

# CONSTITUTIONAL LAW OUTLINE

## PART 1: THE EVOLUTION OF CON LAW

### • THE FOUNDING ERA

**Barnett, pp 3 - 34:**

- **Hobbes:** Nature = Chaos The state of man in nature is brutish and selfish. That he would give up his rights of absolute freedom to any body subjugates him fully to that sovereign.
- **Locke:** Believes in "Natural Law". It's efficient and convenient to have established law with a known and independent judge with a power to execute a decision. Men who enter society to protect their property (liberty, life, etc.) must give up only that which is given up by the whole, decided by the majority, in the interest of balancing freedom for protection and fairness of dispute resolution.

**Whigs (Which we all are) v. Torrys (Monarchists)**

Huge brawl for power around the time of independence.

Virginia Plan is Madison... Bicameral. Madison was a nationalist but was originally an anti-federalist.

**CHEMERINSKY:**

- **Originalism:** The interpretation must be kept within the intent of the framers and the meanings of their principles as they existed at the time.
  - Changes through amendment only...
  - Judicial Constraint is a central issue, however only a rigid view will allow for the prominently mentioned fears to manifest
    - Sliding Scale of values
      - Strict
        - Courts must follow the literal text
      - Moderate
        - More concerned with the framers' and adopters' general purposes rather than their intentions in a very precise sense
- **Non-Originalism:** Interpretation consistent with principles of framers but not necessarily within their specific perspective.
  - Changes through common law interpretation based on the framers principles AS understood today necessary to serve rapid culture shifting...
  - Judicial Constraint is inherent in the principles themselves, (since it may be impossible to truly know what the framers meant, though it is clear that it was intended to evolve) and modifying them to serve the modern meanings and implications thereof does not allow for the tyranny feared by originalists.
    - There isn't ONE knowable, concrete "framers' intent"

- “Framers” includes the drafters the State conventions and people who ratified the original constitution and the people who drafted and ratified the amendments
  - Non-originalism was the framers’ preferred method of interpretation
    - Framers intended the constitution to change with time
      - Evidenced by the inclusion of the amendment process

***Bobbitt: interpretive modalities for the constitution***

- Historical
  - Framers’ and ratifiers’ intentions
- Textual
  - What do the words say?
  - How would an average person interpret the words?
- Structural
  - Inferring rules from relationships that the Con mandates among the structures it sets up
- Doctrinal
  - Rules generated by cases precedent
- Ethical
  - Rules derived from moral commitments of the **American political ethos and ideals** that are reflected in the Con (at the time the con was written)
  - Basic rights, ideals that the framers were striving for
- Prudential
  - Cost - benefit analysis for a particular rule
- Pretextual [Jenna’s addition]
  - Making shit up in order to deem laws constitutional or not depending on political question and social values that the Court is ready / not ready to recognize

**THE FEDERAL POWERS AND LAWS ARE FEW AND DEFINED ,  
WHEREAS THOSE OF THE STATES ARE UNLIMITED AND BROAD...**

**Chisholm v. Georgia (State Sovereignty, Enforcement Clause)  
2 U.S. 419 (1793)**

The court decided against the state of Georgia, which used the defense that it was immune from lawsuit by a North Carolina citizen because it was a sovereign state. **The court upheld the constitutional right for a citizen of one state to sue another state.** The notion that a state was not intended to be made a defendant by the language of the constitution is bogus because the other enumerated jurisdictional statements put the state in this position.

**The 11th Amendment overturned this decision, providing that a state cannot be sued.**

**Calder v. Bull (Congressional Power)  
3 U.S. 386**

A statute barring appeals initiated 18 months after a ruling was *not* an ex post facto law, prohibited by the constitution. **Iredell:** Legislatures have all powers not

expressly forbidden by the constitutions that govern them.

- **THE MARSHALL COURT**

**Marbury v. Madison** (Judicial Power)

5 U.S. 137

**The first case to allow the SC to invalidate laws that contradict the Constitution. (Marshall opportunism, like in McCulloch)**

**Issue:** Whether James Madison should be issued a mandamus requiring him to deliver commissions to appoint several "midnight judges" which met all of the necessary criteria for execution.

**Holding:**

The Supreme Court could not Constitutionally hear the case as a matter of Original Jurisdiction. Although the Judicial Act of 1789 authorized this jurisdiction, this went against the constitutionally provided limits on original jurisdiction.

The court establishes the power to review the constitutionality of executive actions only where the executive has a legal duty to act (or not act), and provide a remedy including mandamus. The court then decides that the "Judicial Act" provides Original Jurisdiction over the issue, which is *contrary* to that enumerated in Article III, thus the Act is invalid since the Supreme Court, as sworn to uphold the Constitution, must overturn any law that contradicts it.

**Fletcher v. Peck** (Federal v. State Laws)

10 U.S. 87

The contract of sale for land made available by statute was valid, and the state of Georgia cannot invalidate it by declaring another law eliminating the new owners right to the property.

**Martin v. Hunter's Lessee** (Judicial Appellate Power)

14 U.S. 304

On writ of error, the Supreme Court held that the appellate power of the United States does extend to cases pending in the state courts; and that the Judiciary Act § 25, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, was supported by the Constitution. ***The Court reasoned that appellate review of state court decisions guaranteed uniformity of laws, avoided state jealousies and biased interests, and entitled a defendant with the power of removal, which assured defendants equality in asserting their constitutional rights.***

**NECESSARY AND PROPER CLAUSE:**

**McCulloch v. Maryland** (U.S. Bank, Necessary & Proper)

17 U.S. 316

The act to incorporate the Bank of the United States was a law made in pursuance of the Constitution. Moreover, the Maryland law imposing a tax on the Bank of the United States was unconstitutional and void because the states had no power to burden the operations of the constitutional laws enacted by Congress.

Marshall asks:

**1) Does Congress have the authority to create the bank of the United States?**



**Wilson v. Black Bird Creek Marsh Co. (Dormant Commerce)**

**27 U.S. 245**

Plaintiffs were the owners of a marsh and were authorized by a state law to make a dam across a creek. The court found that the law allowing the navigable creek to be dammed did not violate the Dormant Commerce Clause because it did not CONFLICT with any law made by Congress and as such, was within the rights of a state to self regulate. HOWEVER, if Congress had made any law respecting the navigability of the creek, then that law would reign because of the DCC.

**THE BILL OF RIGHTS**

**Barron v. City of Baltimore (Dormant Commerce)**

**32 U.S. 243**

Established a precedent on whether the United States Bill of Rights could be applied to state governments. Writing for a unanimous court, Chief Justice John Marshall held "[t]hese [first ten] amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

The Court found that the provision in the Fifth Amendment declaring that private property should not be taken for public use without just compensation was intended solely as a limitation on the exercise of power by the government of the United States and was not applicable to the legislation of the states. **Barron was an expansion of States rights reflecting a movement in that direction especially related to SLAVERY. It prompted the enactment of the fourteenth amendment guarantee of due process and equal protection.**

• **THE TANEY COURT**

Roger Taney became Chief Justice in 1836, replacing Justice Marshall. Though most known for the Dred Scott case and issues of slavery, Taney also wrestled with the issue of dual sovereignty, and how to appoint and divide the powers of the states and the federal govt.

