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ABOUT THE AUTHOR

As a student at Harvard Law School, Steve Emanuel wrote concise outlines for his courses and sold them in the law school dining hall to his fellow students. His outlines were such an immediate hit that soon after graduation, Steve quit the practice of law and started his own company to publish the *Emanuel® Law Outlines* series and other study-aid series he helped write.

For more than 40 years, Steve's full-time job has been to update the *Emanuel® Law Outlines*—and other study aids he's written or published, like the *Law in a Flash* series—to reflect changes in the law, in casebooks, and on topics tested in bar exams. **Over 2 million copies** of study aids written by Steve have been sold. Steve is a retired member of the New York, Connecticut, Maryland, and Virginia bars, and has passed the California bar.

ABOUT THE BOOK—TOOLS TO SUCCEED

- The ***Capsule Summary*** provides a quick reference summary of the key concepts covered in the full Outline
- The **detailed course Outline with black letter principles** supplements your casebook reading throughout the semester and gives structure to your own outline
- The ***Quiz Yourself* feature** includes a series of short-answer questions and sample answers to help you test your knowledge of the chapter's content
- ***Exam Tips*** alert you to issues and commonly used fact patterns found on exams
- The ***Casebook Correlation Chart*** correlates each section in the Outline with the pages covering that topic in the major casebooks

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Coverage of key 2020-2021 Supreme Court developments, including:

- ***Cedar Point Nursery v. Hassid***, where the Court held that if government requires a landowner to submit to a ***physical occupation***, that occupation will be ***compensable*** under the ***Takings Clause***, even if the occupation is a ***temporary*** and/or ***intermittent*** one.
- ***Mahanoy Area School District v. B.L.***, where the Court held that when a ***public-high-school student*** expresses herself ***off-campus*** (and not as part of a school-sponsored activity), the school's ***First Amendment authority*** to ***regulate*** that expression will usually be ***weaker*** than where the speech occurs *on*-campus.
- ***Americans for Prosperity Foundation v. Bonta***, where the Court held that when government requires a group to ***disclose who its members are***, the disclosure scheme will be subjected to ***"exacting scrutiny"*** under the First Amendment, so that government will have to prove that the disclosure requirement was ***"narrowly tailored"*** to the achievement of an important governmental interest.
- ***Fulton v. City of Philadelphia*** and ***Tandon v. Newsom***, two ***free-exercise-of-religion*** cases in which the Court held that that if government ***grants exemptions*** from a law to those pursuing some ***secular*** activity, government's refusal to grant a similar exemption to one pursuing a comparable ***religious*** activity is likely to ***prevent*** the law from being a ***"generally applicable"*** one, in which case the refusal will be ***strictly scrutinized*** and probably struck down.

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10051838-0005

ISBN 978-1-5438-4738-3

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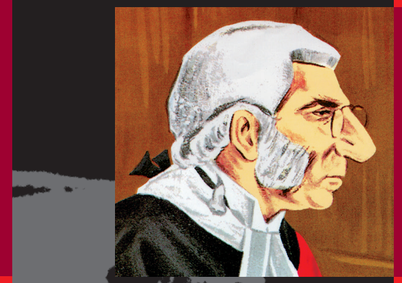
Constitutional Law

Thirty-Ninth Edition



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Constitutional Law

Thirty-Ninth Edition

Steven L. Emanuel

ASPEN PUBLISHING

CONSTITUTIONAL LAW

THIRTY-NINTH EDITION

STEVEN L. EMANUEL

Founder & Editor-in-Chief, *Emanuel Law Outlines* and
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The *Emanuel*® *Law Outlines* Series

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Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-4738-3

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Dedication

To Jeffrey Howard Emanuel,

No longer even close to being
the littlest Emanuel

Abbreviations Used in Text

CASEBOOKS

Chemerinsky Csbk (6e) — Erwin Chemerinsky, *Constitutional Law* Casebook (Wolters Kluwer, 6th Ed. 2020)

L,K,&C — Lockhart, Kamisar, Choper, Shiffrin & Fallon, *Constitutional Law — Cases, Comments, Questions* (West Publ., 8th Ed., 1996)

S,S,S,T&K — Stone, Seidman, Sunstein, Tushnet & Karlan, *Constitutional Law* (Wolters Kluwer, 8th Ed., 2018)

Sullivan & Gunther — Kathleen Sullivan & Gerald Gunther, *Constitutional Law* (West Academic, 19th Ed., 2016). (Where earlier editions are referenced, the edition number is indicated.)

HORNBOOKS AND OTHER AUTHORITIES

Chemerinsky Hnbk (6e) — Erwin Chemerinsky, *Constitutional Law: Principles and Policies* Treatise (Wolters Kluwer, 6th Ed. 2019)

Chemerinsky Hnbk (5e) — Erwin Chemerinsky, *Constitutional Law: Principles and Policies* Treatise (Wolters Kluwer, 5th Ed. 2017)

Ely — John Ely, *Democracy and Distrust* (Harvard Univ. Press, 1980)

Engdahl — David Engdahl, *Constitutional Power: Federal and State* (West Publ., Nutshell Series, 1974)

N&R — Nowak & Rotunda, *Constitutional Law* (West Publ., 5th Ed., 1995)

Schwartz — Bernard Schwartz, *Constitutional Law: A Textbook* (MacMillan Publ., 2nd Ed., 1979)

Tribe — Lawrence Tribe, *American Constitutional Law* (Foundation Press, 2nd Ed., 1988)

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Preface

Thank you for buying this book.

This new edition includes full coverage of the Supreme Court's term that ended in July 2021, the first term after Justice Barrett replaced the late Justice Ginsburg. The edition features extensive coverage of several major Supreme Court decisions from that term, including:

- ***Cedar Point Nursery v. Hassid***, a ***Takings Clause*** case in which the Court held that if government requires a landowner to submit to a ***physical occupation***, that occupation will normally be a ***compensable*** taking, even if the occupation is a ***temporary*** and/or ***intermittent*** one.
- ***Mahanoy Area School District v. B.L.,*** a ***free-speech*** case in which the Court held that when a ***public-high-school student*** expresses herself ***off-campus*** (and not as part of a school-sponsored activity), school authorities have a ***weaker interest*** in regulating that speech than where the speech occurs *on*-campus.
- ***Americans for Prosperity Foundation v. Bonta,*** a ***freedom-of-association*** case in which the Court held that when government requires a group to ***disclose who its members are***, the disclosure scheme will be subjected to ***"exacting scrutiny,"*** under which government will have the burden of proving that the disclosure requirement was ***"narrowly tailored"*** to the achievement of an important governmental interest.
- Two ***free-exercise-of-religion*** cases posing the issue of when a law is a ***"generally-applicable"*** one, and thus one from which government need not ***give an exemption*** to those claiming that requiring them to obey the law would infringe their religious beliefs. The two cases — ***Fulton v. City of Philadelphia*** and ***Tandon v. Newsom*** — show that if government grants exemptions from a law to those pursuing some ***secular*** activity, government's refusal to grant a similar exemption to one pursuing a comparable ***religious*** activity is likely to make the law ***not*** a "generally applicable" one, in which case the refusal will be ***strictly scrutinized*** and probably struck down.

Here are some of this book's special features:

- **"Casebook Correlation Chart"** — This chart, located just after this Preface, correlates each section of the main Outline with the pages covering the same topic in the four leading Constitutional Law casebooks.
- **"Capsule Summary"** — This is a 128-page summary of the key concepts of Constitutional Law, specially designed for use in the last week or so before your final exam.
- **"Quiz Yourself"** — Either at the end of the chapter or after major sections of a chapter I give you short-answer questions so that you can exercise your analytical muscles. There are over 100 of these questions, each written by me.
- **"Exam Tips"** — These alert you to the issues that repeatedly pop up on actual Constitutional Law exams, and to the fact patterns commonly used to test those issues. I created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You'd be surprised at how predictable the issues and fact patterns chosen by professors really are!

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:

1. The book seems (and is) *big*. But don't panic. The actual text includes over 75 pages of *Quiz Yourself* short-answer questions and answers, plus lots of *Exam Tips*. Anyway, you don't have to read everything in the book — there are lots of special features that you may or may not decide to take advantage of.

2. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel®*.

3. If you make your own outline for the course, use the *Emanuel®* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel®* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel®*.

4. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you about one day.

5. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. You can find these quickly by looking for *Quiz Yourself* entries in the Table of Contents. When you do these questions: (1) record your short "answer" on the small blank line provided after the question, but also: (2) try to write out a "mini essay" on a separate piece of paper or on your computer. Remember that the only way to get good at writing essays is to write essays.

6. Three or four days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step **5**, so that you use the Tips to help you spot the issues in the short-answer questions. You'll also probably want to follow up from many of the Tips to the main Outline's discussion of the topic.

7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your thinking and writing juices flowing, and (2) re-scan the *Exam Tips* (spending about 2-3 hours).

My deepest thanks go to my editorial colleagues, Barbara Lasoff and Barbara Roth, who have helped greatly to assure the quality of this edition. Warm thanks also to the excellent publishing team at Aspen Publishing, Nicole Pinard, Joe Terry and Natalie Danner, who have been highly supportive of the *Emanuel Law Outlines, CrunchTime* and *Law in a Flash* series that I've created.

Good luck in your ConLaw course. If you'd like any other Aspen publication, you can find it at your bookstore or at **www.AspenPublishing.com**. If you'd like to contact me, you can email me at **semanuel@westnet.com**.

Steve Emanuel

Larchmont NY

November 2021

CASEBOOK CORRELATION CHART

(**Note:** general sections of the outline are omitted from this chart. **NC** = not directly covered by this casebook.)

Emanuel's Constitutional Law Outline *(by chapter and section heading)*	Feldman & Sullivan **Constitutional Law** (20th ed. 2019)	Stone, Seidman, Sunstein, Tushnet & Karlan **Constitutional Law** (8th ed. 2018)	Varat, Amar & Caminker **Constitutional Law** (16th ed. 2021)	Chemerinsky, **Constitutional Law** (6th ed. 2020)
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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1

INTRODUCTION

I. THREE STANDARDS OF REVIEW

A. Three standards: There are three key ***standards of review*** which reappear constantly throughout Constitutional Law. When a court reviews the constitutionality of government action, it is likely to be choosing from among one of these three standards of review: (1) the ***mere-rationality*** standard; (2) the ***strict scrutiny*** standard; and (3) the ***middle-level review*** standard. [2]

1. Mere-rationality standard: Of the three standards, the easiest one to satisfy is the ***"mere-rationality"*** standard. When the court applies this "mere-rationality" standard, the court will ***uphold*** the governmental action so long as two requirements are met:

a. Legitimate state objective: First, the government must be pursuing a ***legitimate governmental objective***. This is a very broad concept — practically any type of health, safety or "general welfare" goal will be found to be "legitimate."

b. Rational relation: Second, there has to be a ***"minimally rational relation"*** between the means chosen by the government and the state objective. This requirement, too, is extremely easy to satisfy: only if the government has acted in a completely ***"arbitrary and irrational"*** way will this rational link between means and end not be found.

