

HYPO 1 – 2 20 YEAR OLD MALES COMMIT THE EXACT SAME CRIME IN DIFFERENT SECTIONS OF BALTIMORE. EACH ROBBS A 7/11 OF \$275 USING A KNIFE. **DO THEY RECEIVE THE SAME SENTENCE ?**

HYPO 2 – ASSUME CRAZY STATE HAS A RULE THAT 3 FELONY CONVICTIONS = LIFE IMPRISONMENT. ASSUME DEFENDANT DOES THE FOLLOWING (ALL FELONIES IN STATE):

1. \$ 150 VISA CHARGE OVER THE CREDIT LIMIT;
2. BOUNCES A \$ 50 CHECK
3. STEALS A CHICKEN

IF STATE'S COURTS SEND HIM TO JAIL FOR LIFE, SHOULD USSC OVERTURN THE DECISION ?

HARD CASES MAKE BAD LAW - O W HOLMES

IN DEALING WITH A HARD CASE, WOULD YOU PREFER A MEMO ON THE LAW OR A MEMO ON THE JUDGE'S PERSONALITY, VALUES AND BACKGROUND ?

SHOULD THE USSC BE MORE CONCERNED WITH DOING JUSTICE IN A PARTICULAR CASE OR BE CONCERNED WITH PRECEDENT AND GUIDANCE FOR THE FEDERAL JUDICIARY ?

WHAT IS SOCIETY'S OBLIGATION TO THOSE
LEAST ABLE TO HELP THEMSELVES ? SOCIAL
WELFARE v SOCIAL DARWINISM

2014 CONSTITUTION – INTERPRET GIVEN
MEANING WHEN WRITTEN OR FLEXIBLE
DOCUMENT INTERPRETED THROUGH
CONTEMPORARY VALUES ?

JUDICIAL ACTIVISM (TAKE A LOT OF CASES) v
JUDICIAL RESTRAINT (TAKE FEWER CASES)

MY APPROACH:

1. HISTORY ESPECIALLY 1937 – NEW DEAL, GROWTH OF FEDERAL GOVERNMENT AND SOCIALISM

2. USSC CONCERNED WITH NEXT CASE IN DISTRICT COURTS – GUIDANCE/PRECEDENT.

3. USSC CASES – END OF THE STORY. REWIND AND DECIPHER ARGUMENTS BEFORE DC CASE STARTED.

US CONSTITUTION :

AS THE CONVENTION TRIED TO BALANCE
COMPETING INTERESTS, THINGS WE KNOW FOR
SURE THAT WERE UNANIMOUS CONCERNS OF THE
FOUNDING FATHERS:

1. PROTECTION – NATIONAL MILITARY
2. FEAR A KING – SEPARATION OF POWERS WITHIN
THE FEDERAL GOVERNMENT
3. ROLE OF STATE GOVERNMENT - FEDERALISM
4. NATION = SINGLE ECONOMIC UNIT

RESIDUARY (STATES) v ENUMERATED (FEDERAL)

CONSTITUTION DEALS WITH 3 ENTITIES – FEDERAL GOVERNMENT (MOST), STATES AND CITIZENS

FEDERAL GOVERNMENT (CREATING – RULES)

1. LEGISLATURE – ART. I, SEC 7, AND 8

2. EXECUTIVE – ART II, SEC 1, 2 AND 3

3. JUDICIARY – ART III, SEC 1 AND 2

LEGISLATIVE

1. MOST POWERFUL BRANCH – MAKE LAW

2. SEC 7 – HOW TO MAKE LAW – MAJORITY OF BOTH CHAMBERS WITH PRESIDENT, 2/3 OF BOTH CHAMBERS TO OVERRIDE PRESIDENTIAL VETO.

3. CAN CONGRESS PASS A LAW REGULATING THE TERMS OF DIVORCE ? SEC 8 – IF NOT A TOPIC LISTED THERE, CONGRESS CAN'T DO IT. EVERY STATUTE MUST BE TRACED BACK. ESSENTIALLY ALL RELATED TO DEFENSE OR NATION AS SINGLE ECONOMIC UNIT.

4. AT END OF SEC 8, NECESSARY AND PROPER CLAUSE. WHAT DOES IT MEAN ? DOCTRINE OF IMPLIED POWERS EXPANDING EXPRESS POWERS.

EXECUTIVE

1. SEC 1, 2 AND 3 – JOB DESCRIPTION OF MOST POWERFUL PERSON IN WORLD.

A. **COMMANDER IN CHIEF**

B. FOREIGN AFFAIRS (AMBASSADORS, TREATIES, ETC)

C. **APPOINT EXECUTIVE OFFICERS WITH SENATE APPROVAL**

D. **FAITHFULLY EXECUTE LAWS**

EVERYTHING PRESIDENT DOES MUST BE TRACED BACK TO ONE OF THESE POWERS. EQUIVALENT OF NECESSARY AND PROPER = EXEC POWER, SEC 1

JUDICIAL

CAN YOU FILE A CASE IN FEDERAL COURT INVOLVING A CAR ACCIDENT BETWEEN 2 MARYLAND DRIVERS ?

CAN YOU FILE A CASE IN FEDERAL COURT INVOLVING A CAR ACCIDENT BETWEEN MARYLAND AND VIRGINIA DRIVERS ? \$\$\$

CAN YOU FILE A CASE IN FEDERAL COURT INVOLVING A MARYLAND POLICEMAN BEATING A MARYLAND RESIDENT ?

JUDICIAL

1. **SEC 2, FIRST PARA.** POWER = THE KINDS OF CASES FEDERAL SYSTEM CAN HEAR. EXCLUSIVE ? DISCRETION IN CONGRESS. LIKE ART 1, SEC 8 FOR LEGISLATURE.

2. **SEC 2, SECOND PARA.** ORIGINAL JURISDICTION – USSC CAN HEAR CASE FIRST – NO LOWER COURT. MUST IT HEAR IT FIRST ? DISCRETION IN USSC.

3. APPELLATE JURISDICTION

A. **WITH SUCH EXCEPTIONS AND UNDER SUCH REGULATIONS AS CONGRESS MAY MAKE.** CAN CONGRESS SAY USSC CAN'T HEAR ABORTION CASES ?

B. **APPEALS FROM WHAT ?** SEC 1 – INFERIOR COURTS AS **CONGRESS** MAY FROM TIME TO TIME ...

HOW MANY JUSTICES ON USSC ?

CONSTITUTION CLEARLY GRANTS CONGRESS CONTROL OVER JUDICIARY – DOES EXECUTIVE HAVE POWER OVER JUDICIARY ?

EXECUTIVE POWER OVER JUDICIARY

1. APPOINTMENT OF JUDGES WITH CONSENT OF SENATE.

2. ENFORCEMENT. **NIXON TAPES HYPO.**

WHAT POWER DOES JUDICIARY HAVE OVER OTHER BRANCHES ?

JUDICIAL REVIEW FROM WHERE ?

LEAST DANGEROUS BRANCH ?

STATES

1. PRE – 1930's, STATES MUCH BIGGER IN TERMS OF POWER OVER INDIVIDUAL CITIZENS.

2. **ART IV, SEC 1 AND 2** - FEDERAL HOUSEKEEPING – THINGS NEEDED TO MAKE THE COUNTRY A NATION - **FULL FAITH AND CREDIT, PRIVILEGES AND IMMUNITY AND EXTRADITION.**

3. **ART VI, PARA 2** – SUPREMACY CLAUSE. NOTE STATE JUDGES BOUND – STATE JUDGES DOING SOMETHING ON FEDERAL LAW.

IF STATE COURT DECIDES A FEDERAL ISSUE, CAN YOU APPEAL TO USSC ?

WHERE DOES CONSTITUTION SAY IT ?

SINCE IT IS AN APPEAL TO USSC, DO YOU NEED A **CONGRESSIONAL** STATUTE AUTHORIZING IT ?

GOVERNOR FAUBUS IN ARKANSAS.

BROWN V BD OF ED – COLLATERAL ESTOPPEL

IF PRESIDENT DOESN'T SEND IN TROOPS, WHAT HAPPENS ?

IF PRESIDENT DOES SEND IN TROOPS AND GOVERNOR DOESN'T BACK DOWN, WHAT HAPPENS ?

AMENDMENT X – EMBODIMENT OF CONCEPT THAT FEDERAL GOVERNMENT IS **LIMITED** TO POWERS GRANTED IN THE DOCUMENT. STATES ARE **PLENARY** OR **RESIDUAL** – EVERYTHING NOT EXPLICIT IN THE DOCUMENT REMAINS IN THEM.

AMENDMENT XI - A STATE CANNOT BE SUED BY AN OUT OF STATE PLAINTIFF IN FEDERAL COURT.

CITIZENS

ARTICLE I, SEC 9 - HABEUS CORPUS

BILL OF ATTAINDER

EX-POST FACTO LAW

AMENDMENTS 1 – 8 - DO THESE RIGHTS APPLY TO THE STATES ? AS WRITTEN ? BARRON v BALTIMORE.

AMENDMENT 14 – INCORPORATION – APPLIES TO STATES THROUGH THE DUE PROCESS CLAUSE.

LIMITS – CASE OR CONTROVERSY

ADVISORY OPINION

STANDING *

MOOTNESS

RIPENESS

ARTICLE III, SEC 2 - WORD PRECEDES EACH GRANT OF
POWER.

NO DIFFERENCE FOR US BETWEEN CASE AND
CONTROVERSY – ASSUME THEY BOTH MEAN CASE.

CONSTITUTIONAL - FEDERAL COURT HAS NO POWER TO HEAR THE LAWSUIT – NOT A CASE AS THE CONSTITUTION ENVISIONED IT.

PRUDENTIAL - FEDERAL COURT HAS THE POWER TO HEAR IT, BUT NOT A GOOD IDEA TO DO SO. WOULDN'T BE PRUDENT TO HEAR IT.

VOLUME

ADVERSARIAL

CONGRESS

JUDICIAL ACTIVE v JUDICIAL RESTRAINT

RIGHT WRONGS OR DECIDE CASES

ADVISORY OPINIONS

COURT ANSWERING HYPOTHETICAL
QUESTIONS. DO STATE COURTS DO IT ?

1. **31-32** - JOHN JAY REFUSING TO ANSWER WASHINGTON'S QUESTION REGARDING TREATY IMPLICATIONS.
2. EFFICIENCY v ADVERSARY SYSTEM ?
3. NOT BINDING. IF IGNORED, LOWER POWER AND PRESTIGE OF USSC.
4. MAY RESOLVE BY AVOIDING CONSTITUTIONAL ISSUE
5. **32** – RULE AND POLICY QUOTES

COULD USSC GIVE ADVISORY OPINIONS IF IT WANTED TO DO SO ?

DECLARATORY JUDGEMENTS - THOUGHT FOR DECADES TO BE ADVISORY OPINIONS. CHANGE IN 1930'S –

A) LIKE INJUNCTION AND

B) C AND C CONCERNED WITH SUBSTANCE NOT FORM. OK AS LONG AS ADVERSARIAL AND NOT HYPOTHETICAL.

STANDING

DO THE PARTICULAR PARTIES HAVE A SUFFICIENT PERSONAL STAKE IN THE LITIGATION ?

IS THIS A PROBLEM IN NORMAL TORTS OR CONTRACTS LAWSUIT ?

MODERN PROBLEM IN GROWING FEDERAL ACTIVITY AND RIGHTS. CITIZEN HAS A GENERAL PROBLEM WITH A GOVERNMENT ACTION OR A HARM AS A TAXPAYER.

POWER ? DISCRETION ? OTHER BRANCHES ?

CONSTITUTIONAL STANDARDS (33):

1. **ACTUAL INJURY** - INDIVIDUALIZED
2. **CAUSAL CONNECTION**
3. **LIKELY TO BE REDRESSED**

PRUDENTIAL STANDARDS (43):

1. **NO THIRD PARTY**
2. **NO GENERALIZED GRIEVANCES**
3. **P = ZONE OF INTERESTS**

WHAT IF CONGRESS GRANTS STANDING IN STATUTE ?

LUJAN v DEFENDERS OF WILDLIFE (1992 - 32) SPLITS

ENDANGERED SPECIES ACT – ONLY US AND SEAS
DC AND C OF A FOR P. EGYPT – NILE CROCODILE; SRI
LANKA – ASIAN ELEPHANT AND LEOPARD
SCALIA 7 - 2

1. 33Q – CONSTITUTIONAL STANDARDS – INJURY,
CONNECTION AND REDRESSABILITY.
2. 34Q – NOT INGENIOUS. LOWER COURTS WOULD
GIVE EVERYONE STANDING
3. NO REDRESSABILITY - FOREIGN

4. **35** - ESA CITIZEN SUIT – SOME OK BUT NO TO GENERAL INTEREST IN HAVING EXECUTIVE FOLLOW PROCEDURES.

5. GENERALIZED INTEREST – BENEFITS P NO MORE THAN PUBLIC. CONGRESS CAN'T TRANSFER FROM PRESIDENT TO THE COURTS THE POWER TO ENFORCE THE LAWS.

6. IF CONGRESS GRANTS STANDING, ONLY DENY IF VIOLATES **CONSTITUTIONAL**, NOT PRUDENTIAL.

KENNEDY AND SOUTER (C)

CONGRESS CAN GRANT STANDING, BUT MUST IDENTIFY INJURY AND CLASS OF P WHO CAN SUE. NOT JUST GENERAL INTEREST IN ENFORCE

STEVENS (C)

ON MERITS – CONGRESS DIDN'T INTEND TO APPLY TO FOREIGN COUNTRIES

BLACKMAN AND O'CONNOR (D)

COURTS SHOULD BE ABLE TO ENFORCE MANDATED PROCEDURES. SLASH AND BURN.

MASS. v EPA (2007 - 37)

NEW CAR CARBON EMISSIONS. COASTLINE.

HOW MUCH CARBON DOES US PRODUCE ?

STEVENS (5 – 4)

1. NOT PQ, ADVISORY OR MOOT
2. 37 – 38 - 3 CONSTITUTIONAL REQUIREMENTS
3. STANDING APPLIES LESS STRINGENTLY TO STATES

4. INJURY – LOSS OF COASTLINE

5. CAUSAL – US PRODUCES CO₂

6. REDRESS – CAN BE INCREMENTAL

ROBERTS + 3 (D)

JOB OF CONGRESS AND EXECUTIVE, NOT
COURTS.

GLOBAL WARMING IS COMPLEX WEB – CHINA
AND INDIA

PERSONAL INJURY 41

NOT NECESSARILY ECONOMIC

CAUSATION 42

ALLEN v WRIGHT (1984 - 42)

IRS TAX EXEMPTION TO RACIST SCHOOLS

INJURY NOT FAIRLY TRACEABLE TO GOVERNMENT.

UNSURE IF ENOUGH PRIVATE SCHOOLS

DISCRIMINATING. UNSURE IF SCHOOLS WOULD

CHANGE IF DENIED TAX EXEMPTION.

REDRESSABILITY 43

FOCUS ON INJURY AND RELIEF REQUESTED.
CAUSATION LOOKS TO CONDUCT AND INJURY.

THIRD PARTY 43

1. **CLOSE RELATIONSHIP** BETWEEN P AND THIRD PARTY.
2. THIRD PARTY HAS GENUINE **OBSTACLE**

GENERALIZED GRIEVANCE 44

TAXPAYER SUITS - GENERALLY NO – FROTHINGHAM v MELLON. NARROW EXCEPTION – FLAST v COHEN –

1. ART I, SEC 8 **SPENDING** (CITIZENS UNITED – NOT PROPERTY CLAUSE)

2. SPECIFIC CONSTITUTIONAL VIOLATION (HEIN – ESTABLISHMENT CLAUSE)

ARIZONA CHRIST. v WINN – STATE TAXPAYER TOO SPECULATIVE ON INJURY AND CAUSATION.

US v RICHARDSON – CIA § - ART I, SEC 9 – PUBLIC

SCHLESINGER v RESERVISTS – ART I, SEC 6, CL 2 –

CAN'T BE IN CONGRESS AND BE OFFICER. NO CITIZEN STANDING.

NO STANDING EVEN IF NO POSSIBLE P (PRESIDENT – AGE, NATURAL BORN)

ZONE OF INTEREST 44

BENNETT v SPEAR – ESA HALTS DAM. RANCHER SUES TO GET DAM. ZONE MORE FLEXIBLE SINCE PRUDENTIAL. SATISFIES CONSTITUTIONAL.

CONGRESSIONAL GRANT 45

VERMONT v US – STATUTE ALLOWED PRIVATE P TO SUE FRAUDULENT CONTRACTORS. STANDING ALLOWED – ASSIGNMENT OF FEDERAL CLAIM.

FEC v AKINS - VOTERS CHALLENGING FEC FAILURE TO TREAT AIPAC AS POLITICAL.

1. IF CONGRESS GRANTS STANDING, CAN'T USE PRUDENTIAL, ONLY CONSTITUTIONAL
2. INJURY SHARED IN COMMON CAN STILL BE CONCRETE AND AN INJURY IN FACT.

LEGISLATOR STANDING 46

RAINES v BYRD – AGAINST LINE ITEM VETO. DC – MEMBER STANDING ON DILUTED VOTE AND LAWMAKNG AFFECTED. NO STANDING - NO INDIVIDUAL INJURY AND INSTITUTIONAL INJURY WIDELY DISBURSED. (LATER INJURED P ALLOWED)

2014 USSC POLITICS

LIBERAL

GINSBURG
SOTOMAYOR
KAGAN
BREYER

CONSERVATIVE

SCALIA
THOMAS
ALITO
ROBERTS

KENNEDY

CLAPPER v AMNESTY INT'L (2013 -2013-1)

STATUTE ALLOWS US TO CONDUCT SURVEILLANCE ON NON US PERSONS OUTSIDE US. P = US PERSONS WHOSE WORK REQUIRES COMMUNICATIONS WITH LIKELY TARGETS.

ALITO

1. FUTURE INJURY TOO SPECULATIVE TO SATISFY **CERTAINLY IMPENDING**.
2. EVEN IF INJURY, NOT FAIRLY TRACEABLE.

3. ALTERNATIVE – CURRENT INJURY ON INCURRING COSTS. NO – CAN'T MFG STANDING ON HYPO FUTURE HARM.

4. REJECT SECOND CIRCUIT'S "OBJECTIVELY REASONABLE LIKELIHOOD" AND REASSERT "CERTAINLY IMPENDING". TOO LONG A CHAIN.

5. P ONLY SPECULATING ON WHAT GOV'T WILL ACTUALLY DO. CAN'T SATISFY FAIRLY TRACEABLE

6. NO POSSIBLE P IS NOT AN ARGUMENT FOR STANDING. HERE REVIEW BY FISA COURT.

BREYER + 3 (D) GINSBURY SOTOMAYOR AND KAGAN

1. CLEARLY INTERCEPTING PHONE AND EMAILS = INJURY. QUESTION IS “ACTUAL OR IMMINENT”
2. GOV'T MOTIVE AND PAST PRACTICES AND CAPACITY = STRONG LIKELIHOOD. US LAWYER, JOURNALIST OR HUMAN RIGHTS WORKER AT RISK.
3. ALL AGREE CERTAINTY IS NOT THE STANDARD. REASONABLE OR HIGH PROBABILITY IS.

HOLLINGSWORTH v PERRY (2013 - 2013 – 6)

PROP 8 – MARRIAGE = MAN + WOMAN. CALIF OFFICIALS REFUSED TO DEFEND BUT DO ENFORCE. D = PROPONENTS OF PROP 8. NINTH CIR ASKED CALIF SC – THEY SAID PROPONENTS AUTHORIZED TO ASSERT STATE’S INTEREST. DC AND C OF A GRANTED STANDING AND DECLARED PROPOSITION 8 UNCONSTITUTIONAL.

