Constitutional Law outline, Fall 2004. Professor R. Miller.

I. Constitutional interpretation

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(1) *Martin v. Hunter's Lessee* (1816):

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(1) The Exceptions and Regulations Clause (A3s2c2)

(a) Jurisdiction stripping

i) Arguments in favor of jurisdiction stripping:

a. Constitutional text

b. Structural--this is a check and balance on the judiciary.

c. Prudential--otherwise, the judiciary gets unlimited power.

d. Doctrinal--*McCardle* and *Felker*.

ii) Arguments against jurisdiction stripping:

a. Doctrinal--*Klein.*

b. Historical--it appears that the framers aimed the Exceptions and Regulations clause at the Court's review of *facts* only--not at its jurisdiction over questions of law.

(b) *Ex parte McCardle* (1868): congress passed a bill, over president Andrew Johnson's veto, stripping the Court of its jurisdiction over habeas appeals from federal circuit courts, leaving its habeas jurisdiction limited to

appeals from state courts. The Court says this was valid jurisdiction stripping.

i) "[T]he power [of the legislature] to make exceptions to the appellate jurisdiction of this court is given by express words."

(c) *Felker v. Turpin* (1996): again the Court upholds congressional jurisdiction stripping--here, where congress removes the Court's authority to hear appeals from circuit court "gatekeeping" of a prisoner's second habeas corpus petition.

i) "[S]ince it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, s 2."

(d) *United States v. Klein* (1871): the Court says a provision that stripped it of its jurisdiction to hear appeals involving certain pardons from the Court of Claims, because the stripping was simply a means to an end (to deny to these pardons the force the Court had said they had).

(e) Distingsuishing *McCardle* and *Felker* from *Klein*: *McCardle* was decided during a time of crisis (the Civil War) and *Felker* left the Court with some jurisdiction to hear habeas cases.

(2) Separation of powers

(a) Presidential appointment of judges

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(1) Advisory opinions

(2) Standing

(a) (Constitutional requirements

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iii) Redressability

(b) Prudential requirements

i) Third-party standing

ii) Generalized grievances)

(3) Ripeness

(4) Mootness

(5) The political question doctrine: a misnamed doctrine, in a way, because it doesn't prevent the Court from considering political issues (see *Bush v. Gore*, campaign finance cases, political primaries cases). Rather, a political question is subject matter which the court holds to be inappropriate for judicial review because it should be left to the political *branches* for a decision.

(a) *Baker v. Carr* (1962): the Court sets out the principle categories of political questions.

i) Categories of political questions:

a. Textual commitment of the issue to a political branch.

b. Lack of judicially discoverable, and manageable, standard for decision.

c. Impossibility of decision without an initial policy determination.

d. Impossibility of independent resolution without disrespecting the political branches.

e. Unusual need for adherence to a political decision that's already been made.

f. Potential embarrassment of the judiciary.

(b) Political institutions

i) The Guarantee clause (A4s4): this is an area that the Court simply will not touch. Period.

ii) Equal protection (am14): in *Baker v. Carr* (1962), the Court says that while the constitutionality of redistricting is nonjusticiable when brought as a Guaranty Clause claim, it can be justiciable when brought as an am14 claim. This approach was later reaffirmed in *Davis v. Bandemer* (1986). Then, however, in *Vieth v. Jubelirer* (2004), the Court goes back to saying redistricting issues are nonjusticiable, even on am14 grounds--because in two decades, the courts have still not discovered a "judicially discoverable and manageable" standard for resolving them.

a. Note that Justice Kennedy is the fence sitter in *Vieth*--he agrees that there is no standard to be found in am14 for resolving redistricting issues. He thinks that there must be a standard somewhere, though, and suggests maybe am1 might have one.

(c) Congressional self-governance

i) *Powell v. McCormack* (1969): the Court says a question about whether an elected congressman is qualified to take his seat is justiciable, because the only textual commitment in A1s5, providing that the House has the adjudicatory power to determine a congressman's qualifications, only goes as far as the qualifications expressly set forth in the constitution.

(d) Foreign affairs

i) *Goldwater v. Carter* (1979): the Court says a question about the president's authority to rescind a treaty is nonjusticiable, because it involves foreign affairs and should be controlled by political standards.

