

# Outline for Constitutional Law 1 – Structure Of Government

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## Modes of Constitutional Argument

- Types of arguments
  - o Text – what did they write
  - o Structure – how the individual pieces fit together
  - o Cannons of Interpretation and Construction –
  - o Historical Context – what was the purpose of putting this thing in (federalist papers, notes that were made, general understanding of how things work)
  - o Institutional Practice / history – What have we been doing. How has this been understood by congress, the executive, by past courts?
  - o Policy – Fundamental issues with the practical operation of the constitution. Exempli gratis, Kennedy was fond of saying “federalism protects liberty”
  - o Precedent – Stare decisis

## Summary of Critical Federalist Papers

- Fed 10: (Madison): Factions are inevitable. People are self-interested. This competition is healthy because any laws that actually pass will be for the common good.
- Fed 32: (Madison): Taxation is a concurrent power between the states and the federal government. Powers granted to the fed are exclusive only in dictated positions, and only state power which is repugnant to federal ability is disallowed.
- Fed 45: (Madison): There must be a balance between state and federal government. While a strong federal government is a necessary coordinating mechanism during times of strife, in times of peace states are closer to their citizens and can manage their happiness better.
- Fed 46: (Madison): Description of hypothetical conflicts which might emerge between state and federal governments. These two have foundationally different powers, but both are accountable to voters.
- Fed 47: (Madison): Outline of separation of powers. Points to Montesquieu. Separation of powers into individual branches is the only way to avoid tyranny. They are not completely distinct, they must work in concert to function. Thus, while they are separate, they must have constitutional control over each other.
- Fed 48: (Madison): Power is of an encroaching nature.
- Fed 51: Checks and balances, call for rivalrous institutions
- Fed 78: Lifetime appointments, why judicial review exists. Raises counter-majoritarian concerns
  - o Counter-majoritarian – theory of the federal govt is that the people run congress and the executive. Because they are closer to the people, they represent the majority. So when a court declares something wrong, the court wants to be aware of whether it is acting against the tyranny of the majority

## Types of Scrutiny

- Strict Scrutiny
  - o Must be a compelling government interest
  - o Must be narrowly tailored to achieve that interest
- Intermediate Scrutiny (*Craig v Boren*)
  - o Must further an important government interest
  - o Must do so by a means substantially related to that interest
- Rational Basis Review
  - o Must have a legitimate state interest
  - o There must be a rational connection between the means and ends

## Powers

### *How to tell if a power is exclusive federal, state, or mixed?*

- Federalist 32 gives us a clue
  - o The powers of congress are only exclusive on three occasions
    - The constitution says so (e.g. patenting, Washington DC)
    - If the federal power comes with a textual prohibition against states (coining money)
    - The power is exclusive by nature (a uniform rule of naturalization)
  - o Other powers will likely be shared without some kind of federal pre-emption.
- In real life
  - o Case law is conflicting and changing (bankruptcy is concurrent, naturalization is not)
  - o Exclusivity is a matter of degree based on judicial presumption of statutory interpretation (foreign commerce is more exclusive than interstate commerce)
  - o What is the range of the exclusive power and range?
    - This is largely specific to dormant commerce clause issues (implicit prohibition on states passing legislation that discriminates against or burdens interstate commerce)

### *Exclusive Powers (Federal)*

- Regulation of Interstate Commerce (Article I Section 8)
  - o EXCEPTION: States can regulate waterways if congress is silent (*Blackbird*)
- Determine what is constitutional and the interpretation of the constitution *Marbury*
- Federal govt CANNOT commandeer
- Foreign affairs (treaties and whatnot)
- The taxation of imports
- Blessing the formation of state compacts

### *Concurrent Powers*

- Taxation
  - o Marriage rules for tax - States have the power to define marriage. DOMA undermines that authority by deliberately disadvantaging same sex couples. This is a violation of 5<sup>th</sup> amendment provisions (*US v Windsor*)

### *Exclusive Powers (State)*

- Policing Powers “[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional application of the police power” but attempts to define their bounds is fruitless *Benjamin v Parker*
  - o A comprehensive listing of state police powers is impossible. It is best to assume they are plenary unless they run counter to federal action or constitutional limitation
- States essentially have plenary legislative power if it is not a reserved federal power
- States CANNOT nullify constitutional limitations or preempt federal statutes (*Supremacy Clause*)
- States CANNOT determine what is constitutional *Martin v Hunter's Lessee*
- States CANNOT engage in foreign policy. FEDERAL ONLY
- States CANNOT coin money
- States CANNOT tax imports
- States CANNOT impermissibly burden interstate commerce (dormant commerce clause)

### *Separation of Federal Powers*

- Rooted in Montesquieu – liberty is best secured by separating law making (legislature), law interpreting (judiciary), and enforcement (executive)
  - o Textually rooted in the three vesting clauses
- Federalist 10 (Madison) – Factions are an issue: There are two ways to limit factions. Remove the causes or control the effects. To destroy a faction you can end liberty (no go) or create a society of

homogenous interests (no go). But the republic is large, other words... competition? Not Madison's best writing. Get it together, Jimmy.

- Federalist 51 (Madison) – Checks and balances. Ambition counteracts ambition. We have different adversarial branches who want power. If we have all of them keep fighting for power, we are good because no one wins.
- Federalist 48 (Madison) - Top line, in order for branches to be separate and distinct they must have “constitutional control” over one another. No matter what, people will try to expand their powers, so defining boundaries is insufficient. A constitution must define boundaries and controls (specifically to stymie the legislature)
  - o Personal reflection, this seems to have backfired by Congress abdicating all responsibility for what happens in Washington besides grandstanding.
- Core Issues where Separation of powers may come up
  - o Nondelegation
  - o Bicameralism and presentment

## **The Constitution**

### ***Article I – Powers of the Legislature***

- Enumerated Powers (Article I Section 8)
  - o The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
  - o To borrow Money on the credit of the United States;
  - o To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
  - o To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
  - o To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
  - o To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
  - o To establish Post Offices and post Roads;
  - o To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
  - o To constitute Tribunals inferior to the supreme Court;
  - o To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
  - o To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
  - o To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
  - o To provide and maintain a Navy;
  - o To make Rules for the Government and Regulation of the land and naval Forces;
  - o To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
  - o To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
  - o To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the

- United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;
- And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
- Congress Can Delegate Authority to Execute things to the executive?
  - See powers of the legislature. Must have an intelligible principle. For test of appropriate delegation, see *Benzene*
  - Congress cannot delegate powers it does not have – *Schechter Poultry*

### **Article II – Powers of the Executive**

- Textual Powers (Article II)
  - Commander in chief
  - Vesting clause, head of the executive, request opinions in writing
  - Pardon Power
  - Make treaties (2/3 of senate)
  - Appointment of ambassadors, judges, principal officers (advice and consent of senate)
  - Recess Appointments
  - Convene or Adjourn Congress (sometimes)
  - Take care clause (this is a duty, not a power, but sort of understood as a power)

### **Article III – Powers of the Courts**

- Judicial Review
  - SCOTUS is the ultimate arbiter of the meaning of federal law *Marbury v Madison*
  - SCOTUS is the ultimate arbiter of the meaning of the constitution *Marbury v Madison*
  - States cannot nullify or reinterpret federal law / the constitution *Martin v Hunters Lessee*
  - State officials and legislatures are bound by the rulings of federal courts *Cooper v Aaron*
  - Art II Sec 2 – Judicial power of the US shall extend to all cases in law and equity arising under this constitution... (This is dispositive) *Martin v Hunters Lessee*
- Original Jurisdiction
  - Cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases the Supreme Court shall have appellate jurisdiction, both as to law and fact

### **Article VI – Odds and Ends**

- Supremacy Clause
  - Constitution and federal law are the supreme law of the land
    - States cannot tax or impede federal operations *McCulloch v Maryland*
    - Federal powers are plenary, there is no enclave for the states
    - Federal powers can act directly on citizens
  - States cannot determine what is constitutional *Martin v Hunters Lessee; Cooper v Aaron*
- The Contract Clause
  - The contract clause prohibits the substantial impairment of existing contracts unless a law is responding in a limited manner – *Home Building v Blaisdell*
  - Four part consideration for a state law violating the contract clause – *Allied Steel v Spannaus*
    - Is the law intended to deal with an economic or social problem?
    - Does the law operate in an area already subject to regulation at the time the contract regulation occurred?
    - Does the law yield a temporary alteration of contractual relationships?
    - Does the law affect all contracts of this type or a narrow group of persons?

- Generally, the more broad an economic issue you are dealing with the less likely a state law is to be substantially impairing a contract. Narrow aims that are irrevocable, and within domains never before regulated by the state, and have sweeping impacts are unlikely to pass muster.

## Powers of The Legislature

If the legislature is taking action, start with *McCulloch v Maryland*

### Questions to Ask

- Does Congress have the authority to make a law?
  - Absent spending or tax, it must relate to an enumerated power
  - May be “necessary and proper to an enumerated power” *McCulloch v Maryland*
  - Other reasons
    - They’ve done it before, and no one complained
    - Its pretextual and a holdover from the articles of confederacy (booze)
    - Law of Nations stuff (e.g. International Law, Westphalian Systems)
  - Congress cannot unilaterally amend the constitution *Marbury v Madison*
- Did Congress follow the proper procedure to make the law?
  - Congress cannot amend the constitution on its own *Marbury v Madison*
    - Congress cannot expand or contract original jurisdiction
  - Bicameralism and Presentment – *INS v Chadba*
  - For a law to be valid it must follow bicameralism and presentment
    - Congress cannot create a one house legislative veto – *Chadba*
    - POTUS cannot amend legislation after it passes the houses (e.g. line item veto) – *Clinton v NY*
  - Be Aware, if there is a presentment issue, we can think of this as a delegation issue too. Inappropriate delegation of authority to the executive.
- Did Congress appropriately delegate powers to the executive?
  - Congress may delegate its power as long as there is an “intelligible principle” – *Mistretta*
  - RHENQUIST Framing of Non-Delegation violation - *Benzene*
    - 1) congress makes social policy (not agencies), this should only be technical work,
    - 2) agencies of delegation need an intelligible principle,
    - 3) the intelligible principle must provide metrics for judicial review
  - GORSUCH on Non-Delegation Issues – *Gundy* (NON-CONTROLLING DISSENT)
    - Congress may authorize agencies to “fill in the details” – *Wayman v Southard*
    - Congress may authorize agencies to create rules based on policy it has prescribed based on fact finding – *The Brig Aurora*
    - Congress may delegate authority where there is an overlap (partially legislative and either judicial or executive) – *Youngstown Steel; Humphrey’s Executor*
      - Traditionally called Quasi-Legislative or Quasi-Judicial
    - If none of these conditions hold and the statute grants authority to coercively interfere with private liberty, the delegation is unconstitutional (GORSUCH dissent conclusion, *Gundy*)
  - Congress cannot provide unbounded authorization. There must be limits – *Schechter Poultry*
  - Congress cannot delegate an authority it does not have - *Schechter Poultry*
  - Agencies can make rules using metrics (e.g. safety), but they cannot apply NEW metrics when making rules which are absent from the statute - *Whitman v. American Trucking*
  - Congress may create “contingent” statutes and allow the executive to find facts *Field v Clark*
  - Congress may leave it to the executive to fill in the details - *JW Hampton*
  - Anti-Delegation Cannons
    - Major question doctrine (*King v Burwell*) – Question is so big that we cannot believe that congress meant to delegate it to the agency without a clear statement.

- Mousehole Cannon (*FD A v Brown*) – the court will not presume that congress meant the agency to do big things in minor provisions
    - No Absurdity (*Michigan v EPA*) – the agency must resist achieving absurd or unreasonable results. If congress says you have to take costs into account, you have to do that
    - Constitutional Avoidance (*Benzene*) – We (the court) will read a statute in a restrictive fashion to avoid interpreting constitutional issues
- Pre- v Post Wickard
  - PRE-WICKARD RULES
    - Commerce is the exchange of goods and services for money
    - Commerce does not include value added activities which recombine or improve upon goods and cannot be federally regulated
    - Activities vital to the conclusion of the transaction are not subject to congressional control or oversight and cannot be federally regulated
      - These include, navigation, the means of transportation
    - Activities vital to value added activities are not subject to Congressional control and cannot be federally regulated
      - These include, manufacturing, labor rules, etc.
    - Concurrent powers can be exercised by both state and federal
- Commerce Test After Lopez
  - 1) Channels of interstate commerce people must use to engage in commerce directly (roads, water, hotels, food) *Heart of Atlanta, Ollies BBQ*
  - 2) Instrumentalities of interstate commerce, the means by which we get from here to there (planes trains automobiles) *Shreveport Rate Cases*
  - 3) activities that substantially affect interstate commerce in aggregate (wheat) *Wickard*
    - SUCCEED - Prima facie case → are you engaging or affecting commerce directly, the exchange of goods and services is the central concern (*Raich*)
    - FAIL – Absent prima facie case → can you draw an articulable line where the pre-textual notion ends and where we could stop police action (*Lopez*)
- Powers to Regulate Interstate Commerce
  - The power to regulate commerce, and the stream of commerce is exclusive to Congress, and this does not stop at the state's boundary – *Gibbons* (boundaries below).
    - Commerce is the exchange of goods and services for money, nothing more until after *Wickard* is handed down
    - Activities vital to the conclusion of the transaction are not subject to state control (docks, piers, train platforms)
    - Activities vital to value added services (labor, manufacturing) are not subject to Congress
    - States reserve policing powers (inspection, quarantine, booze)
    - All about CONFLICT when it comes to the regulation of interstate commerce. Did congress intend to displace? If so, state goes poof. Feds win, especially after *Wickard*
  - EXCEPTION TO RULES ABOUT REGULATING WATERWAYS AND OTHER MODES OF TRANSIT: If the law has a legitimate purpose, is consistent with general police power, and does not conflict with federal law, its valid (congressional silence) – *Willson v Blackbird Marsh*
  - Congress can regulate purely intrastate issues regarding the modalities of commerce (e.g. railroads, roads, waterways) – *Shreveport Rate*
  - Congress cannot regulate monopoly manufacturing thru antitrust (pre-*Wickard*) – *EC Knight*
  - Congress cannot create labor laws which affect manufacturing (pre *Wickard*) – *Hammer v Dagenhart*
    - EXCEPTION: This is all distinct from transportation of booze, lottery, and things that cause harm across state lines because the harm happens after the transportation.
    - OVERTURNED: Congress can regulate minimum wages and child labor prior to *Wickard*– *US v Darby*

