

# CONSTITUTIONAL LAW I OUTLINE

## I. The Federal Judicial Power

### A. The Authority for Judicial Review

#### KEEP IN MIND THREE THINGS!

**(1) How does the court justify judicial review of executive actions and according to the court when is such judicial review available, and when is it not?**

→The Court needs to be able to interpret what actions are and are not constitutional so that when executive action violates the constitution there is somewhere the injured party can go for reprieve.

**(2) Why does the court find that the judiciary act of 1789 unconstitutional?**

→Chief Justice Marshall is essentially saying that Marbury is right to get his writ of Mandamus against Secretary Madison under the law of the federal Judiciary act of 1789... HOWEVER, Secretary Madison is also right to not deliver the commission under his order from the president to withhold the commission, and the president has the right to do that under the Constitution. AND SINCE the constitution has the supremacy clause in it, that makes it a higher law, thus it trumps the judiciary act, which means that the judiciary act is unconstitutional (at least where it runs into the constitution).

**(3) How does the court justify judicial review of legislative acts?**

→Because, if the court does not have that ability then what will stop congress from enacting legislation that violates the constitution? AND what could someone do if they believed that they were subject to a law that was unconstitutional? Nothing, that's why the court needs to have this ability, to place a check on congress' power to make laws that they don't make unconstitutional laws.

*Marbury v. Madison (1803)*—landmark Supreme Court case established authority of judicial review "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." **Also** established that political questions could not be answered by the court, and that appointments were political questions.

#### **Authority for Judicial Review of State Judgments**

Martin v. Hunter's Lease (1816)—Case over a rightful inheritor of land question. Can the Supreme Court overturn a state Supreme Court decision?? **YES.** The Supreme Court must have judicial oversight over the state courts,

because even though the judges of the state courts may have the same education as the federal courts, the federal courts are not biased like the state courts, which may be prejudicial to enforcing the federal law, when it is inconvenient for the state's goals.

Cohen's v. Virginia (1821)—Case over the purchase of illegal lotto tickets. Can The United States Supreme Court overturn a State Court on a criminal issue??? **YES**. The state judges might not want to enforce federal law over state law, because the same legislatures that they would have to overrule are the same legislatures that decide if they get to have their judgeships, and decide their salary, so they may be biased, and not enforce federal protections to citizens appropriately.

## **B. Limits on the Federal Judicial Power**

1. **Interpretive Limits:** Raise the question of how the Constitution should be interpreted; some approaches seek to greatly narrow the judicial power, while others accord judges broad latitude in deciding the meaning of the Constitution.

### **How Should the Constitution Be Interpreted?**

#### **Textualism:**

**Originalism:** Judges deciding constitutional issues should confine themselves to enforcing norms that are stated clearly or implicitly in the constitution.

#### **Structuralism:**

*District of Columbia v. Heller*—Gun control case, we didn't read.

2. **Congressional Limits:** Refers to the ability of Congress to restrict federal court jurisdiction.

U.S. Const. Art. III, Sec. 2: "In all the other cases... the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." -(Ex Parte McCardle)

There is question as to the intent of the comma after fact. Is it that the court is limited to establish fact when congress regulates, or that they can be limited in law and fact when the congress regulates it.

Look at DOMA, congress tried to eliminate the Supreme Court's appellate authority to hear DOMA cases, it failed Art I Sec 7, and now it has almost been completely been struck down by the court.

## The Exceptions and Regulations Clause

*Ex Parte McCardle (1868)*—McCardle writes for a southern newspaper, thinks that reconstruction is unconstitutional. McCardle is being tried by a military tribunal, asks for a Habeas petition because he believes that the 1867 Act that he is held under is unconstitutional. Congress is afraid that it is unconstitutional, and that a court ruling could bring down reconstruction, so it repealed the law before the case. **Congress does not set the courts jurisdiction, except when Art III of the constitution allows it to.**

## Separation of Powers as a Limit on Congress's Authority

*United States v. Klein (1871)*—Land taken by the north during the civil war could only be recovered if the person asking for it could prove that he did not assist the rebels. Can Congress make a law instructing the judiciary how to use and interpret action from executive??? **No, Congress cannot do that.** That would infringe upon the executives power, and the judicial power (balance/separation of power issue).

*Robertson v. Seattle Audubon Society (1992)*—Klein applies to cases where the Congress tries to amend laws to gain a particular outcome out of the court, that is unconstitutional, HOWEVER, in this case, Congress made a completely new, law, which had similar instructions, and was constitutional. \*\*\***Close issue.**

3. **Justiciability Limits:** Refers to a series of judicially created doctrines that limit the types of matters that federal courts can decide (the jurisdiction of the court).

“The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made... to all cases affecting...

- Ambassadors,
- Other public ministers and consuls,
- All cases of admiralty and maritime,
- Jurisdiction to controversies to which the United States shall be a party to controversies between...
  - Two or more states
  - A state and citizens of the state
  - Citizens of different states.”

**To say that something is not justiciable is to say that there is no jurisdiction to hear the case.**

- **No Advisory Opinions**

- **All cases must have standing.**
  - **Must be RIPE**
  - **Must not be moot**
  - **Cannot be Political Questions**
- a. **Prohibition of Advisory Opinions**—Case or controversy does not exist.
- b. **Standing**—The determination for whether a specific person is the proper party to bring a matter the court for adjudication.

**Constitutional Elements:**

- (1) Injury:  $\pi$  must allege that he or she has suffered or immediately will suffered an injury.
- (2) Causation:  $\Pi$  must allege that the injury is fairly relatable of the  $\Delta$ 's conduct.
- (3) Redressability:  $\Pi$  must allege that a foreseeable federal court decision likely to redress claims of the injury.

**Prudential Elements:**

- (1) No Third Party Standing (EXCEPTION: when we are talking about First Amendment over breath it becomes possible for 3<sup>rd</sup> party suits).
- (2) No generalized taxpayer or citizen standing.

i. **Constitutional Standing Requirements**

*Massachusetts v. Environmental Protection Agency (2007)*—10 states were suing the EPA for lack of enforcement of their own policy. Do states have the ability to represent all other states and citizens in an action against the EPA? **YES, because states have a “special solicitor status” which allows them to bring third party claims.**

**Notes on Constitutional Standing Requirements; Injury, Causation and Redressability**

*City of Los Angeles v. Lyons (1983)*—Lyons was choked to unconsciousness by LAPD without a privilege.... Can the court provide an injunction to prevent officers from applying chokeholds?? **NO, you would have to assume both that Lyons would have another incident with the police, AND that it was the recommended procedure by the police to choke people.** Since neither are present, there is no standing.

*Simon v. Eastern Kentucky Welfare Rights Org. (1976)*—In order to have tax exempt status, non-profit charitable hospitals were required to provide care to indigent people for free.  $\Pi$ 's were denied care because hospitals claimed that under new IRS policy it only had to provide emergency care. Do the  $\pi$ 's have standing, and is the IRS policy constitutional? **No they do not have standing, and yes the policy is constitutional.** It was

speculative to ask if the revenue ruling was responsible for the lack of care, and it seemed clear to the court that hearing the case did not have the potential to give the  $\pi$ 's the care that they were previously denied.

Duke Power Co. v. Carolina Environmental Study Grp. (1978)—40 individuals and 2 organizations petitioned the court that the Pierson Anderson Act was unconstitutional, because it limited the damages brought by people living close to a Nuclear power Plant, potentially violating their 14<sup>th</sup> Amend. Rights. Do the  $\pi$ 's have standing? Is the act Unconstitutional? **YES standing, but constitutional.** Because the fact that the plant will expose people to radiation in of itself was proof of the harms, therefore standing must exist, even though no catastrophic event had transpired.

ii. **Prudential Standing Requirements**

**The Prohibition of Third-Party Standing**

*Singleton v. Wulff (1976)*—Two abortion physicians are suing the responsible state official for funding abortions for non-medically educated Medicated patients, which he is obligated not to do under MO law. (1) Do the physicians have standing? (2) Can they exert the rights of the Pregnant Women? **YES to both.** The Physicians have standing because they stand to gain or be damaged financially by the outcome of the case, however, they may also exert the rights of the pregnant women because they are in a position to be zealous advocates for this class of citizens that might not otherwise have standing (only pregnant for so long, and the appeals process is long). Physician relationship is close to the woman, and the woman might not want to speak publically.

**“Federal Courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.” TWO REASONS...**

**(1).** The Courts should not adjudicate such rights unnecessarily and it may be that in fact these holder of those rights either do not wish to assert them or will be able to enjoy them regardless of whether the court litigating is successful or not.

**(2).** Third parties themselves usually will be the best proponents of their own rights.

**HOWEVER:** There are two factors that allow their party to be brought up.

**(1).** Closeness to the third party.

**(2).** Likelihood that the injured arty could bring up the issue on their own.

Barrows v. Jackson (1953)— $\pi$  Owned a home, singed a racially restrictive covenant, rented to blacks anyway. Can  $\pi$  raise discrimination as a defense, enough the he is not black, or living there? **YES.** The black tenants could not be a party to the case, because they didn't sign the convenient, but it is clear that it is their rights that are being violated.

Craig v. Boren (1976)—OK law allowed a woman to purchase beer at age 18, but men had to wait until age 21. Bartender sues on behalf of the males between the ages of 18 and 20 who would be customers. Can the bartender represent the rights of the young men? **YES**. The bartender is functionally burdened by the law, so he may use the rights of those he is losing business from in order to remedy his own injury.

Gilmore v. Utah (1976)—A man convicted of murder sentenced to death, waived his right to a habeas corpus petition, so his mother filed a stay of execution claim upon his behalf... BUT does the mother have standing??? **NO**. The injury belongs to the man, and he knows that he has the right to it and has decided to waive it, and his mother cannot interfere with that (the idea being that a third party cannot make a claim when someone who knows that they have a right, have decided to waive that right). She is not the one with the injury.

### **The Prohibition of Generalized Grievances**

#### **TWO PART TEST**

- (1)**. Challenging an enactment under the taxing and spending clause of the constitution.
- (2)**. Claiming that the challenged enactments exceeds specific constitutional limits on taxing and spending powers.

