

From Common-Law Regime to the Regulatory State

Benefits to Regulatory State

1. Ability to Pay - not every manufacturer is able to pay for inspection that may increase safety
2. Lack of Information - lay persons don't have technical knowledge or best concept of what safety features are worth paying and what are not
3. Cognitive Biases
 - a. Endowment Effect - once you have something you don't want to part with it unless paid more
 - b. Optimism Bias
 - c. Overestimate risks - terrorist attacks after a recent terrorist attack
 - d. Underestimate risks - when risk is close to zero, people often reduce a low probability to zero
4. Monopoly Power - Once you have monopoly in a market you don't have to offer the optimal service/product

JUSTIFICATIONS

1. Economic Theory - Sometimes the market, reinforced by common law, will not supply consumers with their preferred option
2. Democratic Theory - Social justice or welfare, sometimes people demand more for society that any individual will seek for herself as single consumer
3. Policing Model - idea that individuals and corporations were best able to safeguard their well-being through transactions - however market failures still existed, gov comes in
4. Compensating for Spillovers (Externalities): Differences between true social costs and unregulated price are "spillover" costs or benefits
 - Example: destroyed crops by a train that runs near a farm because of its spark are spillover costs
5. Inadequate Information - buyers must have sufficient info to evaluate their competing products
6. Unequal Bargaining Power
7. Moral Hazard - When ethical, other institutional constraints or direct supervision by payer fail to control purchases, gov regulation may be demanded (e.g. medical care)
8. Paternalism - Gov knows best. Humans may be irrational, unable to evaluate info.
9. Scarcity - When price allocation (higher demand/scarcity, higher price) is not sufficient, gov may have regulatory allocation to achieve a set of "public interest" objectives, such as in the case of licensing television stations)
10. Non-Rivalrous Consumers - Free Riding effect when a non-paying consumer is free riding from a paying consumer so it ought to be regulated by gov (National Guard)

Constitutional Principles and Interpretation

Horizontal Separation of Government Power

- Separate branches, checks and balances, mitigate risk of self-interest or too much power in one branch.
- No individual branch can enact decision making without other branch enforcing, passing or reviewing that decision

Vertical Separation of Government Power

- Constitution provides certain powers to the states
- Federal power is enumerated/limited
- States gave certain powers to Federal Government with ratification of Constitution but there was presumption they could act outside the enumerated Federal powers in the 10th Amendment
- Supremacy Clause - if there is a federal law that the state law conflicts with, the federal law prevails

AUTHORITY FOR JUDICIAL REVIEW OVER FEDERAL ACTION

MARBURY V. MADISON (1803)

- Election of 1800, Thomas Jefferson is elected president and the federalist also lost control of Congress. John Marshall, then Secretary of State, had the power to grant commissions, one of those being a commission to Marbury. Justices of peace need a commission from the Secretary of State in order to have power. Marshall never delivered the commission to Marbury. When the new President Jefferson came into office, James Madison was appointed the new Secretary of State, and he refused to give the commission to Marbury.
- Issue #1: Does Marbury have a right to commission he demands:
 - The court held that once the President signed the commission and it was sealed by the Secretary of State, that Marbury was entitled to the commission. Judiciary did not have the authority to enforce an executive government official to do anything.
- Issue #2: What can Marbury do about the commission? Does the court have the right to give Marbury his commission?
 - No. Congress cannot expand the scope of the Supreme Court's original jurisdiction beyond what is specified in Article III of the Constitution.
- Issue #3: If they do afford Marbury a remedy, is it a mandamus issuing from this court?:
 - The Supreme Court does not have original jurisdiction to issue writs of mandamus. To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction
 - The writ applies to government officials, and there is legal duty to do something (i.e. deliver the commission)
 - Mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and is therefore a matter of original jurisdiction. If the executive decision falls within the discretionary function, it is beyond judicial power.
- DICTA: The supremacy clause hold that the constitution is the "supreme law of the land," therefore in the conflict *between the constitution and statute, the constitution prevails.*
 - The court is given judicial power via the constitution, *included in that judicial power is the idea of judicial review.*

- Should judiciary have right for judicial review over legislature and to declare statute unconstitutional?
 - They must interpret the law to uphold the constitution over contradictory statute. Though there's no precedent or constitutional enumeration of the power of the court to implement judicial review, the constitution is a regulatory instrument the court must uphold
 - The court has the jurisdiction to hear cases that arise under the Constitution (an individual right to commission)
 - ***"It is the providence and the duty for the judiciary to say what the law is"***
- Discretionary Functions: Not something that the judiciary can tamper with. If the executive act is mandatory under law because the law compels him to do it then judiciary can step in and grant relief, i.e. if Madison was required to deliver Marbury's commission.

LIMITS ON FEDERAL JUDICIAL POWER-

- **Interpretive Limits**

- No right is absolute - Bill of Rights etc. are not without their exceptions, boundaries and conflicting interest (e.g. freedom of speech v. public safety)
- Originalism vs. Interpretivism - Judges should have low discretion deciding Constitutional issues and should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution (see: Constitutional Avoidance Canon)
- Non-Originalism v. Non-Interpretivism - Courts should go beyond that set of references and enforce norms that cannot be covered within four corners of document, favors non-static set of rules evolving constitution that meets needs of society that is advancing technologically and morally
- Process Based Theory - Courts should take active/non-originalism role in processes that support democracy but when confronting substance of Constitution they should apply originalist view

HELLER (2008) - DC generally prohibits possession of handguns. Heller is DC special police officer authorized to carry a handgun while on duty at Federal Judicial Center. He registered to carry one at home but DC refused.