ROBERTS

1. D HAD NO **DIRECT STAKE** IN THE OUTCOME OF THEIR APPEAL. D NOT ORDERED TO DO OR REFRAIN FROM DOING ANYTHING.

2. D CLAIMS SPECIAL STATUS UNDER CALIF LAW.
TRUE BUT ONLY TO ENACTING, NOT ENFORCING. NO
PARTICULARIZED INJURY – ONLY A GENERAL ONE.
NO STANDING TO APPEAL. D PRIVATE WITH NO REAL
TIES TO STATE GOVERNMENT. NO REAL PRECEDENT.

KENNEDY + 3 (D) THOMAS, ALITO AND SOTOMAYOR
CALIF LAWS ALLOWS. LIMITED GROUP – CONCRETE
INJURY. MAJORITY SAYS NO TIE TO STATE
GOVERNMENT BUT CA SC SAID YES. DECISION
UNDERMINES CALIF INITIATIVE – EXECUTIVE HAS A
VETO IF DECIDE NOT TO DEFEND. VIGOROUS
DEFENSE NOT AN ISSUE.

POLITICS CONFUSED – PROP 8 UNCONSTITUTIONAL

US v WINDSOR (2103 - 2013 – 11)

2 WOMEN VALIDLY MARRIED IN CANADA.
RECOGNIZED IN NY. SURVIVOR CHALLENGES
FEDERAL ESTATE TAX. P ALLEGES DOMA
UNCONSTITUTIONAL. AG DECIDES TO ENFORCE BUT
NOT DEFEND. BALG WILLING TO DEFEND IN DC. DC
AND COF A ALLOWED AND DECLARED DOMA INVALID
KENNEDY

1. ENFORCEMENT CLEARLY INJURES P – DENIED
REFUND. ALLOW STANDING. AMICUS WILL FIGHT
EVEN IF EXEC WILL NOT. EXTRAORDINARY POSITION
WHEN EXECUTIVE BELIEVES LAW IS
UNCONSTITUTIONAL. BLAG AUTHORIZED BY HOUSE.

SCALIA + 2 (D) ROBERS AND THOMAS

1. P AND D AGREE LOWER COURTS CORRECT – WHAT ARE WE DOING HERE ?

2. ARTICLE III REQUIRES NOT JUST INJURED P BUT ALSO A D WHO DENIES VALIDITY OF THE COMPLAINT. MAJORITY EAGER TO INVALIDATE.

ALITO (C ON STANDING, D ON MERITS)

BLAG WILL VIGOROUSLY DEFEND.

HANDOUT CL1

MOOTNESS (TOO LATE)

47 – ACTUAL CONTROVERSY MUST EXIST AT ALL STAGES OF LITIGATION – TRIAL AND EACH APPELLATE REVIEW. SOMETHING OUTSIDE THE LEGAL SYSTEM HAS RESOLVED THE DISPUTE. MANY EXCEPTIONS.

PRUDENTIAL ?

RIPENESS (TOO EARLY)

48 - US v MITCHELL (CAN'T CAMPAIGN) AND LAIRD v TATUM (1072 - ARMY SURVEILLANCE - BIG DATA ?)

POLITICAL QUESTION (NOT C OR C BUT SEPARATION OF POWERS)

49 - DOCTRINE ACTUALLY ORIGINATED IN MARBURY v MADISON – BEST LEFT TO OTHER BRANCHES TO DECIDE

BAKER v CARR (1962 - 49)

LEGISLATIVE REAPPORTIONMENT ALWAYS THOUGHT TO BE PQ (COLGROVE v GREEN 1946)

TENNESSEE NOT REAPPORTIONED SINCE 1901.
ACRES NOT PEOPLE. DC AND C OF A – NO STANDING

BRENNAN

1. **51** – QUOTE. MODERN LAW SUMMARY.

2. EG = FOREIGN RELATIONS, RATIFICATION OF CONSTITUTIONAL AMENDMENT, REPUBLICAN FORM OF GOVERNMENT (LUTHER v BORDEN – 1849 – CHAOS – **ART 4, SEC 4**)

3. HERE – EQ PROTECTION = JUDICIAL STANDARDS. NOT ASSIGNED TO CO-EQUAL BRANCH.

FRANKFURTER + HARLAN (D)

1. NO REAL JUDICIAL STANDARDS OR REMEDIES

2. NO REAL PERSONAL INJURY – JUST DISSATISFACTION WITH POLITICAL PROCESS.

3. 54 - 5 – QUOTE

4. IN EFFECT, A GUARANTY CLAUSE CASE. VOTES COUNTED, NOT POWERFUL ENOUGH. TRULY A POLITICAL FIGHT.

REYNOLDS v SIMS – 1964 – ONE MAN, ONE VOTE.

STATE LEGISLATURES MUST BE BUILT ON POPULATION

POWELL v MCCORMACK (1969 - 55)

ACP MET AGE, CITIZENSHIP AND RESIDENCE REQUIREMENTS FOR HOUSE ELECTION. HOUSE REFUSED TO SEAT HIM – FRAUD, EMBEZZLE, ETC

CONSTITUTION SAYS HOUSE MAY JUDGE QUALIFICATIONS OF ITS MEMBERS (ART 1, SEC 5, CL 1).

ARGUMENTS FOR ACP AND HOUSE ?

WARREN

1. IF CONSTITUTION GIVES HOUSE UNREVIEWABLE POWER, CASE OVER. IF NOT, THEN OTHER STRANDS OF PQ.

2. LEGISLATIVE HISTORY REVEALS ACP CORRECT – CAN ONLY EXCLUDE FOR FAILURE TO MEET CONSTITUTIONAL CRITERIA.

3. DEMOCRACY – PEOPLE CAN ELECT WHOMEVER THEY CHOOSE.

WHAT HAPPENS IF DON'T MEET
CONSTITUTIONAL CRITERIA AND NO VOTE TO
EXCLUDE ? UNDER AGE PRESIDENT ?

SILLY OPINION – NEXT MOVE FOR HOUSE ?

GOLDWATER v CARTER (1979 - 56)

TERMINATION OF TREATY WITH TAIWAN.
ARGUMENTS FOR PRESIDENT, ARGUMENTS FOR
GOLDWATER ?

CARTER – PRESIDENT CAN TERMINATE TREATY WITHOUT SENATE. GOLDWATER – NEED 2/3 SENATE APPROVAL TO TERMINATE.

REHNQUIST – POLITICAL QUESTION

POWELL – NOT PQ, BUT NOT RIPE

BRENNAN (D) – NOT PQ AND PRESIDENT ALONE CAN TERMINATE.

IMPEACHMENT

ART I, SEC 2 – HOUSE – TREASON, BRIBERY, HIGH CRIMES AND MISDEMEANORS

ART I, SEC 3 – SENATE SOLE POWER TO TRY – 2/3
VOTE TO CONVICT

NIXON v US (1993 - **56**)

SENATE RULE XI – COMMITTEE OF SENATORS – 4
DAYS OF HEARING. RECOMMENDATION. FULL
SENATE HAS 3 HOURS OF DEBATE.

ARGUMENTS FOR SENATE ?

1. POLITICAL QUESTION – SOLE POWER TO TRY.
2. IF NO 1, THEN STILL VALID - WHOLE SENATE
VOTED

DC AND C OF A – NON-JUSTICABLE

REHNQUIST

1. **TRY** = MANY MEANINGS IN 1789. NOT MEANT TO LIMIT FORM. LACKS PRECISION = NO JUDICIALLY MANAGEABLE STANDARDS.

2. **SOLE** = NO REVIEW. HISTORY – CONVENTION ELIMINATED USSC ROLE IN IMPEACHMENT. INDEPENDENCE IF SEPARATE CRIMINAL TRIAL. CHECKS AND BALANCES – LEGISLATURE'S ONE CONTROL AFTER APPOINTMENT.

WHITE (C)

1. **SOLE** TO DISTINGUISH HOUSE FROM SENATE

2. PROCEDURAL FAIRNESS IS A MANAGABLE JUDICIAL STANDARD.

3. ON MERITS – FOUNDING FATHERS DIDN'T WANT TO LIMIT SENATE IN WORD TRY.

SOUTER (C)

PQ UNLESS SENATE DID SOMETHING HIGHLY UNUSUAL.

DIFFERENT RESULT BETWEEN REHNQUIST AND WHITE ?

IS SOUTER'S POSITION VIABLE ?

CAN USSC REVIEW PRESIDENTIAL IMPEACHMENT
FOR HIGH CRIMES AND MISDEMEANORS ?
CAN YOU RECONCILE MCCORMACK AND
NIXON ?

BUSH v GORE (2000 – 59)

MAJORITY SAID NOT PQ. ARGUMENT THAT USSC
SHOULD HAVE DECLINED TO RULE, LEAVING ISSUE TO
STATE LEGISLATURES AND CONGRESS. SEE ART 2, SEC
1, CL 2 AND AMENDMENT 12.

PQ

1. GUARANTY CLAUSE
LUTHER v BORDEN 51
2. FOREIGN RELATIONS
WAR, TREATY END
3. IMPEACHMENT IN
SENATE
4. PARTY CONVENTIONS
5. TIME LIMITS ON
CONSTITUTIONAL
AMENDMENTS

NOT PQ

1. LEGISLATIVE
REAPPORTION
2. HOUSE QUALIF.

MARBURY v MADISON (1803 – 2)

ISSUES:

1. PROPERTY LAW
2. JUDICIAL POWER AND PROCEDURE
3. POLITICAL QUESTION
4. JUDICIAL REVIEW
5. INTENT OF FOUNDING FATHERS

ADAMS AND MARSHALL ARE FEDERALISTS v
JEFFERSONIAN REPUBLICANS (1800 ELECTION).
MARBURY IS A FEDERALIST = JUSTICE OF THE PEACE.

JUDICIARY ACT OF 1789 – FOOTNOTE, PAGE 5

MARSHALL

1. **PROPERTY** – NO DELIVERY NEEDED – STATUS, NOT SYMBOL. VESTED RIGHT TO POSITION.

2. **JUDICIAL POWER** – ALL EXECUTIVE OFFICERS SUBJECT TO JUDICIAL ORDER, EVEN THE PRESIDENT.

3. **POLITICAL QUESTION** – EVEN IF POWER, SOME THINGS USSC WON'T DO (3,4)
 - A. SOME POSITIONS WON'T FILL – CONFIDENTIAL AGENT OF PRESIDENT (CABINET)
 - B. SOME THINGS WON'T ORDER – OFFICE HAS CONSTITUTIONAL OR LEGAL DISCRETION

4. **JUDICIAL REVIEW** - CAN USSC ISSUE MANDAMUS ?

A. JUDICIARY ACT OF 1789 CLEARLY ALLOWS
USSC TO DO SO AS ORIGINAL JURISDICTION

B. JUDICIARY ACT IS IN **CONFLICT** WITH
CONSTITUTION

C. CONSTITUTION MUST PREVAIL OVER
STATUTE = JUDICIARY ACT UNCONST. AND
INVALID.

5. WHO WINS ?

6. USSC MANDAMUS DOWN TO DC, NOT OVER TO
EXECUTIVE. DC TO EXECUTIVE.

MODERN – CONGRESS - DC HAS CONCURRENT

1. **13** – HISTORICAL SUPPORT FOR JUDICIAL REVIEW. FEDERALIST PAPERS. ALL RELATED TO **WRITTEN** CONSTITUTION.

2. **22 – 25** - OPINIONS OF VARIOUS PRESIDENTS.

3. **25** - JAMES BRADLEY THAYER – 1893 – **UNDEMOCRATIC AND COUNTERMAJORITARIAN.**

AN ACTIVIST USSC =

A. POLITICIZE THE APPOINTMENT PROCESS

B. LEGISLATURES WON'T RESOLVE HARD ISSUES -
LEAVE FOR THE COURT.

SUPER COLLATERAL ESTOPPEL

COOPER v AARON (1958 – 19)

ARKANSAS ARGUING NOT BOUND BY BROWN v BOARD OF ED BECAUSE NOT A PARTY.

1. WHEN US SC DECLARES MEANING OF THE CONSTITUTION THAT IS BINDING ON ALL FEDERAL AND STATE OFFICIALS. NO POWER IN STATE TO NULLIFY.

2. SUPREMACY CLAUSE AND OATH TO UPHOLD THE CONSTITUTION BY STATE OFFICIALS BINDS THEM.

DICKERSON v UNITED STATES (2000 – 21)

PREVIOUS CASE OF MIRANDA v ARIZONA REQUIRED COPS TO READ RIGHTS. AFTER, CONGRESS STATED ADMISSIONS TURNED ON VOLUNTARY, OVERRULING OR CHANGING MIRANDA

1. IF USSC ONLY ACTING PURSUANT TO SUPERVISORY OR REGULATORY FUNCTIONS, CONGRESS MIGHT BE ABLE TO DO. BUT CONGRESS CAN'T LEGISLATIVELY SUPERSEDE USSC INTERPRETING OR APPLYING THE CONSTITUTION. USSC IS FINAL ARBITER OF THAT.
2. ONLY CHANGE BY CONSTITUTIONAL AMENDMENT.

WHAT HAPPENS WHEN USSC INVALIDATES A STATUTE
? NOT REPEALED – ONLY LEGISLATURE CAN DO THAT.
STILL ON THE BOOKS. IF CASE OVERRULED,
STATUTES CAN NOW BE ENFORCED

MISC POINTS

1. CONSTITUTION GRANTS LIFE TENURE FOR
FEDERAL JUDGES AND COMPENSATION CAN'T BE
LOWERED. **INDEPENDENT**. NO USSC CONVICTED OF
IMPEACHMENT – CHASE IMPEACHED BUT NOT
CONVICTED.

2 NOMINATION/APPOINTMENT – PRESIDENT/SENATE

IN 19TH CENTURY, SENATE REJECTED APP 20%. LEGAL PROCESS SCHOLARS INFLUENCE 20TH CENTURY – ONLY IF INCOMPETENT OR CHARACTER DEFECTS. 1987 - CHANGES WITH NOMINATION OF ROBERT BORK BY PRESIDENT REAGAN. REJECTED ON CONSERVATIVE VIEWS BY DEMOCRATIC SENATE. POLITICIZED SINCE.

3. 1937 – FDR COURT PACKING PLAN. INCREASE NUMBER OF USSC JUSTICES (OUT VOTE THEM). 8 JUSTICES IN 2 YEARS. FEDERAL POWER. BUT JUSTICES DON'T ALWAYS VOTE AS PLANNED – EISENHOWER AND EARL WARREN.

AMENDMENT PROCESS – ARTICLE 5

1. 2/3 OF BOTH HOUSES OF CONGRESS AND
2. 3/4 OF ALL STATES APPROVE.

OR

1. 2/3 OF STATES ASK CONGRESS TO CALL CONVENTION TO PROPOSE AMENDING AND
2. 3/4 OF ALL STATES APPROVE.

SECOND METHOD NEVER USED.

RARE - 29 – 11,000 CONSIDERED – 33 PROPOSED – 27 ADOPTED. OF 27, 10 IN 1791 AND 3 POST CIVIL WAR.

CONGRESSIONAL AUTHORITY OVER COURTS

EX PARTE MCCARDLE (1869 – 28)

POST-CIVIL WAR MILITARY GOVERNOR OF MISSISSIPPI. MCCARDLE A NEWSPAPER EDITOR JAILED FOR INCENDIARY ARTICLES. HC ACTION. DC AND COFA DENY. APPEALS TO USSC. AFTER ARGUMENT, CONGRESS PASSES STATUTE REMOVING USSC APPELLATE POWER.

CHASE

1. APPELLATE POWER SUBJ TO EXCEPT AND REGULAT

JUST READING THE DOCUMENT, WHAT IS THE EFFECT OF CONGRESSIONAL SILENCE – JURISDICTION OR NOT ?

2. EVEN THOUGH CONSTITUTION GRANTS POWER AND EXCEPTIONS IS A NEGATIVE, POWER TO NEGATE INCLUDES POWER TO GIVE. THEREFORE ALWAYS SPOKE OF CONGRESSIONAL STATUTES IN THE POSITIVE – STATUTES GIVE JURISDICTION AND, IF NO MENTIONED, NO JURISDICTION. CONGRESS ALSO HAS ABILITY TO WRITE A STATUTE IN THE NEGATIVE AND TAKE POWER AWAY.

3. MOTIVES OF CONGRESS NEVER MATTER – JUST A QUESTION OF POWER.

4. LIMITS ON CONGRESSIONAL POWER

- A. NO EXERCISE OF JUDICIAL POWER BY LEGISLATURE (WHILE PROSECUTION PENDING, TENN LEGISLATURE REPEALS STATUTE AND ORDERS DEFENDANT FREED; PENN LEGISLATURE ORDERS A SECOND TRIAL FOR UNSUCCESSFUL DEFENDANT)

- B. NO INTERFERENCE IN THE EXERCISE OF CONTINUING JURISDICTION

MODERN VIEW OF MCCARDLE – GOOD LAW, BAD APPLICATION.

US v KLEIN (1871)

KLEIN SUES IN COURT OF CLAIMS UNDER 1863 STATUTE WHICH ALLOWED SOUTHERNERS TO RECLAIM LAND CAPTURED IN CIVIL WAR IF CLAIMANT COULD PROVE HAD NOT AIDED REBELLION. EARLIER CASE SAID PRESIDENTIAL PARDON WAS PROOF OF NOT AIDING. C OF C FOR KLEIN. WHILE GOVERNMENT APPEAL TO USSC PENDING, CONGRESS PASSES A STATUE SAYING PARDON PROVES THE OPPOSITE.

USSC SAYS OK IT CONGRESS DENIES APPEAL IN CERTAIN TYPES OF CASES. BUT CANNOT PRESCRIBE A RULE TO DECISION TO A COURT IN A PENDING CASE.

PLANT v SPENDTHRIFT FARM (1995)

CONGRESS AMENDS SECURITIES ACT TO INCREASE
STATUTE OF LIMITATIONS AND REINSTATES
PLAINTIFF'S CAUSE OF ACTION WHICH HAD BEEN
DISMISSED UNDER OLD STATUTE OF LIMITATIONS
TIME PERIOD

SCALIA – CAN AMEND LAW, BUT CAN'T RESURRECT
DISMISSED CASE. FINALITY

MARBURY – USSC CAN'T FUNCTION AS EXECUTIVE
MCCARDLE – CONGRESS CAN'T ACT AS A COURT
SEPARATION OF POWERS.

LIMITS ON CURTAILING USSC JURISDICTION

1. CONGRESS CAN'T COMPLETELY ABOLISH USSC. SCHOLARSHIP SAYING MUST KEEP **CORE** OR **ESSENTIAL APPELLATE** FUNCTIONS. MUST KEEP ORIGINAL JURISDICTION. CONGRESS CAN'T IGNORE OTHER CONSTITUTIONAL LIMITS (EG 14 AMEND. RACE).

2. IF LIMIT USSC JURISDICTION:

- A. FREEZE LOWER COURTS – INCONSISTENT
- B. FREEZE USSC PRECEDENT
- C. STATE COURTS CAN STILL HEAR

FOR LOWER FEDERAL COURTS, NO REAL LIMITS IN STRUCTURE – CAN ABOLISH ALL. STILL LIMITED BY OTHER CONSTITUTIONAL CLAUSES.