2. Strict scrutiny: At the other end of the spectrum, the standard that is hardest to satisfy is the ***"strict scrutiny"*** standard of review. This standard will only be satisfied if the governmental act satisfies two very tough requirements:

a. Compelling objective: First, the ***objective*** being pursued by the government must be ***"compelling"*** (not just "legitimate," as for the "mere-rationality" standard); and

b. Necessary means: Second, the ***means*** chosen by the government must be ***"necessary"*** to achieve that compelling end. In other words, the "fit" between the means and the end must be extremely tight. (It's not enough that there's a "rational relation" between the means and the end, which is enough under the "mere-rationality" standard.)

i. No less restrictive alternatives: In practice, this requirement that the means be "necessary" means that there must not be any ***less restrictive*** means that would accomplish the government's objective just as well.

3. Middle-level review: In between these two review standards is so-called ***"middle-level"*** review.

a. "Important" objective: Here, the governmental objective has to be ***"important"*** (half way between "legitimate" and "compelling").

b. "Substantially related" means: And, the means chosen by the government must be ***"substantially related"*** to the important government objective. (This "substantially related" standard is half way between "rationally related" and "necessary").

B. Consequences of choice: The court's choice of one of these standards of review has two important consequences: [2]

1. Burden of persuasion: First, the choice will make a big difference as to who has the ***burden of persuasion***.

a. Mere-rationality standard: Where the governmental action is subject to the "mere-rationality" standard, the ***individual*** who is attacking the government action will generally bear the burden of persuading the court that the action is unconstitutional.

b. Strict scrutiny: By contrast, if the court applies "strict scrutiny," then the ***governmental body*** whose act is being attacked has the burden of persuading the court that its action is constitutional.

c. Middle-level review: Where "middle level" scrutiny is used, it's not certain how the court will assign the burden of persuasion, but the burden will usually be placed on the government.

2. Effect on outcome: Second, the choice of review standard has a very powerful effect on the ***actual outcome***. Where the "mere-rationality" standard is applied, the governmental action will ***almost always be upheld***. Where "strict scrutiny" is used, the governmental action will ***almost always be struck down***. (For instance, the Supreme Court applies strict scrutiny to any classification based on race, and has upheld only one such strictly scrutinized racial classification in the last 50 years.) Where middle-level scrutiny is used, there's roughly a 50-50 chance that the governmental action will be struck down.

a. Exam Tip: So when you're writing an exam answer, you've got to concentrate exceptionally hard on choosing the correct standard of review. Once you've determined that a particular standard would be applied, then you might as well go further and make a prediction about the outcome: if you've decided that "mere-rationality" review applies, you might write something like, "Therefore, the court will almost certainly uphold the governmental action." If you've chosen strict scrutiny, you should write something like, "Therefore, the governmental action is very likely to be struck down."

C. When used: Here is a quick overview of the entire body of Constitutional Law, to see where each of these review standards gets used: [3]

1. Mere-rationality standard: Here are the main places where the "mere-rationality" standard gets applied (and therefore, the places where it's very hard for the person attacking the governmental action to get it struck down on constitutional grounds):

a. Dormant Commerce Clause: First, the "mere-rationality" test is the main test to determine whether a state regulation that affects interstate commerce violates the ***"dormant Commerce Clause."*** The state regulation has to pursue a legitimate state end, and be rationally related to that end. (But there's a second test which we'll review in greater detail later: the state's interest in enforcing its regulation must also outweigh any ***burden*** imposed on interstate commerce, and any discrimination against interstate commerce.)

b. Substantive due process: Next comes ***substantive due process***. So long as no "fundamental right" is affected, the test for determining whether a governmental act violates substantive due process is, again, the "mere-rationality" standard. In other words, if the state is pursuing a legitimate objective, and using means that are rationally related to that objective, the state will not be found to have violated the substantive Due Process Clause. So the vast bulk of ***eco-***

nomic regulations (since these don't affect fundamental rights) will be tested by the mere-rationality standard and almost certainly upheld.

c. Equal protection: Then, we move on to the ***equal protection*** area. Here, "mere-rationality" review is used so long as: (1) ***no suspect*** or ***quasi-suspect classification*** is being used; and (2) ***no fundamental right*** is being impaired. This still leaves us with a large number of classifications which will be judged based on the mere-rationality standard, including: (1) almost all economic regulations; (2) some classifications based on alienage; and (3) rights that are not "fundamental" even though they are very important, such as food, housing, and free public education. In all of these areas, the classification will be reviewed under the "mere-rationality" standard, and will therefore almost certainly be upheld.

d. Contracts Clause: Lastly, we find "mere-rationality" review in some aspects of the ***"Obligation of Contracts"*** Clause.

2. Strict scrutiny: Here are the various contexts in which the court applies ***strict scrutiny***: [4]

a. Substantive due process/fundamental rights: First, where a governmental action affects ***fundamental rights***, and the plaintiff claims that his ***substantive due process*** rights are being violated, the court will use strict scrutiny. So when the state impairs rights falling in the ***"privacy"*** cluster of marriage, child-bearing, and child-rearing, the court will use strict scrutiny (and will therefore probably invalidate the governmental restriction). For instance, government restrictions that impair the right to use contraceptives receive this kind of strict scrutiny.

b. Equal protection review: Next, the court uses strict scrutiny to review a claim that a classification violates the plaintiff's ***equal protection*** rights, if the classification relates either to a ***suspect classification*** or a ***fundamental right***. "Suspect classifications" include ***race***, ***national origin***, and (sometimes) ***alienage***. "Fundamental rights" for this purpose include the right to ***vote***, to be a ***candidate***, to have access to the ***courts***, and to ***travel interstate***. So classifications that either involve any of these suspect classifications or impair any of these fundamental rights will be strictly scrutinized and will probably be struck down.

c. Freedom of expression: Next, we move to the area of ***freedom of expression***. If the government is impairing free expression in a ***content-based way***, then the court will use strict scrutiny and will almost certainly strike down the regulation. In other words, if the government is restricting some speech but not others, based on the ***content of the messages***, then this suppression of expression will only be allowed if necessary to achieve a compelling purpose (a standard which is rarely found to be satisfied in the First Amendment area). Similarly, any interference with the right of ***free association*** will be strictly scrutinized.

d. Freedom of religion/Free Exercise Clause: Lastly, the court will use strict scrutiny to evaluate any impairment with a person's ***free exercise*** of religion. Even if the government does ***not intend*** to impair a person's free exercise of his religion, if it substantially burdens his exercise of religion the government will have to give him an ***exemption*** from the otherwise-applicable regulation unless denial of an exemption is necessary to achieve a compelling governmental interest.

3. Middle-level review: Finally, here are the relatively small number of contexts in which the court uses middle-level review: [4]

a. Equal protection/semi-suspect: First, middle-level review will be used to judge an ***equal protection*** claim, where the classification being challenged involves a ***semi-suspect*** trait. The two traits which are considered semi-suspect for this purpose are: (1) ***gender***; and (2) ***illegitimacy***. So any government classification based on gender or illegitimacy will have to be "substantially related" to the achievement of some "important" governmental interest.

b. Contracts Clause: Second, certain conduct attacked under the Obligation of Contracts Clause will be judged by the middle-level standard of review.

c. Free expression/non-content-based: Finally, in the First Amendment area we use a standard similar (though not identical) to the middle-level review standard to judge government action that impairs expression, but does so in a ***non-content-based*** manner. This is true, for instance, of any content-neutral ***"time, place and manner"*** regulation.

CHAPTER 2

THE SUPREME COURT'S AUTHORITY AND THE FEDERAL JUDICIAL POWER

I. THE SUPREME COURT'S AUTHORITY AND THE FEDERAL JUDICIAL POWER

A. ***Marbury*** principle: Under *Marbury v. Madison*, it is the Supreme Court, not Congress, which has the authority and duty to declare a congressional statute unconstitutional if the Court thinks it violates the Constitution. [5-7]

B. Supreme Court review of state court decision: The Supreme Court may review state court opinions, but only to the extent that the decision was decided ***based on federal law.*** [7-10]

1. "Independent and adequate state grounds": Even if there is a federal question in the state court case, the Supreme Court may not review the case if there is an "***independent and adequate***" state ground for the state court's decision. That is, if the same result would be reached even had the state court made a different decision on the federal question, the Supreme Court may not decide the case. This is because its opinion would in effect be an "advisory" one. [8]

a. Violations of state and federal constitutions: If a state action violates the ***same clause*** of both state and federal constitutions (e.g., the Equal Protection Clause of each), the state court decision may or may not be based on an "independent" state ground. If the state court is saying, "This state action would violate our state constitution whether or not it violated the federal constitution," that's "independent." But if the state court is saying, "Based on our reading of the constitutional provision (which we think has the same meaning under both the state and federal constitutions), this state action violates both constitutions," this is ***not*** "independent," so the Supreme Court may review the state court decision. [9]

2. Review limited to decisions of highest state court: Federal statutes limit Supreme Court review to decisions of the ***highest state court available***. But this does not mean that the top-ranking state court must have ruled on the ***merits*** of the case in order for the Supreme Court to review it. All that is required is that the case be heard by the highest state court ***available*** to the petitioner, which might be an intermediate appellate court.

C. Federal judicial power: Article III, Section 2 sets out the federal judicial power. This includes, among other things: (a) cases arising under the ***Constitution*** or the ***"laws of the U.S."*** (i.e., cases posing a "federal question"); (b) cases of ***admiralty***; (c) cases between ***two or more states***; (d) cases between ***citizens of different states***; and (e) cases between a state or its citizens and a ***foreign country or foreign citizen***. Note that this does ***not*** include cases where both parties are citizens (i.e., residents) of the same state, and no federal question is raised. [10]

II. CONGRESS' CONTROL OF FEDERAL JUDICIAL POWER

A. Congress' power to decide: ***Congress*** has the general power to ***decide what types of cases the***

Supreme Court may hear, so long as it doesn't expand the Supreme Court's jurisdiction beyond the federal judicial power (as listed in the prior paragraph). [*Ex parte McCardle*] [10-12]

B. Lower courts: Congress also may decide what ***lower federal courts*** there should be, and what cases they may hear. Again, the outer bound of this power is that Congress can't allow the federal courts to hear a case that is not within the federal judicial power. [12]

> **Example 1:** Congress may cut back the jurisdiction of the lower federal courts pretty much whenever and however it wishes. Thus Congress could constitutionally eliminate diversity jurisdiction (i.e., suits between citizens of different states), even though such suits are clearly listed in the Constitution as being within the federal judicial power.
>
> **Example 2:** But Congress could not give the lower federal courts jurisdiction over cases between two citizens of the same state, where no federal issue is posed. The handling of such a case by the federal courts would simply go beyond the federal judicial power as recited in the Constitution.

