Constitutional Law I
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2020

Introduction to the Constitution and Interpretation

- The Constitution is
  - Based on popular sovereignty (republican, a mix of a truly national and truly federal government)
  - Designed to PROTECT freedoms (negative rights, aka our liberties)
  - Recognized as the supreme law
  - Expressed in written form (hugely symbolic for its importance and sovereignty, but also practical for the people to know who has what power or right)
- Origins and precedents:
  - John Locke
    - Social contract theory and natural rights (state of man)
  - English principles, flowing from the Glorious Revolution
  - Declaration of Independence and the Articles of Confederation
  - Colonial charters
  - Natural rights in general:
    - That we are endowed with pre-political rights from our Creator
    - Negative rights vs positive/welfare rights, plus other rights in the Constitution like right to trial by jury
  - AOC
- Most Important Innovations:
  - Based on popular sovereignty "We the People" – Federalist 39
  - Designed to protect individual freedoms (rights) by limiting power of the government
  - Expressed in written form
  - Recognized as supreme law to be changed only by supermajority
- Constitution's Key Decisions:
  - Stronger national government
  - Representation in the legislature (Great Compromise)
  - Independent judicial and executive branches (unlike in England)
  - 3/5 Compromise (slavery)
  - Ratification by part of the whole, not unanimous
- Why written?
  - Allows society to commit itself to protect fundamental rights in times of crisis
  - Creates a framework for intergenerational lawmaking and private ordering
  - Works as a "gag rule" taking certain controversial topics off the agenda of ordinary politics
  - Easier for people to access and understand, so they can hold government accountable
- <u>Problems with written ©</u>
  - Any written document that regulates future conduct is inevitably incomplete, so whoever decides how it answers unforeseen Qs has immense power

    - Public officials and judges will be tempted to change difficult-to-amend © in times of crises or social change
    - A court that is under political pressure and would make a decision that is bad
- Interpretive schools of thought
    - Originalism
        - Wants to find a reasonable person's meaning at the time of enactment of the Const.
        - Claims the meaning is fixed at time of enactment, and that the fixed meaning is a constraint on judicial application
        - Seeks to find the meaning that the reasonable listener would place on the text at the time of its enactment (the public meaning)
        - Note the difference between this and original intent (which has been largely denounced)
        - So the constitution reflects the public's consensus view, and ratification requires a supermajority vote to reflect that
        - Therefore, the original meaning is the ratified meaning
    - Non-originalism (aka living document)
        - Seeks to find the meaning in our time, typically guided by some overarching interpretive ideal (human dignity, etc)
        - Believes judges have the power to change the meaning, without a supermajority vote or consensus of the public
- Methods to analyze con law cases:
    - 1. Text and Context– common linguistic meaning when ratified
    - 2. Structure – internal ordering or logic of ©
    - 3. Historical purpose and understanding – contemporaneous commentary on meaning
    - 4. Precedent and Practice – constitutional tradition
    - 5. Policy – political or personal views
    - 6. Consequences

Powers of the Federal Government; The Separation of Powers

1. Congress: interstate commerce, taxing and spending, declare war and fund the armed forces
2. President: carries out laws made by Congress, directs and lead armed forces (Commander in Chief), treaty and foreign affairs, appointment of federal officers, pardons for federal offenses, veto
3. Judiciary: decides cases that fall within fed. jud. Power

Cases:
Noel Canning v. NLRB

- Separation of powers; constitutional interpretation

Separation of powers

- Steel Seizure case (Youngstown)
    - President seized private property through an executive order mid wartime in order to keep steel production going rather than on strike
    - Ct held that this is an unconstitutional exercise of presidential powers, which are confined to Art II, because it crosses into legislative territory
        - Here, not encompassed in Pres's military power, or his "theatre of war" power

- Jackson's concurrence noted that there are 3 times when Pres. acts:
  - With express power (Const. Or by law)
    - Presumably within his power
  - In twilight zone (Congress has taken no action regarding it)
    - Look on this with some scrutiny
  - Pres goes against Congress
    - Scrutinize with caution
    - This is where Pres is now because 5th amendment provides for DP and Takings Clause, so Pres cannot go against it in legislative capacity
- Dissent noted policy and context to justify Pres's action
- Four different approaches to when the President can act with without express constitutional or statutory authority:
  - There is no inherent presidential power; the president may act only if there is express constitutional or statutory authority.
    - Majority stated that the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself - Truman's order was unconstitutional because no statute nor is it expressed in the Constitution
  - The president has inherent authority unless the president interferes with the functioning of another branch of government or usurps the power of another branch.
    - Douglas takes this approach in the concurring - President was forcing the expenditure of federal funds for taking the property and that was usurping Congress's spending power
  - The president may exercise powers not mentioned in the Constitution so long as the president does not violate a statute or the Constitution.
    - Jackson said Congress has denied the President to seize industries so this was unconstitutional. Also since the President violated federal law, he will only be able to such things if the law enacted by Congress is unconstitutional.
  - The president has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated.
    - Federal laws restricting the President's power is unconstitutional.

Legislative powers (Article I):

- **Delegation**
  - Art I, Sect. 8 lists enumerated powers
  - Mistretta
    - Congress delegated legislative powers through a law to a committee to produce sentencing guidelines for criminals in federal court; Can congress delegate its legislative power?
    - Intelligible principle test:
      - As long as there is an intelligible principle guiding the delegated powers (a standard by which the powers are limited/measured), then the delegation is constitutional.
      - Ct found here that there were stated goals, purposes, and checks on the committee so it passed constitutional muster
    - Scalia's dissent
      - Notes that some delegation is necessary, but that the delegation must be of ancillary powers; that is, congress cannot give away