**Mayor of the City of New York v. Miln (Commerce v. Police)**

**36 U.S. 102**

**Holding:** An act requiring that operators of ships from outside NY file a list of passengers, is not a regulation of commerce, but of police power rightfully belonging to the state. As the law was passed before the constitution, the question becomes whether this power was granted to congress. It was not. This was not a case of commercial regulation of navigable waters, but an act related to and reasonably carried out for the benefit of the territory of NY.

**Inspection and Health laws are reserved to the State.  
If the federal Gov't is NOT asserting their power, then it is up to the states to do so until Congress decides to step in.**

**Cooley v. Board of Wardens (Commerce Clause)**

**53 U.S. 299**

**Argument:** Because the power of Congress to regulate navigable waters under the commerce clause is settled, it would follow that regulation of pilots of vessels and requirements regarding them are a part of that same commerce.

**Holding:** The nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the states.

**CITIZENSHIP AND THE MISSOURI COMPROMISE**  
Each side in the EVEN battle over the right to enslave feared that admission of new states would tip the balance against them. The compromise outlawed slavery above a certain line.

**Dred Scott v. Sanford (Congressional Power, Standing, and Um...Takings)**  
60 U.S. 393

The Supreme Court reversed the judgment for respondent and ordered the case dismissed for lack of jurisdiction. Petitioner was a slave of African descent. He brought suit in the federal court against respondent, his owner, for assault. The Court held that petitioner was not a citizen of Missouri as asserted in his original complaint because he was not permitted to become a citizen, and no state had the power to grant him citizenship. Furthermore, *the Court held that petitioner did not gain his freedom by being transferred into a territory of the United States declared free by Congress because Congress's power to make rules and regulations for territories only applied to those territories belonging to the United States when the constitution was drafted. Therefore, the law making the territory free was unconstitutional. Finally, the Court held that petitioner did not gain his freedom by being taken into the free state of Illinois because the property laws of one state could not grant petitioner's freedom.* Therefore, the Court held that judgment against respondent was to be vacated and the case dismissed because the Court did not have jurisdiction over petitioner's complaint.

• **THE CIVIL WAR**

THE SOUTH:
<ul style="list-style-type: none"><li>Govt. By consent no longer consented to the possibility of outlawing slavery</li><li>As a nation founded to overthrow an oppressive govt. the south shared that obligation to overthrow the restraints of the north.</li><li>Confederation of the States.</li></ul>
THE NORTH:
<ul style="list-style-type: none"><li>The states never existed as independent... only as a union.</li><li>Financial arguments regarding creditors and the debts of state.</li><li>States can't secede because the govt. IS the people. National govt. by National ppl.</li></ul>
So: Why a legal argument to break out of an existing legal system?
<ul style="list-style-type: none"><li>MONEY / Prevent costly violence...</li><li>Wining the legal argument would be the same as winning the war.</li><li>"Legalify" everything... (Spitzer)</li></ul>

**EX PARTE MERRYMAN (Habeas Corpus, War Powers)**

**17 F.Cas. 144 (1861) Circuit Court, District of Maryland**

(Taney acting as Circuit Court Judge)

Article 1 sec. 9 is where the authority to suspend writ of Habeas Corpus is found,

which is the Congress section... Lincoln suspended Habeas Corpus in order to detain those involved in the Maryland Insurrection at the start of the Civil War. Against President Abraham Lincoln's wishes, Chief Justice Roger Taney, sitting as a judge of the United States Circuit Court for the District of Maryland, ruled: "1. That the president cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war except in aid of the judicial authority, and subject to its control."

**AFTER THIS OPINION:** Lincoln was approved in his actions by Congress, who retroactively allowed his suspension of the Writ of Habeas Corpus as though enacted by Congress.

**THE PRIZE CASES (War powers, Takings)**

**67 U.S. 635**

The first three ships sailed in waters during a blockade and claimed they were unaware of the war when they were captured as enemies' property.

**The Court found that the President had a right to institute a blockade of ports in possession of persons in armed rebellion against the Government and that the vessels were bound to regard the blockades.** *"Whether property be liable to capture as enemies' property does not in any manner depend on the personal allegiance of the owner. It is the illegal traffic that stamps it as enemies' property. It is of no consequence whether it belongs to an ally or a citizen"* Note how Justice Grier in his opinion in *The Prize Cases* emphasizes how an insurrection or rebellion could be found to exist because the federal courts have been expelled from the South

**EX PARTE MILLIGAN (Habeas Corpus, War Power)**

**71 U.S. 2**

**AFTER THE WAR**

(Same case as Hamdi v. Rumsfeld, fundamentally)

The prisoner argued that the military commission (commission) did not have jurisdiction to try him.

After reviewing the Constitution, the Court determined that *the commission was not a court vested with judicial power by Congress, and therefore the prisoner's rights were infringed upon when he was tried by the commission.* The prisoner's rights were further infringed upon when he was denied a trial by jury. Thus, the Court held that the appropriate remedy was to issue the writ of habeas corpus. Moreover, because the military trial of the prisoner was contrary to law, on the facts stated in his petition, the prisoner should have been released from custody.

**The supreme court rarely speaks as to the constitutionality of the President's use of the military without congressional approval.**

**Challenges to a President's use of troops in a foreign country are likely to be dismissed on political question grounds.**

**The challenges to foreign policy that are probably most likely to be deemed political questions are precisely the use of war powers by the Pres.**

**It is unresolved what constitutes a declaration of war sufficient to fulfill the requirements of Article 1 of the Constitution.**

*"In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist." - Dwight D. Eisenhower, 1960*

## • RECONSTRUCTION

The 13th Amendment freed the slaves except if they'd been convicted of a crime. The first Civil Rights Act allowed all citizens equal rights under the law, but there existed fear that the Act was unconstitutional, or that southerners could take over and repeal it.

- As such they began to draft the 14th amendment.

Section 1 of the 14th has 4 parts.

The Citizenship clause: All people born or naturalized in the U.S. are citizens...

The Privileges or Immunities Clause: No state shall make a law that shall abridge these.

Applies mainly to state *Legislatures* and deals with law *Making*.

The Due Process Clause: No depriving without Due Process of Law

Judicial Branch and application of laws.

The Equal Protection Clause: ... nor deny anybody in the jurisdiction the equal protection of the laws.

Executive Branch ...

The Enforcement Clause: The language "The Congress shall have power to enforce this article by appropriate legislation" is used, with slight variations, in Amendments XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, and XXVI.

**Section 2** of the 14th set women back a ways, because it limited voting to MEN.

### THE SLAUGHTERHOUSE CASES (Privileges and Immunities)

83 U.S. 36

Represented a block appeal to the United States Supreme Court testing Section 1 of the relatively new Fourteenth Amendment to the Constitution. **The Court held that the Fourteenth Amendment's Privileges or Immunities clause affected only rights of United States citizenship and not state citizenship.** Therefore the butchers' Fourteenth Amendment rights had not been violated. At the time, the Court viewed due process in a procedural light rather than substantively. The Court further held that the amendment was primarily intended to protect former slaves and so could not be broadly applied.