HANDOUT CL 2

USSC PROCEDURES

1. **APPEAL** = MUST TAKE. **CERTIORARI** = USSC DISCRETION TO TAKE OR NOT. PRIOR TO 1988, MORE APPEAL. NOW ALMOST ALL CERT.

2. NEED 4 VOTES TO TAKE CASE. FIRST BRIEF.

USSC RULE 10 – REASONS TO GRANT WRIT:

1. COURT OF APPEALS – CONFLICT WITH ANOTHER C OF A; CONFLICT WITH STATE; DEPARTED FROM USUAL PROCEEDINGS

2. STATE COURT – DECIDES IN CONFLICT WITH ANOTHER STATE COURT OR C OF A

3. STATE COURT OR C OF A – DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY USSC.

1% OF ALL PETITIONS; 5 % OF “PAID” (7700 / 80)

SEPARATION OF POWERS

FREQUENTLY USSC RESOLVING A DISPUTE BETWEEN CONGRESS AND PRESIDENT. USSC DEFINING POWERS AND LIMITS OF EACH. MANY DISPUTES RESOLVED POLITICALLY NOT IN THE COURTS.

ISSUES:

1. NOT ALWAYS TRYING TO BE EFFICIENT
2. POWERS GENERALLY DESCRIBED – MANY QUESTIONS. DYNAMIC TENSION – IDEAL IS BRANCHES WORK TOGETHER TO RESOLVE GAPS.
3. CONGRESSIONAL POWERS MORE DEFINED – EXECUTIVE MORE VAGUE. PRESIDENT = 1 (MORE DECISIVE), CONGRESS = 535 (MORE DELIBERATIVE)

YOUNGSTOWN SHEET AND TUBE v SAWYER (1952 - 249)

KOREAN WAR – UNION AND COMPANIES FIGHTING OVER NEW CBA. NATION WIDE STRIKE TO BEGIN APRIL 9. PRESIDENT ISSUES EXECUTIVE ORDER SECRETARY OF COMMERCE DIRECTED TO TAKE POSSESSION OF STEEL MILLS AND KEEP RUNNING. HE DID – COMPANIES TO ACT UNDER GOVERNMENT. THEY DID AND FILED SUIT ASKING FOR INJUNCTION.

WHY NOT YOUNGSTOWN v TRUMAN ?

ARGUMENTS FOR STEEL MILLS ?

ARGUMENTS FOR SAWYER ?

STEEL MILLS:

1. SEIZURE = LAWMAKING. LEGISLATIVE FUNCTION. CONGRESS NEVER AUTHORIZED SEIZURE – REJECTED.
2. NO ARTICLE 2 POWER SUPPORTS

SAWYER:

1. KOREAN WAR = COMMANDER IN CHIEF
2. NATIONAL EMERGENCY = CUSTOM AND USAGE = EXECUTIVE POWER
3. WAGE PRICE STABILIZATION ACT = FAITHFULLY EXECUTE LAWS

BLACK

1. NO SUPPORT FOR PRESIDENT FROM CONGRESS – REJECTED IN TAFT HARTLEY DEBATES. NOT EXPLICIT IN CONSTITUTION

2. NO AS C IN C – THEATER OF WAR NOT BROAD ENOUGH TO ENCOMPASS PRIVATE/DOMESTIC.

SERIOUSLY ?

3. EXECUTED MEANS NOT A LAWGIVER. CONGRESS MAKES LAW. EXEC ORDER READS LIKE STATUTE.

FRANKFURTER (C)

CONGRESS EFFECTIVELY DENIED. 252 - FAMOUS QUOTE. MEANING ?

JACKSON (C)

1..252 - FAMOUS QUOTE. 252 – 253 - 3 CATEGORIES. WHICH ONE ?

2. DANGEROUS TO SAY CAN ENLARGE DOMESTIC POWER BY FOREIGN MILITARY ACTION.

3. WON'T GIVE PRESIDENT POWER TO DEAL WITH

EMERGENCIES. NO LIMITS TO SUCH A POWER.

4. CONGRESS NEEDS TO ACT OR USSC CAN'T CONSISTENTLY SAVE IT. EXECUTIVE MUST BE UNDER THE LAW.

5. 254 - QUOTE. MEANING ?

VINSON + 2 (D)

C IN C + FAITHFUL EXECUTION = EMERGENCY POWER.
MANY PAST EXAMPLES. PROTECT COUNTRY.
PRESIDENT TOLD CONGRESS HERE. NOT SEIZING
POWER. MANY APPLICABLE STATUTES TO ENFORCE.

MANY OTHER COUNTRIES HAVE EXPRESS EMERGENCY POWERS FOR EXECUTIVE – FRANCE, INDIA AND SOUTH AFRICA.

EX PARTE MILLIGAN (1866 - 268) REJECTS LINCOLN'S SUSPENSION OF HABEUS CORPUS DURING CIVIL WAR.

INS v CHADHA (1983 - 302)

CHADHA IN US ON STUDENT VISA. OVERSTAYS – INS JUDGE ALLOWS HIM TO STAY – 7 YEARS, GOOD MORALS, HARDSHIP TO RETURN – AFTER HEARING. P PART OF 9 REJECTED BY HOUSE ON LAST DAY. NO HEARING OR DEBATE OR RECORDED VOTE.

LEGISLATIVE VETO STATUTE - 244(C) WHEN SUSPEND DEPORTATION, INS MUST NOTIFY CONGRESS. CONGRESS CAN VETO BY EITHER CHAMBER PASSING A RESOLUTION. WHAT IS THE PROBLEM ?

BURGER

1. NOT POLITICAL QUESTION. JUST BECAUSE A POLITICAL ISSUE NOT NECESSARILY PQ.
2. 303 – WISDOM AND EFFICIENCY NOT IMPORTANT – CONSTITUTIONALITY IS. QUOTE – PRESENTMENT AND BICAMERALISM. EMBODIMENT OF SEPARATION OF POWERS.

3. 303 – QUOTE. LEGISLATIVE IN CHARACTER AND EFFECT. HERE – ALTERED LEGAL RIGHTS OF CHADHA AND ATTORNEY GENERAL. GRANTED DISCRETION TO AG – CAN ONLY DISAGREE AS GRANTED - THROUGH LEGISLATION.

4. 304 – CONSTITUTION CLEAR ON LIMITED TIMES ONE CHAMBER MAY ACT ALONE.

POWELL (C)

CONGRESS HAS INVALIDLY ASSUMED A JUDICIAL FUNCTION.

WHITE (D)

1. POOR CHOICE – DON'T GRANT DISCRETION OR ABDICATE SUPERVISION. INNOVATION – KEEPS AGENCIES ACCOUNTABLE, PRESERVES CONGRESSIONAL CONTROL.

3. **307** - QUOTE – P AND B SATISFIED IN ORIGINAL LEGISLATION. REALITY – CHANGE FROM STATUS QUO ONLY IF AG, HOUSE AND SENATE AGREE. AGENCIES MAKING LAW.

ARGUMENTS FOR EACH SIDE IN BOWSHER ? WHICH SIDE CITES CHADHA ?

DIV OF OFF MGT

CONG BUDGET OFF

CONTROLLER GENERAL

CG = NOMINATED BY PRESIDENT FROM LIST OF 3.
CONFIRMED BY SENATE. REMOVED BY JOINT
RESOLUTION FOR LISTED REASONS.

MEYERS v US (1926 – 320) – STATUTE =
POSTMASTERS ONLY REMOVED BY PRESIDENT WITH
CONSENT OF SENATE. INVALID.

HUMPHREY'S EX v US (1935 - 320) – CAN LIMIT
PRESIDENT'S REMOVAL POWER TO LISTED REASONS

BUCKLEY v VALEO (1976 - 315) – FEC APPOINTED BY PRESIDENT OF SENATE AND SPEAKER OF HOUSE. LEGISLATIVELY APPOINTED = ONLY LEGISLATIVE COMMITTEE FUNCTIONS – INVESTIGATORY AND INFORMATIVE.

HUMPHREY’S EX = INDEPENDENT AGENCY

<u>CONTROL</u>	<u>LEGISLATIVE</u>	<u>EXECUTIVE</u>
FUNCTION	LEGISLATIVE	LEGISLATIVE
	EXECUTIVE	EXECUTIVE

PLAINTIFF'S BRIEF (INVALID):

1. LEGISL/LEGISL – NO P AND B. **STEVENS AND MARSHALL**

2. LEGISL/EXECUTIVE – CONGRESS CAN ONLY REMOVE EX OFF BY IMPEACHMENT – MEYERS AND CHADHA. CG REMOVED BY CONGRESS. CG = EXEC POWERS. THUS UNCONSTITUTIONAL **BURGER MAJORITY**

3. NO VALID ARGUMENT UNDER EXECUTIVE CONTROL – HISTORY.

DEFENDANT'S BRIEF (VALID):

1. MAJOR PROBLEM – INNOVATIVE/EFFICIENT.
2. EXEC/EXEC – CAN HAVE NON-AT WILL – HUMPHREY'S. JR LIKE INDEPENDENT – P AND B SATISFIED - CHADHA. **WHITE**
3. IF NOT 2, THEN CG NOT EXECUTIVE BUT MINISTERIAL.
4. IF NOT 2 OR 3, THEN STRIKE REMOVAL STATUTE – NEVER USED – MAKES CG AT WILL. **BLACKMUN.**

REAGAN SIGNS BUT SAYS UNCONSTITUTIONAL.
ARGUING AGAINST STATUTE IN USSC.

BURGER

1. STANDING TO UNION MEMBERS

2. SEPARATION OF POWERS = CONFUSION

3. CONGRESS GIVEN NO DIRECT ROLE IN
SUPERVISION OF EXECUTIVE OFFICES – ONLY
IMPEACHMENT. MYERS. INDEPENDENT AGENCIES
OK BUT PRESIDENT REMOVAL. CONGRESSIONAL
REMOVAL = LEGISL VETO. CHADHA. 317 QUOTE

4. SINCE 1921, SEEN AS PART OF LEGISLATIVE BRANCH. INEFFICIENCY AND NEGLECT. 317 Q

5. 317-18 – CG NOT MINISTERIAL. INTERPRET LAW AND ORDERS THE PRESIDENT.

6. 318 QUOTE - CONGRESS CAN ONLY ACT BY LEGISLATION. ONCE ESTABLISHED, LEGISLATION.

STEVENS + MARSHALL (C)

318 FOOTNOTE - CG IS AGENT OF CONGRESS. CAN'T DELEGATE TO ITSELF ABILITY TO MAKE POLICY THAT WILL BIND THE NATION. CHADHA – CUTS = P AND B

BLACKMUN (D) 319 FOOTNOTE

GIVEN MAGNITUDE OF INTERESTS, WAIT AND INVALIDATE 1921 STATUTE IF CONGRESS EVER ACTUALLY TRIES TO REMOVE CG.

WHITE (D)

1. 318 Q – DEFICIT = BIG PROBLEM

2. STILL OK – CAN HAVE EXEC OFF NOT REMOVABLE AT WILL OF PRESIDENT – INDEP.

3. CLEARLY EXEC POWERS IN CG. BUT JR SATIFIES P AND B. NOT LEGISL VETO AND REASONS OK. PRESIDENT HAS MAJOR ROLE.

CAN YOU RECONCILE BOWSHER v SYNAR (1986 - STANDING) WITH RAINES v BYRD (1997 - NO STANDING) ?

3 JUDGE DC DC HELD STANDING IN BOWSHER –

1) MEMBERS OF CONGRESS – VOTE DILUTION

2) NATIONAL TREASURY EMPLOYEES UNION

3) INDIVIDUALS – LOST COLA

USSC – SINCE INDIVIDUALS HAVE STANDING, NO REACH MEMBERS OF CONGRESS.

RAINES – LOWER COURTS RELIED ON DC OPINION IN BOWSHER – GAVE STANDING ON DILUTED VOTE THEORY. SCALIA ?

MORRISON v OLSEN (1988 - 321-322) NORMAL ?

AG COMPLETES INVESTIGATION OR 90 DAYS –
REPORTS TO SPECIAL DIVISION ON WHETHER TO
APPOINT INDEP PROSECUTOR. IF NO REASONABLE
GROUNDS, NO APPOINT. IF REASONABLE GROUNDS,
SPEC DIV APPOINTS WHO AND DEFINES
JURISDICTION.

REMOVAL BY IMPEACHMENT OR AG FOR GOOD
CAUSE OR INCAPACITY. JUDICIAL REVIEW AVAIL.

TERMINATES WHEN INDEP PROSECUTOR NOTIFIES AG
OR SPECIAL DIV CAN HOLD FINISHED.

REHNQUIST

APPOINTMENTS CLAUSE

1. IF **PRINCIPAL OFFICER**, PRESIDENT AND SENATE. IF **INFERIOR OFFICER**, CONGRESS CAN DELEGATE.

2. HERE – NO EASY LINE. INFERIOR –

A. REMOVED BY AG

B. LIMITED DUTIES – NO POLICY

C. LIMITED JURISDICTION

D. LIMITED IN TENURE – TEMPORARY.

ARGUE – EVEN IF INFERIOR, NO INTERBRANCH

3. CONSTITUTION GIVES DISCRETION TO CONGRESS

NO IF INHERENT INCONGRUITY.

ARGUE THAT APPOINTMENTS POWER DOESN'T INCLUDE JURISDICTION.

4. CONGRESS HAS DISCRETION TO DEFINE JURISD. AS INCIDENT TO APPOINTMENT. RELATE TO AG'S FACTUAL BASIS FOR APPOINTMENT.

5. MISC POWERS – NO TRESPASS ON EXECUTIVE – MINISTERIAL.

6. TERMINATION – WORRISOME BUT NOT SIGNIFICANT JUDICIAL ENCROACHMENT.

REMOVAL

7. LIKE HUMPHREY'S EXECUTOR, REMOVAL IN EXECUTIVE BUT REASONS LIMITED. 322 Q - PURELY EXECUTIVE – DO RESTRICTIONS IMPEDE PRESIDENT'S ABILITY TO PERFORM CONSTITUTIONAL DUTY ? INFERIOR OFFICER. GOOD CAUSE = MISCONDUCT – GIVES PRESIDENT DISCRETION.

8. ENTIRE ACT CONSISTENT WITH SEPARATION OF POWERS. CONGRESS NOT TRYING TO INCREASE ITS POWERS. PROPER BALANCE = AG STARTS AND REMOVES – COURT LIMITS CHOICE AND DEFINES JURISDICTION AND REMOVES.

SCALIA (D)

1. **324** – IF WITHIN EXECUTIVE POWER, PRESIDENT MUST HAVE EXCLUSIVE CONTROL. SIGNIFICANT CONTROL NOT ENOUGH.
2. NOT INFERIOR OFFICER.
3. LIMITED REMOVAL INVALID. INTERFERES WITH EXECUTING THE LAWS.
4. EXEC CAN INVESTIGATE ITSELF. POLITICALLY RESPONSIBLE. UNFAIR TO TARGETS – INVESTIGATION TAKES ON LIFE OF ITS OWN.

MISTRETTA v US (1989 – 326)

OLD – DISCRETION TO JUDGE ON SENTENCING.
CONGRESS DEFINES MAXIMUM, JUDGE GIVES
SENTENCE AND EXECUTIVE DOES PAROLE.

ACT – US SENTENCING COMMISSION. 7 MEMBERS –
PRESIDENT AND SENATE FOR APPOINTMENT.

DEFENDANT ARGUMENTS:

1. CONGRESS GRANTED COMMISSION EXCESSIVE
LEGISLATIVE DISCRETION – EXCESSIVE DELEGATION
2. ACT VIOLATES SEPARATION OF POWERS.

EXCESSIVE DELEGATION

1. SIGNIFICANT DISCRETION IS ALLOWABLE IF INTELLIGIBLE PRINCIPLE – 326. HERE – SATISFIED – SUFFICIENTLY SPECIFIC AND DETAILED. 11 FACTORS.

JUDICIARY DOING WORK OF OTHER BRANCH

2. NOT COURT AND NOT JUDICIAL POWER = TWILIGHT ZONE. TRADITIONAL JUDICIAL – JUDGES ALWAYS HAD ROLE IN SENTENCING.

RULEMAKING. NO THREAT TO OTHER BRANCHES – JUDICIARY NOT TRYING TO EXPAND ITS POWER.

COMPROMISE JUDICIAL INTEGRITY

3. NO CONSTITUTIONAL LIMIT ON JUDGES HOLDING

OTHER POSITIONS. ALWAYS HAVE – JOHN JAY.

4. NOT MANDATORY. PARTICIPATION IN GUIDELINES DOES NOT IMPEDE ABILITY TO SENTENCE. JUDGES STILL NEUTRAL.

SCALIA (D)

1. SHOULDN'T BE ON EXCESSIVE DELEGATION TEST. THIS ISN'T ANCILLARY TO ANYTHING.

2. THIS CREATES A JUNIOR VARSITY CONGRESS.

CLINTON v NY (1998 – 310)

CLINTON USED LINE ITEM VETO TO CANCEL A FORGIVENESS OF MEDICAID PAYMENT TO NY AND TO CANCEL A TAX BENEFIT TO FARMERS CO-OPERATIVES. 3 THINGS SUBJECT TO CANCELLATION AND 3 REQUIRED FINDINGS – CAN BE OVERRIDEN BY ART I SEC 7 PROCESS.

GOVERNMENT ARGUMENT – LIKE

A) VETO

B) DISCRETIONARY SPENDING

C) IMPOUNDMENT – ELIMINATE 1974

STEVENS

1. PRACTICAL EFFECT – PRESIDENT AMENDING THE STATUTE. REPEAL OR AMENDING = LEGISLATING AND REQUIRES P AND B.

2. VETO IS BEFORE LEGISLATION – THIS IS AFTER

3. NOT LIKE DISCRETIONARY SPENDING – HERE REJECTING CONGRESSIONAL POLICY, NOT IMPLEMENTING. DISCRETIONARY P NEVER HAD – LINE ITEM TAKES AWAY.

4. NOT LIKE IMPOUNDMENT – CONGRESS ELIMINATE

KENNEDY (C)

FAILURE OF POLITICAL WILL DOES NOT JUSTIFY
UNCONSTITUTIONAL REMEDIES

SCALIA + 2 (C AND D)

ORIGINAL HAD P AND B. CONGRESS AUTHORIZED
THE CANCELLATION. SAME AS DISCRETIONARY
SPENDING – HISTORICAL.

BREYER (C AND D)

CLEARLY PRESIDENT EXECUTING THE LAWS.
FINDINGS LAID DOWN BY CONGRESS. OVERSIGHT
RETAINED. P AND B SATISFIED.

FREE ENT FUND v PCAO BOARD (2010 - S 26)

5 MEMBER BOARD APPOINTED BY SEC. CAN BE REMOVED BY SEC ONLY FOR GOOD CAUSE. SEC CAN BE REMOVED BY PRESIDENT ONLY FOR INEFFICIENCY, NEGLIGENCE OF DUTY OR MALFEASANCE IN OFFICE.