- Note from Con Law II: This is going to be subject to aggressive disagreement in the *Lochner* Era. There is significant tension regarding minimum wage laws at the state and federal level between *Lochner* and *West Coast Hotels v Parrish*
- Congress cannot delegate the ability to create labor laws to the executive (pre-Wickard) – *Schechter Poultry*
- The regulation of labor rules is a legitimate exercise of the commerce power? – *US v Darby*
  - This case is 1941 (part of the New Deal). States began to regulate labor more frequently as the court got away from the *Lochner Era* and towards the presumption of constitutionality (*West Coast Hotel*)
  - Explicitly overrules *Hammer v Dagenhart*
- Congress has the power to regulate labor disputes that may affect interstate commerce – *NLRB v Jones and Laughlin*
- The issuance of minimum wage laws do not violate Due Process (5<sup>th</sup> and 14<sup>th</sup>) – *West Coast Hotel*
  - A state may use its police powers to restrict freedom to contract – *West Coast Hotel v Parrish*
- Congress can invalidate or prohibit contracts based on monetary policy – *Gold-Clause*
  - The government’s power to regulate money is unrestricted and plenary – *Gold Clause*
- Congress may regulate private intrastate action if, when aggregated, it might substantially affect interstate commerce – *Wickard v Filburn*
  - This case ends the categorial manufacturing / transaction distinction from pre-*Wickard* and opens up almost unfettered federal regulation.
  - KEY ITEM: private action that may affect interstate commerce in the AGGREGATE
- States can regulate within state production of goods – *Parker v Brown*
  - KEY ISSUE: Act must not be incongruent or repugnant to federal action – *Parker v Brown*
  - This can result in monopolies which have state blessing (taxi medallions, production)
  - *Parker* doctrine is going to be separate from antitrust under Sherman and Clayton
- The enactment of racial protections (due process under 14<sup>th</sup>) that may substantially affect commerce is valid – *Heart of Atlanta Motel / Ollie’s BBQ*
  - Under the 14<sup>th</sup> amendment you can reach out against state action, but not private action. Commerce makes it feasible to enact prohibitions on personal actions under commerce
  - Commerce also has a pretextual means to deal with moral issues (has been done FOREVER!!! SEX WORKERS!!! LOTTERY TICKETS!!! BOOZE!!!)
- The regulation of non-commercial activity which does not have a substantial effect is invalid – *US v Lopez* (see test above)
  - You can aggregate ECONOMIC CONDUCT but you CANNOT aggregate NON-ECONOMIC CONDUCT: Recall test from Lopez
    - 1) Channels of interstate commerce people must use to engage in commerce directly (e.g. roads, water, hotels, food) *Heart of Atlanta, Ollies BBQ*
    - 2) Instrumentalities of interstate commerce, the means by which we get from here to there (e.g. planes trains automobiles) *Shreveport Rate Cases*
    - 3) activities that substantially affect interstate commerce in aggregate (wheat) *Wickard*
      - SUCCEED - Are you engaging or affecting commerce directly, the exchange of goods and services is the central concern (*Raich*)
      - FAIL – Can you draw an articulable line where the pre-textual notion ends and where we could stop police action (*Lopez*)
- Congress can regulate in-state production of drugs – *Gonzalez v Raich*
  - This is the regulation of production, aggregation, substantial effect on illicit markets
  - In *Raich* you have both a moral issue (Congress has pretextual authority) and a market issue (congress is regulating the illicit drug market)
- Congress may not COMPELL commerce. Can’t make you buy things – *NFIB v Sebelius*

- The Spending Power
  - CONGRESS CAN DO DIRECT SPENDING (buying land and setting up a National park)
  - CONGRESS CAN DO CONDITIONAL SPENDING (*South Dakota v Dole*)
  - The background rule is that Congress cannot compel states to do things (no commandeering). But congress may offer states incentives to do things. This is the way around enumerated powers.
  - There is no specific clause in the constitution enumerating the spending power.
  - Congress can't use spending as an enforcement mechanism for exclusive state power. – *Butler v US*
    - o Butler also notes that these powers do not come from necessary and proper
    - o In *Butler*, Congress was attempting to regulate and control agricultural production directly via spending. This is in the pre-*Wickard* era, so its unclear how the specific case would shake out today. But the key is that you cant do direct end runs on state police power by nationalizing a market.
  - Rational taxes and spending which do not coerce states are not unconstitutional – *Steward Machine Co*
  - There are five elements of an appropriate spending contract b/w states and fed – *South Dakota v Dole*
    - o Spending must be for general welfare – *General Welfare Clause*
    - o The conditions to get the dollars must be clear – *Pennhurst v Halderman*
    - o Spending must be germane to the statutory purpose – *South Dakota v Dole*
    - o Conditions must not conflict with the constitutional text
    - o The conditions must not be coercive – *Steward Machine Company v IRS*
  - Spending Issues are reviewable, they are not pure political questions – *Steward Machine Company*
  - Congress cannot compel state behavior through coercive choices – *NFIB v Sebelius*
  - The use of spending must be consistent with the spirit of the original text (see *McCulloch*)
  - ALWAYS RECALL THAT COMPULSION AND PROHIBITION ARE DIFFERENT
    - o The state saying people must do XYZ is a no no. The state prohibiting XYZ, in the clear
- The Taxing Power (re: Spending)
  - Taxing power is almost plenary (for both states and feds, except when there are textual prohibitions)
  - Taxing must raise revenue - *US v Kabriger; NFIB v Sebelius*
  - The tax may not impose an exceedingly heavy burden – *Drexel Furniture*
    - o Penalty for healthcare was smaller than the purchase price – *NFIB v Sebelius*
  - The tax must only be imposed on those who knowingly do something if it is conditional upon behavior – *Drexel Furniture*
    - o People had to decide not to buy health insurance – *NFIB v Sebelius*
  - A tax must be enforced by the Treasury / IRS, not by other departments (Labor) - *Kurth Ranch*

## **Powers of the Executive**

If the president is taking action. You should almost always start with *Youngstown Steel*

### **Questions to Ask**

- What is the source of the power?
  - o It must be either a textual power (article II) or granted by congress
  - o JACKSON YOUNGSTOWN CONCURRENCE - three-pronged Test. When determining whether the executive has authority there are three general circumstances.
    - First, when the President acts with the express or implied authorization of Congress then the President's authority is at its greatest.
    - Second, in the absence of either a congressional grant or prohibition then the President acts in a zone of twilight. Congress and the President may have concurrent authority. In this zone of twilight, an actual test on authority will be dependent on the events and the contemporary theory of law existing at the time.
    - The third circumstance is when the President takes measures that go against the expressed will of Congress, his power is at its lowest.

- TAKEAWAY: You can conceive executive power very broadly. But POTUS **cannot unilaterally reorder domestic legal relations**. It has to be done with congress. *Youngstown*
- Executive Privilege to avoid judicial action?
  - Documents may be held in privilege if they are deliberative and pre-decisional. But there is no universal immunity. "the fundamental demands of due process of law in the fair administration of justice." *United States v Nixon*
- Executive Privilege to avoid congress?
  - Balancing test from *Trump v Mazars* on congressional oversight
    - Is the subpoena of items available elsewhere (must we bother POTUS)?
    - Is the subpoena broader than is necessary to accomplish the legislative purpose?
    - Has congress offered "detailed and substantial" evidence that the subpoena advances a "valid legislative purpose"?
    - What is the burden imposed upon the president?
- Appointment of Federal Officers
  - Most of this comes under unitary executive theory (Federalist 70). There is only one president, and they are accountable for everything.
  - Was the officers nominated and appointed correctly? (Article II Section II)
    - Principal Officers: requires POTUS and senate approval
    - Inferior Officers: (Courts or POTUS or Head of Department) and senate approval
      - The legislature CANNOT nominate officers - *Buckley*
  - Who is an officer? TEST
    - Someone with an ongoing position and some sort of statutory authority – *Lucia*
      - Someone with significant authority – *Buckley*
      - Someone with a continuing position – *Germaine*
  - Is the officer principal or inferior? (all suggestive for inferior, none dispositive)
    - Subject to removal by an exec branch official (has a superior who is not POTUS) – *Morrison v Olson*
    - Limited in tenure and jurisdiction – *Morrison v Olson*
    - KEY: Subordinate to someone – *Edmond v United States*
    - Are decisions reviewed by someone – *Edmond / Artbrex*
    - CLARIFICATION: You can have officers in reporting hierarchies where both are principal (Sec State and Assistant Sec State)
- Removal of Federal Officers
  - Critical point, congress cannot insert itself into the removal process – *Myers v US*
  - All executive officers must be removable at will either directly or by a principal officer who is removable (distinguished into oblivion) – *Myers v US*
  - Congress may protect principal officers if they perform a quasi-judicial or quasi-legislative task (e.g. FTC, SEC) – *Humphrey's Executor*
  - Congress cannot appoint or remove executive officers– *Buckley v Valeo / Bomsher v Synar*
  - Congress may protect inferior officers as long as those protections do not "impede POTUS's ability to perform their function" – limited scope and duration – *Morrison v Olson*
    - SCALIA's dissent in *Morrison* and what happened with Clinton probably predicts that this is on the chopping block if it comes up again.
  - Removal protections for principal officers of independent agencies are ok. Removal protections for inferior officers is ok. Double protections are not – *Free Enterprise v PCAOB*
  - Congress may limit the removal of multi-headed agencies, but not single headed – *Seila Law*
- Powers relating to foreign affairs
  - Article I
    - Tax (provide for common defense), Declare war, Vesting legislative power, Approve treaties, International commerce, Uniform rule of naturalization, Foreign coin,

Defining piracy, Support armies and navy, Call forth the militia, Necessary and proper clause, Duties on imports and exports

- Article II
  - Vesting clause, Commander in Chief, Appoint ambassadors, Receive ambassadors, Take care clause
- Article III
  - Section II – power extends to treaties and ambassadors, Controversies to which the US is a party, Cases arising under treaties, Cases of admiralty and maritime jurisdiction, Cases between states, foreign states, etc, Treason, et al
- When answering a foreign affairs question refer to the powers that we can draw from.
- NOTE: If there is ever an attack on the national territory, all bets are off and POTUS acts with impunity
- Foreign Affairs
  - When answering a foreign affairs question refer to the powers that we can draw from (see above). There are a mix of all three branches
  - GREVE's theory: there are specific grants of power are needed to limit the divestment of power elsewhere. Congress has power to declare war. That means the executive needs to have powers related to war (commander in chief). Stuff in the middle is more up for grabs
  - All of this stops at the water's edge. Then the executive is in control. Be careful though
  - Forms of international agreements (there is bleed)
    - Self-executing treaties – no legislation needed to carry into effect (exchange of ambassadors etc)
    - Non-self-executing treaties – migratory bird treaty act (cant shoot migrating birds). You need legislation to impose penalties for violations
    - International Agreements – simple majority in both houses (NAFTA)
    - Sole Executive Agreements (land lease under Roosevelt, Iran nuclear deal)
  - We speak with one voice in foreign policy. The president is that voice - *Curtiss-Wright*
  - Congress cannot impermissibly recognize foreign states – *Zivotofsky*
  - To determine who is acting correctly in foreign affairs look to the closest enumerated power – *Zivotofsky*
    - If no such power exists, default to the POTUS one voice argument - *Curtiss-Wright*
  - POTUS cannot unilaterally make treaties self-executing. Treaties require consent of the senate – *Medellin v Texas*
  - Questions regarding treaties can be political and non-judicial – *Goldwater v Carter*
    - This about whether the debate is an obligated duty or a how we did it question...
- War Powers
  - Just like foreign affairs, there is no single war power. Commander in chief, raise army. Only congress is able to declare war or issue letters of marque
    - When bad things are about to happen, POTUS gets free reign – *Take Care/C in Chief*
  - Constitutional Structure of War Powers
    - Little beyond commander in chief and declare war (FULL and TOTAL WAR)
      - President can make peace, congress cant (see treaties / removal of officers)
      - There is the War Powers Resolution but that's unconstitutional (see *Chadha*)
    - President generally can do the following under enumerated authority
      - Take military action short of creating a state of war
      - Respond to attack
      - Take diplomatic or military action likely to *provoke* attack
  - A commander of a warship, or other military leader, is answerable for damages when acting beyond their authority or following an illegal order (*Little v Barreme*)
    - POTUS cannot authorize an illegal act – *Little v Barreme*
  - POTUS can make the determination of who is a belligerent - *Commander in chief / Prize Cases*