*United States v. Richardson (1974)*—U.S. citizens wanted proper accounting on how the CIA spent funds appropriated to it by Congress under the transparency clause in Art. I §§ 7,8 of the Constitution. Seems similar to the Frothingham case, which stated that taxpayer grievances don't have standing. The Majority felt that way and held that it redress was only through the political system, Dissenting opinion considered this a failure on the part of the government to uphold a constitutional provision, and saw this as a suit by a citizen.

*Flast v. Cohen (1968)*— $\pi$  brought suit against the state law for funding things to a religious private school, and the  $\pi$  pays tax dollars that contributed to this. Does he have standing? Surprisingly, **YES**, creates an exception for when a taxpayer MAY obtain standing where claim that the government has used its taxing and spending power in violation of the establishment clause. **Status of a taxpayer, and a link between that and the unconstitutional status of the law.**

#### **Flast TWO part test:**

- (1)**. Taxpayer must establish a nexus between their role as a taxpayer and the particular enactment by congress; and
- (2)**. Taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.

**HOWEVER:**

→ Valley Forge (1982)—For purposes of Flast, government disposal of Property is not an “expenditure.”

→ Hein (2007)—For purposes of Flast, Executive expenditure is not an “expenditure.”

- c. **Ripeness**—Prohibition of advisory opinions: There must be an actual dispute between adversary litigants. \*\*\*Even under the Washington Administration, the court did not want to give advice on how the executive branch should go about its duties without an actual case to decide.

**Factors:**

(1). Fitness of the Issues for Judicial Decision

(2). Hardship to parties.

→ The ripeness doctrine seeks to separate matters that are premature for relief because the injury is speculative and may never occur.

→ In order to have standing the  $\pi$  must demonstrate that an injury has occurred or immediacy will occur and that review is not premature.

→→ Has occurred or immediately will occur.

*Poe v. Ullman (1961)*—Husband and Wife who want information about contraception are unable to obtain it because their doctor is afraid of violating a Conn. Law that prohibits the education or sale of contraceptives. Do the  $\pi$ 's have ripeness??? **NO**. The law is not enforced; therefore they are not “really” prohibited from access or education. **HOWEVER**, dissent notes that telling a person to violate the law that is on the books proves that the case is ripe, **AND** there is a factual disconnect, the fact of the matter is that the state is enforcing the law.

*Abbott Laboratories v. Gardner (1967)*—New FDA policy required drug manufacturers to place the name of the generic drug in large print on packaging so that they know what it really is. Drug manufacturer claim that it will be a great burden (because they have to change their ads and throw away all of the packaging they have already created. **IS THE CASE RIPE** since they have not performed yet?? **YES**, large potential injury if they have to pay all of this money on new packaging.

- d. **Mootness:** A case becomes moot when there is no longer a controversy between adverse litigants.

**THREE exceptions where a court will hear a moot case:**

(1). “Capable of Repetition yet evading review.”

(2). Voluntary Cessation.

(3). Class Action.

**\*\*\*Capable of Repetition Yet Evading Review:**

Moore v. Ogilvie (1969)—Bad IL election law, but by the time it got to the court the election happened, BUT because there was going to be another election the court decided that it was NOT moot so that the court could decide the issue before the next election, and so that the next election does not pass before this can be fully litigated again. →The court decides that it can continue to have jurisdiction over the case long past the ability to remedy the π's injury because this is a continuing issue that is likely to come up with every subsequent election, and will continue to EVADE judicial review if a strict interpretation of ripe prohibits it.

Roe v. Wade (1973)—Roe got pregnant and wanted an abortion in the state of TX, when it was banned, sued, but by the time the case made it to the US supreme Court 3 years later she was no longer pregnant, even though it was moot, the court still heard the case because it would be impossible to ever hear a case of abortion, because a woman is only pregnant for 9 months. **Also**, important that she could want an abortion in the future. And in the future she would be stuck in the same situation of not being able to litigate before the pregnancy ends.

DeFunis v. Odegaard (1974)—π sued University of Washington Law school for not accepting him due to the schools affirmative action policy. BUT by the time the case went to the Supreme Court he π was a 3L, but the court heard the case because others will go through the case process. It is completely moot, he will never go through law school applications again.

**\*\*\*Voluntary Cessation:** leaves the alleged improper behavior, but has a right to come back for it:

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (2000)*—Environmental Groups brought suit to stop Laidlaw Environmental Services from Polluting specifically unlawful amounts of mercury discharge onto the Roebuck facility. Laidlaw was a holder of a National pollutant Discharge Elimination System (NPDES) permit. However, because the case is heard Laidlaw stops dumping on the lot completely, and shuts down the Roebuck facility, but retains the NPDES permit and ownership of the Roebuck facility. Laidlaw argues that the issue is moot now that they've stopped dumping, but the environmental groups argue that there is nothing stopping them from abusing their NPDES later. **The court holds that this is not moot because the wrongful act could reoccur.** "A case can become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur." BASICALLY, if it is clearly possible that Laidlaw could just go back to polluting once the litigation passes they could avoid litigation forever.

**\*\*\*Class of unnamed person described in the certification acquires a legal status separate from the interest asserted by the plaintiff:**

*United States Parole Commission v. Geraghty (1980)*—A federal prisoner, after twice being denied parole from a federal prison, brought suit challenging the validity of the U.S. Parole Commission's Release Guidelines. HOWEVER, before the case came up he was released. Can a class action be reviewed after the original controversy has become moot???? **YES.** The "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposite positions.

**e. The Political Question Doctrine**

**Political Question Doctrine:**

- (1) Challenges to restriction on congressional membership where the political question doctrine was rejected,
- (2) Challenges to the president's conduct of foreign policy, and
- (3) Challenges to the impeachment process—where the political question doctrine was applied.

**i. The Political Question Doctrine Defined**

**What is a Political Question?:** The Supreme Court refuses to hear cases that it believes are best for elected officials to answer (like policy judgment).

**Political Question**—matter is *inappropriate* for judicial branch to consider, rather, it is for the *political* branches (legislative or executive) to decide.

**The Issues of Malapportionment and Partisan Gerrymandering**

*Baker v. Carr (1962)*: Baker is suing Tennessee (Carr) because he believes that the reassignment of political districts in his state is unconstitutional under the 14<sup>th</sup> Amendment Equal Protection Clause. This is because the state used malapportionment, where a vote is worth 1/100,000 in one district but 1/100 in another. The state argues that this is a political question. **NO it is not.** While it was questionable in the Guarantee Clause case what a republican form of government is, it is not questionable that malapportionment violates the equal protections clause.

**\*\*\*Baker v. Carr created the 1 man = 1 vote standard.**

**We now look to 6 guidelines.**

1. Textually demonstrable constitutional commitment of the issue to a coordinate political department; and or
2. A lack of judicially discoverable and manageable standards for resolving it and or
3. The impossibility of deciding without an initial poly determination of a kind clearly not for judicial discretion; and or
4. The impossibility of a court's undertaking independent resolution without expressing a lack of respect for coordinate branches of the government; and or
5. An unusual need for unquestioning adherence to a political decision already made; and or
6. The potentially embarrassment for multifarious pronouncement by various departments on the question.

\*\*\*OR!

1. Textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. A lack of judicially discoverable and manageable standers for resolving it; or
3. Prudential considerations counsel against judicial intervention.

*Vieth v. Jubelirer (2004)*: π is challenging the state's districting map, which gerrymandered in a way that was favorable to the party he does not agree with. Looked to a cause where the court had held that gerrymandering claims were justiciable, **BUT held that gerrymandering is not justiciable after all**. No workable standard. BUT Concurrence (and 5<sup>th</sup> vote) stated that if a proper standard to adjudicate gerrymandering cases arise in the future, then it should be. LOTS of dissenting opinions.

\*\*\*So, the plurality and the concurrence say that we don't have a standard. The concurrence and the dissenters say that we should not close the door on the political gerrymandering cases, and that at some point the court could have a standard, AND the dissenters come up with standards (such as the race standard).

ii. **The Political Question Doctrine Applied: Congressional Self-Governance**

*Powell v. McCormack*: Powell was a member of the 89<sup>th</sup> congress, was chair of the committee on labor and education a special committee re-elected that Powell was utilizing his discursion to pay his wife an illegal salary. So his party removed him from their caucus, and asked him not to stand at the swearing in for the 9<sup>th</sup> congress. Once the 90<sup>th</sup> congress sat, they voted, by a simple majority, to remove Powell. Powell sues that it was a violation of Art. I, §5 which requires a 2/3 vote to remove someone, Congress argues that the court can't review because Congress has the authority to regulate itself. Court holds that 2/3 vote is necessary,

BECAUSE it is important to uphold the will of the people who voted him into the office (can only use the majority vote if the person is unfit for office under Art. I §2 cl. 2 (age, citizenship, residency)).

Term Limits v. Thornton (1975): States cannot set term limits for members of congress, citing Powell, the court found the case justiciable under Art I, §2, BECAUSE that would add another element to the three criteria in the constitution.

iii. **The Political Question Doctrine Applied: Foreign Policy**

*Goldwater v. Carter (1979)*: President Carter ended a treaty with Taiwan as part of a recognizing China... However, Senator Barry Goldwater brought a constitutional claim that only the Senate can rescind a treaty, just as only the senate can make them... The Supreme Court held that **the issue is NOT justiciable** because the Constitution is silent on who has this power, and since it is in the rheum of foreign relations, the court should not intervene with the president, and furthermore allow the elected bodies figure it out.

iv. **The Political Question Doctrine Applied: Impeachment and removal**

*Nixon v. United States (1993)*: Walter L. Nixon was Chief District Court Judge for the Southern District of Miss. Nixon took a bribe from a businessman in order to intervene with the businessman's son's case, and have charges dropped against him. Nixon was subsequently convicted by a jury of two counts of making false statements before a federal grand jury and sentenced to prison, but because Nixon did not resign, he continued to collect his judicial salary while in prison. The House voted to impeach, and the Senate convicted, the senate only had the evidence examined by a 10 person committee, and that committee did not inform the Senate body before conviction... Nixon appeals that the senate violated Art. I §3 Cla. 6. **However, the court found that it was not justiciable to look into an impeachment proceeding.** (1) There are plenty of constitutional safeguards as it is to prevent unjust impeachments from happening, the fact that it has to pass both chambers, and the fact that a 2/3 supermajority is required. (2) If the court did grant judicial review an impeachment could "expose the political life of the country to moths, or perhaps years of chaos especially a prom in the even to f a presidential succession.