(e) Impeachment and removal

i) *Nixon v. United States* (1993): the Court says an impeachment question is nonjusticiable because of (1) a textual commitment to the Senate, (2) framer's intent to leave impeachment trial to the Senate, (3) judicial review of impeachment would be inconsistent with separation of powers, (4) lack of finality, and (5) difficulty of fashioning a remedy.

e) (Avoidance: the Court will reach constitutional questions only when necessary**)**

B. The legislature

1. Congress and the states

a) *McCulloch v. Maryland* (1819): the Marshall Court upholds the federal bank, and says that Maryland can't tax it.

(1) In his decision, Marshall considers to broad questions:

(a) The federal legislative power: can congress create a corporation, viz., a bank? Yes.

i) Bank creation is not a congressional power enumerated in A1s8., so Marshall looks at the A1s8 powers as a whole and concludes that the Necessary and Proper Clause (A1s8c18) entitles congress to effect the *means* by which the A1s8 powers can be realized. Means, that is, like a national bank. These means, then, are the implied powers of congress.

a. "Necessary and Proper": Marshall looks to his modern times for the meaning of "necessary and proper," and ends up equating it with "convenient and useful." The state of Maryland argues that "necessary and proper" only means that congress may make *laws*--laws necessary and proper to effect the other enumerated powers. But Marshall thinks that reading is too restrictive--that it would make the constitutional congressional power a dead letter.

ii) Marshall also makes a historical pedigree argument: that the U.S. had done this before (created a bank) and benefited from it.

(b) Federalism: if congress can create a bank, can a state tax that bank? No.

i) Marshall says that the *people* created the union--rejecting the state of Maryland's argument that the states created the union, and so it wouldn't make any sense that they would create something (e.g., a bank) that could overtake their own sovereignty ("the power to tax involves the power to destroy").

a. (Note that in the 1990s, Justice Thomas said in a dissent that, though it was the people that created the union, it was the people of the *several* states--not the people of the United States.

ii) Marshall also looks to the Supremacy Clause for justification here.

2. The positive Commerce Clause (A1s8c3)

a) The initial, "not-limited" era (1790 to 1890s)

(1) *Gibbons v. Ogden* (1824): the Marshall Court allows a federally-licensed ferry operator to continue running ferries in New York despite that New York granted a monopoly to a competing ferry operation.

(a) "Commerce": Marshall defines "commerce" in a "not-limited" way--broadening its definition beyond the facially obvious to include, here, navigation. His definition of "commerce" is not necessarily a broad one, but it is decidedly not a narrow one.

(b) "Among the states": Marshall says "among the states" means more than just regulation of commerce across state lines--it includes, to some extent, regulation of some activities within a state.

i) "The word 'among' means *intermingled* with. . . . Commerce among

the States, cannot stop at the external boundary line of each State, but may be introduced into the interior."

(2) The transitional period

(a) *United States v. Dewitt* (1869): the Court strikes down a federal law regulating illuminating oils because this kind of regulation is purely police power. And that's the realm of the states--the police power is the essence of the the power that inheres in an autonomous sovereign.

(b) *The Trademark Cases* (1878): the Court strikes down a federal law establishing a federal system for registering trademarks because it regulated wholly *intra*state matters--thus, the law was "obviously the exercise of a power not confided in Congress."

b) The limited era (1890s to 1937): the American Industrial Revolution brings *massive* development--development managed in no small part by the Supreme Court. The Supreme Court justices of this time were not just constitutional interpreters, Miller argues--they were men of particular backgrounds, all former advocates for capitalist interests. For instance, Justice Brewer (1890 to 1910), once said that "it is unvaryingly the natural law that the wealth of the community will be in the hands of the few." So, it was a Supreme Court thus composed that spoke for the constitution during this time where the "robber barons" opposed an expansive reading of the Commerce Clause, because such a reading would impede enterprise.

(1) "Commerce": production/manufacturing is not "commerce"

(a) *United States v. E.C. Knight Co.* (1895): the Court says congress can't suppress the American Sugar Refining Co.'s monopoly with the Sherman Antitrust Act.

i) <u>"Commerce"</u>: the Court decides that whatever "commerce" is, it's *not* manufacturing. Because, it reasons, manufacturing is just making things--it's not putting them into commerce. "Commerce," then, is just the disposition of things that are made.

a. "Although the exercise of [the power to control manufacture] may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and it not a part of it."

ii) <u>Police power</u>: "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive [in the states]."