CHAPTER 3

FEDERALISM AND FEDERAL POWER GENERALLY

I. THE CONCEPT OF FEDERALISM

A. The federalist system: We have a ***"federalist"*** system. In other words, the national government and the state governments co-exist. Therefore, you always have to watch whether some power being asserted by the federal government is in fact allowed under the Constitution, and you must also watch whether some power asserted by the states is limited in favor of federal power. [15]

B. Federal government has limited powers: The most important principle in this whole area is that the federal government is one of ***limited, enumerated powers***. In other words, the three federal branches (Congress, the executive branch, and the federal courts) can only assert powers ***specifically granted*** to them by the United States Constitution. (This is very different from what our Constitution says about the powers of ***state*** governments: state governments can do whatever they want as far as the U.S. Constitution is concerned, unless what they are doing is ***expressly forbidden*** by the Constitution.) [15]

1. No general police power: The most dramatic illustration of this state/federal difference is the general ***"police power."*** Each state has a general police power, i.e., the ability to regulate solely on the basis that the regulation would enhance the welfare of the citizenry. But there is ***no general federal police power***, i.e., no right of the federal government to regulate for the health, safety or general welfare of the citizenry. Instead, each act of federal legislation or regulation must come within one of the very specific, enumerated powers (e.g., the Commerce Clause, the power to tax and spend, etc.).

a. Tax and spend for general welfare: Congress *does* have the right to "lay and collect taxes … to pay the debts and provide for the … general welfare of the United States. … " (Article I, Section 8.) But the phrase "provide for the … general welfare" in this sentence modifies "lay and collect taxes … to pay the debts. … " In other words, the power to tax and spend is subject to the requirement that the general welfare be served; there is no ***independent*** federal power to provide for the general welfare.

C. "Necessary and Proper" Clause: In addition to the very specific powers given to Congress by the Constitution, Congress is given the power to "make all laws which shall be ***necessary and proper*** for carrying into execution" the specific powers.

1. **Rational-relation test:** The "Necessary and Proper" Clause is easy for Congress to satisfy: if Congress is seeking an ***objective*** that is within the specifically enumerated powers, then Congress can use ***any means*** that is: (1) ***rationally related*** to the objective Congress is trying to achieve; and (2) is not specifically forbidden by the Constitution. [17]
   a. **Broad reading given to Clause:** Congress gives a very ***broad and deferential reading*** to Congress' powers under the Clause. [19]

D. Can't violate specific constitutional provision: Even where congressional action appears to fall within a specific grant of power, the federal action may not, of course, violate some ***other*** specific constitutional guarantee. In other words, congressional (or other federal) action must satisfy ***two*** tests to be constitutional: (1) it must fall within some specific grant of power under the Constitution; and (2) it must not violate any specific constitutional provision. [16]

CHAPTERS 4, 5 AND 8

POWERS OF THE FEDERAL GOVERNMENT; THE SEPARATION OF POWERS

CAPSULE SUMMARY

I. POWERS OF THE THREE FEDERAL BRANCHES

A. Powers of the three branches: Here is a summary of the powers of the ***three branches*** of the federal government:

1. **Congress:** Here are the main powers given to Congress [16]:
   a. **Interstate commerce:** Congress has the power to ***regulate interstate commerce***, as well as foreign commerce.
   b. **Taxing and spending:** Congress has the power to ***tax*** and the power to ***spend***.
   c. **DC:** Congress can regulate the ***District of Columbia***.
   d. **Federal property:** Congress has power to regulate and dispose of ***federal property.***
   e. **War and defense:** Congress can ***declare war***, and can establish and fund the armed forces.
   f. **Enforcement of Civil War amendments:** Congress can ***enforce*** the ***post-Civil War amendments***. (For instance, under its power to enforce the Thirteenth Amendment's abolition of slavery, Congress can ban even private intrastate non-commercial conduct.)
2. **President:** Here are the main powers of the President:
   a. **Execution of laws:** The President holds the ***"executive power."*** That is, he ***carries out*** the laws made by Congress. It is his obligation to make sure the laws are "faithfully executed."
   b. **Commander in Chief:** He is ***Commander in Chief*** of the armed forces. So he directs and leads our armed forces (but he cannot declare war — only Congress can do this).
   c. **Treaty and foreign affairs:** The President can make ***treaties*** with foreign nations (but only if two-thirds of the Senate approves). He appoints ***ambassadors.*** Also, he effectively controls our ***foreign policy*** — some of this power over foreign policy stems from his right to appoint ambassadors, but much is simply ***implied*** from the nation's need to speak with a single voice in foreign affairs (so that congressional involvement in the details of foreign affairs will generally not be appropriate).
   d. **Appointment of federal officers:** The President appoints all ***federal officers***. These include ***cabinet members***, ***federal judges*** and ***ambassadors***. (But the Senate must approve all such

federal officers by majority vote.) As to "***inferior*** [federal] officers," it's up to Congress to decide whether these should be appointed by the President, by the Judicial Branch, or by the "heads of departments" (i.e., cabinet members). (But Congress can't make these lower-level appointments itself; it may merely decide who *can* make these appointments.)

e. Pardons: The President can issue ***pardons***, but only for federal offenses. (Also, he can't pardon anyone who has been impeached and convicted.)

f. Veto: The President may ***veto*** any law passed by both houses (though this veto may be ***overridden*** by a 2-3's majority of each house). If the President doesn't veto the bill within 10 days after receiving it, it becomes law (unless Congress has adjourned by the 10th day after it sent him the bill — this is the so-called "pocket veto").

3. Judiciary: The federal ***judiciary*** may decide "cases" or "controversies" that fall within the federal judicial power. See the section on "Federal Judicial Power" in the chapter called "The Supreme Court's Authority and the Federal Judicial Power," above.

II. THE FEDERAL COMMERCE POWER

A. Summary: Probably Congress' most important power is the power to "***regulate Commerce*** … among the several states." (Art. I, §8.) This is the "Commerce power." [21]

> **Exam Tip:** Any time you have a test question in which Congress is doing something, first ask yourself, "Can what Congress is doing be justified as an exercise of the commerce power?" Most of the time the answer will be "yes."

B. Summary of modern view: There seem to be ***four broad categories*** of activities which Congress can constitutionally regulate under the Commerce power:

1. Channels: First, Congress can regulate the use of the ***"channels"*** of interstate commerce. Thus Congress can regulate in a way that is reasonably related to highways, waterways, and air traffic. Presumably Congress can do so even though the activity in question in the particular case is completely intrastate. [45]

2. Instrumentalities: Second, Congress can regulate the ***"instrumentalities"*** of interstate commerce, even though the particular activities being regulated are completely intrastate. This category refers to people, machines, and other "things" used in carrying out commerce. [45]

> **Example:** Probably Congress could say that every truck must have a specific safety device, even if the particular truck in question was made and used exclusively within a single state.

3. Articles moving in interstate commerce: Third, Congress can regulate ***articles moving*** in interstate commerce. [45]

> **Example:** The states and private parties keep information about the identities of drivers. Since this information gets exchanged across state lines (e.g., from states to companies that want to sell cars), the information is an article in interstate commerce and Congress may regulate how it's used. [*Reno v. Condon*]

4. "Substantially affecting" commerce: Finally, the biggest (and most interesting) category is that Congress may regulate those activities having a "***substantial effect"*** on interstate commerce. [*U.S. v. Lopez*] As to this category, the following rules now seem to apply: [45]

a. Activity is commercial: If the activity itself is arguably ***"commercial,"*** then it doesn't seem to matter whether the ***particular instance*** of the activity directly affects interstate commerce, as long as the instance is part of a general class of activities that, ***collectively***, substantially affect interstate commerce. So even purely intrastate activities can be regulated if they're

directly "commercial." This is especially true where Congress regulates the intrastate commercial activities as part of a ***broad scheme*** to regulate interstate commerce in the same activity. [45]

Example: In the federal Controlled Substances Act (CSA), Congress outlaws all distribution and possession of marijuana. California then makes it legal under state law for a Californian to cultivate marijuana for her own personal medicinal use. The U.S. seeks to prevent P, a Californian, from taking advantage of this state-law loophole. P asserts that the application of the CSA to bar P from personally cultivating marijuana for her own personal medical use is beyond Congress' Commerce powers.

Held, Congress' Commerce powers extend to this regulation of P's own cultivation and use. Marijuana is a commercial commodity, and the CSA is regulating interstate commerce in that commodity. Congress reasonably feared that if it exempted personal — and thus "intrastate" — cultivation and use of marijuana for medical purposes, some of the marijuana so cultivated would be illegally drawn into the interstate market, jeopardizing Congress' overall scheme of banning the drug. So the private cultivation of marijuana by people like P, even though purely an intrastate activity, falls within Congress' Commerce power. [*Gonzales v. Raich*] [35]

b. Activity is not commercial: But if the activity itself is ***not "commercial,"*** then there will apparently have to be a ***pretty obvious connection*** between the activity and interstate commerce. [46]

Example 1: Congress makes it a federal crime to possess a firearm in or near a school. The act applies even if the particular gun never moved in (or affected) interstate commerce. *Held*, in enacting this statute Congress went beyond its Commerce power. To fall within the Commerce power, the activity being regulated must have a "substantial effect" on interstate commerce. The link between gun-possession in a school and interstate commerce is too tenuous to qualify as a "substantial effect," because if it did, there would be essentially no limit to Congress' Commerce power. [*U.S. v. Lopez*]

Example 2: Congress says that any woman who is the victim of a violent gender-based crime may bring a civil suit against the perpetrator in federal court. *Held*, Congress went beyond its Commerce power. Although it may be true that some women's fear of gender-based violence dissuades them from working or traveling interstate, gender-based violence is not itself a commercial activity, and the connection between gender-based violence and interstate commerce is too attenuated for the violence to have a "substantial effect" on commerce. [*U.S. v. Morrison*]

i. Jurisdictional hook: But where the congressional act applies only to particular activities each of which has a direct link to interstate commerce, then the act will probably be within the Commerce power. Thus the use of a ***"jurisdictional hook"*** will probably suffice. (*Example*: Suppose the statute in *Lopez* by its terms applied only to in-school gun possession if the ***particular gun had previously moved in interstate commerce.*** This would be enough of a connection to interstate commerce to qualify.) [45]

c. Little deference to Congress: The Court ***won't*** give much ***deference*** (as it used to) to the fact that Congress ***believed*** that the activity has the requisite "substantial effect" on interstate commerce. The Court will basically decide this issue for itself, from scratch. It certainly will no longer be enough that Congress had a ***"rational basis"*** for believing that the requisite effect existed — the effect must *in fact* exist to the Court's own independent satisfaction. [*Lopez*] [46]

d. Traditional domain of states: If what's being regulated is an activity the regulation of which has ***traditionally*** been the ***domain of the states***, and as to which the states have expertise, the Court is less likely to find that Congress is acting within its Commerce power. Thus ***education***, ***family law*** and ***general criminal law*** are areas where the court is likely to be especially suspicious of congressional "interference." [46]

e. Forcing someone to buy or sell a product: Congress may not use its Commerce powers to require that a person ***not presently in the marketplace*** for a particular type of product to ***buy that product***. That's true even if many individuals' combined failure to purchase the product significantly affects interstate commerce in the product. [***Nat'l Fed. of Indep. Bus. v. Sebelius*** (2012)] [37]

i. Health insurance: So, for instance, Congress can't use its Commerce powers to require otherwise-uninsured citizens to ***purchase health insurance*** or pay a penalty, even though the uninsureds' failure to have insurance has a substantial effect on the interstate health-insurance market by making everyone else's insurance costs higher. [*N.F.I.B. v. Sebelius*, *supra*]

Example: Congress, in an attempt to greatly broaden the availability of health-care insurance, enacts the 2010 Affordable Care Act ("ACA"). Under the ACA, Congress imposes an "individual mandate," under which most uninsured individuals are required to buy a specified level of health insurance or else make a "shared-responsibility payment" to the Internal Revenue Service, which the ACA refers to as a "penalty." (The payment to the IRS is typically much less than the cost of qualifying insurance.) In Congress' view, the individual mandate and the shared-responsibility payment system fall within the Commerce power, because these measures are simply a means of regulating how and when people will pay (via insurance) for a product (health care) that they would inevitably consume even without regulation. Twenty-six states claim that the mandate goes beyond the Commerce power.