### **III. The Federal Legislative Power**

#### **A. Introduction: Congress and the States**

**Federal Legislative Power (Art. I.):** Limited (enumerated) Powers: Congress may act ONLY if there is express or implied authority in the Constitution.

--**Tenth Amendment:** "The powers not delegated to the United States (congress) by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people."

→Federal Governments have

→States Governments have residual power (police power: health, safety, and welfare (and morals, but that has been diminished or dropped)).

**\*\*\*When reviewing the constitutionality of congressional law making—2 questions always to ask when considering if an act (law of congress) is constitutional.**

**1. Does Congress have the Power?**

→i.e. specifically, what clause in the Constitution gives the power?

**2. Is there a Constitutional LIMIT on that power?**

→e.g. often one of the provisions in the Bill of Rights; 10<sup>th</sup> amendment.

**Federal Legislative Power**

→Where Congress is acting within the scope of its power, its laws are **supreme** (i.e. they "preempt" State laws).

**Supremacy Clause (Art. VI., sec. 2)**

"This constitution, and the Laws... and all Treaties made... under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, any thing in the Contradiction or Laws of any State to the Contrary notwithstanding."

**"Necessary and Proper" Power**

"The Congress shall have Power... To make all laws which shall be necessary and proper for carrying into execution the foregoing powers..." (Art. I, sec. 8 [18]).

*MuCulloch v. Maryland (1819)*—The State of Maryland, in opposition to the federal bank operating in its state, decided to apply a tax (\$15,000 or 2%). The bank believed that state government could not tax the federal government. The court found that the Bank was necessary and proper to allowing the Federal government to carry out its enumerated powers (maintaining a military, and waging war). So for necessary and proper "let the end be legitimate." As long as there is a nexus between an enumerated power (helpful to carrying out the enumerated powers), and the action that the congress is taking, then it is constitutional.

**Necessary and Proper Clause:** gives the government the ability to do whatever necessary to carry out these enumerated powers in the Constitution.

**What Role Should Concern over Protection States Have in Defining Congress's Powers?**

1. How important is the protection of state sovereignty and federalism?
2. Should it be the role of the judiciary to protect state prerogatives or should this be left to the political process.

\*\*\*National legislation is needed for national problems, the court should not circumscribe the scope of congress's authority or use of the 10<sup>th</sup> amendment to invalidate federal laws, BUT on the other side, those who for judicial use of federalism as a contraction on congress's power usually identify three benefits of protection the states.

- (1) Protect against federal tyranny.
- (2) State governments are closer to the people, and more responsive to the public needs and concerns.
- (3) States can serve as laboratories for experimentation—Justice Brandies.

*NFIB v. Sibelius*—skipped and then come back to later with commerce clause.

**B. The Necessary and Proper Clause**

→ In *McCulloch v. Maryland*, the “necessary and proper clause” is interpreted by the court as a grant of power to congress, not a limitation.

→ → Congress has the power to carry out its duties by any means that are not otherwise unconstitutional.

*United States v. Comstock (2010)*—The case was about a federal law with regards to a civil-commitment program for those found to be legally insane for criminal law proceedings. Congress did have the power, and Justice Breyer, writing for the majority came up with a 5-factor considerations test to determine necessary and proper clause cases.

- (1) The breadth of the Necessary and Proper Clause (congress already has the power to create prisons, imprison people, and ensure safe and responsible administration of the prison, and this goes along with that.
- (2) The long history of federal involvement in this area (the federal government has had prisons and federal crimes for some time, and has administered them for some time, and has had a similar civil commit people for other reasons).
- (3) The sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody.
- (4) The statute's accommodation of state interest (allows the states to decide where to keep the prisoner). If it is established that the federal government

has valid power, then the federal government has “plenary” (complete) power over the issue.

(5) The statute’s narrow scope (it is tailored to only apply to those who are mentally ill, and pose a significant threat to cause a violent se crime or molestation of children).

\*\*\*Taken together, these considerations lead us to conclude that the statute is a necessary and proper means of exercising the federal authority that permit congress to create federal criminal laws, to punish their violation, to imprison violator, to provide appropriately for those imprisoned and to maintain the security of those who are not imprisoned, but who may be affected by the federal imprisonment of others.

In Justice Thomas’s dissenting opinion he points out that Congress is acting outside of executing an enumerated power, and that this is too closely related to state’s police power...

### C. The commerce Power

“The Congress shall have power... to regulate Commerce with **Foreign Nations**, and **among the several states**, and with the **Indian Tribes**” (Art. I, sec 8 [3]) (e.g. *Gibbons v. Ogden (1824)*; *U.S. v. Morrison (2000)*).

\*\*\*THREE QUESTIONS WHEN ANSWERING A COMMERCE ISSUE!!!

(1) What is the commerce???

(2) What does among the Several States mean???

(3) Does the 10<sup>th</sup> Amendment limit congress???

#### 1. The Initial Era: Gibbons v. Ogden Defines the Commerce Power

*Gibbons v. Ogden (1824)*—Ogden believed that he had purchased a legal monopoly from Fulton and Livingston who had purchased all of the rights to operate steam ships in between NYC and New Jersey from the State government of NY. However, Gibbons purchased the right to operate a steam ship in the same way from the **federal government**. The state courts held for Ogden but the U.S. Supreme Court held for Gibbons because **interstate, means between states, and commerce is any commercial navigation**. (How broadly do we interpret commerce???) Broadly enough to cover navigation!). \*\*\*If something were completely intra state (within) then it cannot be reached by congress and the commerce clause.

#### 2. The 1890s-1937: A Limited Federal Commerce Power

##### a. What is “Commerce”?

→Between 1890 and 1937 it was not anything that was not explicitly the navigation of trade...

→→The anti trust laws were unenforceable, and companies won caes rendering minimum wage laws, and regulations of products to be unconstitutional.

→The Court held that commerce was to be narrowly defined as one state of business, separate and **distinct** from earlier phases such as mining, manufacturing, and production.

**b. What Does “Among the States” Mean?**

If something is indirect, then it is not among the states, not among the stream of distribution, then it is not commerce not over states lines, not commerce.

**c. Does State Sovereignty Limit Congressional Power?**

\*\*\*In the child labor case (*Hammer v. Dagenhart (1918)*), the court held that the congress aimed its action at actions that occur within the state, therefore the 10<sup>th</sup> amendment applied and the law was found to be unconstitutional.

\*\*\***BUT** in the Lottery case (*Chapinon v. Ames (1903)*), the court held that the congress was within its scope of power, and was not limiting a state when it made a law that prohibited the travel of lottery tickets across state lines.

**3. 1937-1990s: Broad Federal Commerce Power**

“Switch in time that saved 9” When Justice Owen Roberts changed his vote on a couple of cases that were tied to new deal legislation. The switch was important, because FDR had a court-packing plan, to set up a 15-member court that would have someone in place now for every justice over the age of 70, and eventually let the court settle back down to 9.

**Key Decisions Changing the Commerce Clause Doctrine**

*NLRB v. Jones & Laughlin Steel Corp. (1937)*—Steel company was in violation of the NLRB’s regulation against unfair labor practices by discriminating against members of the Union with regard to hire, and tenure of employment, and was coercing and intimidating employees in order to interfere with self-organization. NLRB argues that since the company works in PA, MI, OH and NY it is interstate. But the steel company argues that they only manufacture in one state, so is it interstate commerce? **YES** it is. Companies that manufacture at a large enough scale to interfere with many states to the point where their own stopping in manufacturing would have a considerable deterrent to the other states must be operating in interstate commerce... AND to use a 10<sup>th</sup> Amendment argument against that is to think only inside of a vacuum without considering the effects that a large manufacturing company has upon the commerce between other states. **Dissenting** opinion calls this a slippery slope to all commerce being regulated by the federal government.

*Wickard v. Filburn (1942)*: Famer Filburn owns and operates a small farm in OH, it is common to sow wheat in the winter to harvest in the spring, and to

use some to feed the livestock, some for household consumption, and sell the rest at market. → Pursuant to the Agg. Ac. Of 1938, Farmer Filburn was given an allotment of 11.1 acres at an average of 20.1 bushels of wheat per acre, BUT INSTEAD farmer Filburn decided to plant 23 acres of wheat figuring that the government would not know, because he would only take the bushels produced by his allotted 11.1 acres at 20.1 bushels per acre to market and keep the rest on his farm for house and cattle consumption. **The court held that the federal government was able to regulate the wheat on farmer Filburn's land** because even though it was not entered into the stream of commerce, and completely intra state it all affected the wheat market for all of the surrounding states (and even though he is small, if everyone got away with it, it would be a huge problem. It would "defeat and obstruct the purpose of the rice control for the trade." Imagine if there were hundreds of thousands of people acting like farmer Filburn, **cumulative effects principal**, if we look at the effect of the cumulative effect of many people violating the law, then it can have an effect on interstate commerce.

### **The Meaning of "Commerce Among the States"**

**\*\*\*Civil Rights Act of 1964, based on the 14<sup>th</sup> Amendment for public places. HOWEVER, for private places the court could not use the 14<sup>th</sup> Amendment, and got create and utilized the commerce clause to enforce it.**

*Heart of Atlanta Motel v. United States (1964)*—Hotel refused service to Blacks in violation of the Civil Rights Act. Is renting a hotel room interstate commerce? **YES.** While congress does not have authority to correct social wrongs, it does have the authority to regulate commerce to correct for social wrongs in so long as commerce is being achieved. Ability to find lodging while traveling is part of commerce—the more difficult it is for a class of citizens then commerce is being weakened. **The Concurrence** wanted to use a 14<sup>th</sup> Amendment §5 claim. But that may have been too broad.

*Katzenbach v. McClung Sr. & Jr. (1964)*—BBQ in Birmingham AL was a small family owned restaurant that refused to serve blacks in violation of the Civil Rights Act. It received most of its supplies from a company in state, but that company received most of its supplies from out of state. **THUS** in some way the restaurant was dependent upon interstate commerce. Just like **Farmer Filburn** "The appellee's own contribution to the demand for wheat may be trivial by itself, is not enough to remove him from the scope of federal regulations where as here contribution taken together with that of many others situation did the same situation is not trivial." ALSO, this passes rational basis test (government wants to open access to commerce to all people).