- Issue: Can DC prohibition of the possession of usable handguns in the home violate the Second Amendment?
- Arguments for Heller:
 - Prefatory clause or purpose ("well regulated militia") does not limit or expand operative clause or right ("right to bear arms")
 - "Rights of the people" used in Second Amendment, used in Bill of Rights and Constitution routinely to proclaim individual rights instead of collective rights or specific body (ie. militia)
 - Nine state constitutional provisions identified "bear arms" or "keep arms" independently of the militia.
- Arguments for DC:

- The amendment is structured to ensure militia-related interests and not self-defense concerns; purposes may be intertwined but amendment's sole concern is protecting militia's right
- SCOTUS in Miller already interpreted Second Amendment right as specific weapon that was not for militia use
- Cites Marbury v. Madison - there is no surplusage in Constitution so rejects majority's contention that prefatory "well regulated militia" is without independent meaning
- Scalia (Majority) -
 - Originalist Sources - Text of the of the Second Amendment, other parts of the Constitution, Dictionaries (from constitutional ratification era), state constitutions
 - Non-Originalist Sources - Reconstruction era, Miller 1935 opinion
- Stevens (Dissent)
 - Originalist sources - Text of Second Amendment, State Militia Law, State Constitutional Provision
 - Non-Originalist Sources - Dictionary (contemporary, 1989), Miller 1935 opinion

The Framework for Analysis of Federal Legislative Power

Federalism (Protecting States)

- Decreasing likelihood of Federal tyranny
 - More dangerous than autocratic state or local rule
- Enhancing democratic rule by providing government closer to people
 - States more responsive to public needs, concerns
 - BUT- may form factions formed by special interests, when there is smaller, local gov.
- Allowing states to be laboratories for new ideas
 - Novel social and economic experiments without risk to rest of country

Protecting Federal Interests

- States represented in the national political process
 - Sufficient protection of state sovereignty?
 - Likely not nowadays, because individual state reps chosen not because of individual views or views of state as entity but more just a political process

MCCULLOCH (US BANK) v. MARYLAND (1819)

- Holdings:
 - The Bank of the United States has a right to establish its branches within any state.
 - The States have no power, by taxation or otherwise, to impede or in any manner control any of the constitutional means employed by the U.S. government to execute its powers under the Constitution.
- No enumerated power for US to establish national bank, but implied power thru N+P Clause
 - Regulate commerce; Levy taxes; Coin money; Raise armies; Borrow money
- Court on N+P Clause:

- N+P Clause is meant to expand and not confine Congressional powers
- In other provisions of Constitution, “necessary” is accompanied with “absolutely” but not in the N+P clause
- Rule:
 - **“Let the end be legitimate**, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”
 - **Means to an End** - Appropriate/plainly adapted/rationally related/reasonably adapted regulating commerce, coining money, borrowing money, raising armies

The Necessary and Proper Clause

COMSTOCK (2010) - Statute authorizes Dept. of Justice to detain a mentally ill, sexually dangerous fed prisoner beyond date the prisoner would otherwise be released, and thus whether its doing so falls beyond the reach of a government’s enumerated powers

- **Five Factor Test**
 - Wide Breadth of the N+P Clause - “A government, entrusted with such powers must also be entrusted with ample means for their execution.” Congress’ power to criminalize conduct is coupled with the means to imprison that conduct and safe, responsible administration of the system
 - Long history of fed involvement in civil commitment sphere authorizing detention of federal prisoners who suffer mental illness and therefore dangerous, the only difference is that this extends to sexual predators as well
 - Fed government’s custodial interest safeguarding the Public from dangers posed by those in federal custody - N+P to take measures in continuing confinement of prisoners with strong history of sexual misconduct to ensure public safety
 - Statute accommodates State’s interests in its procedure
 - Statute’s narrow scope - statute is fairly narrow in scope and doesn’t apply to many federal prisoners and therefore is not a “general police power”

The Commerce Power

1. First, Congress may **regulate the use of the channels of interstate commerce**;
2. Second, Congress is empowered to **regulate and protect the instrumentalities of interstate commerce, or persons or things in Interstate Commerce, even though the threat may come only from intrastate activities**;
3. Third, Congress's commerce authority includes the **power to regulate those activities having a substantial relation to interstate commerce (i.e., those activities that substantially affect interstate commerce)**
4. **Power to Regulate Interstate Commerce Itself**
 - a. The power to regulate interstate commerce itself is plenary (unrestricted).
 - b. The power to regulate the interstate shipment of goods and the power to regulate the methods of transportation used to accomplish interstate shipment (Gibbons v. Ogden).

- c. The power to prohibit the shipment of goods (the commerce prohibiting technique) as in *Champion v. Ames* (the Lottery Case) and *Darby* (which overruled the Child Labor Case).
 - d. Interstate transportation includes the regulation of interstate instrumentalities such as carriers (including interstate railroads, buses, trucks, airplanes, boats (as in *Gibbons v. Ogden*), etc.) and the power to regulate the channels used by these interstate carriers to transport goods including interstate highways, waterways, bridges, railroad tracks, and the Internet. This also includes the power to protect the channels and instrumentalities of interstate commerce them from both interstate as well as intrastate threats.
 - e. When regulating interstate commerce itself, the Congressional motive is irrelevant even if the regulation is designed to achieve non-economic objectives such as to promote morality (as in the Lottery Case).
5. **Power to Regulate Intrastate Commerce if it Substantially Affects Interstate Commerce**
6. When Congress regulates an intrastate economic or commercial activity (as in *Wickard v. Filburn*, *Heart of Atlanta* and *Perez*), the test the court uses is whether Congress could have rationally concluded that the regulated activity has a substantial economic effect on interstate commerce.
- a. The substantial economic effects can be found in the aggregate so the question is not whether an individual instance of the regulated activity affects commerce (the wheat grown by farmer Filburn or the guests who stay at the Heart of Atlanta Motel), but whether the regulated activity in its entirety (adding together the impact of each individual instance of the regulated activity) has a substantial economic effect on interstate commerce
 - b. When Congress regulates an interstate economic activity or enterprise under a comprehensive regulatory scheme, it may also regulate the aspects of that activity that are intrastate in character (as in *Wickard v. Filburn* and *Gonzales v. Raich*). This is true where the characteristics of the product are the same, whether intended for interstate shipment or local use (like the wheat in *Wickard* and the marijuana in *Raich*) and the failure to regulate the local production would, in the view of Congress, leave a significant gap in the regulatory scheme.
7. Congress regulates an intrastate noncommercial, non-economic activity (*Lopez* and *Morrison*), the court is less deferential to Congress and requires that the activity have a direct and substantial economic effect on commerce.
- a. Congressional regulatory scheme. If the scheme generally regulates a commercial activity, the Court may be willing to characterize all of the applications of the statute as the regulation of commercial activity even those that reach activity, which viewed in isolation, might be considered noncommercial (such as the medicinal marijuana grown for personal consumption in *Raich* which was regulated as part of a comprehensive regulation of the illegal drug market).
 - b. When Congress regulates a non-economic, noncommercial local activity the Court will be more likely to uphold the regulation if the statute contains a jurisdictional element that requires a connection to interstate commerce be shown in each individual case where the statute is applied (such an element was missing in both *Lopez* and *Morrison*).