(b) *Carter v. Carter Coal Co.* (1936): the Court says the Bituminous Coal Act of 1935 is unconstitutional because the Act is beyond the powers of congress.

i) <u>"Commerce"</u>: again, the Court says "commerce" is *not* production. "Commerce in the coal mined is not brought into being by force of [employment of men and the extraction of coal], but by negotiations,

agreements and circumstances entirely apart from production. *Mining brings the subject-matter of commerce into existence. Commerce disposes of it.*"

(2) "Among the states": giving meaning to *Gibbons* "intermingling"

(a) The direct/indirect effect distinction

i) *A.L.A. Schechter Poultry Corp. v. United States* (1935): the Court says the Live Poultry Code is invalid, in part because it regulated intrastate transactions that affected interstate commerce only *indirectly*.

a. The Live Poultry Code: this code isn't really about chickens--it's really about labor conditions (child labor, collective bargaining, 40-hour work weeks) and health and welfare (keeping sick chickens out of commerce).

b. Direct versus indirect effects: "where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."

1) ("If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.")

2) The argument here that there *is* interstate commerce here is that 96% of the chickens coming into New York City came from outside of the state.

c. (Stream of commerce: the stream of commerce analysis is not implicated here, the Court says, because these chickens are at the end of their trip--they're not going to continue on to another state.)

d. Note that while the Court strikes down the Live Poultry Code, it still gives congress *some* power. Viz., the power to regulate transactions that have a direct effect on interstate commerce. That is, the Court could have said that since the only chickens affected here were chickens within New York City, there was absolutely no *possible* Commerce Clause authority here.

ii) *The Shreveport Rate Cases* (1914): the Court upholds regulation of a wholly intrastate rail freight operation, because the operation affects interstate commerce.

a. Direct versus indirect effects: "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and *not the state*, that is entitled to prescribe the final and dominant rule."

iii) Distinguishing *Schechter* and *Rate Cases*:

a. The *Rate Cases* involve a company trying to gain a competitive advantage against other companies in its industries, whereas *Schechter* does not involve competitive advantage.

b. The nature of the commercial activity in *Schechter* is basic buying

and selling, whereas the commercial activity in the *Rate Cases* is transportation--a more typically interstate activity.

c. It was the commercial activity in the *Rate Cases* was wholly opposed by the railroad industry, whereas it was the *regulation* in *Schechter* that was wholly opposed by industry.

(b) The stream of commerce analysis

c) The expansive era (1937 to 1990s): the Great Depression happens. FDR's New Deal hinges on the Court changing its Commerce Clause jurisprudence, and so FDR threatens with the court packing plan. But then, in 1937, Justice Owen Roberts (1930 to 1945) switches sides (owing to the political pressure probably, but Robert says not), and the court packing plan isn't needed. The new Court says it will not "shut our eyes the the plainest facts of our national life" and shifts from a limited to an expansive reading of the Commerce Clause.

(1) The shift

(a) *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937): the Court permits the National Labor Relations Board to enforce labor standards, scrapping (but only implicitly) the manufacturing/production is not "commerce" idea.

i) The "substantial relation" test is born: Congress's power to regulate commerce "is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it. Although activities may be intrastate in character when separately considered, if they have *such a close and substantial relation to interstate commerce* that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

a. "The *close and intimate* effect which brings the subject within the read of the federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. . . . The question remains as to the *effect* upon interstate commerce of the labor practice involved."

(b) *United States v. Darby* (1941): again considering labor standards regulations, the Court now explicitly scraps the manufacturing/production is not "commerce" idea.

i) "While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate *is* such commerce." The Court says that congress can regulate commerce in every case unless it infringes on some other constitutional prohibition.

ii) The Court also discards, explicitly, *Hammer v. Dagenhart* (1918).

(c) *Wickard v. Filburn* (1942): the Court goes all out, upholding regulation that affects a small, sustenance farm in Ohio.

i) Shedding the old Commerce Clause analyses: the Court scraps the commerce/manufacturing distinction, the direct/indirect distinction, and the stream of commerce limitation.

ii) The substantial effect test: "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be

reached by Congress if it exerts a *substantial economic effect* on interstate commerce."

iii) Combined effect: the Court is willing to beyond the particular farm here, to the aggregate effect of the activity involved. "Appellee's own contribution to the demand for wheat may be trivial by itself [but that's] nt enough to remove him from the scope of federal regulation where, as here, his contributions *taken together with that of many others similarly situated*, is far from trivial." ("Home-grown wheat in this sense competes with wheat in commerce.")