Hodel v Indiana (1981): Court upheld a federal law that regulates strip mining and required reclamation of strip mining land.

Perez v. United States (1971): **Majority**: Congress aimed law at preventing loan sharks, even though their practices could be entirely within a state the fact that the predatory loans were the principal revenue for organized crime meant that it was being used to facilitate illegal act that was occurring over state boundaries. **Dissenting**: The way the law is written the federal government does not have to prove that the criminal  $\Delta$  is linked to any interstate action at all in order to prosecute...

The Tenth Amendment Between 1937 and the 1990s

- Only once has it been used to strike down a federal law... Which was *National League of Cities v. Usury (1976)*, Federal Min. Wage law case... HOWEVER that was overturned by Garcia...

*Garcia v. San Antonio Metropolitan Transit Authority (1985)*—SAMTA believe that it was a state entity, protected from having to pay employees federal minimum wage under *NLC v. Usury* (case decided 8 years prior). Where transit workers state worker for the purpose of the commerce clause, and was that not protected like everyone else's right to a min wage??? Belonging to the classification of employee should have been interpreted as more important than the classification than state autonomy... Thus, the *Usury* case is wrong, and is overturned. Dissent made an interesting argument about how now that state government do not choose their senators they are less represented by the Congress...

4. **1990s-???: Narrowing of the Commerce Power and Revival of the Tenth Amendment as a Constraint on Congress**

→The court brought back narrow view of the commerce clause, and use of the 10<sup>th</sup> Amendment, but NOT as narrow as the *Lochner* era.

a. **What is Congress's Authority to Regulate "Commerce Among the States"?**

**LOPEZ TEST—Federal Legislative Power, Commerce Clause, (*Lopez* Test) Congress has power to regulate:**

**(1) Channels (of transportation, planes, trains, automobiles, persons) of interstate commerce (I/C).**

**(2) Instrumentalities of Interstate Commerce.**

**(3) Activities that substantially affect interstate commerce must be economic activity.**

*United States v. Morrison (2000)*—Student at Virginia Tech who was raped attempted to utilize the VAWA to seek remedy in federal court when the school and state court failed to provide her with adequate remedy.

However the court held that the Congress does not have authority to regulate violence against women... Applied the *Lopez* test. (1) Regulate channels of interstate commerce, (2) protect the instrumentalities of interstate commerce even though the threat may come only from intrastate actions, or (3) Congress commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ... i.e. those activities that substantially affect interstate commerce. Violence against women is a policing power issue, which should be left to the states to decide how to punish—allowing the Congress to get involved for gender related crime could become slippery slope... **Thomas's Concurrence would even cut out the third aspect of the test... DISSENTING OPINION, looks to the economic impact that violence against women have upon the whole country each year as a basis for justifying a VAWA...** Notes that the court is failing to learn the lessons of the *Lochner* era...

**\*\*\*Court has taken a narrow interpretation of the commerce clause in a few cases.**

*United States v. Jones (2000)*—A federal arson statute, the arson of a dwelling had to be removed from the statute so that it did not become unconstitutional (dwelling = not commerce according to the court).

*Solid Waste v. United State Army Core of Engineers*—U.S. wanted to use the clean air act provision to protect the “navigable waters” could apply to interstate waters hat had migratory birds... but the court said **No**. Majority held that congress should not assume to have the authority to extend its activity into state owned wetlands... but the dissent points out that the Federal government has an obligation to protect migratory birds.

**\*\*\*Possible that court has moved back to accepting commerce clause after *Washington v. Gulia*.**

*Gonzales v. Raich (2005)*—Two CA citizens using marijuana in respect of the state's “Compassionate Use Act” are caught by county deputy sheriff, situation turned over to DEA, and the court held that it could get involved even though they were acting in the state, and with compliance with state law? **YES**. Majority, If it does not sever to (1) regulate interstate commerce, (2) protect the instruments of interstate commerce even though threat may come only from intrastate action, or (3) congress commerce authority includes the power to regulate those activates having a substantial relation to interstate commerce.. i.e. those activities that substantially affect interstate commerce. In this case it falls under the third category. (Basically, since the federal government can regulate the use of pot as a narcotic, it can regulate all use of it, because no matter how small or pursuant to whatever state law, it is adding to the existence in

the interstate market for pot). The Concurrence, in addition to the economic arguments, adds that Congress has the ability to act whenever it is regulating something that it has the authority to regulate, regardless of the economic impact (Scalia really does not like drugs), the dissents bring up the value of states acting as laboratories of democracy outweighing Congress's interest, and the Thomas adds that this is distinct from Famer Filburn who is selling, these two are not selling. → This could amount to federal government intruding in police power.

**b. Does the Tenth Amendment Limit Congress's Authority?**

\*\*\*Only three cases since 1990 to use 10<sup>th</sup> Amendment (first time since 1937)

*New York v. United States (1992)*—Congress makes a law that forces state to take title of all low level radioactive waste within the state. Can Congress make a law requiring the state to regulate low-level radioactive waste in a particular way??? **NO.**

- (1) "The allocation of power contained in the commerce clause, for example, authorizes congress to regulate interstate commerce directly; it does not authorize congress to regulate state governments, regulation of interstate commerce.
- (2) However this does NOT prevent the congress from using suggestive means just not coercive means... for example.
  - (a) "Congress may attach conditions on the receipt of federal funding... like the drinking age, and
  - (b) Congress has authority to regulate private citizens under the commerce clause, under an action that operates as "co-operation federalism": where the federal government and the State government can both have power over private citizens on an issue, and the federal government law can displace the state law, but the state is not responsible for carrying out the federal law (i.e. the state government cannot become an agency for carrying out federal laws)

\*\*\*The constitution gives Congress the power to make law regarding radioactive waste, and that they can preempt state law, but not sue to force states to carry out federal laws.

**D. The Taxing and Spending Power**

"The Congress shall have power... to lay and collect Taxes... to pay the debts and provide for the common defense and general welfare of the United States; but all **taxes shall be uniform** throughout the United States." Art. I, sec. 8 [1].

**Two Questions Always to ask when considering if an Act (law) of congress is constitutional?**

- 1. Does Congress have the Power?**
- 2. Is there a Constitutional LIMIT on that power?**

### **For What Purposes May Congress Tax and Spend?**

→interpreted by the courts broadly, *US v. Butler* has 10<sup>th</sup> Amendment limits that have not been seen since, but are anticipating come back in this more conservative court, like in *US v. NY* and *US v. Printz*.

*United States v. Butler (1936)*—The aggr. adjustment act declared that because of a crisis in agricultural production the secretary of aggr. among other powers could set limits on production of certain crops, and impose taxes on production of crops in excess of the limits... The court had a back and fourth argument between what James Madison and Alexander Hamilton wanted.

**James Madison:** believing that the N+P clause is tied to the previous 17 clause that come before it in Art. I); while

**Alexander Hamilton:** would believe that the N+P clause is not tied to the previous 17 clauses and is an independent power of congress.

\*\*\*Court holds that it was not in the N+P, by way of a **James Madison** argument (since tax and spend is independent of N+P, Congress cannot use N+P to justify).

\*\*\*Dissent: **NOW THE PREVAILING VIEW:**

1. Declaring a statute unconstitutional requires (1) when it violates the power to enact it, and not what it is, or (2) the exercise of the law is unconstitutional. **It is proper to defer to the legislative body.**
2. The power of congress to evoke taxes on agriculture is without question **(Power to tax).**
3. It is helping the general welfare (**controlling prices in the form of grants and taxes**).
4. There is no question that congress can give taxing authority to the department of agriculture (**and most importantly there is no problem with uniformity**).

**Chas. C. Steward March. Co v. Davis**—Commentary on the expansive view of congress taxing powers, beginning in 1937, when the court upheld the social security Act is tax provision that congress can enact (**remember this is post Lochner ear**).

*Sabri v. United States (1937)*—Can the Congress make a law that punishes for bribery, even when the bribe's only nexus is the amount of federal funds made available to the organization N+P?? **YES.** Because Money is fungible, bribed officials are untrustworthy stewards of federal funds—similar to corruption... It is enough that the government placed a large monetary benchmark in order to evoke the interest (\$10,000). Also, it is a means to a constitutional ends. **The dissent** argues that this should have been a commerce clause issue, and that this will allow Congress the opportunity to regulate things it has no business to be in, through a back door of providing funds.

### **Conditions on Grants to State Governments**

The court has reasoned that while it does not have the power to regulate state and local politics it does have the authority to regulate how the grant money is used.

*South Dakota v. Dole (1987)*—SD tries to violate the federal law regarding drinking age (Congress requires 21+ in order to receive highway funding), SD has something other than that, and sues for its funding back, court believes that is not a violation of federal spending power.

#### **4-part test for limitations on federal conditions for grants.**

- 1. The constitution:** The exercise of the spending power must be part of the general welfare of the country. → Highway safety is part of general welfare.
- 2. Condition must be unambiguously enable state to exercise choice:** Even if all of the states make the same choice... Only lose %5 of highway funds.
- 3. Must be related “to the federal programs or projects” :** some nexus between the funding and the action that the federal government wants out of the state government.
- 4. Constitutional provision may provide an independent bar to the conditional grant of federal funds:** There does not appear to be one according to Chief Justice Rehnquist.

*NFIB v. Sebilus (2012)*—The Health Care Case.

**Issues:** (1) Is the individual mandate constitutional?—**YES.** (2) Is the Medicaid expansion constitutional?—**No.**

#### **REASONING:**

### **Commerce Clause and the Necessary and Proper Clause**

On the issue of whether the individual mandate fell within the powers allotted to Congress under the Commerce Clause and Necessary and Proper Clause, no single opinion was joined by a majority of the Court. However, a majority of the Justices were of the opinion that the individual mandate did not fall under these powers.

**Chief Justice Roberts** would have held that the individual mandate lay outside Congress's Commerce and Necessary and Proper Clause powers, distinguishing the mandate from the federal prohibition on marijuana cultivation and possession upheld in *Gonzales v. Raich* in part on the ground that the latter regulated economic activity, while the individual mandate penalizes economic *inactivity*. \*\*\*Congress has the ability to regulate commerce, not force them into commerce.