### BRADWELL v. State of ILLINOIS (Proof of gutted Priv and Imm.)

83 U.S. 130

Held that the right of admission to practice in the courts of a state was not one of the privileges and immunities of the Federal Government and that this right in no sense depended on citizenship of the United States. The Court reasoned that the right to control and regulate the granting of license to practice law in the courts of a state was one of those powers that was not transferred for its protection to the federal government. The Court found that its exercise was in no manner governed

or controlled by citizenship of the United States in the party seeking such license.

**Facially Neutral Laws:**

Neutral; on their face, but enacted with the purpose or result of discriminatory enforcement.

**Yick Wo v. Hopkins (Equal Protection)**

**118 U.S. 356**

Laundry operation in wooden buildings prohibited without a permit. Permits denied to Chinese. Law was facially neutral, but discriminatory in practice, thus voided by the court for violating **Equal Protection**.

**Plessy v. Ferguson (Equal Protection)**

**163 U.S. 537**

Whether the statute of Louisiana is a reasonable regulation, there must necessarily be a large discretion on the part of the legislature. ... Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools ... the constitutionality of which has not been questioned, or the corresponding acts of state legislatures. **Nowadays, as a suspect classification, this decision would be subject to Strict Scrutiny.**

**U.S. v. Dewitt (Dormant Commerce, Necessary and Proper)**

**76 U.S. 41**

*The earliest statute held unconstitutional because it exceeds the commerce power of Congress.* Congressionally enacted statute prohibiting sale of one type of oil, in order to increase sale of the type to be taxed, was not applicable to the several states because it regulated trade of the oil within the states alone and was not necessary or proper to further the collection of the tax on the other type of oil.

**Hepburn v. Griswold / Knox v. Lee (Congressional Power to coin money, N&P)**

**79 U.S. 457**

The court held that the acts making all debts payable by newly created paper money were constitutional as applied to contracts made either before or after their passage. The court held that the acts were a proper exercise of Congress' authority to coin money.

**Juilliard v. Greenman (Congressional Power to Borrow, N&P)**

**110 U.S. 421**

The circuit court held that the tender of treasury notes, which were originally issued during the war and were subsequently reissued under the Act of May 31, 1878, 20 Stat. 87, was a tender of lawful money in payment of defendant's debt. The Supreme Court affirmed. Congress's power to borrow money on the credit of the United States was the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form of stock, bonds, bills, or notes.

• **THE PROGRESSIVE ERA**

**United States v. E.C. Knight Co. (Commerce Clause)**

**156 U.S. 1 (1895)**

**Basically:** The Sherman Anti trust act was not adequate to curtail monopolies because the manufacture of goods in one state does not constitute interstate commerce because it does not regulate the product in relation to commercial intercourse, but only its manufacture.

Manufacture is transformation -- the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation of such transportation.

The court characterizes this control over manufacturing as impinging on the police power of the states.

**Commerce clause focuses on what Congress can't do, whereas the Necessary and Proper clause focuses on what congress can do, with an assumption that it can.**

**Champion v. Ames (Commerce)**

**The Lottery Case, 188 U.S. 321**

This case is still cited as the principal authority for the proposition that the power to "regulate" commerce also grants the power to prohibit commerce.

On appeal, the Court affirmed and held that lottery tickets were subjects of traffic among those who trade in them and thus, that the carriage of tickets between states involved interstate commerce. The Court also held that such carriage was subject to regulation by Congress, since the Commerce Clause granted Congress plenary authority over interstate commerce, it was within Congress' power to invoke the Act and prohibit carriage of such tickets among states.

**Hammer v. Dagenhart (Police Power, Commerce)**

**247 U.S. 251**

*There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition.* Congress enacted an Act that prevented interstate commerce in the products of child labor. The court further held that Act exceeded congress' authority under the Commerce Clause and invaded the states' reserved powers under U.S. Const. amend. X. Finally, the court held that although there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public's welfare, such regulation was reserved for the states

### **DUE PROCESS AND INCORPORATION OF THE 14th**

**Chicago B&Q R.R Co. v. City of Chicago (Police, N&P, Due Process)**

**166 U.S. 226**

The Supreme Court of the United States held that the states reserved to themselves the power to enact all police laws necessary and proper to secure and protect the life and property of their citizens, and **uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not a taking** or damaging without just compensation of private property.

Due process of law requires, **first**, the legislative act authorizing the appropriation of property, pointing out how it may be made and how the compensation shall be assessed; and, **second**, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every

regulation for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them.

**Lochner v. State of New York (Substantive Due Process)**

**198 U.S. 45**

*Held that a "liberty of contract" was implicit in the due process clause of the Fourteenth Amendment.* The general right to make a contract in relation to one's business, and the right to purchase or to sell labor, was part of the liberty protected by the 14th Amdmt. The statute at issue was not necessary as a health law to safeguard the public health or the health of the individuals who labored as bakers.

**1st)** Freedom of contract is a basic right protected as liberty and property rights under the due process clause of the 14th Amendment.

**2nd)** The Govt could interfere with freedom to contract only to serve a valid police purpose, such as protection of public health or safety

**3rd)** It is the judicial role to scrutinize legislation interfering with freedom of contract to make sure that it served a police purpose.

**Muller v. State of Oregon (Subs. Due Process)**

**208 U.S. 412**

The Oregon Supreme Court upheld the constitutionality of state restrictions on the working hours of females. The United States Supreme Court affirmed, taking judicial notice of the historical belief that women required protective legislation. Though the right to contract was a liberty protected by the 14th, the state can restrict some elements of that liberty for good cause.

**Adkins v. Children's Hospital of District of Columbia (Sub.DProcess / Police Power)**

**261 U.S. 525**

The United States Supreme Court held that the Act fixing minimum wages for females interfered with 5th Amdt, as the Act prevented private employers and employees from bargaining for the best contractual terms. The Court also held that the wage fixed by the Act had no relation to the capacity of female employees but, rather, was an invalid exercise of state police power by attempting to establish an arbitrary living wage for women. Further, the Act required an employer to make an arbitrary payment to female employees without any causal connection to his business or the type of work the employee performed.

**Stromberg v. California (1st Amdt / LIBERTY / 14th S.D.Process)**

**283 U.S. 359**

It held that the first clause of the statute, which prohibited the display of the red flag as a sign of opposition to organized government, was unconstitutional because it could be construed to prohibit peaceful and orderly opposition to government by legal means. A statute that is so vague and indefinite as to permit the punishment of the fair use of political expression, is repugnant to the guarantee of liberty contained in the 14th amendment.

**Munn v. Ill. (Commerce Clause, Sub. Due Process)**

**94 U.S. 113**

The Munn case allowed states to regulate certain businesses within their borders, including railroads, and is commonly regarded as a milestone in the growth of federal government regulation, *narrowed and weakened by the decision in*

*Wabash, St. Louis & Pacific Railroad Company v. Illinois (also known as the Wabash Case).*

In *Munn v. Illinois*, the Supreme Court decided that the Fourteenth Amendment did not prevent the State of Illinois from regulating charges for use of a business' grain elevators. Instead, the decision focused on the question of whether or not a private company could be regulated in the public interest. The court's decision was that it could, if the private company could be seen as a utility operating in the public interest. The statute did not impermissibly interfere with the Commerce Clause of Constitution because the state's regulation of commerce was within its own boundaries.

## ● **THE NEW DEAL COURT**

During the Progressive era, the regressive *Lochner* court used the commerce clause and the due process clause to engage in conservative "judicial activism" to impede progress and thwart the popular will as reflected in legislation.