ROBERTS

1. HUMPHREY'S EX AND MORRISON – LIMITED BUT EITHER PRESIDENT REMOVED OR PERSON REMOVABLE AT WILL OF PRESIDENT REMOVED. HERE DECISION ON GOOD CAUSE MADE BY INDIVIDUALS PROTECTED FROM PRESIDENT – SEC NOT AT WILL

2. MAKES BOARD TOO INDEPENDENT – GOOD CAUSE A HARD STANDARD TO MEET.

3. SEVER. BOARD MEMBERS REMOVABLE AT WILL OF SEC.

BREYER + 3 (D)

1. MYERS ONLY INVALIDATION PRIOR TO THIS.

2. CONGRESS HAS NO ROLE IN REMOVAL HERE.

3. SEC HAS MUCH OVERSIGHT OVER BOARD.
PRESIDENT'S CONTROL OVER SEC NOT AN ISSUE.

HANDOUT CL 3 AND 4

PRIVILEGES AND IMMUNITIES

A FEW ISSUES:

1. NO EXPRESS PRIVILEGES OR IMMUNITIES IN CONSTITUTION FOR EXECUTIVE
2. CONSTITUTION CLEAR – AFTER IMPEACHMENT CONVICTION, CAN BE A CRIMINAL TRIAL - ART 1, SEC
3. DO YOU NEED IMPEACHMENT FIRST ?
3. HOW DO YOU ENFORCE A SUBPOENA TO THE PRESIDENT ?

US v NIXON (1974 - 330)

7 ASSOCIATES OF NIXON INDICTED – PRESIDENT AS UNINDICTED CO-CONSPIRATOR. SPECIAL PROSECUTOR MOVED AND RECEIVED A SUBPOENA ON TAPES (CRIMINAL CASE IS US v MITCHELL). (MIDNIGHT MASSACRE = PRESIDENT ASKED AG TO FIRE SPEC PROS BEFORE ASKED FOR SUBPOENA – ELLIOTT RICHARDSON, JOHN RUCKELSHAUS AND ROBERT BORK.)

ARGUMENTS FOR NIXON ?

1. POLITICAL QUESTION – DISAGREEMENT
INSIDE EXECUTIVE BRANCH

2. PRESIDENT NOT AMENABLE TO PROCESS –
REARGUE MARBURY.

3. TAPES PRIVILEGED

a. FOR EXECUTIVE TO DECIDE

b. IF NOT a, THEN USSC SHOULD DECIDE THEY
ARE PRIVILEGED.

BURGER

1. NOT PQ – BAKER 51 NOT SATISFIED.
2. PRESIDENT IS SUBJECT TO PROCESS. WON'T REARGUE MARBURY. NO ONE IS ABOVE THE LAW.
3. EACH BRANCH IS ENTITLED TO DEFERENCE IN ITS INTERPRETATION OF THE CONSTITUTION BUT IT IS THE ROLE OF THE JUDICIARY TO SAY WHAT THE LAW IS.
4. NEITHER CONFIDENTIALITY OR SEPARATION OF POWERS CAN VALIDATE AN ABSOLUTE PRIVILEGE.

5. IF NO CLAIM OF NATIONAL SECURITY, ALLOW IN CAMERA INSPECTION. CONSTITUTIONALLY MANDATED JUDICIAL FUNCTION IN CRIMINAL JUSTICE. 330 – 331.

6. DC MUST ACCORD PRESIDENT RESPECT AND DEFERENCE. ADMISSIBLE AND RELEVANT. MUST BALANCE INTEREST IN KEEPING EXECUTIVE RUNNING v RULE OF LAW IN CRIMINAL JUSTICE – RELEVANT EVIDENCE. NO CLAIM OF MILITARY OR DIPLOMATIC SECRETS. CRIMINAL PROSECUTIONS INFREQUENT – WON'T HURT CANDOR OF CABINET.

DIFFERENT IF CONGRESS v CRIMINAL TRIAL ?

333 – NO IMMUNITY FOR SECRET SERVICE

CIVIL IMMUNITY

NIXON v FITZGERALD (1982 – 333)

FITZGERALD IS WHISTLE BLOWER IN AIR FORCE.
NIXON APPROVES FIRING – HE CLAIMS IN REALIATION
FOR TRUTHFUL TESTIMONY.

POWELL

1. PRESIDENT GETS **ABSOLUTE IMMUNITY** FROM
CIVIL DAMAGES PREDICATED ON OFFICIAL ACTS.

PRESIDENT MUST BE FREE TO MAKE DECISIONS –
AROUSE EMOTIONS AND EASY TARGET.

2. NOT ABOVE THE LAW – IMPEACHMENT AND
POLITICAL PRESSURE.

WHITE + 3 (D)

NO ABSOLUTE BUT DEPENDS ON FUNCTION. 334-
QUOTE.

OTHER OFFICIALS GET THIS – FUNCTIONAL
IMMUNITY. ONLY PRESIDENT GETS ABSOLUTE.

ABSOLUTE LIMITED TO OFFICIAL ACTS – ALL
EFFECTIVELY IN – PRESIDENT ON DUTY 24/7.

CLINTON v JONES (1997 – 335)

CLINTON AS GOVERNOR. STATE TROOPER ASKED HER IF SHE WANTED ORAL SEX. SHE REJECTED AND CLAIMS SUPERVISOR PUNISHED.

DOESN NIXON v FITZGERALD CONTROL ?

ARGUMENT FOR PRESIDENT ?

TEMPORARY IMMUNITY – DELAY TRIAL – PRESIDENT MUST RUN THE EXECUTIVE AND CAN'T BE DISTRACTED. DC ORDERED DISCOVERY BUT DELAYED TRIAL – C OF A REVERSED DELAY OF TRIAL.

STEVENS

1. FITZGERALD – RELATED TO OFFICIAL CONDUCT. HISTORY – INCONCLUSIVE – EVIDENCE FOR EITHER SIDE.
2. NO SEPARATION OF POWERS PROBLEM – JUDICIARY NOT ACTING LIKE EXECUTIVE OR RUNNING IT. ONLY 3 LAWSUITS IN 200 YEARS – NOT LIKELY TO OCCUPY SIGNIFICANT TIME.
3. 338 – QUOTE – PRESIDENT SUBJECT TO PROCESS – MARBURY. JUST BURDEN ON TIME AND THAT IS NOT ENOUGH. SANCTION IF FRIVOLOUS. DC ACCOMODA

BURGER (C)

PRESIDENT BUSY. 1 PERSON – TO IMPEDE PRESIDENT = WHOLE EXECUTIVE. CONSTITUTIONAL DUTY NOT TO INTERFERE WITH PRESIDENT AND EXECUTIVE DUTIES.

1. **341 – 342** – PRESIDENT CAN BE CRIMINALLY INDICTED AFTER LEAVING OFFICE. SPLIT ON INDICT WHILE SITTING. LESSER OFFICERS HAVE .

2. PRESIDENT CAN PARDON CRIMINAL, CAN'T PARDON CIVIL.

NIXON v ADMIN OF GENERAL SERVICES (1977)

CONGRESS DIRECTS ADMIN TO SEIZE NIXON PAPERS – RETURN PERSONAL TO HIM. REASONS – RESTORE FAITH IN POLITICAL PROCESS, PRESERVE MATERIALS FOR FUTURE WATERGATE UNDERSTANDING, AND UNDERSTAND HOW POLITICAL PROCESS WORKED (REMEDIAL LEGIS)

BRENNAN

UNIQUE SITUATION – DIDN'T REALLY ENCROACH ON RUNNING EXECUTIVE. NOT DISRUPTIVE.

BURGER (D) – COERCION OF PRESIDENT – LEGISL = EX

IMPEACHMENT

MOST IMPEACHMENTS OF FEDERAL JUDGES. 2 PRESIDENTS IMPEACHED – NEITHER CONVICTED BY SENATE. (NIXON RESIGNED AFTER HOUSE COMMITTEE.) 343 - 345

CENSURE

PRESIDENT

1. SOME PRIVILEGE ON **DISCLOSING** INFORMATION BUT LESS TO NON-PRESIDENT. NIXON v US.
2. **CRIMINAL** - CONVICT OF IMPEACH, TRIAL.
3. **CIVIL** – FITZGERALD AND JONES.
4. **IMPEACHMENT PROCESS** - HOUSE IMPEACH, SENATE TRY (2/3 VOTE TO CONVICT).

LEGISLATIVE IMMUNITY

ART I, SEC 6 –

1. PRIVILEGED FROM ARREST (EXCEPT TREASON, FELONY AND BREACH OF PEACE) IN ATTENDANCE AND TO AND FROM.
2. NOT QUESTIONED FOR ANY SPEECH OR DEBATE.

US v BREWSTER – BRIBERY – HE ARGUED COULDN'T QUESTION MOTIVE FOR VOTE. JUST SHOW ACCEPTANCE OF BRIBE.

HUTCHINSON v PROXMIRE – PROTECTED IN COMMITTEE HEARINGS AND CONGRESSIONAL RECORD – LIABLE IF DISTRIBUTE BEYOND THAT. AIDES AND EMPLOYEES DERIVE SOME BUT NOT ALL.

FOREIGN AFFAIRS

TREATIES AND EXECUTIVE AGREEMENTS

MISSOURI v HOLLAND (1920 – 169)

MISSOURI SUES TO STOP FEDERAL GAME WARDEN FROM ENFORCING A TREATY CLAIMING THE SUBJECT MATTER IS LEFT TO STATES. TREATY WITH CANADA TO PROTECT MIGRATORY BIRDS – EXTINCTION, INSECTS. LIST BIRDS CAN'T CAPTURE, SELL OR KILL.

HOLMES

1. EARLIER ATTEMPTS BY CONGRESS TO REGULATE WITHOUT TREATY INVALIDATED.

2. TREATIES VALID WHEN MADE PURSUANT TO CONSTITUTIONAL PROCESS. CAN EXPAND FEDERAL POWER.

3. CONSTITUTION MADE TO DEAL WITH PROBLEMS FOUNDING FATHERS COULDN'T ANTICIPATE. HOPED TO CREATE AN ORGANISM.

4. NATIONAL PROBLEM – ONLY TRANSITORY IN STATE. NOT FORBIDDEN IN EXPRESS TERMS.

TREATIES MAY BE **SELF EXECUTING** – DON'T REQUIRE LEGISLATION OR NEED STATUTE TO IMPLEMENT. NON SELF EXECUTING REQUIRE CONGRESS.

REID v COVERT (1957 - 171)

TREATIES AND EXECUTIVE AGREEMENTS CANNOT IGNORE CONSTITUTIONAL RIGHTS OR LIMITATIONS. HOLLAND NOT INCONSISTENT WITH SPECIFIC. HERE CAN'T APPLY MARTIAL LAW TO CIVILIAN ACCOMPANYING MILITARY IN CAPITAL CASE IN PEACE TIME.

ZSCHERNING v MILLER (1968 - 173)

OREGON PROHIBITED ALIENS FROM INHERITING UNLESS RECIPROCITY BY ALIEN'S COUNTRY. INVALID – INTRUDES INTO FOREIGN AFFAIRS.

US v CURTISS-WRIGHT (1936 - 301)

JOINT RESOLUTION AUTHORIZING PRESIDENT TO IMPOSE ARMS EMBARGO ON BOLIVIA/PARAGUAY CONFLICT. COMPANY ARGUED INVALID DELEGATION BY CONGRESS.

1. EXCESSIVE DELEGATION DOCTRINE LESS TEETH IN FOREIGN AFFAIRS.
2. CONGRESS + PRESIDENT = FULL FEDERAL POWER. PRESIDENT INDEPENDENT POWER.
3. LIMITED NATURE OF FEDERAL GOVERNMENT DOESN'T APPLY IN FOREIGN AFFAIRS – STATE NEVER HAD INTERNATIONAL POWERS.

EXECUTIVE AGREEMENTS

DON'T INVOLVE THE SENATE – LIKE A CONTRACT NEGOTIATED BY PRESIDENT WITH FOREIGN COUNTRY.

US v BELMONT (1937 - 259)

US RECOGNITION OF USSR. PART OF RECOGNITION WAS EXECUTIVE AGREEMENT ASSIGNING TO US SOVIET CLAIMS AGAINST AMERICANS WHO HELD FUNDS OF RUSSIAN COMPANIES SEIZED AFTER REVOLUTION.

1. RECOGNITION, ESTABLISHMENT OF RELATIONS

AND ASSIGNMENT WERE ALL PART OF ONE INTERNATIONAL TRANSACTION – WITHIN COMPETENCY OF PRESIDENT.

DAMES & MOORE v REGAN (1981 - 260)
IRAN SEIZES HOSTAGES 11/4/79. ON 11/14, PRESIDENT BLOCKED TRANSFER OF ALL PROPERTY SUBJECT TO US JURISDICTION. D & M SUED IRAN 12/19/79 AND ATTACHES ASSETS. 1/20/81 – HOSTAGES FREED – EX AGREEMENT – 1. NULLIFY ATTACHMENTS 2. TRANSFER FROZEN AND 3. SUSPEND CLAIMS IN US COURTS (INTERNATIONAL TRIBUNAL).

REHNQUIST

1. REFER TO JACKSON'S 3 CATEGORIES IN YOUNGSTOWN. 1 AND 2 AUTHORIZED BY CONGRESS – FULL FEDERAL POWER = VALID.
2. SUSPENSION NOT AUTHORIZED BY CONGRESS BUT GENERAL CONGRESSIONAL APPROVAL.
3. CLAIMS FREQUENTLY SETTLED BY EX AGREEMENTS. CONGRESS HAS IMPLICITLY ACCEPTED OR AT LEAST NEVER OBJECTED. LIKE FRANKFURTER IN YOUNGSTOWN – HISTORY OF SUCH PRACTICES WITH NO OBJECTION BY CONGRESS = VALIDITY

USSC HAS UPHELD ALL EX AGREEMENTS THAT HAVE COME BEFORE IT. MAJORITY MODERN VIEW THEREFORE IS THAT EX AGREE = TREATY.

WAR POWERS

CONSTITUTION CLEAR – CONGRESS DECLARES WAR AND FUNDS MILITARY. PRESIDENT LEADS IN THE FIELD. PRESIDENT CAN RESPOND TO INVASION OR ATTACK.

WOODS v CLOYD MILLER (1948 - 168)

DURING WWII, RENT CONTROL. NEW ONE IN 1947

DC – WAR POWER ENDED ON 12/31/46 WITH PRESIDENTIAL PROCLAMATION ENDING HOSTILITIES.

1. WAR POWERS CONTINUE AFTER WAR IS OVER – REMEDY ALL EVILS THAT ARISE FROM WAR. DOESN'T END WITH CESSATION OF HOSTILITIES.

2. 168 – QUOTE. CONGRESS CAN REMEDY AFTER THE WAR ECONOMIC EFFECTS CAUSED BY WAR.

JACKSON

OK HERE BUT MAJORITY STATEMENT TOO BROAD. SOME LIMIT ON WHEN THEY END LESS THAN AS LONG AS PROBLEMS EXIST (WAR DEBT LONG ?)

WAR POWERS RESOLUTION

PRESIDENT FREQUENTLY COMMITS TROOPS
WITHOUT DECLARATION OF WAR

PRIZE CASES (1863) – LINCOLN ORDERS NAVAL
BLOCKADE OF SOUTH BEFORE CONGRESS DECLARES
WAR. USSC SAID OK UNDER PRESIDENT POWER TO
REPEL INVASION AND GENERAL EXECUTIVE POWER.
IF NEEDED LEGISLATIVE SANCTION, FIND IT IN
APPROPRIATIONS AND RATIFYING STATUTES, BUT
PRESIDENT DIDN'T NEED IT.

VIETNAM – NEVER DECLARED, NEVER REACHED USSC

DC – MOST DISMISS ON SOME JUSTICIABILITY ISSUE,
OTHERS APPROVED ON MERITS.

WAR POWERS RESOLUTION OF 1972 (265)

FDR INCREASED DRAMATICALLY PRESIDENT'S POWER
TO COMMIT TROOPS.

JOINT RESOLUTION – PASSED WITH OVERRIDE OF
NIXON VETO.

PRESIDENT MAY INTRODUCE TROOPS (2C): 1.
DECLARATION OF WAR 2. STATUTORY
AUTHORIZATION AND 3. NATIONAL EMERGENCY BY

ATTACK ON US, ITS TERRITORIES OR POSSESSIONS OR ITS ARMED FORCES.

SEC 4 – CONSULTATION – REPORT WITHIN 48 HOURS TO CONGRESSIONAL LEADERS.

SEC 5B – TERMINATE WITHIN 60 DAYS UNLESS 1. CONGRESS HAS DECLARED WAR OR 2. CONGRESS HAS EXTENDED PERIOD OR 3. CONGRESS IS PHYSICALLY UNABLE TO MEET. CAN BE EXTENDED FOR 30 DAYS IF MILITARY NECESSITY.

SEC 5C – ARMED FORCES REMOVED BY **CONCURRENT RESOLUTION.**

MANY PRESIDENTS QUESTION VALIDITY 5B AND 5C.

OVER 125 INCIDENTS OF PRESIDENT INTRODUCING TROOPS WITHOUT CONGRESSIONAL APPROVAL. MOST AFTER 1973 COMPLY WITH AT LEAST PARTS OF RESOLUTION. **GULF WAR I** – BUSH I BUILD UP ON SAUDI BORDER. *DELLUMS v BUSH* – DC SAYS NOT RIPE. CONGRESS ADOPTS JOINT RESOLUTION BY FAIRLY CLOSE VOTE.

LIBYA – MARCH 27, 2011 – UN RESOLUTION – NEXT DAY US AND EUROPE. 60 DAYS – NOTHING. HOUSE ASKS FOR **EXPLANATION**. PRESIDENT ASKS YOU FOR ADVICE – RESPONSE ?

OBAMA;

A. NATO IN CHARGE – TREATY.

B. NO GROUND – ONLY AIR – PLANES AND DRONES. **NOT HOSTILITIES** AS USED IN WAR POWERS RESOLUTION.

CONTINUED AFTER 90 DAY LIMIT.

EXECUTIVE DETENTION OF ENEMY COMBATANTS.

WHAT IS **MARTIAL LAW** ?

ART 1, SEC 9 – HABEUS CORPUS NOT
SUSPENDED UNLESS REBELLION OR INVASION.

WHO SUSPENDS ?

TYPES OF COURTS:

1. ART 3 – FEDERAL COURTS
2. **MILITARY COURTS** – UCMJ – COURT MARTIAL
3. **MILITARY** TRIBUNAL – PRESIDENT ALONE ?
 - A. MARTIAL LAW
 - B. ENEMY TERRITORY
 - C. BATTLEFIELD – VIOLATE LAWS OF WAR

QUESTIONS AROUND 3 – MILITARY TRIBUNALS

LEGAL DISTINCTIONS WORK BEST WHEN A
“CLEAN” BATTLEFIELD. PROBLEM WITH WAR
ON TERRORISM – NO SUCH THING.

IS CONSTITUTIONAL INVARIABLE DURING WAR
OR DOES WARTIME EMERGENCY DILUTE OR
RESTRAIN CONSTITUTIONAL GUARANTEES ?

270 – LINCOLN UNILATERALLY SUSPENDS HC IN
RESPONSE PRO-SOUTH ACTIVITIES IN
MARYLAND. 13, 000 CIVILIANS ARRESTED AND
DETAINED BY UNION TROOPS. CONGRESS
RATIFIES A FEW MONTHS LATER.

EX PARTE MILLIGAN(1866 – 270)

HC PETITION. RESIDENT OF INDIANA – NOT IN ARMY. SEIZED BY MILITARY AND CHARGED WITH TREASON. MILITARY TRIBUNAL SENTENCES TO DEATH. AFTER WAR, CIVILIAN GRAND JURY REFUSES TO INDICT.

1. SHOULD HAVE BEEN TRIED IN ART 3 COURT. NOT RESIDENT OF REBELLIOUS STATE OR PRISONER OF WAR.

2. MILITARY NECESSITY NOT AN ARGUMENT IN STATE WHERE NO WAR AND COURTS OPERATING NORMALLY. CAN'T DENY RIGHTS WHEN COURTS

OPEN AND UNOBSTRUCTED.

