

## MODES OF CONSTITUTIONAL INTERPRETATION

- Textual: Plain language; court reads text and comes to decision. Paul hates.
  - critique: many things that are not explicitly stated in Constitution are read into it, e.g. dormant commerce clause
- Doctrinal: Looking at court's precedents over time and seeing if they support a certain outcome
  - problem: it's a myth
- Historical/Intentional/Original: What the original intent of the authors was (problem: whose intention do we mean? The person in a room in Philly? The member of society who voted for him? How do you prove it?) Scalia and Thomas love.
  - Jefferson: Republican
  - Madison: Pro-federal government; was afraid of State/local oppression
  - Can be modernized: a protection of "speech" can be stretched to include airwaves/cyberspace without disrupting original intent
- Responsive: Tries to get to essence or spirit of law – what was the function of putting this in the Constitution? 4 approaches:
  - Structural: Meaning determined by looking at structure of gov; this was concern of framers (sep. of powers, maintaining balance). Constitution is not just words but contains gaps, which structure can fill in.
    - Scalia, Thomas etc. will embrace in states' rights cases (e.g. Brady act) but dismiss w/r/t personal liberties
    - counter-majoritarian function: idea that courts often must go against the will of the majority (as expressed through the legislature) to protect from tyranny, and that their unelected nature allows them to do exactly this.
      - anti-democratic: courts are brakes on democratic process, job is to restrain majority
      - neutrality: courts are neutrally applying law; they don't make it (formalist bullshit)
      - intentionalism/natural law: courts are simply interpreting intention of framers, which bind them
      - political: courts are ultimately responsive to political pressures ("we the people")
      - democratic representation reinforcement: the court is reinforcing democracy by eliminating barriers to it and will only strike down leg. when it represents failure of the political system (comes up when minorities are not being represented)
  - Ethos of Constitution: framers wanted to protect individual rights, balance fed power and state autonomy (e.g. "count every vote"). Looks at Constitution as a whole (cf. purposive)
    - teleological view of constitution as an instrument – "We must never forget that it is a constitution we are expounding" – intended to endure for many years and to be adapted to the many changes and emergencies in society
    - idea that an affirmative grant of power does not preclude other grants
  - Prudential search for most "cost-effective" way of striking balance (e.g. balance of *Mathews* factors) (*Miller* – cedar rust)
  - Purposive search for particular purpose of a provision – what were they thinking when they wrote this? Less literal than historical approach, but does not need as much historical evid. as intent. (e.g. *Martin* – underlying purpose of Constitution is unity of foreign relations)

Thomas, Scalia, Rehnquist, Kennedy, O'Connor, Breyer, Souter, Stevens, Ginsburg

## HISTORY OF CONSTITUTION

- Articles of Confederation were a failure because States were too sovereign – fed. has no power to print money, banks, etc. All of this gets solved in Constitution.

- Shay's rebellion: States in debt so MA raised taxes and farmers revolted. Ultimately the fed. had to crush the rebels. RI printed money which then became worthless, so legislature made it a crime not to accept this money. Weaton (businessman) refuses, gets sued, and judiciary says statute is unconstitutional and leg. fires the court. Created critical mass of support for constitutional convention.
- Framers wanted judiciary independent from legislative branch that had the power to strike down rules it saw as Unconstitutional, esp. when interfered with property rights (result of Weaton)
- Wanted stronger national government with power to tax
- Wanted power to conduct foreign relations and wanted an army
- Wanted democracy at local level b/c distant government can threaten freedom
- Federalists were pro-Constitution and pro strong federal government. Madison wrote first draft of constitution. Supported pluralistic democracy as best way to ensure individual liberty and democratic government. Thought factions were dangerous (special interests like farmers) because people will try to serve self-interest. Big national government would give everybody a stake and let all the factions check each other so it's harder for one to dominate.
- Anti-federalists, or Republicans (Jefferson), favored small local government and did not want to take power from the States. Factionalism less likely to occur.
- Hamilton: Courts were designed as intermediary between people and legislature, in part to keep leg. in check. When will of people as declared in Constitution goes against act of leg. it is job of SC to ascertain meaning of Constitution and to apply it. The power of people is superior to both branches (not part of intent of Constitution b/c after constitution)

## THE SUPREME COURT'S JURISDICTION

### Judicial Review:

*Hamdi v. Rumsfeld:* AUMF authorized pres. to use all necessary and appropriate force to counter terrorism. US went to Afghanistan, arrested Hamdi and brought him to US. He was detained as enemy combatant and wanted to challenge this status. SC said (1) AUMF is explicit authorization for detention of Hamdi and (2) due process demands that he have opportunity to contest basis for that detention. Although government has broad discretion in military matters the SC iterated its own role of reviewing and resolving these claims. SC rejected notion that their only task is to review the broader detention scheme and not the individual case. Although exec. is comm.-in-chief, war is not his blank check and the potential curtailment of liberty is too dangerous. Court strikes a balance: SC suggested procedural solutions (hearsay ok, presumption in favor of gov. evidence) to "unburden the executive." Scalia: AUMF is not authorization for detention, esp. given the conflict such authorization would provide with the constitution. Thomas dissent: SC cannot balance away federal gov's war powers; pres. can do what he wants when he wants.

- DP analysis factors (balancing test is in Court's discretion): (1) importance of personal interest at stake (here, Hamdi's liberty); (2) risk of error if no safeguards provided (here, that Hamdi wasn't an enemy combatant); (3) government's interest/cost of additional process. Here they decide he should have notice of charges against him, a hearing/opportunity to rebut the charges and access to counsel – most minimal type of DP required.
- *Hamdi* is example of using the Constitution to re-interpret statutory law: the DP clause gives citizens additional rights and modified the AUMF. Salient Q is why the court has power to make this determination, to be the final arbiter re: balance of power.

### Original Jurisdiction

Constitution Art. III: Judicial Power shall be vested in one SC and inferior courts established by Congress.

- It shall extend to all cases under the Constitution, U.S. laws, Treaties, Ambassadors/Consuls, Maritime/admiralty cases, controversies between States or where U.S. is party, btwn States and citizens, btwn citizens of diff. states, land grants, and btwn a State or citizens and a foreign state or citizens.
- SC has original J over Ambassador cases or cases where State is a party; in all other aforementioned it shall have appellate J subject to congressional regulation
- But the Constitution does not expressly establish district courts and leaves this to Congress. Congress could:

- limit J by regulating what types of cases SC can hear (some say, under Art III § 2 – necessary check on unelected judiciary; others say they can only do so re: questions of fact, not law – this enforces role of protecting minority from majoritarian influence)
- establish special courts, e.g. tribunals, to hear Qs federal courts can otherwise hear.
- Constitution also does not expressly give SC power to determine constitutionality of a law

**Policy: Counter-majoritarian difficulty** because unelected court is striking down laws: tension btwn. ideas of self-governance with amount of power we give SC. Possible responses; note that all are problematic:

- anti-democratic: the courts are brakes on democratic process, job is to restrain majority
- neutrality: courts are neutrally applying law; they don't make it (formalist bullshit)
- intentionalism/natural law: courts are simply interpreting intention of framers, which bind them
- political: courts are ultimately responsive to political pressures (“we the people”)
- democratic representation reinforcement: the court is reinforcing democracy by eliminating barriers to it and will only strike down leg. when it represents failure of the political system (comes up when minorities are not being represented)

*Marbury v. Madison* (1803):

- Background: Jefferson (R) is elected and federalists panic, establish courts of appeal and stuff with their federalist appointees; put Marshall in SC. Marbury was appointed justice of peace on Adams' last day of office under Congressional Act passed that day; commission was signed by pres and sealed by SOS Marshall but not formally delivered by end of day and Jefferson, next Pres, treated them as a nullity. Marbury sued to compel SOS Madison to deliver commissions.
- **SC has power under Art. VI § 2 to review acts of Congress and declare them void if repugnant to the Constitution** (doctrinal).
- Judiciary Act gives courts original J to issue writs of mandamus, thus expanding Court's original J, which is limited Art. III. **You can't increase original J of the SC** (textual, responsive/structural).
- Marshall is asserting the SC's right to interpret the Constitution – to “say what the law is.” Says he is speaking for the people (ethical/intentionalist) (Hamiltonian view)
  - Jurisdiction (never explicitly mentioned) over Madison conforms with notion that executive officials should be accountable for their actions. Thus **SC has power to review executive actions** (basis of all admin. law)
  - SMJ – you could argue that this is a political Q and should not be before the court, or you could say it is his vested property right and not a political Q.

### **Appellate jurisdiction and judicial interpretation**

*Martin v. Hunter's Lessee*: State court said Martin was not entitled to certain land under a treaty between U.S. and England. SC reversed and directed State court to give him the land, said State was bound by Treaty (responsive/purposive – purpose of Const. was to centralize foreign relations). **SC has appellate J over decisions of State SCs** under 1789 Judiciary Act § 25 (structural). This **adds to the appellate J of the SC** under Art. III § 2, which is fine (textual). If Congress can supercede State laws then SC's J over matters in State court is no less intrusive. States are subordinate to the people – ethical arg, v. controversial. **Federal laws require uniformity of having one final arbiter.** Args for and against (use in commerce clause cases):

- for uniformity: we the people bargained for a certain system and we have to ensure we all have the same rights; cost-shifting would allow costs of disuniformity to shift from offending state to other states
- for disuniformity: representation, local control, states as laboratories, state sovereignty should allow them choice, different states' needs (e.g. different economies and values), slavery (real reason), choice (basic foundation of our system is liberty to move if you don't like laws)

*Cooper*: Arkansas had refused to comply with a district court order requiring desegregation and Eisenhower has to send in troops to de-segregate a school. Court said that its interpretation of *Brown* is supreme law and all state legislators and officers are committed to following it. Cements notion that States are not supreme and that **SC is ultimate arbiter of the Constitution**.

*McCulloch v. Maryland*: U.S. bank established pursuant to act of Congress issued notes against Maryland statute which said banks in the state could only issue notes on special stamped paper. MD had passed law in reaction to fear of competition from fed. bank and general anti-bank sentiment.

- Art. I § 8, **Necessary and proper clause**, gives Congress power to establish national bank – **highly expansive textual reading** of “necessary.” As long as the end is legit and constitutional any means adapted to that end are also. “This is a constitution we’re expounding,” **it’s a framework and not an exhaustive list of powers** (purposive: framers meant it to be this way). Teleological approach, looking at broadest purposes, seeing it as an instrument, inviting judicial creativity, looking beyond letter to spirit of the text. Affirmative grant of power doesn’t negate additional grants (you could make exact opposite arg. that Congress enumerated powers to limit them)
- (2) **States cannot tax institutions created by Congress** – they cannot impede or burden the constitutional laws enacted by Congress (structural argument). The MD statute is unconstitutional and void. **Cost-shifting**: they would be imposing taxes on people in NH, VA, etc. **Representation reinforcement**: no congruity between those imposing tax and those bearing its costs

### **Standing, political questions, ripeness and mootness**

- Art. III § 2 extends judicial power to enumerated Cases and Controversies: no advisory opinions or political Qs, no moot or premature issues, must have standing (judicially-made interpretation)
- **Purposes for judicial restraint**:
  - sep of powers/judicial restraint: reduces friction between branches
  - constitutional issues resolved only in context of concrete disputes: not hypothetical, distinguished judiciary from legislature. Adversary system works best when litigants have a stake.
  - preserves resources (dismissing cases b/c moot)
  - individual autonomy and self-determination: suits heard for those actually injured, not ideologically interested outsiders. Fairness.
  - allows legislation to be tested in society, defers to electoral accountability
  - immunizes progressive government from judicial review
- **Purposes of judicial review**:
  - Courts must uphold essential role in enforcing the constitution

**No advisory opinions**: no opinions on constitutionality of legislative action or inaction that did not come from a case or controversy; maintains balance of powers and allows independence of judiciary

**Must have standing**: Developed by Frankfurter in response to *Lochner* era so factories would not request leg to be struck down. Very broad reading of Const. perhaps not intended by framers. **Constitutional minimum requires**:

- **injury in fact**: concrete actual (past or imminent) injury cognizable by the court; criminal law (if justiciable – seems circular)
- **injury must be fairly traceable to the actions of the defendant (causation)**
  - is effect uncertain?
  - *Allen* dissent argued economics
- **injury must be redressable**: if the court grants **sought-after relief** the injury will be redressed

**Secondary, “prudential” requirements** developed over time (Congress may override by statute)

- **you can’t argue someone else’s rights**; must be your injury (adversarial system, autonomy of individual)
  - Exception: third party standing when **interest is congruent to that of injured party** and they have no other means, e.g. institutionalized/mentally incapacitated; *Hamdi*
- **can’t be a generalized grievance**, e.g. this is wrong way to spend my tax money (go to the legislature) or psychological or moral harm
  - Exception: taxpayer standing for any Establishment Clause issue, limited to giving taxpayer money (not property)

- **Claim must be within zone of protected interests**: a big corp can't sue another big corp. for violating enviro laws just b/c it wants to stop it from building, but a conservationist group can

Exceptions:

- Congressional standing lets them sue on behalf of constituencies (if member vote was frustrated)
- If you are claiming violation of a procedural right (e.g. due process) you don't need to show that the hearing would come out a certain way.

Policy for standing doctrine:

- Properly limited role of courts in democratic society – minimizes review of actions of other branches (but cannot be too limited – must strike a balance)
- If you have no injury you can bitch to the legislature
- Judicial efficiency – preventing flood of litig. by those with no stake
- Personal stake will sharpen the presentation of issues and give courts best scenario for informed decision
- Fairness – must let people adjudicate only their own rights and not others'

*Allen v. Wright*: NARROW construction of standing. Parents of AA schoolkids sued to compel IRS to deny tax exemptions to racially discriminatory private schools because it draws white kids away from public school. Injury must be personal, traceable to D and redressable by requested relief. First claim that mere fact of IRS aid harms them is not cognizable b/c it's not enough to say you are harmed in general or as member of a race. Assertion that gov. must act lawfully is not enough to confer J. Second claim that aid denies their kids an integrated education is cognizable and serious (segregation is an actual injury), but is not traceable to challenged gov. conduct – causation is speculative. Also, requested remedy might not make a difference in integration. Art. III gives executive the power to ensure laws are executed and parents should bitch to them (structural, bullshit argument). No standing.