- Separate from *Little v Barreme* where we were at peace. No belligerent
  - POTUS can repel attacks and has full control of the conduct of operations *Prize Cases*
  - The rights of persons are different from property (ships) in the theatre of war. US citizens cannot be unilaterally stripped of rights, e.g. 5<sup>th</sup> and 14<sup>th</sup> amendment protections - *Hamdi*
- Emergency Powers
  - Emergency Powers relate to war powers but involve life after the fighting has stopped
  - POTUS cannot suspend habeas, not matter how much he wants to – *Ex Parte Merryman*
    - Only Congress can suspend habeas – *Article I / Merryman*
  - Emergency restrictions related to race are subject to strict scrutiny – *Korematsu*
    - The courts defer to the military - NO LONGER VALID – *Korematsu*
    - Emergency restrictions may be correlated with race (Muslim ban didn't ban all Muslim countries) based on evidence POTUS has – *Trump v Hawai'i*
    - Habeas petitions cannot be denied to “concededly loyal” US citizens on the basis of race – *ex Parte Endo*
  - If POTUS sets up a military commission it must conform to statutory authority – *Hamdan*
    - One authority can be the UCMJ, but the must conform to rules – *ex parte Queenan*
    - TAKEAWAY – don't mess around when establishing tribunals. Do it based on an authority that Congress or an agency has promulgated. Mickey Mouse wont fly.
  - You cannot partially suspend habeas or 5<sup>th</sup> protections - *Boumediene v Bush*
    - Don't do end runs on habeas protections
  - A US Citizen doesn't lose habeas (or 5<sup>th</sup> amend) protections because of enemy combatant status - *Hamdi*

## Powers of The Judiciary

### Questions to Ask

- Does the court have jurisdiction?
  - If SCOTUS hears first, jurisdiction must be original *Marbury v Madison*
  - Federal courts do not have jurisdiction over legal actions of a citizen against their own state. *Hans v Louisiana*
  - Federal courts do not have jurisdiction over legal actions of a citizen against a different state – 11<sup>th</sup> Amendment (overturns *Chisholm*)
- Is the question judiciable?
  - Non-judiciable political questions are generally those where the Constitution commits the power to a branch besides the judiciary
  - Political question. If the question is about an obligated duty of the executive or other agent, and their FAILURE to perform that duty, it is reviewable (*Cooper v Aaron, Baker v Carr*).
    - This extends to federal agents and congress - *Marbury v Madison*
    - This extends to state executives and legislators – *Cooper v Aaron*
    - Treaties are a suspect, be careful with them – *Goldwater v Carter (Plurality)*
  - If it is about the ministerial way the executive does it, not reviewable *Marbury v Madison*
    - Ministerial largely implies the mechanics of how a job is done rather than a policy position by the executive themselves
    - What constitutes a political question? (First two most important *US v Nixon*)
      - Text where a political department is put in charge of answering the question (e.g. executive war powers / foreign affairs) - *Nixon*
      - Where there is a lack of judicially discoverable standards - *Nixon*
      - Cases impossible to decide without an initial policy determination
      - Unusual need to adhere to a previous political decision that has been made
      - Embarrassment to various political branches based on the question
- Spending Issues are reviewable, they are not pure political questions – *Steward Machine Company*

- TEST: A controversy is non-justiciable (a political question) when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it. *Baker v Carr*
  - o Ripeness – facts have matured to a substantial controversy *Article III Section II, Abbott Labs*
  - o Mootness – Can only resolve live disputes. Once it goes away, so does the controversy *Hicklin v Orbeck*
    - EXCEPTION: Abortion- *Roe v Wade*
- Does the court have jurisdiction?
  - o Original Jurisdiction – if we are in original, straight to SCOTUS *Article III Section II*
  - o Diversity - Cases where there is no shared state citizenship between a defendant and complainant - *Strawbridge v Curtis*
    - In *Strawbridge*, plaintiffs were from Massachusetts and most defendants were from Vermont. Some defendants were from MA though, so there was not diversity.
  - o Is there a grant of jurisdiction from Congress *Article III Section I*
- Do the parties have standing? (Ten Rules of Standing)
  - o Note that courts can raise questions of standing if they do not believe standing exists. This does not need to emanate from counsel.
  - o HARD REQUIREMENTS
    - Injury in fact - *Lujan v Defenders of Wildlife*
      - The injury in fact need not be monetary, it can be aesthetic or dignitary. But it must be concrete, particularized, and supported by credible evidence.
        - o economic harms carries more weight.
    - Causality traceable to defendants conduct – doesn't matter how long the chain is, what matters is the strength of the claim and a straight line of causality - *Lujan v Defenders of Wildlife*
    - Redressable - the court can resolve the issue - *Lujan v Defenders of Wildlife*
  - o Standing is not dispensed in gross, exists regarding individual claims - *Lyons v City of LA*
    - Each individual must demonstrate standing. If one party has it that does NOT mean everyone gets it by extension
  - o Mootness – Controversy must exist throughout the litigation
    - EXCEPTION – Abortion *Roe v Wade*
  - o Associations can sue on behalf of members with individual standing – *Warth v Seldin*
  - o You can have standing even if the parties agree on the outcome. Only an adversarial presentation of evidence is necessary – *US v Windsor*
    - In *Windsor* the government stopped defending DOMA but other groups were allowed to present adversarial evidence on the govt's behalf.
  - o Two forms of standing rules
    - Prudential standing requirements (created by statute): No generalized grievances, no third-party challenges (except in discrimination cases); must file suit under statutory “zone of interest”
      - Example: Private Right of Action granted to group X based on statute Y
    - Jurisdictional standing (cannot be altered or waived)
      - See above: injury, causally traceable, redressable.
  - o HARD EXCEPTIONS TO STANDING RULES
    - Establishment clause (religion), first amendment, global warming (*Mass v EPA*)
- Which Laws Govern?
  - In diversity commercial cases, Federal Courts will decide the case under federal common law unless there is positive law – state or federal – to the contrary. *Swift v. Tyson*
    - o LIMITATIONS
      - (1) Only in areas with no substantive law;
      - (2) Does not preempt state law;

- (3) Diversity cases only – didn’t apply to federal question or original jurisdiction cases;
    - (4) Good for merchants as way to avoid bias (forum – judge/jury or state law bias itself)
  - OVERTURNED BY *ERIE*. This made a lot of Constitutional Law Professors very angry, but seems to be fine with everyone else.
- Except in matters governed by federal question, the law to be applied in any case is the law of the state—both statutory and common—there is no federal common law. – *Erie RR*
  - Note that most states have created jurisdictional rules which explicitly point to the venue and law that will govern XYZ controversy.
- There are five areas which preempt state law and relate to statutory or constitutional authority
  - Areas of “uniquely federal interest” (admiralty, government contracts, interstate disputes, foreign affairs, etc.)
  - Jurisdictional grants to federal courts to craft fed common law (Maritime statutory)
  - Normal filling of statutory ambiguity/gaps (supplying rules)
  - Implications of private Causes of Action (*Bivens*)
  - Constitutional Common Law (Constitutional default rules which Congress can change – see *McCulloch*)
- Federal common law displaces state law in areas of “uniquely federal interest” when the state law substantially conflicts with the federal law. *Boyle v. United Technologies*
- NEVER SAY THAT THERE IS NO FEDERAL COMMON LAW. WE JUST DON’T HAVE GENERAL FEDERAL COMMERCIAL COMMON LAW
  - GREVE underscores this several times but I am still trying to wrap my head around it fully
- Erie Doctrine (in Full)
  - Federal courts must apply state-substantive rules when adjudicating state law claims as long as federal law is not controlling
    - Substantive question: State law (contract, negligence, state govt official behavior)
    - Procedural question: Federal law (where and when to file things, FRCP)
  - Erie has nothing to do with subject matter jurisdiction. It just incidentally shows up with diversity
    - Most claims are diversity, this is incidental. Any supplemental jurisdiction case without a federal question means state law will apply.
  - The federal court must determine if either
    - 1) state law is clear as to the case in controversy, or
    - 2) if not, then has the state's highest court ruled specifically on a similar case.
      - If so, the state law or court ruling must be followed. If not, then the federal court must determine how the state's highest court would potentially rule on a matter
  - Why do this? Ensure consistency... minimize forum shopping, you can choose where but you don’t get to choose your substantive law... prevent the plaintiff from choosing law favorable to their case

### **Federalism (Relationship between States and Fed)**

Federal and state powers can be concurrent. They can also be exclusive

- How do we know when we are in one vs another
- Federalist 32 gives us a clue

The powers of congress are only exclusive on three occasions

The constitution says so (patenting, Washington DC)

If the federal power comes with a textual prohibition against states (coining money)

The power is exclusive by nature (a uniform rule of naturalization).

In real life

The case law is conflicting and changing (bankruptcy is concurrent, naturalization is not)

Exclusivity is a matter of degree based on judicial presumption of statutory interpretation (foreign commerce is more exclusive than interstate commerce)

What is the range of the exclusive power and range? Specifically with dormant commerce clause issues

### Questions to Ask

- IS CONGRESS ACTING ON A STATE OR A PERSON? Congress usually acts on people directly
- Ways congress acts on states
  - Pre-emption (*Gibbons*) – federal license pre-empts state monopoly law
  - Conditional pre-emption – there are federal statutes which say states have to comply with a federal regulatory regime or the state’s regulatory regime will be pre-empted (*Clean Air / Water*) [so close to pre-emption who cares]
  - Spending and conditional spending (*South Dakota v Dole*)
  - Regulating States as states in their capacity as economic actors (*Garvia v SAMTA*) → Fair Labor standards act. In *Garvia* we are mandating that States meet the requirements that private employers meet
  - Commandeering (*Printz v US*) – distinction between forbidding behavior and compelling behavior by states
    - Congress cannot unilaterally order state to enforce federal law, or take action
- Is someone changing qualifications which are outlined in constitutional text?
  - Congress cannot add additional qualifications for representation. *Powell v McCormack*
    - If you expel a member, you have to follow the rules
  - States cannot alter the qualifications for someone to sit in congress *US Term Limits v Thornton*
    - NOTE: Look to see if we are adding to requirements in constitutional text
- Can congress regulate state and local governments when performing traditional function?
  - YES! As long as it has the authority to make the rule *Garvia v SAMTA*
    - EXCEPTION: State sovereign immunity issues (see below)
    - EXCEPTION: Official immunity from prosecution (*Twombly*)
    - EXCEPTION: Must be acting within congressional powers (*Lopez / NFIB*)
    - EXCEPTION: Must be a CLEAR STATEMENT of authority (clear statement rules)
    - EXCEPTION: States cannot be commandeered
- Basics of Sovereign Immunity
  - Sovereign immunity protects states, not officials. Officials are protected by official immunity
  - State, for 10<sup>th</sup> amendment purposes, includes local governments. For the 11<sup>th</sup> amendment purposes (which outlines immunity) state means STATE and INSTRUMENTS OF THE STATE (e.g. officers). Not local governments
  - State sovereign immunity doesn’t matter unless you are trying to
    - 1) sue a state or its officers,
    - 2) sue a for money (rather than relief),
    - 3) suit is under a statute enacted pursuant to article 1 (rather than 14<sup>th</sup> amendment)
  - What cases could these be?
    - Age discrimination, Suits for back pay
    - *Garvia* tells us that Congress can subject state governments to labor rules. But sovereign immunity says there is no remedy and congress cannot make one
- What is sovereign immunity?
  - A sovereign state cannot be exposed to suit without its consent.
  - Note, it is usually possible to sue an individual officer
  - Note, sovereign immunity can be waived (e.g. APA)
- Black Letter Law - Is there a sovereign immunity issue at play?
  - Original rule: States had no immunity from citizens of foreign states – *Chisholm v Georgia*
    - Immediately overturned by the 11<sup>th</sup> amendment
  - States are immune from suits of equity unless they have waived immunity (*Hans*)

- State officers are not immune from suits of non-monetary, prospective relief (*Ex Parte Young*)
    - No suits for monetary relief against state officers (*Edelman v Jordan*)
    - There can be suits for monetary relief pursuant to 14<sup>th</sup> amendment violations
  - Can Congress abrogate State sovereign Immunity?
    - Suits can occur between non consenting states – *South Dakota v North Carolina*
    - Congress must be clear that it is trying to do so (*Seminole*)
      - REQUIRES A CLEAR STATEMENT
    - Congress must act under valid constitutional power
      - No abrogation under the Article 1. (*Seminole*)
      - This is fungible under some very specific circumstance, namely if it can be determined that the state forewent a particular responsibility at the time of the constitutional convention. The test for a structural waiver is when federal power is “complete in itself, and the States consented to the exercise of that power, in its entirety, in the plan of the convention” *PennEast*
        - Congress may authorize private suits against states under the bankruptcy clause – *Va Community College v Katz*
        - *PennEast* held that congress could authorize private eminent domain suits to enforce federally approved condemnations necessary to build interstate pipelines
        - Congress can abrogate sovereign immunity with regard to the military – *Torres v Texas Department of Safety*
          - *Torres* deals with re-employing veterans after service
      - Abrogation can only come from things coming under 13, 14, 15 (*Fitzpatrick*)
        - This abrogation can include MONETARY DAMAGES
  - Sovereign immunity rules apply only to states, not to local government, you can always sue your local government for damages.
- Dormant Commerce Clause Rules
    - The dormant commerce clause is the implicit prohibition against states passing legislation that discriminates against or impermissibly burdens interstate commerce
    - MORE LENIENT TEST: [*Pike* balancing]
      - Step 1: Is there discrimination (with all possible Caveats)
      - Step 2: If there is no discrimination against out of state interests, is the benefit sufficiently large to justify the burden on interstate commerce?
      - TAKEAWAY: If you are into *Pike* balancing, you’re usually good.
        - My notes are shaky on *Pike* Balancing. The subsequent case law is more informative
        - Under this balancing test, a presumption of validity attaches to the state statute (or municipal ordinance). It will be upheld even though it burdens interstate commerce so long as the burden it imposes is not excessive in relation to its value as a health, safety, environmental protection or consumer protection measure.
          - To win, the challenger must show the law burdens interstate commerce in a significant way and the benefits of the law are not sufficient to outweigh the burdens
      - *Pike* is no longer the standard test
    - Standard Test Post *Pike*: Is there facially different treatment (via regulation / taxation) between local and inter-state actors, or what they can do, the law fails (*Philadelphia v New Jersey; Maine v Taylor*)
      - There is no exception for non-profit actors or the label of taxes (property) (*Camps Newfoundland*)
      - You can likely get around the tax issues by direct subsidy, but under those conditions the state is engaging as a market actor
    - EXCEPTIONS