"naked" legislative powers to create an independent legislative body (JV congress)
        - Would find unconst. As a pure delegation of legislative power
    - Nondelegation doctrine
        - That Congress cannot delegate any powers to private actors
        - Cts have instead given broad approval to delegation of powers to the public sector, and applied the intelligible principle test
- **Composition of congress**
    - Art 1, Sects 2, 3, 5
    - Powell v. McCormack
        - Can Congress change its own composition in a way different than Art I allows because it has power to judge its own members in Sect 5?
        - Congress excluded Powell from Congress by requiring majority vote only (so not an expulsion under Const. Sect 5 with ⅔ vote needed), even though he was elected, for his misconduct during previous Congress
        - Ct held that this was unconstitutional: Congress cannot change the composition unless goes by constitution guidelines
    - US Term Limits, Inc
        - Can the states change the composition of the congress?
        - Ct held that the state law barring candidates from the ballot if they had served a certain number of terms in Congress was unconstitutional as a violation of Art 1, Sects 2 and 3
            - Also not a reserved right because states never had the power to change the composition so cannot do so now
        - Dissent noted that imposing term limits on Congressional candidates is a reserved right under the 10th Amendment
- **Procedure and prerogatives**
    - Art 1, Sect 5
        - To what extent does the Const give Congress the power to enforce its power of inquiry?
    - McGrain
        - Art 1, Sect 5: be the judge of their own rules
        - Can Congress demand that a private person (not a member of gov) appear in court?
        - SCOTUS held that YES; Congress has power of inquiry, but also the power to enforce that inquiry against private ppl
            - Why? Fxns as oversight for agencies, and imposes ethical rules on gov ppl
    - Committee on Judiciary US House of Reps v. Miers
        - Same issue, but power of inquiry involving ppl in the ex branch
        - Held that C can enforce its power of inquiry against ex branch officials (no absolute immunity!)
    - Filibuster
        - A cloture rule: in order to cut off the debate, you have to have 60 votes
        - It gives the minority party a virtual veto power
        - Some things are not subject to it but still very powerful
        - Argument against it:
            - Const has anticipated how to pass laws, and that is majoritarianism (a supermajority vote of 2/3 both houses)
- **Bicameralism and presentment**
    - Art 1, Sect 7: EVERY LAW REQUIRES BICAM AND PRES.

        - every bill goes through both houses and then presented to Pres, who can veto or pass (or do nothing, and then after 10 days it is assumed passed)
    - Chadha
        - Are legislative vetoes unconstitutional bc they are congressional lawmaking that does not comply with the presentment clause?
        - YES, unconst.; bc it is a leg fxn (passing amendments to deport people), it must satisfy bicam and pres
    - Clinton v. NY
        - Is the line item veto an unconst. Violation of Art 1, Sect 7 bi cam and prese clause?
        - YES, unconst; it is an ex doing a leg fxn of changing a law; can only change a law with bicam and presentment
        - Unconstitutional because by changing anything was changing a law adopted by Congress. There is a way outlined in the Constitution on vetoing and repealing statutes and that is what should be followed.
- **Power of the purse**
    - Art 1, Sect 9
        - The things Congress CAN'T do in an effort to control stuff with their power of the purse
        - Goal of these prohibitions is to ensure generality (no single ppl are punished), and prospectivity (no retroactive criminal laws)
    - Lovett
        - To what extent can Congress use its power of the purse to impose limits on the ex. Branch?
        - It does have the pursestrings, so can cut off funding for things it doesn't agree with, but CANNOT make it a bill of att!!
        - Bill of Att means a leg. Act that:
            - 1: is directed at 1 person or a group of people
            - 2: imposes punishment on those people
            - 3: without judicial trial
        - But what constitutes punishment?
            - Does it fall within the historical meaning (think prison, etc)?
                - The historical test
            - Does it further nonpunitive leg purposes?
                - The functional test
            - Does the leg record show a leg intent to punish?
                - Motivational test
    - Calder v Bull
        - Court held that the Art 1, Sect 10 (applies to state laws; sect 9 has same provision in it) ex post facto laws apply ONLY to CRIM laws and not to civil laws; thus, there is nothing stopping the leg. From making retroactive civil laws, and also does not apply to judicial
        - These laws either make criminal 1) an act that was innocent at the time committed, or 2) make the punishment greater than it was when committed
    - Signing statements
        - What a president writes when he passes a law (bc no line item veto anymore) but doesn't actually want to enforce a specific provision which Congress has funded with its power of purse
    - HofR v. Burwell
        - How can C actually enforce the limits it imposes on ex. Branch spending?

        - It is a fine line; the court will not address it if it is a political question, but will if it touches a const. Question like the Lovett case and bill of att.

Executive Powers (Article II):

- **The Nature of Executive Power**
    - Art II
        - Attempts to take a medium between tyranny of English monarchy and the weakness of Pres with the Art of Confed
        - Vesitng clause gives all ex power to pres, but this power can be limited or delegated
        - Sections:
            - 1: granting of power (vesting clause) and qualifications
            - 2: Specifies and limits certain pres. Powers
            - 3:Limits, and duties:
                - State of the union address
                - Recommending new laws to Congress
                - Receiving foreign ambassadors
                - Faithfully ex laws
                - Commissioning all officers to US
            - 4: subject to impeachment
    - Basic elements of Ex power:
        - Appointing officers
        - Supervising and removing those officers
        - Faithfully executing the laws
    - Themes:
        - Unitary
        - Energy
        - Independence
        - Law executing, not law making
- **The Appointment power**
    - Art II, Sect 2: appointments clause and recess appointments clause
        - Need advice and consent of the senate; inferior officer appointments can be vested in other people, up to Congress
    - Buckley v. Valeo
        - Can Congress pass a law that allows people other than the pres to nominate officers?
            - NO; law allowing that is unconst.
            - *Officers defined as anyone who exercises significant authority pursuant to the laws of US (broad definition)*
            - Officers must be nominated by pres, then confirmed by congress, then officially appointed by pres
            - Under Art. II, Congress could vest the appt power for inferior offices in the president, the heads of the departments, or the lower federal courts. The Speaker and pres pro tem are none of these and therefore do not possess the appt power.
    - Noel Canning v. NLRB
        - Can president make recess appointments intra-session?
            - Yes, both inter and intra within power
        - Can pres make appointments which exist, or only happen during, a recess?
            - Both