The New Deal court, which came to be through a series of events and not through the popularly believed "court packing" scheme of Teddy Roosevelt, was seen as a restoration of the constitution and began upholding minimum wage statutes among others.

### **Home Building and Loan Assn. v. Blaisdell (Mortgage Sub Due Proc.) 290 U.S. 398**

The statute, which granted appellees an extension for the period of redemption for a foreclosure sale, was sustained. The Act had been enacted pursuant to the state's police power with regard to an emergency economic crisis and that the legislation was addressed to a legitimate end. The conditions upon which the period of redemption was extended were not unreasonable, and the legislation was temporary in operation. Thus, the Act violated neither the Contracts Clause nor the provisions of U.S. Const. amend. XIV.

### **West Coast Hotel v. Parrish (Sub Due Proc) 300 U.S. 379**

A female employee filed an action for back wages under the Washington Minimum Wages for Women Act. The Supreme Court held that the Act did not violate the Due Process Clause of the Fourteenth Amendment because it was a valid exercise of the state's police power to protect the health and safety of women. The Court reasoned that the state had a valid interest in the wages paid to women because their support would fall on the state if women were not paid adequate wages. The Act was directed at a social position unique to women, so the Act did not constitute arbitrary discrimination.

### **The Substantial Effects Doctrine:**

### **NLRB v. Jones & Laughlin Steel Corp. (Commerce Clause) 301 U.S. 1**

*It effectively spelled the end to the Court's striking down of New Deal economic legislation, and greatly increased Congress's power under the Commerce Clause.* National Labor Relations Act was a proper exercise of Congress' power to regulate interstate commerce, the Act applied to respondent's employees who

were engaged exclusively in production because intrastate activities that were closely connected to interstate commerce were subject to regulation by Congress. The court also ruled that the Act did not violate the Fifth Amendment or the Seventh Amendment.

The fundamental principle is that the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; and to foster, protect, control and restraint. That power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it."

**United States v. Darby** (Commerce Clause)  
**312 U.S. 100**

*Abandons the old "pretext" theory that said that any pretextual use of the commerce clause to affect intrastate commerce would be struck down. Instead, this says that it doesn't matter how we do it (i.e. use the commerce clause or some other clause) as long as the ends are justified and within the power of Congress. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.*

**Wickard v. Filburn** (VERY Dormant Commerce Clause)  
**317 U.S. 111**

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. That one person's contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, **the contribution, taken together with that of many others similarly situated, is far from trivial.**

Appellee was not denied due process by a penalty being imposed because government regulation was by an authorized act of Congress and was within its commerce powers.

**THE WAR POWER:**

**Korematsu v. U.S.** (War Power, Scrutiny)  
**323 U.S. 214 (1944)**

**Forefather case for Strict Scrutiny...**

*Korematsu ruling is significant both for being the first instance of the Supreme Court applying the strict scrutiny standard to racial discrimination by the government and for being one of only a tiny handful of cases in which the Court held that the government met that standard.*

Because the order curtailed the rights of a group based on national origin, the order was inherently suspect and rigid scrutiny was applied. The Court found that the exclusion order, like a previously upheld curfew order, was intended to prevent espionage and sabotage in threatened areas during war. The exclusion from such an area was closely related to the intent of the order. Moreover, the Court could not reject the judgment of the military and Congress that there were disloyal members of the population who constituted a menace to the national

defense and safety

**EX PARTE ENDO (War Power, Scrutiny)**

**323 U.S. 283 (1944)**

The Court further held that when the power to detain was derived from the power to protect the war effort against espionage and sabotage, detention which had no relationship to that objective was unauthorized. Accordingly, as appellant was conceded to be loyal, her release from detention was required.

**YOUNGSTOWN SHEET & TUBE CO. V. SAWYER (Pres. Power)**

**343 U.S. 579 (1952)**

On the eve of a strike against certain steel companies, an executive order was issued directing the Secretary of Commerce to take possession of most of the nation's steel mills.

The Court held that the presidential power exerted here could not be sustained as an exercise of the President's military power nor under the several constitutional provisions that granted executive power. The seizure could not stand because Congress had the exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution. Accordingly, the district court's judgment was affirmed.

The President's power, if any, to issue an order must stem either from an act of Congress or from the United States Constitution itself.

**EQUAL PROTECTION AND DUE PROCESS**

**Brown v. Board of Education of Topeka (Equal Protection)**

**347 U.S. 483**

In the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, segregation is a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment. Public schools were not equal and could not be made equal, thereby denying them equal protection of the law.

**Bolling v. Sharp (Sub Due Proc)**

**347 U.S. 497**

The Court found that segregation in public education was not reasonably related to any proper governmental objective, and thus it imposed on petitioners a burden that constituted an arbitrary deprivation of their liberty in violation of the Due Process Clause.

**Loving v. Virginia (Equal Protection, Sub Due Proc)**

**388 U.S. 1**

The Court rejected the notion that the mere "equal application" of a statute containing racial classifications was enough to remove the classification from the U.S. Const. amend. XIV's proscription of all invidious racial discriminations and held there was no legitimate overriding purpose which justified the classification. The Court found that restricting the freedom to marry solely because of racial classifications violated the central meaning of the Equal Protection Clause and deprived appellants of liberty without due process of law in violation of the Due Process Clause of U.S. Const. amend. XIV.

• **THE WARREN COURT**

**Heart of Atlanta Motel v. U.S. (Commerce, Scrutiny, Sub Due Proc)**  
**379 U.S. 241**

The power of Congress to promote interstate commerce also included the power to regulate the local incidents thereof, including local activities in both the state of origin and destination, which might have a substantial and harmful effect upon that commerce. Accordingly, Congress was within its power to prohibit racial discrimination by motels serving travelers, however local their operations appeared.

Nor does the Act deprive the motel owner of liberty or property under the 5th. The commerce power invoked in the Act by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

**WHAT'S NEW ABOUT THIS IS THAT THE COMMERCE CLAUSE IS USED TO ALLOW REGULATION OF SERVICES... AND TO PROMOTE THE ECONOMY.**

**PATH DEPENDENCE:** Once the court goes in one direction, it becomes difficult to change course... thus commerce and not equal protection ... also the money issue.

ALSO: Being kind of addicted to paths.

**Katzenbach v. McClung (Commerce, Race, Funny Names)**  
**379 U.S. 294**

Appellee served food procured via interstate commerce and served interstate travellers, but refused to serve Negroes. The district court held that the Commerce Clause did not apply because there was no demonstrable connection between food purchased in interstate commerce and the conclusion of Congress that discrimination in the restaurant would affect commerce. The court stated that the enforcement of Title II had already been found to be a valid exercise of the power to regulate commerce by requiring hotels to serve transients without regard to their race or color and held it was equally valid in the case of restaurants.

**Katzenbach v. Morgan (Equal Protection, Scrutiny)**  
**384 U.S. 641**

It held that under the McCulloch v. Maryland standard, § 4 of the Voting Rights Act was "plainly adapted" to furthering the Equal Protection Clause and that its remedies constituted means consistent with the letter and spirit of the constitution. It therefore held that the state English literacy requirement could not be enforced to the extent that it was inconsistent with § 4(e) of the Act.