**Justices Scalia, Kennedy, Thomas, and Alito** would have held that the individual mandate was unconstitutional, for similar reasons.

**Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan,** would have held that the individual mandate lay within Congress's Commerce Clause and Necessary and Proper Clause powers. Costs go off to everyone else, because the hospitals still serve people who do not have health care, and just because they opt out of the health care scheme does not mean that they are inactive of the health care market.

### **Medicaid Expansion**

On the question of the expansion of Medicaid, no single opinion commanded the support of

a majority of the Justices. However, a majority of the Court did find the expansion in some way unconstitutionally coercive and severed the coercive mechanism from the act.

**Chief Justice Roberts, joined by Justices Breyer and Kagan**, would have ruled that the Medicaid expansion could survive, but that states must be given the right to opt out of the expansion without losing their pre-existing Medicaid funding.

**Justice Ginsburg, joined by Justice Sotomayor**, would have upheld the Medicaid expansion in its entirety (with non-participating states losing all their federal Medicaid funding).

**Justices Scalia, Kennedy, Thomas, and Alito** would have struck down the Medicaid expansion completely (along with the entire Act).

## **E. Congress's Powers Under the Post-Civil War Amendments—BLUE SHEET!**

Use flashcards to memorize this AND the tests (rational basis, intermediate, etc)!

### **13<sup>th</sup> Amendment—Abolition of Slavery**

§ 2: "Congress shall have power to enforce this article by appropriate legislation."

§1: "Neither slavery nor involuntary servitude, except as punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

\*\*\*THIS IS THE ONLY amendment that directly applies to private citizens, because it would be useless if the state could not stop private citizens from enslaving people.

### **14<sup>th</sup> Amendment—Civil Rights** (Citizenship; Privileges or immunities; due process; equal protection)

§5: "The Congress shall have power to enforce, **by appropriate legislation**, the provisions of this article." –Very broad, allows the Congress to make and enforce law.

§1: "...No State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### **15<sup>th</sup> Amendment—Suffrage**

§2: "The Congress shall have power to enforce this article by appropriate legislation."

#### **1. Whom May Congress Regulate Under the Post-Civil War Amendments?**

*United States v. Morrison (2000)*—The VAMA case that had already lost on commerce clause grounds was also challenged on 14<sup>th</sup> Amendment §5 grounds. However, the protection of woman could not be justified because §5 protects against the state or state actors, not PRIVATE citizens. That would be police power, reserved for the states.

## 2. What is the Scope of Congress's Power

**Narrow:** Accords congress only authority to prevent or provide remedies for violations of rights recognized by the Supreme Court; under this view, Congress cannot expand the scope of rights or provide additional rights.

**Alternative:** Also accords Congress authority to interpret the Fourteenth Amendment to expand the scope of rights or events to create new rights. Under this view, Congress may create rights by statute where the court has not found them in the constitution, but Congress cannot dilute or diminish constitutional rights.

*Katzenbach v. Morgan & Morgan (1966)*—NY law was in violation of the VRA, majority held that the NY law could not be enforced (it was going to prevent or disenfranchise PR voters by way of English requirement). However, the dissent later becomes the thought process for the majority in future cases, as the concept of Congress overstepping its authority to create laws under the 14<sup>th</sup> Amendment with the Supreme Court not already giving them permission to do so through prior case law... Congress has to act according to a playbook, the playbook being the cases that the Supreme Court uses to expand the rights of citizens under the Amendment, and the Congress can not act beyond that... and they did here...

*City of Boerne v. Flores (1997)*—A church needed to expand, but the city ordinance prevented it from doing so, then the church sued the city under the RFRA claiming that it could ignore the city ordinance due to religious right. However, the Court held that RFRA was not a proper use of §5 of the 14<sup>th</sup> Amendment by Congress. The stringent test the RFRA demands of the State laws reflects a lack of proportionality between the means adopted and the legitimate end to be achieved. Therefore, the RFRA is not a proper exercise of Congress' §5 power to "enforce" by "appropriate legislation" the constitutional guarantee that no state shall deprive any person of "life, liberty, or property without the due process of law" nor deny any person "equal protection under the law."

\*\*\**We do not have a history of discrimination on religious grounds (usually racial).* The voting rights act was dealing with a long history of voting discrimination, the judicial branch did not recognize racial discrimination, especially things like voting.

→Look to the history of the 14<sup>th</sup> amendment, Congress committee actually purposed a version of the amendment that would have given congress broader power, but that was struck down, and then re-written to give congress less power, and that was the version that was adopted. No longer plenary but remedial.

→So the power to determine the power of the 14<sup>th</sup> amendment, the congress must rely on what the judiciary decides.

→OTHERWISE, we would be allowing the Congress to treat the Constitution like a general piece of legislation, which would allow the Congress to constantly change the constitution with a simple majority vote.

**Proportional and Congruent:** The means must be a congruent and proportionality between the discrimination and the Congressional Action... THIS is called the **Boerne Test**.

**F. Congress's Power to Authorize Suits Against State Governments**

**1. Background on the Eleventh Amendment and State Sovereign Immunity**

**2. Congress's Power to Authorize Suits Against State Governments**

**a. The Basic Rule: Congress May Authorize Suits Against State Pursuant Only to §5 of the Fourteenth Amendment**

**LIMITS on Congress's (and Judiciary) Power:**

**11<sup>th</sup> Amendment:** "The Judicial power of the U.S. shall not be construed to extend to any suit... against one of the United States by Citizens of another State, or by Citizens ... of any foreign state." (state sovereignty).

→The 11<sup>th</sup> amendment was a response by Congress to the *Chisholm* case where a citizen from AL sued the state of GA for damages (without the consent of the state of GA). The π won the case, and there was outrage by all of the states, an amendment to the constitution to undo the outcome was passed by Congress within a matter of weeks, and ratified within a year (back in the 19<sup>th</sup> Century).

**Prevailing View:** Forbids ANY suit against the Government (State sovereign Immunity) AND in a case, *Hans*, a court reasoned that the 11<sup>th</sup> Amendment is restriction citizens of a state from suing their own states...

**NOT prevailing view:** Affects Diversity Jurisdiction cases.

**Three ways around the 11<sup>th</sup> Amendment in Federal Court .**

- 1. Sue State Officers for injunctive relief (or damages to be paid by them, but NOT when it is the state treasure would have to pay for the wrong)**
- 2. State Waives Immunity (gives consent):** States often give consent when it is responsible for actions (classically in torts) where it may be responsible, and want the victim to have the opportunity to win on the merits.
- 3. Congress may authorize (using 14<sup>th</sup> amendment §5 powers) suits against State governments. Which means if a private citizen believes that their rights under a law, which was created by congress under Congress's 14<sup>th</sup> Amendment §5 powers, THEN (and only then) can a private citizen abrogate the States' 11<sup>th</sup> Amendment sovereign immunity. Congress can't create the right, only enforce (*Biltzer*).**

*Shelby Country v. Holder (2013)*—§4(b) (the formula for deciding which state has to be further reviewed) of the VRA was found unconstitutional, due to the fact that it is a heavy burden, and there is no longer data to suggest that it is necessary (no more discrimination...). **Thomas** would have repealed the whole law because this will happen again under the

new formula (which has never been written), and **Ginsburg** would not have repealed anything because Congress followed the playbook, acted appropriately, and was renewing this law all along the way.

*Fitzpatrick v. Biltzer (1976)*—Can congress abridge 11<sup>th</sup> Amendment sovereign immunity by exercising its authority under §5 of the 14<sup>th</sup> amendment? **YES**. §5 of the 14<sup>th</sup> Amendment is an exception, because congress can enact legislation to enforce the Amendment (which other amendments lack), thus it can use states for failing to uphold the protections of the Civil Rights Act of 1964 (a law that was created utilizing §5). **Remember, the 14<sup>th</sup> Amendment was written with the 11<sup>th</sup> Amendment in mind, and §5 of the 14<sup>th</sup> amendment expressly gives the Congress the power to write laws that enforce the Amendments protections, specifically against whatever state actions could occur.**

*Seminole tribe of Florida v. Florida (1996)*—May Congress allow suit against a non-consenting state under the **Indian Commerce Clause (or the commerce clause for that matter???)**—**NO**. (1) The abrogation of 11<sup>th</sup> Amendment State sovereignty has to be unequivocally stated (**congress must clearly state that it is abrogating the 11<sup>th</sup> amendment**); and (2) the abrogation has to be authorized under the constitution (**congress must have constitutional authority to do so**). →The Indian Gaming Regulatory Act was created under Art. I, and only 14<sup>th</sup> Amendment §5 cases have 11<sup>th</sup> amendment immunity. The dissenters argue that 11<sup>th</sup> amendment is designed to prevent citizen suits, this is not a citizen, it is a sovereign.

**b. Cases Denying Congress Authority to Act Under §5 to Authorize Suits Against State Governments**

\*\*\*After *Seminole Tribe* it is clear that Congress may authorize suits against state government only when it is acting pursuant to §5 of the Fourteenth Amendment. Therefore, the scope of Congress's power under the provision became crucial.

*Kimel v. Florida Board of Regents (2000)*—Challenge to a State College's hiring practice as a violation of the ADEA (age discrimination). Does the ADEA contain a clear statement of congress's intent to abrogate the state's 11<sup>th</sup> Amendment rights? **Clear, but not appropriate**. Congress may abrogate the States's constitutionally secured immunity from suit in federal court only by making its intentions unmistakably clear in the language of the statute, **which it does. HOWEVER**, to see if congress has the constitutional authority to make the law, look to case to see that congress can only do so when it has 14<sup>th</sup> Amendment §5 ability to do so. AND age discrimination is not protected by the 14<sup>th</sup> Amendment. Dissent

believes that Congress, not the court should decide which groups of people need to be protected.

c. **Congress's Greater Authority to Legislate Concerning Types of Discrimination and Rights that Receive Heightened Scrutiny**

**Strict Scrutiny:** It must be necessary to achieve a compelling government purpose.  
→Discrimination **based on RACE, RELIGION, NATIONAL ORIENTATION, ALIENAGE. Or infringement of fundamental rights** (speech, ability to carry guns, quarter soldiers, double jeopardy).