        - Is a pro forma session a real session?
            - Yes
        - Constitutional, then?
            - No; 3 days is too short a recess for the recess appointments clause to apply so appointment needed to be with advice and consent of the senate
- **The Removal Power**
    - Decision of 1789:
        - Madison wanted to give pres all authority to remove at will
        - Other theories were:
            - Remove by impeachment only
            - Pres remove with advise/consent of senate
            - Or let congress decide
    - If pres alone is to have removal power, where does it come from?
        - Vesting clause
        - Take Care clause
    - Congress decides is a big argument:
        - Congress has control over all other aspects of ex agencies (money, creation, etc), so why not also removal
        - And historically, there has been a lot of back and forth with people wanting Congress alone to have this power
    - Myers v. US
        - A strong decision in favor of giving Pres alone all the power to remove; found to be constitutional
        - Involved the removal of a postmaster (treated as a superior officer in ex branch)
        - Says Pres can remove both superior and inferior officers
        - The President has the exclusive power of removing executive officers of the US whom he has appointed by and with the advice and consent of the Senate. The ability of the president to control the personnel in administrative positions is central to the executive power. Taft felt that it was the framers intent to place the removal power in the president.
    - Humphrey's Executor v. US
        - Limits Myers by holding that pres cannot remove officers of independent agencies
            - Justifies this because they are not solely ex in nature
        - The court said that Art. I allows Congress to create independent agencies and insulate their members fro presidential removal unless good cause for firing existed. The court said that officers in quasi-legislative or quasi-judicial positions are different and that Congress may limit the removal of these individuals.
- **The Take Care Clause**
    - This justifies ex's supervisory powers over the laws
    - Can ex. Branch suspend (not enforce at all) or dispense (only enforce with some people)?
        - The inclusion of the Take Care Cl in Const seems to show that Pres can't just do these whenever he wants; must be faithfully executed
    - Wirt under Pres Monroe
        - Was hesitant to say that the pres has powers to direct people lower than him who are in executive; not practical and they answer to another person anyway in that department

- Taney under Jackson?
  - Thought the pres did have plenty of supervisory powers to direct prosecutors to either prosecute or nolle pros.
- US v. Cox
  - US Attorney, acting per instructions of US AG, did not draft or sign indictments which a grand jury requested
  - Court upheld this exercise of discretion
    - A lot of different reasons why in the concurring opinions, but it comes down to the policy reasons we would want an ex. With discretionary power to not prosecute (nonaction)
- Adams v. Richardson
  - Court here orders a series of enforcement actions pursuant to Title 6 instructions
    - The agency discretion exception does not apply bc the law clearly and narrowly tells the ex. How to enforce the law, so ex. Must do so (action)
- Thompson, DHS Authority to Prioritize Removal and Defer Aliens
  - Defends the Pres's discretion to prioritize the removal of certain kinds of illegal immigrants over others, and the discretion to temporarily tolerate some of those aliens' presences
- Morrison v. Olsen
  - Upheld (over Scalia's lone dissent) the independent counsel provisions of a statute which appointed someone from executive to be a special counsel in the judiciary branch, removable by AG after jumping through hoops like "good cause"
  - Found that the special counsel was an inferior officer, based on an importance kind of test, and thus could be appointed without the Const process
  - Scalia concluded that she was not inferior, and there could not be appointment without the process
  - Ct also held that the act did not violate the sep of powers either by encroaching on Pres's removal power or by taking away Pres's supervisory powers;
    - The pres could still remove special counsel through AG although the power was limited, and could also supervise the ex. Well enough although this limited it
    - Scalia of course found that sep of powers is such a big issue that this can't possibly be const. Just because the special counsel is less important or the ex has to jump through hoops or policy demands it
  - Big idea is the tests for an inferior officer (remember the Buckley definition for a superior/principal officer as a contrast):
    - Majority: importance
      - Looks at person's duties, scope of tenure and jurisdiction, whether they are a subordinate, etc
    - Scalia (in Morrison but refined in Edmunds): chain of command
      - Looks to see if they have a superior officer as a boss
    - On exam:
      - Ask if person is inferior or principal, then see if Congress has delegated a princ. Officer in an unconst way

- **Take Care Clause Elements**

- The President
  - 1. “Shall” execute laws
  - 2. Must act with “care”
  - 3. Object is “law” passed by Congress
  - 4. Must act in good “faith”
- Take Care duty means that presidents do not have power to suspend or dispense with any laws.
- President can veto bill for policy reasons, but cannot decline to enforce a law he disagrees with for policy reasons.
  - 3 exceptions
    - 1. Statutes that give political discretion to President or subordinate officers are ambiguous (Chevron Doctrine)
    - President prosecutorial discretion (limitations?)
    - If President (in good faith) believes a law is unconstitutional

- **Foreign Affairs**
  - Art 2; Sect 1, 2, and 3
  - The powers given to pres are to make treaties (with congress), to be commander in chief, to appoint ambassadors (with congress), and to receive ambassadors and other public ministers
  - So some of the foreign affairs powers are in art 1 with congress; what about powers that aren’t mentioned? Are they inherent in ex or limited bc framers set out the dichotomy between the ex and the leg?
  - We should start with Article 2, the Vesting Clause, and then see what else Art 2 gives the Pres and what Art 1 gives Congress or that Congress lacks
  - Neutrality Controversy
    - Pres Washington wanted to declare neutrality, and did so by proclamation, instead of helping France in their war with England; the issue was that it seemed like a legislative function without congress, who has the power to declare war, help make treaties, etc; so this is unilateral foreign affairs power
    - Hamilton, as Pacificus, supported this as inherent in Vesting Clause and the powers given to Pres in sect 2
    - Madison, as Helvidius, opposed the proclamation, arguing that it is a legislative fxn
  - Can pres unilaterally terminate a treaty?
    - Approaches:
      - Yes, with consent of senate (which it needed to pass anyway)
      - Yes, unilaterally
      - Depends on what the treaty itself allows
  - US v. Curtiss-Wright Export Corp
    - FDR issued a proclamation pursuant to a law which allowed pres to decide to make illegal the selling of guns/warfare to countries if he thinks making it illegal would promote peace
    - This company sold weapons to countries at war in South America, violating this proclamation
    - FDR then issued another proclamation, ending the first one but keeping the prosecutions for violating it will it was in effect
    - Court held that the proclamation is not an unconstitutional delegation of legislative power