- Brennan: standing is a mask for Court's view of the merits
- Stevens: Economic analysis – the injury is traceable; separation of powers argument has nothing to do w/standing; if court wants to argue justiciability they should say so openly. Furthermore *Marbury* said the court has every right to comment on other branches when there is a fundamental violation of Constitutional rights.

**No political questions**: Political questions (which may have constitutional dimensions) should be resolved in political arena and not court – e.g. foreign relations/war. Political issues with constitutional dimensions are generally fair game for judicial review.

*Baker v. Carr*: NARROW interp. of political Q. Statute apportioned TN's assemblypeople along county lines but by 1961 population significantly redistributed; individuals filed suit seeking reapportionment. Court said political Qs must be left to other branches: Qs like foreign relations, when a war has ended, validity of enactments. The issue here is whether equal protection is met – it's justiciable for court to judge constitutionality of apportionment system.

- Frankfurter dissent: This is a political disagreement not for the court; furthermore state institutions should be given respect
- Baker definitions of what constitutes a political Q (essentially it's a function of separation of powers – structural argument). Unless one is inextricable from case at bar we should not dismiss it:
  - **textually demonstrable constitutional commitment** of the issue to a coordinate political department – e.g. Congress has power to declare war. Does not include States.
  - **lack of judicially discoverable and manageable standards** for resolving, e.g. how can court decide which is legit gov. of RI, if there are no legal standards for assessing constitutionality
    - e.g. war, Pres. has all sorts of secret info and Constitution less strong (though perhaps it's most needed in war!)
  - **impossibility of deciding without an initial policy determination** of a kind clearly for nonjudicial discretion – e.g. Qs that involve military issues or policy analysis court is not set up to make; *Hamdi* court should not decide who is an alien

- **impossibility of a court's undertaking independent resolution** without expressing lack of respect to other branches; unusual **need for unquestioning adherence to political decision already made; potentiality of embarrassment** from multifarious pronouncements by various depts. on one question,
  - e.g. no Qs on foreign affairs if will conflict with or embarrass executive, no policy judgment but must have applicable standard.
  - Example: exec. grants asylum to retired dictator and someone wants to sue him

*Luther*: question of which was the valid gov. of RI. Qs that invoke Art. IV §4 Guaranty Clause (Cong. guarantees a republican government) are political. This decision had been committed to other branches, Pres. acted unambiguously in recognizing the charter gov, need for finality in his decision, lack of criteria for court to determine which gov. was republican.

*Powell*: House said he could not be member b/c he did bad things; Const. gives House the power to set membership qualifications. Court said this clause's meaning must be interpreted, and that it does not give House power to set the standards but only to judge whether its members meet standing requs. set forth in Constitution, therefore there is no textually demonstrable authority for House to exclude him; furthermore it is resp. of Court to interpret Constitution (*Marbury*) and does not disrespect other branches.

- You can argue that whether Congress has power to charter a bank (*McCulloch*) is political Q (necessary & proper clause)
- You can say *Bush v. Gore* (whether to count the chads) is a political Q b/c it's policy judgment, no judicially discoverable standard, furthermore Article II gives states right to create electoral selection framework (court said it was not political Q b/c FL SC violated the constitution).

### **Case must be ripe and cannot be moot**

- A case is moot when issue has passed (too late), e.g. you didn't get into law school, sue and have graduated by the time case comes up (but maybe not moot if he had not gone to school). Goes back to standing rationale that we don't want court deciding academic Qs not based on specific, actual conflict
- *Roe v Wade*: was not moot despite her no longer being pregnant b/c case was capable of repetition and evades review
- A case is not ripe if it is premature (too soon) – too speculative or remote, e.g. challenge to criminal statute before a prosecution is initiated
  - must exhaust other remedies first

## CONGRESSIONAL POWER - Commerce Clause

- Art. I contains almost all of Congress' powers except appoint judges and treaties (Art. II): all legislative power resides in Congress, qualification and election of House and Senate, State power to prescribe election subject to Congress power, housekeeping for each house, compensation of Congresspeople, legislative procedure, enumerated powers list, limits on Cong power and on state power.
- Art. I Section 8 sets forth Congress' enumerated powers, including "to regulate commerce with foreign nations, and among the several States," "to tax," to appropriate money, and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution into the Government of the U.S., or in any Department or Officer thereof."
- Section 9 discusses limits on Congress' power (e.g. no ex post facto laws)
- Section 10 lays out what the States cannot do (e.g. can't make Treaties)
- 10<sup>th</sup> Amendment gives States or people all powers not delegated to the US or prohibited by it to States.
- Forms of Federalism/Distribution of Powers:
  - neither state nor gov. can make a law, e.g. because it violates 1<sup>st</sup> amendment
  - national gov has exclusive power to regulate: Art. I, section 10 list of what States may not do even though Congress may under section 8, e.g. coining money
  - state gov has exclusive power to regulate: criminal law, family law, education, land use
  - state and national gov. have concurrent power: under Supremacy Clause if Congress chooses to exercise its power the national leg. prevails (salient Qs: have they chosen to exercise it, is there a conflict, what does their silence say?)
- **BLACK LETTER LAW** (from *Lopez*): **Congress can regulate only 3 things under CC:**
  - **use of channels of interstate commerce** – e.g. navigable waters, railroads, highways, air traffic (*Gibbons*) or even hotels (*Heart of Atlanta*)
  - **instrumentalities** (ships/trucks/planes/cars), **persons** (anybody providing a service or labor and in racketeering cases the corporate "person" of a gold mine) **and things in commerce** (guns, condoms, lottery tickets)
    - jurisdictional element goes to this – if statute says "in connection with commerce"
    - Definition of what is being regulated allows you to come to different arguments as to whether Congress has the power: is it the good itself (guns, condoms)? public health? sex? teaching of values? education? violence, or obtaining a remedy against violence?
  - **activities having substantial effect on commerce.**
    - If non-economic, you cannot aggregate effects (*Lopez*: guns are not *per se* economic activity; *Morrison*: crimes of violence are not economic activity)
      - but non-economic activity could become so if in an economic environment (e.g. beating a woman in a restaurant) but in a home not likely to be economic
      - note that transactions in *Perez* (use of force to loan shark) or civil rights cases (denial of service) were not economic, nor was *Wickard* explicitly categorized as such at the time
      - Nagle: middle ground – Congress should provide some evidence that it is economic, that its ends or means are related to commerce
    - If economic, you can aggregate effects (*Wickard*) no matter how trivial the individual activities.
      - e.g. buying or not buying
      - *Lopez* presumably concedes broad Congressional power to regulate all intra-state activities that can be categorized as economic (in a national economy they will undoubtedly affect commerce).
  - **regulation interfering with traditional state activities** – e.g. education, marriage, crime, land use, family law – requires greater showing (*Lopez*: education)

### **Arguments (turn on values of federalism, or distribution between state and nation):**

- **For upholding regulation (pro federal power):**
  - Purposive/Federalism: benefits of uniform policy

- efficiency: economic integration spreads risk of instability and saves money in cooperation on joint services (Hamiltonian vision of centralized economy)
  - majority values: we the people bargained for certain things; national gov can enforce values of majority in nation as a whole, even against majority in a state
  - cost shifting: it would allow costs of disuniformity to shift from offending states to other states
  - harmony among States: we don't want them hating each other
  - framers did not intend to cover things like guns in schools, but the language of the constitution supports this expanse in federal power, and as commerce has expanded so has Congress' power. They could not have foreseen this economic growth.
- Deference to Congressional finding (often implicit) that something is within commerce because (1) Constitution delegates this power to Congress and (2) legislature is more equipped to accurately make this determination
- Removes legal uncertainty:
  - Uniform regulation gives people notice of law
  - Congress enacts all sorts of laws using jurisdictional element. Does this alter the element's meaning of "affecting commerce"?
- Economic/noneconomic distinction is simply formalism serving the interests of anti-federalism, which is no longer relevant given our integrated economy
- Textual: Distinguish from Lopez (see below)
- **For striking down regulation (pro state power):**
  - Textual/original intent:
    - Constitution's enumeration of powers presupposes non-enumerated things (*Lopez*) which aren't theirs; we cannot stretch commerce to cover these as well.
    - Original meaning of 'commerce' was limited (they were debating over whether it applied to building roads!) and we should stick to it.
    - They wanted to increase power of nat. gov. only to distinctly national subjects while maintaining state power. National power was enumerated to prevent abuse (break national gov's monopoly)
      - Hamilton: no need for bill of rights affirming things like freedom of press when we never gave that power to the national gov.
      - Madison: Powers delegated to the fed. are few and defined; those left to States are numerous and indefinite. Congress will be imbued with respect for local gov. and will not abuse its power; people's first attachment is to their States and Congress has "local spirit."
    - can't have attenuated causal link between the thing being regulated and commerce just to obliterate limits on Congress
  - States' rights:
    - encouraging experimentation: state can be laboratory for novel social or economic experiments without hurting entire country, states can copy each other without paying for experiment all over again (list the many ways in which states might choose to regulate the matter at issue)
    - democracy/original intent: local gov. let people participate directly, not be passive subjects of remote national gov.
    - representation/accountability: if we blur boundaries around federal and state power people won't know who to hold accountable
    - structural/original intent: we must allow states to regulate matters traditionally within their spheres
    - individual choice: different state laws allow people to move around to select the policies they prefer
    - different states' needs: different economies and values, need for local control. We want to encourage heterogeneity and not force government-dictated values on states

- Purposive/history: Congress was originally given power to regulate interstate commerce to ensure it would have ample opportunity to further objects entrusted to the federal government. However, now that commerce is so nationalized Congress has many more opportunities to do so and thus ambiguity should be resolved against giving it unlimited power.

Phase 1: Rise of industry and need for strong central power to support industries.

*Gibbons v. Ogden*: O had right from state of NY to operate ships btwn NY and NJ, sought to enjoin G, who has federal gov. license, from doing so. Congress has power to regulate interstate commerce – states can make regs. under their police power but they must yield to any conflicting federal laws. Textual interp: commerce means “all intercourse” and includes navigation; interstate means the whole stream of activity; includes things moving across state borders but also the stuff inside state leading to this. “Regulation” by Congress has no limits unless expressly provided in Constitution – Congressional sovereignty, though limited to certain areas, is plenary in them. (note: early CC cases involved state action and were about restraining state powers)

- limits: Congress can’t govern purely internal activities in state, can’t govern when no external effect on other States, can’t regulate when it’s unnecessary or inconvenient – it’s not obligated to regulate and States can do so when it hasn’t spoken. Also limited by other provisions of Constitution (e.g. first amendment).
- concurrence says states have no economic regulatory authority; purposive reading: power should be uniform and centralized to avoid risk of cost-shifting, promote foreign trade, Hamiltonian vision of centralized national economy. Also federal regulation prevents states from lowering standards to keep jobs in-state: avoids “race to the bottom.”
- **BROAD** statement of reach of Congress’ power (95% of which is under CC)

Phase 2: Rise of police power and regulation of crime/morals through CC, which is only way Cong can punish crime e.g. racketeering, drugs.

*Champion*: Congress can criminalize interstate movement of lotto tickets because commerce includes this movement, and regulatory power is complete and includes this (Paul says it’s an intangible promise and can’t travel). **Sweeping power** court is recognizing.

Phase 3: Opposition to welfare state and subsequent labor regulations, Court striking down regulatory laws by saying they were local and *ultra vires*.

*Schechter*: He was convicted of selling diseased chickens; said law regulating poultry industry went beyond Congress’ powers. (1) Commerce is divisible and you can sever trade local in character. Chickens are not part of interstate commerce: they came to rest at poultry house. (2) Direct vs. indirect effects: everything affects commerce when you have a national economy; it’s a Q of degree (are they “local in their immediacy?”). (3) Manufacturing vs. commerce: laws intended to deal with labor reg and consumer protection are different than those dealing with commerce.

- analogize to current economic/non-economic distinction

*Carter*: Coal worker sues co. to make it comply with law regulating worker conditions. Court looks at local vs. national concerns, says we are not concerned with indirect effects and employer/worker struggle is a local one. Constitution does not provide for these ends.

- Cardozo dissent looks at size and significance of the industry to analyze if effect is direct or indirect; says a coal industry strike would affect the whole nation b/c coal is main source of energy; different than a chicken strike.

Phase 4: Embracing the welfare state. Court is looking not at nature of activity as much as its **economic effect**. *NLRB (1937)*: NLRB found co. had engaged in unfair labor practices (preventing union organization). Court upheld law even though plant did not engage in interstate commerce b/c Congress can regulate any activity, even intrastate production, if it has a substantial effect on interstate commerce – must bear close and substantial relation and not

have remote and indirect effect on commerce. The co had nationwide operations and interruption of production at a plant would effect commerce.

- practical analysis: rejection of categorical reasoning/formalism.
- reasons for shift: economic crisis/failure of l-f; idea that industry is essential to war; shift towards national economy; rise of realism/rejection of formalism.

**Wickard** (1942): Farmer ordered to pay penalty for producing wheat over his assigned quota under Ag. Adjustment Act; he said part of his crop was intended for own consumption and not commerce. Court said wheat consumed at home had effect on interstate price of wheat and reduced demand for wheat. Even if actual effect of this farmer's overproduction is low the aggregate would cause substantial effect on commerce. **Must have (1) some effect on commerce and (2) cognizable and aggregate effect.** Concern w/free riders – one should not benefit at expense of marketplace.