Held, 5-4, for the state plaintiffs on this point: the individual mandate is not authorized by the Commerce power. The Commerce Clause allows Congress to regulate ***"existing commercial activity."*** But it does not allow Congress to "compel[] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." Allowing Congress to regulate based on the effect of *inaction* on commerce "would bring countless decisions an individual could potentially make within the scope of federal regulation[.]" For instance, many Americans do not eat a balanced diet, and therefore become obese. Obese people have higher health costs, which are borne in part by other Americans. Under Congress' theory, therefore, "Congress could address the diet problem by ordering everyone to buy vegetables." But giving Congress the power to "regulate what we do not do [would] fundamentally chang[e] the relation between the citizen and the Federal Government," in a way the drafters of the Commerce power never intended. [*N.F.I.B. v. Sebelius, supra*] [37]

Note: But by a different 5-4 majority, the Court in *N.F.I.B.* sustained the individual mandate as an exercise of Congress ***taxing*** power. See *infra*, p. C-11.

C. The Tenth Amendment as a limit on Congress' power: The ***Tenth Amendment*** provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." This Amendment today seems to place a small but possibly significant limit on Congress' ability to use its commerce power to ***regulate the states***. [46-52]

1. Generally-applicable law: If Congress passes a ***generally applicable law***, the fact that the regulation ***affects the states*** has virtually no practical significance, and the Tenth Amendment never

comes into play. If the regulation would be valid if applied to a private party, it is also valid as to the state. [48]

> **Example:** Congress passes minimum-wage and overtime provisions, which are made applicable to all businesses of a certain size. The statute contains no exemption for employees of state-owned mass transit systems. *Held*, the regulation even of state employees here is a constitutional exercise of the commerce power, and is not forbidden by the Tenth Amendment. [*Garcia v. San Antonio Metropolitan Transit Authority*]

2. **Use of state's law-making mechanisms:** But the Tenth Amendment ***does*** prevent Congress from interfering in certain ways with a state's ***law-making processes***. Congress may not simply "***commandeer*** the legislative processes of the states by directly ***compelling them to enact and enforce a federal regulatory program."*** [*New York v. United States*] [48-52] This is the ***"anti-commandeering"*** principle.

> **Example:** Congress provides that each state must arrange for the disposal of toxic waste generated within its borders, or else be deemed to "take title" to the waste and thereby become liable for tort damages stemming from it. *Held*, the congressional scheme violates the Tenth Amendment's anti-commandeering principle. That is, Congress may not force a state to enact or enforce a federal regulatory program, and this is in effect what Congress has tried to do here. *New York v. United States, supra.*

   a. **Administrative actions:** Similarly, the anti-commandeering principle forbids Congress to compel a state or local government's ***executive branch*** to perform functions, even ones that are easy-to-do and involve no discretion.

      Example: Congress can't order local sheriffs to perform background checks on applicants for handgun permits. [*Printz v. U.S.*] [50]

   b. **Can't order state to refrain from legislating:** Just as the anti-commandeering principle prevents Congress from forcing states to act *affirmatively* by enacting or enforcing laws (see *N.Y. v. U.S.* and *Printz v. U.S. supra*), so that principle bars Congress from ordering a state ***not*** to legislate. For instance, Congress ***may not prohibit a state from repealing an existing law.*** [*Murphy v. NCAA*] (2018)] [51]

III. THE TAXING AND SPENDING POWERS

A. Taxing power: Congress has the power to "***lay and collect taxes***." (Art. I, §8.) This is an independent source of congressional power, so it can be used to reach conduct that might be beyond the other sources of congressional power, like the Commerce Clause. [57]

1. **Regulation:** Congress can probably ***regulate*** under the guise of taxing, so long as there's some real revenue produced. [58-62]

2. **Limits on taxing power:** There are a few ***limits*** which the Constitution places upon the taxing power:

   a. **Direct taxes:** "Direct taxes" must be allocated among the states in proportion to population. This provision is of little practical importance today.

   b. **Customs duties and excise taxes must be uniform:** All ***customs duties*** and ***excise taxes*** must be ***uniform*** throughout the United States. (*Example:* Congress may not place a $.10 per-gallon federal excise tax on gasoline sales that take place in New Jersey, and a $.15 per-gallon tax on those that take place in Oklahoma.) [58]

   c. **No export taxes:** Congress may not tax any ***exports*** from any state. (*Example:* Congress may not place a tax on all computers which are exported from any state to foreign countries.) [58]

3. **Effect of calling a measure a "penalty":** The fact that Congress labels a measure as a ***"penalty"*** does ***not*** prevent the measure from being upheld as a valid tax, as long as the measure actually functions in a way that resembles a tax. [*N.F.I.B. v. Sebelius* (2012)] [59]

   Example: As described *supra*, C-9, in the 2010 Affordable Care Act ("ACA"), Congress requires most individuals to purchase health insurance (this requirement being called the "individual mandate"). If a covered person doesn't make the required insurance purchase, she must pay the IRS at tax-filing time a ***"shared-responsibility payment,"*** a payment that the Act repeatedly characterizes as a *"penalty"* rather than as a tax. If a person doesn't make the shared-responsibility payment, the IRS can use some of its standard tax-collection methods, but cannot bring a *criminal prosecution*.

   Held, by a 5-4 vote, the individual mandate and shared-responsibility payment scheme is a valid exercise of Congress' taxing power. If a federal statute would be unconstitutional unless found to be a valid tax, the Court will treat it as a tax as long as that interpretation is a "fairly possible" one. The process here "yields the essential feature of any tax: it ***produces at least some revenue*** for the Government." And the fact that Congress called this a "penalty" rather than a "tax" is not dispositive, because the Court will look at the reality of how the scheme operates, not the label used by Congress. Here, the payment to the IRS would typically be far less than the price of insurance, making it look more like a tax (which a rational person might voluntarily choose to pay instead of buying insurance) than a penalty for unlawful conduct. [*N.F.I.B. v. Sebelius*, *supra*] [59]

B. Spending power: Congress also has the power to "pay the debts and provide for the common defense and general welfare of the United States." (Art. I, §8.) This is the "***spending***" power. [62]

1. **Independent power:** This is an independent power, just like the Commerce power. So Congress could spend to achieve a purely local benefit, even one that it couldn't achieve by regulating under the Commerce power.

2. **Use of conditions:** Congress may generally place ***conditions*** upon use of its spending power, even if the congressional purpose is in effect to regulate. Conditions placed upon the doling out of federal funds are usually justified under the "Necessary and Proper" Clause (which lets Congress use any means to seek an objective falling within the specifically-enumerated powers, as long as the means is rationally related to the objective, and is not specifically forbidden by the Constitution). [62]

   Example: Suppose Congress makes available to the states certain funds that are to be used for improving the states' highway systems. Congress provides, however, a state will lose 5% of these funds unless the state passes a statute imposing a speed limit of no higher than 55 mph on all state roads. Even without reference to the Commerce Clause, this is a valid use of congressional power. That's because by the combination of the spending power and the "Necessary and Proper" Clause, Congress is permitted to impose conditions (even ones motivated solely by regulatory objectives) on the use of federal funds. [*South Dakota v. Dole*] [63]

   a. **Conditions can't amount to "coercion":** But there is a ***limit*** to how much pressure Congress can bring to bear on the states when it sets conditions on a new program that relies on the spending power. Pressure that amounts to ***"coercion"*** will cause the new program to go beyond the spending power.

      i. **Loss of pre-existing federal funding:** So far, this "coercion" problem has arisen only where Congress tells the states that if they don't agree to participate in a new federally-funded program, they will lose ***major federal funding*** associated with an independent ***pre-existing program***. In this situation, the Court will ask whether Congress has left the states "***no real option but to acquiesce"*** in the new program and its conditions. If the answer is

"yes," the Court will conclude that Congress has coerced the states, and that this coercion ***goes beyond the scope of Congress' spending power.*** (Only one case — set forth in the following Example — has found that Congress used such unconstitutional coercion.)

Example: Every state has for decades participated in Medicaid, a federal-state program under which the states provide health care for certain classes of poor people, and Congress pays most of the costs. In the 2010 Affordable Care Act (ACA), Congress dramatically expands the Medicaid program by means of the "Medicaid Expansion." Under the Medicaid Expansion, each participating state must now give Medicaid coverage to ***every adult under 65*** with income up to 133% of the federal poverty level (whereas far fewer people have been covered by most states under the pre-Expansion version of Medicaid). Congress promises to pay all or nearly all of the costs (depending on the year) of the Expansion. If a state declines to participate in the Expansion, it will lose ***all*** Medicaid funding, not just the "extra" funding to cover the newly-eligible recipients. Twenty-six states claim that the threatened loss of all existing Medicaid funding is so coercive that the Medicaid Expansion goes beyond Congress' spending power.

Held (by a 7-2 vote), for the plaintiff states. Congress is entitled to impose conditions on the use of money it provides to states. But the Court will give closer scrutiny to those situations in which Congress, in connection with ***one*** federally-financed program, imposes conditions that take the form of threats to terminate a state's participation in ***another*** significant federally-funded program. Here, Congress has held "a gun to the head" of the states: a state that rejects the Medicaid Expansion (essentially a new program) will lose all funding for "old" Medicaid, typically over 10% of the state's overall budget. This is "economic dragooning that leaves the states with ***no real option but to acquiesce"*** in the Medicaid Expansion. Such compulsion goes beyond Congress' spending power.[1] [*N.F.I.B. v. Sebelius* (2012)] (other aspects of which are discussed *supra*, C-9 and C-11). [63]

C. "General Welfare" Clause: Although, as noted above, Congress can "provide for the common defense and general welfare of the United States," the reference to "general welfare" does ***not*** confer any independent source of congressional power. In other words, no statute is valid solely because Congress is trying to bring about the "general welfare." Instead, the phrase "for the general welfare" describes the circumstances under which Congress may use its "taxing and spending" power. So if Congress is ***regulating*** (rather than taxing and spending), it must find a specific grant of power (like the Commerce Clause), and it's not enough that the regulation will promote the general welfare. [62]

CAPSULE SUMMARY

IV. THE SEPARATION OF POWERS

A. Separation of powers generally: Let's now review some of the major practical consequences that come from the fact that each federal branch gets its own set of powers. These practical consequences are collectively referred to as ***"separation of powers"*** problems. [112-119]

B. Limits on Congress's delegation of law-making power to the executive branch: An important category of separation-of-powers problems involves the boundary between ***Congress's*** core power (the power to ***legislate***, i.e., to "make the laws") and the core power of the ***President*** and the executive branch (the power to "execute" the laws, i.e., to carry them out). And within this category, the most important issue concerns the limits on the Congress's power to ***delegate to the President*** (and to the ***executive branch*** that the President controls) ***Congress's law-making powers.*** [116-118]

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1. But the Court held that the rest of the ACA could be ***severed*** from the unconstitutional condition. So each state got to choose whether to participate in the Medicaid Expansion, or instead just keep its pre-existing Medicaid rights and funding. [67]

1. **Grant of "legislative powers" to Congress:** Recall that ***all the "legislative powers"*** of the federal government are entrusted by the Constitution solely to ***Congress***. Art. I, § 1.