                - While the court is okay to assume it would not be const if it concerned internal affairs, the pres has broad discretion and lots of power when it comes to foreign affairs
                - It is inherent in the ex branch!!
            - Case talks about theory that the national executive power with respect to foreign affairs was not delegated to the federal government by the States but was instead transferred from the United Kingdom to the United States when the United States became an independent nation. Under this theory, the United States may exercise not only the powers that the Constitution expressly grants, but also other foreign affairs powers enjoyed by all sovereigns.
    - Zivotofksy; Reception Clause, Art 2, Sect 3
        - The court held that the Pres does have exclusive power to grant formal recognition to foreign sovereigns by changing State policy to put only "Jerusalem" on passport and consular report of birth (instead of "Israel," as Congress had mandated by law), and Congress cannot demand through legislation that the Pres issue a formal statement that would contradict his earlier recognition
        - So the court here limits the Pres's powers from Curtiss-Wright (in the opinion, it says that the Pres's argument that Curtiss gives it ALL executive power is not right), but still says that the Pres had this power to go against Congressional law; the dissent would say that it isn't even a recognition issue, but a naturalization issue under Art 1, Sect 8 so Pres cannot have power to go against it
        - 3 ways that we could hold the statute here unconstitutional:
            - The policy on Jersulem is an unenumerated power (so inherent) in the Pres's Vesting Clause so Congress cannot regulate this
            - The policy is a specific power (enumerated) under the Reception Clause so Congress can't regulate it; OR
            - There is no enumerated power in Congress's article so it simply lacks the power all around to do anything about it
    - Trump immigration materials
        - Original 9th circuit opinion on Presidential authority seemed to lack any real substance grounded in constitutional law
        - Focused much more on DP and the 1st Amendment
        - Justice Bybee would ground the authority on precedent (Mandel and Knauff and Din), and the statute (the Immigration and Naturalization Act of 1952 which gives Pres the authority to do this, and in art 2, Sect 2 (comm in chief), Sect 3 (reception clause), and the Take Care Cl sect 3
        - Mandel held that if the Pres's exercise of discretion is on its face for a bonafide and legitimate reason, then the court will not look behind that exercise of discretion; 9th circuit said this was inapplicable but had no real logic there
        - Criticism on the 9th opinion, see notes
- War Powers: Initiating
    - Overview:
        - Art. I grants Congress the power to declare war and the authority to raise and support the army and the navy.
        - Art. II makes the president the commander-in-chief

        - **Based on the constitution, Congress can initiate war, but the President has the remainder of executive power to conduct (manage) and defend (defense) in war.
        - The Supreme Court rarely has spoken as to the constitutionality of the president using troops in a war or war-like situation without congressional approval. The only case is in the context of the Civil war – the Prize Cases ruled that the president had the power to impose a blockade on Southern states without a congressional declaration of war. No other Supreme Court case has addressed the constitutionality of presidential war making without a congressional declaration of war.
        - The Supreme Court often has generally remarked that challenges to the conduct of foreign policy present a non-justiciable (court cannot hear) political question. In Oetjen v. Central Leather Co, the court stated that the conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative – the political – Departments of the Government, and the propriety of what may be one in the exercise of this political power is not subject to judicial inquiry or decision.
        - Cases about Vietnam being unconstitutional, Regan's military activities in El Salvador, and Americans bombing Yugoslavia the court dismissed as to justiciability
        - It is unresolved as to what constitutes a declaration of war sufficient to fulfill the requirements of Art. I.
        - War Powers Resolution
            - The President as commander-in-chief may introduce the US Armed forces into hostilities or situations where hostilities appear imminent only pursuant to (1) a declaration of war (2) specific statutory authorization or (3) a national emergency created by attack upon the US, its territories or possessions, or its armed forces.
            - It required president consult with Congress within 48 hours after troops are introduced into hostilities or risky situations
            - President shall withdraw troops after 60 days unless Congress has declared war or authored an extensions or is physically unable to meet as a result of an armed attack upon the US
            - President can extend for 30 days
    - Madison's notes on "make war" vs "declare war"
        - Notes that Pres has traditional war powers:
            - 1) defensive (so when someone starts the fight, Pres can unilaterally go all out), AND
            - 2) manage (once it starts by Congress, Pres can unilaterally conduct it)
    - The Prize Cases
        - Pursuant to his executive powers, as conferred by the Constitution, the president may use force against rebelling states during a civil war without a formal congressional declaration of war. According to Art. II, § 2 of the Constitution, the president is the Commander-in-Chief of the armed forces and therefore has the power to direct the Army and Navy of the United States, as well as the militias of the individual states in some circumstances. **If the country is at war with a foreign nation, the president is not only permitted, but is obligated, to use force against any such threats. This obligation to protect the country during war**

does not come with the requirement that the president wait for prior legislative approval. This is so whether the opponent is a foreign country or a group of states rebelling domestically against the government, because both situations are considered wars. Here, the war amongst the states was unexpected and abrupt, and the president had to react without waiting for Congress to deem it a war. Whether a civil war is sufficiently severe to warrant the use force against belligerent states is the president's decision, and **it is within the president's discretion to determine how much force the circumstances require**. The order of blockade itself proves that a state of war existed, which justifies the president's power to use such force. Additionally, though legislative approval was not necessary before the president could act in this way, Congress did later pass a series of statutes that made the president's actions valid.

