

MODULE 2

Default Rules of Government Power

The police power · substantive due process · rational basis · the Necessary and Proper Clause

Constitutional Law · Fall 2026 · Professor Jorge R. Roig

Two questions, not one

Keep them apart and this module is orderly. Run them together and none of it is.

THE STATES

What **LIMITS** the power?

A general power to legislate for health, safety, morals and welfare is assumed. It is never proved. A court asks only what cuts it back.

Alger · Jacobson · Lochner · West Coast Hotel · Williamson

THE FEDERAL GOVERNMENT

Does the power **EXIST**?

Nothing is assumed. Congress must point to an enumerated grant, and only then to a limit. Two steps, in that order.

McCulloch · Module 3 · Module 3A · Module 4

Day 3 is the left column. Day 4 is the right.

What a State starts with

General, all-encompassing, and older than the Constitution that limits it.

THE POLICE POWER

The general power of a State to prescribe policy and regulate human conduct — safety, health, peace, order, morals, aesthetics, trade, education, family, taxing, spending, welfare. General jurisdiction to prescribe.

ALGER • MASS. 1853

The legislature drew a line in Boston Harbour and forbade building past it. Alger built past it on flats he owned, and was prosecuted.

WHY NOTHING WAS TAKEN

All property is held under an implied obligation that its use will not injure the community. The regulation removed no stick — the stick was never there.

THE THREE LIMITS

Defer to the legislature. No conflict with the Constitution or valid federal law. Nothing arbitrary, unreasonable or oppressive.

If the State can always say the right never included what it just forbade, what work is the limit doing? Hold that for Module 2A.

Jacobson, 1905 — and a warning

The police power at its most confident. Do not carry the holding into a modern problem.

THE CASE

Compulsory smallpox vaccination during an outbreak; a five-dollar fine for refusing. Upheld. Liberty is not freedom from all restraint, and a community may protect itself against an epidemic.

Same year as Lochner, pointing the other way.

THE LIMITS INSIDE THE OPINION

The Court reserved the case of someone for whom vaccination would be cruel or inhuman, and said a measure so arbitrary and oppressive as to be a plain violation would not stand.

Even at its most deferential it kept a floor.

⚠ DO NOT CARRY THIS INTO A MODERN PROBLEM

Jacobson starts from deference. A modern court starts from the individual — bodily integrity is protected liberty, and unwanted medical treatment is analysed under Cruzan and Glucksberg, not under Jacobson. Quote Jacobson at a compelled-treatment problem today and you will get the answer wrong.

Where the limit comes from

If a State's power is general, a court striking down a state law needs a text. There is one.

DUE PROCESS

Slaughter-House, 1873: no violation. Due process is procedural. Enacting a statute IS due process — the legislature went through the hoops.

And the Lochner era grows out of this clause anyway.

EQUAL PROTECTION

The argument was that economic regulation is class legislation — it singles out one trade or one group.

It was made repeatedly. It was never a very successful argument.

So the question for the next fifty years: how does a clause about process strike down a statute because of what it says?

The early hints, and then the holding

Four cases assembling the pieces — and then, in 1897, the right itself.

TOPEKA • 1874

Natural law limits legislative power. Unauthorized invasions of private rights — and no clause is cited.

MUNN • 1876

Some businesses are affected with a public interest. Some contracts are merely private, and then there is no public interest.

RAILROAD COMM'N • 1886

Reasonableness is to be judicially ascertained. The Court is now setting railroad rates, not reviewing them.

SANTA CLARA • 1886

Corporations are persons under the Due Process Clause — which hands corporate plaintiffs every argument that follows.

ALLGEYER • 1897

The liberty of the Fourteenth Amendment includes the right to make contracts. The right is created here — eight years before *Lochner*, which only fought about its scope.

Loan Ass'n v. Topeka, 87 U.S. 655 (1874) • Munn v. Illinois, 94 U.S. 113 (1876) • Railroad Comm'n Cases, 116 U.S. 307 (1886) • Santa Clara County, 118 U.S. 394 (1886) • Allgeyer v. Louisiana, 165 U.S. 578 (1897).

Lochner v. New York, 1905

A maximum hours law for bakers, struck down five to four.