- Perhaps Congress is passing laws unfair to small farmers who have limited finances and practical barriers due to how far apart they are standing in the way of them getting adequate representation. On the other hand rural populations are very well represented in Senate b/c they get 2 and their States are so sparsely populated.
- Paul says he isn't really doing an economic activity – that's just how the *Morrison* court later interprets this case.
- Distinguish from *Wickard*: he was violating a program that had a cap on growth and home consumption was found to be “THE MOST VARIABLE FACTOR” in the disappearance of the wheat crop. The entire purpose of the statute was to limit the amount of wheat produced and the extent to which you can circumvent the market by growing your own.

**By now almost any economic activity – even if essentially an omission – is subject to federal regulation. Formalistic and categorical direct/indirect test, for sale/not for sale tests no longer apply. Dramatic expansion of federal power, even individuals can be subject to regulation.**

Phase 5: 1960s growth of Civil Rights legislation. 1964 CRA enacted under the commerce clause. Congress prohibited discrimination in restaurants and establishments having a close tie to commerce.

*Heart of Atlanta*: Suit to enforce CRA and make hotel near interstate highway allow AAs to let rooms. Hotel says it is static but court rejects and says Congress can regulate local activities that affect commerce and can choose its means as long as they're reasonably constitutional. Discouraging AAs from traveling burdens commercial intercourse. It doesn't matter that Congress also had a moral or social end.

*Katzenbach*: Court said Ollie's BBQ had to seat AAs. They buy chicken wings which come across state lines. Shutting doors to AAs means you have fewer customers. This is about regulating instrumentalities – people and chickens (and, secondary effect of travel).

- Only way to get CRA through door was commerce connection (14<sup>th</sup> Amendment would not do b/c said to apply to States): families wanting to travel got discouraged from commerce b/c didn't know where to eat, sleep. Real intention was to promote civil rights. Flipside of effects arg. would be that Ollie loses customers b/c whites don't want to eat there anymore; Court ignores this. It doesn't matter what concern of Congress was (to protect AAs) because there was economic effect, even though it was not a result of their motivation.

Phase 6: Modern era. Revival of federalism-based limits on Congressional power. New federalism.

*Lopez* (1995): First law to be struck down in 60 years. Student charged with violating 1990 Gun-free School Zones Act for firearm possession on school premises. (1) The gun law structurally interferes with autonomy of education – there is a division between national and local activity we must respect. (2) Furthermore the economic argument is a slippery slope and could make anything subject to federal power. In looking at substantial effect you can't aggregate a non-economic activity like education. Guns are not *per se* economic activity – there is no economic impact even in the aggregate.

- jurisdictional element: Some Fed statutes say “In connection w/commerce ...” Here there was no such language. If they had it would have made a difference.
  - Subtext: opposing nationalization of curricula; signaling belief that federal power has limits
- Kennedy concurrence: We must review Congressional attempts to alter federal balance. Political branches have sworn to protect Constitution. This law upsets balance (structural arg).
- Thomas concurrence: Substantial effects test has eviscerated federalism and has to go; without boundaries limiting them to “truly commercial” activity we give the gov. a blank check to regulate.
- Stevens dissent: Guns are articles of commerce and can be used to restrain commerce. National interest justifies laws against letting kids possess guns.
- Souter dissent: Congress should have plenary power to legislate so long as law passed rational basis test.
- Breyer dissent: Violence interferes w/education which is tied to the economy. Activity can be non-commercial – it is the effect that matters. Congress could have rationally concluded that guns in schools is related to commerce.

Ways to distinguish Lopez: (1) had no jurisdictional hook; (2) contained no findings or leg. history as to how guns near schools affect commerce; (3) sphere was traditionally one of state law; (4) activity had no apparent connection to commerce.

Condom hypo: Congress wants to pass law mandating condom distribution in schools

- pro: helps condom company; population control impacts number of goods sold and bought; teen pregnancy in schools will affect productivity and quality of education; social costs of welfare, poverty, extra kids; STDs are a social cost (but these are moot if it’s not economic activity)
- con: can’t regulate States directly; narrow idea of “commerce;” family law and education are traditional realms of States; we want to promote social heterogeneity and reflect the diverse views in our country

*Morrison*: Challenge to civil remedy of violence against women law. Rehnquist says crimes of violence are not economic activity and we must distinguish between truly national and truly local. The activity has to be economic in nature to be aggregated. Souter says this is a new formalism serving federalism; Breyer says “rules” about whether nature of things are economic achieve random results.

- pro: gender violence increases social costs, deters victims from engaging in employment, stops women from reaching economic potential in society/participating in economy, affects travel across state borders (under federal law women can pursue remedy while being able to leave state). Marriage is economic activity b/c community property questions, economic responsibility for others (but statute applies to non-married women)
- con: marriage should not be regulated by feds
- Under *Morrison* Congress cannot pass a law prohibiting same-sex marriage.

**TREATY POWER: Congress may enact statutes enforcing Treaties even if they would be unconstitutional in the absence of a Treaty.**

- Except no Bill of Rights violation (*Reid*)
- Article 2 Section 2 gives President power to make Treaties (must be ratified by 2/3 Senate); Article 6 Section 2 says they are supreme law of the land.

*Missouri*: Bird Treaty Act was statute to enforce bird-protecting treaty US had with GB; Act allowed Secretary of Ag to formulate regs enforcing it. Missouri said 10<sup>th</sup> Amendment reserves States powers not delegated to Congress. Article I section 8 gives Congress power to enact statutes enforcing treaties, and they can enact anything “necessary and proper” to do so. This applies even if the statute would be unconstitutional by itself b/c not within Congressional power; suggests 10<sup>th</sup> Amendment is not check on treaty power, which can pre-empt state regulation. This is traditionally a matter of State regulation, but Missouri could not adequately control the birds. National action was needed, and Congress alone could not do it.

- Dynamic Constitutional Theory \*important moment\* Holmes says framers could not have foreseen this problem, post civil War constitution says we are one nation now and not individual states. We have important and time-sensitive national problem here.
- Bootstrapping problem: interpretation of treaty power so broad that all constitutional limitations could be ignored by doing things through treaty power and subsequent Congressional legislation.
- Bricker Amendment tried to stop this but was defeated by one vote in Senate; Treaty power is plenary.

*Reid v. Covert*: Covert murders her husband on military base in England; tried in military tribunal and says denied 6<sup>th</sup> Amendment rights. Treaties can't give Congress power; must be Constitutional – gov. cannot violate a basic right (can't bootstrap around individual rights).

**WAR POWER: Gives Congress discretion in times of emergency – a current condition of which the war is direct and immediate cause** (Art. I Section 8: power to declare war, etc.)

*Woods v. Cloyd* (1948): SC upheld Housing Act freezing rent at wartime levels under war powers even though Pres had declared hostilities terminated. Court said war power does not necessarily end with cessation of hostilities. The war is direct and immediate cause of this. Congress is aware of its constitutional responsibilities and will not use war power to obliterate 9<sup>th</sup> and 10<sup>th</sup> amendments.

- Problem: We must be particularly wary of laws enacted in times of emergency because of patriotic fervor that sweeps legislators AND judges! (Jackson concurrence)
- Although it extends beyond cessation of hostilities there must be a limit

## **TAXING & SPENDING POWER**

- Article I Section 7: Bills for raising revenue originate in House; must be passed by House, Senate and President.
- Article I Section 9: Prohibited powers – what Congress cannot do
- **BLACK LETTER LAW: TAXING**
  - **Must be for general welfare**
    - (as defined by Congress; very deferential)
    - taxes can have regulatory effect but cannot be mere penalties (nowadays, very deferential: all taxes are somehow regulatory) (could look to amount of revenue earned by tax)
    - conditions beyond the tax itself must be reasonably adapted to the collection of the tax (*Bailey*)
- **BALCK LETTER LAW: SPENDING: Modern test** under *Steward*:
  - (1) **for general welfare** (as defined by Congress – broad deference)
  - (2) **any conditions imposed are unambiguous;**
  - (3) **conditions placed on grants to state/local govts. must be related to the purpose of the federal spending program**
    - very broad, e.g. conditioning money for highways on State adopting drinking age (*South Dakota v. Dole*) or speed limits but not on free abortion clinics
    - at some point pressure becomes coercion – look at what State stands to lose by not regulating or by not getting the money. Has not happened yet, but perhaps as Court limits on federal rights it will begin to restrict conditional spending.
    - look at extent of monetary inducement: a huge bribe might be coercive.
  - (4) **cannot explicitly violate Constitution.**

**IMPLIED LIMITS ON CONGRESS**: Congress can (1) regulate behavior of individuals in a state by encouraging States using spending power or (2) regulate individuals using Commerce Clause to pass fed. law pre-empting state law, BUT Congress cannot force States to regulate a certain way or commandeer State officials.

- Framing: Congress can prohibit harm but not impose affirmative duty, but you can say duty to do background checks is really just prohibition on sale of guns unless they do check

- Policy:
  - Coercion diminishes accountability
    - We want to enhance democracy by providing gov. close to the people. If States are coerced to regulate their officials may bear brunt of public disapproval. But, if States have a meaningful choice and choose not to regulate, federal law will pre-empt and residents will know to direct disapproval to the fed.
    - Congress doesn't have to raise taxes to enforce its regulations but State does, so everyone's pissed at the State officials
  - Dual federalism/Sovereignty: Decreasing likelihood of federal tyranny, allowing states to be laboratories for new ideas.
  - Separation of powers: Congress can't hijack an administrative branch and make it its own (*Printz*) (though it can make State courts follow federal law);
  - Exceptions: regulations mandating state inaction may be ok (*Reno*); regulations commandeering information (e.g. DMV database) but not people may be ok.

*Us v. Butler* (1936): Congress passed 1933 Agric. Adjustment Act to tax agricultural processors; money spent for farmer subsidy so they could reduce crop output and acreage. Court said Congress has broad power to tax for general welfare or to pay off national debt, but not in areas within local, State sphere. This is a form of regulation and is forbidden. Old view.

- Hamiltonian view that taxing power is separate/distinct from enumerated powers
- Madisonian view that taxing power limited to enumerated areas; Court rejected

*Steward Machine Co* (1937): Under Soc. Sec. Act employers of 8 or more are taxed, but can be credited against tax if they contribute to State unemployment fund. Court said the use of money to relieve unemployment crisis is definitely for general welfare and within Congress' power. Furthermore it is an incentive – not coercive.

- Broad deference to Congress

*New York v. United States* (1992): Congress cannot directly compel state legislative or regulatory action, though it can induce behavior by putting conditions on grants. 1985 Act waste disposal plan set deadlines for states to find a way to deal with their waste and provided:

- sited states could impose tax for use of their sites and they would be taxed on the charge (valid authorization of States to burden commerce); funds from these charges would go back to gov. to fund site development in other complying states (valid ex. of spending clause – compliance as “condition” to receive return);
- sited states could deny access to states not in compliance and to eventually raise tax so much as to prohibit importation (valid condition b.c non-sited states have choice to comply, and burden of non-compliance falls on residents and not states)
- states not in compliance by 92 had to take title to their waste, become liable to waste generators for damages. Court said take title provision is coercion b/c it offers States no option but to comply.
  - structural problem: States asked Cong. to pass this law so they wouldn't seem like the ones putting waste sites in constituents' backyards. They hid behind federal gov and fed used state as “creature of its own will.” O'Connor wants more transparency and ACCOUNTABILITY. Structure/ethos of Constitution.
  - Consent: States cannot consent to an expansion of Congressional power beyond the Constitutional limits.
  - White: but this is a national crisis; in such times gov. must be expedient.
    - response: that's why we have Constitution – to resist temptation to concentrate power as expedient solution to crisis of the day, to protect us from our best intentions.
  - solutions: private market (allow companies to bid on waste disposal); cooperative federalism (regulate but let states come up with their own alternatives; states can opt out and lose federal funding); centralized federal site (e.g. Nevada); Tax producers of waste (price will go up so consumers will demand less and creates incentive to find alternative ways to dispose)

*Printz v. United States*: Brady Act requiring gun dealers to send forms to law enforcement officers for each purchaser's background check declared unconstitutional. Court says fed. gov. can't commandeer States and shift costs onto them (unfunded mandate). Congress can't create its own admin. branch by hijacking the States.

- States should regulate this themselves; no accountability.
- This could impose costs on states and force them to raise taxes or cut spending
- Paul thinks this is not good ex. of s/t traditionally within local control.

*Bailey v. Drexel*: Tax on companies that shipped goods made by child labor unconstitutional because motive was to prevent child labor (cf. chickens being used to enforce civil rights act!; cf. *Woods*: war power being used to enforce low rent). Although taxes can have "incidental" regulatory effect they are unconstitutional when they become a mere penalty.

*Reno v. Condon* (2000): Act prohibiting States from disclosing personal information to companies. Court upheld law because it was not commandeering States to regulate their citizens but rather directly regulating them as the owners of databases.