- c. The substantial effect on interstate commerce needs to be more direct and not based on an attenuated series of links in a chain that may connect an activity to a decline in education and then to a less qualified workforce and then to a decline in economic productivity (Lopez).

INITIAL COMMERCE CLAUSE POWER:

- **Stages of Business:**
 - Narrowed the scope of commerce as a separate and distinct from earlier phases/”stages of business,” such as mining, manufacturing and production
 - *Non-Uniformity Criticism:* Distinction b/w production/commerce is problematic b/c it will create a patchwork of states determining the laws that corporations (ie. auto industry) will have to comply with to achieve their commercial goals
- **Zone of Activities to States**
 - Constitution requires that the judicial role is to protect this Zone
 - *“Direct” vs. “Indirect” Effects*
 - Sufficient “direct relationship to interstate commerce must exist for Congress to regulate
 - Rejected laws that involved business practices of corporations, pension of mineworkers etc., b/c they were not direct enough to interstate commerce itself
 - Congress Regulating Commerce for a Non-Commercial Purpose?:
 - If the **mere purpose** of such a Fed law is to accomplish a non-commercial purpose (ie. moral purpose) then the power is abused, need an extra reason
 - Examples:
 - Congress prohibiting interstate shipments of lottery ticket sales with a moral purpose
 - Child labor federal laws (also moral) upheld, favors uniformity

GIBBONS v. OGDEN (1824) - New York gave Livingston and Fulton the exclusive right to operate steam ships on state waters and Livingston assigned his rights to Ogden. Ogden sought to enforce the exclusive right against Gibbons. The Supreme Court held that the states couldn’t pass legislation for the regulation of internal affairs that would normally fall within the scope of the states’ police powers, if such legislation is inconsistent with federal law enacted under the commerce power.

- **Court’s Argument for Commerce Clause Power:**
 - *Past practice:* “Navigation” has always been deemed part of “Commerce” so the attempt to “restrict” it comes too late
 - *“Among several states” is interpreted broadly*
 - Commerce “among the several states” means intermingled with
 - Anything “amidst” the states, is within commerce clause, among the states
 - But: Commerce that is “completely internal” is reserved for States
 - *Even if Congress has Constitutional power, is there an independent check that reserves power to “zone of the states?”*

- If the means are not prohibited, Congress can carry out power
- Tenth Amendment is not a tight restriction but rather a reminder

BROAD COMMERCE POWER:

- **Substantial Effect Test:**
 - Congress' power over interstate commerce extends to intrastate activities, so long as intrastate activities have a substantial effect on the commerce or exercise of Congressional power over it
- **NLRB v. Jones & Laughlin Steel Corp. (1937)**
 - Federal labor law regulates all aspects of manufacturing process and commerce of industry of Steel Corp.
 - Disregards prior narrow interpretation of "commerce"/ distinct stages of business
- **United States v. Darby (1941)**
 - Fair Labor Standards Act
 - Darby charged with failing to comply with minimum wage and hour requirements for employees.
 - Shift in the court's understanding that when you regulate terms and conditions of employment you might be regulating something that is purely within the state
 - Congress should be able to regulate even the purely local if there is a substantial effect that goes beyond the state.
 - Tenth Amendment issue:
 - 10A is reminder, not an independent check, of "truism" enumerated powers vested in Federal gov, yet does not innately prohibit any Federal powers
- **Wickard v. Filburn (1942)**
 - Federal law regulates allotment of land for farming Filburn's (intrastate producer, mostly non-commercial) wheat
 - Aggregate/Cumulative Effect:
 - Federal objective: stimulation of commerce is a regulatory function, must avoid surplus that would negatively affect interstate commerce
 - Wickard is one farmer who doesn't produce very much but if every farmer produced his surplus, it would have a negative aggregate effect on interstate commerce
 - After Lopez and Morrison, Wickard's largely non-economic production of wheat would likely not be applied to aggregate effect principle

NARROWING OF THE COMMERCE POWER (1990s-Present)

LOPEZ (1995)

- Statute - "Gun Free School Zones Act of 1990" - Congress made it a federal offense for any individual knowingly to possess firearm at a place that the individual knows or has reasonable cause to believe is a school zone
- Issue - Whether Congress enacted statute "substantially affects" interstate commerce, and is therefore Constitutional:

- Court finds that statute fails three-prong test
- Government's "Cost of Crime" argument rejected
 - "Possession of firearm in school zone -> violent crime -> impairs national economy b/c of handicapped educational process, less productive citizenry, costs of violent crimes are substantial through insurance, costs spread throughout population
- Court's response: Inferences too Attenuated.
 - Government could regulate any activity that has to do with economic productivity of citizens (e.g. family law, which is state issue)
 - Inferences out of Constitution's enumerated powers into something not enumerated (policing power)
 - Substantially effects test and aggregation principle must have a stopping point - activities wholly separated from business (gun possession) are beyond the reach of commerce power

MORRISON (2000)