THE STATUTE

New York's Bakeshop Act: bakery employees limited to 60 hours a week or 10 hours a day. Lochner was fined for letting an employee work longer. He challenged only the hours provision.

THE RIGHT — AND IT IS NOT NEW

Liberty of contract, protected by due process and absent from the text. Allgeyer put it there in 1897. Nobody on this Court denies it exists — the fight is over its scope.

WHOSE LIBERTY? — ASK BEFORE YOU ANSWER

The statute protects employees. The Court treats it as an interference with the employee's own freedom to sell his labour on whatever terms he chooses. That framing does enormous work, and it is what both dissents attack.

Lochner: the rule, and why the statute failed

The State conceded nothing. It lost on the fit.

THE RULE

- 1 A legitimate state interest — public health, safety or morals.
- 2 A direct relation between the means and that end.

WHY IT FAILED

The Court accepted that bakers' health is a legitimate concern, then held the hours limit was not directly related to it. The interest was conceded. The fit was not — and students get this backwards.

AND THE ESCAPE HATCH

Hours laws for “grown and intelligent men” are “mere meddlesome interferences.” But the same passage allows a statute really and substantially related to health. The era demanded proof of the connection — from judges who decided whether it had been made.

The analysis assumes the baker and the bakery bargain on equal terms. What about bargaining positions? Hold that until 1937.

The two dissents

One attacks the economics. The other attacks the Court's role. The second is the one that wins.

HOLMES

The Court has written laissez-faire economics — and Social Darwinism behind it — into the Constitution. The Constitution does not make those choices. A majority may embody its own views in law.

HARLAN

There was evidence that long hours harm bakers, and the Court substituted its own reading of it for the legislature's. So the question is the role of the Court. When in doubt, defer to the legislature.

Holmes wrote the line everyone quotes. Harlan wrote the doctrine. West Coast Hotel, Carolene Products and Williamson are all versions of Harlan's answer.

Is a court that defers when in doubt abdicating, or doing the only thing it is competent to do?

Lochner v. New York, 198 U.S. 45, 65 (Harlan, J., dissenting), 74 (Holmes, J., dissenting) (1905).

Muller v. Oregon, 1908

A maximum hours law upheld three years after Lochner — and nothing is overruled.

THE STATUTE · UPHELD

Oregon capped the working day for women in factories and laundries at ten hours. Muller ran a laundry, required longer, and was fined ten dollars. Upheld, unanimously.

WHY IT SURVIVED

Women are differently situated, and healthy mothers matter to the public. So her well-being becomes a concern “in order to preserve the strength and vigor of the race.”

THE BRANDEIS BRIEF

Two pages of law and about a hundred of medical, factory and labour data. The first time social science was put before the Court at scale. Every expert appendix since descends from it.

THE SENTENCE THAT IS THE HOLDING — 208 U.S. 422

“Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men.”

Two things outlive this case and they point in opposite directions. The brief is still good practice. The reasoning is not.

Muller v. Oregon, 208 U.S. 412, 421–422 (1908).

What Muller cost

Two things outlived it, and they point in opposite directions.

THE BRANDEIS BRIEF

208 U.S. AT 419

Industrial and medical data rather than legal argument. It cannot establish a constitutional fact — at most that a legislature could reasonably act. The seed of rational basis.

→ *Williamson, in twenty minutes*

THE CLASS APART

208 U.S. AT 422

“...properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.”

→ *Module 11A, and the wreckage*

The victory for protective labour legislation was purchased with a sex classification.

Coppage, 1915, and Adkins, 1923

The same framework, applied twice more. Both statutes fall.

COPPAGE • 1915 • STRUCK

Kansas made it a crime to require a worker to leave a union as a condition of the job. Struck down on liberty of contract and property. The Court's line — it takes two to make a bargain — assumes both sides are equally free to walk away. Kansas legislated because it thought they were not.

ADKINS • 1923 • STRUCK

A minimum wage for women and children in the District of Columbia. Struck down as “simply and exclusively a price-fixing law.” The District is federal, so this runs under the Fifth Amendment, not the Fourteenth — most of the class gets that wrong.

WHY ADKINS DOES NOT FOLLOW MULLER — 261 U.S. 553

“In view of the great — not to say revolutionary — changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.”

The State may shorten her hours. It may not raise her pay. And the Nineteenth Amendment, says the Court, has taken care of the rest.