3. SUSPENDING WRIT DOES NOT EQUAL MARTIAL LAW. MARTIAL LAW ONLY WHEN, IN INVASION OR CIVIL WAR, COURTS ARE CLOSED AND CRIMINAL JUSTICE IS IMPOSSIBLE.

EX PARTE QUIRIN (1942 – 272)

BORN IN GERMANY – LIVED IN US. BACK TO GERMANY BEFORE 1941. CITIZEN OF REICH. TRAINED IN SABOTAGE. DROPPED INTO US BY SUB. CAPTURED IN CIVILIAN CLOTHES. TRIED BY MILITARY TRIBUNAL – DENIED ACCESS TO DISTRICT COURT.

1. PRESIDENT = C IN C IN TIMES OF CRISIS.

2. CONGRESS PROVIDED MILITARY TRIBUNALS HAVE POWER TO TRY OFFENSES ACCORDING TO LAWS OF WAR. DO NOT CONSIDER HERE PRESIDENT'S UNILATERAL POWER.

3. NO MILITARY TRIBUNAL IF A) NOT AGAINST LAW OF WAR OR B) CLASS OF OFFENSE TRIABLE ONLY BY JURY. MILLIGAN. HERE AGAINST LAW OF WAR. BELLIGERENTS OUT OF UNIFORM – SPIES. NOT CONSIDERED POW'S. MILIGAN NOT ENEMY BELLIGERENT, POW OR LOW.

GOOD DECISION ?

QUIRIN MET BY COAST GUARD – CLAIMS FISHING BOAT GROUNDED. WHEN OTHERS STARTED SPEAKING GERMAN, GAVE GUARD \$ 300. GOT OTHER COAST GUARDS BUT GONE – ON RR. ON TRAIN, QUIRIN SAYS NEVER INTENDED TO DO IT – TURNING IN TO FBI. TRY IN NYC – IGNORED. GO TO DC – TURN IN AND ARRESTED.

JULY 29 , 1942 – ORAL ARGUMENT

JULY 31, 1942 – USSC DECISION

AUGUST 8, 1942 – 6 ELECTROCUTED, BUSCH AND DASCH GIVEN LIFE.

JOHNSON v EISENTRAGER (1950 – 275)

GERMAN CIVILIANS CAPTURED IN PACIFIC THEATER OF WAR. MILITARY TRIBUNAL. NO ACCESS TO US COURTS. NON CITIZEN AND NOT IN US = NO DUE PROCESS RIGHTS.

275 – AUMF (JOINT RESOLUTION = AUTHORIZATION FOR USE OF MILITARY FORCE) – QUOTE – BROAD AUTHORITY FOR PRESIDENT TO USE FORCE AND SPECIFIC REFERENCE TO WAR POWERS ACT.

WHY ESTABLISH GUANTANAMO AS TERRORIST PRISON ? HINT – THE LAWYERS PICKED IT.

EISENTRAGER – NO JURISDICTION OVER NON-US INDIVIDUALS CAPTURED AND HELD OUTSIDE US.

RASUL v BUSH (2004 - 275)

GUANTANAMO DETAINEES BRING SUIT – HELD UNLAWFULLY. DC AND C OF A HELD NO JURISDICTION – EISENTRAGER. USSC REVERSES. JURISDICTION TO HEAR HABEUS.

IS RASUL ABOUT THE VALIDITY OF A MILITARY TRIBUNAL ?

276 – QUESTION. CONTROL BUT NOT SOVEREIGNTY

1. **276** – DISTINCTION FROM EISENTRAGER – NOT AT WAR, DENY SOLDIERS, NO HEARING AT ALL FOR 2 YEARS.

KENNEDY (C)

US TERRITORY IN EFFECT AND INDEFINITE DETENTION WITHOUT ANY LEGAL PROCEEDING

SCALIA + 2 (D)

TIME OF WAR – MILITARY ENTITLED TO RELY ON EISENTRAGER. OVERRULES EISENTRAGER AND EXTENDS HABEUS OUTSIDE US FOR FIRST TIME.

HAMDI v RUMSFELD (2004 - 277)

O'CONNOR FIRST LINE – “AT THIS DIFFICULT TIME ..”
BOUGHT THE PROBLEM.

US CITIZEN CAPTURED ABROAD IN AFGHANISTAN. IN
JAIL IN US. GOVERNMENT ALLEGES ENEMY
COMBATANT SUPPORTING FORCES HOSTILE TO US.
HELD FOR 2 YEARS WITH NO HEARING.

WHAT ARE THE 4 POSITIONS ON THE USSC ?
SOUTER, SCALIA, O'CONNOR AND THOMAS

SOUTER	SCALIA	O'CONNOR	THOMAS (D)
GINSBUR	STEVENS	+ 3	
RELEASE	RELEASE	HEARING	JAIL
NO CONG	CRIM PRO	DP =	HOLD
AUTHOR.	OR	SOME	INDEFIN
	CONGRESS	MODIFIED	AS
	SUSPENDS	HEARING	C IN C
	HABEUS		

WHAT IS THE RESULT FOR HAMDY ? WHAT IS THE
ORDER TO THE DISTRICT COURT ?
VACATED AND REMANDED

O'CONNOR + 3

1. AUMF AUTHORIZES DETENTION OF ALL ENEMY COMBATANTS IN WAR ON TERROR.
2. US CAN CLEARLY HOLD IN DETENTION WHILE ACTIVE COMBAT ON-GOING.
3. QUESTION = EVEN IF DETENTION LEGAL, WHAT PROCESS IS CITIZEN ENTITLED TO WHO DISPUTES HIS STATUS AS ENEMY COMBATANT WHEN HABEUS HAS NOT BEEN SUSPENDED ?
WHAT IS GOVERNMENT ARGUMENT ON HAMDY AS ENEMY COMBATANT ?

GOVERNMENT = SEIZURE IN WAR ZONE PER SE
ENEMY COMBATANT OR DEFERENCE TO EXECUTIVE
CONCLUSION OF SAME.

4. 279 – GOVERNMENT AT WAR v RIGHTS OF
CITIZEN. DP MATTERS MOST IN CRISIS.

5. 280 – IF CITIZEN CHALLENGES ENEMY
COMBATANT STATUS, HE MUST RECEIVE A) NOTICE AS
TO NATURE OF GOVERNMENT'S FACTUAL BASIS FOR
ASSERTION AND B) FAIR OPPORTUNITY TO REBUT IN
FRONT OF NEUTRAL DECISION MAKER. NOT ALL
RIGHTS PRESENT. NOT ON BATTLEFIELD – AFTER
DECISION TO HOLD HAS BEEN MADE. CAN BE
MILITARY TRIBUNAL NO SUSPENSION OF HABEUS.

SOUTER (C AND D)

1. NON DENTION ACT SAYS MUST RELEASE UNLESS HELD PURSUANT TO ACT OF CONGRESS. AUMF DOES NOT AUTHORIZE DETENTION.

SCALIA (D)

1. CORE OF CONSTITUTION IS FREEDOM FOR CITIZEN FROM INDEFINITE DETENTION BY GOVERNMENT.

2. QUIRIN – UNDISPUTED ENEMY COMBATANTS. THIS IS MILLIGAN – COURTS ARE OPEN.

3. CRIMINAL PROCEEDINGS PROMPTLY BROUGHT IN FEDERAL COURT OR CONGRESS SUSPENDS WRIT.

THOMAS (D)

AUMF AUTHORIZED DETENTION. ONLY A GOOD FAITH DETERMINATION BY EXECUTIVE IS REQUIRED. NO JUDICIAL EXPERTISE HERE – NATIONAL SECURITY = EXECUTIVE.

RUMSFELD v PADILLA (2004 - 285)

USSC DISMISSES BECAUSE SHOULD HAVE SUED IN SOUTH CAROLINA NOT NY. VIGOROUS DISSENT – HOLDING NOT AUTHORIZED. US CITIZEN ARRESTED IN CHICAGO. C OF A HELD VIOLATED NON-DENTION ACT AND AUMF DID NOT AUTHORIZE. AS ENEMY COMBATANT, HELD BY DEPARTMENT OF DEFENSE.

HAMDAN v RUMSFELD (2006 – 286)

HAMDEN = YEMEN – CAPTURED IN AFGHANISTAN – TALIBAN. CAUGHT NOV 2001. GITMO JUNE 2002. OVER 1 YEAR LATER, ELIGIBLE FOR MILITARY COMMISSION. OVER 1 MORE YEAR LATER, CHARGED. HABEUS HERE.

DETAINEE TREATMENT ACT TRIED TO LIMIT ALL APPEALS TO C OF A FOR DC CIRCUIT – ONLY REVIEW WHETHER FOLLOWED D OF D RULES AND US STATUTES AND CONSTITUTION. USSC HELD DTA DIDN'T STRIP IT OF JURISDICTION IN EXISTING HABEUS AND APPEALS

1. MILITARY COMMISSION OR TRIBUNAL NOT IN CONSTITUTION OR BY STATUTE. FROM MILITARY NECESSITY. QUIRIN BASED ON CONGRESSIONAL AUTHORIZATION. DON'T ANSWER QUESTION OF WHETHER CONGRESS ALWAYS NEEDED BUT CLEAR – WHEN JUSTIFIED UNDER CONSTITUTION AND LAW, INCLUDING THE LAW OF WAR.

2. **287** – MILITARY COMMISSIONS ALLOWED:
- A. MARTIAL LAW DECLARED
 - B. OCCUPIED ENEMY TERRITORY (NO CIVILIAN – TEMPORARY)
 - C. USUALLY ON BATTLEFIELD ITSELF, TO DETERMINE VIOLATION OF LAW OF WAR.

3. NEITHER AUMF OR DTA EXPAND PRESIDENTIAL POWER FOR MILITARY COMMISSIONS.

4. MUST BE IN THEATER OF WAR AND DURING CONFLICT. NO HERE. ALSO CONSPIRACY VALID TRIAL IN DISTRICT COURT OR MILITARY COURT – NOT IN MILITARY COMMISSION OR TRIBUNAL.

5. UCMJ – INCORPORATES LAW OF NATIONS AND GENEVA CONVENTION. HEARSAY ALLOWED. MUST BE AT LEAST LEVEL OF MILITARY COURT UNLESS IMPRACTICABLE.

BREYER + 3 (C)

PRESIDENT CAN GO TO CONGRESS FOR
AUTHORIZATION NEEDED. NOT GIVEN A BLANK
CHECK SO FAR.

KENNEDY (C)

JACKSON 3RD CATEGORY – CONGRESS SAID NO.

THOMAS (D)

AUMF AUTHORIZES. PRESIDENT HAS DECIDED PRE
911 MATTERS AND THEATER IS EVERYWHERE.

ALITO (D)

MILITARY COMMISSION HAS SUFFICIENT LEGAL
SAFEGUARDS.

MILITARY COMMISSIONS ACT OF 2006 (292)

1. APPLIES TO ALIENS
2. DEFINES ENEMY COMBATANT
3. MILITARY COMMISSION CAN TRY ANY ALIEN ENEMY COMBATANT FOR ANY OFFENSE MADE PUNISHABLE BY LAW OF WAR.
4. REMOVED HABEUS FOR ALL ALIEN ENEMY COMBATANTS REGARDLESS OF WHERE HELD.

BOUMEDIENE v BUSH (2008 – 293)

P AT GITMO. DEPARTMENT OF DEFENSE HAS CREATED CSRT – COMBAT STATUS REVIEW TRIBUNALS
NO LAWYERS, HEARSAY, NO CONFRONT, LIMITED \$\$

P = COMBATANTS. SUSPENSION CLAUSE – ART 1, SEC 9, CL 2 – **NOT SUSPEND UNLESS INVASION OR REBELLION.**

KENNEDY

1. GOVERNMENT ARGUES HABEUS SUSPENDED IN TERRITORIES OVER WHICH US HAS NO SOVEREIGNTY. US HAS EFFECTIVE SOVEREIGNTY OVER GITMO. UNCLEAR AT CL – EXTRA TERRITORIAL EFFECT OF WRIT. WRIT REALLY IMPORTANT TO FF. **294 - 3** FACTORS DETERMINING REACH OF THE WRIT. P CONTESTING ENEMY STATUS – GITMO SECURE. MCA NOT FORMAL SUSPENSION OF WRIT. CONSTITUTION IN FULL EFFECT IN GITMO.

2. **295** – HABEUS MINIMUM

DETAINEE MUST HAVE OPPORTUNITY TO PRESENT RELEVANT EXCULPATORY EVIDENCE THAT WAS NOT PART OF RECORD AT EARLIER PROCEEDINGS.

3. COSTS NOT ENOUGH TO OUTWEIGH. SOME IN JAIL FOR 6 YEARS. STRIKE ENTIRE STATUTE.

ROBERTS (D)

MORE RIGHTS TO ENEMY COMBATANTS THAN EVER BEFORE

SCALIA (D)

FIRST CASE TO APPLY HABEUS TO ALIENS DETAINED ABROAD. EISTRANGER CLEAR AND CORRECT.

MILLIGAN – NO MIL TRIBUNAL – COURTS OPEN

QUIRIN – SPIES = MIL TRIBUNAL

EISENTRAGER – FOREIGN IN FOREIGN = M TRIB

RASUL – **HABEUS IN GITMO, SOME NOTICE AND HEARING EVEN FOR ALIENS** (EXECUTIVE ONLY)

HAMDI – **CITIZEN IN US – 5 SAY PRESIDENT**

AUTHORIZED BY CONGRESS, 4 SAY DUE PROCESS

HEARING, 4 RELEASE OR FILE CRIMINAL (PRES ONLY)

HAMDAN – **PRESIDENT DEFIED CONGRESS -NON**

CITIZEN IN GITMO GETS MORE THAN MIL TRIBUNAL

(3 CIRCUMSTANCES)

BOUMEDIENE – **ALIENS IN GITMO GET HABEUS**

MINIMUM – CONGRESS CAN'T SUSPEND HERE

FEDERALISM

USSC AUTHORITY OVER STATE COURTS

MARTIN v HUNTER'S LESSEE (1816 - 16)

VIRGINIA ----- HUNTER

FAIRFAX ----- MARTIN

TREATY OF 1783 ENDING THE REVOLUTIONARY WAR.

WHAT IS THE SOLE ISSUE IN THE CASE ?

VIRGINIA 1 – FAIRFAX DEVISEE v HUNTER’S LESSEE –
VA SC FOR HUNTER. USSC REVERSES IN 1813 –
MANDATED VIRGINIA TO GRANT TITLE TO MARTIN 16

VIRGINIA 2

1. SEC 25 IS UNCONSTITUTIONAL. STATE COURTS CAN’T ENCROACH ON FEDERAL POWER – NOTHING IN CONSTITUTION GIVING FEDERAL POWER TO ENCROACH ON STATES. EQUAL RESPECT FOR RESIDUAL SOVERIGN.
2. IF ONE COURT IS APPELLATE, MEANS SUPERIOR. CAN’T BE UNLESS SAME SOVERIGNITY. EG NO APPEAL FROM COURT IN FRANCE.
3. CONGRESS CAN MAKE EXCLUSIVE BUT DIDN’T

STORY

1. USSC APPELLATE POWER IN ALL ART 3 CASES NOT IN ORIGINAL JURISDICTION. IT IS THE CASE, NOT THE COURT, WHICH GIVES JURISDICTION. CONSTITUTION DOESN'T MENTION CERTAIN COURTS – JUST TYPES OF CASES.

2. STATES CAN HEAR BUT APPEAL TO USSC. CONSTITUTION REGULATES STATES IN MANY WAYS – IF CAN DECLARE ACTS OF GOVERNOR AND LEGISLATURE UNCONSTITUTIONAL, APPELLATE POWER.

3. 17 – STATE BIAS – CHAOS IF DIFFERENT DECISION

3. REMOVAL = APPELATE. FEDERAL CONTROL OVER THE CASE. HISTORY SUPPORTS.

WHY DID MARTIN WIN IN USSC ?

DEFER TO STATE PROPERTY LAW ?

IS THE APPEAL DEPENDENT ON A STATUTE ?

PROCEEDINGS NOT INCONSISTENT WITH THE OPINION OF THIS COURT. DON'T ORDER.

WHO IS MARTIN ?

COHENS v VIRGINIA 18 MARSHALL IN CRIMINAL CASE 15 – OW HOLMES QUOTE

18 – INTERPOSITION – STATE CAN NULLIFY UNCONSTITUTIONAL FEDERAL LAWS OR INTERPRETATIONS. REAPPEARS IN 1950'S.

ADEQUATE AND INDEPENDENT STATE GROUNDS

IF STATE LAW RESOLVES THE CASE, THEN FEDERAL COURTS SHOULDN'T HEAR. USSC SHOULD CORRECT WRONG JUDGMENTS, NOT REVISE OPINIONS.

EXAMPLE – IF CASE INVOLVES STATE LAW AND FOURTH AMENDMENT, USSC WILL NOT TAKE CASE IF STATE LAW PRODUCES A JUDGMENT EVEN IF STATE COURT OPINION WRONG ON FOURTH A RESULT.

FEDERALISM

STATES MUCH MORE IMPORTANT PRE-1937

McCULLOCH v MARYLAND (1819 - 63)

FIRST BANK OF US (71)

STATUTE FOR FIRST BANK PASSED BY CONGRESS IN EARLY 1791. WHILE DECIDING VETO, WASHINGTON ASKED FOR OPINIONS. ISSUE IS IMPLIED POWERS AND NECESSARY AND PROPER CLAUSE – NO ARGUMENT EXPLICIT POWER TO CREATE CORPORATION.

JEFFERSON (72) – PRO STATES RIGHTS

1. POWER OF FEDERAL GOVERNMENT TO FORM A CORPORATION NOT SPECIFICALLY ENUMERATED IN CONSTITUTION.
2. TAXING CLAUSE DOESN'T VALIDATE. GENERAL WELFARE MEANT TO BE A LIMIT – CAN'T TAX FOR JUST ANY REASON.
3. NECESSARY AND PROPER – NECESSARY MEANS MORE THAN MERELY CONVENIENT. 72 – WITHOUT WHICH POWER WOULD BE NUGATORY. FEDERAL HAS IMPLIED POWERS BUT ONLY THOSE NECESSARY.

HAMILTON (72) PRO NATIONAL GOVERNMENT

1. FEDERAL GOVERNMENT CAN INCORPORATE BUT ONLY FOR PURPOSES LISTED IN ART 1, SEC 8
2. JEFFERSON DEFINES AS IF ABSOLUTE OR EXTREME BEFORE THE WORD NECESSARY.
3. 72 – QUOTE – MEANS/END TEST. NOT ON DEGREE – HOW NECESSARY. CAN'T HAMSTRING FEDERAL GOVERNMENT WITH NARROW INTERP.
4. RELATED TO RAISING TAXES AND BORROWING \$\$\$ CONSTITUTION NOT CONVENTION CONTROLS.

ARTICLES OF CONFEDERATION 60

1. CONSENSUS THAT CENTRAL GOVERNMENT IN REVOLUTION WAS TOO WEAK.
2. ARTICLES SEC IX = CONSTITUTION ART 1, SEC 8. BUT ARTICLES SAID STATES RETAINED ALL POWERS NOT EXPRESSLY DELEGATED TO FEDERAL GOVERNMENT.
3. CONSTITUTION ADDED TAX AND INTERSTATE/FOREIGN COMMERCE POWERS AND NECESSARY AND PROPER CLAUSE. NOT MUCH DISCUSSION ON NECESSARY AND PROPER.