iv) The *Wickard* problem:

a. Textual problems: how can a small, sustenance farm be involved in commerce? The Court might respond by saying that even though it's just a small farm, it's not wholly divorced from commerce--since the farmer is self-sufficient, he's not spending money. That is, he's participating in commerce by not participating. The Court might add that if you start isolating "commerce" from commerce, you can end up with the absured "commerce" ≠ manufacturing idea that the Court adhered to for so long.

b. Absurdity problems: even given that the manufacturing is not "commerce" idea is absurd, how can the Court justify obliterating the "commerce"/*non*-commerce distinction? The Court is focused on the *regulations*, not the farmer. This leads them to think of the aggregate effect. But, still, couldn't *everything* be regulated under this analysis? No--the Court draws the line at "substantial effect." This means for the regulation to be constitutional, there has to be an *actual* aggregate that *actually* affects commerce.

(d) Just how radical is this shift?

i) The "substantial effect" test: how different is this from the direct/indirect distinction? Could it be that the Court, e.g. in *Jones & Laughlin Steel*, is simply clarifying what "direct" means?

(2) The civil rights cases

(a) *Heart of Atlanta Motel, Inc. v. United States* (1964): the Court upholds enforcement of the Civil Rights Act of 1964 against a motel that refuses to rent rooms to blacks.

(b) *Katzenbach v. McClung Sr. and McClung Jr.* (1964):

(3) *Perez v. United States* (1971): the Court upholds the Consumer Credit Protection act, looking at congressional findings for evidence that even intrastate credit transactions affect interstate commerce (although noting that congress need not "particularized findings in order to legislate"). The Court, however, also goes a little formalist, identifying three categories that the Commerce Clause addresses--channels, instrumentalities, and activities affecting commerce.

d) Another limited era? (1990s to ???)

(1) *United States v. Lopez* (1995): the Rehnquist Court, starting from "first principles," rather than precedent, strikes down the Gun-Free Schools Zones

Act, and affirmatively sets up three categories of CC application.

(a) Categories of CC application:

i) Regulation of the use of channels of interstate commerce.

ii) Regulation and protection of instrumentalities of interstate commerce.

iii) Regulation of activities having a "substantial relation" to interstate commerce

a. The substantial effect test:

1) Does the nature of the law have anything to do with commerce or some sort of economic enterprise?

2) Is there a "jurisdictional nexus" that would ensure in a case-by-case inquiry, that the law affects interstate commerce? E.g., "receive, possess, or transport in commerce."

3) Do congressional findings or legislative history show a substantial effect on interstate commerce? (But note that congress is not required to make formal findings--they are just helpful.)

(b) Justice Thomas concurs, but argues, using a textualist/originalist approach, for abandonment of the substantial effect category of CC application

(c) Justices Kennedy and O'Connor concur, saying that the holding is a necessary but limited (because of the increased need for centralization) holding.

(d) The dissenters argue for a better balance of power between the congress and the judiciary. That is, they don't show concern for the balance between the federal government and the several states.

(2) *United States v. Morrison* (2000): the Court strikes down a federal law providing a civil remedy for victims of gender-motivated violence, applying the substantial effects test. In doing so, the court places in doubt the *Wickard* aggregate method and the value of congressional findings ("Simply because congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."). "The constitution requires a distinction between what is truly national and what is truly local."

3. The Tenth Amendment: the question here is whether the Tenth Amendment reserves a sphere of power to the states--does it establish a judicially enforceable limit on congress? Some say yes, others say no.

a) Limited era (1890s to 1937)

(1) *Hammer v. Dagenhart* (1918): the Court strikes down a child labor regulation because the act seeks to regulate production, the Court says, even despite the plain language.

(2) *Champion v. Ames* (1903): the Court upholds an act prohibiting lotteries because it focuses on interstate, not local, activity, the Court says.

b) Expansive era (1937 to 1990s)

(1) *National League of Cities v. Usery* (1976): the Court strikes down the 1974 amendments to the Fair Labor Standards Act because they violate am10, even though they were enacted within congress's CC power. That is, the

amendments operated "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."

(2) *Garcia v. San Antonio Metropolitan Transit Authority* (1985): the Court overrules *National League of Cities* and says that am10 is a procedural, not a substantive boundary against the CC.

c) Another limited era? (1990s to ???)

(1) *New York v. United States* (1992): the Court strikes down the "take title" portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on Tenth Amendment grounds.