Coppage v. Kansas, 236 U.S. 1 (1915) • Adkins v. Children's Hospital, 261 U.S. 525, 553 (1923).

Get the amendment right

Most of the class will not. It was the Fifth, not the Fourteenth.

THE STATUTE

An act of CONGRESS,
operating in the District of
Columbia.

THE CLAUSE

The FIFTH Amendment's
Due Process Clause. Not
the Fourteenth.

WHY IT MATTERS

Never about federalism.
About what “due process
of law” MEANS — binding
Congress as it bound New
York.

THE ARITHMETIC

5 of 8, over the Chief
Justice's dissent. Fourteen
years of wage law.

So West Coast Hotel retires a reading of two clauses at once — not an allocation of power between governments.

The recusal is unexplained in the reports. Say “the usual explanation,” not “because.”

Sutherland's argument is real

Drained of 1923's politics, put it in its strong form.

Formal equality and protective treatment cannot both be had: a rule that a group is not a class apart strips it of legislation premised on its being one.

1

Wrong about liberty of contract?

Attack the premise — but then Muller falls too.

2

Wrong about the Nineteenth Amendment?

Attack the 1920 factual claim. Strong empirically; concedes his framework.

3

Wrong that a COURT decides?

The institutional answer. Requires no disagreement about equality — the question is not his.

The winning objection to this era was never “you have the wrong values.” It was “this is not your question.”

The argument to test: does legislation singling out a group for protection also ratify that group's subordinate status?

The era in five moves

Same framework throughout. Only the answers change.

1897

ALLGEYER

The right is
created

1905

LOCHNER

The Court answers

1908

MULLER

A class apart

1923

ADKINS

The class dissolves

1937

**WEST
COAST**

The legislature
answers

WHAT NEVER CHANGES

The framework. Liberty of contract is the rule, the police power is the exception, and the question is whether this statute fits. Peckham states it in 1905; Hughes is still asking a version of it in 1937.

What changes is who gets the benefit of the doubt. The arc is about an epistemic burden, not about liberty.

Allgeyer (1897) • Lochner (1905) • Muller (1908) • Adkins (1923) • West Coast Hotel (1937).

The tide turns

Two cases, three years apart. The second one overrules Adkins.

NEBBIA • 1934 • UPHELD

New York set a minimum price for milk — a staple of the diet. The test: a proper purpose, and a reasonable relation to it. A State may adopt any economic policy so long as the law is not arbitrary or discriminatory.

The modern test is already here, three years early.

WEST COAST HOTEL • 1937

A minimum wage for women, upheld. Adkins is overruled by name. The Constitution does not speak of freedom of contract — Hughes does not attack the right, he points out it was never in the text.

The test: an interest of the community, and a reasonable relation.

And the answer to the question left hanging at *Lochner*: the Court now recognises differences in bargaining power, and names the exploitation of workers as the community interest.

What was retired, and what was not

Adkins goes by name. The reasonableness question survives — and that matters.

RETIRED

Adkins, by name.

Adkins was a Fifth Amendment case, so what falls is a reading of “due process of law” wherever it appears.

SURVIVING

The reasonableness question.

Hughes still asks whether the regulation is reasonable in relation to its subject. He answers it — he does not decline to ask.

Two dates, not one. 1937 flips the presumption. 1955 empties the inquiry.

This is not yet Williamson. Hughes still asks whether the statute is reasonable in relation to its subject.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937): “Our conclusion is that the case of Adkins v. Children’s Hospital, supra, should be, and it is, overruled.”

Williamson and the rational basis test

The test the first half of this module has been building toward since 1853.

THE RATIONAL BASIS TEST

A legitimate government purpose, AND means rationally related to it. That is the whole test.

WHO CARRIES THE BURDEN

The challenger of the government action, not the government.

THE PRESUMPTION

Constitutionality. And the legislature's actual reason does not matter — a court may supply a conceivable one.

WHY THE COURT SAYS SO

The political process. If a law is foolish, the remedy is an election, not a lawsuit.

This is the third limit from the first slide of the day — nothing arbitrary or unreasonable — in its weakest possible form.

Carolene Products, 1938

First the presumption. Then the footnote that says when the presumption gets narrower.