FIRST BANK EXPIRES. SECOND BANK AFTER WAR OF 1812 – NATIONALIST FERVOR. ALL FINE IN POST WAR BOOM OF 1817-18 – DISCONTENT AFTER PANIC AND DEPRESSION OF 1818. STATES RIGHTS POPULAR – McCULLOCH A BUM.

MARYLAND STATE LAW IMPOSED A FEE ON BANKS OPERATING WITH AUTHORITY FROM STATE. FINES ON OFFICERS. McCULLOCH REFUSED TO PAY EITHER.

DOES CONGRESS HAVE POWER TO CREATE A BANK (A CORPORATION) ?

IF YES, DOES MARYLAND HAVE POWER TO TAX THE BANK ?

MARSHALL

FEDERAL POWER

1. FIRST BANK PASSED BY FIRST CONGRESS. THEY THOUGHT FEDERAL GOVERNMENT HAD POWER. DEFER TO DRAFTERS.
2. CONSTITUTION NOT CREATION OF THE STATE BUT THE PEOPLE. JUST USED STATES FOR CONVENIENCE
3. CLEAR THAT FEDERAL GOVERNMENT = ENUMERATED POWERS. CLEAR THAT FEDERAL GOVERNMENT HAS SOME IMPLIED POWERS.

4. CONSTITUTION AS AN OUTLINE – NEEDS CONSTANT INTERPRETATION. 65 – QUOTE.

5. FEDERAL GOVERNMENT GIVEN GREAT POWERS – MUST HAVE INTENDED APPROPRIATE MEANS TO IMPLEMENT.

6. 66 - MARYLAND'S ARGUMENT (JEFFERSON). ABSOLUTELY NOT BEFORE NECESSARY. FEDERAL GOVERNMENT INTENDED TO LAST A LONG TIME – DIDN'T INTEND NARROW MEANS TO IMPLEMENT BROAD POWERS. EG – CAN ESTABLISH POST OFFICE – CLEARLY POWER TO MAKE MAIL THEFT A CRIME. LATTER NOT INDISPENSABLY NECESSARY.

7. **68** - QUOTES. NECESSARY AND PROPER A GRANT OF POWER, NOT A LIMITATION. MEANS/END TEST. TAX AND BORROW POWERS

CAN MARYLAND TAX THE FEDERAL GOVERNMENT (THE BANK) ?

1. **70** - QUOTE – TAX = DESTROY. STATES CAN'T TAX INCONSISTENT WITH CONSTITUTION. SUPREMACY CLAUSE.

2. CAN ONLY TAX DOWN – TAX YOUR OWN CONSTITUENTS. IF FEDERAL TAX OPPRESSIVE, STATES HAVE REPRESENTATIVES IN CONGRESS.

NO SUCH VOTING SAFEGUARD WHEN STATE TAXES UP ON FEDERAL. 71 - QUOTE. MODERN LAW – STATE CAN'T TAX REAL ESTATE OWNED BY FEDERAL GOVERNMENT. DISTINGUISH MARBURY BY SAYING LAND OWNED BY BANK – 80% PRIVATE OWNERSHIP.

HERBERT WECHSLER – USSC SHOULD BE PRO FEDERAL GOVERNMENT BECAUSE STATES RIGHTS PROTECTED BY STRUCTURE OF CONGRESS. LAW PASSED MEANS STATES ALREADY AGREE. JESSE CHOPER – USSC SHOULD SAVE POLITICAL CAPITAL FOR PROTECTION OF INDIVIDUAL RIGHTS.

US v COMSTOCK (2010 - S5)

DOES N AND P CLAUSE GRANT CONGRESS AUTHORITY TO ALLOW DC TO ORDER CIVIL COMMITMENT OF MENTALLY ILL, SEXUALLY DANGEROUS FEDERAL PRISONERS BEYOND DATES THEY WOULD BE RELEASED ? YES

BREYER

1. NP = CONVENIENT OR USEFUL OR CONDUCIVE. NOTHING ABOUT FEDERAL POWER OVER CRIMINAL LAW IS EXPLICIT IN THE CONSTITUTION. HISTORY CLEARLY ALLOWS. COMSTOCK HIGHLY DANGEROUS. ALREADY CUSTODIAN.

2. RELIQUINSH CUSTODY TO STATE WHENEVER A STATE WANTS IT.

3. UNDER AUTHORITY THAT PERMITS FEDERAL CRIMINAL LAWS, FEDERAL PRISONS, GOVERN PRISONS AND PROTECT POPULATION

KENNEDY (ALITO) (C)

RATIONAL REVIEW TOUGHER IN COMMERCE THAN DUE PROCESS.

THOMAS +1 (D)

CRIMINAL LAW, CARING FOR MENTALLY ILL AND PROTECT POPULATION = STATE MATTER.

US v KEBODEAUX (2013 – 13S 15)

WHETHER CONGRESS HAS AUTHORITY UNDER NP TO REQUIRE CONVICTED MEMBER OF AIR FORCE TO REGISTER AS SEX OFFENDER UNDER SORNA, ENACTED AFTER HIS CONVICTION ?

BREYER

1. ART 1, SEC 8 POWER TO MAKE RULES FOR THE REGULATION OF THE LAND AND NAVAL FORCES. NP BROAD. UCMJ MAKES MILITARY CRIME. CAN IMPRISON AND PUT CONDITIONS ON RELEASE.
ROBERTS – (C) BUT NO GENERAL FEDERAL POLICE
THOMAS (D) – STATE = SEX OFFENDERS, CHILD PREDATORS.

NFIB v SEBELIUS (2012 - S 15 – 18) 1 OF 3

ACA REQUIRED ALL CITIZENS TO MAINTAIN
MINIMUM ESSENTIAL HEALTH INSURANCE OR
PAY A PENALTY TO IRS FOR FAILING TO DO SO.
HERE ON TAXING POWER TO DO SO (REJECT
COMMERCE CLAUSE ELSEWHERE).

ROBERTS (5-4)

1. PRIOR CASE LAW – PENALTY (INVALID) v TAX
(VALID).

2. GOVERNMENT ARGUES THAT NOT GETTING INSURANCE IS A DECISION THAT IT CAN TAX. PAID TO IRS BY APRIL 15. RAISES REVENUE.

3. DREXEL FURNITURE – PENALTY BUT A) EXCEEDINGLY HEAVY BURDEN B) SCIENTER REQUIRED AND C) DEPARTMENT OF LABOR COLLECTED.

4. TAX CAN BE USED TO INFLUENCE CONDUCT.

5. PROBLEM – STATUTE CALLS IT A PENALTY. LABEL NOT BINDING UNDER USSC. CONSISTENT WITH OUR CASES TO CALL IT A TAX. HOWEVER, A PENALTY FOR ANTI-INJUNCTION ACT – THAT IS CONGRESS' CALL.

SCALIA (KENNEDY, THOMAS, ALITO) (D)

1. PENALTY NOT TAX. CRITERIA OF WRONGDOING AND PUNISHMENT FOR VIOLATION. CONGRESS CALLED IT A PENALTY. TO CALL IT A TAX IS A JUDICIAL REWRITE OF THE STATUTE.

INCOME TAX IS SEPARATE AMENDMENT (16TH – 1913). HERE ART 1, SEC 8 – POWER TO TAX.

ANTI INJUNCTION ACT – IF TAX, MUST PAY AND SUE FOR A REFUND. NO INJUNCTION AVAILABLE. CONGRESS SAID PENALTY BECAUSE OF POLITICAL RAMIFICATIONS OF TAX AND TO ALLOW LAWSUIT.

US TERM LIMITS v THORNTON (1995 - 76)

ARKANSAS CONSTITUTION AMENDED BY GENERAL VOTE – CAN'T BE ON BALLOT IF 3 TERMS IN HOUSE OR 2 IN SENATE. CAN STILL BE WRITE IN. BALLOT ACCESS RESTRICTION, NOT DISQUALIFICATION.

WHAT IS THE PROBLEM ARKANSAS IS TRYING TO FIX ?

ART 1, SEC 2, CL 2 – HOUSE - 25, 7 YEARS US CITIZEN, INHABITANT OF STATE.

ART 1, SEC 3, CL 3 – SENATE – 30, 9 AND INHABITANT

ART 1, SEC 4 – TPM OF HOLDING ELECTIONS BY STATE

ARGUMENTS ?

PRO TERM LIMITS ARGUMENTS:

1. CONSTITUTION IS JUST A MINIMUM. STATES GENERALLY CAN ADD EVEN IF CONGRESS CAN'T (SUBSTANTIVE).
2. IF NO 1, THEN STATES INCLUDE AS TPM (PROCEED)
3. IF NO 1 OR 2, RIGHT OF THE PEOPLE

ANTI TERM LIMITS ARGUMENTS:

1. CONSTITUTION SPECIFIC ON REQUIREMENTS – CAN'T ADD OR SUBTRACT. NOTHING PRE 1789.
2. DEMOCRACY – PEOPLE ELECT WHOMEVER THEY WANT.

STEVENS

1. POWELL v McCORMACK – HOUSE COULD NOT IMPOSE ADDITIONAL QUALIFICATIONS. AT ENGLISH CL, CONTINUED RE-ELECTION OF JOHN WILKES SET PRINCIPLE IN A DEMOCRACY, PEOPLE CAN ELECT WHOMEVER THEY DESIRE.
2. FOUNDING FATHERS WANTED QUALIFICATIONS TO BE FIXED. FF AND PRINCIPLES OF DEMOCRACY = PEOPLE ELECT WHOMEVER THEY WANT.
3. NO POWER IN STATES. AUTHORITY DIDN'T PRE-EXIST THE CONSTITUTION SO NO RESIDUAL POWER

3. FEDERAL ELECTIONS DELEGATED TO STATES RATHER THAN RESERVED BY THEM.

4. POTENTIAL PATCHWORK OF STATE QUALIFICATIONS UNDERMINES UNIFORMITY AND NATIONAL CHARACTER.

5. NOT JUST PROCEDURAL – WRITE INS HAVE POOR CHANCE TO WIN. FF REJECTED TERM LIMITS. FEDERAL POLITICIANS ARE NOT JUST AGENTS OF STATE.

KENNEDY (C)

FEDERALISM IMP. RIGHT OF PEOPLE, NOT STATE.

THOMAS + 3 (D)

1. IRONIC TO DEFEND RIGHT OF PEOPLE WHEN PEOPLE APPROVED BY OVER 60%.
2. PEOPLE VOTING WITHIN STATES. IF CONSTITUTION DOESN'T TAKE AWAY FROM STATES, THEY HAVE POWER.
3. CONSTITUTIONAL LIST IS JUST A MINIMUM. NOTHING SAYS STATE CAN'T ADD. MAJORITY ARGUMENT APPLIES TO CONGRESS, NOT STATE. DON'T WANT CONGRESS PERPETUATING ITSELF.
4. WRITE IN IS VIABLE.

POSSIBLE GOVERNMENTAL STATUS:

1. REGULATOR (LEGAL v ILLEGAL)
2. FUNDING SOURCE
3. MARKET PARTICIPANT (EG EDUCATOR)
4. PROPERTY OWNER

SPENDING POWER AS REGULATORY DEVICE

US v BUTLER (1936 - 157)

AGRICULTURAL ADJUSTMENT ACT – PAID NOT TO GROW. TAX ON PROCESSING TO SUPPORT. BUTLER REFUSED TO PAY TAX.

ROBERTS

1. NOT WISDOM OF STATUTE, CONSTITUTIONALITY
2. NOT JUSTIFIED UNDER COMMERCE CLAUSE.
3. **157** - TAXING CLAUSE. CONGRESS CAN SPEND FOR THE GENERAL WELFARE (HAMILTON)
4. HERE, REALLY FEDERAL REGULATION OF SUBJECT LEFT TO THE STATES.
5. **158** – NOT A CONDITIONAL GRANT. OBVIATE ALL LIMITS. NATIONAL PROBLEM NOT ENOUGH.

STONE (BRANDEIS, CARDOZO) (D)

1. NATIONAL PROBLEM = GENERAL WELFARE. CAN REQUIRE MONEY TO BE SPENT FOR THE PURPOSE GIVEN.

CONDITIONAL GRANT v DISGUISED REGULATION

STEWARD MACHINE v DAVIS (1937 - 160)

PAYROLL TAX FOR FEDERAL UNEMPLOYMENT. 90% CREDIT FOR AMOUNTS CONTRIBUTED TO STATE PLAN

161 – VALID – NOT BUTLER – NATIONAL PROBLEM

SOUTH DAKOTA v DOLE (1987 - 163)

FEDERALS WITHHOLD 5 % OF INTERSTATE HIGHWAY FUNDS UNLESS STATE ADOPTS LAW MAKING DRINKING AGE 21 OR OLDER. PURPOSE = HIGHWAY SAFETY.

REHNQUIST

1. FEDS CAN'T REGULATE – 21ST AMENDMENT SAYS NO COMMERCE CLAUSE POWER.
2. HAMILTON – GENERAL WELFARE NOT LIMITED TO ENUMERATED LIST OF POWERS.

3. **163** – 4 PART TEST:

1. \$\$ = GENERAL WELFARE
2. CONDITION MUST BE UNAMBIGUOUS
3. CONDITION MUST BE RELATED TO
FEDERAL INTEREST IN PROGRAM
4. CONDITION CAN'T VIOLATE ANY OTHER
CONSTITUTIONAL PROVISION.

4. 3 MET HERE – SAFETY RELATED

5. 4 MEANS SPECIFIC CONSTITUTIONAL RIGHT – NOT
JUST FEDERALISM OR STATES RIGHTS.

6. CONDITION CAN'T BE COERCIVE – ONLY 5% HERE.

O'CONNOR (D)

1. AGREE WITH 4 POINTS – MISAPPLIED 3 HERE. NOT RELATED TO HIGHWAY CONSTRUCTION. 165 –
CONDITIONAL GRANT OR DISGUISED REGULATION.

2. BUTLER CORRECT ON SPENDING ANALYSIS BUT WRONG ON COMMERCE CLAUSE.

AFTER DOLE AND UNDER 4 PART TEST, NO SPENDING PROVISION INVALIDATED UNTIL

NFIB v SEBELIUS (2012 - S 15) 2 OF 3

ACA REQUIRES STATES TO EXPAND MEDICAID COVERAGE – TO 133% OF FEDERAL POVERTY LEVEL. INCREASED FEDERAL FUNDING TO PAY FOR NEWLY INCLUDED. IF STATE DID NOT INCREASE COVERAGE, LOST ALL MEDICAID FUNDING, NOT JUST INCREASE.

ROBERTS (BREYER AND KAGAN)

1. STATES MUST VOLUNTARILY AND KNOWINGLY ACCEPT TERMS OF THE CONTRACT. FEDS CAN CREATE INCENTIVES, NOT COMPULSION. ENCOURAGE, NOT COERCE.

2. DOLE – MILD ENCOURAGEMENT – 5% OF HIGHWAY FUNDS. HERE – LOSE 10% OF ENTIRE STATE BUDGET.

3. GOVERNMENT – STATES KNEW CONGRESS RESERVED RIGHT TO AMEND. NO – THIS IS A RETROACTIVE CONDITION. CAN CONDITION RECEIPT OF NEW \$\$\$, BUT NOT OLD – LOSING ALL IS A PUNISHMENT.

4. BUT THIS PROVISION IS SEVERABLE – REST OF ACA IS VALID (5 – 4 HERE).

SCALIA (KENNEDY, THOMAS, ALITO) (C AND D)

1. DOLE VALID BUT THREAT TO FEDERALISM IF LEFT UNCHECKED. CONDITION IS TIED TO VOLUNTARINESS OF STATE. HERE MASSIVE AMOUNT OF \$\$\$ LOST IF STATE OPTS OUT. NO REAL CHOICE.

2. NOT SEVERABLE.

GINSBURG (SOTOMAYOR) (C AND D) (C ON SEVER)

1. CONGRESS CAN AMEND – DONE IT 50 TIMES. STATES HAD NOTICE – NOT AN ENTITLEMENT. CONGRESS COULD NATIONALIZE. ALL MEDICAID \$\$\$

COMMERCE CLAUSE POWER (FEDERAL GROWTH)

MAJOR SOURCE OF MODERN FEDERAL POWER.

MOST OF STATUTES IN USCA FROM COMMERCE

POWER. FIRST – INTERSTATE COMMERCE ACT OF

1887 AND SHERMAN ACT OF 1890. WHAT IS

HAPPENING IN ECONOMY BETWEEN 1880'S – 1920'S

?

DOES CLAUSE MEAN ONLY COMMERCIAL TOPICS OR

CAN CONGRESS USE AS POLICE POWER ?

1937 – CREATION OF MODERN FEDERAL

GOVERNMENT

GIBBONS v OGDEN (1824 - 83)

NY GIVES LIVINGSTON AND FULTON EXCLUSIVE RIGHTS TO STEAMBOATS IN NY. THEY ASSIGN TO OGDEN. GIBBONS OPERATES BETWEEN ELIZABETHTOWN AND NYC. GIBBONS REGISTERED UNDER FEDERAL STATUTE. NY COURTS ENJOINED GIBBONS. **MAP**

WHAT DOES OGDEN (NY) SAY IS SUBJECT TO STATE CONTROL ?

WHAT DOES OGDEN (NY) SAY IS SUBJECT TO FEDERAL CONTROL ?

MARSHALL

1. FEDERAL GOVERNMENT IS LIMITED ONE BUT INTERPRET EXPLICIT POWERS GIVING WORDS THEIR NORMAL MEANING.

2. OGDEN – NAVIGATION NOT INCLUDED IN COMMERCE. NO – 83 - COMMERCE = BUYING, SELLING AND TRANSPORTING. NAVIGATION INCLUDED IN TRANSPORTING.

3. DEFINITION OF AMONG – CANNOT STOP AT BOUNDARY OF EACH STATE BUT MAY INTRUDE INTO INTERNAL. STATE = STRICTLY INTERNAL.

FEDERAL = MORE THAN 1 STATE. TENSION BETWEEN COMPLETELY INTERNAL v INTERSTATE WITH INTERNAL ASPECTS . WHERE BEGIN AND WHERE END ?

3. 84 – RELY ON THE POLITICAL PROCESS FOR LIMITATIONS.

US v EC KNIGHT (1895 - 85)

AMERICAN SUGAR ACQUIRED 4 OTHER REFINERIES (33%) TO GIVE IT 98% OF THE REFINING MARKET. GOVERNMENT CHALLENGES UNDER SHERMAN ACT – D ALLEGES MANUFACTURING IS NOT COMMERCE.

FULLER

1. CONCEDE MONOPOLY IN MANUFACTURING. BUT COMMERCE SUCCEEDS MANUFACTURING, NOT PART OF IT. MONOPOLIES CAN BE REGULATED BUT ONLY WHEN PART OF COMMERCE.
2. MANUFACTURING IS TRANSFORMING. COMMERCE = BUYING, SELLING AND TRANSPORTING – AFTER MAKING.
3. EFFECT ON COMMERCE IS INDIRECT – CAN'T USE NP TO BRING UNDER FEDERAL POWER. IF CONGRESS CAN REGULATE THIS, NO LIMIT ON POWER.

SHREVEPORT RATE CASE (1914 - 86)

ICC CONTROLLED RATES (FEDERAL). RR IN TEXAS CHARGING LESS FOR INTRASTATE, ESPECIALLY WHEN INTERSTATE MILEAGE WAS SHORTER. MAP

CAN CONGRESS CONTROL INTRASTATE RATES ?

HUGHES

1. 86 - CLOSE AND SUBSTANTIAL TEST

2. 86 – WHEN INTRA AND INTER SO RELATED THAT ONE CONTROLS OTHER, CONGRESS CONTROLS. CAN'T USE INTRASTATE TO HARM INTERSTATE.