- 2 propositions from the Prize cases that say Comm in Chief power gives president:
  - 1) defensive power, AND
  - 2) power to command military during "hostilities"
- See pg 303, Note 1:
  - Some scholars think, based on historical texts, that
    - The constitution gives a narrow view: Congress can initiate a CONDITION of war and Pres cannot unilaterally do so; OR
    - The constitution gives a broad view: Congress's power to declare is only a formal recognition of war, but Pres can still unilaterally wage war

- Operation Desert Shield and Pres Bush
  - Bush sent troops to Saudi Arabia to protect them from an invasion by Iraq; Congress had not authorized this, although UN had; Pres claimed this was offensive; Did he have power to act?
    - Dellums: held that the issue wasn't ripe but it was not a political question bc the Const. Requires congressional authorization for President offensive action
    - Ange: held that the issue was nonjusticiable bc was a political question
    - Issue became moot bc Congress did authorize it
- AUMF (Authorization for Use of Military Force)
  - Congress did this after 9/11
  - Is this basically a declaration of war?
- Libya:
  - The OLC reasoned that Pres could act bc it was a residual executive power which includes foreign affairs
- Terminating war:
  - Note: textbook says it is a political act, but could be done by treaty, proclamation, or legislation
- Conclusions?:
  - Seems to be that if the President is acting with congressional authorization or in defense, then Pres is exercising constitutional war powers. If it is an offensive act without congressional approval, then it might be a political question and for Congress to just quit funding or pass

a law saying “stop,” which would put Pres in Youngstown 3 and probably unconst.

- War powers: Conducting war and detaining US citizens (civilian and enemy status) and foriegn ppl
    - Emancipation Proclamation
        - Could be seen legally as a deprivation of property without due process; was not authorized to do this expressly, although Congress had passed a couple slave-freeing related laws recently
    - Korematsu v. US
        - Court upheld an executive order which imposed an exclusion of Japanese people who were US citizens based solely on ancestry; found it was an inherent power within “Comm in chief” power
    - Ex parte Milligan
        - Court held that the trial of a US citizen, not affiliated with but plotting to assist the Confederate states, would not be tried by a military commission when the civilian courts were still operating
    - Ex parte Quirin
        - Court held that enemy war criminals (including a US citizen) were properly tried by military commission rather than in civilian courts
    - Hamdi v. US
        - Held: If federal legislation grants the President authority to use military force, but does not specify the details, the President has only the powers granted by the Constitution, by other statutes, and by the laws of war. Exercising these powers, the President may detain enemy combatants, if they are accorded certain requirements imposed by the Due Process Clause.
        - No controlling opinion
        - Plurality (O’Connor):
            - Held that the AUMF authorized Pres to unilaterally detain US citizens with status of “enemy combatants” but those detainees must be afforded some sort of DP in order to contest their status (suggested that a military commission would be adequate, with hearsay and not beyond a reasonable doubt, and with a presumption of favor for military)
        - Souter and Ginsberg; concur in judgment, dissent in reasoning
            - Would have found that the Pres was not authorized by AUMF, and that there is actually another law which prohibits that act, but concur in judgment for remand for new hearing
        - Scalia and Stevens; dissent:
            - Say constitution gives 3 options:
                - Charge the person in civilian courts
                - Release the person
                - Or suspend the writ of habeas corpus by legislation
            - Said milligan controls, but glossed over why quirin was inapplicable
        - Thomas dissent:
            - Agreed with the plurality that Pres has the power, but not with the judgment
            - Would find that DP is satisfied by the Pres’s determination of “enemy” pursuant to AUMF, so the act was squarely within his ex power

    - See timeline in notes, as well as the Boumediene case
- Impeachment
    - Art II, Sect 4: “can be impeached for treason, bribery, or other high crimes and misdemeanors”
    - Clinton
        - Was impeached but not convicted
    - US v. Nixon
        - Was not impeached but was about to be
        - Claimed absolute executive privilege and argued that the whole impeachment issue was nonjusticiable; Court rejected this argument
        - Court held:
            - 1: Court can decide if pres his this privilege and its scope
            - 2: Ex priv does exist bc need for candor in communication and confidentiality
            - 3: the ex priv is not absolute; presumptive but can be overcome by countervailing gov interests
    - Andrew Johnson
        - Was impeached but not convicted
    - Currie on Johnson’s impeachment
        - Notes on the resolutions and process of impeaching him
        - Some thought that he couldn’t be impeached bc the Const. Says “treason, bribery, or other high crimes and misdemeanors” and the charges were not a high crime or a misdemeanor; the charges were things like misconduct of public men
    - Letter on Clinton’s impeachment:
        - This letter thinks that bc treason and bribery are executive fxn crimes, then the “other high crimes” must also be executive in nature
        - Perjury is not executive in nature, thus not an impeachable offense

The Judiciary Powers (Article III):

- Map of art III
    - Begins with vesting clause
    - Historically, judicial power was thought to ideally be law-interpreting only, and no law-making; but realistically, judicial review was something contemplated and perhaps even wanted by a lot of the framers
    - Judicial review power is not expressly in the constitution
    - Limits on judicial power:
        - No advisory opinions
        - Standing
        - Ripe
        - Not moot
        - Genuinely adverse parties
        - Not a political question
        - (these are ideas from both Art 3 and judicial restraint)
    - Art III creates SCOTUS but leaves Congress to create all other federal courts
    - Federal judges (all of them) get life tenures but can be impeached for misbehavior
    - 3 categories of cases:
        - Ambassadors, consuls, and other public ministers (think foreign dignitaries)
        - Admiralty and maritime