- Statute: All persons within US shall have right to be free from crimes of violence motivated by gender" "A person who commits a crime of violence motivated by gender and thus deprives another of the right declared in this section shall be liable to party injured, in an action for recovery of compensatory and punitive damages, injunctive and declaratory relief and such other relief as a court may deem appropriate"
- Court rejects "mountain of data" how violence against women affects interstate commerce:
 - Existence of congressional findings is not sufficient, by itself, to sustain constitutionality of Commerce Clause legislation
 - Gender-motivated crimes of violence are not in any sense economic activity
- Court rejects Aggregation argument:
 - Violence against women act does not regulate economic activity, so connection too attenuated

GONZALES (2011)

- Statute prohibits schedule 1 drugs into illicit interstate drug market even though it is non-economic (e.g. prohibiting gun possession, gender crime) in nature
- Principle for Federal Regulation here:
 - "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances of the class'
- Intrastate activities ARE within reach of Fed Gov
 - Economic intrastate activities are not categorically beyond the reach of Fed Gov
 - Intrastate activities bearing a local connection with a comprehensive Federal regulation scheme (to argue otherwise is "superficial and formalistic")
 - Congress may only regulate noneconomic intrastate activities where the failure could undercut its regulation of interstate commerce
- Does this rule re: noneconomic activity change the holding in Lopez?

- No. Non-economic activity that is local MUST actually undercut regulation of interstate commerce which gun possession in a school does not do on any significant level

The Taxing and Spending Power

Spending Power Overview:

1. Exercise of spending power must be in pursuit of general welfare
2. Conditions must be unambiguous, enabling the states to exercise choice knowingly
3. Federal grants might be illegitimate if unrelated to federal interest in national projects or programs
4. Other constitutional provisions may independent bar to the conditional grant of federal funds
 - a. Conditions cannot take form of threats to terminate other significant independent grants (could be interpreted as coercion)
 - b. A certain amount might be too much but Court hasn't gone there yet- probably won't

TENTH AMENDMENT - The powers not delegated to US by Const. nor prohibited by it to the States, are reserved to States or to the people

- Truism - that the delegated enumerated powers of Const. to Congress are to be taken as is
- Purpose of the Tenth Amendment cases: anti-commandeering or protecting States from being compelled to directly follow the law

***New York v. United States* - Feds can't regulate state legislatures**

- Congress requires states to figure out what to do with their waste or "take title." Thus allegedly commandeering the state.
- Rule:
 - Congress can incentivize through spending and manage directly, but it cannot force the states to do something (ie. take title)
 - Commerce Clause authorizes Congress to regulate interstate commerce directly; it does NOT authorize Congress to regulate state governments' regulation of interstate commerce
- Dicta:
 - Compelling States to implement Fed law in own state regulations disrupts accountability of state officials because they become responsible in eyes of constituents of unpopular or unsuccessful Federal initiatives

***Printz* - Feds can't regulate state executives to carry out federal executive functions**

- Mandates or commands state officers (attorney general) to regulate Fed direct command of law of providing background checks on gun owner applications
- Rule expands on *New York*:
 - Feds cannot regulate the state machinery itself NOR the state's individual officers
 - Regulating state executive officers to do federal executive duties impedes on President's role as Federal Exec branch power

Reno

- Act prevents the disclosure of motor vehicle info which States have sold, used by insurers, manufacturers, direct marketers to contact drivers with customized solicitations, into the stream of commerce
- Rule:
 - Distinction between prohibiting the states (OK) vs. commandeering affirmative duties (NOT OK - *Printz* and *New York*)

Taxing Power Recap:

1. Congress may tax for the general welfare (*US v. Butler*)
 - “to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”
2. Not much changed with *Sibelius*

Sabri v. US

- To what extent is the Tenth Amendment a limit on taxing and spending power?
- *Sabri*'s argument (losing argument)
 - Failure to require proof of a connection between federal funds and alleged bribe as an element of liability
- Rule:
 - No need for such a requirement; Congress has authority under spending clause to appropriate federal money to promote general welfare and has corresponding authority under N+P to ensure taxpayer dollars appropriated under that power are spent for general welfare and not projects undermined by corruption
 - **Money is fungible** and *Sabri*'s bribery and other corrupt behavior affects Gov's ability to provide welfare of the people with its funding/spending

Conditions on Grants to the States (shift from Commandeering)

South Dakota v. Dole

- Congress withholds 5% of funds to use on their interstate highways
- Limits to Congress' ability to use strings on grants to induce state action? Does this withholding tactic go beyond the Tenth Amendment?
 - Spending power should be in pursuit of “general welfare” but not so much a check from the court but rather wider deference for Congress
 - Congress must do so unambiguously, enabling states to exercise choice knowingly, cognizant of the consequences of their participation
 - Must be related to federal interest in particular national projects, programs
- Rule:
 - Losing 5% of funds is not significant coercive tool to render this “incentive” to be commandeering etc. of NY, *Printz*.

Sibelius

- *South Dakota* distinguished with *Sibelius*
 - 5% reduction in highway funds vs. 20% of state's funding on ALL of medicaid funding is substantial difference, veers into coercive territory
- Rule

- Individual mandate
 - Commerce Clause **does not** authorize individual mandate
 - it **compels individuals** to purchase a product, on the ground that their failure to do so affects interstate commerce, as opposed to regulating existing commercial activity (even though the mandate itself has to do with a federal interest: public health costs)
 - Tenth Amendment **does not** authorize individual mandate
 - Commerce Clause on its own is not general license to regulate individuals from cradle to grave because he will engage in these actions because “**policing power** to regulate individuals as such is **vested in the States**”
 - Necessary and Proper Clause **does** authorize individual mandate:
 - **Cost-shifting problem** of healthcare costs is squarely interstate commerce (substantial effect on interstate market in health care) concerns in that people can’t afford to pay hospital costs, hospitals pass on the cost to insurers through higher rates, insurers in turn pass on the cost to policy holders in the form of higher premiums
- 5000(A) is Constitutional because it can be reasonably read as a tax and is authorized under its power to impose tax (tax for purposes of Taxing and Spending power but NOT for purposes of Anti-Injunction Act)
 - Anti-Injunction Act - you cannot challenge any tax until you pay it (penalty vs. tax)

Preemption Roadmap

1. Is there a preemption clause? -> express preemption test
2. Is preemption implied
 - a. Is there a conflict between the state and federal laws?
 - b. Does the state law interfere with the objective of federal law
 - c. Did the feds intend to occupy the field?
 - i. if yes to any of the above- the state law is preempted
 - ii. identify federal and state arguments relative to congressional intent

Lorillard Tobacco Co.