- If the state is a market actor, the state can discriminate in the presence of congressional silence (*Hughes v Alexandria; White v Massachusetts*)
  - If the state is a market actor, it cannot simultaneously influence up and downstream markets which are removed from the TRANSACTION (*South Central Timber*)
    - Example, state is selling timber and then heterogeneously engaging down the supply chain
  - If the state is a market actor, and discriminatory actions are present, those can be challenged under privileges AND immunity (*City of Camden*), i.e. Art V, not [14]
    - INTERMEDIATE SCRUTINY will be applied
- If the regulation is part of the plenary power of the state (safety / police), it will receive deference as long as there is material evidence and there is not a discriminatory intent underpinning (*Kassel v CF Freight*) (size of trucks)
  - DISCRIMINATORY INTENT is prioritized over DISCRIMINATORY IMPACT when deciding 14th amendment issues. - *Village of Arlington v MHDC*
    - Discriminatory purpose is based on the totality of the facts - *Washington v Davis*
  - Test for discriminatory intent is culmination of facts based on - *Village of Arlington v MHDC*:
    - Look for discriminatory impact (affects one race more than another)
    - Historical context of the action (pattern of behavior)
    - Unusual departures from prior decision making
    - Legislative and administrative history
- There can be a carveout for the dormant commerce clause from Congress (*Metropolitan Life*) but if it is done that carveout must be clear (*South Central Timber*)
  - Put simply, Congress can permit states to favor in state economic agents when acting in a regulatory capacity but there must be a CLEAR STATEMENT
- STATE CAN REGULATE IF (*Cooley doctrine*)
  - Completely internal issues (completely)
  - Congress can pre-empt completely local issues under a constitutional grant
    - FLSA and municipal employees (*Garvia*)
- WHAT A STATE CAN REGULATE
  - States can restrict subsidies so they only go to their citizens (e.g. Tuition)
  - Completely internal issues (emphasis on completely)
  - Issues of health and safety (*SC Highway Department*), e.g. quarantine
    - This cannot be overly restrictive and requires evidence (*Kassel v CF Freight*)
    - States can charge airlines for their use of airports (*Northwest Airlines v Kent County*)
- Does Federal Law preempt state law?
  - This is all statutory interpretation. Preemption is about what happens when congress has said something and we are not sure how far it goes.
  - In a pinch, hyper-textualism of the statute wins. Look for clear statements and EXPLICIT conflict
- Preemption Black Letter Law
  - The focal point in a preemption case will be the intent of Congress (*Lobr v Medtronic, Sante Fe Elevator*)
  - The parties will be suing as part of an *Ex Parte Young* style action (injunction, no damages)
  - How do we know how far Congress meant to go?
    - Statutory language may be **expressed** (“No state shall make a law”) or **implied**.
      - Expressed preemption requires a clear statement (as in *Lorrillard Tobacco*)
      - There was no clear statement in *PG&E v State Energy Comm* or in *Virginia Uranium*
    - Implied may be:

- **Field preemption:** statute is so comprehensive and deep that it is obvious that Congress clearly meant to preempt everything → HEAVILY DISFAVORED
      - Best example would be something like the FDA
      - **Often implied.** If you have to choose between “field preemption” and “conflict pre-emption” look to the state’s reason for the regulation. If the state is part of a traditional police power and reasons are incongruent look to conflict preemption (Can derive from *PG&E*)
    - **Conflict Preemption:** There is a conflict between state and federal statute. Supremacy clause wins.
      - Conflict may come from **impossibility preemption** (you cannot actually comply with both state and federal law)... fairly rare
      - **Obstacle preemption** (or frustration preemption): state law is impliedly preempted if it states as an obstacle to congressional purposes.
  - A **presumption against preemption**, does exist - If congress acts in a field traditionally regulated by states (historic police powers), the assumption should be made that states are not superseded by Congress unless that is the clear purpose of Congressional action (*Medtronic v Lohr*)
    - There is a strong presumption against preemption in personal liability (*Wyeth v Levine*)
- Clear Statement Rules
- IF THERE IS EVER A FEDERALISM QUESTION, THERE WILL BE A CLEAR STATEMENT RULES ISSUE. WAS CONGRESS CLEAR IN WHAT THEY SAID?
  - Don’t make a clear statement unclear unless your name is John ROBERTS
  - Don’t make a fine a tax unless your name is John ROBERTS
  - Unless youre ROBERTS, you aren’t smart enough to recast things and get away with it
- The new organizing principal on clear statement rules is BALANCE (*Gregory v Ashcroft*) – balance between the state and feds.
  - Generally, there is some dice loading in favor of the states
- Federalism Clear Statement Rules
- You need a clear statement in the language of the statute when a statute threatens to:
  - If you are going to upset the usual balance or “invade traditional state functions” (*Gregory*)
  - If you create a statute and that statute might raise constitutional doubts about the limits of congressional power (*US v Jones; SWANCC*)
  - If you are waiving immunity of state actors (*Pennhurst State School v Halderman*)
  - If you are creating private rights of action (*Will v Michigan Dept of State Police*)
  - If you are creating an abrogation of state sovereign immunity (*Seminole Tribe*)
    - Can only be done pursuant to civil war amendments ([13], [14], [15])
  - Before the Court will assume that Congress legislated something pursuant to the 14<sup>th</sup> amendment it must say so (*Pennhurst*). We don’t just assume equal protection or due process.
  - Before the Court will assume that Congress has authorized an administrative agency to exercise power at the outer limits of congressional power (*SWANCC*)
    - Agencies get *Chevron* deference but will not receive deference if they are doing something that congress does not have the authority to empower them to do
  - There is always a presumption against preemption, so we need clarity (*Wyeth*)
- Commandeering
- Congress may not commandeer state legislatures (*NY v US*) or state officers (*Printz*).
- Congress can do a lot to states.
  - It can preempt states (*Supremacy*),
  - conditionally preempt states (*regulate my way or I will regulate for you*),
  - conditionally fund states (*Dole*),

- regulate states alongside private parties (*Garvia / Gregory*)
- There are exceptions, but this is different from clear statement. Its not a presumption. It's a rule.
- There are exceptions to commandeering rules, but generally congress cannot commandeer states to legislate or enforce a federal program. This differs from everything else in two ways
  - The anticommandeering principle is not a New Deal idea. This has been around forever
  - Unlike clear statement rules, there is no balancing test or a presumption. It's a categorical RULE. No matter whats at stake, theres no commandeering.
- EXCEPTIONS PER SCALIA AND GREVE
  - Congress may commandeer state judges (enforce fed law / constitution) – *Testa v Katt*
  - Congress may regulate states alongside private parties (capacity as economic actors) - *Garvia*
  - Congress may commandeer state officials for purely ministerial reasons (reporting crime statistics or DMV rules)
  - Congress can preempt with constitutional statutes
  - Congress can “commandeer” relative to a spending statute (contract) (*NFIB / SD v Dole*)
- Enforcing Civil War Amendments
  - All three amendments address constitutional defects with slavery. They are not self-enforcing. Instead they give congress the power in a necessary and proper sort of way.
    - No right to vote. Just right not to be discriminated against based on suspect class
    - These are NOT RIGHTS GRANTING. We empower Congress to stop things. In other words, these do not create new rights (exception substantive due process), they instead empower congress to remedy deprivations of rights by states (and only states)
  - 13 – abolishes slavery. Operates on citizens, the states, and federal government
  - 14 – resolves STATE oppression of citizens of a suspect class. No private parties or federal protections (note, Federal will occasionally be dealt with under reverse incorporation through [5])
    - Persons: Due process; Equal protection
    - Citizens of the United States: Privileges Or Immunities
    - Citizens of the state: enjoy the privileges and immunities of that state
  - 15 – empowers Congress to prevent denial of voting rights by governments. Not private parties
  - Prior to incorporation (now defunct) The bill of rights only applies to FEDERAL action. It does not limit STATE action (*Barron v Baltimore*)
  - The 13<sup>th</sup> amendment cannot be used to block constitutionally permissible state police action (e.g. monopoly rights grant for public health) *Slaughterhouse Cases*
  - The 14<sup>th</sup> amendment cannot be used to protect privileges OR immunities that pertain to state citizenship. It only protects against racial discrimination by the STATE – *Slaughterhouse Cases*
  - The 14<sup>th</sup> amendment cannot be used to constrain private actors from gun ownership or assembling – *United States v Cruikshank*
  - Congress cannot ban racial discrimination (public accommodation) by PRIVATE PARTIES pursuant to the 13<sup>th</sup> or 14<sup>th</sup> amendments
    - 13 only applies to SLAVERY – *Civil Rights Cases*
    - 14 only applies to STATE action – *Civil Rights Cases*
    - They eventually do this under commerce (*Ollie's BBQ, Heart of Atlanta Motel*)
  - State Action Doctrine – See above re: *Civil Rights Cases*, 14 generally only applies to state govts and government officials
  - Joint Participation Doctrine – PRIVATE parties can be deemed to be engaging in state actions if they have a close and interdependent financial relationship – *Burton v Wilmington Parking Authority*
    - Also, if the party exercises power under statute or law that make it fair to say that the private party is a *de facto* state actor – *Lugar v Edmondson Oil*

## Cases Prepped

***McCulloch v Maryland (1819) – Necessary and Proper***

- FACTS: The second bank of the United States is founded in Baltimore. Maryland taxes any out of state bank. McCulloch, bank administrator refuses to pay. SCOTUS on writ of error.
- ISSUE: Can the United States found and operate a bank?
  - o YES – necessary and proper to an enumerated power.
  - o TEST – Is there an enumerated power? Is there rational basis "rationally related" to a "legitimate" government interest, real or hypothetical for doing so
- ISSUE: Can Maryland tax an instrument of the federal government?
  - o NO – the power to tax is the power to destroy. Is the tax singling out the federal govt?
- ADDITIONAL ARGUMENT: violation of dormant commerce clause. Treating in and out of state groups differently. Violation of Privileges and Immunities (Article IV)
- “This is a constitution we are expounding.”
- “States have no power, taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional law enacted by congress to carry into execution of the powers vested in the general govt”
- EXCEPTION: Maryland could tax a federal bank through normal police powers (zoning regulations, licensing fees).
- LIMITATION: Jefferson Retort. Mousehole cannon. Not a “great and substantive” power

### ***Marbury v Madison (1803) – Judicial Review***

- SCOTUS notion of Judicial Review is marginally pre-textual. This case nails it down
- FACTS: Jefferson is narrowly elected with a new congress. There are a bunch of midnight appointments. Not all the letters get to the intended person. Jefferson refuses to deliver them. Suit
- ISSUE: Does Marbury have a right to his commission? (rolling two up)
  - o YES: Presidential actions are enduring. Lawful POTUS made the order. It can be remedied
- ISSUE: Can the court remedy this?
  - o NO: Lack of jurisdiction. Congress impermissible expanded Original Jurisdiction
- ADDITIONAL NOTE: Model for political question doctrine (non-discretionary duties)
  - o Mandatory duty → vested right → de novo review
  - o Means of executing duty → political question → no judicial review
- “It is the province of the judicial department to say what the law is”
- Foundational tension: is the role of the court dispute resolution – deciding the rights of individuals or Law Declaration – the province and the duty of the judiciary to say what the law is

### ***Virginia and Kentucky Resolutions***

- Ignore. This is ginned up Madison and Jefferson making a state compact argument and trying to nullify federal law. States cant nullify federal law or determine constitutionality.

### ***Martin v Hunter’s Lessee (1816) – State Review of Federal Decision Making***

- FACTS: Martin is a British citizen who claims a piece of land. Hunter claims the same. In 1779, Virginia expropriates all British land. In 1783, Jay Treaty (federal) reverses and protects British citizens. In 1789, Virginia grants the land to Hunter, who try’s to kick Martin off the land
- ISSUE: Can congress grant SCOTUS appellate review over state cases involving federal law?
  - o YES. Supremacy clause combined with a grant of jurisdiction from Congress permits SCOTUS to review all federal questions
- State and Federal governments are NOT CO-SOVERIGN. State judges cannot ignore federal law.
- We can’t have 16 different constitutions. This is a practical issue
- Art II Sec 2 – Judicial power of the US shall extend to all cases in law and equity arising under this constitution... (This is dispositive)
- Jurisdiction is Everything (Not quite everything, but close)

### ***Warth v Seldin (1975) – Standing***

- FACTS: Petitioners claimed that Penfield, NY zoning laws effectively barred lower income persons from living in the area. Proposals to build low-cost housing went nowhere. The harm is Penfield's exclusionary practices, the city of Rochester had been compelled to increase taxes to subsidize their own citizens as a right
- ISSUE: Do petitioners have standing to sue?
  - o NO. You need injury, traceable, redressable. The grievance must be specific to you. Taxes (*Londoner / BiMetallic*) are general.
  - o An association can sue on behalf of members, but one of those members, or the association itself, must have standing
- KEY ISSUE: Injury, causality (traceable), redressable (see *Lujan v Defenders of Wildlife*)

### ***Baker v. Carr (1962) – Political Questions Doctrine***

- Political question starts under *Marbury* but is refined in *Baker*
- FACTS: The TN Constitution required that legislative districts be redrawn every 10 years. Complaint is that this hasn't happen in 60+ years and there is now a malapportionment issue
- ISSUE: Can malapportionment of a state legislature be declared unconstitutional without raising a political question?
  - o YES – Race (15<sup>th</sup> amendment) – *Gomillion v Lightfoot*
  - o YES – Controversy (14<sup>th</sup> amendment) *Baker* – Redistricting is judicially if it can be shown that there is an actual controversy and a concrete harm accrued (one man one vote)
- RULE: A controversy is non-justiciable (a political question) when there is a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it.