        - Cases arising under US laws (federal question)
    - 6 controversies:
        - When US is a party
        - 2 or more states
        - State vs citizen (changed by 11th Am)
        - Diverse citizens (diversity)
        - Citizens of states claiming lands from grants of other states
        - Between a state/citizens of one state and foreign countries/citizens (changed by 11th Am)
    - Original jurisdiction over:
        - The ambassador case type
        - When a state is a party
    - Appellate jurisdiction over all else, and congress can make exceptions and regulations to appellate juris
    - Erie: when in federal court using CL, use state CL bc there is no CL
- Judicial review
    - Brutus No. 11
        - Saw the judiciary, if independent and with power of judicial review, as leading to corruption and a judicial oligarchy
        - Saw that impeachment would not be a meaningful check
    - Federalist No 78 (Hamilton)
        - Trying to dissuade Brutus
        - Argued for judicial review, noting that the judiciary is the least dangerous of the branches bc it does not have the power of the purse or the sword but of judgment only
        - But that does not make the judiciary superior (not in favor of judicial supremacy, just judicial review)
        - Who gets to judge? Not the legislature or executive, so must be judiciary
    - Marbury v. Madison (1803)
        - Know the history of this
        - Held: no jurisdiction to rule on Marbury's case
        - Held that section 13 of the judiciary act of 1789 was unconstitutional as a conferring of original jurisdiction to SCOTUS, which is contrary to Art 3 (which makes no actual sense if you read the statute)
        - Dicta regarding:
            - Removal power of the President
            - Standing
            - Political question
        - Marshall's argument for judicial review:
            - Bc cosnt is written, which shows supremacy over other laws
            - "Arising under" clause
                - If court can hear cases, it should be able to interpret
            - "Oath" Clause
                - Judges take oath to uphold const
            - "In pursuance" clause
                - Laws are passed in pursuance to const so need to be able to interpret const
        - What Marshall argues for is Constitutional Supremacy, not judicial supremacy
    - Stuart v Laird

        - Upheld the Repeal Act (which took away judgeships and reinstated circuit riding)
        - There, petitioner argued was unconst bc:
            - Fed judges have life tenure so taking away the judgeships/commissions is contrary to const
        - Court did not directly address the life tenure const provision, but said the transfer of the case was authorized by statute so was const and was fine bc it just restored the old way of circuit riding
- Dilemma of Judicial Supremacy
    - Does judicial review imply, or enable, judicial supremacy?
    - Lincoln v Douglas debates
        - After Dred Scott decision, Lincoln argued (during an election where he wanted Douglas's Senate seat) that the decision should be overruled by a later court
        - Douglas saw SCOTUS as supreme and not to be argued with
    - Departmentalism:
        - Lincoln
        - Each branch of the gov interprets the const separately and independently
    - Judicial Supremacy:
        - Doulgas
        - Only the federal courts have the power to interpret and enforce the constitution
    - (actual practice has been a blend of both)
    - Questions to consider:
        - Must other branches branches follow federal court decisions interpreting the Const?
        - Must the executive branch enforce a federal court decision interpreting the Const in a specific case?
        - Common depart. Would say yes and yes
    - Cooper v Aaron (1958):
        - Held that the executive branches in states did have to enforce the federal court decision which interpreted the constitution to mean segregation in schools violated equal protection of 14th am
    - Ex Parte Merryman (1861):
        - Had previously held that Lincoln's suspension of the writ of habeas corpus was unconstitutional, but when the executive branch did not accept the service of a writ of attachment to free people, SCOTUS held that the executive must follow the federal court's decision
- Adjudication of Genuine Disputes: Cases and Controversies
    - The Correspondence of the Justices:
        - Jeff and SCOTUS
    - Jefferson's letter
        - Asked for advisory opinion concerning what US should do when England and France were at war with one another
    - SCOTUS letter to Jeff
        - Said deal with it yourself, Jeff
        - No advisory opinions to the executive branch bc the judicial power is confined to cases and controversies only
    - Alexis de Tocqueville
        - Liked the US system of federal courts bc is different than Europe
    - Ex Parte Levitt (1937)

        - The CT refused to entertain the merits of Congressman L's motion to make Justice Black show why he is properly serving on the bench bc the "injury" was not meaningful or personal to him, but to the public generally, so lacked standing
        - Who would have standing there?
            - A litigant before Black, who argued that his impropriety would affect the outcome of the case
    - US v. Windsor (2013)
        - CT held that the legislative branch did have standing to argue the constitutionality of legislation after the ex branch decided not to defend Marriage Act
            - Scalia dissenting, stating that the parties were no longer adversarial so no standing bc no controversy
            - Alito dissented bc agreed with Scalia that there was no adversity anymore; but found that BLAG would have had standing bc Chadha held that congress is the proper party to defend the validity of a statute when the ex branch won't defend it
    - Standing requirements:
        - Parties must allege that have suffered or will suffer a concrete injury, that is not hypothetical;
        - The injury must be fairly traceable to D; AND
        - The injury is redressable by a favorable ruling
    - Ripeness:
        - Asks whether the case is ready to be litigated
        - Test:
            - Hardship to the parties (esp P) if there was no judicial review, and
            - Fitness of the issues and record for judicial review
            - MUST BE YES AND YES to be ripe
    - Mootness:
        - Asks whether the controversy has been eliminated
        - Events like repeal of the act challenged, death of a party, settlement, etc
        - Exceptions:
            - Secondary injuries (the injury is moot but has collateral consequences; think Powell, where he still wanted his salary)
            - Wrong that is capable of repetition yet would likely evade judicial review (think abortion and time limit of pregnancy)
            - Illegal practice that has stopped but could be resumed; and
            - Class actions
- Political Question Doctrine
    - Even if a suit has standing, is ripe, and not moot, the case may still be nojusticable as a pol question
    - The question is whether the legal issue is appropriate for judicial resolution or better left to the political branches
    - Note: a case is not political question just bc it involves political issues or is a big deal for society
    - Luther v. Borden (1849)
        - Luther sued in trespass, claiming Borden broke and entered his house unlawfully bc the charter gov had been out of effect at the time
        - Ct held that it is for the other branches to recognize the legitimacy of the state governments; the pres here had considered sending military in to