**Intermediate Scrutiny:** It must be substantially related to achieving substantial government purpose. **GENDER, Children of unmarried spouses.**

**Rational Basis Test:** Rationally related to government interest.

Nevada Department of Human Resources v. Hibbs (2003)—A man utilized his time off from work under the FMLA, and wants to sue his employer (the state) for a violation, the court held that he can because the law was created utilizing §5—and the law is a congruent and proportionate to the target violation, and intermediate scrutiny was appropriate when deciding the constitutionality of the law (sex).

**VIOLATION:** Congress found that employers were disproportionately gave time off to care for family to women. This means that men were unable to receive same benefit, AND make women less marketable to employers.

**TARGET:** Was to equalize gender in the workplace for time off, by guaranteeing everyone 12 weeks off per year to care for family.

**PERPORTIONATE:** because it set a minimum standard, it alleviated a former state-sanctioned violation of equal protection.

3. **Congress's Power to Authorize Suits Against State Governments in State Courts**

*Alden v. Maine (1999)*—Group of probation officers were denied OT, and sued under FLSA. But a state cannot be sued without consent within the state.

(1) tradition, states have to consent,

(2) FLSA is authorized by Art. I, NOT §5 of the 14<sup>th</sup> Amendment.

**Dissenting:** A state should not have absolute sovereign immunity from federal laws within their state courts.

(1) It does not follow tradition, many states were not seen as sovereign entities before the revolution, and only saw sovereign immunity as an aspect of the crown,

(2) Congress must have requisite power, because the Federal government can sue states for violating state law,

(3) If only the federal government can make the suit against eh state on the behalf of the wronged party, then the entire system will become inefficient.

## IV. The Federal Executive Power

President' Power arises from:

1. Express Act of Congress (Congress can allocate certain responsibility to the president... however congress is limited in how it can do so); and/or
2. Express Constitutional Provision:  
**Vesting Clause:** "The executive Power shall be vested in a President." Art. II §1.  
**Take Care Clause:** He shall take Care that the Laws be faithfully executed. Art. II, § 3.  
**Commander-In-Chief Clause:** "He shall be Commander in Chief of the Army and Navy of the United States." Art II, §2.  
**(Pardon power, treaty power, appointment power);** and/or
3. "Inherent" Authority (does that even exist?) ... NO, over time there is an undefined, twilight zone, of power derived from the executive.  
-->For Example, The president is to speak for the nation for foreign affairs, and when congress wants to allocate authority it may do so without limit.

### A. Inherent Presidential Power

#### **Federal Executive Power (Art. II)**

"The executive Power shall be vested in a President of the United States of America."

#### **Compare Federal Legislative Power (Art. I).**

"All legislative powers **herein granted** shall be vested in a Congress of the United States."

\*\*\*Under the Hamilton view, this is expansive (for the president), there is no enumerated powers of the president mentioned here for the President, while there are enumerated power for congress.

\*\*\*Under Madison, this is just a housekeeping issue.

*Youngstown Sheet & Tube Co. v. Sawyer (1952)*—The President argues that as Commander in Chief this is a war related decision (to seize the steel factories and put the workers back to work), however, even under the expanding concept of "theater or war," the President cannot have the ability to seize steel factories that should be an issue left to lawmakers not the President. This is because it takes Congress to also go to war, the President can only merely direct the military and take action when action needs to be taken immediately, (so the president could immediately take the factories, and turn them over to congress to decide what to do with).

#### **THERE ARE THREE WAYS TO LOOK AT PRESIDENTIAL POWER**

**(1). President's power is at a MAXIMUM when she acts pursuant to congress's authorization (express or implied).** When the President acts pursuant to an express or implied authorization of Congress, his authority is at

its maximum when he acts pursuant to Congress's authorization (express or implied).

**(2) The President's power is at MEDIUM (relies only on President's own independent power) when he acts in absence of Congress's authorization (silent).** When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain.

**(3) The President's power is at LOWEST when he acts in a way against Congress's will (express or implied).** When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

**POWERS CONSIST OF:**

- President's own constitutionally-granted power,
- MINUS any power that Congress has over the matter.

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

*United States v. Richard M. Nixon, President of the United States (1974)*— President Nixon refused to comply with a court order Subpoena duces tecum to provide Oval Office Tapes in the Watergate investigation due to absolute privilege created by the executive branch of government. In a unanimous decision the court held that the President did have to turn over the tapes.

*\*\*\*The President does NOT possess an absolute generalized privilege to keep secret all communications with advisors and others.* E.g. he may not withhold materials relevant to a pending criminal prosecution. HOWEVER, the court did recognize that there are times when confidentiality is within the national interest.

**B. The Authority of Congress to Increase Executive Power**

**TWO VIEWS...**

- (1)** When Congress and the President agree, then the court cannot get involved;
- (2)** Always enforce separation of powers doctrine.

*William J. Clinton, President of the United States v. City of New York (1998)*—Can congress give the president a line item veto??? **NO—Congress does not have the authority to grant this power to the president, notwithstanding the fact that it makes a lot of sense, and is widely agreed upon.** Lawmaking (Art I, §7) "Every Bill which shall have passed the House and the Senate, shall, before it becomes a law, be presented to the President of the United States; IF he approves he shall sign it, but if not he shall return it... if after such reconsideration two thirds of House shall agree to pass the bill, it shall be sent to the house... if approved by the other house become law." **This would interrupt in the process laid out in the constitution, can only be changed by an amendment.**

\*\*\*Dissenting opinion points out three reasons why that argument is not true.

- (1) Congress had the ability at the founding to submit individual bills to the president... thus the line item veto was never necessary (and constructively always there).
- (2) Congress has all legislative power, thus the congress has the ability to write a law that changes how the federal government operates as long as it does not violated something enumerated in the constitution. President has all executive power, this would not change that.
- (3) No dispute between branches of government, when both branches and major parties agree, the court should not get involved.

### C. The Constitutional Problems of the Administrative States

Broad power, difficult to have oversight.

#### 1. The Non-delegation Doctrine and Its Demies

Concept that congress cannot give particular powers to agencies (even if it wanted to dominated the court in the 1930s as it struck down New Deal Legislation).

*Whitman v. American rucking Association, Inc. (2001)*—In almost 70 years in-between *Panama Refining Co. v. Ryan (1935)* and *Whitman*, there was no use of the non-delegation doctrine, but it could be coming back, but that is doubtful...

#### 2. The Legislative Veto and Its Demise

*Immigration & Naturalization Services v. Jagdish Rai Chadha (1983)*—An INS court ruled that Chada met the requirements for staying, this is then submitted to the Attorney General, and this is given to the House to affirm. HOWEVER, the House passed a resolution that ordered deportation of various people including Chada. **Was the action of one House of Congress alone a violation of structure of the constitution?? YES IT WAS!!! WHY— Presentment clause, and bicameral requirement.** The presentment clause is a limitation on congress, all laws must got o the president, because if the congress is able pass something that President thinks is unreasonable it cannot pass. ALSO the bicameral requirement is a necessary aspect, because the House is built to represent the interest of small states, while the Senate is built to protect the interest of highly populated states.

**ONLY FOUR AREAS WHERE A HOUSE OF CONGRESS CAN ACT ALONE:**

1. **HOUSE—brining Article of Impeachment.**
2. **SENATE—Convicting of Impeachment.**
3. **SENATE—Affirming of executive appointments.**
4. **SENATE—Ratify treaties.**

**\*\*\*Thus Congress no longer has administrative veto.**

### **3. Checking Administrative Power**

- Statutes (Congress)
- Budget (Congress) Power of the purse strings.
- Appointment Power (President and Congress).

#### **The Appointment Power (Art. II, §2).**

[2] “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and consuls, Judges of the Supreme court, and all other Officers of the U.S. ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

→ This means that while the Senate confirmation is required for the enumerated offices, all of the inferior officers for the federal government can be appointed by the president AND WITHOUT Senate confirmation.

*NLRB v. Noel Canning (2014)*—Can the President fill vacancies utilizing the Recess Vacancy Clause (Art, II §2 cla. 3) when the Senate is: (1) openings that occur before the recess, (2) openings that come about during the recess, AND is a recess just the time between congress’ or do they include the substantial breaks that congress takes mid term (like summer vacation) and refers to as recess as well? AND does it apply to pro forma sessions? **Applies to all EXCEPT pro forma. \*\*\*If a Senate recess is so short that it does not require consent of the House, then it is too short to trigger the Recess Appointment clause.**

\*\*\*Also, keep in mind that, although Scalia would only see the true recess (inter session, when it does not know when it will be meeting again as a recess), the court keeps the summer vacations and other long breaks as recess, the only time that it is concerned about is when the Congress adjourns on a pro forma, where it can technically still meet at any time to take care of any business (since the Senate has its own rules, which only require a quorum to do a vote, which quorum is always achieved as long as no one disputes it... even two people).

#### **Removal Power Implied**

- General rule: President may fire any executive official.
- BUT, Congress may limit removal by statute if both:
  - (1) It is an office where independence from the President is desirable;  
AND
  - (2) The statute does not prohibit removal, but limits it to where there is good cause.

### **The Impeachment of Andrew Johnson**

→ Andrew Johnson was acting contrary to the wishes of the Northern Republicans leading reconstruction, Secretary of War Edwin Stanton openly challenged the President's authority, Johnson removed him in violation of the law, Congress impeached Johnson, but the Senate failed to convict by one vote.

## **D. Separation of Powers and Foreign Policy**

### **Treaty Power**

- President "Shall have Power, by and with Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."
- But—executive Agreements also have force of treaty.

Should the Constitution be read to give the President more power with regard to the international affairs??? (Probably).

### **1. Are Foreign Policy and Domestic Affairs Different?**

*United States v. Curtiss-Wright Export Corp. (1936)*—Congress passed a resolution authorizing the President to stop sales of arms to countries involved in the Chaco border dispute... FRD immediately issued an order prohibiting ammunition and guns sales to warring nations... Curtiss Wright Export did it anyway... **Could the congress delegate this to the President? YES!!!** The President is the sole organ of foreign affairs, he is acting pursuant to a resolution of congress, BUT the court does not seem to think that was even necessary—the president already had this power inherent to the authority of foreign affairs. The president is virtually unlimited in power of foreign affairs, The usual limits of the Constitution do **NOT** apply.