2. **President and agencies can't "make the laws":** This exclusive grant of lawmaking power to Congress means that the ***President cannot make the laws*** — all he or she can do is to ***carry out the laws*** made by Congress. And the grant means that the many ***federal agencies and commissions*** that are part of the executive branch similarly cannot make laws — they can only administer Congress-made laws. [116]

   a. **Rise of federal agencies:** But during the last century or so, Congress has increasingly ***delegated*** its law-making powers to these administrative agencies and commissions. Congress has done this by giving the agencies the power to promulgate ***administrative "rules"*** that have the ***force of law.*** [116]

      i. **Rationale:** Why has Congress done this? Because, as the Supreme Court has put it, "[I]n our increasingly complex society, ... Congress ***simply cannot do its job*** absent an ability to ***delegate power under broad general directives."*** *Mistretta v. U.S.* (1989). [117]

3. **Possibility of "excessive delegation":** Given that only Congress can "make" laws, it's easy to imagine a situation in which Congress so completely delegates to an executive-branch agency or commission the authority to make "rules" that are like "laws" that the Supreme Court would find a violation of separation-of-powers principles.

   a. ***Schechter Poultry* case:** Very occasionally (and not recently), the Supreme Court has held that Congress has, indeed, ***excessively, and unconstitutionally, delegated too much authority*** to the executive branch without giving that branch adequate guidance about how to use the authority. But the last time the Court so held was in *Schechter Poultry Corp. v. U.S.* (1935) [117]

4. **Modern "intelligible principle" standard:** The Court's test for measuring whether a delegation is constitutional is in theory the so-called ***"intelligible principle" test***, which says that delegation is constitutional if, but only if, Congress has ***supplied an "intelligible principle"*** to guide the person or agency to whom Congress has delegated rule-making authority. [118]

   a. **Never found to be violated:** But in the many post-1935 cases in which the Supreme Court has heard challenges to congressional statutes delegating legislative power to federal agencies, the Court has ***never once struck down a statute*** as an unconstitutional delegation. All delegations, including those ***without any meaningful criteria,*** have been upheld. [*Gundy v. U.S.* (2019)] [117-118]

C. Limits on the powers of the President: Let's concentrate now on several aspects of how the Constitution's separation-of-powers principles ***limit the powers of the President***.

1. **President can't make the laws:** As we just saw in the special context of delegation of rule-making power by Congress to the President, a key separation-of-powers principle is that the ***President cannot make the laws***. All he or she can do is to ***carry out the laws*** made by Congress. [112]

   Example: During the Korean War, Pres. Truman wants to avert a strike in the nation's steel mills. He therefore issues an "executive order" directing the Secretary of Commerce to seize the mills and operate them under federal direction. The President does not ask Congress to approve the seizure. *Held*, the seizure order is an unconstitutional exercise of the lawmaking authority reserved to Congress. [*Youngstown Sheet & Tube v. Sawyer*]

2. **Line Item Veto:** The principle that the President can't make the laws means that the President can't be given a ***"line item veto."*** That is, if Congress tries to give the President the right to veto individual portions of a statute (e.g., particular expenditures), this will violate the Presentment Clause. (The Presentment Clause says that bills are enacted into law by being passed by both

Houses, then being presented to the President and signed by him.) [*Clinton v. City of New York*] [114]

3. **Congress' acquiescence:** But the scope of the President's powers may be at least somewhat expanded by ***Congress' acquiescence*** to his exercise of the power. This congressional acquiescence will never be ***dispositive***, but in a close case, the fact that Congress acquiesced in the President's conduct may be enough to tip the balance, and to convince the Court that the President is merely carrying out the laws rather than making them. [113]

4. **Implied powers:** Recall that Congress' powers are somewhat expanded by the "Necessary & Proper" clause — Congress can pass any laws reasonably related to the exercise of any enumerated power. There's no comparable "Necessary & Proper" clause for the President. But the effect is the same, because of the inherent vagueness of the phrase "shall take care that the laws be faithfully executed..." The Constitution does specifically enumerate some of the President's powers (e.g., the pardon power, the commander-in-chief power, etc.), but this specific list is not supposed to be exclusive. Instead of giving a complete list of the President's powers (as is done for Congress), the Constitution gives the President this general "executive" or "law carrying out" power.

   a. **Consequence:** Consequently, so long as the President's act seems reasonably related to carrying out the laws made by Congress, the Court won't strike that act merely because it doesn't fall within any narrow, enumerated Presidential power. (*Example:* Nothing in the Constitution expressly gives the President prosecutorial discretion [the power to decide whom to prosecute], yet he clearly has this power, because it's part of the broader job of "carrying out the law.")

5. **War powers:** Separation-of-powers issues often arise when the President's ***war-related powers*** are at stake.

   a. **Can't declare war:** The President is the Commander-in-Chief of the armed forces. But ***only Congress, not the President, can declare war.*** The President can commit our armed forces to repel a sudden attack, but he cannot fight a long-term engagement without a congressional declaration of war. [121]

6. **Treaties and executive agreements:** As noted, the President has the power to enter into a ***treaty*** with foreign nations, but only if two-thirds of the Senate approves. Additionally, the Court has held that the Constitution implicitly gives the President, as an adjunct of his foreign affairs power, the right to enter into an ***"executive agreement"*** with a foreign nation, without first getting express congressional consent. [68]

D. National security and the entry of foreigners into the U.S.: The President and Congress (together, the "political branches") — ***not*** the judiciary — have the principal role in matters of ***national security and the entry of foreigners into the U.S.*** Therefore, the courts will show ***extreme deference*** to the political branches' judgment in these matters. Thus the courts will usually apply easy-to-satisfy ***"mere-rationality"*** standard to review the constitutionality of any federal statute or executive order in these areas, even though the courts would likely use heightened scrutiny to review a similar measure in the *domestic* arena.

1. **Sustained despite evidence of religious bias:** Thus even if the President's statements in support of limits on the entry of foreign nationals from certain countries indicate that the President is acting largely out of ***bias towards a particular religious group,*** the Court will apparently sustain the measure so long as it's ***rationally related to the achievement of a national security interest.***

   Example: President Trump issues a "Proclamation" (a type of executive order) greatly restricting entry to the U.S. by citizens of eight countries, most of which are majority-Muslim (e.g., Iran, Iraq, Libya, and Syria). There is evidence that this "travel ban" was motivated in part by the President's bias against foreigners who are Muslim.

Held (by a 5-4 vote), the ban does not violate any provision of the Constitution, and is therefore valid. The admission and exclusion of foreign nationals is "largely immune from judicial control." The Court will therefore apply an easy-to-satisfy "rational basis review" to the travel ban, under which the ban will be upheld so long as it is "plausibly related to the Government's stated objective." Since the travel ban plausibly advances the government's stated interest in protecting the country against the entry of foreign nationals who may be terrorists, the Court will uphold the ban even though there may also be evidence that the ban was motivated in part by religious bias. [*Trump v. Hawaii*] [124-126]

E. Appointment of executive personnel: The President, not Congress, is given the power to ***appoint federal executive officers***. This is the ***"Appointments" Clause.*** [126-135]

1. Text of Clause: If we ignore the Clause's treatment of the power to make treaties, here's how the Clause reads:

> [The President] ... shall **[1]** ***nominate***, and by and with the ***Advice and Consent of the Senate***, shall ***appoint Ambassadors***, other ***public Ministers*** and Consuls, ***Judges*** of the supreme Court, and ***all other Officers of the United States***, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but **[2]** ***the Congress may by Law*** vest the ***Appointment of such inferior Officers***, as they think proper, in ***the President alone, in the Courts of Law, or in the Heads of Departments.***

(I have added the "[1]" and "[2]" markers, so that in our discussions below I can refer separately to each of these two main provisions.) [126]

2. Summary of the Clause: As we'll see in more detail below (in Pars. 4 and 6), the Appointments Clause is interpreted to ***create two different classes*** of "federal officers":

- **Top-level ("principal") officers:** Under what I've marked above as prong [1] of the Clause, ***top-level*** "officers of the United States" are ***appointed by the President***, ***subject to Senate approval***; and
- **Inferior officers:** Under prong [2] of the Clause, "***inferior***" officers are to be appointed by ***whichever group*** (the President, the Judicial Branch or the "Heads of Departments") ***Congress specifies***. [126]

3. Congress can't appoint federal officers: A major consequence of the Appointments Clause is that ***Congress may not appoint "federal officers***," whether the officer is a "principal" one or an "inferior" one. See Par. 7 below.

4. Distinguishing between "principal" and "inferior" officers: We'll discuss the dividing line between "principal" and "inferior" officers in greater detail in Par. 6 below.

a. Two categories: But for now, here's a high-level overview of how the two categories are defined:

i. Who are "principal" officers: "***Principal***" officers of the U.S. are people who ***have no boss*** except for the President. ***Members of the Cabinet, heads*** of ***federal agencies,*** federal ***judges,*** and ***ambassadors*** are the main examples of principal federal officers.

ii. Who are "inferior" officers: All officers who are *not* "principal" officers of the U.S. are automatically "***inferior***" officers. Therefore, any officer who ***has a boss other than the President*** is an inferior officer. People ***who work in federal agencies*** but who are not the head of the agency are typically inferior officers, if they are officers at all. (As to the dividing line between "officers" and non-officers, see Par. 8 below.) [127]

b. How the two types differ: A key reason why it's important to determine whether any given federal officer is a "principal" one or instead an "inferior" one is that the Appointments Clause makes the process for ***appointing*** the two types of officers dramatically different:

i. Appointing "principal" (top-level) officers: In the case of ***"principal***" officers of the United States (i.e., ***top-level*** officers), the ***President nominates a candidate***. But the Appointments Clause says that the nomination cannot take effect until the Senate has given its ***"Advice and Consent"*** (i.e., has "***confirmed***") the nomination. That approval must be by an ***ordinary majority*** of those Senators voting. [127]

(1) Congress relatively powerless: An important aspect of this system for appointing principal officers is that Congress ***may not take away or limit*** the President's power to appoint (i.e., nominate) a principal officer.

ii. Appointing "inferior" (lower-level) officers: But Congress *does* have the right to circumscribe the President's power to appoint "***inferior***" federal officers. The Appointments Clause specifies several methods for making these appointments. The portion of the Clause marked as prong [2] in Par. 1 *supra* says that "Congress may by Law vest the Appointment of such ***inferior*** Officers, as they think proper, in the ***President alone***, in the ***Courts of Law***, or in the ***Heads of Departments***." For more about these methods, see Par. 5 immediately below. [127]

5. Appointing "inferior "officers: Here's a bit more detail about the various ways an ***inferior*** officer can be appointed, according to the Appointments Clause.

a. Limits on Congress: First, Congress has ***no*** power of its own to ***appoint inferior officers,*** at least those who are to work in the Executive or Judicial Branches. In other words, whereas the Senate can at least veto any Presidential appointment of a *principal* officer (by refusing to "Advise and Consent" to the appointment), neither the House nor Senate has the power to appoint (or to veto the appointment of) an *inferior* Executive Branch officer. [127]

b. Three possible appointers: But Congress *does* have a limited power to ***choose the class of persons who are to appoint*** any given type of inferior officer. This power comes from the final portion of the Appointments Clause:

> ". . . but Congress may by Law vest the Appointment of such ***inferior*** Officers, as they think proper, in the ***President alone***, in the ***Courts of Law***, or in the ***Heads of Departments***."