## DORMANT COMMERCE CLAUSE

- Dormant Commerce Clause is judicially-created rule arising when Congress is silent (sleeping on its authority). Question is whether the State regulation or taxation is valid or whether it interferes with Commerce powers.
- **Black letter analysis:**
  - **Is the law facially discriminatory against out-of-staters?**
    - text: do the words literally refer to non-residents and residents in a way that burdens non-residents explicitly?
      - reciprocity reqs are unconstitutional: giving out-of-staters access to markets and resources only if from states granting similar benefits to their citizens
      - States can't create laws that give business to one local business or a group of them – this protectionism is *per se* invalid.
    - legislative intent: was that the aim of the law even if words non-resident don't appear.
    - effect: disparate impact is sufficient to show discrimination, though Court may be reluctant to find this impact (Paul doesn't like this, so argue under scrutiny)
      - likely discriminatory if effect is to exclude virtually all out-of-staters from a market but not if it excludes only one group of out-of-staters (*Clover Leaf*: out-of-state plastic industry was disadvantaged, but not out-of-state paper industry, thus law was not discriminatory)
      - likely discriminatory if imposes costs on out-of-staters that in-staters would not have to bear (*Hunt*)
      - likely discriminatory if motivated by protectionist purpose – helping in-staters at expense of out-of-staters
      - representation: if in-staters getting all the benefits but not paying for it, that's a problem
      - at times Court does not find disparate impact sufficient, especially if Court's trying to preserve state sovereignty/heterogeneity (*Exxon*)
      - unlikely if not accountability problem:
        - taxes on an industry usually pass muster (out-of-state milk dealers will be represented in those in state)
        - subsidies to an industry ok because interest represented and cost borne by state's taxpayers
        - problem is when costs are shifted to other States
  - **If yes, does the law have an important purpose that clearly outweighs its costs?**
    - balancing test: benefit to State (important local purpose unrelated to protectionism) vs. burden on interstate commerce given the alternatives
      - almost always struck down if yes; heavy presumption of invalidity unless there are no other means to advance this legitimate local interest/necessary to achieve important purpose
      - laws limiting access to resources to in-staters or charging fee for state resources usually impermissible protectionism (*Philadelphia*)
      - laws limiting access to local markets by out-of-staters (*Hunt*) usually impermiss.
      - laws requiring use of local businesses usually impermiss. (*Carbone*)
    - narrow construction of benefit might lead to striking down law and vice-versa (benefit to small class of citizens vs. to entire state)
  - **If no, there is a heavy presumption of validity.**
    - Will be invalidated only if the law's burdens on commerce outweigh benefits to State (but much less strict here)
      - not a burden on commerce if some businesses withdraw from market and are replaced by others (*Exxon*)
      - Substantial state interest in enviro reg can outweigh burden (*Clover Leaf*)

- Broad discretion/deference to States if interest is in public safety or if burden falls on their residents (*Exxon*)
- Conflict with other state laws may lead to striking down
- In rare cases where huge burden on commerce and no benefit, law may be unconstitutional (e.g. *Bibb*, law banning straight mudguards and requiring curved ones unconst. when 45 states allowed straight and one banned curved, which had zero safety value)
- **Exceptions:** Market participation doctrine & express Congressional authorization

**Arguments for State law/against DCC** (Scalia, Rehnquist, Thomas):

- Factors:
  - vicarious representation
  - baseline: out-of-staters are not entitled to this to begin with
- Textual/Federalism:
  - Framers set forth certain restrictions on States, such as privileges and immunities clause and Article I Section 10. The DCC is not supported by the text of the Constitution.
  - 10th Amend. gives States power over all non-enumerated things
- Structural: Congress and not the unelected judiciary can control this by making laws that pre-empt; weighing interest of a State vs. interest of commerce is for Congress
  - response: it is unrealistic to expect Congress to review these things, and deference to political process is unwarranted when those affected are not represented in-State
- Diversity among States allows people choices and allows laws to be tailored to different populations and local problems
- Balancing test is comparing apples and oranges! We should eliminate it altogether.
- Minorities in federal gov. can have majority in particular States – “more democratic accountability”
- States should be laboratories for democracy

**Arguments against State law/for DCC:**

- Historic: Framers intended to prevent state laws that interfered with commerce – therefore they drafter commerce clause specifically to prevent protectionist state legislation where state would discriminate against out-of-staters to benefit its citizens.
- Economic/Purposive: economy is better off if we promote one national economy without barriers to commerce; this law fragments national market; interferes with efficient allocation of resources (regulation burdens businesses’ functioning elsewhere)
- Political/Frustrates accountability: States and their residents should not be harmed by laws in other states where they lack representation
- States have their own interests in mind

*Philadelphia v. New Jersey* (1978): NJ passed law banning import of waste for disposal. Court said State may not enact ban on articles of commerce absent legitimate public welfare concerns. Here there is no reason to ban the articles other than their out-of-state nature – although NJ could regulate all waste it cannot enact protectionist measures. NJ cannot shift the costs of its waste disposal services.

- alternatives: buy and operate landfills (and exclude whoever they want as private owners – market participation doctrine allows States to discriminate when acting as market participants) OR create incentives for people to dump in other States: tax all who dispose of waste; require more recycling/pre-sorting or incinerators/compacting; limit amount of trash taken/day; forbid dumping of recyclables. Law will be upheld if legitimate local concerns and minimal burden on commerce

*Carbone v. Clarkstown* (1994): Town created a waste transfer station and mandated that all solid waste leaving town be processed through that station. Carbone was forbidden from sending its waste to another state to save money. Court said any ordinance depriving non-local businesses from access to local markets discriminates against interstate commerce. Court said this law discriminated against non-local providers of waste service and struck it down.

- o vicarious representation: if everyone is treated equally the residents of PA are vicariously representing the non-residents.

*West Lynn Creamery* (1994): MA tax on all dairy sold in MA which disbursed proceeds only to MA dairy producers held unconstitutional. States may not tax only out-of-state goods and this effectively does so. (note: tax on all dairy would be ok if its proceeds were re-distributed to general state things).

### **Facially neutral state statutes**

*Exxon* (1978): MD enacted law prohibiting gasoline producers or refiners from operating retail gas stations. Therefore producers had to sell to independent distributors or leave. Because majority of producers were out-of-staters the effect was to support local businesses. Court said this was not protectionism b/c allowed out-of-state retailers to enter MD market and did not burden interstate flow of petroleum. MD was behaving neutrally, just favoring small business over big business.

- o democratic representation reinforcement: you can burden your own people. Here, costs shift to MD residents who pay for the expensive gasoline; they are represented by local gov. and can make their feelings known; *Exxon*, who is big player, is also presumably represented.
- o counter: if 95% of people harmed are non-residents, maybe it's not so neutral; this creates a market distortion (counter to the purpose of the CC) b/c it gives some service providers an effective monopoly

*South Carolina v. Barnwell* (1938): Law prohibiting use of trucks over a certain weight or width was facially neutral; court held that burden on commerce was not so great to trump state interest in fewer accidents and less highway wear and tear.

*Southern Pacific v. Arizona* (1945): Law limiting train length struck down. Although it seems non-discriminatory, effect is to require reconfiguring of cars and therefore greatly increase cost of bringing trains through AZ.

- o court applies balancing test: burden which regulation of trains as safety measure imposes on commerce vs. weight of state and national interests
- o difference with *South Carolina* is that highways are matters of State concern and that truckers might have more local leg. representation
- o court construes benefit narrowly: to small number of workers

*Kassel* (1981): IA reg. prohibiting trucks over 65 feet appears facially neutral. However INTENT was discriminatory (not really about safety): (1) border cities can permit longer trucks (truck drivers then stop in IA and spend money there); (2) IA manufacturers can get permit to ship larger trucks; (3) permits available to move oversized mobile homes. Law struck down.

- o diff. from *South Carolina* b/c by now (1981) highways are vital channel in commerce

*Hunt v. Washington* (1977): NC required that all apples sold or shipped into state be marked no grade other than US grade. WA, whose apples are labeled based on their more rigorous system, sued. Court says EFFECT of statute is (1) market distortion for NC growers; (2) significant costs to WA for repackaging apples; (3) removal of WA apples' competitive advantage. Burden on WA large and benefit small, so court strikes down.

- o alternatives: NC requires apples with diff. state grades to also bear national grade; NC requires states to show their grading system is equal or better

### **Market participation doctrine: States may discriminate when they act as private participants in the market, but not when they act as regulators.**

- o Bypasses black letter analysis above b/c it's a defense to DCC.
- o e.g. State-owned businesses (*Hughes*: state purchasing abandoned cars can discriminate; *Reeves*: cement co. owned by State can charge less to in-State purchaser); benefits from gov. programs (*White*)
- o You can say state is "buying" the services and therefore acting as a consumer

- Narrow definition of what is the “market” prevents this rule from swallowing dormant commerce clause limitations (*South-Central*)
- Policy: fairness of allowing community to retain benefits of the taxes they pay (Tribe)

*White*: Boston ordinance requiring businesses to hire a certain percent Bostonians. Court upheld b/c city acting as market participant.

- critique: it seems downstream

*South-Central Timber*: Purchasers of state-owned timber must process it (mill their logs) in AK before shipping it elsewhere. Court strikes down saying this is a downstream regulation: AK is in privity with loggers and not mills. Market participation allows States to burden commerce within the market but not to go further or attach conditions outside of the market.

- alternatives: give tax incentives to mills; cut trees down yourself

**Privileges & Immunities Clause**: Article IV § 2: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States.” Another way of attacking a discriminatory State law, but more limited than DCC inquiry b/c applies only to private people.

**Black letter law**:

- **Does the State law discriminate against a non-resident US citizen with respect to a fundamental right or important economic activity it accords its own citizens?**
  - applies when denying people livelihood, or fundamental right (to use highways, to demonstrate in state park)
- **If yes, is there a substantial justification for the discrimination?**
  - requires both a substantial reason and a substantial means, or relation to the purpose of the discrimination.
  - There is no exception for Congressional authorization (unlike DCC, which Congress can allow States to violate)
  - Stricter scrutiny than DCC, so better for Ps

*United*: Camden passed regulation saying that 40 percent of employees of contractors and subcontractors on city projects must be from Camden. Court said privileges and immunities clause entitles all citizens to same privileges and allows discrimination only if there is “substantial reason,” e.g. a tangible evil such as rampant unemployment, sharp population decline, decline in business and subsequent erosion of property values.

**Federal Pre-emption** (when State and Federal law conflict on a matter)

THERE MUST FIRST BE A VALID EXERCISE OF FEDERAL POWER – E.G. COMMERCE CLAUSE

- Express pre-emption exists when national statute specifically indicates what state law it supplants
- Implied pre-emption
  - conflict pre-emption: If a requirement imposed by fed. cannot be met without violating State req., fed. wins (assuming Congress had power – e.g. under Commerce Clause – to make reg. in the first place)
  - field pre-emption: When federal law is so broad it takes whole subject matter outside realm of State regulation and makes it its own (e.g. Fed. Comm. Act requiring broadcasters to carry political speech without censoring immunized broadcasters from liability under state libel laws)

## **EXECUTIVE POWER: Plenary and Concurrent Powers**

- **Article II:** President is commander in chief of the Army and Navy, has power to make Treaties and to “take care that all laws be faithfully executed.”
  - no textual support for foreign affairs power, but “historical gloss” recognizes his vast share of responsibility in this sphere.
- **Article I § 1:** All legislative powers shall be vested in Congress which shall consist of a Senate *and* a House of Representatives. **Article I § 7:** Every bill which passed House and Senate *shall*, before it becomes a law, be presented to the President of the United States.
- **Political Q:** Challenges to foreign policy often are, e.g. to pres’ use of war powers
- **Checks and balances** or **separation of powers** operate to divide labor and make gov. more efficient and to prevent tyranny.
  - **legislature** makes rules of general application
  - **courts** interpret and apply rules in specific cases
  - **executive** enforces rules and might make rules incident to enforcement
- **Original intent:**
  - *Curtiss-Wright* is historically inaccurate;
  - Hamilton argues that CIC power was less than that of king or governor; but that he has authority not granted in constitution b/c Art. II does not refer to all power “herein granted” (Cf. Art. I)
  - Madison says he has no powers not enumerated in Article II
  - Constitutional congress wanted to **limit** foreign affairs power.

### **Theories:**

- (1) President may act only if there is express Constitutional or statutory authority** (*Youngstown*)
  - **Constitutional:** (1) **Executive power** to administer laws (but there must first be a law; unclear what that means); (2) **War power** (broad deference to things within theater of war; but there must be a war or threat to security and action reasonably related to it); (3) **Treaty power**
  - Policy: inherent authority inconsistent with gov. of limited powers
- (2) President may exercise power not in Const. as long as he doesn’t violate Const. or statute** (narrow)
  - Jackson’s zones when president is acting pursuant to Constitutional power; he is function of Congress:
    - (1) Pursuant to **express or implied authorization** of Congress, authority is at max (presumptively valid)
      - tacit acquiescence, history of exec. practice never before questioned, or authorization of related activity can be read as approval (*Dames & Moore*); even silence can be (*Garamendi*)
      - counter: non-delegable power, so that puts us in zone 3 (*Curtiss-Wright*)
    - (2) In **absence of Congressional grant or denial of authority**, he is in twilight zone (depends)
      - *Chada* says silence is not legislation; only bicameralism and presentment are
    - (3) Pres action **incompatible with express or implied will of Congress**, power at its lowest ebb
      - If silence read as prohibition (*Youngstown*) his power can be limited
      - policy: original intent of preventing tyranny
  - **Limits on Congress:** may not usurp or delegate executive power (*Bowsher*); must be bicameralism & presentment (*Chada*)
- (3) President has inherent authority unless he interferes with functioning of another branch** (Douglas *Youngstown* concurrence)
  - e.g. usurping spending powers of Congress or effecting a taking (*Youngstown*) or interfering with judiciary (*Hamdi* or *Razul* tribunals)
- (4) Pres. has inherent powers that may not be restricted by Cong and may act as long as Const.**
  - Broadest view – *Curtiss-Wright* says he is “sole organ” of foreign relations (but historically wrong)
  - Suggestion that there is some other plenary power

*Youngstown* (1952): Truman directed Secretary of Commerce to take possession of and operate nation’s steel mills. Secretary did this and pres. reported it to Congress, which took no action. Court declared seizure unconstitutional.

Textualist approach: President has no power that does not arise from text of Constitution or grant of authority by Congress. Narrow view (Cf. *Curtiss-Wright*)

- Court said this was not within his war power over things falling within theater of war: labor regulation not related directly enough. There are geographical/spatial limits to CIC power (but if we were dealing with steel on ships docked in Korea it might be different)
- Duty to see that laws are executed does not mean he's a lawmaker: there must first be a law passed by Cong.
- Congress decided not to adopt this proposed amendment, which shows it did not intend to give President this power. Congress' silence read as a prohibition.
  - problematic: silence could mean they just could not get it past Senate or agree on its form; furthermore he told Congress what he had done and they did not respond forbidding him
  - Court reads President in zone 3 (test below) but could also be seen as zone 2

*Chada* (1983): House agrees to proposed legislation ordering that a visa violator whom the AG had allowed to stay be deported under INA (giving them power to overturn finding suspending deportation – legislative veto). Court says only one House voted, which violates principles of bicameralism (both houses must approve of veto to executive action) and presentment (was not send to president for signature so he had no opportunity to veto it). You must have presentment and bicameralism in order to have legislation; silence is not legislation (contradicts *Youngstown*).