### **2. Treaties and Executive Agreements**

Art II §2 states that the President "Shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

An executive agreement, in contract, is an agreement between the United States and a foreign country that is effective when signed by the President and the head of their government.

→ Treaty = Senate Approval required.

→ Executive Agreement ONLY the President and other foreign head required.

*Dames & Moore v. Regan, Secretary of the Treasury (1981)*—Dames and Moore are most likely upset that they have pending damages against Iran that are being excused by the arbitration tribunal... **Can the president and**

**the secretary of the treasury enter into agreements with other countries to settle claims?? YES!!!** Congress created a procedure to implement future settlement agreements (when it allowed International Claims settlement Act of 1949, and the 10 subsequent agreements the President was able to infer that he had the authority to act the way he did.

## **E. Presidential Power and the War on Terrorism**

### **1. Detentions**

**Art. I §9 [2]:** “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when is Cases of Rebellion or Invasion the public Safety may require it.”

*Hamdi v. Rumsfeld (2004)*—Does the President have the power to detain enemy combatants??? Does Hamdi (American Born) have a right to habeas corpus petition in federal court???? **Yes Enemy combatants can be detained, and the plurality decided that he is entitled to a habeas corpus petition.**

### **War on Terror Cases**

To decide what “due process” a U.S. citizen “enemy combatant” must receive, the Court weighs:

Since Process is due, what do we have to look at? **The Matthew’s 3-factor test:**

- 1. The Private Interest that will be affected by the official action.**
- 2. The Government’s interest (including burdens the Government would face in providing greater process).**
- 3. Probable value of additional process (i.e., but reducing the risk of error).**

**Notice in hearing to rebut the government’s presumption that the person is an enemy combatant.**

Government concerns: Security v. Liberty.

- We don’t want enemy combatants returning to the battlefield.
- We don’t want military personnel to spend their time collecting evidence.
- BUT we are concerned about the liberty of the detainees.

*Boumediene v. Bush (2008)*—Petitioners are at Guantanamo bay Cuba, they have been taken from the battle filed, and determined to be enemy combatants and are being denied a Habeas petition where they could prove that they are not enemy combatants, and argue that **their holding is in violation of the Suspension Clause, Art. I §9 cl. 2. YES, it is an violation of the Suspension Clause.** Scalia believes that the writ should not apply to non-citizens.

### 3 Factors relevant in determining reach of Suspension Clause

- A. The citizenship and status of the detainee and the adequacy of the process through which the status determination was made,
- B. The nature of the sites where apprehension and then detention took place, and
- C. The practical obstacles inherent in resolving the prisoner's entitlement to the writ.

## F. Checks on the President

### 1. Suing and Prosecuting the President

#### Immunity

→ **Absolute Immunity**—President has complete protection from Civil Suit for all official actions while in office.

\*\*\***BUT** can a sitting president be criminally charged??? We really don't know.

*Richard Nixon v. A. Ernest Fitzgerald (1982)*—Fitzgerald sought civil damages from the President after he had been fired—claiming wrongful discharge.

**Does the President have immunity? YES!** This immunity only extends to official actions of the President, AND the President is STILL subject to impeachment as well as the constant scrutiny of the media. **Dissent looks to Marbury v. Madison**—US is a government of laws not men.

*William Jefferson Clinton v. Paula Corbin Jones (1997)*—President Clinton asked for temporary postponement of his civil action with Paula Jones. In all three prior cases of a President trying to postpone, the first two settled before taking office, and the third was denied... The court decided that the President would be able to take care of his legal issue without interference with his duties as President.

### 2. Impeachment

“The president, vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and misdemeanors.” (Art. §4).

→ Remember, THIS is entirely decided by the House of Representatives.

## VI. Limits On State Regulatory and Taxing Power

### A. Preemption of State and Local Laws

**Supremacy Clause:** “This Constitution, and the Laws... and all treaties... shall be the supreme Law of the Land and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.”

1. **Express Preemption**—Not difficult, clear language of statute.
2. **Implied Preemption**—Three ways to describe (not mutually exclusive).
  - a. **Conflicts Preemption**—Where compliance with both federal and state regulations is physically impossible (remember keep in mind Congress’s intent).

*Florida Lime & Avocado v. Paul, Director of the Department of Agg. of CA. (1963)*—CA requires Avocados sold in state have 8% oil amount before they can be sold, this upsets FL growers who operate at the lower federal standard. **Does federal law preempt???** **NO!!** The Florida grower could have just left the avocados on the vine longer for the ones going to CA to satisfy the state law. Also, that was a floor not a ceiling by Congress.

- b. **Preemption Because State Law Impedes the Achievement of a federal Objective**—Where state/local law impedes the achievement of a federal objective.
  - c. **Preemption Because Federal Law Occupies the Field**—Where the scheme of Federal regulation is so pervasive that reasonable inference is that Congress left no room for States to supplement it.

*Arizona v. United States (2012)*—The State of AZ created a controversial law to “protect its boarder” which punishes the employees instead of the employer (which now contradicts the method of criminalization that the federal government had focused on). Through executive action the Federal Government did not want AZ to deal with immigration this way, and claims preemption over the entire field of boarder security. **Does the federal government preempt the Arizona law? YES!!!!** Congress and the President have the shared duty of boarder protection, and that does not involve the states. Thus the federal government can occupy the whole field, and preempt any state law. Scalia does not believe that there ever be such a thing as field preemption...

- B. **The Dormant Commerce Clause**—is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. There is

no constitutional provision that expressly declares that states may not burden interstate commerce. Rather, the Supreme Court has inferred this from the grants of power to Congress in Art. I, §8 to regulate commerce among the states.

**\*\*\*In absence of Congress action, the judiciary determines that a state/local government is placing an undue burden on interstate commerce.**

1. **Why a Dormant Commerce Clause?**—The critical issue with regard to the dormant Commerce Clause is whether the judiciary, in the absence of congressional action, should invalidate state and local laws because they place an undue burden on interstate commerce.

#### **Three justifications for the Dormant Commerce Clause...**

1. **Historical Argument:** The framers intended to prevent state laws that interfered with interstate commerce.
2. **The Economic Justification:** The economy is better off if state and local laws impeding interstate commerce are invalidated.
3. **The Political Argument:** States and their citizens should not be harmed by laws in other states where they lack political representation.

**Thomas's reasons against the Dormant Commerce Clause:** Textual argument, the power is not in the constitution, furthermore, it should be the role of the Congress to act affirmatively with the commerce clause power to legislate state laws that it does not like out of effect, NOT the role of the courts to render the state laws invalid.

*H.P. Hood & Sons v. Du Mond, Commissioner of Agriculture of New York (1949)*—Is NY violating the commerce clause by denying the Massachusetts milk corporation the ability to expand within the state of NY?? **YES.** States have the ability to foster safety and protect citizens from health hazards, and fraud, but the constitution prevents States from acting to protect commerce and economical advantage... Every farmer, craftsman, etc, has the right to access all markets within the United States.

“The peoples of the several states must sink or swim together, and that isn't the long run prosperity and salvation are in union and not division.” Justice Cardozo.

→Laws that advantage in states while disadvantaging other states violates that principle.

## 2. **The Dormant Commerce Clause Before 1938**

The Marshall Court made it clear that States could not make laws in interstate commerce because that was an area reserved for Congress,

however, there was an exception to things that related to a state's police power.

*Aaron V. Cooley v. The Board of Wardens of the Port of Philadelphia (1851)*— Can Philadelphia require all pilots entering their port to be local or force the non-conforming parties to pay a fine without violating the commerce clause??? **YES—because the first congress wanted individual states to have police power over this area of law.** HOWEVER, limited to local matters, the law might not be constitutional when applied to national matters (or matters that are uniform, or not unique to local commerce)—the **Cooley Test—but where do we draw the line between local and national?? Ambiguous...**

### **3. The Contemporary Test for the Dormant Commerce Clause**

#### **a. The Shift to a Balancing Approach**

#### **b. Determining Whether a Law is Discriminatory**

THE QUESTION IS—determining whether the state law is discriminatory against out of staters!

→ If the State law treats out of state people differently than in state people then there is a strong presumption against the law and it will only be upheld if it is necessary to achieve an important purpose...

→ The founders were concerned about protectionist state legislatures, and also figured that if the state law applied equally to in state citizens and out of state citizens then most of the people affected by the law actually get to participate in the political process.

#### **DORMANT COMMERCE CLAUSE 2-PART Analysis:**

##### **(1) Discriminatory Purpose?**

- If **YES** struck down without question.
- If **NO** go to step 2, balancing...

##### **(2) Balancing**

- **Discriminatory on FACE**—strict scrutiny like test.
- **Discriminatory in EFFECT**—intermediately scrutiny + like test.
- **Evenhanded**—rational basis like test.

#### **Facially Discriminatory Laws**

*Granholm v. Heald (2005)*—Were NY and MI laws that prohibited online sale of wine while allowing in state online sale of wine a violation of the commerce clause discrimination (or was it permissible use of §2 of the 21<sup>st</sup> Amendment)??? It was a violation of the Commerce clause. The 21<sup>st</sup> Amendment would make it possible for MI and NY to BAN ALL online sale of wine, because it has the authority to regulate the sale of alcohol, but if they were truly concerned about minors obtaining alcohol or tax evasion

then the law is not valid, because just as likely with in state online sale.  
**Discriminatory in effect—Intermediate scrutiny +.**

*Hughes v. Oklahoma (1979)*—OK state law prohibited the sale of minnows that were gathered within the state to be sold out of state. Does the ecological concerns of the state abridge the discriminatory practice of limiting the sale of the minnows? **NO**, if the state was truly concerned about removing too many minnows then it should have restricted the number to be taken out, NOT where they can be sold.

→the court accepts that there is a health safety and wellness reason for the law, HOWEVER, there are nondiscriminatory alternatives, and that is not met!

### **Facially Neutral Laws**

“A court may find that a state law constitutes ‘economic protectionism’ on proof either of discriminatory effect or of discriminatory purpose.”