Thus Congress has the right to choose, on a position-by-position basis, to confer the power of appointment on ***any*** of the following groups (but *only* on those groups):

[1] the ***President***;

[2] members of the ***federal judiciary***; or

[3] the ***"heads of departments"*** (e.g., Cabinet members). [128]

Example 1: Congress creates the post of Deputy Secretary of State, and says that the person occupying this post must be appointed by the Secretary of State. There is no constitutional problem with this statute, since (1) the Secretary of State is a Cabinet member and is thus automatically a "Head of Department"; and (2) the Deputy Secretary is an "inferior" federal officer, who Congress may therefore say (by authority of the final portion of the Appointments Clause) is to be appointed by the head of the department in which the Deputy will serve. [128]

Example 2: Congress creates the post of *Assistant* Deputy Secretary of State, and specifies that the power to appoint a person to hold this post shall be held by the Deputy Secretary of State. This statute *is* a violation of the final portion of the Appointments Clause, assuming that

the post is senior enough that the person who holds it exercises "significant authority."[2] Although Congress can limit the President's power to make appointment of an inferior federal officer, Congress must give this appointment power to one of the following: the President, members of the federal judiciary, or a "Head of Department" (typically, a Cabinet member). The Deputy Secretary of State does not fall into any of these three categories, so Congress can't constitutionally grant her the power to appoint an inferior federal officer. [128]

6. **Dividing line between "principal" and "inferior" officers in more detail:** As we saw earlier, a "principal" officer of the U.S. is one who ***has no "boss" except the President***; and any officer of the U.S. who has a boss other than the President is an "inferior" officer. But what exactly is the definition of a ***"boss"*** for these purposes? The Supreme Court has never given a precise definition that can be applied to all scenarios involving those who supervise U.S. Executive-Branch officers.

   a. **"Administrative law judges" (the *Arthrex* case):** But there *is* one category of Executive-Branch officer as to which the Supreme Court *has* had occasion to analyze this "who is a boss?" issue: so-called ***"administrative law judges,"*** who are employed by various federal agencies to conduct "hearings" in specialized federally-regulated areas like patent law and the military criminal-justice system. [128]

      i. **Summary of rule:** Here's the rule announced by the Supreme Court to determine whether a given administrative law judge has a "boss" for purposes of the Appointments Clause: In cases where an administrative law judge of some sort makes a decision following a "hearing," the officer is a ***"principal"*** officer (i.e., has no boss) if, and only if, the decision is ***"final"*** in the sense that it is ***not reviewable*** by any member of the Executive Branch. Conversely, if the decisions by an administrative law judge ***are reviewable/modifiable by an Executive Branch member,*** then the judge is an ***"inferior"*** officer (i.e., has a boss), and can therefore legally be appointed by the ***head of the "department"*** in which the judge works. [*U.S. v. Arthrex*] [130]

7. **No appointments by Congress:** As we've seen, a key aspect of the Appointments Clause is that ***Congress itself may not make any appointments*** of federal officials, whether "principal" or "inferior." The most it may do (and only in the case of inferior officers) is to prescribe the ***procedures*** by which the President, department heads or members of the Judicial Branch shall make appointments. These "procedures" may, however, include fairly detailed ***qualifications*** regarding ***age***, ***experience***, etc.

   a. **Supporting employees appointable by Congress:** On the other hand, Congress may ***make its own appointments*** of persons who ***will help Congress perform its "legislative" duties*** (as opposed to duties associated with the Executive or Judicial Branches). As the Supreme Court has put it, the Appointments Clause does not apply where Congress wants to designate people who will help Congress exercise "powers … essentially of an ***investigative and informative*** nature." *Buckley v. Valeo*, discussed *infra*, p. C-18. [130]

      Example: Suppose the Senate Banking Committee is considering reforming the nation's banking system. The Committee has the power to appoint staff members to investigate possible changes that Congress might make to that system. Because these staff members will be working on what's essentially a "legislative" matter, the Appointments Clause doesn't apply, so Congress may appoint whomever it wishes, with no participation from the Judicial or Executive Branches. [131]

2. See *infra*, p. C-18, Sub-Par. 8(b,) establishing "significant authority" as the standard for determining whether a person is an inferior federal officer at all, as opposed to a rank-and-file federal employee who is not even an inferior officer.

8. **Dividing line between "officer" and non-officer:** Let's now examine another dividing line, the one between all federal "***officers***" (whether principal or inferior) on the one hand, and all non-officer "***employees***" of the federal government on the other.

   a. **Why it matters:** Here's why this dividing line matters: ***Mere "employees"*** of the Executive Branch — i.e., workers who are ***not powerful enough to qualify as at least "inferior officers"*** — are ***not required*** to be appointed in compliance with the Appointments Clause at all. By contrast, "inferior officers" ***are*** required to be appointed in compliance with that Clause. Therefore, if an appointee is an "inferior officer of the U.S.," that person ***may not be appointed by a federal employee*** (or group of employees) who is *not* a Head of Department. [131]

   b. **"Significant authority" standard (*Buckley v. Valeo*):** So where is the ***dividing line*** between the least-powerful "***inferior officer***" and the most-powerful ***non-officer employee***? The Supreme Court has given the following limited, semi-cryptic, guidance: federal "officers" (as opposed to mere federal "employees") are persons who ***"exercise significant authority"*** under federal law. [*Buckley v. Valeo*] [131]

   c. **ALJs have "significant authority":** What, then, does ***"significant authority"*** *mean*? The one area in which the Supreme Court has discussed the detailed meaning of this phrase is that ***administrative law judges*** (ALJs) for the Securities and Exchange Commission (SEC) ***have*** such authority, and thus must be appointed by a Head of Department (which in the case of the SEC means by the Commission itself, not by Commission staff members). [*Lucia v. SEC*] [133]

   Example: The SEC brings civil charges against P for violating securities laws. The case is heard in a "hearing" by an ALJ, Judge Elliot, who was appointed by an SEC official rather than by majority vote of the Commissioners themselves. Each SEC ALJ is given a set of powers to use in hearings that is comparable to the powers of a federal trial judge (e.g., power to take testimony, to rule on motions and evidentiary objections, to make findings of fact, and to issue a proposed "opinion" that will resolve the case unless the full Commission votes to reject the opinion, something that rarely occurs). Elliot conducts the hearing and finds that P has broken SEC rules. P appeals, saying that Elliot exercised "significant authority," and therefore was not properly appointed to his ALJ post given that he wasn't appointed by the Commission itself.

   Held, for P: SEC ALJs like Judge Elliot, because they hold nearly all the tools of federal trial judges, have "substantial authority." Therefore, Judge Elliot was an "inferior officer" (not just a garden-variety SEC employee). As such, he needed to have been appointed by a "Head of Department" (i.e., by the whole Commission); without such an appointment his hearing of P's case was constitutionally invalid. [*Lucia v. SEC*, *supra*.] [132-133]

9. **President's Recess Appointments power:** If a ***vacancy*** in a post requiring Senate confirmation ***arises*** when ***Congress is not in session***, so that Congress is ***not available*** to confirm the President's choice of replacement, Art. II, §2, cl. 3 applies. That clause gives the President, ***acting alone***, the power "to ***fill up all Vacancies*** that may happen ***during the Recess of the Senate***, by granting Commissions which shall ***expire at the End of their next Session."*** This is the so-called "***Recess Appointments" Clause.*** [134]

   Example: Suppose the Secretary of State dies suddenly in early December of 2014, at a time when the old Congress has ended, and the new Congress hasn't yet been sworn in (which won't happen until early January, 2015). There is therefore no Senate in session that can "advise and consent" on any replacement nominee. The President may immediately after the prior Secretary's death use his Recess Appointments power to appoint a temporary Secretary,

who will serve even without Senate approval until the end of the *next* session of Congress (an end that will occur in December 2016).

a. Intra-session appointments: The Recess Appointment Clause's use of the phrase "the recess" includes not only the single long ***"inter-session"*** recess by the Senate (i.e., the one between the end of the first session in December of odd-numbered years and the start of the second in the following January), but also any ***"intra-session recess*** of substantial length." [*N.L.R.B. v. Noel Canning*] [134]

Example: The second session of Congress starts on Jan. 3, 2012. Congress goes on recess on Jan. 4. Even though this is an "intra-session" recess, if it lasts a "substantial length" of time (usually 10 days or more, as discussed below), the President may use his Recess Appointments power during that recess. [Cf. *Noel Canning*]

i. Minimum length: There is a ***minimum length*** that an intra-session recess must have in order to trigger the recess power, according to the Supreme Court: any recess of ***10 days or more is sufficiently long***, but any recess ***less than 10 days*** will be ***presumed to be too short*** to fall within the Clause. [*Noel Canning*] [134]

(1) Emergency: However, in a truly ***emergency*** situation ("a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response"), the Court may find that the presumption that a 10-day recess is the shortest allowable has been rebutted. [*Noel Canning*]

ii. Vacancy need not arise during the recess: A vacancy will still be deemed to "happen" during recess (so that it qualifies under the Clause) even though the prior occupant ***leaves the post while the Senate is still in session***, as long as the Senate has gone into recess by the time the President makes the new appointment. (That's what has happened historically in the vast majority of cases where the President has purported to exercise the recess power.) [*Noel Canning*]

F. Removal of federal officers: The power to ***remove*** federal officers similarly rests mainly with the ***President***.