- Federal law (FCLAA):
 - To “provide new strategy for making Americans more aware of adverse effects of smoking to assure Americans more aware of any adverse health effects.
 - FTC regulated cig advertising in general, advertising in electronic media, sought to protect public, including youth from being confronted with images of cig smoking
- MA passes law targeting and banning all cig advertising
 - Argues that the anti-advertising law for cigs is more of a zoning issue to prevent youth exposure to cig advertizing
 - Governing zoning, location of ads vs. governing content (federal space)
- Court:

- Can't pick and choose what part of Federal law you want to adopt - as Federal law already controlled location, access to ads in electronic media, they already "intended to occupy the field"
- Congress unequivocally precluded the requirement of any additional statement on cig packages beyond what is in its statute and Congress does not want non-conformity in regulatory schemes for cig smoking
- Rule:
 - Ambiguous preemptive language is not enough, court starts with presumption against preemption unless there's a "clear manifest purpose" to prevent such a law

Florida Lime & Avocado Growers

- CA's new law that has higher standards of oil content than existing Federal law does not warrant preemption
- Rule:
 - The Court only needs to look into Congressional intent when compliance with the state and federal law is a physical impossibility; that is not the case here because Federal law is merely setting a floor. If the CA law accepted oil content below that floor that would require investigating Congressional intent / possible preemption.
 - No such collision here

State Laws Impeding a Federal Regulatory Objective

Pacific Gas & Electric Co.

- CA state law puts moratorium on constructing nuclear power plants; does this frustrate a Federal regulatory purpose?
- Although there is 1) Federal interest in constructing nuclear power plant, safety concerns etc. 2) conflicts with decisions made with nuclear power disposal 3) frustrates federal objective of creating nuclear energy
- Rule:
 - Though the purpose of an Act is promoting nuclear energy, it does not mean it is to happen "at all costs"; federal concern certainly is safety and furthering nuclear energy initiative but states retain power to judge need, costs, and other state concerns.

Federal Laws that Occupy the Field

Arizona v. US

- Immigration policy is broadly a federal issue -> affects trade, investment, tourism, diplomatic relations for entire Nation, as well as perceptions, expectations of aliens in US who seek full protection of our laws
- **Field Preemption - Facial Challenge applied to anyone these laws would be Constitutional**
 - Where Congress intends to occupy field of alien registration that provide full set of standards governing alien registration including punishment for noncompliance -> even complementary state registration is impermissible

- Scalia's challenge: What about state drug laws- why didn't Feds occupy that field?
 - Because Congress never intended to.
- Congress makes a deliberate choice to impose civil vs. criminal penalties to certain offenses - States cannot decide to criminalize what is a civil penalty federally
- Federal removal vs. State's arrest of aliens
 - Federal scheme also does not authorize arrest of suspected aliens but instead tells alien about proceedings including time and date of removal hearing.
 - If Federal officer did decide to make arrest, attorney general may issue a warrant but both cases warrants are executed by federal officers who received training in immigration law and not state cops.
- Sec. 2(b) requires state officers to make reasonable attempt to determine immigration status of any person they stop, detain, arrest on some other legitimate reason. Requires that any person who is arrested shall have person's immigration status determined before released. (NOT PREEMPTED)
 - ICE database maintains info on immigration records
 - State scheme does not necessarily interfere with federal database as state officers can simply contact the database
- Scalia: Arizona is entitled to have its own immigration policy including more rigor in enforcing it as long as it doesn't conflict with federal law - AZ can still cooperate with fed scheme

Dormant Commerce Clause:

What is it?

- Principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. No clause or Constitutional provision that expressly declares that states may not burden interstate commerce

Analysis

Discriminatory?

- Discriminatory on its face? --> strict scrutiny
- Discriminatory Purpose? --> strict scrutiny
- Discriminatory in effect? --> strict scrutiny

Discriminatory Laws -> Strict Scrutiny Test

1. Legitimate purpose?

- Y --> 2
- N --> unconstitutional

2. Less discriminatory alternatives?

- Y --> unconstitutional
- N --> constitutional

Non-discriminatory laws --> Balancing

- If Not discriminatory on its face its purpose, or in its effect -> Do the benefits outweigh the incidental burdens on ISC
 - Y--> constitutional
 - N---> unconstitutional

Why do we have it?

- To prevent burdening citizens of other states, who don't vote on the said laws
- Efficiency of interstate commerce, free trade, benefits the economy
- Uniformity

H.P. Hood

- NY refuses Boston milk distributor, on basis of state law requiring issuance of licenses only where Comm. of Agriculture and Markets finds that such an issuance will not encourage destructive competition and such issuance is in the public interest, is a violation of the commerce clause
- Rule: A state may not use its powers to protect the health and safety of its people as a basis for suppressing competition.

Cooley

- PA law requires only local pilots use ships entering the Port of Philly or pay a fine that went to support retired pilots
- Rule: States are free to regulate commerce matters that are local in nature and different from state to state. If there is a need for uniform treatment among the states on a commerce issue, Congress can override state action.

South Carolina State Highway

- SC law prohibits use on state highways of motor trucks and "semitrailer motortrucks whose width exceeds 90 inches and whose weight including load exceeds 20,000 pounds.
- Legitimate State interest?
 - Maintaining highways are peculiar state concern, as opposed to railroads which are much more an interstate concern, highways travel interstate but states have interest in their safe and economical administration
 - Congress has not acted on reviewing, enacting state highway regulation because of diverse interests involved
- Rule: States may impose nondiscriminatory restrictions with respect to motor vehicles moving in interstate commerce as safety measures and means of securing economical use of its highways

South Pacific Co. v. Arizona

- AZ law - unlawful to operate within state a railroad train of more than 14 passenger or seventy freight cars, authorizes state to recover money penalty for violation of the act
- Undue burden on Interstate Commerce?