*Hunt, Governor of the State of North Carolina v. Washington State Apple (1977)*—NC passed a law which prohibited the use of apple grading labels other than the USDA’s, however, the State of Washington, known for its apples, utilizes a higher standard known very well in the apple trade, Washington argues that even though it is NOT facially discriminatory, it is discriminatory in effect, (1) more expensive to change the apple box grades/labels, (2) not able to use their higher grade that they pay a lot for, and (3) unable to utilize their higher quality at the market to distinguish from competition. → Strict scrutiny + AND NC failed to meet its burden of proving that there was a compelling state interest.

*West Lynn Creamery, Inc. v. Healy, Commissioner of Massachusetts (1994)*—Massachusetts creates a tax on all dairy farmers, and the revenue goes back to the in state dairy farmers, but 2/3 of all dairy sold in the state comes from out of state, which means out of state farmers are subsidizing in state farmers. The State argues that it has the constitutional authority to enact the tax, and that the tax is non-discriminatory since the tax applies to all milk and not just the milk that is coming from out of state... *HOWEVER*, The purpose and effect of the tax is to divert the market share to in state dairy farmers. This diversion necessarily injures the dairy farmers in neighboring states, which is a form of preservation of local economic protection, which the commerce clause prohibits. *Political accountability issue*, The only dairy farmers who get to participate in this state’s political system are the ones who benefit from the tax revenue.

### **Analysis If a Law is Deemed Discriminatory**

→Most cases are found to be discriminatory laws and struck down... but not *Main v. Taylor*...

*Maine v. Taylor & United States (1986)*—State bans a particular species of minnow is banned from importation into the state (usually used for bait). Citizen who wants to import argues that the state's ban is in violation of the commerce clause, however the state makes three ecological arguments for why the law is in fact a necessary police power.

- (1) Maine's population of wild fish—including it won indigenous minnows, could be placed at risk by three types of parasites prevalent in out of state baitfish.
- (2) Nonnative species inadvertently included in shipments of live baitfish could disturbed Maine's aquatic ecology
- (3) There is no satisfactory way to inspect the shipments of baitfish coming into the state to see if the parasite is present (because they are tiny, and the shipments are huge).

SO, **Main won!** "The States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected."

c. **Analysis if a Law is Deemed Non-discriminatory**

**Balancing Test**—the conservative justices don't agree with it, but the court tends to favor a balancing test of the reason for the discrimination (like ecological concern) against the economic discrimination.

*American Trucking v. Michigan PSC (2005)*—MI has a \$100 tax on trucking intrastate. The fee is NOT in violation of the commerce clause. The fee does not impose any significant practical burden upon interstate trade. The fee seeks to defray costs such as those of regulation "vehicular size and weight" of administering insurance requirements and of applying safety standards.

d. **Exceptions to the dormant Commerce Clause**

**Congressional Approval** →When Congress, utilizing its plenary powers in interstate commerce, creates a law that allows states to create a law that would otherwise violate the dormant commerce clause (IT CAN).

*Western & Southern Life Insurance Co. v. States Board of Equalization of California (1981)*—Congress created a law, the McCarran-Ferguson Act, which decided that insurance taxation could be completely decided by states (decided that there was a benefit to states giving incentive to in state insurance companies through taxes). CA took advantage of this, and an OH company sued and lost, the CA law was ok, because it was pursuant to an act of congress. The act placed no limit on how the states could tax and regulate insurance companies, and the act placed no limit on what

qualified to create the tax, all while the statute gives the state the ability to make the tax and apply it to insurance companies.

**The Market Participant Exception**—If the state is literally a participant in the market, such as with a state-owned business, and not a regulator, the dormant Commerce Clause does not apply.

*Reeves, Inc. v. William Stake (1980)*—In order to meet the state's increased demand for cement, the state built a cement factory. Then the factory started supplying out of state companies... BUT then there was a huge shortage one year, and the company made sure to fill in state orders first, and then only use what was left to fulfill out of state orders on a first come first serve basis. A frustrated out of state company sued, but lost because the cement factory, although state owned, was acting within its power as a company in the market.

\*\*\*The purpose of the dormant commerce clause is to limit state interference with private companies participating in interstate commerce, however, when the company is state owned, then it should serve a state purpose, and not the same duty to provide for all people as a private company would, therefore if a state policy were to have a state owned company favor the in state purchasers it would not infringe upon the dormant commerce clause.

*White v. Massachusetts Council of Construction Employers, Inc. (1983)*—The city made an ordinance to prefer locals to work on projects that are paid for with public funds, this is also a proper exception to the dormant commerce clause, because when the city utilizes its own funds for the construction, then it is in effect entering the market, and can do anything that a private company would have the ability to do in the same situation.

*South-Central timber Development, Inc. v. Commissioner, Department of Natural Resources of Alaska (1984)*—AK makes a law that demands that Timber purchased from the state has to be processed at an in state company. South-Central purchased the timber thinking that it could ship it to its Japanese partner to be processed. AK and the dissent argue that this was proper because AK was essentially selling at a discount with this requirement attached, as a private company can do, however, the majority decided that this was a violation of the private separate economic relationships of its trading partners, that is, it restricts the post-purchase activity of the purchasers, rather than merely the pre purchasing activities.

**WHAT MAKES AN entity a participant in the market????**—Take the State name off of a business, and see if the action would still be legal (so, market participant exception does not apply when the state makes decisions that private companies physically could not have).

## C. The Privileges and Immunities Clause of Article IV, §2

### 1. Introduction

“The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” Art. IV, §2.

→The section in effect, prevents a state from discriminating against citizens of other States in favor of its own.

→The term CITIZEN, is a **person** who is a citizen of the United States (NOT a corporation or a resident alien).

What are the “Privileges and immunities” covered by this clause? (e.g. that “ear upon the vitality of the Nation as a single entity”)??

- Constitutional Rights (e.g. bill of rights)
- Important Economic Activities (e.g. ability to earn a livelihood).

There is a mutually reinforcing relationship between the Privileges and Immunities Clause and the Dormant Commerce Clause.

→Because they both prevent discrimination against out-of-staters...

### **However, there are three main differences...**

1. The Privileges and Immunities Clause can be used only if there is discrimination against out-of-staters. The dormant Commerce Clause, can be used to challenge state and local laws that burden interstate commerce regardless of whether they discriminate against out-of-staters.
2. Corporations and aliens can sue under the Dormant Commerce Clause, but NOT under the Privileges and Immunity Clause... The privileges and immunities clause is expressly limited to citizens where as no such limitation exists with regard to the dormant commerce clause.
3. The two exceptions to the Dormant Commerce Clause (Congressional Approval, and Market Participation by the states), do not apply to the privileges and immunities clause.

### 2. Analysis Under the Privileges and Immunities Clause

#### **TWO QUESTIONS:**

1. Has the state discriminated against out-of-staters with regard to privileges and immunities that it accords its own citizens?
2. If there is such discrimination, is there a sufficient justification for the discrimination?

\*\*\*Not absolute, but creates a strong presumption against the state when it creates a law that discriminates against out-of-staters. However, it can be justified.

**What Are the “Privileges and Immunities of Citizenship”?**

→Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly perceive for the general good of the whole.

\*\*\*Only apply with respect to those privileges and immunities bearing upon the vitality of the Nation as a single entity...

\*\*\*Sufficiently fundamental to the promotion of interstate harmony.

**TWO CONTEXT:**

- (1) When a state is discriminating against out-of-state with regard to constitutional rights (which could be taken care of through applying the bill of rights to the states through the Fourteenth Amendment), and
- (2) When a state is discriminating against out-of-staters with regard to important economic activities (bigger focus).

*Toomer v. Witsell (1948)*—IN order to shrimp, you need a license, \$25 for in state, and \$2,500 for out of state. State claims that it needs to do so to protect the shrimp... but the Court argues that it could have achieved this without restricting the sale of shrimp licenses to out of staters...like placing stricter limits on the number of shrimp everyone can take...

*United Building & Construction Trades Council of Camden County v. Mayor & Council of the City of Camden (1984)*—City of Camden created a municipal ordinance that at least 40% of the employees of contractors and subcontractors working on City construction projects must be residents of Camden... **Is the Privileges and Immunities Clause applicable to protect people from municipality discrimination??? Even when others in the state are discriminate against?? AND does the fact that the discrimination is only in employment protection???**

\*\*\*The court held that it does apply to municipal governments, under all of those conditions. Also, the ability to seek employment is a protect right.

*Lester Baldwin v. Fish & Game Commission of Montana (1978)*—Out of state hunters were required to pay more for licenses for hunting particular animals... a few hunters who did not live in state decided to sue for a violation of privileges and immunities. **However, the court held that this was not a violation, because hunting is recreational, not a fundamental right (or fundamental economic interest).**

\*\*\***JUST LIKE COLLEGE EDUCATION:** it is not a fundamental right, therefore states can charge different tuition for in state students and out of state students.

→ALSO, this would be a dormant commerce clause issue (and exception) because the school is charging different amount for tuition, but so could a private school if it wanted to, because it is in the Market exception...

### **What Justifications are Sufficient to Permit Discrimination?**

The Court repeatedly has stated that Privileges and Immunities Clause is not absolute. There is discussion in the above cases as to what interests are sufficient to permit discrimination. The court's most detailed consideration for this issue is in the following decision.

*Supreme Court of New Hampshire v. Kathryn Piper (1985)*—Piper passed the bar in NH, but lives 400 feet from the boarder in VT. NH argues that lawyers have to live within the state because (1) to become, and remain familiar with local rules and procedures, (2) to behave ethically, (3) to be available for court proceedings, (4) to do pro bono and other volunteer work in the State. **HOWEVER, the court holds that this does not overcome the Privileges and Immunities test**, On its face this is discriminatory against a right to a job/profession, and there is no evidence that out of state attorneys cannot remain familiar with local rules and procedures, act any less ethically, be any less available, or do any less volunteer work than in state attorneys. Dissent believes that law is special profession, which should grant great deference to bar association.

*McBurney v. Young (2013)*—π's are residents of CA and RI, and make FOIA requests in VA. **HOWEVER**, the state is not required to offer FOIA, and only makes it available to state citizens (not to mention all of the information is available otherwise, just more difficult to procure). **The court holds that the state not granting the FOIA request was not a violation of the Privileges and Immunities Clause, because it was not a fundamental right.** Here by contract, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather it merely creates and provides to its own citizens copies with which would not otherwise exist of state records.