1. General rule: The general rule (subject to exceptions discussed below) is that the President ***may remove*** any presidential or executive-branch appointee ***without cause***.

a. High-level ("principal") federal officers: Thus Congress may not limit in any way the President's right to remove a ***high-level*** ("principal") appointee with pure executive-branch powers, such as a ***Cabinet member*** or ***ambassador***. [141]

Example: The President may remove the Secretary of State)at any time, without cause. Congress may not limit this right by saying, for instance, "The President may remove the Secretary of State only for good cause." [142]

Note: But Congress has more power to limit the President's power to remove federal officers who head "***independent***" federal agencies possessing mostly judicial or legislative powers. See Par. 2, *infra*, C-20.

i. Lower-level ("inferior") officers: The above rule — that Congress may not prevent the President from removing without cause a presidential or executive-branch appointee having executive-branch powers — applies *only* to ***high-level*** ("principal") federal officers, not to lower-level ("inferior") ones. In the case of an ***"inferior"*** federal officer (i.e., one who ***has a boss***, such as someone who reports to the head of a cabinet department), Congress *may* say that the President or the executive branch may remove the officer — whether or not she heads an executive branch agency — only for cause. [141]

Example: Congress may say that an independent counsel who is to investigate possible executive-branch wrongdoing — an "inferior" executive officer — may only be removed by the executive branch for "good cause" or other inability to perform his duties. [*Morrison v. Olson*]) [141]

2. Quasi-legislative and quasi-judicial officers: The rule discussed in Par. 1 above — that Congress may not limit the President's right to remove, even without cause, a high-level presidential or executive-branch appointee with executive-branch powers — does ***not*** apply to appointees who ***head certain federal agencies*** that have a significant ***quasi-judicial*** or ***quasi-legislative*** role. Congress may ***limit*** or even completely ***block*** the President's right to removel such agency heads. [135]

a. "Independent" federal agencies: This special rule applies to the heads of so-called "***independent***" federal agencies, i.e., agencies that ***don't mainly carry out the President's policies*** (as, say, cabinet members do), but instead make significant rules governing the actions of ***persons outside the executive branch***, such as private citizens. It's important that these agencies be ***insulated from interference by the President.*** Therefore, the Court has held, Congress ***may*** under Article I limit the President from removing the heads of such agencies unless he has ***just cause*** for the firing. [136]

Example: Congress creates the Federal Trade Commission, an administrative agency whose function is to administer a federal statute designed to guard against certain types of unfair competition. Congress provides that Commissioners will be appointed for fixed terms by the President (with the advice and consent of the Senate), and that the President may remove a Commissioner before the expiration of his fixed term only for cause. The President (Franklin Roosevelt) contends that the statute improperly interferes with what he says is his constitutional right to remove a Commissioner even without cause.

Held, against the President. The FTC is an independent body designed to act quasi-legislatively and quasi-judicially; it is not part of the executive branch. To perform its functions properly, it must be free from executive-branch interference. Therefore, Congress was constitutionally entitled to maintain the Commission's independence by insisting that the President may remove a Commissioner only for cause. [*Humphrey's Executor v. U.S.*] [136]

i. Agencies with executive powers and one-member heads don't qualify: But this special rule illustrated by *Humphrey's Executor* — allowing Congress to prevent the President from removing the heads of "independent" agencies or commissions except for cause — applies ***only*** if the structure and powers of the agency or commission satisfy ***two stringent requirements:***

[1] First, the powers of the independent agency or commission ***must not include significant executive powers.*** Thus the agency's powers must be ***primarily legislative and/or judicial***, and must ***not involve a significant power to enforce existing laws***; and …

[2] Second, the agency or commission must be ***governed by a multi-member board*** rather than by a ***single director.***

[*Seila Law v. Consumer Fin. Prot. Bureau* (2020] [136]

ii. Two levels of protection not allowed: As we just saw in (i) above, the special rule that Congress may limit the President's power to prevent the President from removing the heads of "independent" agencies or commissions except for cause applies only if the body meets two stringent requirements. Furthermore, even if the agency or commission *does* meet these two requirements, there's yet *another* restriction on Congress' power to protect the body's leadership: Congress ***can't*** confer on the agency's leadership ***two levels*** of only-for-good-cause protection from Presidential or executive-branch removal. [140]

Example: Congress may say that the Chairman of the Federal Election Commission (an independent agency) may be removed by the President only for cause. But Congress ***may not*** then *also* say, "there shall be a Deputy FEC Commissioner, who may be removed by the Chairman only for cause." Such a provision would unduly limit the President's ability to discharge his power to appoint federal officers. [*Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*] [140]

3. **Impeachment:** Separately, Congress may directly remove any federal executive officer by ***impeachment***, a power discussed immediately below.

G. Impeachment: Congress can remove any "officer" of the U.S. (President, Vice President, Cabinet members, federal judges, etc.) by ***impeachment***. The House must vote by a ***majority*** to impeach (which is like an indictment). Then, the Senate conducts the trial; a two-thirds vote of the Senators present is required to convict. Conviction can be for treason, bribery, and other "high crimes and misdemeanors."

1. **Meaning of "high crimes and misdemeanors":** Probably only ***serious*** crimes, and ***serious*** non-criminal abuses of power, fall within the phrase "high crimes and misdemeanors." But the Supreme Court has never had occasion to determine this (and probably never will, since the Court has generally treated issues about impeachment as being non-justiciable political questions). [143]

H. Removal of federal judges: Federal ***judges*** cannot be removed by ***either*** Congress or the President. Article III provides that federal judges shall hold their office ***during "good behavior."*** This has been held to mean that so long as a judge does not act improperly, she may not be removed from office. The only way to remove a sitting federal judge is by formal ***impeachment*** proceedings, as noted above.

1. **Non-Article III judges:** However, the above "life tenure" rule applies only to garden-variety federal judges who hold their positions directly under ***Article III***. Congress is always free to establish what are essentially ***administrative*** judgeships, and as to these, lifetime tenure is not constitutionally required.

V. LEGISLATIVE AND EXECUTIVE IMMUNITY

A. Speech and Debate Clause: Members of Congress are given a quite broad ***immunity*** by the ***"Speech and Debate" Clause:*** "For any speech or debate in either house, [members of Congress] shall not be questioned in any other place." This clause shields members of Congress from: (1) civil or criminal suits relating to their legislative actions; and (2) grand jury investigations relating to those actions. [145]

B. Executive immunity: The Speech and Debate Clause has no counterpart in the Constitution giving any sort of immunity to members of the ***executive*** branch. However, as a common-law matter, the federal courts have recognized certain types of executive immunity.

1. **Judicial process, including subpoenas to produce documents:** The President and other members of the executive branch ***do not have general immunity*** from ***judicial process***, such as ***subpoenas to produce documents.***

   a. **Federal-court subpoenas:** Thus, Presidents do not have general or absolute immunity from subpoenas ***issued by federal courts.***

      Example: During Watergate, the Watergate Special Prosecutor secures a federal-court subpoena directing Pres. Nixon to produce tape recordings of Oval Office meetings. Nixon moves to quash the subpoena, claiming that the Constitution provides an absolute privilege of confidentiality to all presidential communications. *Held* (unanimously), claim rejected: Presidents are subject to subpoenas issued by federal courts. [*U.S. v. Nixon.*] [145]

b. State-court subpoenas: The same rule applies to subpoenas issued in state-court proceedings: the President ***does not have absolute immunity from state-court subpoenas.***

Example: The office of the New York State district attorney for Manhattan begins a grand jury investigation of whether business transactions by various individuals linked to a sitting President, Donald Trump, have violated state law. The grand jury serves a subpoena *duces tecum* on Trump's personal accounting firm, directing it to produce financial records relating to Trump and his businesses, starting before Trump ran for office. Trump sues to quash the subpoena, arguing that a sitting President should have absolute immunity from subpoenas issued as part of state criminal proceedings, because forcing a President to comply with such subpoenas will allow state officials to harass the President, and will inevitably divert him from performance of his constitutionally-mandated duties.

Held (7-2), the President's claim of absolute immunity is ***rejected***. Any danger of harassment posed by state-grand-jury subpoenas can be eliminated by enforcing existing rules prohibiting grand juries from engaging in "arbitrary fishing expeditions" or from initiating investigations out of "malice or an intent to harm." Furthermore, a state grand jury subpoena seeking a President's private papers is ***not*** required to satisfy a ***"heightened need standard"*** as Trump has argued. (But Presidents still have the right to "challenge specific subpoenas as impeding their Article II functions.") [*Trump v. Vance* (2020)] [145]

2. Civil liability of President for official acts: But the President ***does*** have ***absolute immunity*** from being held ***civilly liability*** for his ***official acts.*** [146]

Example: P sues Pres. Nixon (D), as well as several Nixon Administration officials, for violating his First Amendment and statutory rights. P claims that he was fired from his Defense Department job in retaliation for testimony in which he criticized military cost overruns.

Held, for Nixon. The President is entitled to ***absolute immunity*** from civil damage actions for all acts within the "***outer perimeter***" of his authority. Since the President has authority to prescribe the manner in which the business of the armed forces will be conducted, including the authority to dismiss personnel, Nixon is immune from liability for the firing of Fitzgerald ***even if he caused it maliciously or in an illegal manner***. [*Nixon v. Fitzgerald.*] [146-146]

a. Civil liability of presidential assistants: Do presidential ***assistants*** get a similar absolute immunity from civil suits for their official acts? The brief answer is ***"no."*** [*Harlow v. Fitzgerald*] [147]

i. Qualified immunity granted: But presidential assistants do get fairly broad "***qualified*** immunity" from civil suits for their official acts. Essentially, a presidential assistant has immunity from civil suit for conduct arising out of her ***performance of her office***, except where the official has violated a ***"clearly established"*** right.

Example: Suppose a cabinet official fires a subordinate on the grounds that the subordinate is openly gay. Suppose further that at the time of the firing, there is no clearly established law about whether the federal government may fire a person for being gay.

Even if, immediately after the firing, the Supreme Court decides that such firings are illegal, the cabinet official will have qualified immunity. That immunity will protect the official here, because, at the moment of the firing, the official was not violating a "clearly established" right. [147]

3. No presidential immunity for non-official acts: *Nixon v. Fitzgerald, supra,* only establishes absolute immunity for ***official*** presidential acts, i.e., those that are within the "outer perimeter" of the President's job. There is ***no immunity — not even qualified immunity*** — for acts that the President takes that are completely ***unrelated to the carrying out of his job***. [147]

Example: P (Paula Jones) brings a private damages suit against President Clinton, filed while Clinton is in office. Jones claims that while she was employed by the state of Arkansas and Clinton was Governor of Arkansas, Clinton made illegal sexual advances to her. Clinton argues that a President should have "temporary immunity" — to last while he is in office — against virtually all civil litigation arising out of events that occurred before he took office.

Held (unanimously) for P. There is no policy reason supporting even temporary immunity for unofficial acts. The rationale for immunity for *official* acts of the President and other officials is that such immunity enables them to perform their designated functions effectively ***without fear*** that a particular decision may expose them to civil liability. This rationale does not apply to the President's *unofficial* acts, a category that includes any acts he took before he became President. [*Clinton v. Jones*] [147]

4. **Criminal prosecution:** Members of the executive branch have ***no*** general executive immunity, either of a common-law or constitutional nature, from ***criminal*** prosecution.

   a. **Delay in the case of the President:** However, at least in the case of the ***President***, there's a strong argument that the Constitution's provision of impeachment as the means of removal bars any criminal prosecution of a President until ***after he or she has been removed from office.***

      i. **Justice Department view:** This is the position of the U.S. Justice Department. Since 2000, the Department's official policy has been that no criminal prosecution of a President may be begun until he has left office, because "[t]he indictment or criminal prosecution of a ***sitting President*** would ***unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions***."

   b. **People other than the President:** In the case of the Vice-President and other principal federal officers besides the President, criminal prosecution prior to impeachment seems to be ***permissible***. For instance, Nixon's Vice-President, Spiro Agnew, was indicted by a federal grand jury on bribery and tax evasion charges prior to his resignation. (But the Supreme Court never passed on whether the Constitution prohibited such prosecution of a sitting Vice President.)