- *Chada* says one-house veto violates both bicameralism and presentment; a 2-house veto theoretically still violates presentment. But, the reality is that Congress passes such laws all the time and Court won't hear them.
- Court treats this as a legislative act. But you could argue that since allowing *Chada* to stay was an executive act, Congress' order that he leave was also executive; you could also argue that it was a judicial act because it checked the executive
- War Powers Act: giving President power to use military force for 90 days without explicit authority unless Congress vetoes him. Some say the legislative veto part was invalidated by *Chada*.

Military tribunals: President established tribunals to try non-citizens suspected of terrorism; sentencing requires 2/3 concurrence and final review was vested solely in President or defense secretary. Conflict with Constitution which establishes one supreme court and gives president only EXECUTIVE power.

- Some commentators argue that president has power to create military commissions even absent Congressional authorization – he has (1) CIC powers; and (2) resolution to use “all necessary and appropriate force” to combat terrorism (AUMF)
- One can say he has power to do this regardless of AUMF (Scalia? in *Hamdi*)
- Others say that adjudication and punishment are way outside his sphere.
- Bush claims right to suspend anti-torture treaties in name of his war powers

### **Foreign Affairs: President is “sole organ” of foreign relations**

*Curtiss-Wright*: C-W wanted to sell machine guns to Bolivia contrary to presidential proclamation declaring such sales illegal. Joint resolution of Congress has authorized him to make this proclamation. C-W said that Congress was delegating its authority and violating separation of powers. Court said President has power to issue proclamations relating to international affairs and is “sole organ” of foreign relations. His unique knowledge of confidential information justifies the issuance of proclamations w/out Congressional approval. Court strikes down the Act because President alone has power to speak with foreign nations.

- When Congress delegating they must give him “intelligible principle” to follow (specific standards)
- They treat as zone 3 even though it's zone 1
- They did not need to do this – they could have just upheld the proclamation.
- Sutherland believes these are extraconstitutional powers; Paul thinks he's totally wrong. Neither the text nor history support his findings and they've been sharply criticized.
- *Youngstown* dismissed this case in a footnote but “sole organ” concept survives

## **War Powers**

*Dames & Moore v. Regan* (1981): In exchange for release of hostages Pres. Carter agreed to dismiss all claims against Iran from court and refer them to a special claims tribunal. All Iranian assets in US were to be unfrozen. Congress passed an emergency economic powers act IEEPA allowing seizure of assets as leverage to get back hostages. Court said authorization of this related action can be inferred – Congress tacitly acquiesced. We are in zone 1 and this exercise of authority is legitimate. Furthermore this power has historically been exercised by pres. and unquestioned by Cong.

- Cf. *Chada* – no bicameralism or presentment here – troubling because Congress has to jump through hoops to stop the President, but he seems to have the green light here. These 2 cases create legal foundation for imperial Presidency.
- Cf. *Youngstown*: his authority is not a function of Congress

*Garamendi*: Government set up fund by executive agreement to settle claims against insurance companies who kept money of Holocaust victims who were sent to camps and never disclosed their names to their families. Gov agreed to avoid the courts. CA had passed a law requiring its insurance cos to disclose victims' names. Agreement pre-empted State law. Court said President's foreign affairs power is broad; he may make "executive agreements" with other countries without ratification by Senate or approval by Congress.

- Cf. *D & M*: here not even implicit approval is needed – silence is seen as acquiescence
- suggestion that President could make law pre-empting Congress itself if he wanted to

## **Executive Agencies and Executive Authority: Congress may not delegate executive power or usurp executive removal power**

*Bowsher v. Synar*: Comptroller General was authorized by Congressional Act to effectuate spending reductions in federal government. He is considered legislative officer. (1) he is allowed to decide budget cuts and therefore "execute" a piece of legislation, infringing on role of President; (2) Congress can remove him, thus infringing on executive power to remove those performing executive tasks. This is unconstitutional. Non-delegable function: Congress may not delegate legislative discretion to agencies or its agents or usurp executive power.

- This also defeats accountability by allowing Cong. to wash its hands of responsibility.
- note: he is appointed by president but removable by Congress so you could say he is not entirely part of legislative branch – can be seen as executive or legislative, or as a single Congressional official (who alone cannot do job of all of Congress).

## ECONOMIC REGULATION – CONTRACTS CLAUSE

Art. I section 10: No State shall pass any law impairing the obligation of contracts

- intent: designed to prevent states from enacting debtor relief and similar laws
- applies to States, and to Fed through the DP clause.
  
- **Black letter law**
  - **Has there been substantial impairment on current contractual relationship?**
    - you can argue that a law is simply imposing an additional duty, not impairing a current contract (Brennan *Allied Steel* dissent)
  - **Is there a legitimate government interest?** (answer almost always yes)
  - **Is there a reasonable relation between the objective and the means?**
    - weighs burdens and benefits but is generally deferential (temporary crisis may be ok – *Blaisdell*); reasonable = not wholly irrational
    - easiest to prove when state has singled out your contract
    - Ks involving State self-dealing (*U.S. Trust*) or spreading burden too narrowly (*Allied Steel*) are especially scrutinized; or if State changes K to which it is a party

### Args for striking down regulation/upholding the K

- textualist: the clause should mean what it says
- intent: only if debtor relief

### Args for upholding reg/impairing K

- this power comes from the State anyway; State needs to use police powers these days (dynamic Constitution; changes over time) – implied notice read into every K
- the original intent was about striking down debtor relief laws – not laws about this type of K
- government needs to prevent serious harm to public

*Blaisdell*: MN law allowing courts to postpone mortgage foreclosures for emergency period so people can work things out with the banks. Court upholds the law, saying State law can interfere with contracts if it is for a legitimate purpose and the measure is appropriate, reasonable and temporary or limited in scope.

- critique: CC was devoid of meaning after this – what are limits on police power?
- court acknowledges that interpretation is not based on original intent (which is contrary to this ruling) but uses teleological approach
- retrospective application: State could forbid lotteries and suddenly invalidate all outstanding tickets; rationale that leg. should not be bound by decisions of leg. before it.

*U.S. Trust Co.*(1977): NY/NJ Port Authority issues bonds saying the money will not support commuter railways, then changes its mind and repeals this language, saying money can be used for commuter rails. Court said the change was not necessary given alternatives (e.g. tolls or gas taxes to discourage drivers and give money to public transit). When contract involves self-interest we look with scrutiny to means/ends relationship.

- critique: legitimate purpose was to benefit millions of commuters; property of bondholders does not necessarily get impacted, terms just change
- Cf. *Blaisdell*: here, not temporary but permanent solution; State is self-dealing; no emergency.

*Allied Steel v. Spannaus* (1978): Striking down MN law requiring companies with pension programs to pay into special fund if they cancel pension and move out of State, thus financing existing pension obligations and keeping ppl from getting screwed. Court said (1) the law was too narrowly written – burden falls on too few; if State had applied to “every employer” it might have worked; (2) benefit not wide-spread; (3) burden-shifting: this is a PA company with small office in MN; law benefits MNers at its expense; (4) retrospective – if they had said “from now on you cannot do x” it may have been ok.

- Examples above are only 2 cases in 100 years in which court has struck down laws under Ks clause.

**ECONOMIC SUBSTANTIVE DUE PROCESS: Modern rule: Legislation cannot be unreasonable, arbitrary or capricious. Short of that it is upheld.**

- 14<sup>th</sup> Amendment: No State shall deprive any person of life, liberty, or property, without due process of law. Substantive DP addresses rights affected *ab initio* by the legislative process.
- Historical background: Rise of industrial organization transformed American society in late 19<sup>th</sup> century; laissez-faire doctrines had been used to invalidate protective legislation. Reasons for Court's shift: conservative economic policies, hostility to labor regulation, "free labor" jurisprudence of antislavery movement.
- Not one law since 1937 has been declared unconstitutional as violating economic substantive due process

*Lochner* (1905): Striking down labor law prohibiting employment in bakeries for more than 60 hrs/week or 10 hrs/day. 14<sup>th</sup> Amendment protects liberty of contract: SUBSTANTIVE DP prevents States from making law fundamentally denying freedom of K. States do have police power w/r/t safety, health, morals and general welfare, but a reasonable exercise of this power must have direct relation to this objective, and these do not. Many critiques of *Lochner*:

- The substantive component read into the DP clause was not there; it was just procedural (problem: substantive DP does exist – it's what makes 1<sup>st</sup> Amend. applicable to States).
- "Liberty" discussed does not mean freedom of K
- Counter-majoritarian: court overstepped bounds w/r/t balance of power; States speaking for the people and this interfered w/democratic process (but the court is ALWAYS doing something counter-majoritarian; that's the point of all Con Law)
- Court misunderstood nature of consent: it was not a bargain among equals. Market status quo had been set by legal choices, not by nature.
- Baseline is wrong: court thinks they should not take sides but they misunderstand neutrality – regulation is not an imbalance, the situation being regulated was the imbalance (Sunstein)

*Nebbia* (1934): Law fixing min and max retail prices for milk upheld. Court said that they must look at whether challenged regulation is a reasonable exertion of government authority, or whether it is arbitrary or discriminatory. Much looser standard of review: presumption that everything State does is reasonable; expands what is considered for the public welfare.

*West Coast Hotel* (1937): Upholding State law establishing minimum wage for women. End of doctrine of economic/substantive DP.

**TAKINGS:** Eminent domain clause: “Nor shall private property be taken for public use without just compensation.”

**FOCUS ON: WHAT IS THE PROPERTY INTEREST? IS IT REGULATORY TAKING?**

- Much more protective than contracts clause: Court is more protective of property/more likely to strike down laws

**Is there a property interest?** (If no the clause is n/a)

- What is property? What is in your bundle of rights?
  - Natural right to build (*Nollan*)
  - Common Law right – to exclude others from trespassing on your property (*Lucas*) or causing nuisance
  - State law rights given to you by gov, e.g. to build, welfare (*Penn Central; Bowen; Flagg Brothers*)
    - Court has generally relied on State law to define

**If so, is there a taking?**

- possessory taking: confiscation or physical occupation of property (State building highway in your yard)
  - If so we are not concerned with how much of value was destroyed (*Nollan*)
  - Condition on development w/no nexus can be possessory taking (*Nollan*)
  - *Nollan* treated easement as possessory! Cf. *Penn Central* air rights.
- regulatory taking: any regulation less than a physical occupation (not all are takings). Must show you have destroyed all reasonable economically viable use of property.
  - Depends on the denominator: Portion of the whole can be rhetorically manipulated (*Penn Coal; Keystone; Penn Central*)
  - May not be taking just b/c it denies you most profitable use (*Penn Central*) so long as it leaves you some economically viable use
  - Inaction could be considered a regulation (implied in *Miller*)
  - Could be taking if defeats investment-backed expectations even if reg. in place at time of purchase (*Palazzolo*)
    - but not if background principles of nuisance law gave owner notice (*Lucas*)
  - Gov may choose to destroy one type of property to save another
  - Natural rights vs. rights given to you by government (e.g. *Penn Central*, you could argue gov. was the one who gave them air rights anyway!) (In *Nollan*, right to build your property is “natural.”)
  - Condition on property development requires essential nexus between condition and reason for imposition – if so it is a voluntary act and not a taking (Cf. *Nollan*)
  - Average reciprocity of advantage: if regulation is broad, it’s not confiscatory because it both benefits and burdens the property owner (e.g. zoning regs. often upheld)

**If so, is it for a public purpose?**

- If no, gov. must give it back. If yes, must pay compensation.
- Very broadly defined: almost anything State leg. deems to be public purpose (*Midkiff*)
- Taking from person A to give to person B or a narrowly defined class is NOT a public purpose; but giving to a large group may be ok (*Midkiff*)
- Cose Theorem: once judge has found purpose he can weigh using theorem

**Is fair compensation paid?**

**Arguments for taking property/saying it’s not a taking:**

- These are not inherent rights but rights granted by government
- No right to create nuisance with property
- Change denominator so it’s small portion being taken – gov. is simply decreasing value of property, but there are still uses for it
- No interference w/ investment expectations - there was notice through background principles of nuisance law
- Conditional taking: there is essential nexus

### Policy against taking property/saying it is a taking:

- loss spreading: if you take someone's property to benefit society, society should pay, not just one person
- Natural right to one's property
- Change denominator so it's 100% being taken, or say there is no economically viable use left
- This totally interferes with investment expectations, even if regulation was in place
- Conditional: no essential nexus

*Midkiff* (1984): State of HI allows tenants to petition housing authority to condemn prop. on which they live for repurchase by State and resell to tenants. Court upholds even though it benefits only tenants because legislature's purpose is legitimate and means are not irrational – here they are correcting a market failure and we must defer to their judgment.

*Penn Coal* (1922): Coal act forbade mining of coal in such a way as to cause subsistence of any structure used as a habitation. Here there is no public interest b/c it protects single homeowner and coal company's property will be destroyed if you make it unprofitable. Holmes likens physicality of coal to a possessory taking. Homeowners had contracted for this and are stuck with it.

- What's the denominator? If the property in question is area under the house then they are taking 100% but if it's everything the coal company owns it's a tiny amount. Here they chose the former, so all property is taken as though it were physical occupation.
- Critique: right to cause injury is not part of investment expectations; you don't own right to create nuisance/harm others w/your property.
  - response: P waived his right to sue under C/L for nuisance; court's says common law defines property rights and what a "nuisance" is.
- Common Law elitism: We could re-define the K to say it gives them the right only to all "safely mineable" coal

*Keystone* (1987): SC upholds statute prohibiting mining that causes subsidence damage to dwellings. Generally required 50 percent of coal to be kept in place. Court said this is not a taking b/c (1) State is arresting threat to common welfare; (2) no interference with investment expectations.