THE RULE, AND IT COMES FIRST — THE PRESUMPTION OF CONSTITUTIONALITY

“The existence of facts supporting the legislative judgment is to be presumed.” The legislature need not build a record. So the challenger must show that no rational basis could be imagined — not that the legislature was wrong, and not even that it had no reason in mind.

1 • IN THE TEXT

The law runs into a specific prohibition — one of the first ten amendments, or one held to apply to the States.

2 • THE PROCESS BREAKS

Restrictions on voting, speech, assembly — the machinery by which bad laws are normally repealed.

3 • WHO CANNOT USE IT

Prejudice against discrete and insular minorities, who cannot protect themselves through that machinery.

Footnote four opens by naming a “narrower scope for operation of the presumption of constitutionality.” It is an exception to the presumption — which is why you have to hold the presumption first.

Footnote four is three paragraphs, not one

And they do not obviously belong together.

¶1 TEXTUALIST

Legislation “within a specific prohibition of the Constitution, such as those of the first ten amendments.”

Nothing to judge but the text.

¶2 PROCEDURALIST

Legislation “which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”

Police the channels, not the outcomes.

¶3 SOCIOLOGICAL

Whether “prejudice against discrete and insular minorities may be a special condition which tends... to curtail” those processes.

The only one asking a court to judge who is losing, and why.

Not one of the three is a holding. “It is unnecessary to consider now.” “Nor need we enquire.” “Whether.”

Twice today: doctrine built out of what a court expressly declined to decide.

What Stone cites for paragraph three

McCulloch v. Maryland. Which is not a rights case — and you read it next.

McCULLOCH, 4 WHEAT. AT 428 — MARSHALL

Maryland may not tax the Bank because those on whom the tax falls are not represented in the legislature imposing it. “In the Legislature of the Union alone are all represented.”

FOR TUESDAY

Has Stone used it fairly?

Marshall: one sovereign taxing another’s instruments. Stone: a majority against a minority inside one polity.

THE CLOSING ARGUMENT

Does it avoid value judgments, or relocate them?

Someone must decide which minorities are discrete and insular. If that is itself a value judgment, the theory has renamed the Lochner problem.

A structural argument about representation, run as a theory of individual rights.

Find the floor

Two questions, neither rhetorical. The second one is an exercise, and I want it written.

QUESTION ONE

Can a law actually fail this test?

A test is something a statute can flunk. A tie-breaker is not — it just names the winner when nobody can prove anything either way. After *Williamson*, which one is rational basis?

QUESTION TWO

Draft a regulation that FAILS *Williamson*.

Not one that offends a specific guarantee — that is cheating. One a court **MUST** strike down because no rational legislator could have thought it addressed any evil at hand.

If you can write it, you have found what is left of the limit. If you cannot, say so out loud and defend what follows.

End of Day 3. Day 4 begins on the next slide, with a different question.

Congress has no police power

Everything so far asked what limits a power. Now we ask whether the power exists at all.

A STATE

Starts with everything. General jurisdiction to prescribe. The only question is what cuts it back — which is the whole of Day 3.

CONGRESS

Starts with nothing. No general authority over health, safety, morals or welfare. Every statute must first be traced to an enumerated grant.

YOU HAVE MET THIS ALREADY — ERIE

There is no federal general common law. A federal court in diversity applies state law because there is no general federal lawmaking power to draw on. Same idea from the other direction: where the enumeration runs out, the States are what is left.

McCulloch v. Maryland, 1819

Can Congress create a national bank? Nothing in Article I says it can.

THE FIRST QUESTION

No express grant of a power to create a bank. So: are there implied powers? Marshall answers yes, and gives three reasons.

THE CLAUSE

Necessary and Proper. Maryland read “necessary” as indispensable — the natural reading. Marshall reads it as appropriate. The case turns on that word.

THE DOCUMENT

A constitution is a simple, brief sketch, marking great outlines and intended to endure. You cannot write every means into it.

THE OMISSION

The Articles of Confederation limited Congress to powers expressly delegated. The new Constitution dropped the word, and the omission was deliberate.

Maryland's reading is not stupid. It is what the word means in ordinary speech — which is why the answer had to come from the other two.

What kind of government this is

Before Marshall can answer either question, he has to say what the Constitution made.