(2) *Printz v. United States* (1997): the Court strikes down certain interim provisions of the Brady Act that require states to conduct background checks on handgun purchasers, because those provisions violated the system of dual sovereignty set up by the constitution, particularly am10.

(3) *Reno v. Condon* (2000): the Court here rejects an am10 challenge to the Driver's Privacy Protection Act because the information regulated by that act was a "thing in interstate commerce" (CC empowers) and because it didn't require the "States in their sovereign capacity to regulate their own citizens" (am10 doesn't prevent).

4. The taxing and spending powers (A1s8c1)

a) Direct taxing and spending

(1) *United States v. Butler* (1936): the Court strikes a tax on am10 grounds, but only after adopting an expansive approach to the taxing power.

(a) Approaches to the taxing power:

i) The Madisonian, Anti-Federalist approach: the T&S power is a bookend to A1s8--like the N&P clause.

ii) The Hamiltonian approach: the T&S power is a free-standing enumerated power. The Court adopts this one.

(b) am10 limitations: the court says the T&S power is not unlimited--rather, it's limited by am10. This way, the Court never defines "general welfare," and instead takes a formalist approach, categorizing what the federal government may be concerned with and what the states may be concerned with.

(2) "General welfare": though the Court did not define "general welfare" in *Butler*, the phrase has since received the broadest possible reading. See, for instance, *Chas. C. Steward Mach Co.* (1937), saying that the federal government may enact "every form of tax appropriate to sovereignty."

b) Conditional grants to state governments

(1) *South Dakota v. Dole* (1987): the Court upholds congress's ploy to raise the drinking age to 21 by withholding highways funds from states who don't comply.

(a) General restrictions on the spending power:

i) Spending must be in pursuit of "the general welfare."

ii) Congress must condition spending unambiguously, "enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation."

iii) Grants may be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."

(b) The Tenth Amendment restriction on the spending power: "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion."

(2) *Sabri v. United States* (2004): the Court upholds an act proscribing bribery of entities receiving at least $10K in federal funds, because "the power to keep a watchful eye on expenditures is bound up with congressional authority to spend in the first place."

5. **Sovereign immunity (am11):** A3s2c1 provides the Court with jurisdiction over cases "between a state or its citizens and foreign states or their citizens." *Chisolm v. Georgia* (1793), where the Court allowed a South Carolina citizen to recover money from the state of Georgia, prompted the Eleventh Amendment, which provides that the "Judicial power shall not extend to any suit commences against one of the states by citizens of another state." The Court has carved out several exceptions to am11's protections of state sovereign immunity, though:

a) State officers can be sued for injunctive relief or for damages that will come out of the officer's own pocket.

b) States can consent to federal jurisdiction, such as when they seek removal to federal court, or when they otherwise seek federal jurisdiction, because it may offer better law or remedies.

(1) However, "the test for determining whether a state has waived its am11 immunity is a stringent one." Waivers must be explicit, and there is no constructive or implied waiver.

c) Some suits may be authorized by congress under am14s5 ("The congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Even though this interpretation threatens state sovereignty, the Court says that that was the *intent* of am14s5 (see *Ex parte Virginia* (1880)).

(1) *Fitzpatrick v. Bitzer* (1976): the Court says principles of state sovereignty are limited by am14s5, and when congress acts under am14s5, its authority is plenary.

(2) *Pennsylvania v. Union Gas* (1989): the Court, very splintered, said that two environmental acts authorized suits against states pursuant to the Commerce Clause!!!

(3) *Seminole Tribe of Florida v. Florida* (1996): the Court overrules *Union Gas*, and reasserts that am11 exceptions created by commerce must be created under am14s5 authority, only.

(a) Requirements for congressional abrogation of state sovereign immunity:

i) Congress must unequivocally express an intent to abrogate immunity.

ii) Congress must act pursuant to a valid exercise of power--and the only valid exercise is am14s5 (and, presumably, the similar sections in ams13 and 15).

(4) *Board of Trustees, University of Alabama v. Garrett* (2001): the Court works to determine the scope of am14 to which am14s5 abrogation may be applied. The Court decides that am14s5 legislation can reach beyond the scope of

am14s1, but, if so, there must be "proportionality between the injury to be prevented and the means adopted to that end." Also, the Court looks at whether congress has identified a history and pattern of am14 violation in the conduct in question.