### ***Nixon v. United States (1993) – Justiciability***

- FACTS: Nixon was a federal judge challenging impeachment conviction. He was convicted by the senate but only a subset of the senate heard the full case.
- ISSUE: Is the impeachment of a federal judge non-judicially?
  - o YES: Textual demonstration says a political branch handles this (Art 1 Sec 6). There is also no judicially manageable standard for resolving the controversy.
- TAKEAWAY: Non-judicially if the text says the political branches have to manage this. Non-judicially if there is no standard for resolving the controversy.

### ***Cooper v. Aaron (1958) – Supremacy / Justiciability***

- FACTS: Arkansas amended its Constitution and whipped up mobs to prevent school integration. Little Rock school district requests an extension of the timeline for safety reasons.
- ISSUE: Can the program for desegregation be postponed? NO!!!!
  - o Although the school board operated in good faith, it was constitutionally impermissible under equal protection to deprive black students of their equal right to an education
- ISSUE: Are states bound by all SCOTUS decisions? YES!!!!
  - o Supremacy clause, *Marbury*

### ***U.S. v. Windsor (2013) – Standing / Justiciability***

- FACTS: DOMA defined a marriage as one man / one woman. Windsor and her wife were legally married, moved to NY (marriage recognized). When her wife died, she was hit with \$363k in federal taxes because her marriage was not recognized federally.
- Lower Courts held DOMA unconstitutional and Obama administration didn't fight it.
- ISSUES: Does the executive branch's agreement with lower courts eliminate jurisdiction? NO
- ISSUES: Does DOMA's definition of marriage undermine 5th amendment equal protections? YES
  - o Later note: The equal protection under [5] reads as a reverse incorporation through due process but I am not clear on that.

### ***Youngstown Sheet & Tube Co. (1952) – Separation of Powers / Executive Power***

- If you ever see questionable executive action on an exam, go straight to YOUNGSTOWN
- FACTS: we are in the middle of the Korean War. Truman has been empowered to price fix steel. After failed mediation attempts workers are irritated and Truman seizes the steel mills.
  - o Key separation. This is in the national territory and war has not been formally declared
- ISSUE: Can the president simply take this action on his own?
  - o NO!!! You need a specific grant of power from the text or statutory from Congress.
- JACKSON CONCURRANCE - three-pronged Test. When determining whether the executive has authority there are three general circumstances.
  - o First, when the President acts with the express or implied authorization of Congress then the President's authority is at its greatest.
  - o Second, in the absence of either a congressional grant or prohibition then the President acts in a zone of twilight. In this circumstance, Congress and the President may have concurrent authority. In this zone of twilight, an actual test on authority will be dependent on the events and the contemporary theory of law existing at the time.
  - o The third circumstance is when the President takes measures that go against the expressed will of Congress, his power is at its lowest.
- TAKEAWAY: You can conceive executive power very broadly. But the president cannot unilaterally reorder domestic legal relations. It has to be done with congress.

### ***Trump v Mazars (2020) – Executive Privilege***

- FACTS: Congressional committee subpoenas tax returns (private documents). POTUS sues to block his accounting firm from disclosing those papers citing harassment of the executive.
- ISSUE: Does the constitutional text prevent the subpoena of non-privileged financial records?
  - o NOT EXACTLY – Congress can do so if there is a valid legislative goal
- TEST: Balancing
  - o Is the subpoena of items available elsewhere (must we bother POTUS)?
  - o Is the subpoena broader than is necessary to accomplish the legislative purpose?
  - o Has congress offered “detailed and substantial” evidence that the subpoena advances a “valid legislative purpose”?
  - o What is the burden imposed upon the president?

### ***United States v Nixon (1974) – Executive Privilege***

- FACTS: A grand jury has indicted POTUS co-conspirators. A special prosecutor has subpoenaed tapes and recordings. POTUS has denied access to documents based on executive privilege
- ISSUE: Is the President's right to safeguard certain information under “executive privilege” universal, making them immune from judicial review?
  - o NO – Documents may be held in privilege if they are deliberative and pre-decisional. But there is no universal immunity. "the fundamental demands of due process of law in the fair administration of justice."
- TAKEAWAY: Focus on the administration of justice. Deliberative and pre-decisional
  - o Court can review documents in camera

### ***Mistretta v United States (1988) – Nondelegation***

- FACTS: Congress created the sentencing reform commission to address the wide disparity in sentencing across federal offenses. Mistretta (triple coke sale convictions) sues under nondelegation
- ISSUE: Did the act violate nondelegation doctrine?
  - o NO!!! There was an intelligible principle in the delegation to the committee
- TEST: Intelligible principle test. There are specific directives and a rational reason to delegate.

### ***AFL-CIO v. American Petroleum Institute - Nondelegation***

- Benzene

- FACTS: Under the Occupational Safety and Health Act the Secretary of Labor, after determining exposure to benzene caused leukemia, set the standard for workers to be exposed at 10ppm
  - ISSUE: Did the secretary exceed his authority?
    - o YES! Plurality: Act dictates that the new standard was to provide “safe and healthful employment.” Court held that since the secretary had not made a threshold determination (i.e. had not determined precisely where harm would be in the record), he could not promulgate the rule.
- Rehnquist Argues Non-Delegation violation:
- o 1) congress makes social policy (not agencies), this should only apply to technical work,
  - o 2) agencies of delegation need an intelligible principle,
  - o 3) the intelligible principle must provide metrics for judicial review

#### ***A.L.A. Schechter Poultry (1935) - Nondelegation***

- FACTS: National Industrial Recovery Act permitted the president to set codes of unfair competition. The act had no guidelines, just blank authorization.
- ISSUE: Can congress delegate rulemaking without guidelines?
  - o NO: Congress can delegate authority for the execution of general power but cannot delegate core or essential legislative function
- TAKEAWAY: You need an intelligible principle and some guidance regarding bounds

#### ***Whitman v. American Trucking Ass’n (2001) - Nondelegation***

- FACTS: The Clean Air Act requires the EPA administrator to promulgate air quality standards for pollutants. When setting the ozone threshold Whitman based the rule on safety AND cost
- ISSUE: Does the clean air act unconstitutional delegate legislative power? NO!!!
- ISSUE: Can the EPA consider implementation costs? NO!!!!
  - o The Clean Air Act is a constitutional delegation (intelligible) but the CAA explicitly states the metrics for setting guidelines. Safety only, no costs
- TAKEAWAY: admin agencies can use the guidelines and ONLY the guidelines

#### ***Anti-Delegation Cannons***

- Major question doctrine (*King v Burwell*) – Question is so big that we cannot believe that congress meant to delegate it to the agency.
- Mousehole Cannon (*FDA v Brown*) – the court will not presume that congress meant the agency to do big things in minor provisions
- No Absurdity (*Michigan v EPA*) – the agency must resist achieving absurd or unreasonable results. If congress says you have to take costs into account, you really have to do that
- Constitutional Avoidance (*Benzene*) – We (the court) will read a statute in a restrictive fashion to avoid interpreting constitutional issues

#### ***INS v Chadha (1983) – Bicameralism and Presentment***

- FACTS – Chadha overstayed a visa and was about to be deported by INS. The AG suspended this deportation, but a House committee continued the deportation under the REINS Act
- ISSUE: Can the House of Reps have a one house legislative veto of executive action?
  - o NO: Congress may not promulgate a statute granting itself veto powers over the executive
- RULE: The only way congress may legislate is through bicameralism and presentment

#### ***Clinton v New York (1998) – Bicameralism and Presentment***

- o Be aware that if there is a presentment issue, there could be a delegation issue. Look for one.
- FACTS: The line item veto allowed the president to unilaterally strike portions of appropriations legislation. Congress could then override the veto. This is a little tricky because POTUS is not

compelled to spend all dollars in discretionary appropriations. Converse is that a line item strike would prevent future POTUS from using those allocated dollars

- ISSUE: Is the line item veto a violation of the presentments clause?
  - YES! Unilateral striking of portions of statute amounts to amending acts of congress. Actions must be approved by both houses and then a straight up or down by POTUS
- TAKEAWAY: If you are making laws, bicameralism and presentment, always

### ***Lucia v. SEC (2018) – Appointment (Who’s an officer)***

- FACTS: Lucia was tried by an ALJ who imposed sanctions. He challenged the finding arguing that the ALJ was an Officer of the US had not been properly appointed under appointments
  - President, Court of Law, Head of Department
- ISSUE: Are SEC ALJ’s Officers Subject to Appointment?
  - YES! Similar to STJ’s (*Freytag*) ALJs enjoy career appointments and wield significant authority. Since FTJs are officers, and ALJs look like FTJs, thus, officers

### ***United States v. Germaine (1879) – Appointment (Who’s an officer)***

- Germain was a surgeon appointed by the Commissioner of Pensions rather than the president. This case defined officers during an argument about what a Head of Department is.
- KEY TAKEAWAY: Officers are persons whose duties are continuing, not temporary. If work is not continuous, i.e. occasional or intermittent, then the person is not an officer.

### ***Buckley v. Valeo (1976) – Appointment (Who’s an officer)***

- SIGNIFICANT AUTHORITY TEST (TWO PARTS) – Trigger for who must be appointed
- An principal officer must be appointed as described in the appointments clause (nominated by POTUS), confirmed by senate (inferior officers can get heads of departments etc)
  - An officer is anyone who exercises significant executive authority
  - Continuing Position
- FACTS: Federal Election Campaign Act of 1971 created a series of rules for donations and the Federal Election Commission. FEC was comprised of two persons from POTUS, two from the house, two from the senate, and others
- ISSUE: Can the legislature nominate executive officers?
- NO!!!! Its ok to create and delegate but these persons are exercising executive authority

### ***Morrison v Olson (1988) – Appointment / Removal***

- FACT: After Nixon, congress created a special court that can appoint independent counsels. The AG (SHALL) conduct a preliminary investigation upon receipt of information. If the AG finds reasonable ground SHALL report to the special division. The DC Circuit MUST then appoint an IG
- ISSUE: Is the IG a principal officer (thereby violating appointments)?
  - NO! The IG is limited in tenure, responsibility, and is removable by the AG.
- ISSUE: Can you have someone in the executive branch not removable at will by POTUS?
  - YES! The AG is at will removable. Having a line between an inferior an POTUS is ok
- NOTE: SCALIA angry in dissent. RARRRR! In retrospect, he may have had a point

### ***Seila Law (2020) – Removal***

- FACTS – After the 2008 financial crisis the CFPB was established to manage debt protections. The director was appointed for a five year term, single head, only removable for Cause
- ISSUE: Does an agency with a single head and for cause removal violate the separation of powers?
  - YES!!!! Creating an independent agency with a single head and for-cause removal (inefficiency, neglect, or malfeasance) violates the separation of powers.

- TAKEAWAY: Congress may not limit the removal of agencies headed by a single director
  - *Humphrey's Executor* – You can have for cause removal at multi-headed agencies if those agencies are quasi-legislative or quasi-judicial in function
  - *Morrison v Olson* – you can restrict removal of inferior officers who have limited duties and no policy making or administrative authority

### **Removal – Key Precedent**

- *Myers v US* (1926): all executive officers must be removable at will either directly or by a principal officer who is removable
  - Narrow reading: congress may not “draw itself” into any part of the removal power
- *Humphrey's Executor* (1935): congress may protect principal officer against removal if they perform quasi-judicial or quasi-legislative functions
- *Buckley v Valeo* (1976) *Bowsher v Synar* (1986): Congress may not draw the appointment or removal of executive officers to itself. (Congress cannot appoint executive officers)
- *Morrison v Olson* (1988): Congress may protect officers unless those protections “impede the POTUS’s ability to perform their function”
  - Limited duration, limited scope
- *Free Enterprise v PCAOB* (2010): Removal protections for principal officers of independent agencies can be constitutional. Removal protection for inferior officers can be constitutional. But double layer protections are not constitutional.
- *Seila Law v CFPB* (2020): Congress may limit removal of multi-member independent commissions, but not agencies headed by a single director.

### **U.S. v. Curtiss-Wright Export (1936) – Foreign Affairs**

- THIS IS DELEGATION. DICTA SAYS WE SPEAK WITH ONE VOICE. INTERPRET NARROWLY. LARGELY IGNORE.
- FACTS: War breaks out between Paraguay and Bolivia. Congress approves a joint resolution empowering the president to embargo arm sales from private parties to both belligerents.
- ISSUE: Did the joint resolution violate nondelegation by congress?
  - NO!!! Although the constitution doesn’t empower POTUS to conduct foreign policy, it is implicit in the nature of the executive.
- NOTE: This does not violate the unilateral reorganization of domestic affairs partly because things are happening overseas but mostly because congress was involved
  - "the President alone has the power to speak or listen as a representative of the nation,"

### **Zivotofsky v. Kerry (2015) – Foreign Affairs**

- FACTS: Zivotofsky is a US citizen born in Israel. Pursuant to the Foreign Relations Authorization Act of 2003, his parents want his passport to say he was born in Jerusalem. State department rules don’t permit this (Israel only). Congress passes a statute via Naturalization (enumerated)
  - Originally determined to be non-judicial, then comes back
- ISSUE: Does a federal statute that orders Sec State to record birthplace as “Israel” instead of “Jerusalem” impermissibly infringe on POTUS’s ability to recognize foreign states?
  - YES!!! – POTUS has exclusive power to recognize foreign states. The act impermissibly interferes with the Receptions Clause and recognition.
- GREVE INTERPREATION: We are under *Youngstown* bucket 3. How can POTUS win? POTUS wins because what congress did was unconstitutional.