- What's the denominator? Here, property taken is only 50% percent of coal under the building, compared to all the coal the co. owns
- Cf. *Penn Coal* b/c number of people benefited here is huge vs. just one person (but that's sort of a myth); also b/c no quick claim/waiver of rights. Reality is shift in Court's view of property rights (Paul)

*Miller* (1928): Upholding cedar rust act which ordered Ps to cut down red cedars to prevent communication of disease infecting nearby apple orchards. Court said the State may choose destruction of one class/property interest to save another which, in judgment of legislature, is of greater value to the public. State was choosing to maximize wealth of whole state. This was reasonable.

- typical of law & economics approach: Kose theorem says in a perfect world one party would buy out the other for maximum wealth (but assumes no transactional costs, which in real world are unavoidable). Judge would do this for the parties. Government must internalize social costs
  - critique: there is no answer to which of these is causing a social cost (the apples are killing off the cedars too!); ignores fairness (who was there first); ignores aesthetics (are cedar trees more important than apple orchard?)
- Could say state was preventing nuisance of cedars – but is it an intentionally created nuisance?

*Penn Central* (1978): NY landmark ordinance requiring approval prior to developing a landmark; commission denied application for erection of skyscraper over Grand Central. Brennan says no taking occurred – there was no physical invasion, this was not arbitrary but part of a plan, and a reasonable return on the property remained. Did not lose present value (station still there) or investment-backed expectations (didn't have skyscraper in mind when they bought it). This was especially true b/c TDRs allowed them to transfer the rights to another property. Government may deny owner the MOST profitable use of his property w/out a taking occurring.

- air rights are not separable from whole value – just part of it
- aesthetic values are reasonable basis for exercise of police power
- critique: no average reciprocity, unlike zoning where everyone shares burden

*Nollan*: Holding that CA Coastal Comm. conditioning permit to rebuild house on transfer to public of easement across beachfront property was a possessory taking. No essential nexus between the condition and the end advanced as justification for the prohibition – thus it is not valid regulation.

- State says they are not taking beachfront rights, just offering just compensation (zoning permit) if they take them.
- critique: you can say letting people walk on beachfront is very reasonably connected b/c if he builds they can't see the coast otherwise; furthermore an easement is just part of property, not all of it; finally the property will not lose all its value
- either of these alone (easement for money or zoning variance) would be ok; combining them is unconstitutional
- natural right to build on your property – not granted by government; common law and not statutory law defines your rights when you purchase property

*Lucas* (1992): Striking down regulation which prohibited Lucas from building homes on coastal zone. Court said that regulation was a taking because it prohibited him from all economically viable use of his land. Furthermore the regulation did not accord with common law of nuisance, which to Scalia is the baseline because it “defines” traditional understanding of property rights. Furthermore it interfered with his investment expectations: what he thought he would do w/it when he bought it.

- critique: land was not totally worthless (could camp on it, etc.); nuisance law should not be the baseline; very pro-property above everything else.

*Palozzolo* (2001): Purchased land as corp. with intent to fill and build on the property; corp.'s zoning app. turned down b/c incomplete; RI passes law protecting salt marshes and saying you can't build; he applies for special permission but is turned down. Corp. goes out of business and P acquires land. Court holds takings claims may be brought by owners to challenge regulations that were in place when property was acquired. However there was not a taking b/c he was still allowed to build on his other parcel.

- critique: court ignores that his corp. \*did\* acquire the land before the regulation
- Cf. contracts clause – you can't challenge a regulation which existed before your K is formed because it was in effect – you knew. But you still have a takings cause of action if reg. occurs before you come into possession. Notion that property rights are sacred/natural, whereas K rights are instrument of the state.

## SEPARATION OF CHURCH AND STATE: ESTABLISHMENT CLAUSE

- Amendment I: Congress may not make laws “respecting an establishment of religion, or prohibiting the free exercise thereof.” Applicable to States through 14<sup>th</sup> Amendment.

**Black letter law: *Lemon* Test:** Strict separation approach – wall btwn. church & state. Has been rejected by majority of SC judges but used by some, e.g. Souter, Stevens:

- **Is there a secular purpose?**
- **Is the primary effect secular – to neither enhance nor inhibit religion?**
- **Does the law foster an excessive government entanglement with religion?**
  - can be compounded by risk of community divisiveness

**Endorsement/Neutrality Test:** O’Connor, primarily:

- **Has the State endorsed religion in some way? Examine both subjective intent of state and objective message conveyed by it** (collapse *Lemon*’s purpose and effect prongs).
- **If no, it’s permissible provided there is no entanglement.**
  - gov. must minimize extent to which it encourages or discourages belief or disbelief
  - state cannot give its *imprimatur*
  - would reasonable observer see it as endorsement? (*Capitol Square*: O’Connor says this is reasonable well-informed member of community but dissenters says that’s too high a standard).
  - accomodationists think this test is hostile to religion

**Accomodationist approach/Coercion:** Kennedy, Scalia and Thomas (Thomas most likely to say that it’s fine unless you prefer one religion over another). Generally ok to support religion unless:

- **Can’t literally establish a church**
- **Can’t show preference or discriminate between one religion and another**
- **Can’t coerce anyone into practicing someone else’s religion (coercion test)**
  - We should not be hostile or antagonistic to religion – want to allow pluralism and diversity (crèche or menorah just encourage pluralism – Scalia’s *Lynch* dissent)
  - Mandatory student prayer coercive (*Lee*; *Santa Fe*; *Wallace*) but legislative prayer is not (*Marsh*)
  - Conservatives define coercion narrowly: if law requires and punishes failure to engage in religious practices

**For finding establishment violation/against striking down law:**

- Unlike property right which state should protect, religion should be free of interference by gov.
- Individual should not have to protect his views from majority – we need to protect minorities from feeling unwelcome (purposive)
- Pluralism: you can only respect this by protecting even more subtle influences of religion; it’s not just coercion that’s a problem
- Divisiveness/Entanglement: Protects state from being torn by religious conflict, esp. in education
- Original intent:
  - Settlers escaping bondage of government-favored churches and of violence and death that ensued from government being in league with particular religions.
  - Colonial charters authorized establishment of church which all would be required to attend and minorities found themselves persecuted and forced to pay taxes to gov-sponsored churches.
  - People decided that individual religious liberty could be best achieved under gov. which was stripped of all power to tax/otherwise support religion.
  - Jefferson said it was intended to enact a strict “wall of separation” btwn. church and state.
  - Madison said true religion did not need support of law and that best interest of society required that men be free (“Memorial and Remonstrance”) – this includes religion over irreligion; Madison was opposed to things which funded religion even if they included secular recipients. Supported by legislative history of Amendment (p. 1415) (some commentators). **see pp. 1412-17 for more.**

- Teleological argument (Brennan): The practices threaten the practices the founding fathers feared - they promote interdependence between gov and religion. Today our nation is far more religiously diverse – thus there is much higher risk that people will be offended by stuff.

**Against finding violation/ against striking down law:**

- Political process argument: We are a pluralist society and religious groups will shape legislation as it makes its way up.
  - critique: this is a problem b/c we must protect the minority who will not be heard that way!
- Original intent:
  - Framers were largely religious, only concerned with preferring one religion over another (Thomas) – Madison meant that gov. cannot give special benefits to religion, not that it must exclude religion from all public benefits
  - Roger Williams: thought Churches should get state aid as long as independent
  - We are free of the original dangers the Establishment Clause sought to avoid (*Mueller*). We do not risk the type of gov. involvement in religion that is likely to lead to strife.
  - Even if we extend the EC beyond prohibiting a State church or payment of funds to a church it was not meant to include this attenuated situation
- Pluralism: Some acknowledgment of religion makes nation pluralistic and not secular. Freedom of choice/diversity (accommodationist)
- Religion is a welcome element in our life – protected just as any other belief (accommodationist).
- We should not be hostile to religion (accommodationist)
- Endorsement, if it exists at all, is indirect, remote and incidental.
- It's impossible to erect a total wall of separation – religion has been part of our culture in some way or another for centuries. This is ceremonial deism, like money or the Pledge; this practice has been drained of all religious meaning
- If law establishes a minority it's not the kind of threat that the framers envisioned
- If there is a disclaimer, e.g. a sign saying this is not government display
- Longstanding historical practice – *Marsh, Waltz*
- Entanglement requires “comprehensive, discriminating, and continuing state surveillance” and this is nothing like that. Furthermore when aid must be supervised to prevent entanglement and the supervision itself is what created the entanglement, this is the “Catch-22” decried by the *Aguilar* dissenters.
- Narrow definition of what constitutes religion

**Anti-Coercion principle**: Prayer cases: State-sponsored prayer is per se invalid because no secular purpose but legislative prayer ok (public ed. is very sensitive subject)

*Lee*: Student challenged practice of rabbi giving non-sectarian prayers at public high school graduation ceremony. Court said the practice was coercive because she must choose between attending grad. or going and being in uncomfortable position of sitting down during prayer.

- importance of autonomy of protecting your privacy in a public space
- religious speech diff. than secular because there is presumption of participation – although rabbi is not state employee his speech is treated as state speaking
- problems: (1) creating the space for a benediction; (2) inviting religious speaker; (3) censorship – state asking him to bleach prayer is entanglement
- Scalia dissent: prayer has always been important to our nation; sitting in respectful silence is not participation. Dissenter's interest in not even appearing to participate not as great as government interest in fostering respect for religion.

*Santa Fe*: Holding unconstitutional school district policy authorizing students to vote on whether to allow “invocations” at high school football games. Court said it would be coercive, as in *Lee*.

- having students vote was attempt to disguise it as private action (public v. private)

- Essence of Est. Clause: we do not want people arguing about religion/having elections that turn on prayer – this creates the social fissures and frictions that plagued Europe.
- courts generally reluctant to stop speech before it happens
- If Pat Buchanan speaks and says something religious the state did not necessarily know he was going to do it so it would not be unconstitutional

*Marsh v. Chambers*: Prayer in legislative session is not coercive – we’re all adults and not under same pressures as children. Must look at context.

- relied on history of 200 years of opening legislative sessions with prayer
- critique: legislator refusing to pray might be affected politically

*Wallace*: Moment of silence for prayer or meditation is coercive - could have moment of silence but can’t say it’s “for prayer.” Prayer connotes religious state.

- Cf. pledge, which probably not coercive because it’s something you do – individual action

### Non-endorsement/Neutrality

- Display cases: When state is involved in a display it is permissible if characterized as secular in nature

*Lynch*: Upholding city Christmas display which includes nativity scene. In context of holiday it is historical and traditional and it has secular purpose of promoting holiday consumerism. So long as it is not endorsing religion it’s permissible (if no entanglement) – here any endorsement is merely indirect, remote and incidental.

- critique: birth of Christ is central tenet of Christianity – not historical – this would offend a lot of Christians!; crèche should not be advertisement for Wal-Mart; wink-wink tone – they are really accommodating religion
- Brennan dissent: effect is to alienate minorities/atheists

*Allegheny* (1989): Court adopts endorsement test. Held unconstitutional a freestanding display of nativity scene on courthouse steps because it was the single element of the display and thus has effect of endorsing Christianity.

However, court upheld menorah next to Christmas tree as state’s “salute to liberty” as creating overall holiday setting/sending message of pluralism and of symbols of the season (neutrality approach)

- Brennan dissent: use of religion to promote patriotism is offensive to those who separate these beliefs (strict separationist)
- Conservatives’ dissent: endorsement test “reflects hostility to religion” (accommodationist)
- critique: it’s offensive to say menorah has no religious meaning

*Capitol Square Review* (1995): Scalia says KKK display of cross on public property is private display and constitutional. BUT court acknowledged that if state appears to be giving its *imprimatur* – if it allows sectarian speech close to the seat of gov. – that would be a problem.

- concurrence: importance of sign disclaiming gov. sponsorship. Reasonable observer must be aware of context of display.
- dissent: very fact that a sign is installed on public property implies official recognition and reinforcement, esp. when across from seat of government. A reasonable person could think this even of a private display.
- a burning cross, clear symbol of KKK, would be more easily protected because no risk of confusion

*McGowan*: Upholding laws requiring Sunday closing. Just because original motivation was religious does not mean it is now religious. Furthermore it would be hard to police if stores closed on different days (very post-hoc rationale). It’s been drained of its religious meaning – we don’t see it as an establishment.

- critique: Court is stretching things to justify once-religious laws

*Stone*: Holding unconstitutional a statute requiring posting of Ten Commandments in schools. Impermissible State purpose.

*Harris*: Upholding statute restricting abortion funding restrictions – mere coinciding with religious tenets does not suffice for showing of religious purpose.

*Edwards*: Brennan opinion; held unconstitutional statute requiring public schools to teach “creation science” whenever they taught evolution. No secular purpose despite claim of promoting “academic freedom.” Primary purpose was clearly to advance religion.

- Scalia dissent: legislative purpose is impossible to discern and will always be contrived and sanitized.