        - defend the state from insurrection pursuant to Const, so Ct would not say that charter gov was overthrown
        - Before modern pol question doctrine, but same principles
    - (Walter) Nixon v. US (1993)
        - CT held that the Senate's impeachment process was a political issue for the Senate to regulate and refused to decide whether Senate had violated the impeachments clause of Const
    - Baker v Carr factors:
        - Does Const text commit the issue to another branch?
        - Is there a judicially-discoverable and manageable standard for resolving the issue?
        - Can the ct decide the question without showing a lack of respect for the other branches?
        - Is there an unusual need for unquestioning adherence to a political decision already made?
        - Is there potential for embarrassment from multifarious pronouncements by various branches on one question?
    - Critique:
        - Seems like a roundabout way of deciding the case; by saying won't review the issue, is sort of giving a green light to the gov
    - Note: easiest paradigm to think of as a pol question is war powers; be careful here
- Congressional control over judicial power:
    - Sheldon v Sill:
        - Ct held that Congress can limit the jurisdiction of the lower cts which is creates pursuant to Art III section 1
    - Ex Parte McCardle:
        - Ct held that Congress can take away SCOTUS's appellate jurisdiction from a pending case (really dicta, but still)
    - Approaches today to how much congress can change juris:
        - Congress has plenary power to change or limit SC's app juris
        - Congress has power to limit app juris, but only if it then assigns the power to a lower fed ct
        - Congress has NO power to limit app juris, but can only shift that power to Court's original juris
        - Congress has power to limit, but cannot destroy the "essential role" of SC in const plan as the apex and last resort of all (??? like what even is this interpretation)
- Sovereign Immunity and the 11th Am:
    - Chisholm v. Georgia
        - SC citizen sued state of GA to recover a Rev War debt
        - Ct held that sovereignty is with the ppl and allowed him to sue the state
        - Justice Iredell's dissent:
            - Says that the states are sovereign absent a congressional law which says otherwise
            - Bc there is no statute here which authorizes suing a state pursuant to const, have to fall back to CL which says states are sovereign
            - Would not allow the suit
    - Responses to Chisolm:
        - The 11th Am:

        - 2 possible readings of the 11th am:
            - It reverses Ch bc the ct's interpretation of the original meaning of the const was wrong, or
            - It reverses Ch bc original meaning of the const did not recognize state sovereignty and that is no longer politically acceptable
        - The 11th Am text:
            - Says nothing about suing a state under federal question, but Hans ct held that states cannot be sued by their own citizens under federal question
            - The solution: sue state officials, or see if state consents to it (like FTCA)
            - Can sue the official in personal capacity (in law) and official capacity (in equity)

Federalism

- Defined (loosely): the system of government in which there is vertical separation of powers such that the national and state governments provide checks on one another
- Federalism No. 10:
    - Madison says that factions are a big evil for a government, and the way to control its effects is with a republic
    - Factions are groups of people with interests that are adverse to the rest of the people
    - Unlike with a democracy, a republic will control both the minority factions, and if there is a majority faction, its effect won't be as widespread
    - The optimal size of a faction is large bc there will be a lesser concentration of the factions, but notes that at some point, a rep can be too large and puts a strain on the relationship b/w states and their reps in the national gov
- The National Bank Controversy
    - Only Hamilton wanted this; Pres Wash agreed and signed it into law
    - Jeff, Jackson, and Madison did not want this
    - The big issue was whether or not the power to create a national bank was an incidental power to congress; it isn't enum in art 1 sect 8 but could it be incidental to the power to lay and collect taxes, etc?
    - Madison eventually signed the 2nd ban into law bc the public wanted it and they had had it for 20 years already
    - McCulloch v. MD
        - After the second bank was enacted, MD signed into law a tax on the federal government in order to operate in that state; McCulloch, the head of the MD branch of the bank of US, sued MD
        - Ct held that congress does have the power to create a national bank (nec and proper), and that the MD bank unconst contradicts that power
        - Marshall argued practice, text and structure, history, and policy
        - This case shows an expansion of federal power
        - Remember the quote (Let the end be legit); this seems to be his interpretation of the nec and proper clause
- The Commerce Clause
    - An enum power in art 1 sect 8, but what does regulate, commerce, or among mean??
    - Gibbons v Ogden
        - Ct held that navigation bw NY and NJ constituted commerce, and seemed to hint at the dormant commerce clause
        - Marshall defines the three terms in broad terms

        - commerce = intercourse
        - Regulate = prescribe rules
        - Among = intermingling
- US v. Darby
    - Ct held that Congress can prohibit the shipment and employment of goods within a state which will eventually cross state lines bc the power of Congress extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legit end
- Dormant Commerce Clause
    - Analysis for exam:
        - Is there a state law which burdens interstate commerce?
        - If so, then has the federal government preempted it in some way?
        - (If so, then State law is unconst) If not, then might violate dormant comm clause. Has the state discriminated against other states by the law? (a question of whether or not the law treats all other states the same or not); is measured by strict scrutiny
        - Even if not, must also ask whether the state law imposes an undue burden on interstate commerce. The test is one of balancing the burdens on int comm and the benefits of the law to the state
            - Note, if it gets this far, it is likely to be an undue burden; see Maine v. Taylor with the parasitic fish being bad for Maine's native fish
- Important cases:
    - Champion v Ames (Lottery case); congress can regulate the channels of int commerce
    - Shreveport Rate Case; congress can regulate instrumentalities of commerce
    - Wickard v FIlburn; congress can regulate intrastate activities which have a substantial effect on int commerce, using the aggregate principle
- Wickard v Filburn:
    - Congress upheld the wheat provision in a congressional act; even though F's growing of the wheat was for purely intrastate home consumption, his noncompliance had a substantial effect on int commerce per the aggregate principle
- Heart of Atlanta Motel v. US
    - Court held that the commerce clause does empower congress to regulate intrastate discrimination by private company bc has sub effect on int comm
    - Note that the 13th, 14, and 5th amendments all fall short, so to regulate discrim in states, congress has to use the comm clause.
- US v Lopez
    - Court held that congress cannot prohibit gun in school zones bc of limiting factors:
        - Noncommercial (activity itself it not comm and it is not part of broader commercial scheme)
        - No jurisdictional limits (drafting error; didn't link/hook the activity to int com)
        - Congress had not presented findings (in the law itself or in Congressional hearings, etc)