(5) *Nevada Dep't of Human Resources v. Hibbs* (2003): the Court more clearly sets out the requirements for am14s5 abrogation that seeks to remedy a wrong beyond the strict scope of am14s1.

(a) Requirements for beyond-scope abrogation:

i) The abrogation must be congruent and proportional to the law's remedial object.

ii) The law must be responsive to or designed to prevent the unconstitutional behavior.

(6) *Tennessee v. Lane* (2004): the Court upholds an am14s5 abrogation because the abrogation was responsive to evidence of unequal treatment--it was a reasonable prophylactic measure reasonably targeted to a legitimate end.

C. The executive

1. Inherent presidential powers

a) A catalog of inherent presidential powers:

(1) Commander in chief

(2) Pardoning

(3) Treaty-making (with advice and consent of the Senate)

(4) Appointment (with advice and consent of the Senate)

(5) Temporary appointment

(6) Approve or return legislation

(7) Take care that the laws be faithfully executed

b) *Youngstown Sheet & Tube Co. v. Sawyer* (1952): the Court says that a congressional command is enough to empower the executive, but finds none here. It also finds no inherent power, saying that the executive's responsibility to execute the laws refutes any idea that he should be a lawmaker.

(1) The zones of presidential power: Justice Jackson's concurrence laws out the paradigm for analyzing executive power that survives today:

(a) Congressional and constitutional authorization: here, the executive is at maximum power.

(b) Constitutional authorization but congressional silence: the Court must determine the exent of congressional acquiescence.

(c) Constitutional authorization but against express congressional will: the executive is limited to his inherent powers.

(2) Other justices offer more functionalist analyses here, saying, in effect, that the president must have some power in the circumstances of this case because the U.S. was at war with the communists.

c) **Executive privilege:** although some argue that the executive privilege is a myth, because it can't be found in the constitutional text, the Court has adopted a limited executive privilege.

(1) *United States v. Nixon* (1974): the Court does not allow an executive privilege

where the president was a third-party in a criminal case, citing concerns over the defendants receiving their due process rights to hear the evidence against them. The Court does, however, recognize that executive privilege can sometimes be good, because of the value of promoting candor in the executive's internal deliberations.

(2) *Cheney v. U.S. District Court for the District of Columbia* (2004): the Court, although not deciding the executive privilege, recognizes that it does exist and that it is broader than the ordinary individual's privilege, and suggests that the *Nixon* case might be limited to criminal cases.

2. Congressional expansion of presidential power

a) *Clinton v. City of New York* (1998): the Court strikes down the line item veto, taking a formalist approach rather than a functionalist approach that would have recognized the budget crisis. The Court says that the line item veto violates separation of powers because it's lawmaking, basically--and the constitution contemplates that lawmaking should only be done using the "finely wrought" congressional process.

3. The administrative state

a) **The non-delegation doctrine:** whether congress can delegate its powers to another branch.

(1) *A.LA. Schechter Poultry Corp. v. United States* (1935): the Court strikes down a delegation, setting out specific limits for when congress can delegate power to executive agencies.

(a) Limits on congressional delegation to executive agencies:

i) No delegation without some prescribed rules of conduct for the agency.

ii) No delegation without some standards for the agency to follow when making rules.

(2) *Panama Refining Co. v. Ryan* (1935): again the Court strikes down a delegation, saying that congress "left the matter to the president without standard or rule, to be dealt with as he pleased." Such a delegation is a violation of the "processes of legislation which are an essential part of our system of government."

(3) *Mistretta v. United States* (1989): the Court upholds a delegation, and the non-delegation doctrine meets its demise, replaced with the intelligible principle doctrine. Delegation is okay, the Court says, as long as congress lays out an "intelligible principle." Here, the Court finds an intelligible principle because congress set out goals for the target group (the judicial sentencing commission) and set out a mechanism for achieving those goals. The Court also notes that the non-delegation doctrine simply can't work anymore--in today's complex society.

(a) Justice Scalia dissents, saying that the legislature should be, under the constitution, the only body doing any legislating--not the agencies, which are "insulated from the political process."

(4) *Whitman v. American Trucking Association, Inc.* (2001): the Court again upholds a delegation, with Scalia writing for the majority. Scalia might be

being sarcastic in his opinion, however, because he bases it on stare decisis grounds, saying that the "intelligible principle" in the delegation here is at least as "intelligible" as others the Court has found.

b) Checks on administrative power

(1) The legislative veto: whether congress can overturn an agency decision without adopting a new law.