The consideration of whether an enactment is "appropriate legislation" to enforce the Equal Protection Clause of U.S. Const. amend. XIV is to be made under the McCulloch v. Maryland standard, that is, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."

**PART 2: FOCUS ON FEDERALISM**

## • **THE LEGISLATIVE POWER**

**South Dakota v. Dole** (Leg. Power, Sub Due Proc)

**483 U.S. 203**

23 U.S.C.S. § 158 permitted the reduction of federal highway funds otherwise allocable to a state if the state had a minimum drinking age below 21.

(1) the statute's indirect imposition of a minimum drinking age was a valid exercise of Congress's spending power, reasonably calculated to advance the general welfare and national concern of safe interstate travel; and (2) the Twenty-First amendment was not violated as the statute did not induced petitioner to engage in unconstitutional activities.

### **Internal v. External Limits:**

**Under the commerce clause Congress could regulate, say, telling lies in advertising drugs (Interstate Commerce)... but the Constitution regulates telling lies about fires in theaters.**

**Congress uses the power to exercise spending power for "General Welfare" in concurrence with it's ability to tax: (Social Security, Unemployment Benefits...) BUT Congress uses these things and the forms they take to bribe States into doing what Congress wants, creating a form of legislation on the State level through funding (or withholding funding) BRIBERY.**

**With the drinking age issue: the gov't BANS something under its police power. Hadn't been done before.**

**United States v. Lopez,** (Commerce, Leg. Power)

**514 U.S. 549**

The GunFreeSchoolZoneAct had nothing to do with commerce or any economic activity, and, therefore, could not be sustained as a regulation of activity arising out of or connected with a commercial transaction, which when viewed in the aggregate, substantially affected interstate commerce.

Congress may regulate intrastate activity that has a "**substantial effect**" on interstate commerce and activity that exerts a substantial economic effect on interstate commerce. The court decides whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce. Here, they were critical of Congress' findings...

(This decision was seen as a "drafting guide for congress)

**U.S. v. Morrison** (Commerce, Leg Power, Sub Due Proc)

**529 U.S. 598**

The court affirmed the decision of the lower court and held that gender-motivated crimes of violence were not considered economic activity, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating such. The subject statute redressed *private* discrimination, not state, and was outside Congress' power to enact.

Simply because Congress may conclude that a particular activity substantially

affects interstate commerce does not necessarily make it so.

**Gonzales v. Raich** (Stupid Bullshit, "Commerce")  
**545 U.S. 1**

The Court held that the regulation of marijuana under the CSA was squarely within Congress' commerce power because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market.

Congress was acting well within its authority of the Commerce Clause, U.S. Const., art. I, § 8., the Court had no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

**If the fact finding is on the court to scrutinize, as in previous decisions, as to the interstate effects of a particular piece of legislation, then why does the court balk here in deference to congress? Does the court admit here that legally binding precedent is to be set by an arbitrary decision whether or not to investigate congress' evidence?**

**"Rational basis" test ... so saying "could be" is enough? This court is too deferential!**

**"Failure to regulate the states would leave a hole in the CSA" Because failure to blindly agree with congress based on a "Rational Basis" test would make their job harder? Where's the checks and balances that was so important before? As in LOPEZ where the court scrutinizes the findings of congress???**

**Is the law outlawing medical pot really Necessary and Proper?????**

**"Cops... coma and try to snatch my crops," -Cypress Hill**

**The Enforcement Clause:**

**14th § 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.**

**City of Boerne v. Flores**

**521 U.S. 507**

Struck down Religious Freedom Restoration Act as an unconstitutional use of Congress's enforcement powers. Because it was the Court that had the sole power of defining the substantive rights guaranteed by the Fourteenth Amendment—and because RFRA was not legislation designed to have "congruence and proportionality" with the substantive rights that the Court had defined, Congress could not constitutionally enact RFRA. Although Congress could enact "remedial" or "prophylactic" legislation that guaranteed rights not exactly congruent with those defined by the Court, it could only do so in order to more effectively prevent, deter or correct violations of those rights actually guaranteed by the Court. RFRA was seen disproportionate in its effects compared to its objective.

**Confirms that the Court, not congress, defines the substance of constitutional guarantees. Valid §5 legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.**

**United States v. Morrison (Commerce Clause, 14th §5)**

**529 U.S. 598**

Gender-motivated crimes of violence were not considered economic activity, and therefore, the Commerce Clause did not vest Congress with the authority to enact a statute regulating such. Moreover, the court affirmed that the civil remedy contained in § 13981 should be struck down as it was outside Congress's remedial power under U.S. Const. amend. XIV, § 5. The civil remedy was not found to be corrective in its character nor adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers. Instead, the subject statute redressed private discrimination and was outside Congress' power to enact.

**Board of Trustees of University of Alabama v. Garrett**

**531 U.S. 356 (2001)**

the court concluded that states were not required by U.S. Const. amend. XIV to make special accommodations for the disabled, so long as their actions towards such individuals had a rational basis. Thus, if special accommodations for the disabled were to be required, they would have had to come from positive law and not through the Equal Protection Clause, U.S. Const. amend. XIV. Even if a pattern of discrimination were shown, however, the rights and remedies in the ADA were not congruent and proportional to the targeted violation given the ADA's sweeping requirements.

**NEVADA DEPT. OF HUMAN RESOURCES V. HIBBS**

**538 U.S. 721 (2003)**

Congress acted within its constitutional authority when it sought to repeal the States' immunity for purposes of the FMLA's family-leave provision. Congress validly exercised its power under U.S. Const. amend. XIV, § 5 by enacting the prophylactic legislation in order to prevent and deter gender-based discrimination in the workplace. The States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits was weighty enough to justify the enactment of prophylactic § 5 legislation.

**"Because the standard for demonstrating the constitutionality of a gender-based classification is more heightened than our rational-basis test, ... it was easier for Congress to show a pattern of constitutional violations."**

**The Level of scrutiny is what determines the validity of the legislation under the constitution.**

**Chemerinski:**

- **Boerne v Flores is an example of federalist perspective, where congress can only remedy, not a nationalist perspective where they can expand the scope of rights. This limit on expanding the rights of citizens is a common criticism of the decision.**
- **Katzenbach v Morgan took a nationalist tack, and indicated that congress, under §5 of the 14th, could independently interpret the constitution and even overturn the Supreme Court.**

- The principle that has emerged is that congress has much broader authority to legislate if it is a type of discrimination or a right that receives heightened scrutiny. BUT if it is a type that only receives rational basis review, Congress's ability to legislate under §5 is very narrow.

- **FEDERALISM LIMITS ON THE LEGISLATIVE POWER**

**The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."**

**Gregory v. Ashcroft  
501 U.S. 452 (1991)**

State judges argued that state law requiring judges to retire at age 70 violated the Age Discrimination in Employment Act. Respondent governor's motion to dismiss was granted and affirmed because petitioners were not covered by the ADEA, and a rational basis existed for distinguishing judges who were over 70 from those who were not. The Equal Protection Clause was not violated because respondent demonstrated a legitimate interest and rational basis for age discrimination in maintaining a judiciary fully capable of performing its duties. **Age is not a suspect classification under the Equal Protection Clause**, U.S. Const. amend. XIV. The state need therefore assert only a rational basis for its age classification. In cases where a classification burdens neither a suspect group nor a fundamental interest, courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.