        - The link was too attenuated (should not have to pile inferences upon inferences)
- The modern comm clause (hand in hand with nec and proper):
    - Expands the definition of commerce
    - Expands the definition of interstate (reaching intrastate)
    - Gives congress a virtual police power within the states (ie Darby, Heart of Atlanta)
- US v Morrison
    - Applied the Lopez factors and found that the Violence Against Women Act was unconst as violative of Com Cl power; even though Congress had made findings that gender-motivated crimes do impact int comm, that was insufficient
    - Significance of the two cases is that they say:
        - If Congress is going to regulate intrastate, non economic activity, it must be part of a broader economic scheme that regulates interstate commerce
        - There has to be a close causal connection/relation between the activity and the interstate commerce (ie the link)
        - Allowing congress to regulate this it cannot obliterate the distinction between what is national and what is state

- *Gonzales v. Raich*: Congress may regulate the use and production of home-grown marijuana as this activity, taken in the aggregate, could rationally be seen as having a substantial economic effect on interstate commerce
- 1. Congress can regulate purely **intrastate** (local) **noncommercial activity** (i.e., not produced for sale) if essential to larger scheme of regulating **interstate market in that commodity**
    - Adopts **broad definition** of what is economic and looks at category as whole (noneconomic activity can be regulated so long as other economic activity is regulated along with it)
- 2. Congress can regulate individual instances of activity if "total incidence" (i.e., aggregate effect) of activity affects national market
    - Compares *Wickard*
- 3. Rational basis review: Is there a rational basis for Congress to conclude that these activities—taken in the aggregate—substantially affect IC?
- Scalia's concurrence: N&P Clause is true rationale here—Congress may prohibit intrastate production and use as necessary to extinguishing national market for marijuana

- Has to be a relationship between the means and the end
    - End being the regulation of marijuana

- Disentangling the Commerce and Necessary & Proper clauses:
- 1. COMPLEMENTARY: Commerce Clause authorizes regulation of IC, but all in-state commerce is actually regulated by the N&P Clause (Scalia's view)
- 2. CUMULATIVE: Commerce Clause authorizes regulation of all commerce that affects IC, and the N&P Clause adds even more power on top of that (what is left?)
    - With this view, Congress would have virtual police power

- 3. CONFLICTING: Commerce Clause authorizes regulation of all commerce that affects IC, but the N&P Clause actually cuts back on that power (inconsistent with McCulloch, right?)
- 4. REDUNDANT: Two clauses can't be disentangled, because the Commerce Clause already contains incidental-powers authority, which is redundantly confirmed by N&P Clause (essentially Madison's view)

- *1 and 4 most plausible views

- Limiting principles? (Scalia):
- 1. *Lopez* and *Morrison*: Attenuation—can't "pile inference upon inference" to establish that noneconomic activity has substantial effect on interstate commerce (but WEAKENS this rule)
- 2. Congress may regulate **noneconomic intrastate activities** only when (1) regulation is necessary part of more general regulation of interstate commerce (economic activity) and (2) failure to regulate would undercut its regulation of interstate commerce
- 3. Means must be "**appropriate**" and "**plainly adapted**" to legitimate end (= majority's rational basis test??)
- 4. Not "proper" when violates **principle of state sovereignty**

- The Necessary & Proper Clause *US v Comstock*:
- Rule: Under the Necessary and Proper Clause, Congress has the authority to enact a law that allows civil commitment of mentally ill, sexually dangerous federal inmates beyond the end of the prisoners' criminal sentences
- Challenge to civil commitment statute
- TEST: Does law constitute a means that is rationally related to implementation of constitutionally enumerated power? (i.e., are the means chosen reasonably adapted to the attainment of a legitimate end?)
  - What is the enumerated power "end" here?
  - Links between statute (means) and enumerated power (end) must not be too attenuated?
  - Statute (means) must "properly" account for state interests
- Limiting principle: Does not confer general "police power" on Congress—but isn't creating crimes a "great substantive and independent power"? (see McCulloch)

- **The Necessary and Proper Clause and State Sovereignty**:
- Summary:
- Congress' Power to Regulate the States State Sovereignty:
- Any limits on Congress' power to regulate states as such? (internal (Enumerated Powers, Necessary and Proper Clause, Commerce Clause) v. external limits (Bill of Rights and 14th Amendment, etc.)
- *Garcia v. San Antonio Metropolitan Transit Authority*: there are NO limits
  - Suggests no judicially-enforceable limits on Congress' powers at all—left to "political safeguards of federalism")
- Does the Constitution presume that states retain a core of sovereignty upon which federal power cannot intrude?

- *New York v. United States*:

- Two approaches to determining limits on congressional power
- Tenth Amendment a truism?

- § **Operates as sign post that points us to this extra textual principle of state sovereignty (barring Congress of regulating state and local governments)**
- § Congress cannot not invade that core of state sovereignty
  - Congress cannot invade an "incident of state sovereignty"
  - **ANTI-COMMANDEERING RULE (applied to state legislatures)**
  - Although they can incentivize local and state governments
  - However, if they make them an "offer they cannot refuse," then that DOES violate rule
- *Printz v. United States*: Anti-commandeering rule applied to state executives
- *Testa v. Katt* (n.2, p. 596): State courts are exception to anti-commandeering rule
- Other exceptions to anti-commandeering rule:
- 1. State militias when called into federal service
- 2. State election machinery
- 3. Federal court jurisdiction over states as parties
- 4. Full Faith and Credit Clause
- Application: Anti-commandeering rule to Trump policy on sanctuary cities?