WHO MADE IT

The people, in conventions — not the States as States. Maryland argued it is a compact among sovereigns, so federal power should be read narrowly. Marshall rejects the premise.

WHOM IT ACTS ON

It acts directly on the people of every State, not through the States. That makes it a government and not a league — and if it acts on all of them, it answers to all of them.

WHAT IT HOLDS

Only what Article I, section 8 enumerates, plus whatever is necessary and proper to carry those powers out. No general authority over health, safety, morals or welfare.

AND ONE MORE SENTENCE — ARTICLE VI

Where a valid federal law and a state law collide, the federal law governs. Hold that sentence. It decides the second half of this case, and it is the whole of Module 7.

“It is a Constitution we are expounding”

The most quoted sentence in the case, and the most misused.

“...we must never forget that it is a Constitution we are expounding.”

Preceded by: “the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist.”

NOT THIS

A licence to read federal power broadly because broad government is good.

NOT THIS

A canon of construction with a thumb on the federal side.

THIS

An argument about what KIND of document it is — a charter meant to endure marks only its great outlines.

It is an argument about what KIND of document this is — which is Tuesday’s interpretation question, in 1819.

The Necessary and Proper rule

Three elements. Two of them you already know, because they are rational basis.

1 A LEGITIMATE END

Is Congress after something it is allowed to be after?

2 WITHIN THE SCOPE OF THE CONSTITUTION

Is there a power that covers this at all? Scope means the enumerated powers.

3 APPROPRIATE MEANS

Plainly adapted to that end, and not prohibited. The choice of means is for Congress.

Elements one and three together are close to rational basis — a legitimate end, and means plainly adapted to it. Courts defer on both. So the fight is all in element two, and element two means commerce and spending. That is Module 3 and Module 4.

Running the rule: Comstock

A federal prisoner is mentally ill and dangerous, and his sentence is ending.

ENUMERATED POWERS

Commerce and spending
— what Congress
actually has.

FEDERAL CRIMES

Necessary and proper to
those powers.

A PRISON SYSTEM

Necessary and proper to
having crimes.

CIVIL COMMITMENT

Necessary and proper to
custody — do not release
the dangerously ill.

THE HONEST TROUBLE WITH IT

Every link is plausible and the chain ends somewhere Article I never mentions. Protecting the public is historical and sensible, and it is not in the Constitution. If necessary and proper can stack on necessary and proper, what cannot be reached in four steps?

That is the question NFIB picks up in Module 3, when the Chief Justice calls a statute necessary but not proper.

Can a State tax the Bank?

Two real powers, each with a second step. The answer is not the slogan.

CONGRESS

- 1 · The power to create the Bank.
- 2 · And with it, the power to preserve — to keep the Bank in existence.

MARYLAND

- 1 · The power to tax — one of the most fundamental a State has.
- 2 · And with it, the power to destroy.

Congress may preserve. Maryland may destroy. “The power to tax involves the power to destroy” states the danger — it does not resolve it.

THE SENTENCE THAT ACTUALLY DECIDES IT

The federal government was created by the people and acts directly on the people of every State, so it answers to all of them. Maryland answers only to Marylanders. A Maryland tax on the Bank falls on people who had no vote in Annapolis and no way to remove the legislators who imposed it. It fails because it is taxation without representation — not because taxes can be large. Article VI does the rest, and preemption is Module 7.

Where this goes

One module, two questions, and both of them stay open.

MODULE 2A • TAKINGS

Today the police power limits a right. Next it is what a property owner runs into. If the State can always say you never held that stick, what is left?

MODULE 3 • COMMERCE

Element two, and nothing else. ⚠️
The modern commerce test is NOT in today's material — do not answer Module 3 from McCulloch.

MODULE 10 • RATIONAL BASIS

The same two words doing different work. Today's measurement is what makes footnote four legible there.

THE QUESTION THAT DOES NOT RESOLVE — AND IT IS MINE

Iredell told Chase that a court striking down a law without a text is legislating. Allgeyer supplied a text. Forty years later the Court decided the text had never carried the content — then reserved three exceptions in a footnote, one asking judges to decide which minorities the political process has failed.

A principled substitute for natural law, or a better-dressed version of the same discretion? Pick one and defend it.

Next: Module 2A — The Takings Clause. Then Module 3 — The Commerce Clause.