**New York v. United States  
505 U.S. 144**

The Act included monetary incentives, access incentives, and a take title provision, which offered states the option of taking title to and possession of low level radioactive waste generated within their borders and assuming liability for damages that waste generators suffer due to the states' tardiness. The take title clause exceeded U.S. Const. amend. X restrictions, because the take title incentive was not an exercise of congressional power enumerated in the Constitution.

**The problem with "take title" is that it unduly burdens the state to carry out the federal goal, by taking ownership of property...**

**Congress may not simply commandeer the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.... they have to bribe them by threatening to take away their money.**

**What is the difference between saying that a state can choose either regulate itself according to federal guidelines or adopt the federal goal (IS THIS REALLY A CHOICE?) and saying that a state has to adopt a federal guideline "or else." Seems like the state can:**

- **Regulate itself according to federal guidelines**

- **Adopt the federal goal**
  - **Concede federal assistance, to the states detriment...**
  - **NOT COERCION unless the state has no other choice but to accept**
- "No other federal statute has been cited where the state has no option other than implementing the legislation."**

**Printz v. United States**  
**521 U.S. 898 (1997)**

The Brady Act effectively transferred the executive branch's responsibility to administer federal laws to thousands of CLEOs in 50 states, who were left to implement the program without meaningful presidential control. Interim provisions directed state law enforcement officers to participate in administration of a federally enacted regulatory scheme. The Supreme Court agreed and held that the interim provisions violated constitutional principles of dual sovereignty and separation of powers. Congress could not compel states to enact or enforce a federal regulatory program. Congress could not circumvent that prohibition by conscripting the state's officers directly.

**The "remedial and preventative nature of Congress' enforcement power" refers to the legislatures ability only to remedy laws made by states which abridge the privileges or immunities of citizens of the U.S. or remedy laws that preclude equal protection. Thus, congress cannot make law so broad as to touch and concern anything under the 14th amendment, but only that which specifically addresses and fixes a certain problem.**

• **FEDERALISM LIMITS ON STATE POWER**

**The Dormant Commerce Clause: The Commerce Clause expressly grants Congress the power to enact legislation that affects interstate commerce. The idea behind the Dormant Commerce Clause is that this grant of power implies a negative converse — a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. The restriction is self-executing and applies even in the absence of a conflicting federal statute.**

**Oregon Waste Systems v. Department of Environmental Quality**  
**511 U.S. 93**

Petitioners, solid waste disposers, challenged Or. Rev. Stat. § 459.297(1), which allowed respondent State to impose an additional fee on solid waste generated out-of-state and brought into respondent's state for disposal, as violative of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. State courts upheld the fee. The Court reversed, holding that *the additional fee charged to waste generated out-of-state was discriminatory on its face because the statutory determinant for whether the fee applied was whether solid waste was generated out-of-state*. The fee's purpose and justification had no bearing on whether it was facially discriminatory. In making a geographical distinction, the fee discriminated against interstate commerce. Respondents failed to demonstrate any legitimate reasons that disposal of out-of-state waste imposed higher costs to subject it to a higher charge. *SOME*

*tax difference is said to be permissible, but nothing disproportionate to the rationale.*

**The first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce. "Discrimination" means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.**

- **If a restriction on commerce is discriminatory, it is virtually per se invalid.**
- **By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.**

### **Granholm v. Heald**

**544 U.S. 460**

The constitutional authority of the state to regulate the importation of intoxicating liquors was limited by the requirement under U.S. Const. art. I, § 8, cl. 3, that such regulation could not discriminate against the out-of-state wineries in favor of in-state wineries.

### **South Central Timber Development, Inc. v. Wunnicke**

**467 U.S. 82**

The regulation attempted by the State was in the industry of processing, not timber sales. Thus the regulation precluded a characterization that the state was acting as a Market Participant that would permit the state to influence "a discrete, identifiable class of economic activity in which it is a major participant"

**Basic Rule: Although the commerce clause is an affirmative grant, it has long been recognized as a self executing limitation on the power of the states to enact laws posing substantial burdens on such commerce. Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate the commerce in a way that would otherwise be prohibited.**

#### **For a tax to be compensatory:**

- a) The tax must serve some purpose for which the state may otherwise impose a burden on interstate commerce.
- b) The tax on interstate commerce must approximate, but not exceed, the tax on intrastate commerce
- c) The different taxes for in-staters and out-of-staters must fall on substantially equivalent events...

## **PART 3: SEPARATION OF POWERS**

### • **THE EXECUTIVE POWER**

Chemerinski:

| Executive Privilege refers to the ability of the president to keep secret any

communications with advisors.

**U.S. v NIXON:** The court rejected the President's contention that the issue was a political question... the president does not have sole authority to control prosecutions.

FIRST: It is the role of the court to decide whether the president has executive privilege and its scope.

SECOND: The court recognized the existence of Executive Privilege

THIRD: Executive privilege is not absolute, and must yield to important countervailing interests.

The president has absolute immunity to suits for damages. Executive officials have "qualified immunity" whereby they are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

>>>Totally objective?

An executive Agreement, unlike a treaty, does not require approval by the senate. It is well established that these are constitutional.

### **United States v. Nixon**

**418 U.S. 683**

Holding that the President's general privilege of confidentiality did not extend to an absolute privilege of immunity from all judicial process, the U.S. Supreme Court affirmed the denial of the motion to quash. Because the special prosecutor had demonstrated a specific need for the evidence sought by way of subpoena and had complied with the requirements of Fed. R. Crim. P. 17(c), it was proper to compel production and to examine the material in camera. The legitimate needs of the judicial process outweighed executive privilege.

*Neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.*

### **Nixon v. Fitzgerald**

**457 U.S. 731**

In reversing the lower court's decision, the Court noted that a grant of absolute immunity to the President would not leave the President with unfettered power. A former President of the United States is entitled to absolute immunity from damages liability predicated on his official acts. This immunity is a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by history.

### **Clinton v. Jones**

**520 U.S. 681**

The court held that the doctrine of separation of powers did not require federal courts to stay all private actions against the President until he leaves office. However, the court held that it was appropriate for the district court to consider potential burdens on the President in evaluating the management of the case. It was an abuse of discretion for the district court to delay the trial until after petitioner leaves office.

### **Dames & Moore v. Regan (Acquiescence = Permission)**

#### 453 U.S 654

*Jimmy Carter's Executive Order 12170, which froze Iranian assets in the United States in response to the Iran hostage crisis.*

A systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned may be treated as a gloss on executive power vested in the President by Article II, Section 1 of the United States Constitution; *past practice does not, by itself, create power, but long-continued practice, known to and acquiesced in by Congress, raises a presumption that the action has been taken in pursuance of its consent.* The President does not lack the power to settle claims against foreign governmental entities, where the settlement of claims has been determined to be a necessary incident of the resolution of a major foreign policy dispute between the United States and the foreign government and where it can be concluded that Congress has acquiesced in the President's action.