(a) *INS V. Chadha* (1983): the Court says that where an act of congress is legislative in "character and effect," it must satisfy the legislative process (presentment and bicameralism) spelled out in the constitution. An act is legislative in "character and effect" if it affects the rights or duties of entities external to congress, and if it is a policy decision in some way. This is the demise of the legislative veto--to check an agency act, congress must either (a) not create the agency in the first place or (b) pass a new law (satisfying the "finely wrought process" undoing the agency. So, it's all or nothing.

i) However, there's an argument that if we need the administrative state so much, as the Court suggests in *Mistretta*, then maybe we shouldn't be so wedded to the "finely wrought process."

(2) The appointment power

(a) *Morrison v. Olson* (1988): since congress can only appoint, without the president, "inferior" officers, the Court, in order to decide whether the "independent counsel" must be appointed by the president, must decide whether the independent counsel is "inferior" or not.

i) The "inferior" tests": if all of these are satisfied, then the officer is definitely "inferior."

a. Is the officer subject to removal by a higher executive branch official?

b. Does the officer have limited duties? (He does not have limited duties if he can formulate policy.)

c. Is the officer's jurisdiction limited?

d. Is the officer's tenure limited?

(3) The removal power

(a) The impeachment of Andrew Johnson

(b) *Myers v. United States* (1926): the power of removal is plenary in the president--it is "incident to the power of appointment."

(c) *Humphrey's Executor v. United States* (1935): congress can limit the removal power--somewhat at least.

i) The *Humphrey's Executor* removal test:

a. Is the officer merely a unit of the executive branch? If so, that officer is inherently subject to presidential removal alone.

b. Is the officer acting in a quasi- role? If so, then congress can limit the executive's removal power to some degree.

(d) *Wiener v. United States* (1958): adjudicatory officers are excluded from at-will presidential removal. That is, the president must have some cause

to remove such an officer.

(e) *Bowsher v. Synar* (1986): when congress creates an executive officer, it can't retain removal powers over that officer.

(f) *Morrison v. Olson* (1988): the Court modifies the *Humphrey's Executor* removal test. It's new test is: Will the congressional limits on the president's removal power impede the president's ability to perform his duties? If so, then the limits may not be permissible.

4. Foreign affairs

a) *United States v. Curtiss-Wright Export Corp.* (1936): the Court characterizes the executive's inherent foreign affairs authority. It notes that the constitution does not provide for a government of enumerated powers when it comes to foreign affairs, since the states never had foreign affairs authority and the executive is the boss of the ambassadors and it is "he alone" who negotiates.

b) Executive agreements

(1) *Dames & Moore v. Regan* (1981): the Court basically says that an executive agreement is just as good as a treaty--even though the executive agreement does not require approval by the senate. Justice Jackson's zones of authority test works in the background here, since the kind of executive agreement at issue had traditionally been authorized by congress.

c) War powers

(1) War Powers Resolution (50 U.S.C. s 1541) (1973): congress reaffirms, expressly, that the war powers are shared between the executive and congress.

(a) Presidential introduction of armed forces: the president can introduce armed forces only if either:

i) Congress has declared war.

ii) Congress has specifically, statutorily authorized it.

iii) There's a national emergency created by an attack on the U.S.

(b) Once the president has introduced armed forces, he must continue to consult with congress:

i) He must report to congress within 48 hours of introducing the armed forces.

ii) He must remove the armed forces within 60 days (or 90 in some cases) unless congress either (a) declares war or (b) specifically authorizes the use of armed forces.

(c) *Campbell v. Clinton* (D.D.C. 1999): a district court dismisses, on justiciability (standing) grounds, a challenge to the president's introduction of armed forces in Yugoslavia.

(d) *John Doe I* (D.?. recent): a district court dismisses, on justiciability (ripeness) grounds, a challenge to the president's introduction of armed forces in Afghanistan.

d) Military tribunals

(1) Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (66 Fed. Reg. 57,833) (2001).

(2) *Ex parte Quirin* (1942): the Court says German soldiers captured on

American soil may be tried before a military tribunal, because such trial was authorized by congress, in the Articles of War.

(3) *Hamdi v. Rumsfeld* (2004): the Court only formally enforces the constitutional mandate of shared war powers, saying that the Authorization for the Use of Military Force (2001) was not as specific and detailed a commitment by congress as the Articles of War (1941) considered in *Quirin*.