RR DIFFERENT – PURE COMMERCE AND ALWAYS FEDERAL CONTROL.

STREAM OF COMMERCE – SWIFT AND STAFFORD (1905 - 87). CHICAGO STOCKYARDS – SOME LOCAL IN BECAUSE THEY ARE PART OF A STREAM – NO ONE INTENDS THE STOCKYARD TO BE FINAL DESTINATION. INDUSTRY CREATED AS INTERSTATE IN NATURE WITH INTRASTATE PARTS.

COMMERCE CLAUSE AND MORALITY

CHAMPION v AMES (1903 - 87) LOTTERY CASES

LOTTERY ACT PROHIBITED IMPORTING, MAILING OR TRANSPORTING LOTTERY TICKETS. HERE – PARAGUAY.

HARLAN 1

1. TICKETS = ARTICLES CARRIED THROUGH INTERSTATE COMMERCE. **POWER TO REGULATE INCLUDES THE POWER TO PROHIBIT.** NOT JUST LIMITED TO CONTROLLING.

2. PROTECTING MORALS IS IMPORTANT FUNCTION OF GOVERNMENT. FEDERAL CAN'T ON PURELY INTRASTATE BUT CAN IF USING INTERSTATE MEANS OF TRANSPORTATION.

3. IF CONGRESS ABUSES THIS BROAD POWER, THE REMEDY IS IN THE POLITICAL PROCESS. ABUSE OF POWER NOT ARGUMENT FOR ITS NON-EXISTENCE.

DISSENT

LOTTERIES NOT COMMERCIAL. CONGRESS CAN'T DIRECTLY REGULATE – SHOULDN'T LET HERE.

HIPOLITE EGG v US (1911 - 88)

PURE FOOD AND DRUG ACT BANNED ADULTURATED EGGS. D – SHIPMENT SEIZED AFTER OUT OF INTERSTATE COMMERCE.

1. OUTLAWS OF COMMERCE – CAN'T ESCAPE CONSEQUENCES OF ILLEGAL TRANSPORTATION.

2. McCULLOCH – MEANS/END TEST MAKES LATER SEIZURE VALID.

HOKE V US (1913 - 89) – CRIME TO CROSS STATE LINES FOR IMMORAL PURPOSES. POLICE POWER.

HAMMER v DAGENHART (1918 - 89)

STATUTE EXCLUDED PRODUCTS OF CHILD LABOR FROM INTERSTATE COMMERCE. ILLEGAL IF UNDER 14 OR BETWEEN 14 – 16 MORE THAN 8 HOURS A DAY FOR 6 DAYS PER WEEK.

1. LOTTERY, EGGS AND WOMEN – PRODUCTS THEMSELVES EVIL. 89 - QUOTE. REGULATE DOES NOT EQUAL PROHIBIT ALWAYS – LIMITED.

2. HERE GOODS ARE HARMLESS – TRYING TO REGULATE CONDITIONS OF MANUFACTURE. WHEN OFFERED FOR SHIPMENT, LABOR IS OVER.

3. NO CONGRSSIONAL POWER TO STANDARDIZE LABOR CONDITIONS. EG NO POWER TO STANDARDIZE TREATMENT OF WOMEN.

4. CAN'T JUSTIFY BECAUSE NEED FOR NATIONALLY UNIFORM LAWS. PURELY LOCAL

HOLMES + 3 (D)

1. REGULATE = PROHIBIT. PRECEDENT.

2. IF NO CONSTITUTION, POWER TO CROSS STATE LINES WOULD DEPEND ON NEIGHBORS. INSTEAD OF STATE TARIFFS, POLICY OF FEDS. 91 - QUOTE

COURT AND THE NEW DEAL

DEPRESSION – REALLY BAD ECONOMIC TIMES.
STARTS IN 1929 – YEARS OF REPUBLICAN PRESIDENTS.
1932 – FDR PROMISES NEW DEAL TO GET AMERICA
WORKING, SECURE RETIREMENTS, PROTECT BANK
DEPOSITS, ETC. ALL INVOLVED MORE FEDERAL
POWER. DEMOCRATIC PARTY DOMINATED FEDERAL
GOVERNMENT FROM 1932 - 1968

USSC –

1. COMMERCE CLAUSE – FEDERAL GOV'T CAN'T
2. SUBSTANTIVE DUE PROCESS – STATES CAN'T
3. CLAYTON ACT – UNIONS = ILLEGAL MONOPOLY

RR RETIREMENT BD v ALTON RR (1935 - 91)

ICC HAD ESTABLISHED COMPULSORY RETIREMENT PLAN FOR ALL RR EMPOLYEEES.

INVALID – NOT REGULATION OF COMMERCE. SAFETY LAWS DIFFERENT. IF CONTENTED WORKER IS STANDARD, NO LIMITS. SOLELY FOR BENEFIT OF EMPLOYEE – NOT COMMERCE.

SCHECHTER POULTRY v US (1935 - 91)

NIRA – ESSENCE MINIMUM WAGE, MAXIMUM HOUR. POULTRY MARKET IN BROOKLYN – LOCAL BUYERS.

GOVERNMENT ARGUES STREAM AND EFFECT.

1. EFFECT IS INDIRECT. 92 - QUOTE. IF ALLOW HERE, NO LIMIT ON FEDERAL EXPANSION.

2. NO STREAM – ENDED WHEN REACHED WAREHOUSE. SLAUGHTER AND SALE IN NYC.

CARTER v CARTER COAL (1936 - 93)

REGULATE HOURS AND WAGES IN COAL.

1. NOT ENOUGH TO VALIDATE BECAUSE BIG NATIONAL PROBLEM (SAME SAID IN SCHECHTER)

2. MANUFACTURING NOT COMMERCE –
PRODUCTION, NOT TRADE. COMMERCE AFTER.

3. 93 – QUOTE. INDIRECT EFFECT, NOT DIRECT.
LABOR DISPUTES LOCAL.

DISSENT – DIRECT EFFECT. 94 – QUOTE.

COURT PACKING

95 - MESSAGE TO CONGRESS AND RADIO ADDRESS.

95 – USSC AGES AND BILL

BETWEEN 1937 AND 1941, 7 JUDGES RETIRE

1937 – BLACK (1971 – 34 YEARS)

1938 – REED

1939 – FRANKFURTER (1962 – 23 YEARS),
DOUGLAS (1975 – 36 YEARS)

1940 – MURPHY

1941 – BYRNES, JACKSON

1937 – WEST COAST HOTEL v PARRISH (389) –
SUBSTANTIVE DP CASE – SWITCH IN TIME THAT
SAVED THE NINE.

POLITICAL CONTROVERSY – ALL APPOINTMENTS
WITH AGENDA OF INCREASING FEDERAL POWER.

TRILOGY CASES

NLRB v JONES & LOUGHLIN (1937 - 97)

NATIONAL LABOR RELATIONS ACT. NLRB FOUND D GUILTY OF UNFAIR LABOR PRACTICE – DISCHARGE FOR UNION ACTIVITY.

HUGHES

1. NLRB FIND D ORGANIZED IN INTERSTATE MANNER – ALIQUIPPA IS HEART OF THE BODY.

2. 97 - EFFECT ON COMMERCE

3. P – MANUFACTURING NOT COMMERCE. D – STREAM OF COMMERCE. NEITHER – 97 – 98 - CLOSE AND SUBSTANTIAL RELATIONSHIP TO INTERSTATE = FEDERAL POWER. SUBSTANTIALLY AFFECTING INTERSTATE COMMERCE.

4. EFFECT OF STRIKE WOULD BE CATASTROPHIC FOR NATIONAL ECONOMY. ORGANIZED BUSINESS ON NATIONAL LEVEL.

DISSENT (4)

98 - EFFECT TOO INDIRECT

WICKARD v FILBURN (1942 – 102)

FILBURN – DAIRY FARMER – WHEAT QUOTA IS 223 BUSHELS – HE IS 239 OVER. \$ 117 FINE. EXCESS ALL FOR HOME CONSUMPTION.

JACKSON

1. PRODUCTION ISN'T COMMERCE AND INDIRECT EFFECT – BASED ON A FEW DICTA AND DECISIONS OF THIS COURT. 102 - EVEN IF LOCAL AND NOT COMMERCE, STILL FEDERAL POWER IF SUBSTANTIAL ECONOMIC EFFECT.

2. 102 -103 – HYPOTHETICAL MULTIPLIER.

3. POWER TO REGULATE INCLUDES POWER TO CONTROL PRICES. HOMEGROWN WHEAT COMPETES WITH WHEAT IN COMMERCE.

DOES HYPOTHETICAL MULTIPLIER MEAN EVERYTHING IS UNDER FEDERAL CONTROL ?

US v DARBY (1941 – 98)

FAIR LABOR STANDARDS ACT OF 1938 – REGULATED HOURS AND WAGES OF EMPLOYEES IN LOCAL MANUFACTURING ACTIVITIES. DARBY IS LOCAL LUMBER MANUFACTURER – WOOD FROM GEORGIA. SHIPPED SOME OUT OF STATE.

1. 99 - 2 ISSUES.

2. POWER TO REGULATE INCLUDES POWER TO PROHIBIT. CAN EXCLUDE EVEN IF ON MORAL GROUNDS – NO OBJECTION THAT IT LOOKS LIKE STATE POLICE POWER.

3. CONGRESS' MOTIVE DOESN'T MATTER IF WITHIN POWER AND DOESN'T INFRINGE OTHER CONSTITUTIONAL PROVISION. CAN EXCLUDE ANY MATTER FROM IC. IC SHOULD NOT BE USED TO TRANSPORT GOOD MADE FROM SUBSTANDARD CONDITIONS.

3. 100 - HAMMER IS OVERRULED.

VALIDITY OF WAGE AND HOUR

1. CAN CONTROL INTRASTATE IF SUBSTANTIAL EFFECT ON COMMERCE. 100 – QUOTE – MEANS/ENDS.

2. VALID PURPOSE TO ELIMINATE UNFAIR COMPETITION IN IC.

3. DARBY SMALL BUT HYPOTHETICAL MULTIPLIER = SUBSTANTIAL EFFECT.

4. 101 - 10TH AMENDMENT STATES BUT A TRUISM.

5. THEREFORE, CONGRESS CAN PROHIBIT ANYTHING AND MEANS/END TEST THEN LETS CONGRESS REGULATE IT DIRECTLY.

FROM 1937 – 1995 (ALMOST 60 YEARS), FEDERAL POWER THROUGH THE COMMERCE CLAUSE WAS ESSENTIALLY UNQUESTIONED.
THIS INCLUDED FEDERAL CRIMINAL LAW.

US v LOPEZ (1995 - 107)

GUN FREE SCHOOL ZONE ACT – FEDERAL CRIME TO CARRY GUN IF KNEW OR SHOULD HAVE KNOWN SCHOOL ZONE. NO SPECIFIED CONNECTION TO IC.

D CHARGED UNDER TEXAS LAW – DISMISSED AND REINDICTED UNDER FEDERAL LAW.

REHNQUIST

1. GIBBONS DEFINED LIMITS. NEXT CENTURY SPENT ON SILENT CC – INVALIDATING STATE LEGISLATION THAT IMPEDED IC. THEN 1937.

2. 107 – 3 PART SUMMARY OF FEDERAL POWER:

A. CHANNELS OF INTERSTATE COMMERCE

B. PROTECT INSTRUMENTALITIES FROM

INTRASTATE THREATS

C. INTRASTATE WHICH SUBSTANTIALLY AFFECTS IC

3. HERE CLEARLY NOT A OR B. SUBSTANTIALLY

4. NOT A REGULATION OF ANYTHING ECONOMIC. NO JURISDICTIONAL NEXUS TO ECONOMY. NO CONGRESSIONAL FINDINGS ON EFFECTS.

5. GOVERNMENT – a) COSTS OF CRIME AND INSURANCE b) LESSENS TRAVEL IN UNSAFE AND c) QUALITY OF EDUCATION DOWN.

6. NO LIMITS IF GOV'T ARGUMENT ACCEPTED. DISTRUPT ALL OF FAMILY LAW. WOULD ALLOW FOR COMPLETE REGULATION OF SCHOOLS WHICH IS CLEARLY STATE FUNCTION.

KENNEDY (O'CONNOR) C

1. ECONOMY OF 1789 REALLY DIFFERENT FROM ECONOMY OF 1937. POST 1937 DEFERENCE TO CONGRESS NOT REALLY QUESTIONED TODAY.

2. ALL HAVE LARGE STAKE IN POST 1937 WORLD. CONGRESS CAN LEGISLATE ON BASIS OF SINGLE NATIONAL MARKET.

3. FEDERALISM = DOCTRINE OF UNCERTAINTY. CITIZENS NEED TO KNOW WHICH GOV'T IS ACCOUNTABLE. NORMALLY POLITICAL. HERE – EDUCATION = STATE CONCERN. STATE = LABORATORY

THOMAS C

1. ALL AGREE LIMITS AND NO FED POLICE POW
2. FF – IC NOT MANUFACTURING AND FARMING.
REEXAMINE SUBSTANTIALLY AFFECTS
CREATED IN 1937.
3. REMOVED **FOOTNOTE** - PROBABLY ALL TOO
VESTED IN STARE DECISIS.

STEVENS D

FUTURE DEPENDS ON EDUCATION. GUNS ARE
ARTICLES OF COMMERCE.

SOUTER D

1. RATIONAL BASIS FOR SUBSTANTIALLY AFFECTS.
THEN REASONABLE MEANS TO END.
2. DEFER – CONGRESS POLITICALLY ACCOUNTABLE.
3. DON'T REQUIRE CONGRESSIONAL FINDINGS. FACT
THEY PASSED THE STATUTE.

BREYER + 3 D

RATIONAL BASIS FOR SUBSTANTIALLY AFFECTS.
STUDIES SHOW RELATION BET GUN VIOLENCE AND IC

WHY NOT DARBY PROHIBITION ?

CAN LITIGATORS MAKE UP PURPOSE/CONNECTION ?

114 – 115 AMENDMENTS. DRAFTING PROBLEM ?

US v MORRISON (2000 - 116)

WOMAN RAPED BY VIRGINIA TECH FOOTBALL PLAYERS. VIOLENCE AGAINST WOMEN ACT – MOTIVATED BY GENDER – CIVIL CAUSE.

REHNQUIST

1. LOPEZ – a) CRIMINAL – NON ECONOMIC b) NO EXPRESS JURISDICTIONAL ELEMENT c) NO FORMAL

CONGRESSIONAL FINDINGS AND d) LINK
ATTENUATED.

3. EVEN WITH FINDINGS – CAN'T ALLOW FEDERAL
REGULATION OF EVERYTHING. FAMILY LAW AND
CRIMINAL LAW – STATE CONCERN.

NO WHEN USING SUBSTANTIALLY AFFECTS TEST TO
REGULATE NON ECONOMIC ACTIVITY.

THOMAS C

NO CONSTITUTIONAL BASIS FOR SUBSTANTIALLY
AFFECTS TEST.

SOUTER + 3 D

1. SUBSTANTIALLY AFFECTS TEST STILL VALID. HERE – YEARS OF TESTIMONY.
2. RETURN TO PRE-1937 SOCIAL DARWINISM.
3. ALL STATES AG'S AND POLICE CHIEFS SUPPORTED THE STATUTE. 118.

BREYER + 3 D

ECONOMIC/NON-ECONOMIC WON'T WORK.
CHANGES IN ALL ASPECTS OF SOCIETY HAVE MADE A
WORLD IN WHICH EVERYTHING SUBST AFFECTS IC

GONZALES v RAICH (2005 - 119)

CALIFORNIA CONSTITUTION AMENDED TO ALLOW MEDICAL MARIJUANA. DEA – CONTROLLED SUBSTANCES ACT. RAICH ARRESTED FOR GROWING 6 PLANTS – DEA SEIZED. RAICH FOR DECLATORY AND INJUNCTIVE RELIEF.

STEVENS + 4 (KENNEDY)

1. CSA COMPREHENSIVE SCHEME. CLEARLY WITHIN COMMERCE POWER.
2. LIKE WICKARD HERE – SUBSTANTIAL AFFECT.

3. CONGRESS CAN REGULATE INTRASTATE ACTIVITIES EVEN IF NON-ECONOMIC IF FAILURE TO REGULATE IT WOULD UNDERCUT INTERSTATE REGULATION OF THAT COMMODITY (EG WHEAT)

4. 120 – USSC DOESN'T DETERMINE ACTUAL SUBSTANTIAL AFFECT – JUST WHETHER CONGRESS HAD A RATIONAL BASIS FOR CONCLUDING SUBSTANTIAL AFFECT.

5. ENFORCEMENT DIFFICULTIES IF STATES CAN LEGALIZE. IF OUTSIDE CC FOR HOME GROWN MEDICAL, MUST BE OUTSIDE FOR HOME GROWN RECREATIONAL. USE DOESN'T DETERMINE POWER.

SCALIA C

1. INTR^ASTATE REGULATION = N AND P CLAUSE

2. COMPREHENSIVE SYSTEM OF FEDERAL REGULATION – EXTINGUISH INTERSTATE MARKET IN CONTROLLED SUBSTANCES.

O'CONNOR (REHNQUIST AND THOMAS) D

1. STATE AS LABS. INNOVATION. HISTORICALLY STATE SOVERIGN. COMPREHENSIVE SOMEHOW BETTER THAN PIECEMEAL.

2. NON-ECONOMIC – HOME USE, NOT IN STREAM

3. IGNORED VOLUMES OF FINDINGS IN MORRISON, VALIDATE ON ESSENTIALLY NONE HERE.

4. HOMEGROWN MEDICAL MARIJUANA TOO SMALL A CLASS TO EFFECT. GROWING WITH NO PRODUCTS MOVING THROUGH IC.

STATE GOVERNMENTS ARE THE EFFECTIVE ENFORCERS OF CRIMINAL MARIJUANA LAWS

126. DOES THIS MATTER ?

NFIB v SEBELIUS (2012 - S 7)

IF NOT EXEMPT, ACA REQUIRES YOU TO PURCHASE HEALTH INSURANCE. IF NOT, FINE PAYABLE TO IRS (SHARED RESPONSIBILITY PAYMENT).

ROBERTS

1. GOVERNMENT – ALL NEED CARE AT UNPREDICTABLE TIMES. HOSPITALS DON'T TURN AWAY. INSURANCE PASSES ON ABOUT \$ 1,000 IN PREMIUMS PER YEAR TO COVER NON-INSURED.

2. HERE – REGULATING DOING NOTHING ON

GROUNDS INACTIVITY AFFECTS COMMERCE. NO –
EVEN WICKARED WAS ON AN ACTIVITY – DID
SOMETHING. CAN YOU ORDER EVERYONE TO BUY
VEGETABLES ?

3. GOVERNMENT – N AND P CLAUSE VALIDATES
COMPREHENSIVE SYSTEM OF REGUALTION. NO –
MUST STILL BEGIN IN EXPLICIT ART 1 SEC 8 POWER.
NOT DERIVATIVE OF ANYTHING.