#### **The Legislative Veto / The Appointments Power**

**Congress controls the purse strings of administrative agencies, and there are undoubtedly informal political checks such as oversight.**

**It is impermissible for congress to delegate the executive power to itself or its officers: such as giving a legislative agency the power to impose statutory regulations on the federal budget.**

**As the law now stands: In general the president has the power to remove executive officials, but Congress may limit removal power if it is an office were independence from the president would be desirable. Congress cannot, however, completely prohibit all removal, and it cannot give the removal power to itself (other than by exercising its impeachment power).**

#### **INS v. Chadha**

**462 U.S. 919**

*The one-house legislative veto violated the constitutional separation of powers.*

(Act), 8 U.S.C.S. § 1254(c)(2), authorizing the House of Representatives, by one-house veto, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow respondent to remain in the United States. The lower court held that the House was without constitutional authority to order respondent alien's deportation because § 244(c)(2) violated the doctrine of separation of powers.

The U.S. Supreme Court affirmed and held that the House's action pursuant to § 244(c)(2) was legislative in function and *did not fit within any exceptions authorizing one House to act alone.* As a result, the House's action was subject to certain checks contained in U.S. Const. art. I, such as the bicameral requirement, presentment to the President, and the Presidential veto.

**Special Prosecutor is set up by special court. Attorney General fires them. Atty. General decides what the Special Council investigates.**

#### **Morrison v. Olson**

**487 U.S. 654**

*Court ruled that the Independent Counsel Act was constitutional.*

Olson, who was a Constitutional lawyer, attempted to argue that the independent counsel took executive powers away from the office of the President of the United States and created a hybrid "fourth branch" of government that was ultimately answerable to no one. He argued that the broad powers of the independent counsel could be easily abused, or corrupted by partisanship.

Independent Counsel Alexia Morrison in turn argued that her position was necessary in order to prevent abuses of the executive branch, which historically operated in a closed environment.

The Court upheld the Independent Counsel provision of the Ethics in Government Act because it did not violate the separation of powers by increasing the power of one branch at the expense of another. Instead, even though the President could not directly fire the independent counsel, the person holding that office was still an Executive branch officer, not under the control of either U.S. Congress or the courts.

## ● **THE JUDICIAL POWER**

**The non-justiciability of a political question is primarily a function of the separation of powers. It results from the judiciary relationship to the federal government and not to the states.**

"The United States shall guarantee to every State in this Union a Republican Form of Government"

This clause, sometimes referred to as the Guarantee Clause, while somewhat obscure today, has historically been a part of the debate about the rights of citizens vis-a-vis state governments. No explanation is offered in the Constitution as to what constitutes a republican government, however the Federalist Papers give us a keen insight as to the intent of the Founders. A Republican form of government is meant to distinguish its institutional function from a pure democracy, which the Founding Fathers abhorred.

### **Baker v. Carr** **369 U.S. 186**

A landmark United States Supreme Court case that retreated from the Court's political question doctrine, deciding that reapportionment (attempts to change the way voting districts are delineated) issues present justiciable questions, thus enabling federal courts to intervene in and to decide reapportionment cases. Brennan reformulated the political question doctrine, proposing a six-part test for determining which questions were "political" in nature.

Cases which are political in nature are marked by:

1. "Textually demonstrable constitutional commitment of the issue to a coordinate political department;" as an example of this, Brennan cited issues of foreign affairs and executive war powers, arguing that cases involving such matters would be "political questions"
2. "A lack of judicially discoverable and manageable standards for resolving it;"
3. "The impossibility of deciding without an initial policy determination of a kind clearly

for nonjudicial discretion;"

4. "The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"

5. "An unusual need for unquestioning adherence to a political decision already made;"

6. "The potentiality of embarrassment from multifarious pronouncements by various departments on one question."

### **Nixon v. United States**

**506 U.S. 224**

Petitioner, a former federal judge, challenged his impeachment conviction. The Court held the controversy was a nonjusticiable political question as there was a textually demonstrable constitutional commitment of the issue to the legislature and a lack of judicially discoverable and manageable standards for resolving it. The Impeachment Clause granted sole authority over impeachments to the Senate, and did not require or provide a means of judicial review. As impeachment was designed to be the only check on the judiciary by the legislature, it was counterintuitive to have judicial review of impeachment proceedings.

A controversy is nonjusticiable -- i. e., involves a political question -- where 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.

The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted of impeachment.

### **Bush v. Gore**

**531 U.S. 98**

A state supreme court's command to consider the intent of the voter in counting legally cast votes is unobjectionable as an abstract proposition and a starting principle. The problem here is when there is an absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on recurring circumstances is practicable and necessary.

the recount procedures were inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer.

### **Allen v. Wright (Standing)**

**468 U.S. 737**

The first basis for standing alleged by respondents, that they were harmed directly by the mere fact of government financial aid to discriminatory private schools, did not constitute a judicially cognizable injury and second basis, that their children were being deprived of an opportunity to receive an education in racially integrated schools, although a judicially cognizable injury, was not fairly traceable to the government conduct that respondents challenged as unlawful.

**In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.**

**In order for a plaintiff to have standing to sue, the injury alleged must be distinct**

**and palpable, and not abstract or conjectural or hypothetical. The injury must be fairly traceable to the challenged action, and relief from the injury must be likely to follow from a favorable decision.**

**Doe v. Bush**  
**323 F.3d 133**

(1) the plaintiffs' argument that the President and the Congress were in collision because the President was about to act in violation of the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498, was not ripe for review; (2) there was insufficient evidence to support the plaintiffs' argument that the President and Congress were in collusion because Congress handed over its exclusive power to declare war to the President; and (3) under the circumstances, judicial intervention was not warranted.

The ripeness doctrine involves more than simply the timing of a case. It mixes various mutually reinforcing constitutional and prudential considerations. One such consideration is the need to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. Another is to avoid unnecessary constitutional decisions. A third is the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts.

**DeFunis v. Odegaard**  
**416 U.S. 312**

The court found that the controversy between the parties had clearly ceased to be "definite and concrete" and no longer touched the legal relations of parties having adverse legal interests because the petitioner would have completed his law school studies at the end of the term for which he was registered regardless of any decision the court reached on the merits of the litigation.

**Friends of Earth, Inc v. Laidlaw Environmental Services Inc.**  
**528 U.S. 167**

The Supreme Court (Court) reversed an appeals court decision that held that petitioners' citizen suit for civil penalties under Clean Water Act was moot when respondent came into compliance. The civil penalties petitioners sought carried with them a deterrent effect that made it likely the penalties would redress petitioners' injuries by abating current violations and preventing future ones. Thus, petitioners had standing. The Court then addressed whether the matter became moot when respondent came into compliance with its discharge permit. The Court held the action may have become moot only if respondent's compliance or respondent's closure of its facility made it absolutely clear that respondent's permit violations could not reasonably be expected to recur. The effect of respondent's compliance and facility closure on the prospect of future violations was a disputed factual matter. Thus, the matter was not moot.

**The "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting moot-ness.**

**PART 4: FOCUS ON EQUAL PROTECTION**

**SCRUTINY on the bounty! LEVELS:**

**Strict:** *Necessary* to achieve a *compelling* government purpose

Under strict scrutiny, a law will be upheld if it is *necessary to achieve a compelling government purpose*. The court must regard the purpose as vital. The law must be a necessary means to the end. This requires proof that the least restrictive or least discriminatory alternative. If not, then it is not *necessary* to accomplish the end. *Under strict scrutiny, the government has the burden of proof.*

**Intermediary:** *Substantially* related to an *important* government purpose

The government's objective must be more than just a legitimate goal for government to pursue, because the court must view the purpose as "important". The means chosen must be *more than a reasonable way* of achieving the end, but must be *substantially related to the goal*.