**PERMISSIBLE ACCOMODATION: challenges to statutes that allegedly aid religion**: When *can* the State accommodate religion or carve out exceptions to prevent violating free exercise?: Special version of *Lemon* test:

- **must be facially neutral/broad class**: benefit to broad class of persons and not just to religious org.
  - *Zelman*: example of high degree of state support the Court will tolerate
  - **Doctrinal**:
    - forbidden: reimbursing private schools for textbooks, salaries, materials in secular courses and paying salary supplements (*Lemon*), aid to religious publications only (*Texas Monthly*), tax breaks to private-school parents (*Nyquist*), tuition reimbursement (*Sloan*), *Kiryas Joel* (which was a process failure – the law was not a generalized scheme).
  - *Everson*: State should extend its general state law benefits to its citizens
  - You can contest by saying neutrality is just formalistic (*Agostini* dissent) and evenhandedness is not enough (*Rosenberger* dissent); it’s just the beginning of the inquiry
    - otherwise a State could pay all bills of religious institutions through so-called “general programs”
  - If it benefits narrow group, Scalia would defer to political process. The State is not required to say up-front that it would make benefit available to all (*Kiryas Joel* dissent)
  - Conservatives/Thomas in *Mitchell*: aid to religious OR areligious institutions is ok because any indoctrination that occurs does not do so at behest of government, ok so long as not discriminating among religions Ok even if aid goes to religious uses so long as aid itself does not have religious content.
  - O’Connor: aid to religious schools ok as long as not used for religious purp. or symbolic endorsement; sufficient guarantees that it won’t are enough (*Mitchell* dissent)
  - Liberals: if likely to be used for religious purp. Court should strike down; aid should be limited to “essential public benefits” (*Rosenberger* dissent)
  - Baseline: what is neutrality? Conservatives: in modern welfare state where aid to individuals and orgs. is widespread, religious neutrality may require that it be available to all. In fact denying them aid is akin to imposing a tax on religious organizations!
  - Would objective observer characterize it as an endorsement of religion or an anti-discrimination measure (if carved out to prevent burdening free exercise)?
- **effect should be to benefit religious institutions only indirectly**:
  - aid should go directly to individuals who then freely choose how to use it. Then there is no *imprimatur* (endorsement test can be considered here)
  - Aid should not create an incentive for parents to choose a sectarian school (*Zobrest*)
    - question of choice: vouchers must offer a “real choice” and not just steer towards religious education (*Zelman* dissent)
  - If the exception is carved out to prevent free exercise, it is sufficient to show that gov itself has not advanced religion through its activities (*Amos*)
  - Strong presumption against aid received by schools, but might be allowed if not used for religious instruction (critique: it may appear to be an endorsement)
- **no entanglement between state and institutions**:
  - state cannot be regulating conduct of religious institutions in ongoing way
  - danger of divisiveness especially when benefits are given to religious groups and thus non-religious are deprived

- **If it fails *Lemon*, we apply strict scrutiny**
  - is there a compelling government interest? is it narrowly tailored?
  - but as a practical matter when a prong is violated the Court strikes it down, because violating *Lemon* test essentially answers this already.
  - interest in not violating free exercise is important (*Amos*)
- **If it passes *Lemon*, we apply rational basis test**
  - Scalia: highly deferential to laws/political process
- Tax exemptions to religious groups ok only if also given to nonreligious groups
- School aid: (1) must be available to all students enrolled in private and parochial schools; (2) should go directly to students rather than to schools; (3) cannot be used for religious instruction (Thomas disagrees) (but gov may send special ed. teachers (*Agostini*) or health/educational testers or sign interpreters (*Zobrest*) or computers (*Mitchell*))
  - Court strikes down gifts (money, textbooks, etc.) to parochial schools but permits lending books and teachers because (1) temporary loan and (2) can't be used for religious purposes.
  - problem: parochial schools benefit by not having to hire their own teachers or buy their own books
- Aid to religious colleges: More lenient than w/secondary schools: less impressionable, less overt religious influence (bullshit!)
- Aid to students in religious schools: Aid to particular students usually upheld (*Zobrest*)
- Aid to other religious institutions: More likely to be deferential to government (aid to Church-operated hospital; counseling to adolescents (dissent: religious effect of their counseling, entanglement to monitor);

Taxpayer Standing exception: Establishment Clause complaints brought by taxpayers based on expenditure of taxpayer money have standing. There would be no way to police boundaries between state and religious institutions otherwise.

*Everson*: Court upheld statute authorizing NJ school board to repay parents w/kids in private schools the cost of bus transportation. Fares are part of a general program – therefore the state is neutral.

*Lemon*: Holding that State reimbursing nonpublic schools for salaries, textbooks and instructional materials used in secular courses and paying salary supplement to teachers of secular subjects was unconstitutional. Teachers might teach religious subjects (if inadvertently).

*Aguliar*: Special ed. teachers sent to parochial schools provided they take down all crucifixes, etc and clear space free of religious context. Also allowed school district inspectors to come check in on schools. Court struck it down as excessive entanglement subjecting parochial schools to state supervision.

- As a result NY changed law so teachers taught in shacks outside the school.

*Agostini* (1997): Court reversed itself, allowing state to assign special ed. teachers to religious schools. Aid was going to school indirectly because teacher was providing a service to the students already there. Where they provide assistance (off or on campus) is irrelevant. Some degree of entanglement is inevitable: here there was no need for pervasive monitoring or risk that teachers would be tempted to inculcate.

- “not all government aid that directly aids the educational function of religious schools is invalid.”
- Court would not presume symbolic union between Church and State
- there is no financial incentive to undertake religious indoctrination here: aid is allocated on basis of neutral, secular criteria
- dissent: this is direct State aid to religious schools – allowed state schools to assume a responsibility indistinguishable from responsibility of private schools themselves. Evenhandedness or formal neutrality alone is not sufficient to withstand scrutiny.

*Mueller* (1983): Upholding state tax allowing parents to deduct education-related expenses (transit, books, tuition). They went to private schools of which overwhelming majority were religious. Court said (1) secular purpose of

giving parents incentive to educate children; (2) the benefit goes to the parent and not the school; benefit flowing to school is simply consequence of individual decision of parent. No religious effect; (3) Token decisions of whether certain textbooks apply for discount are not entanglement. Furthermore we are free of original dangers of Establishment Clause (!) and those risks are remote in this case.

- dissent: Court ignores the fact that all subsidy goes to religious schools where parents must pay tuition, and not public schools. It's more likely parent will send kids to cheaper religious school. Tuition subsidy masquerading as non-religious aid.

*Zobrest* (1993): Allowed school district to pay salary of sign-language interpreter for deaf kid at Catholic high school (general program distributing benefits neutrally to any "handicapped" child). Court said it was a program neutrally providing benefit to a broad class of citizens without reference to religion. No incentive for parents to choose sectarian school. Minimal benefit to school – if anything, they get handicapped kid's tuition, assuming they make a profit off of it and that without interpreter he would have enrolled elsewhere.

- dissent: interpreters will be relaying religious message through sign language, thus inexorably linking the secular and sectarian

*Rosenberger* (1995): Striking down refusal to give student activity funds to printers hired by student group to print their religious magazine. Benefit to religion is incidental – it was not "directly aiding" the organization (also, payments were made directly to the printer). Furthermore, purpose was not to aid religion but to add to general level of speech – plurality of ideas/expression.

- dissent: the government aid is ultimately benefiting religion and there must be some justification aside from evenhandedness on the government's part.

*Good News Club*: Holding that an elementary school cannot exclude a religious group from using school facilities after school. Allowing it does not infringe on EC because gov. is neutral: allows both religious and non-religious groups, club meetings were after hours, not sponsored by school and open to anyone. Furthermore there is no coercion for students to participate in religious activities.

*Zelman*: Cleveland voucher program allows students to use vouchers to (1) pay for private school education at a secular or religious school; or (2) to pay tuition at community schools set up by the state as special charter schools; or (3) to attend a magnet school. Court upholds the law, saying there is no religious effect because there is no direct aid to the schools: it is going to the individual parents who are freely choosing where to send their kids. The law only incidentally benefits religion but this is attributable to the individual and not the gov.

- Indicates the degree of state support the court will tolerate, and gives the green light to voucher programs.
- Dissent: Almost all Cleveland schools are religious and 95% of students using vouchers are doing so in religious schools, so effect seems like it benefits religion. Options (2) and (3) above are not "meaningful" if vast majority of students end up going to religious schools. This money would otherwise be available to public schools; its effect is to lower the quality of public schools while increasing that of religious schools.

*Mitchell* (2000): Upholding statute providing funds for state education agencies to lend computers and books to nonpublic schools. Thomas says states can actively subsidize religious practices; they simply can't prefer one religion over another. They could even aid parochial schools directly provided they don't choose one particular religion.

- O'Connor concurrence: not all "neutrality" is ok. A gov. program giving direct aid to religious schools based on number of students attending will communicate message of endorsement if aid is used to inculcate. But gov. distributing aid directly to individual students who in turn decide to use it at religious schools is different.
- O'Connor says aid in Mitchell not ok because of what Thomas says but because (1) sufficient guarantees that it would not be diverted to religious uses; and (2) evidence of actual diversion was *de minimis*.

*Amos*: Mormon janitor refuses to sign pledge saying he doesn't smoke, drink, etc. Challenges law allowing religious organizations to discriminate in hiring employees for both secular and religious activities. Justice White says the

legislature's purpose was arguably secular – to allow religious orgs. to run their affairs without government having to interfere. The effect was not appearance of government endorsing religion, thus passing second prong. Because the statute is neutral we must apply rational basis test – and there is a rational basis for this decision.

- Brennan concurrence: this fails the effects test. Problem is that determining if an activity is religious or secular would require entanglement and we must avoid that.

*Texas Monthly* (1989): Striking down law granting an exemption from State sales tax to religious publications only. Court says it violates Establishment clause by aiding religious publications. It burdens nonbeneficiaries by increasing their taxes and it does not remove a State's imposed deterrent to free exercise.

- Scalia dissent: imposing tax on publications is unconstitutional (!?) and applies strict scrutiny (but next year in *Smith* applies rational basis to law of general application?)

*Kiryas Joel* (1994): Hasidic Jews petitioned NY to set up separate school district to incorporate their homes so they could go to specially-created state schools with special ed for their kids. Law challenged by a taxpayer as example of special benefit going to a particular religious group. Court said it violates the EC b/c leg. did not create a general law or framework, thus there was no way to know whether the leg would allow the same exception to a group of Amish.

- O'Connor concurrence: explains that it's a process failure – NY did not have generalized scheme
- Scalia dissent: the political process lead to the creation of this school district – the court should not intervene to un-do the outcome of democracy. If another religion wanted its own school district it could do the same thing these Jews did.

See notes pp. 1466-68

## **FREE EXERCISE CLAUSE and required accommodation of religious practices**

Arises when (1) government prohibits behavior required by your religion (e.g. polygamy) or (2) gov. requires conduct that your religion prohibits (e.g. getting a SSN) or (3) law burdens your religious observances (e.g. denies you unemployment for quitting your job for religious reasons)

### **Rational Basis Test:**

- If law is one **of general application**
- That is **neutral on its face**
- That **does not intentionally burden religious exercise**
  - e.g. not motivated to punish a particular group - *Smith, Goldman* (and deference to military)
  - BUT insidious motivation is not ok (*Hialeah*) – these must meet strict scrutiny
  - Hybrid claims might be subject to strict scrutiny
  - Under *Locke* avoiding entanglement is not intentional burden
  - Mere financial inconvenience/incidental effect is not such a burden!
- It is **constitutional if it is rational** (e.g. passes rational basis test – not wholly arbitrary or capricious)
  - Scalia – highly deferential to political process
  - Reasonableness test applies in context of prisons; Scalia seems to apply it in *Smith* (rational basis – is it not wholly unreasonable).
  - Congress tried to pass Religious Freedom Restoration Act requiring strict scrutiny of all free exercise claims but Court overturned it in *Boerne*. But this only applies to state govts.
  - Note: there should be no entanglement

**Strict scrutiny Test/Compelling interest:** High watermark; applied to (1) unemployment insurance or compulsory public education; (2) federal actions pursuant to RFRA; (3) to decisions concerning land use or affecting institutionalized persons under Religious Land Use and Institutionalized Persons Act. Threshold Q: is it a law that burdens religion?

- **There must be a compelling State interest** (the end must be necessary)
  - interest can be defined narrowly (compelling interest that the particular kids in *Yoder* go to school) or broadly (interest in preventing peyote consumption in general).
  - Blackmun dissent in *Smith*: interest cannot be abstract or symbolic; must look at gov's actual behavior
- **The means must be no less drastic than others available (look at person's interest)** (can it be achieved less drastically?)
  - requesting case-by-case exception rather than changing the whole law makes this easier to prove (Cf. *Braunfeld* and *Sherbert*) because less burden on State
  - higher standard of scrutiny for someone wholly reliant on gov program (*Sherbert*) than for someone simply burdened (*Braunfeld*)
  - indirect burden (e.g. merely financial - *Braunfeld*) is not as critical
  - Hybrid claims may be more compelling. Deprivation of associational rights or parental rights on top of religious beliefs = more drastic (*Sherbert*; *Yoder*). You can define these broadly (e.g. *Yoder*)
  - Non-neutral laws
  - taxation considered “essential” to achieve government interest (*Lee*)
  - you can always argue the laws is not narrowly tailored to accomplish what they want to – given the alternatives (but, you can say entanglement problems limit alternatives)
  - Interest in avoiding Establishment may not be enough (Thomas) or may be purely symbolic and not real threat. Ask whether reasonable observer would think it an establishment.

### **Args for allowing exercise:**

- First Amendment was enacted to protect the minority - it is even more compelling in such a pluralistic society - Strict scrutiny is appropriate b/c it reflects original intent of protecting minority (O'Connor concurrence in *Smith*). They have no way of taking it up with the legislature!

- Ways to get strict scrutiny: it's hybrid claim (livelihood, association, parental rights or other Constitutional violation), it's denying someone entire livelihood, the law is not neutral
- Denial of associational rights – e.g. going to church
- Hybrid claim denies some other right – e.g. parental right
- Livelihood is impacted – we are wholly reliant on being able to do this thing/get this benefit
- If it's just case-by-case exception and not invalidating entire law
- We don't want people debating religion in a public setting (which is why we need not take it up with the legislature, Scalia!)
- We are good god-fearing people!
- Characterize burden as direct or penalizing
- Paradox: court has generous view of gov. accommodation of religion under Establishment Clause but much less sensitive about protecting practice of religious worship under Free Exercise clause
- Narrowly define State interest (in stopping this particular thing)
- Broad definition of what constitutes religion
- You are forcing citizen to choose between her religious practice and your law/her financial livelihood
- Baseline: The State has made this thing generally available and should not penalize me for my religion

#### Args against allowing exercise:

- Deference to legislative process – take it up with them! (critique: how can the minority do that?)
- Doctrinal: history of our free exercise jurisprudence has never allowed you to get around the law. The cases where challenges have been upheld – e.g. *Yoder* – were all “hybrid claims” (*Smith*). Even under strict scrutiny we weren't upholding challenges – however you package it we've been saying no forever.
- Government should not be required to restructure its affairs simply to comport with your needs. The original intent of the clause was to protect you from government compulsion, not to tell gov. what to do
- You are bad non-Christian peyote smokers!
- Broadly define State interest (in upholding crim laws in general, etc.)
- Entanglement: gov. should not have to decide each time someone claims a religious exemption
- *Sherbert* scrutiny applies only to unemployment cases!
- Pluralism: precisely because we are such a pluralist society we cannot deem every little regulation presumptively invalid
- Freedom to believe is absolute but freedom to act must be limited
- Burden is only indirect
- Associational rights threatened in *Yoder* were the fundamental tenets of their beliefs – the manner of daily living, farming, etc. and denying them carried huge threat of undermining community. This is just a small burden in comparison.
- Floodgates/slippy slope: if we allow this exception what will people ask for next (e.g. Rastafarian military) (critique: purely speculative!)
- Economic: you're just trying to get more money
- Baseline: The government does not guarantee you the right to break the law. It's different than *Sherbert* where unemployment is given to everyone and she is penalized because of her religion.