- Yes. long trains, freight cars are standard practice and indispensable to operation of efficient and economical national railway system
- Discriminatory in Effects:
 - 93% of train traffic in Arizona is interstate, would require these companies to send more trains in AZ just to transport same amount of goods
- Safety argument of the State rejected:
 - There is actually more safety risk by putting more trains on the railroad due to the more stringent length requirements

City of Philadelphia v. New Jersey

- NJ law forbids anyone bring in waste from outside NJ, to protect public health, safety, welfare
- Discriminatory on its face
- State's interest:
 - Volume of solid and liquid waste increasing and their treatment, disposal threatens quality of environment in NJ and availability of landfill sites diminished, threatens public health
- Undue burden on Interstate Commerce:
 - NJ discriminating outside garbage purely on its origin (outside its own state) is not permitted - even if the actual impact on interstate commerce is quite small
- Rule:
 - One state cannot isolate itself from stream of interstate commerce simply because it does not want burden of a problem shared by all
- Dissent proffers that this "impossible" decision of NJ leaves them with no alternatives

Hughes v. Oklahoma

- OK statute forbids transportation of natural minnows out of State for purposes of sale and thus "overtly blocks the flow of interstate commerce at State borders"
- Discriminatory on its face
 - Application of strict scrutiny assuming legit state interest- any non-discriminatory alternatives?
- Alternatives:
 - State places no limits on non-discriminatory measures like limiting numbers of minnows that can be taken by licensed dealers nor does it limit how these minnows may be disposed within the State, yet forbids transportation of any commercially significant number out of state. Thus, this is not "last ditch" attempt

Facially Neutral Laws

Hunt

- NC statute only permitting USDA grade and nothing else and puts burden on WA apple interstate trade as they have expended a lot of money promoting, creating higher grades of apples, creates embargo effect on out of state producer
- NC interest is to combat consumer confusion buying apples

- NC must show unavailability of non-discriminatory alternatives
 - NC did not satisfy this- as this consumer protection measure does not address consumers directly but more negatively impacts wholesalers, brokers, such as WA, does not combat consumer confusion more than other alternatives.

Exxon Corp.

- Argument that Statute is Discriminatory in its effect:
 - Effect of statute is to protect in-state independent dealers from out of state competition and create protected enclave for Maryland independent dealers
 - Law itself doesn't distinguish between in/out state producers, BUT there are no in state producers affected by the law that harms **disproportionately harms out of state producers** that are refineries that also retail gas
- Is this law that incidentally negatively affects out of state producers Unconstitutional?
 - No. **Commerce Clause does not protect structure or individual refineries but rather interstate commerce itself** which isn't the precise discriminatory effect here
 - Theoretically, statute will just cause a shift in the services interstate companies offer in Maryland to comply with statute, does not burden interstate commerce in general

Discriminatory in Purpose - Facially Neutral Laws

West Lynn Creamery

- MA statute requires dealers to make payments into fund that is disbursed to MA farmers ONLY
- Rule: A tax that primarily affects out-of-state producers and is redistributed directly to in-state producers of the same product is unconstitutional under the Dormant Commerce Clause.

Minnesota v. Clover Leaf Creamy Co.

- MN statute bans retail sale of milk in plastic, non-reuseable containers but permitted sale on returnable, nonrefillable containers such as paperboard milk cartons
- Discriminatory in Purpose?:
 - Clover Leaf argues actual basis of statute was to promote economic interest of local dairy pulpwood industries at expense of economic interest of other segments of dairy industry and plastic industry
- Court: NO.
 - MN statute regulates even-handedly.
 - But even if law is not discriminatory - apply balancing:
 - Burden on interstate commerce vs. Benefits of legitimate state interests:
 - **Burden on interstate commerce is relatively minor**; milk can still freely move across border as most dairies package products in more than one container in anyway
 - But most importantly: **no way to determine winners and losers of this statute being local or interstate** etc.
 - But what about Hunt's apples? That was an undue burden:

- **Burden does not fall squarely on out of state interests** like they did onto Washington Apples

Dean Milk Co.

- Restricts pasteurized milk products in Madison that were not inspected at plant within five miles of Madison city square
- Discriminatory on its face?
 - Yes. any geographic line, regardless of state line or radius is border against interstate commerce. Discriminates state interests too, but still affects interstate commerce in general
- Legitimate purpose for Madison's ordinance? Yes.
 - Combating consumer health hazards in consuming pasteurized milk
- Are there non-discriminatory alternatives available? Yes. So law is Unconstitutional.
 - Madison health commissioner recommended uniform standards that outside milk would have to comply with; but **Madison inspectors could go directly to Illinois and inspect milk there**

Maine v. Taylor & United States - Discriminatory on Face

- Maine's statute directly restricts interstate trade by blocking all inward shipments of live baitfish, but this alone does not render it unconstitutional.
- Legit interest?: The **environment is a legitimate concern** for Maine because importing minnows could ruin Maine's fragile fisheries.
- ND Alternatives? Scientific community is in disagreement; Maine cannot be expected to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees, on what disease organisms are or are not dangerous, before it acts to avoid such consequences.
- CONSTITUTIONAL

Non-Discriminatory Laws

Apply Balancing Test (Burden v. Law's Purpose)

Pike v. Church, Inc.

- Statute requires AZ farmer to go to packing shed, closest shed to farmer is in CA 30 miles away, no other sheds in his area.
- Legitimate state purpose:
 - Improving and protecting the reputation of state cantaloupe growers
- Burden on farmer and interstate commerce vs. Law's purpose?
 - Significant burden on interstate commerce - \$700,000 to build a packing plant for the company
- Court finds burden > legit state purpose
- Rule: Where a state statute regulates even-handedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Bibb v. Navajo Freight Lines

- IL statute requires use of certain type of rear fender mudguard on trucks and trailers operation on state roads?
- Discriminatory?
 - NO. does not distinguish b/w in and out of state
- Does the incidental burden on interstate commerce significantly outweigh law's purpose to increase safety on State's highways?
 - YES. Burden is quite significant: must modify fenders whenever vehicle has wrong type of fender to comply with, and going into states with contrary laws re: fenders
 - **reduces uniformity** b/w states interstate highways
 - Safety concern is pretty weak. Fenders that IL requires has its own safety issues involved that negate benefit.