SCALIA + 3 (C)

1. CAN'T ALLOW FEDS TO REGULATE ALL PRIVATE
CONDUCT. ALL HUMAN ACTIVITY INCLUDED IF HERE

2. CAN'T FORCE PARTICIPATION IN MARKET.

GINSBURG (BREYER, SOTOMAYOR, KAGAN)

1. HUGE MARKET – ALL NEED EVENTUALLY.

2. FEDS COULD HAVE ADOPTED SINGLE PAYOR SYSTEM.

3. FREE AND INEVITABLE DOESN'T EXIST IN ANY OTHER MARKET – NO PRECEDENT.

4. N AND P CL – ESSENTIAL PART OF COMPREHENSIVE REGULATION.

HANDOUT CL 5

10th AMENDMENT AS LIMIT ON COMMERCE POWER

EVEN AFTER 1937 EXPANSION, EVERYONE ACKNOWLEDGED THAT THE COMMERCE POWER WAS LIMITED BY SPECIFIC CONSTITUTIONAL PROHIBITIONS (EG 1ST AND 14TH AMENDMENTS). ATTEMPT TO MAKE THE IDEA OF STATE AUTONOMY IN THE 10TH AMENDMENT EQUIVALENT TO 1 OR 14 LIMITATION.

NATIONAL LEAGUE OF CITIES v USERY (1976 - 129)
1974 AMENDMENT MAKES STATE EMPLOYEES SUBJECT TO FEDERAL MINIMUM WAGE.

REHNQUIST + 4

1. CLEARLY WITHIN COMMERCE POWER TO DO. BUT 10TH AMENDMENT LIMIT – FEDERAL GOVERNMENT CAN'T IMPAIR STATE INTEGRITY OR ABILITY TO FUNCTION.

2. 129 – QUOTE. FEDERAL CONTROLLING STATES AS STATES – INTEGRAL OPERATIONS.

3. STATES NOT JUST A FACTOR IN SHIFTING ECONOMICS BUT A CO-ORDINATE ELEMENT IN THE GOVERNING STRUCTURE.

BLACKMUN C

1. JOINED EVEN THOUGH **NOT UNTROUBLED**.
BALANCING – STILL FEDERAL POWER WHERE STRONG
FEDERAL INTEREST (ENVIRONMENT).

BRENNAN + 3 D

STATES CAN PROTECT THEMSELVES IN POLITICAL
PROCESS. USSC JUST ASSURING REASONABLE FIT TO
ECONOMIC ISSUE. DARBY – 10TH AMENDMENT BUT
A TRUISM. CONGRESSIONAL STRUCTURE PROTECTS
STATES.

GARCIA v SAMATA (1985 – 130)

AFTER NATIONAL LEAGUE, SAMATA DIDN'T PAY MINIMUM WAGE. DEPARTMENT OF LABOR SAID IN 1979 HAD TO PAY. GARCIA, A SAMATA EMPLOYEE, SUED FOR OVERTIME PAY.

BLACKMUN

1. 130 - QUOTE. INTEGRAL OR TRADITIONAL TEST IS UNWORKABLE. CAN'T EASILY DEFINE STATE SOVEREIGNTY. FEDERALISM INCORPORATED INTO THE STRUCTURE OF CONGRESS. REMEDY THEREFORE SHOULD BE IN THE POLITICAL PROCESS.

2. NATIONAL LEAGUE IS OVERRULED.

POWELL + 3 D

1. CONGRESS MEMBERS ARE FEDERAL OFFICIALS ONCE ELECTED. FEDERAL BUREAUCRACY NOT RESPONSIVE TO STATES.

NEEDED MORE FEDERAL POWER TO DEAL WITH DEMANDS OF MODERN, NATIONALLY INTEGRATED ECONOMY. HERE – STATES AS STATES.

REHNQUIST D

132 – QUOTE.

133 – WECHSLER 1954 ARTICLE.

NEW YORK v US (1992 – 135)

LOW LEVEL RADIOACTIVE WASTE. SINCE 1979 ONLY 3 SITES IN US. 1985 ACT – WANTED STATES TO KEEP THEIR OWN WASTE. INCENTIVES: A) SURCHARGE IF NO WASTE IN SENDING STATE B) DENIAL OF ACCESS OR MORE FEES AND C) TAKE TITLE TO WASTE.

O'CONNOR

1. 135 – HAVE POWER, JUST NOT THIS WAY. CONGRESS CAN'T DIRECT STATES TO REGULATE.

2. 136 - CONGRESS CAN'T COMMANDEER THE STATES.

3. 136 QUOTE – OK IF CONDITION ON RECEIPT OF MONEY (RELATED – NOT A PENALTY) OR GIVE STATES CHOICE OF REGUALTING UNDER FEDERAL STANDARDS OR PREEMPTION. A AND B THEREFORE VALID AS INCENTIVES. C AND TAKE TITLE IS THE PROBLEM.

4. VOTERS NEED TO KNOW WHO IS RESPONSIBLE FOR ANY GIVEN PROGRAM OR DECISION.

5. NY PREVIOUS BENEFIT CAN'T VALIDATE UNCONST

6. C = SEVERABLE

7. NATIONAL PROBLEM DOESN'T VALIDATE
UNCONSTITUTIONAL MEANS.

WHITE + 2 D

1. BIG CRISIS

2. STATES CREATED SYSTEM AND BEGGED CONGRESS
NOT TO PREEMPT. IRONIC TO INVALIDATE ON STATE
SOVEREIGNTY BASIS.

3. NY HAS REAPED BENEFITS FOR 7 YEARS.

PRINTZ v US (1997 – 139)

BRADY BILL – FIREARMS DEALER MUST TELL CHIEF LAW ENFORCEMENT OFFICER OF BUY. 5 DAY WAIT. CLEO MUST MAKE REASONABLE EFFORT TO ASCERTAIN IF SALE WOULD VIOLATE LAW. IF NO, DESTROY. SILENT IF YES. P = CLEO.

SCALIA

1. NOT DEALING WITH FUNDING LEGISLATION HERE.
2. CONSTITUTIONAL SCHEME = DUAL SOVEREIGNTY.

3. CONGRESS HERE DIRECTING THE FUNCTIONING OF THE EXECUTIVE. JUST LIKE CAN'T COMMANDEER LEGISLATURE (NY v US), CAN'T COMMANDER EXECUTIVE. WEAKENS PRESIDENT IF CONGRESS GETS STATES TO ENFORCE.

STEVENS + 3 D

1. FEDERALISM PROTECTIONS BUILT INTO POLITICAL PROCESS.

2. HISTORY – STATE OFFICIALS TO COLLECT FEDERAL TAXES. BY DENYING USE OF STATE OFFICIALS, ENSURE THAT THE FEDERAL BUREAUCRACY WILL GROW. STATE EXECUTIVE ENFORCES LAW.

ALDEN v MAINE (1999 – 145)

FAIR LABOR STANDARDS ACT AUTHORIZED SUITS IN STATE COURTS.

CONGRESS CAN'T **COMMANDEER STATE JUDICIARY** EITHER. FEDERAL GOVERNMENT CAN'T ORDER STATE COURTS TO HEAR CERTAIN CASES.

11TH AMENDMENT AS LIMIT ON COMMERCE POWER

ANY CITIZEN OF ANOTHER STATE CANNOT SUE A STATE IN FEDERAL COURT. JUDICIALLY INTERPRETED TO BAN ANY CITIZEN FROM SUING HOME STATE.

EX PARTE YOUNG (1908 – 144)

FEDERAL COURTS CAN ENFORCE AN INJUNCTION AGAINST A STATE OFFICIAL WHO SOUGHT TO ENFORCE AN UNCONSTITUTIONAL STATE LAW.

SEMINOLE TRIBE v FLORIDA (1996 – 144)

INDIAN GAMING ACT – ONLY ALLOW GAMBLING WHEN TRIBE HAS VALID COMPACT WITH STATE. DUTY ON STATE TO NEGOTIATE IN GOOD FAITH. ACT ALLOWED TRIBE TO SUE IN FEDERAL COURT

1. IRRELEVANT THAT LAWSUIT IS FOR PROSPECTIVE INJUNCTION RATHER THAN RETROACTIVE \$\$.
DEFENDANT IS STATE ITSELF, NOT AN INDIVIDUAL OFFICIAL.

2. STATUTES BASED ON 14TH AMENDMENT CAN SUBORDINATE 11TH AMENDMENT BECAUSE 14TH LATER IN TIME. NOT TRUE FOR COMMERCE CLAUSE – ART 1, SEC 8 BEFORE 11TH AMENDMENT.

STEVENS D

UNSOUND. INDIAN GAMBLING SMALL ISSUE – NOW QUESTION BANKRUPTCY, ENVIRONMENTAL AND A HOST OF ECONOMIC LEGISLATION.

SOUTER + 3

PLAIN STATEMENT TO OVERRULE IS ENOUGH.
POLITICAL SAFEGUARDS FOR FEDERALISM.

2014 - CAN'T SUE STATE IN FEDERAL COURT UNLESS:

1. **UNITED STATES = PLAINTIFF** (NOT CITIZEN)
2. CAUSE OF ACTION BASED ON **LATER AMENDMENT** IN TIME (BARRED IF COMMERCE CLAUSE).
3. PLAINTIFF ASKING FOR **PROSPECTIVE INJUNCTION AGAINST STATE OFFICIAL** (CONSTITUTION OR LAW)
4. DEFENDANT IS A **POLITICALLY INDEPENDENT SUBUNIT** OF STATE (EG CAN BE COUNTY, SCHOOL BOARD – STATE NOT ULTIMATELY PAYING)

INDIVIDUAL P v STATE:

1. FEDERAL COURT = 11TH AMENDMENT
2. STATE COURT = SOVEREIGN IMMUNITY (DID STATE CONSENT TO BE SUED)
3. ALDEN v MAINE – CONGRESS TRYING TO ORDER STATE TO WAIVE SOVEREIGN IMMUNITY – NO – VIOLATES 10TH AMENDMENT (COMMANDEERING).

ANTI-FEDERAL POWER :

1. COMMERCE CLAUSE – LOPEZ AND MORRISON
2. 10TH AMENDMENT – NO COMMANDEERING
3. 11TH AMENDMENT – JUDICIAL LIMITATION

COMMERCE CLAUSE AND RACIAL DISCRIMINATION

CIVIL RIGHTS ACT OF 1964 (103):

CAN'T DISCRIMINATE ON RACE, COLOR, RELIGION OR NATIONAL ORIGIN IF A PLACE OF PUBLIC ACCOMODATION.

1. INN, HOTEL, MOTEL OR LODGING (UNLESS 5 OR FEWER ROOMS)
2. RESTAURANT OR GAS IF SERVES INTERSTATE TRAVELERS OR SUBSTANTIAL PORTION OF PRODUCT MOVED IN INTERSTATE COMMERCE.
3. MOVIE THEATER, CONCERT HALL OR ATHLETIC FACILITY IF PERFORMERS OR MOVIES MOVED IC.

4. COVERED ESTABLISHMENT – WITHIN THE PRESENCE OF OR IN WHICH ONE IS LOCATED.

PRIVATE CLUB EXCEPTION.

DEBATE ON SOURCE – 14TH AMENDMENT OR COMMERCE CLAUSE. WORRIED ABOUT STATE ACTION PROBLEM – WANTED TO REACH PRIVATE.

HEART OF ATLANTA v US (1964 – 103)

216 ROOMS BLOCKS FROM PEACHTREE STREET. NATIONAL ADVERTISING (MEDIA, BILLBOARDS) AND 75% OUT OF STATE.

1. DON'T CONSIDER COMMERCE EVEN THOUGH CITED. 14TH ENOUGH
2. HEARING REplete WITH BURDEN ON COMMERCE – ESPECIALLY HOTELS AND MOTELS.
3. 104 – QUOTE. NATIONAL INTEREST OR SUBSTANTIAL EFFECT ON COMMERCE. CONGRESS FREQUENTLY USES COMMERCE CLAUSE TO LEGISLATE ON MORALITY.

KATZENBACH v MORGAN (1964 – 104)

OLLIE'S BARBECUE IN BIRMINGHAM. SEATING 220

PRIOR YEAR, BOUGHT \$ 150,000 OF FOOD – 46% FROM LOCAL SUPPLIER WHO BOUGHT OUT OF STATE.

1. BURDEN ON COMMERCE – FEWER CUSTOMERS (NO BLACKS) MEANS LESS FOOD BOUGHT. ALSO RESTRICTS INTERSTATE TRAVEL BY BLACKS.

2. REVERSE DC HOLDING OF NO CONNECTION BETWEEN RACIAL DISCRIM AND IC. NO NEED DIRECT CORRELATION BETWEEN DISCRIMINATION AND FOOD MOVEMENT.

3. EVEN IF \$ 70,000 IS INSIGNIFICANT – HYPO. MULTIPLIER FROM WICKARD. EVEN IF LOCAL, FEDERAL CONTROL IF SUBSTANTIAL EFFECT ON IC.

BLACK

AGGREGATE EFFECT HERE. ISOLATED RESTAURANT WHICH BUYS AND SELLS LOCALLY MAY BE BEYOND FEDERAL POWER.

DOUGLAS C

HUMAN RIGHTS – SHOULD BE 14TH AMEND.

DANIEL v PAUL (1969 - 105)

232 ACRE LAKE NIXON. SNACK BAR BRINGS IN WHOLE PARK. ALSO ADVERTISING NATIONALLY. PADDLE BOATS AND JUKE BOXES MOVED IN IC.

PEREZ v US (1971 - 106)

FEDERAL CRIME TO ENGAGE IN EXTORTIONATE
CREDIT TRANSACTIONS – LOANSHARKING.

DIRECTLY AFFECTS IC. UNDER FEDERAL POWER EVEN
IF INTRASTATE. CONGRESSIONAL FINDINGS OF
MAJOR SOURCE OF INCOME FOR ORGANIZED CRIME.

DORMANT COMMERCE CLAUSE CL 6

NO FEDERAL STATUTE ON POINT. INVALIDATION OF
STATE LAW BECAUSE IT INTERFERES WITH IC. TEXT
DOESN'T SAY STATES CAN'T – NEGATIVE IMPLICATION

IN ARTICLES OF CONFEDERATION, MAJOR PROBLEM WAS TRADE WARS. CLEAR DESIRE AMONG FF TO STOP.

PHILADELPHIA v NEW JERSEY (1978 - 185)

NJ LAW BANNING IMPORTATION OF SOLID WASTE FROM OTHER STATES INTO NJ LANDFILLS

STEWART

1. SIMPLE ECONOMIC PROTECTIONISM IS PER SE ILLEGAL.

2. NJ – HEALTH LAW. 186 - QUOTE. CAN'T SLOW OR FREEZE IC FOR PROTECTIONIST PURPOSES.

3. QUARANTINE LAWS STILL VALID BUT MUST SHOW GOODS THEMSELVES DANGEROUS. NO CLAIM THAT MOVEMENT IS DANGEROUS.

4. NATIONAL MARKET BEST PROTECTION FOR ALL. NJ WILL BENEFIT AT SOME POINT.

REHNQUIST (D)

QUARANTINE CASES CONTROL. LANDFILLS HAVE SAFETY, HEALTH AND ENVIRONMENTAL IMPACT.

BALANCING – SOME JUSTICES DENY.

KASSEL v CONSOLIDATE FREIGHTWAYS (1981 - 217)

IOWA MANDATES 55 FOOT MAX ON DOUBLES,
PROHIBITS 65 FOOT DOUBLES ALLOWED BY
EVERYONE ELSE

POWELL

1. 218 - DC FOUND NO SAFETY BENEFIT IN SMALLER.
IOWA INCONSISTENT WITH ALL OTHER STATES. MAY
BE LESS SAFE – MORE TRUCKS ON ROAD.

2. SOME EVIDENCE IOWA TRYING TO REDUCE AMOUNT OF INTERSTATE TRAFFIC. 219 - LOCAL EXEMPTIONS.

BRENNAN (C)

220 - BALANCE STATE BENEFITS WITH BURDEN ON IC.

PIKE v BRUCE CHURCH (1970 - 216) BALANCING QUOTE.

CTS v DYNAMICS CORP (1987 - 224) INVALID IF SUBJECTING INTERSTATE COMMERCE TO INCONSISTENT STATE REGULATION.

MARKET PARTICIPANT EXCEPTION – STATE RUNNING BUSINESS ON PROVIDING \$\$.

PRIVILEGES AND IMMUNITIES – ART 4, SEC 2.

1. FUNDAMENTAL RIGHT – WORKERS ON PUBLIC PROJECTS. NO UNDER DORMANT CC – MARKET PARTICIPANT.

2. NOT ABSOLUTE – OK IF SUBSTANTIAL REASON

3. NO MARKET PARTICIPANT EXCEPTION

FEDERAL PREEMPTION OF STATE AUTHORITY

CONGRESS EXERCISING POWER (STATUTE) – CLEAR THAT SUPREMACY CLAUSE INVALIDATES CONFLICTING STATE LAW. BUT MAY NOT PREEMPT ENTIRE FIELD – QUESTION OF CONGRESSIONAL INTENT.

PG&E v STATE ENERGY (1983 - 233)

ATOMIC ENERGY ACT. NUCLEAR REACTORS – PROBLEM OF DISPOSABLE OF NUCLEAR RODS. PROPOSED NEW REACTOR IN CALIFORNIA'S DIABLO CANYON – STATE HAS MORATORIUM ON BUILDING.

WHITE

1. 234 - QUOTE –

EXPLICIT FULL

EXPLICIT PARTIAL

IMPLICIT FULL

IMPLICIT PARTIAL

2. APPLICATION - 235 – QUOTE - FEDERAL KEPT CONTROL OVER NUCLEAR MATERIAL, ITS HANDLING AND TRANSPORT AND SAFETY. STATE KEEPS CONTROL OVER ELECTRICITY, RATES, ECONOMIC VIABILITY, NEED FOR NEW.

THEREFORE STATES CANNOT ACT ON SAFETY.

3. ACCEPT ECONOMIC – NO PERMANENT DISPOSAL

COULD MEAN HIGH COSTS. 236 – QUOTE. USSC DOESN'T NEED TO ASCERTAIN TRUE MOTIVE.

237 – QUOTE - 1947 VERSION

238 – QUOTE - 1941 IMPLIED VERSION

WYETH v LEVINE (2009 - 239)

DRUG LABEL COMPLIED WITH FDA. STATE TORT LAW REQUIRED MORE STRINGENT WARNING AND ALLOWED TORT SUIT IF NOT.

STEVENS 6 - 3

1. IMPLIED COMPLETE PREEMPTION CASE.
IMPOSSIBILITY A HARD ARGUMENT – CAN COMPLY
WITH BOTH.

2. STRONGER STATE WARNING DOES NOT OBSTRUCT
THE PURPOSES AND OBJECTIVES.

THOMAS – DOESN'T LIKE ANY IMPLIED PREEMP

ALITO + 2 (D)

STATE TORT LAW DOES COUNTERMAND FDA'S
JUDGEMENT. AGENCY WITH EXPERTISE HAS
CONCLUDED DRUG IS SAFE AND LABEL SUFFICIENT.

CROSBY v NATIONAL TRADE (2000 - 240)

MASSACHUSETTS LAW BANNING ALL TRADE WITH MYANMAR (BURMA). PRESIDENT WITH CONGRESSIONAL SUPPORT HAD A LIMITED TRADE BAN.

1. COMMON END CANNOT JUSTIFY CONFLICTING MEANS.
2. IMPLIED COMPLETE PREEMPTION – INTEND PRESIDENT TO HAVE FULL CONTROL OF THIS ASPECT OF FOREIGN RELATIONS.

PREEMPTION – CL 7

4 POSSIBILITIES

IF FEDERAL STATUTE, QUESTION OF POWER (USUALLY COMMERCE CLAUSE) AND 10TH AMENDMENT (FEDS CAN'T COMMANDEER).

IF STATE STATUTE, PREEMPTION IF RELEVANT
FEDERAL STATUTE, DORMANT COMMERCE CLAUSE IF
NO FEDERAL STATUTE .

11TH A, TAXING AND SPENDING – CL 8