### **Medellin v Texas (2008) – Foreign Affairs**

- FACTS: Medellin is a Mexican national convicted for rape and murder. Post-conviction, Medellin argues that the conviction violates the Vienna Convention, relying on a POTUS memo ordering state courts or comply with International Court of Justice determinations

- ISSUE: Did POTUS act within their authority when ordering a state court of comply with a US treaty obligation?
  - o NO! Signing the Vienna protocol does not make the treaty self-executing.
- TAKEAWAY: If a treaty is not self-executing, then it is not binding until it is enacted by Congress.
- A self executing treaty is one that is judicially enforceable upon ratification. Example, an exchange of ambassadors

### ***Little v Barreme (1804) – War Powers***

- FACTS: Danish ship sailing from a French port. US Captain believed it was American and flying under false colors. Following POTUS orders, the ship was seized. Turned out not to be American (whoops)
- ISSUE: Can courts award damages to the Dutch crew and ship owner?
  - YES!!! Although Little acted on direct orders from POTUS, he acted beyond authority (*ultra vires*)
- TAKEAWAY: A commander of a warship is answerable for damages executed in acting upon orders if those instructions are not strictly warranted by law. So, obeying instructions from POTUS that authorize an illegal act, should be done at the officers peril (illegal orders)

### ***Prize Cases (1863) – War Powers***

- FACTS: Leading up to the civil war POTUS authorized a blockade of states in April 1861. Before war was formally declared numerous vessels were seized.
- ISSUE: Can POTUS authorize the seizure of ships under admiralty law absent a declaration of war?
  - o YES!!! While seizing a ship during peace is piracy, the court determined that the confederacy was in actuality an insurrection, and we were for all intents and purposes at war
- TAKEAWAY – POTUS can make the determination of who is a belligerent, this is incidental to commander in chief. Separate from *Little v Barreme* where we were at peace and the country was neutral in a war between two foreign states
- TAKEAWAY – POTUS can repel attacks and has full control of the conduct of operations
  - o Distinction from *Youngstown* – support of congress, defense of territory, supply of enemies

### ***War Powers Resolution– War Powers***

- The purpose was to prevent another Vietnam, i.e. conflict forever. Constitutionality is dubious
  - o Congress could just cut funding, but congress will never do this. It'll look bad
- Resolution stipulates the president must notify Congress within 48 hours of military action and prohibits armed forces from remaining for more than 60 days.
  - o After 60 days, troops must leave unless authorized. They can get 30 days if it is complicated.
- Section 8 – *Youngstown 2* territory – flat statement, there is no presidential authority to introduce armed forces into hostilities without specific authorizations. NOTHING can count as specific authorization EXCEPT authorization.
  - o This is why AUMFs constitutes SPECIFIC authorization

### ***Hamdi v Rumsfeld (2004) – War / Emergency Powers***

- FACTS: Hamdi (US Citizen) was detained in Afghanistan as an enemy combatant and put in Gitmo. Filed a writ of habeas because he was not put on trial.
- ISSUE: Does perpetual holding violate 5<sup>th</sup> amendment due process protections?
  - o YES!!! Hamdi is a US citizen and is guaranteed the right to contest detention in front of a neutral decision maker.
- TAKEAWAY: The rights of persons are different from property (ships) in the theatre of war.

### ***Ex Parte Merryman (1861) – Emergency Powers***

- FACTS – Maryland did not succeed but asked Lincoln to vacate federal troops. Lincoln suspends habeas and refuses to vacate. Merryman leads a state militia to destroy several bridges. He is detained but never tried. Gets more crazy from there. Its not clear what capacity TANEY is acting in.
- ISSUE - Can POTUS or a general authorize the suspension of habeas corpus?
  - NO!!!! Only congress can, this is written in Article I
- HOLDING
  - Only congress can suspend habeas

### ***Korematsu v US (1944) – Emergency Powers***

- Overturned in Trump v Hawai'i
- FACTS: Civil exclusion order made it illegal for Japanese persons to be on the west coast. Korematsu stays in his home. Convicted of remaining in a “designated military area”
- ISSUE: Can congress implement restrictions which curtail the rights of a single racial group?
  - YES!!! Restrictions related to race are subject to strict scrutiny. While the action does have facial bias it is counteracted by fear of invasion. Court defers to congress and the military
- TAKEAWAY: This case is about the curfew (a restriction). No person SHALL. Keep your eye out for orders v restrictions when dealing with emergency powers

### ***ex Parte Endo (1944) – Emergency Powers***

- FACTS: Japanese Americans were evacuated from the west coast and placed in camps (WWII). Endo filed a petition for habeas asking that she be discharged
- ISSUE: Should habeas be granted?
  - YES!!! Whatever power there was to detain citizens, the government cannot detain citizens that are “concededly loyal” to the United States
- TAKEAWAY: If you want to not grant habeas petitions, you have to suspend habeas.

### ***Prep Trump v Hawai'i (2018) – Emergency Powers***

- Overturns *Korematsu*
- FACTS: POTUS signs EO suspending entry (90 days) from six countries with terror links citing need to study infiltration standards. POTUS then offered a second Proclamation embargoing travel.
- ISSUE: Is the issuance of such EOs a violation of the establishment clause?
  - NO!!! Under the Immigration and Nationality Act POTUS has broad discretion to suspend non-citizen travel. Court also found that the targeted countries were incidentally Muslim.
- TAKEAWAY: You cannot suspend travel based on religion. That would violate establishment. But if there is something that is correlated with religion (terrorism) it is permissible.

### ***Hamdan v Rumsfeld (2006) – Emergency Powers***

- FACTS: After *Hamdi* there are many habeas petitions. Congress passes the Detainee Treatment Act. Statutory Habeas restrictions does not extend to Gitmo. But detainee appeals can go to the DC Circuit. Hamdan is OBL's chauffeur, who challenges his trial as lacking Geneva and UCMJ protection
- ISSUE: May rights protected by the Geneva be enforced in federal court through habeas petitions?
  - YES: Absent that express authorization, the commission must comply with the US and international law. The Geneva Convention, and the UCMJ, can be enforced
- ISSUE: Was the power to establish military established commission for trials authorized by the Congress or the inherent powers of the President?
  - NO: Hamdan's exclusion from certain parts of his trial deemed classified by the military commission violated both of these, and the trial was therefore illegal.
- TAKEAWAY: if POTUS is going to setup a military commission it needs to conform to a statutory authority. If it is the UCMJ (*ex parte Queeran*), then it needs to conform to the UCMJ.

### ***Boumediene v Bush (2008) – Emergency Powers***

- FACTS: Boumediene was seized by Bosnian Police based on a suspected attack on the US Embassy. The 2006 Military Commissions Act eliminates federal courts from hearing habeas petitions from enemy combatants. The MCA was passed in reaction to Hamdan.
- ISSUE: Does the MCA violate the suspensions clause?
  - o YES! The Detainee Treatment Act is not an adequate substitute for a habeas writ.
- ISSUE: Are detainees at Gitmo entitled to 5<sup>th</sup> amendment protections?
  - o Detainees are not barred from habeas simply because they are combatants or at Gitmo
- TAKEAWAY: Another decision telling Congress not to end run habeas protections.

### ***Gibbons v. Ogden (1824) - Commerce***

- FACTS: The NY legislature grants Ogden (eventually) exclusive privileges on navigable waters between NY and NJ. Gibbons got a license from the US Congress. Ogden files suit
- ISSUE: Was the NY law regulating waterways valid?
  - o NO!!! The NY law was invalid because the constitution delegates (Article 1, Section 8, Clause 3) the regulation of interstate commerce to Congress (includes navigation). If we grant concurrent powers, there will be conflicting law.
- TAKEAWAY: Congress can regulate the “stream of commerce” to the transaction. It also doesn’t stop at the state’s boundary (e.g., states can’t deny docking permits to out of staters (Dormant))
  - o Commerce is the exchange of goods and services for money, nothing more
  - o Activities vital to the conclusion of the transaction are not subject to state control
  - o Activities vital to value added services (labor, manufacturing) are not subject to Congress
  - o States reserve policing powers (inspection, quarantine, booze)
  - o All about CONFLICT. Did congress intend to displace? If so, state goes poof

### ***Willson v. Black Bird Creek Marsh Co (1829) - Commerce***

- FACTS: Blackbird creek flowed through a marsh used by shippers. The state of Delaware then dammed the marsh to kill of mosquitos. Willson destroyed the dam to get through to the river.
- ISSUE: Does a state law which restricts navigation (commerce) violate the commerce clause?
  - o Not necessarily: If the law has a legitimate purpose, is consistent with general police power, and does not conflict with federal law, its valid.
- TAKEAWAY: States can regulate via police powers in the face of Congressional silence.

### ***US v E.C. Knight (1895) - Commerce***

- FACTS: EC Knight is purchased by American Sugar, creating a monopoly on sugar production. Govt sues to stop under the Sherman Act. Price manipulation and conspiracy to restrain trade
- ISSUE: Can congressional control of commerce extend to manufacturing?
  - o NO!!!! Manufacturing is not regulatable pursuant to the commerce clause.
- TAKEAWAY – This is pre-Wickard categorization. Commerce is not manufacturing. It is trade.

### ***Shreveport Rate Cases (1914) - Commerce***

- FACTS: Texas Railroad Commission mandated higher fees on freight travelling between TX and LA than within TX only. Federal Interstate Commerce Commission found this an unfair discrimination
- ISSUE: Does the ICC have the power to regulate purely intrastate commerce?
  - o YES! Congress has the right to control operations “having a close and substantial relation to interstate traffic, to the efficiency of interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms”
- TAKEAWAY: Pre-Wickard, we can always control means of transit (waterways, roads, the sky)

### ***Hammer v. Dagenhart (1918) - Commerce***

- FACTS: Congress passed the Keating-Owen Act which prohibited the interstate sale of goods made by children under the age of 14. Most states had child labor laws but this was stricter.
- ISSUE: May congress regulate the interstate sale of good produced by child labor?
  - NO!!! Only states can regulate production. Production and commerce are different
- TAKEAWAY: Pre-Wickard, you cant regulate production. This is distinct from transportation of booze, lottery, and other things across state lines because the harm happens after the transportation.
  - Overturned by US v Darby (1941)

#### ***A.L.A. Schechter Poultry (1935) - Commerce***

- FACTS: NIRA permitted POTUS to set codes of unfair competition, price fixing, wage fixing, and so forth. FDR set forth a bunch of rules on minimum wages, maximum hours, etc
- ISSUE: Can congress delegate the ability to set minimum wages, collective bargaining, etc?
  - NO!!! These are intrastate transactions. This is about production and manufacturing (Carter Coal). Congress cannot delegate an authority it does not have (local commerce)
- TAKEAWAY: Congress cannot delegate authority it does not have

#### ***United States v Darby (1940) - Commerce***

- FACTS: FLSA was passed to regulate minimum wages and child labor. Darby is a lumber manufacturer arrested for violations of the FLSA
- ISSUE: Was the FLSA a legitimate exercise of the commerce power?
  - YES!!! Not much more to say. You can regulate manufacturing post Wickard
- NOTE: Explicitly overrules *Hammer v Daegonhart*

#### ***NLRB v. Jones & Laughlin (1937) - Commerce***

- FACTS: Jones runs a multistate supplier for steel refining. Jones then fires workers who had been part of unionizing efforts. NLRB launches an investigation and orders the rehire of fired workers
- ISSUE: Is the NLRA a constitutional exercise of Commerce?
  - YES! Congress has the authority to regulate labor disputes
- TEST, if there is a “close and intimate relationship” to commerce, congress can do this
- Normally, manufacturing is local. But steel is not a local game. Its interstate
- Strikes would cripple an interstate industry. Thus, regulating labor is good

#### ***West Coast Hotel v. Parrish (1937) - Commerce***

- FACTS: Parrish was suing for back wages. She was compensated at less than minimum wage. WA state had a minimum wage law specifically for women.
- ISSUE: Does a state minimum wage law for women violate Due Process (5<sup>th</sup> and 14<sup>th</sup>)
  - NO!! Minimum wage laws are permissible (as are female minimum wage laws).
- TAKEAWAY: A state may use its policing powers to restrict freedom to contract

#### ***Gold-Clause Cases (1935) - Commerce***

- FACTS: Contracts in the US regularly had gold clauses which allowed creditors to demand payment in gold. The Emergency Banking Act allowed POTUS to prohibit international gold payments.
- ISSUE: Can congress prohibit contract or invalidate previously valid contracts?
  - YES!!! If a contract violates monetary policy congress may prohibit or invalidate contracts
- TAKEAWAY: The government's power to regulate money is a plenary power (unrestricted).

#### ***Wickard v. Filburn (1942) - Commerce***

- FACTS: Agricultural Adjustment Act (AAA) imposed a maximum quota of wheat that farmers could produce. Over his quota, Filburn grew wheat for home use and was fined for overproduction

- ISSUE: Is the regulation of in-state personal production a valid exercise of commerce?
- YES!!! Congress can regulate in state activities if they can substantially affect commerce.
- TAKEAWAY: Private action that might affect commerce, when aggregated, can be regulated.
- No more categorical distinctions

### ***Parker v Brown (1942) – Commerce***

- FACTS: California Prorate Act restricted raisin production in California to stabilize prices. Brown, raisin farmer, is attempting to enjoin the act because it is regulating contracts
- ISSUE: Does a California Act restricting production a violation of commerce?
- NO!!! A State Act that regulates local production is not an impairment of the Commerce power
- TAKEAWAY: As long as the acts are not incongruent with federal regulation, a state can regulate production under policing powers (up to and including state monopolies).

### ***Heart of Atlanta Motel v US – Commerce***

- FACTS: Title 2 of the civil rights act forbade places of public accommodation from discriminating based on race. Heart of Atlanta Motel refused to accept Black guests. Suit.
- ISSUE: Is Title II a valid exercise of the commerce power?
- YES!!! As the motel is near interstates, and receives interstate guests, it affects commerce
- TAKEAWAY: Under the 14<sup>th</sup> amendment you can reach out against state action, but not private action. Commerce makes it feasible to enact prohibitions on personal actions under commerce
  - Commerce is also a pretextual means to deal with moral issues (has been done FOREVER!!! HOOKERS! LOTTERY TICKETS!!! BOOZE!!!)