Consolidated Freightways Corp. of Delaware

- IA statute prohibits large trucks within state (65ft doubles within borders, most trucks restricted at 55 ft in length, double homes, trucks carrying tractors etc. etc.)
- Does burden on interstate commerce outweigh legitimate state purpose?
 - No valid safety reason for barring twins from IA highways b/c twins are as safe as semis, increasing cars to carry same goods in IA negates safety benefit of law

Exceptions to Dormant Commerce Clause

- Congressional approval
- Market Participant exception

Congressional approval

- Congress can overrule Constitutional rulings of Supreme Court by no longer declaring the Federal law as dormant to state law by their express approval
 - e.g. Western & Southern Life Insurance Co. - the Court is compelled by Congress' enacting of McCarran-Ferguson Act to enforce no longer dormant CC state law

Market Participant Exception

- State is a participant in the market rather than a regulator; can discriminate against non-residents when it is producer or supplier of marketable good or service
- Four Rationales:
 - CC intends to free restrictions of private trade
 - Founders were not considered with states themselves operating in the market
 - Protect State Sovereignty
 - If State enters market themselves, they are subject to evenhanded market that imposes its own burdens
 - State uses citizen's own taxes in these projects and the citizens should see the benefit from their own tax dollars

South-Central Timber Development, Inc. v. Commsnr Dept. of Natural Resources of Alaska

- Contract, as a market participant, ended when they sold the goods (unprocessed timber) for the project so they **cannot require the buyers to partially manufacture in Alaska as a “downstream restriction” on an area of interstate commerce that they are no longer a participant**

White v. Massachusetts Council of Construction Employers (1983)

- 1979 Executive Order by Mayor of Boston provided:
 - Construction projects funded in whole or part by the city funds, or funds which the city had authority to administer should be performed by a workforce consisting of at least half bona fide residents of Boston
- Does not violate Commerce Clause because city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such.

Statutory Interpretation

Textual Canons

- **Linguistic Canon:** Rules or presumptions about how words fit together with a particular provision. - you invoke a linguistic canon when you make an argument about meaning of a term based on grammar, punctuation, associated terms
 - *Ejusdem generis* - terms “of the same kind”
 - general term followed by specific terms, generally conform
 - *Noscitur a sociis* - “known from associates”
 - examine words *around* the word on the list, context
 - e.g. “discovery” in “exploration, discovery, prospecting” means discovery of resources
 - *Expressio unius est exclusio alterius* - Inclusion of one thing indicates exclusion of another. Indicates Congress intended to omit a word not mentioned in a list of related words
 - Does not really apply when Congress says “including but not limited to...”

Substantive Canons

- **Whole Act Rule** - What is the purpose of the act? Don’t confine specific context of provisional instance but design of statute as a whole and its object, and policy (see: Bank case)
 - **Identical Words-Consistent Meanings:** Identical words and phrases within the same statute should normally be given the same meaning
 - **Formal Consistency** - Use of different language in parallel sections of the same statute creates inference that Congress meant different things
 - **Avoiding Redundancy or Surplusage:** a court will avoid interpretation of a provision that renders any other provision of same act redundant or “surplusage.” Congress would likely interpret that Congress meant different thing for different term or otherwise it would deny a word its independent meaning

necessarily, or member of an opposing party), Presidential/Agency Statement, “Dog Didn’t Bark” (silence on an issue)

- **Purposivism** - Look into policy context rather than mere semantic context

Differing Statutory Interpretation Approaches

- **Textualism**
 - What do words mean in context - ordinary meaning that reasonable person would understand in appropriate context
 - Tools:
 - Whole act, whole code canons
 - Purposivism (but NOT Intentionalism)
 - Dictionaries, industry norms
 - Semantic context
 - Premises:
 - Objective, democratic (closest to what legislature put into law), predictable (no extraneous interpretivism that might lead to faulty results)
 - Judicial Restraint - restricts judges from interpreting own preferences toward meaning, manipulating text
- **Intentionalism**
 - Goal: What did Congress actually INTEND with the statute?
 - Tools:
 - All textual, substantive canons
 - Legislative history
 - Premises:
 - Faithful Agent - closest idea to what Congress intended by enactment
 - Practical - intent is not always clear by plain text
 - Legislative history is more coherent, simplified explanation or representation of what statute is stating in a very complex, open fashion
- **Purposivism**
 - Goal: to figure out what legislative **aim** of particular statute is
 - Tools:
 - Contextual background
 - Policy context over mere semantic context
- **Legal Process Purposivism:**
 - What would a reasonable Legislature’s aim be with this statute, under these circumstances
 - Use if you don’t know legislative purpose of statute
- **Dynamic Interpretation**
 - Goal: With things changing over time, how do you interpret a statute that is not in line with present circumstances?
 - Elements/ When to Apply DI:
 - Dynamic term used
 - Abundant evidence of change

- Passage of time
 - Tools:
 - ALL Tools PLUS present circumstances
 - **Bob Jones** - All three branches endorsed social policy changes in various ways (executive order, Plessy v. Ferguson, laws promoting social justice, equality) and not just judicial branch.
 - **Democratic Legitimacy** - If current Congress approves certain interpretations but has not updated outdated statute that leads to a faulty interpretation in present times
- **Imaginative Reconstructionism**
 - Goal: What would have been intent of Congress IF they knew of this situation or **absurd result** of the statute

Federal Executive Power and the Administrative State

Youngstown Sheet & Tube Co.