**Braunfeld** (1961): Orthodox Jew opposing Sunday closing laws. Court says it's impracticable to make an exemption and the burden is not excessive – it is indirect and just makes his religious practice more expensive. Demonstrated that Court will tolerate huge burdens on individual religious beliefs.

- Cf. *McGowan*: State had secular (labor-related) purpose, therefore it passed establishment clause

*Sherbert* (1963): 7<sup>th</sup> day Adventist who cannot work on Saturdays is denied unemployment and sues. Court held that denial of benefits burdened her religion. Because there was no compelling State interest, Court ruled unconstitutional. “Strict scrutiny” test or “*Sherbert* balancing test.” High watermark; limited over time to unemployment and compulsory education cases.

- Here, the state interest (preventing unemployment fraud) is not so great.
- She is simply asking for case-by-case exception (not changing the whole law).

- She is wholly reliant on a government program (unlike *Braunfeld* who would just be burdened)
- Her associational rights – going to church – would be taken away (very important; would be best arg. for HCF)

*Yoder* (1972): Amish parents dispute compulsory education for their children; court says state interest in public education is not significant enough to burden their religion. Tiny exception for small minority does not affect state's overall interest in education. Furthermore we do not want state to interfere with parental rights. Finally cow-milking, farming, etc. part of the rubric court describes as their associational rights.

- critique: strict application of compelling gov. interest test would make law survive; court favoring these good God-fearing people seems like arbitrary bullshit; state is undermining children's chance to make independent choices (Douglas dissent)

**Smith**: American Indian denied unemployment because he was terminated for using peyote in connection with religious beliefs. Scalia says the FE clause does not exempt religious conduct from a general law of regulation. “Hybrid situation.” perhaps if religious practice implicated some other constitutional right (e.g. freedom of speech, parental right) we can talk – but ingestion of peyote is not a right. Furthermore, there is an entanglement problem – gov. should not have to decide each time someone comes forward and says they have a “religion” allowing them to do something. Finally, P can take this up with the legislature.

- O'Connor: we must still show compelling government interest
- Blackmun: state interest must be defined narrowly as interest in refusing to make an exception for ceremonial use of peyote. Interest cannot be abstract – the state has not even prosecuted p or anyone for using peyote, ever! \*practical approach\* You could also say the means are not narrowly tailored – e.g. these laws don't serve to keep high school kids away from drugs
- Critique: looks like *Sherbert* – about unemployment! But Scalia says it's not so he can avoid using *Sherbert* test (which he says is limited to unemployment). Also, compare *Zelman* and *Yoder*: are we privileging Christianity as the majority religion in America?
  - Most controversial decision in past 10-15 years; religious groups see it as affront to religion as it does not give it a “preferred position”

*Hialeah*: Court struck down law preventing cruelty to animals although it was written as one of general application, because it was passed entirely to prevent Santeria practices.

- example of Court being concerned and looking behind the lines

*Goldman* (1968): Upholding military policy preventing wearing of anything on your head (protested by Jew who wanted to wear yarmulke). It is not required accommodation to allow religious dress – this is a rule of general application and stands.

- court greatly deferential to uniformity/homogeneity in military

**Locke**: WA gives scholarship to every student who finishes in top ten percent of class. You can go to religious college but cannot take a vocational course to become a clergyman because the state would be subsidizing your religion. Rehnquist says it is not unreasonable for state to decide that in the furtherance of its own state constitution's interest it does not want to allow this. Establishment clause becomes the justification for something that is arguably a burden on free exercise.

- Scalia dissent: Intolerable burden on free exercise – this is a general program and he has met the requirements. The state has established a baseline – you can't deny him that benefit merely by virtue of his religion. Should be a mandatory accommodation.
- You can either view this as (1) state creating general program with exception that burdened religion or (2) that state has general rule of not aiding vocation training for ministers, and everyone else is entitled to support.

HCF suit: you can see it as (1) we have a general program of aiding all student orgs but we won't aid the ones that are exclusive of other religions (challenge: you should create an exception to avoid violating free exercise); or (2)

general policy of non-discrimination: we will fund orgs that fit into it (challenge: your general law prohibits my free exercise).

- Free Exercise: Just as in *Braunfeld*, where State struck down challenge to Sunday closing laws, here you are hurting the HCF by taking away some money, but not hurting their livelihood– they can still practice their religion. It’s not an intolerable burden on their religion.
- It can also be compared to *Amos* as an entanglement issue: how would we enforce the line-drawing is we made an exception for religious orgs? It would risk getting Hastings too involved if they had to evaluate sincerity of religious beliefs.
- Note: just giving funds is ok - as in *Rosenberger*, the organization is adding to the level of discourse at the school.

| <b>REQUIRED ACCOMODATION – Free Exercise</b><br>(compelling government interest/strict scrutiny)   | <b>NO ACCOMODATION REQUIRED – Free Exercise</b>   | <b>PERMITTED ACCOMODATION – Establishment Clause</b><br>( <i>Lemon</i> )<br>(must be * <u>broad</u> ; * <u>indirect</u> ; * <u>facially neutral</u> ; *and <u>no entanglement</u> )   | <b>PROHIBITED ACCOMODATION – Establishment Clause</b><br>( <i>Lemon</i> test)  |
|--|---|---|--|
| * <i>Sherbert</i> : State must show compelling interest to deny her unemployment<br>* <i>Yoder</i> : Must show compelling interest that those children got to school | * <i>Locke</i><br>* <i>Goldman</i> : not required to accommodate yarmulke wearing in military<br>* <i>Smith</i><br>* <i>Braunfeld</i> | * <i>Zelman</i> : State permitted to have vouchers when benefited to broad class and not directly to churches but indirectly to parents<br>* <i>Amos</i> : allowed rational basis<br>* <i>Marsh</i><br>* <i>Waltz</i><br>* <i>Lynch</i> | * <i>Weisman</i> : No accommodation of religion by allowing prayer<br>* <i>Santa Fe</i><br>* <i>Allegheny</i> : display of crèche prohibited<br>* <i>Lemon</i><br>* <i>Lee</i><br>* <i>Texas Monthly</i><br>* <i>Kiryas Joel</i> |

**STATE ACTION AND PRIVATE POWER**

**RULE: Action is considered State action:**

- **Where state has delegated to private entity a function traditionally reserved to the state** OR
- **State has become entangled with private entity** OR
- **State has approved, encouraged or facilitated private conduct**
  - statutory authorization may not suffice (*Flagg Brothers*)
  - inaction may not suffice (*Deshaney*)
  - enforcement of racial covenant may suffice (*Shelley*)

**Theories of State Action**

- **Government Actors**
  - Private corporations established by gov (e.g. Sally Mae, Amtrak but not Olympic Comm.)
- **Public Function**
  - *Marsh* – but not *Jackson*; has been somewhat narrowed in recent years
  - problem: private companies are now running States’ schools and prison systems. Are they private companies or subject to constitutional limitations?
- **Judicial enforcement**
  - *Shelley*: enforcement of racially restrictive covenant by court is State action (courts’ limit)
  - But not state action every time a court speaks – Cf. *Flagg*
- **Subsidies**
  - *Burton*:

- But not *Moose Lodge*:
- **Private acts integral to government**
  - Former organization of primaries as “private” so that black Americans in South could not vote; court held that Democratic party was acting under color of State law (hasn’t been expanded beyond primaries to stuff like banks)

Line between State action and private action is murky today. The trend is toward taking a narrower and narrower view of State action. Problem today is figuring out how to safeguard our liberties from private actors.

### **The problem of inaction and determining the baseline**

*Civil Rights Cases*: Court interpreted section 5 of 14<sup>th</sup> Amendment, which gives Congress power to enforce the Amendment through legislation. As a result Congress enacted law forbidding enforcement of black codes (laws intended to retain racial caste system and re-create slavery). Court held that section 5 was never intended to give Congress power to prohibit discrimination by private parties – it can only prohibit the State from discriminating. Private discrimination is permissible (you can tell AAs they can’t come in your private store)

- baseline: blacks and whites are equal now and we can’t “prefer” blacks by outlawing discrimination
- Original intent: It is obvious that the framers had no intention to allow private discrimination when they wrote the amendment. Thus the court had dramatically narrowed the scope of the 14<sup>th</sup> Amendment

*Shelley*: Racial covenant allowing exclusion of AAs in neighborhood. AA was going to buy house, white neighbor sues to enjoin this. State court enjoined sale of property to AA. SC’s opinion is radical example of activism: says judicial enforcement of private racially restrictive covenant is state action – it is state using its force to make parties behave the way they think they should be.

- Court looks at the disparate impact in the actual application of the rule – court may judge the rule by its ACTUAL EFFECTS
- High watermark – not the norm in state action cases. Only followed in the context of racially restrictive covenants. Court allowed enforcement of non-neutral-in-effect discrimination laws in restaurants despite sit-ins – this was seen as private action.
- Defies idea that C/L is some natural, immutable norm: it is part of state action, so we treat it as subject to equal protection clause (Cf. *Lucas*). Radically realist opinion de-naturalizes C/L – says C/L itself is infused with state action. When you make a contract enforceable it is enforceable only because the state says so.

*Morrison*: (1) Congress does not have power under commerce clause to enact violence against women act b/c not economic activity and b/c you can’t aggregate the effects. Claim (2) was that under the 14<sup>th</sup> Amendment, section 5, Congress was trying to remedy State failure to provide adequate remedy against gender-based violence.

- On second issue court held there was no “congruence and proportionality” because the remedy was against a private person and not against the State. They should have created a remedy against the State for allowing this to happen.

*Flagg Brothers* (1978): NY UCC authorizes warehouses to execute lien against property when they are not paid. The P had been evicted, sheriff put her property in a warehouse, and she refused to pay it. Warehouse wanted to sell her stuff; P said State is acting by taking her property without due process. Rehnquist says warehouse decides whether to execute lien, so it’s them acting and not the State.

- *Lucas* says bundle of rights are defined by common law and statute can’t just change them; but here you have conservatives saying that statute defines your property rights
- critique: State can avoid state action by authorizing private individuals to do what it itself cannot do. But State does this often now – authorizes private companies to run prisons, schools, hospitals. Can they just wash their hands then?
- Ripeness argument: FN 11: we don’t know yet what the state has done or not done – perhaps if they had issued an injunction or given damages then there might be something on which to predicate state action (Paul doesn’t think this is genuine)

- Consequences: If you say that the case above is state action, it could mean that: (1) P can go to court, enjoin Flagg from selling her property, and then have a hearing to ensure her due process rights (e.g. they are subject to same limitations state would be) AND (2) she has a cause of action against the state for any damage to her property

*Deshaney*: Child assigned to care of abusive father was ultimately brain damages; State protective services knew all along that he was being beaten. Brought as DP case. Rehnquist says that it was private action, not State action.

Failure to act does not necessarily trigger state action or a violation of the due process or equal protection clauses – notion of clear distinction between action and inaction. (Cf. *Miller*)

- Brennan dissent: The State did act! They put him in custody of father, required him to remain there, and did nothing in response to complaints to social workers. The State’s scheme gave the false notion of protection for the child (problem: if social worker has to take kid from parent every time they receive a complaint, will they be sued by parents for taking away their kids)
- Blackmun dissent: pulls back the curtain – points to interpretive role of judges as function of “making law.” It’s bullshit for court to be so formalistic when it can be compassionate. Court’s role is to “open up the process.” Expands counter-majoritarian power to the court’s “moral” responsibility to change or re-interpret the law.

*Burton*: DE parking facility has storefronts built into it to make cash; policy of Eagle coffee shop is to serve whites only. P sues Parking Authority

- public property: piece of land belonging to the town
- arguably there is a subsidy to Eagle: but for this building they would be paying more rent somewhere else, or they would pay the same rent and would not have that location
- city is profiting from Eagle’s business – taxing the public to benefit a group not open to the entire public
- the state’s omission, not requiring them to keep their doors open to everyone, constituted State action.

*Moose Lodge*: Challenge to policy of not serving AAs; lodge licensed by State board, without which it cannot conduct its business. Court says even though state is acting as a public regulatory agency and handing out a license it’s not state action– cf. *Burton* which is forbidden even though it looks like a private function!

- problem: the State is also acting to prevent anyone from opening a bar that serves AAs b/c there is a limited number of licenses. There is a scarcity of resources and state is handing them to a private all-white club.

*Jackson*: An electric company need not accord you due process in discontinuing your service.

*Marsh*: Company-owned town in AL is private property but includes residences of company employees. Jehovah’s witness ignores policy prohibiting door-to-door solicitation and is arrested; challenges her freedom of speech and religion. Court says town assumes a public function and is therefore obligated to perform under same types of constitutional limitations that would be imposed on any municipality.

*SF Arts & Athletics*: Olympic Committee sues the gay Olympics for using the word “Olympic” because they own the exclusive license to it. Court says they are not part of gov. even though chartered by Congress, regulated by fed. law and partially federally funded.