5. Checks on presidential power

a) Civil suit and prosecution

(1) *Nixon v. Fitzgerald* (1982): the Court adopts absolute civil suit immunity for the president (for acts he does while in office).

(2) *Clinton v. Jones* (1997): the Court says the executive has no immunity for acts he did prior to taking office.

b) Impeachment

D. The states

1. The preemption doctrine (A6 Supremacy Clause)

a) Express preemption

(1) *Cipollone v. Liggett Group, Inc.* ():

(2) *Lorillard Tobacco Co. v. Reilly* ():

b) Implied preemption

(1) Conflicts preemption

(a) *Florida Lime & Avocado Growers, Inc. v. Paul* ():

(2) Impedes preemption

(a) *PG&E Co. v. State Energy Resources Conservation & Development Comm'n* ():

(3) Field preemption

(a) *Hines v. Davidowitz* ():

2. The Dormant Commerce Clause

a) *H.P. Hood & Sons, Inc. v. du Mond* ():

b) The DCC before 1938

(1) *Cooley v. The Board of Wardens of the Port of Philadelphia* ():

c) The contemporary DCC

(1) The balancing approach

(a) *South Carolina State Hwy. Dep't v. Barnwell Bros., Inc.* ():

(b) *Southern Pacific Co. v. Arizona ex rel. Sullivan* ():

(c) Determining if a law is discriminatory

i) Facially discriminatory laws

a. *City of Philadelphia v. New Jersey* ():

b. *C&A Carbone, Inc. v. Town of Clarkston, New York* ():

c. *Hughes v. Oklahoma* ():

ii) Facially neutral laws

a. *Hunt v. Washington States Apple Advertising Comm'n* ():

b. *Exxon Corp. v. Governor of Maryland* ():

c. *West Lynn Creamery, Inc. v. Healy* ():

d. *State of Minnesota v. Clover Leaf Creamery Co.* ():

(d) Analysis if discriminatory

i) *Dean Milk Co. v. City of Madison, Wisconsin* ():

ii) *Maine v. Taylor and United States* ():

(e) Analysis if non-discriminatory

i) *Pike v. Bruce Church, Inc.* ():

ii) *Bibb v. Navajo Freight Lines, Inc.* ():

iii) *Kassel v. Consolidated Freightways Corp.* ():

iv) *CTS Corp. v. Dynamics of America* ():

(2) Exceptions to the DCC

(a) Congressional approval

i) *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California* ():

(b) The market participant exception

i) *Reeves Inc. v. Stake* ():

ii) *South-Central Timber Development, Inc. v. Wunnicke* ():

III. Federalism and community

A. What is federalism?

1. Miller's definition: federalism is "the division of power between two separate authorities, each of which enforces its own law against its citizens."

B. What is community?

1. Mike Stern's sociological definition: community is made up three elements: place, common intereest, and connection.

2. Tönnies

a) ***Gemeinschaft und gesellschaft*** **(1887)**

(1) Gemeinschaft: community--"horizontal" connections, like family and friends.

(2) Gesellschaft: society--vertical connections, like government and state.

3. The sociology of community

a) "Community lost"

b) "Community found"

c) "Community liberated"

C. Rubin & Feeley, *Federalism: Some Notes on a National Neurosis* (1994)

1. Justifications for federalism

a) Public participation

b) Citizen choice

c) State competition

d) Experimentation

e) Power diffusion

f) Community

(1) Affective communities

(2) Political communities

D. The sociology of federalism

1. Putnam, *Bowling Alone* (2000)

2. Lyon, *The Community in Urban Society* (1989)

E. Federalism and community at the founding

1. *The Federalist Papers*

a) No. 42 (Madison) (1788):

b) No. 44 (Madison) (1788):

c) No. 45 (Madison) (1788):

d) No. 46 (Madison) (1788)

2. de Tocqueville, *Democracy in America*

F. Federalism and community today

1. *****Process federalism: the notion that the procedural aspects of federalism, such as ratification (A7), amendment (A5), and the electoral college (A2s2), which are formally preserved by the constitution, will ensure that the states survive.

2. Nisbet, *The Quest for Community* (1990)

3. Viteretti & Russello, *Community and American Federalism* (1997)

G. *[Final thoughts]**

1. Kymlicka, *Community*

2. Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*

3. Kemmis, *Community and Politics of Place*

4. Current, *Tarheels and Badgers*