### ***U.S. v. Lopez (1990) - Commerce***

- FACTS: Gun Free School Zones Act made it a federal offense to knowingly possess a firearm in a school zone. Lopez brought a gun to school and was charged for doing so
- ISSUE: Is the GFZA a valid exercise of the commerce power?
- NO!!! Handgun possession is not an economic activity and does not have a substantial effect!
- TEST for valid COMMERCE REGULATION
  - 1) Channels of interstate commerce (roads, water, hotels) *Heart of Atlanta*
  - 2) Instrumentalities of interstate commerce (planes trains automobiles) *Shreveport Rate Cases*
  - 3) activities that substantially affect interstate commerce (wheat production) *Wickard*

You can aggregate ECONOMIC CONDUCT but you may not aggregate NON ECONOMIC conduct (this is the Rehnquist v Breyer distinction)

### ***Gonzalez v. Raich (2005) - Commerce***

- FACTS: Controlled Substances Act prohibits the growth and sale of marijuana. Raich used medical marijuana under the California Compassionate use act. DEA destroys the crop.
- ISSUE: Can Congress regulate in-state use and production of medical marijuana?
  - YES!!! See *Wickard*. Congress can regulate local activities that have a substantial effect in aggregate

### ***United States v Butler (1936) - Spending***

- FACTS: Agricultural Adjustment Act implemented a processing tax on commodities. Authority to determine which crops would be affected was determined by Sec Ag
- ISSUE: Is this an unconstitutional use of taxing and spending powers?
  - YES!! This is an attempt to regulate production. That is a state power. (pre-Wickard)
  - This was not a true tax because it was coupled with a coercive contract.
- TAKEAWAY: Congress can't use spending as an enforcement mechanism for exclusive state power.

### ***Steward Machine Company v IRS (1937) - Spending***

- Steward Machine Company challenged a tax from the Social Security Act. The act imposed a tax on employers with eight or more employees to fund an unemployment fund.
- ISSUE: Does the SSA violate the 5<sup>th</sup> Amendment Due Process?
  - NO! The tax does not coerce states in contravention of the 10<sup>th</sup> Amendment
- TAKEAWAY: Rational taxes and relationships which do not coerce states into adoption (i.e. a real choice exists) are not unconstitutional.

### ***South Dakota v. Dole (1984) - Spending***

- FACTS: Congress passed minimum age drinking rules. If states did not require the minimum age drinking law to be 21, they would lose 5% of highway funds. SD's drinking age was 19.
- ISSUE: Can congress use conditional funding to compel states to do things outside authority?
  - YES!! Congress may attach reasonable conditions to funds without violating 10<sup>th</sup>
- TEST [Five Elements]
  - Spending must be for general welfare – *General Welfare Clause*
  - The conditions for spending must be clear – *Pennhurst v Halderman*
  - Spending must be germane to the statutory purpose – *South Dakota v Dole*
  - Conditions must not conflict with the constitutional text
  - The conditions must not be coercive – *Steward Machine Company v IRS*

### ***NFIB v. Sebelius (2012) – Spending / Commerce***

- FACTS: AHCA expanded Medicaid (state program) to 133% of the poverty level. States which did not expand lose all funding. An individual mandate was also created with penalties for non-coverage
- ISSUE: Can congress compel economic activity under commerce?
  - NO!!! It can compel economic activity as a tax though
- ISSUE: Can congress make states expand through a complete revocation of Medicaid dollars?
  - NO!!! Choices must be genuine
- TAKEAWAY: Congress cannot threaten to take away all dollars. Cannot be coercive. Congress cannot compel economic activity under Commerce. It can under a tax though
- Inferred powers must be consistent with the spirit of the original text (see *McCulloch*)
- The court has consistently acknowledged the difference between saying no and YOU MUST. Prohibitions are different from mandates. Prohibitions are generally ok, mandates are not ok.

### ***Swift v Tyson – Federal Structure***

- FACTS: Tyson (NY resident) bought land from Narden with a promissory note. Narden sells the note to Swift (Maine resident). But Narden didn't own the land he sold (fraud). So when Swift came to collect Tyson refused.
- ISSUE: Under diversity jurisdiction, are federal courts free to ignore common law of their states?
  - YES! Federal judges sitting in diversity can ignore the common law of the states where their court resides in (i.e. UNWRITTEN LAW)
- NOTE: This is changed by Erie RR

### ***Erie RR v. Tompkins (1938) – Federal Structure***

- FACT: Tompkins was walking near a RR in PA and was injured. Under PA law, Tompkins was trespassing (no relief). Sues in NY under diversity where the rules are more favorable
- ISSUE: In a liability suit under diversity, should state common law be applied?
  - YES! Federal Courts must apply state law, statutory or common, in all diversity cases unless federal law is controlling. Neither congress nor federal courts can declare state common law
- TAKEAWAY: This creates the Erie doctrine: Federal Courts sitting in diversity must apply state substantive law and may only apply federal procedural law

### ***Powell v McCormack (1969) – Federal Structure***

- FACTS: Powell was a representative from Harlem who had legal issues. After being held in criminal contempt, the House of Representatives voted to exclude him from proceedings.
- ISSUE: Can the house exclude reps for reasons other than the Qualifications of Members Clause?
  - o NO!!! You can expel a member with a 2/3 vote. You can expel, you cant exclude unless they are unqualified based on (age, citizenship, inhabitation)
- TAKEAWAY: Congress cannot add additional qualifications for representation. If you expel, you have to follow the rules

### ***U.S. Term Limits v. Thornton (1995) – Federal Structure***

- FACTS: Arkansas amended its constitution to prevent candidates from being on the ballot after three terms in the US House (2 in senate). They could still win by write in.
- ISSUE: Can a state alter qualifications for congress beyond what is in Article 1 and Amend 17?
  - o NO!!! States cannot alter qualifications. These are national officers. The qualifications clause is utterly clear.
- TAKEAWAY: States cannot change the qualifications for representation. They are in the text.

### ***Garcia v. SAMTA (1985) – Federal Structure***

- FACTS: SAMTA had paid its employees according to the FLSA. After the *National League* decision they let wages drop below the minimum wage standard from FLSA.
- ISSUE: Do federalism requirements make local governments performing traditional functions immune from federal oversight?
  - o NO!!! Congress has the authority under Commerce to apply FLSA to transit operators.
- GREVE Calls this process federalism. (SCOTUS's challenge in resolving state sovereign immunity and the new plenary powers from the federal government)
- TAKEAWAY: Congress can directly regulate state action when the state is acting in trad capacity!
  - o EXCEPTION: State sovereign immunity issues
  - o EXCEPTION: Official immunity from prosecution (*Twombly*)
  - o EXCEPTION: Must be acting within congressional powers (*Lopez* / *NFIB*) ← commerce
  - o EXCEPTION: Must be a CLEAR STATEMENT of authority (see clear statement rules)
  - o EXCEPTION: States cannot be commandeered

### ***Chisholm v. Georgia (1792) – Sovereign Immunity (OLD)***

- FACTS: Chisholm was executing the estate of a deceased South Carolinian who had supplied GA with resources during the revolution. GA renegs on debts. Suit filed directly in SCOTUS
- ISSUE: Can state citizens sue state governments in federal court without state permission?
  - o YES!!! Article III, Section 2 grants federal courts jurisdiction between states and citizens. This immediately removes state sovereign immunity
- NOTE: Immediately overturned by the 11<sup>th</sup> amendment. 11<sup>th</sup> amendment says judicial power doesn't extend to suits of equity between states and citizens of other states

### ***Hans v. Louisiana (1890) – Sovereign Immunity***

- FACTS: Hans (from Louisiana) purchased bonds from Louisiana which were never paid. Sues LA in federal court over violation of contract.
- ISSUE: Can a state be sued in federal court by one of its own citizens over a matter of equity?
  - o NO!!! Federal courts do not have jurisdiction of legal actions of a citizen against their own state.
- TAKEAWAY: States generally have immunity unless they waive it or something else happens

### ***Ex Parte Young (1908) – Sovereign Immunity***

- FACTS: Railroad case. Minnesota imposes railroad rates with harsh enforcement provisions. The railroads claim that the rates are confiscatory. There is no diversity. Suit is under 14<sup>th</sup> amendment
- ISSUE: Do federal courts have jurisdiction to enforce an injunction against a state officer?

- YES! A lawsuit seeking an injunction against a state official does not violate the sovereign immunity of the state, because the state official was not acting on behalf of the state when he sought to enforce an unconstitutional law.
- TAKEAWAY: State officers may be sued to enjoin violations of law. These can ONLY be injunctive. You cannot sue for damages.

### ***Seminole Tribe of Florida v. Florida (1996) – Sovereign Immunity***

- FACTS: Congress passes the Indian Gaming Regulatory Act. While tribes need a license from the state, the act allows suit against a state if the state does not negotiate in good faith
- ISSUE: Does the 11<sup>th</sup> amendment protect the state from suits of equity?
  - YES! Suits of equity against a state are generally impermissible
- ISSUE: Can Congress abrogate state immunity?
  - YES! But it cannot do it under anything but the civil rights amendments
- TWO STEP TEST TO DETERMINE IF CONGRESS CAN STRIP IMMUNITY
  - Congress must unequivocally intend to take away the immunity (clear statement)
  - Congress must act under a valid constitutional power to do so (13<sup>th</sup> 14<sup>th</sup> 15<sup>th</sup>)

### ***Fitzpatrick v Bitzer (1976) – Sovereign Immunity***

- FACTS: The Civil Rights Act of 1964 allowed individuals to sue state governments for monetary damages resulting from discrimination based on suspect class.
- ISSUE: Can congress abrogate sovereign immunity under the 14<sup>th</sup> amendment?
  - YES!
- ISSUE: Can suit against a state include monetary damages under the 14<sup>th</sup> amendment?
  - YES!
- TAKEAWAY: Abrogation of state (not state officer or local jurisdiction) immunity can occur, and include monetary damages, via Congress if that abrogation is occurs related to civil war amendments

### ***Metropolitan Life v. Ward (1984) - Dormant Commerce Clause***

- Dormant Commerce Clause does not rely on Privileges and Immunities. P&I relates to CITIZENS ONLY. Not to INCORPORATED BODIES.
- FACTS: Alabama passed a law which lowered tax rates for Alabama based insurance companies. This is tricky because the McCarran Ferguson Act creates a carveout for insurance (not commerce)
- ISSUE: Can a state tax out of state insurance companies at a greater rate and domestic ones?
  - NO!!! The promotion of domestic business by discriminating against nonresidents is not a legitimate state action. PURELY PUNITIVE is not ok
- NOTE: This has been distinguished into oblivion.
- NOTE: DON'T USE DUE PROCESS IN DORMANT COMMERCE ARGUMENTS

### ***Pike v Bruce Church (1970) – Dormant Commerce Clause***

- ISSUE: Arizona passed a statute that required Arizona cantaloupes to be labeled as such. Church was in AZ but packed his cantaloupes in CA. AZ forced him to package in AZ, causing costs to go up
- ISSUE: Can a state create a burden on residents if there is a legitimate local purpose?
  - YES!!! But the cost to commerce must be balanced against the local benefit that accrues.
- TEST: Step 1: Is there discrimination (with all possible Caveats)
  - Step 2: If there is no discrimination against out of state interests, is the benefit sufficiently large to justify the burden on interstate commerce?
- TAKEAWAY: If you are into Pike balancing, you're done. No one has ever won a case on Pike.

### ***Philadelphia v. New Jersey (1978) – Dormant Commerce Clause***

- FACTS: NJ passes a law that prohibits states from shipping their trash to NJ landfills. The purpose of the law was to protect the environment and reduce NJ burden on landfills
- ISSUE: Can a state prohibit out of state waste from crossing a border?
  - o NO!!! A state may not discriminate based on the origin of an article of commerce.
  - o Banning out of state waste could lead to retaliation. Economic wars between states
- CARVEOUT: If the state took over the landfills it could do this, but then it is an economic actor. But it cant be an economic actor and a regulator (CHECK ME)

### ***Camps Newfound (1997) – Dormant Commerce Clause***

- FACTS: Maine law granted tax breaks to camps (charities) if the charity benefits state residents.
- ISSUE: Does a tax exemption for charities which benefit in state residents violate dormant?
  - o YES!!! Discriminatory state laws are virtually invalid if there is an express distinction between entities serving in state and out of state residents. Non-profit status is irrelevant
- EXCEPTION: You could probably do this with a per-head subsidy.

### ***Kassel v. Consolidated Freightways (1981) – Dormant Commerce Clause***

- FACTS: CF is a freight firm which uses long rigs. IA bans such rigs with an exception for IA truckers. The logic presented is that this is to increase safety and reduce highway wear.
- ISSUE: Under the guise of police powers, can a state impose restrictions that prevent pass through?
  - o NO!!! (Plurality) Police powers re: safety are where the powers of the state are highest.
- TEST: There is a presumption of validity with safety, but it requires evidence. The fact that IA allowed longer trucks from Iowans undermines the evidence presented

### ***South Central Timber v Wunnicke (1984) – Dormant Commerce Clause***

- FACTS: Alaska enacted a statute requiring all Alaskan timber to be partially processed in state before going out of state. Alaska is a market participant the timber industry and processes that timber.
- ISSUE: Is a state exempt from the dormant commerce clause when it is a market participant?
  - o YES!!! But the state cannot be both regulator AND market participant.
- TAKEAWAY: The market participant angle has a lot of support
  - o Construction funded by a city can require citizens be used: *White v Massachusetts*
- TAKEAWAY: Alaska messed up because a state participant can only focus on the TRANSACTION. The state cannot impose upstream and downstream effects.