5. **Subpoenas by Congress (*Trump v. Mazars*):** As we saw earlier (see *Trump v. Vance*, *supra*, p. C-21), the President does not receive any special protection from *court*-issued subpoenas to produce documents. But the same is ***not*** true of ***"legislative subpoenas,"*** that is, subpoenas ***by Congress*** for presidential documents. Before courts enforce congressional demands for presidential records, they must make a ***"careful analysis"*** that weighs Congress' interest in enacting legislation against the "unique position" of the President. [*Trump v. Mazars USA* (2020)] [148]

   a. **Factors in "careful analysis":** Congressional subpoenas for the President's records pose separation-of-powers issues, because such subpoenas "unavoidably ***pit the political branches against one another***." [*Trump v. Mazars, supra*.] Therefore, a court's "careful analysis" of such subpoenas must apply the following principles:

      (1) the subpoena should be quashed if ***other sources could provide*** Congress the information it needs;

      (2) the subpoena must be "***no broader than reasonably necessary"*** to support Congress's legislative objective;

      (3) the court must scrutinize the strength of the evidence offered by Congress of the ***legislative purpose*** for which it's seeking the documents — the more "***detailed and substantial"*** this evidence, the ***better***; and

      (4) the court must carefully assess "***the burdens imposed on the President"*** by the subpoena, keeping in mind that where it's *Congress* (not a court) that's issuing the subpoena, the constitutional dangers are greater, because the subpoenas "stem from a ***rival political***

branch" that has "***incentives*** to use subpoenas for ***institutional advantage."***

[*Trump v. Mazars USA, supra.*]

C. Executive privilege: Presidents have a ***qualified*** right to refuse to disclose confidential information relating to their performance of their duties. This is called "***executive privilege***." [149-151]

1. Outweighed: Since the privilege is qualified, it may be outweighed by other compelling governmental interests. For instance, the need for the President's evidence in a ***criminal trial*** will generally outweigh the President's vague need to keep information confidential. [*U.S. v. Nixon, supra,* C-21]. [149-151]

CHAPTER 6

TWO LIMITS ON STATE POWER: THE DORMANT COMMERCE CLAUSE AND CONGRESSIONAL ACTION

I. THE DORMANT COMMERCE CLAUSE

A. Dormant Commerce Clause generally: The ***mere existence*** of the federal commerce power ***restricts the states*** from ***discriminating against***, or ***unduly burdening***, interstate commerce. This restriction is called the ***"dormant Commerce Clause."*** [74]

1. Three part test: A state regulation which affects interstate commerce must satisfy ***each*** of the following three requirements in order to avoid violating the dormant Commerce Clause:

a. The regulation must pursue a ***legitimate state end***;

b. The regulation must be ***rationally related*** to that legitimate state end; and

c. The regulatory ***burden*** imposed by the state on interstate commerce must be ***outweighed*** by the state's interest in enforcing its regulation.

d. Summary: So to summarize this test, it's both a ***"mere-rationality"*** test (in that the regulation must be rationally related to fulfilling a legitimate state end) plus a separate ***balancing test*** (in that the benefits to the state from the regulation must outweigh the burdens on interstate commerce). [76]

2. Discrimination against out-of-staters: Above all else, be on the lookout for ***intentional discrimination against out-of-staters***. If the state is promoting its residents' ***own economic interests***, this will not be a legitimate state objective, so the regulation will virtually automatically violate the Commerce Clause. [77]

> **Example:** The state of Tennessee says that any individual who applies for a license to operate a liquor store in the state must have resided in the state for the prior two years.
>
> *Held*, this two-year residency requirement violates the dormant Commerce Clause. If a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is ***"narrowly tailored to advanc[e] a legitimate local purpose."*** The two-year requirement here "blatantly favors the State's residents and has little relationship to public health and safety." Therefore, it isn't narrowly tailored to any legitimate local purpose, making it an unconstitutional violation of the dormant Commerce Clause. [*Tenn. Wine & Spirits Ret. Ass'n v. Thomas*] [77-78]

3. Health/safety/welfare regulations: Regulations that are truly addressed to the state's ***health, safety and welfare*** objectives are usually "legitimate." (But again, this cannot be used as a smokescreen for protecting residents' own economic interests at the expense of out-of-staters.)

4. **Balancing test:** When you perform the balancing part of the test (to see whether the benefits to the state from its regulation outweigh the unintentional burdens to commerce), pay special attention to whether there are ***less restrictive means*** available to the state: if the state could accomplish its objective as well (or even almost as well) while burdening commerce less, then it probably has to do so. [78]

   Example: Wisconsin can't ban all out of state milk, even to promote the legitimate objective of avoiding adulterated milk — this is because the less restrictive means of conducting regular health inspections would accomplish the state's safety goal just as well. [*Dean Milk Co. v. Madison*]

   a. **Lack of uniformity:** A measure that leads to a ***lack of uniformity*** is likely to constitute a big burden on interstate commerce. For instance, if various states' regulations are ***in conflict***, the Court will probably strike the minority regulation, on the grounds that it creates a lack of uniformity that substantially burdens commerce without a sufficiently great corresponding benefit to the state.

5. **Some contexts:** The most standard illustrations of forbidden protectionism are where the state says, ***"You can't bring your goods into our state,"*** or ***"You can't take goods out of our state into your state."*** Here are some other contexts where dormant Commerce Clause analysis may be important:

   a. **Embargo of natural resources:** Laws that prevent ***scarce natural resources*** from moving out of the state where they are found are closely scrutinized. Often, this is just protectionism (e.g., a state charges higher taxes on oil destined for out-of-state than for in-state use.) But even if the state's interest is ***conservation*** or ***ecology***, the measure will probably be struck down if ***less-discriminatory alternatives*** are available. [85]

   b. **Environmental regulations:** Similarly, the states may not ***protect their environment*** at the expense of their neighbors, unless there is no less-discriminatory way to achieve the same result. (*Example:* New Jersey prohibits the importing of most solid or liquid waste into the state. *Held*, this violates the Commerce Clause. Even if the state's purpose was to protect the state's environment or its inhabitants' health and safety, the state may not accomplish these objectives by discriminating against out-of-staters. [*Philadelphia v. New Jersey*]) [87-89]

   c. **"Do the work in our state":** Statutes that pressure out-of-state businesses to ***perform certain operations*** within the state are likely to be found violative of the dormant Commerce Clause. Such statutes will probably be found to unduly burden interstate commerce. [85-86]

6. **Discrimination by city against out-of-towners:** The dormant Commerce Clause also prevents a ***city or county*** from protecting its own local economic interests by discriminating against both out-of-state and out-of-town (but in-state) producers.

   Example: Michigan allows each county to decide that it will not allow solid wastes generated outside the county to be disposed of in the county. County X responds by barring both non-Michigan waste and waste generated in Michigan by counties other than X. *Held*, this scheme violates the dormant Commerce Clause because it is an attempt to protect local interests against non-local interests. The regulation is not saved merely because it discriminates against in-state but out-of-county waste producers as well as out-of-state producers. [*Fort Gratiot Sanitary Landfill v. Mich. Dept. of Nat. Res.*] [83]

7. **Market participant exception:** But there is one key ***exception*** to the dormant Commerce Clause rules: if the state acts as a ***market participant***, it ***may*** favor local over out-of-state interests. (*Example:* South Dakota owns a cement plant. It favors in-state customers during shortages. *Held*, this does not violate the Commerce Clause, because the state is acting as a market participant. [*Reeves v. Stake*]) [89-90]

B. State taxation of interstate commerce: Just as state regulation may be found to unduly burden (or discriminate against) interstate commerce, so state ***taxation*** may be found to unduly burden or discriminate against interstate commerce, and thus violate the Commerce Clause. To strike a state tax as violative of the Commerce Clause, the challenger must generally show either: [90-92]

1. Discrimination: That the state is ***discriminating*** against interstate commerce, by taxing in a way that unjustifiably benefits local commerce at the expense of out-of-state commerce. [91]

2. Burdensome: Or, that the state's taxing scheme (perhaps taken in conjunction with other states' taxing schemes) unfairly ***burdens*** interstate commerce even though it doesn't discriminate.

a. Sales and use taxes: Most litigation about whether state tax schemes unduly burden interstate commerce involves the right of a state or local government to require "out-of-state" vendors to collect ***sales and use taxes*** on shipments sent to an in-state recipient. Here are the basic rules:

[1] **"Substantial nexus":** In order for a state or local government to impose sales-tax-collection obligations on out-of-state vendors without the tax scheme being found to be an undue burden on commerce, there must be a ***"substantial nexus"*** between the vendor and the taxing state.

[2] **"Physical presence" test overruled:** On the other hand, as the result of a 2018 decision, states ***may now tax out-of-state firms, including Internet-only firms, even if the firm has no in-state physical presence.*** [*South Dakota v. Wayfair* (2018)]. [92]

CAPSULE SUMMARY

II. CONGRESSIONAL ACTION — PREEMPTION AND CONSENT

A. Federal preemption generally: The discussion above relates only to the "dormant" Commerce Clause, i.e., the situation in which Congress has not attempted to ***exercise*** its commerce power in a particular area. Now, we consider what happens when Congress *does* take action in a particular area of commerce.

1. Supremacy Clause: If there is a ***conflict*** between ***federal law and state law***, the ***state law is simply invalid***. The ***Supremacy Clause*** of the Constitution (Article VI Clause 2) says that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land. … " So if federal and state law conflict, the Supremacy Clause means that ***state law must yield to federal law***. In that event, federal law is said to have "***preempted***" state law. [92]

2. Express vs implied preemption: Federal preemption of state law falls into two main categories: ***"express"*** preemption and ***"implied"*** preemption [92]:

[1] ***Express*** preemption occurs when a federal law ***specifically*** (i.e., "expressly") says that it preempts state or local law.

[2] ***Implied*** preemption occurs when Congress does *not* expressly state that it intends to preempt state or local law, but ***manifests an intent*** to do so.

B. Express preemption: Congress sometimes, in enacting a statute, takes the trouble to state explicitly that the statute is intended to preempt some area of state or local law. That is, Congress says, "In the area of [X], the only governing law shall be federal law." This is ***"express preemption."*** As long as the federal statute is validly enacted (e.g., it falls within one of Congress' enumerated powers, such as the commerce power), any state or local law that falls ***within the zone*** intended by Congress to be ***exclusively federal*** will be ***invalid*** under the Supremacy Clause. [93]