**Rational Basis:** *Reasonably* related to a *legitimate* State interest.

The government's objective need only be a legitimate one for them to pursue. The means must only be reasonable to accomplish this legitimate objective. *Under rational basis, the challenger of a law has the burden of proof.*

**Cursory:** Whatever.

Some whiny punk be all like "What you gonna do about blah blah blah" and the government be all like: "Pssh. Fuck all that that noise. I ain't even gonna stress that shit."

**Univ. of California v. Bakke (Strict, Suspect Classification)**

**438 U.S. 265**

The Court found that the admissions program involved the unlawful use of an explicit racial classification, thereby disregarding individual rights as guaranteed by the Fourteenth Amendment. Respondent was entitled to a showing that the classification was necessary to promote a substantial state interest because the admissions program hinged on race, an inherently suspect distinction. Petitioner failed to show that the classification was necessary to its goals. Nevertheless, petitioner had a substantial interest that legitimately could be served by the competitive consideration of race. Race could be deemed a "plus," yet not insulate the applicant from comparison with all other candidates for the available seats.

**In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest.**

**Grutter v. Bollinger**

**539 U.S. 306**

Rather than imposing quotas, the law school admissions program focused on academic ability and a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them. It did not define diversity solely in terms of race and ethnicity but considered these as "plus" factors affecting diversity. The Court found that the Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining the educational benefits that flow from diversity.

**Gratz v. Bollinger**

**539 U.S. 244**

The university's undergraduate admissions policy was based on a point system that automatically granted 20 points to coloreds. The Court held as an initial matter that the lead plaintiff had standing, having been denied freshman admission and having the potential to be denied transfer admission. The Court also found that the policy made race the decisive factor for virtually every minimally qualified underrepresented minority applicant.

**Parents Involved in Community Schools v. Seattle School District**

**551 U.S. \_\_\_\_**

The U.S. Supreme Court first held that the cases were not moot, even though the plans were not currently being applied to children of the association's members or the student, since it was not absolutely clear that application of the racial guidelines could not reasonably be expected to recur. Further, the Court held that the districts, which did not operate legally segregated schools, denied students equal protection by classifying students by race and relying upon the classification in school assignments. The districts failed to establish a compelling interest in racial diversity since their plans relied on racial classification in a non-individualized, mechanical way as a decisive factor.

**Intermediate Sexual Scrutiny**

**Frontiero v. Richardson**

**411 U.S. 677**

Appellants, female military personnel, filed an action contending that the statutory difference in treatment of male and female military personnel for purposes of determining "dependent" benefits. The court held that the statutory scheme involved the very kind of arbitrary legislative choice forbidden by the United States Constitution because it drew a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commanding dissimilar treatment for men and women who were similarly situated.

**Craig v. Boren**

**429 U.S. 190**

Together, the statutes prohibited the sale of non-intoxicating three and two-tenths percent beer to males under the age of 21 and to females under the age of 18. The Court held that the gender-based differential that resulted from § 245 invidiously discriminated and constituted a denial of the equal protection of the laws to males who were 18 to 20 years of age. The Court held that gender did not represent a legitimate, accurate proxy for the regulation of drinking and driving, and therefore, the classification was not substantially related to the achievement of a legitimate government objective.

**United States v. Virginia**

**518 U.S. 515**

The court opined that **in cases of official classification based on gender, the proffered justification must be exceedingly persuasive**; that the burden of justification was demanding and rested entirely on the state; that the state must show at least that the challenged classification served important governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives; that the justification was genuine, not hypothesized or invented post hoc in response to litigation; and that it did not rely

on overbroad generalizations about the different talents, capacities, or preferences of males and females. The state failed in its justification.

**Cleburne v. Cleburne Living Center, Inc.**

**473 U.S. 432**

The Court held that the mentally retarded were not a quasi-suspect class. The Court held that to withstand equal protection review, legislation that distinguished between the mentally retarded and others must be rationally related to a legitimate governmental purpose. As no rational purpose was present, the Court held that the ordinance was invalid and remanded the action to the lower court.

**Romer v. Evans**

**517 U.S. 620**

Amendment 2 prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons. Amendment 2 violated the Equal Protection clause, U.S. Const. amend. XIV, because the classification was unrelated to any legitimate state interest. Amendment 2 withdrew from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbid reinstatement of protective laws and policies. Amendment 2 thus classified homosexuals not to further a proper legislative end but to make them unequal to everyone else.

## **PART 5: FOCUS ON PRIVACY**

**Williamson v. Lee Optical of Oklahoma**

**348 U.S. 483**

In practical effect, it meant that no optician could fit old glasses into new frames or supply a lens without a prescription. On appeal, the United States Supreme Court held that, although the law might have exacted a needless, wasteful requirement in many cases, it was for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. In reversing the judgment, the Court held that the law did not violate the Equal Protection Clause of the Fourteenth Amendment and that the law's prohibition on the use of advertising for the sale of eyeglasses and lenses was constitutional because the legislature could treat all who dealt with the human eye as members of a profession who should use no merchandising methods for obtaining customers. (This is a "legitimate end"?)

**Mapp v. Ohio**

**367 U.S. 643**

It was apparent that the materials introduced into evidence in the prosecution of defendant were seized during an illegal search of defendant's residence in violation of the Fourth Amendment. The Court held that the due process clause of the Fourteenth Amendment extended to the States the Fourth Amendment right against unreasonable searches and seizures. And, as necessary to ensure such rights, the exclusionary rule, which prohibited the introduction into evidence of material seized in violation of the Fourth Amendment, likewise applied to the State's prosecution of state crimes.

**Griswold v. Connecticut**

**381 U.S. 479**

Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. In examining the United States Constitution, the Court found a right of privacy implicit in the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's right of people to be secure in their persons, the Fifth Amendment's right against self-incrimination, and the Ninth Amendment's right to retain rights not enumerated in the Constitution. The right of privacy to use birth control measures was found to be a legitimate one.

**Loving v. Virginia**

**388 U.S. 1**

The Court found that restricting the freedom to marry solely because of racial classifications violated the central meaning of the Equal Protection Clause and deprived appellants of liberty without due process of law in violation of the Due Process Clause of U.S. Const. amend. XIV.

**Roe v. Wade**

**410 U.S. 113**

The Court affirmed the judgment, holding that abortion was within the scope of the personal liberty guaranteed by the Due Process Clause. This right was not absolute, but could be regulated by narrowly drawn legislation aimed at vindicating legitimate, compelling state interests in the mother's health and safety and the potentiality of human life. The former became compelling, and was thus grounds for regulation after the first trimester of pregnancy, beyond which the state could regulate abortion to preserve and protect maternal health. The latter became compelling at viability, upon which a state could proscribe abortion except to preserve the mother's life or health. The Texas statutes made no distinction between abortions performed early in pregnancy and those performed later, and it limited the legal justification for the procedure to a single reason -- saving the mother's life -- so it could not survive the constitutional attack.

**SPITZER: This is a Substantive Due Process Argument... very similar to Griswold... but not about privacy**