### ***City of Camden (1984) – Dormant Commerce Clause***

- United Building & Construction Trades Council v. Mayor and Council of Camden (1984)
- FACTS: Camden NJ ordinance required 40% of employees, contractors, and subs working on city construction projects to be residents of the city of Camden.
- ISSUE: Can a city require some % of employees to be residents?
  - o YES! The locality is acting as a market participant.
- ISSUE: Do Privileges AND Immunities (Art IV) apply to municipal ordinances
  - o YES! Municipalities are part of states, and cannot do things a state cant do.
- ISSUE: Under P&I, can a state pressure contractors to not hire out of state residents?
  - o NO!!! A state may pressure private employers, but not contractors or subs (e.g. Unions). P&I appl
- TEST: Intermediate Scrutiny
  - o Does the law burden a privilege or immunity protected by fundamental right?
  - o Is the restriction related to the advancement of a substantial state interest?
- DO NOT CONFLATE PRIVILEGES AND IMMUNITIES (Art IV) WITH PRIVILEGES OR IMMUNITIES CLAUSE (14). Three critical differences:
  - o Privileges AND Immunities is self enforcing. It is not a grant of power for congress
  - o Privileges OR Immunities (14th) gives congress power to enact legislation
  - o The OR clause (14th). Allows congress can enforce the rights of citizens

- The AND clause (4th) protects no rights and applies ONLY to citizens. No Incorporated bodies. All it says is, states, whatever privileges you extend you need to extend to all other persons
- CORPORATIONS are citizens for some 14th amendment purposes, but never for 4th amendment

### ***PG&E v. State Energy Comm'n (1983) – Federal Preemption***

- FACTS: California statute requires that before new nuke plants are built, there must be adequate capacity for spent fuel. The Atomic Energy Act had extensive but non conflicting safety regs
- ISSUE: Can a federal law pre-empt a state law even if they are not mutually exclusive?
  - o YES!!! A state law is preempted if it states as an obstacle to the objective of Congress
- ISSUE: Is a state law which imposes a moratorium on economic activity where Congress has spoken automatically preempted?
  - o NO! SCOTUS will not interfere where there is permissible and good basis for law.
- NOTE: These challenges must be RIPE!
- NOTE: MY READING suggests there is an underlying commandeering issue here. Be careful.

### ***Lorillard Tobacco v. Reilly (2001) – Federal Preemption***

- FACTS: Congressional action made it illegal to sell tobacco to kids which said there would be no additional regs “based on smoking and health”. MA legislation enacted legislation to limit advertising
- ISSUE: Is a comprehensive advertising scheme enacted by MA void?
  - o PARTIALLY! The point of sale restrictions additional to federal law and are preempted.
  - o There is also a free speech (advertising) element which invalidated part of the items of commercial speech but upheld holding tobacco behind counters as “narrowly tailored”
- NOTE: Hyper-textualism of the statute will prevail in these cases.

### ***Wyeth v. Levine (2009) – Federal Preemption***

- FACTS: Levine was having headaches and was treated with Phenergan. She was treated by a method that resulted in amputation. Hook: manufacturer labelling was consistent with FDA standards, but the FDA does allow pre-approval changes to labeling that increases warnings
- ISSUE: Does federal law preempt state personal injury law for failing to include a warning label?
  - o NO! Holding hinges on how we define the transaction. Health and safety (state). Interstate sale of pharma (federal). There was an option to increase warnings.
- NOTE: Look for clear statement rules about preemption when things can be cast as police power
- NOTE: Tort liability standards are subject to the presumption against preemption

### ***Virginia Uranium v Warren (2019) – Federal Preemption***

- FACTS: The Atomic Energy Act regulates nuke power generation. When a trove of uranium was discovered in VA, the state enacted a moratorium on mining until a permit program was in place
- ISSUE: Is the moratorium on mining preempted by the AEA?
  - o NO! The text of the AEA lacks an explicit preemption clause. And the AEA and NRC regulate almost all aspect of nuclear energy EXCEPT mining.
- TAKEAWAY: look for a conflict or clear statement about preemption

### ***Gregory v. Ashcroft (1991) – Clear Statement Rules***

- FACTS: MO Constitution required all state court judges to retire at 70. Gregory brings suit based on the Age Discrimination Act (created under 14<sup>th</sup> Amendment). ADA has an exception for “policy making level” employees
- ISSUE: Are state judges employees as defined by the ADA?
  - o NO! Its not clear if the ADA was about judges. No UNAMBIGUOUS clear statement
- TAKEAWAY: Absent a clear statement about federal pre-emption, states have the ability to create rules about qualifications for state employees
- NOTE: This is *Garvia* land. The FSLA was CLEARLY about bus drivers. Unclear about judges
- NOTE: Not the same as *US Term Limits*. Those are national employees with defined qualifications

### ***Jones v. U.S. (1999) – Clear Statement Rules***

- FACTS: Jones throws a Molotov cocktail into the window of a home. Convicted under federal arson rules which criminalize properties involved in or affecting interstate commerce
- ISSUE: Does arson statute cover arson of an owner-occupied building without commercial purpose?
  - o NO! The statute only covers property in use or affect. There is no clear statement that it applies to all owner-occupied building that might be involved in commerce.
- NOTE: Everything here relies on the word used because it limits the scope of the arson statute
- This is the presumption against preemption run into a clear statement rule. No preemption here.

### ***Pennhurst v Halderman (1984) – Preemption / Commandeering***

- 11<sup>th</sup> Amendment bars suit against state officials when the state is the party in interest.
- This prohibits federal Courts from ordering state officials to conform to their state law.
  - o There is no federal issue. Court has no jurisdiction to enjoin on the basis of state law.

### ***Solid Waste of Northern Cook County v US Army Corp of Engineers (2001) - Preemption***

- SWANCC
- FACTS: The clean water act (CWA) has provisions regarding dredged fill in navigable waters. Army Corp read this to confer federal authority over abandoned pits that are habitats for migratory birds
- ISSUE: Can the provisions of 404(a) be fairly extended to dredged areas?
  - o NO!!! The second permits the management of dredge in navigable waters. It is textually clear that it does not apply to this case.
- NOTE that there are also things about *Chevron* and how it doesn't apply because we are at the edges of Congress's ability to regulate.
- TAKEAWAY: Clear statement trumps *Chevron* at the out edge of Congress's authority

### ***New York v. United States (1992) – Commandeering***

- FACTS: In 1985, the Low Level Radioactive Waste law created incentives for states to dispose of nuke waste using regional agreements (compact approved). Statute had a take title provision which compelled states not in a compact to accept the waste and hold the generator harmless
- ISSUE: Does the low level waste act violate the 10<sup>th</sup> amendment?
  - o YES!!! This exceeds power under commerce and violates 10 by compelling state action!
- NOTE: Monetary incentives are fine (spending)
- NOTE: Denying states not in compacts the ability to export waste is fine (interstate commerce)
- NOTE: Would be fine if there was a contract like agreement. You can encourage. You can't coerce

### ***Printz v. U.S. (1997) - Commandeering***

- FACTS: Brady bill creates a network of background checks. While that system was being stood up, Congress required sellers to report purchases to local authorities to validate the sales
- ISSUE: Can congress compel state officials for the implementation of federal law?
  - o NO! You cannot compel non-federal officers to enforce a statute!
- EXCEPTIONS PER SCALIA
  - o Congress may commandeer state judges (enforcement of federal law / constitution) – *Testa v Katt*
  - o Congress may regulate states alongside private parties (capacity as economic actors)
  - o Congress may commandeer state officials for purely ministerial reasons (reporting crime statistics or DMV rules)
  - o Congress can preempt with constitutional statutes
  - o Congress can “commandeer” relative to a spending statute (pseudo-contract)

### ***Somerset v Stewart (1772) – Slavery***

- FACTS: Somerset was a slave brought to the UK from Jamaica. He escaped and was recaptured.

- ISSUE: Can Somerset be re-enslaved in the UK, where slavery is not legal?
  - o NO! Slavery can only be supported by the existence of positive local statute
- “Slavery is so odious that nothing can be suffered to support it but positive law.”

### ***Lemmon v New York (1860) – Slavery***

- FACTS: Lemmon was a slave owner who willingly brought slaves to NY (free) from VA (slave). A writ of habeas was filed based on NY abolitionist statute (no import or export of slaves)
- ISSUE: Can slaves brought willingly to a free state be freed based abolitionist statute?
  - o YES! The willing transit of slaves as property into a free state permits emancipation
- TAKEAWAY: Exception to fugitive slave clause. Slave can be freed if there is no “escape”

### ***Prigg v. Pennsylvania (1842) – Slavery***

- FACTS: Prigg reclaims a slave in PA, who was living in virtual freedom in Maryland and moved to PA. Prigg is hired by the family because she was never formally manumitted. PA had passed a statute which ended the forced return of fugitive slaves
- ISSUE: Does a state statute prohibiting the export of escaped slaves violate federal law?
  - o YES! Supremacy Clause. Full stop
- TAKEAWAY: The differentiating line between *Lemmon* and *Prigg* is the slave running away.
- TAKEAWAY: There is a commandeering issue here. You cant force states to enforce federal law, so the federal govt is bound to enforce the fugitive slave clause.

### ***Barron v. Baltimore (1833) – Pre-incorporation Doctrine***

- FACTS: Baltimore public works program was going to deposit silt near Barron’s Wharf, rendering it significantly less valuable. He sues claiming a taking because his property values decline
- ISSUE: Can Barron sue a non-federal actor under the takings clause?
  - o NO! The bill of rights only applies to federal action
- NOTE: 14<sup>th</sup> amendment allowed incorporation of bill of rights against states.

### ***Slaughter-House Cases (1873) – Civil War Amendments***

- FACTS: First case to interpret 14<sup>th</sup> amendment. LA passes a law granting a 25 year monopoly to a slaughterhouse to resolve public health issues. Butchers sue claiming a due process violation
- ISSUE: Does the 13<sup>th</sup> amendment apply to state monopoly?
  - o NO! This is not a naked transfer of property. This is a constitutionally permissible management of state policing powers under health
- ISSUE: Does the 14<sup>th</sup> Amendment only protects the privileges OR immunities pertaining to citizenship of the United States, not those that pertain to state citizenship?
  - o NO! 14<sup>th</sup> exclusively protects against racial discrimination by the state
- TAKEAWAY: Application of the 14<sup>th</sup> amendment here only protects against STATE discrimination on the basis of a suspect class (in this case race).

### ***United States v Cruikshank (1875) – Civil War Amendments***

- FACTS: In response to the Colfax massacre Congress passes the Klan Act to permit federal enforcement of prosecution extra judicial action (killing / vote denial) by private groups
- ISSUE: Can Congress pass legislation to prevent private actors from acting in such a capacity?
  - o NO! Klan Act is an impermissible violation of the 1<sup>st</sup> and 2<sup>nd</sup> amendments by infringing on the rights of private citizens to assemble
- TAKEAWAY: Pre-incorporation. But Congress cannot restrict the activities of private citizens based on the 14<sup>th</sup> amendment.

### ***Civil Rights Cases (1883) – Civil War Amendments***

- FACTS: Five consolidated cases. Under the Civil Rights Act (1875), Congress statutorily bans racial discrimination in public accommodation (transportation, lodging, theatres) pursuant to 13 and 14

- Often cited as *United States v Stanley*
- ISSUE: Can congress ban racial discrimination in public accommodation pursuant to 13?
  - NO! 13 only applies to slavery.
- ISSUE: Can congress ban racial discrimination in public accommodation pursuant to 14?
  - NO! 14 can only be applied to STATE action. Cannot be applied to private action
- TAKEAWAY: The 14th amendment is not rights creating. It simply bars prohibitions by the state. Congressional action cannot create new rights. It can simply bar state action.

***Lassiter v Northampton Cnty Board of Elections (1959) – Enforcement***

- FACTS: Northampton NC required potential voters to pass a literacy test in order to vote.
- ISSUE: Is a statute requiring literacy to vote permissible under 14 and 15?
  - YES: States may take qualifications into account (age, criminal record) in voting
- TAKEAWAY: A state may implement racially neutral restrictions in setting franchise laws if there is a legitimate reason to do so (in this case intelligence).

***Katzenbach v. Morgan (1966) – Enforcement***

- FACTS: A large portion of NY Latinos were prevented from voting based on English literacy tests. Congress passes the Voting Rights Act which prohibits blocking persons who finished sixth grade at an accredited Puerto Rican School
- ISSUE: Is section 4e of the voting rights act constitutional?
  - YES! Congress may pass legislation to enforce equal protection IF:
    - 1) for the legitimate end of ensuring equal protection
    - 2) plainly adapted to that end
    - 3) not prohibited or inconsistent with the letter and spirit of the constitution
- TAKEAWAY: Congress has broad powers to legislate under the enforcement clause of the 14th amendment to ensure equal protection under the law, even in contexts usually reserved for states

***Employment Division v Smith (1990) – Enforcement***

- FACTS: Oregon denies unemployment benefits to a native American who takes peyote during a religious ceremony.
- ISSUE: Can the state deny benefits to workers fired for the religious use of illicit drugs?
  - YES! Religious beliefs do not excuse non-adherence to facially neutral laws which are within the governments scope of regulation
- TAKEAWAY: Laws that are facially neutral are permitted to undermine religious practice

***City of Boerne (1997) – Enforcement***

- ISSUE: After *Smith*, Congress passes RFRA. A zoning law prevents a church in Boerne from expanding and suit ensues under RFRA.
- ISSUE: Was RFRA a valid exercise of the 14<sup>th</sup> amendment to ensure equal protection?
  - NO!! RFRA is outside the scope of the 14th amendment because it was trying to change the meaning of a constitutional right already defined by the court
- TAKEAWAY – Congress does not have the power to override the Courts explicit interpretation of a constitutional right
- TAKEAWAY – Laws enacted under 14 and 15 must be congruent and proportional to the injury they are seeking to prevent. This is an ends-means test.
- TAKEAWAY – *Marbury II* – The court is the ultimate arbiter of constitutional meaning.
- NOTE: RFRA still valid for FEDERAL Statute