Youngstown Sheet v. Sawyer (the steel seizure case) (1952): During the Korean war, President Truman sought to avert a strike in the nation's steel mills. He therefore issued an executive order directing his Secretary of Commerce to seize the mills and operate them under federal discretion. Congressional approval of the seizure was not requested but the Congress was on recess. The steel companies sought an injunction to prevent the seizure. The SC struck down the seizure order, concluding that it was an unconstitutional exercise of the lawmaking authority reserved to Congress. If a president does not have support from Congress, he may be doing an action under one of his own powers, but that is not the case here ("Take care" power doesn't apply because he can't do what the law doesn't allow him to do; "General executive power" doesn't apply because it will only apply whether it is unclear that you don't have the power to do something, not if its clear that he doesn't have the power to do something). Justice Black said the court order could not be justified after his Commander in Chief power.

TEST:

1. President acting under Article I and Article II power with approval of Congress – acts pursuant to an express or implied authorization from Congress
 - a. Justice Jackson says President's power at its highest
 - b. The only time that this is a violation is if it violates a fundamental right or federalism in a great way
 - c. Court will be very deferential to presidential action
2. "Twilight Zone"- Article II power but acts in the absence of either a congressional grant or denial of authority
 - a. No evidence Congress disapproves, but there is at least some plausible Article II power
 - b. There is Article II power and MAYBE some Article I power
 - c. Congress' view is not clear but not against what the President is doing
 - d. Power is medium at this level
 - e. Balancing competing interests of President and Congress

3. Article II power minus congressional authorization (No art 1)
 - a. Lowest level of power
 - b. This is the case here

There are really four approaches that are identified in the opinions:

1. There is no inherent presidential power; the president may act only if there is express constitutional or statutory authority
2. The president has inherent authority unless the president interferes with the functioning of another branch of government or usurps the powers of another branch
3. The president may exercise powers not mentioned in the Constitution so long as the president does not violate a statute or the Constitution
4. The president has inherent powers that may not be restricted by Congress and may act unless the Constitution is violated

United States v. Nixon

- Nixon claims that he has the executive privilege not to give up certain information for trial and furthermore states that if he gives up the tapes, he will potentially have to divulge information on certain topics. Court holds that this is just like any other privilege and therefore must not violate the 5th and 6th Amendment.
- **This is a criminal trial; there is only an executive privilege for civil cases arising from conduct that did not occur in office. Generalized claim of privilege was outweighed by the fundamental due process rights of the parties in a criminal prosecution.** (Executive Immunity: *president is immune from liability for damages in a civil suit for any official act performed while the President is in office*)
- There is a balancing test here, and we are not dealing with national security or diplomatic issues- but the court said that criminal prosecutions proceeding as they should was more important

Balancing test:

1. **Interests of president v. criminal justice system**
2. **Unless this is national security interest, generally the information will be accessible and the criminal justice interest wins**
3. **Furthermore, courts can listen to tapes in camera and determine what comes in and what does not come in to protect national security**
4. **If president asserts national security interest directly, he may not have to give up the tapes**

Clinton v. New York

- Major premise: Constitution provides that the sole method of repealing law is via statute
- Minor premise: the canceling of appropriation bills is the President repealing law - a.k.a. Line Item Veto Act.
 - Therefore, UNCONSTITUTIONAL
- Line Item Veto Act
 - Authorizes Pres to “cancel in whole” certain types of provisions signed into law:
 - Any dollar amt. of discretionary budget authority

- Any time of new direct spending
- Any limited tax benefit

Hypo:

- Congress passes a Tariff Act with a list of 300 articles exempt from import tariffs. Act states that the President may suspend the exemption for any item if he finds that any country exporting those products imposes duties on agricultural products of the US that he deems reciprocally unequal and unreasonable?
 - Constitutional? Yes. Unlike the line item veto because Pres is not modifying the legislation but merely suspending it or applying it, instead of vetoing bits and pieces of it

Agencies in the Structure of the Federal Gov't

- What are they?
 1. authorized by Congress
 2. in statute, to do something
- Executive branch is given a lot of power, through delegation, from Congress/Legislature
- Far more volume of regulations than statutes enacted by Congress
- Regulations = binding **law** to relevant industries, individuals etc

Delegated Power = Legislative Power?

- Most say yes, but Constitutional

Funnel

- All regulations must not violate statutes, statutes must not violate Constitution

Factors in determining Non-Delegative/Delegative powers (1 + 2 most important):

1. Is there an **intelligible principle**? Guidance for authority?
2. **Scope of the Discretion** - industry specific (better) vs. broader trade/economy regulation
scope (bad) - the bigger your scope, the stronger intelligible principle needed
3. Agency
4. Procedure
5. Judicial Review

Wide Discretion of Legislature on Delegation of Power

- Court will generally give a lot of discretion, leniency to statutes delegating powers for agencies

Agencies and Delegation

A.L.A. Schechter Poultry

- Unconstitutionally Delegated Legislative Power in President - Agency's rule sought to define and effectuate policy to expand "fair competition" and instead of setting standards,

regulation based on delegated statutory law, it gave President authority to “prescribe” any code that effectuates the policy, essentially a legislative function

- Existing law only defined “unfair competition” (Federal Trade Commission Act) in a narrow scope so would permit agency to define “fair competition”, and the President to discern what it means
- Intelligible Principle?
 - No standard of conduct
 - Private industry was left to decide what was “fair competition”
 - President’s discretion thereafter is unlimited and merely to proscribe any means to “effectuate the policy” of Section 1.
- Typical requirements of intelligible principle:
 - Agency with authority over specific industries instead of broad trade, industries etc.
 - Procedures - Private industries cannot deem what is lawful etc.
 - Judicial Review

Whitman v. American Trucking

- Lack of Intelligible Principle?:
 - Congress’ statute “requiring the EPA to set air quality standards at the level that is “requisite”—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety,”
- “Requisite” defined:
 - “sufficient but not more than necessary”
- Does Congress’ failure to set guidance for where to set how much financing is too much, disrupt the non-delegation principle?
 - Historically no, “we have never demanded, that statutes provide a “determinate criterion” for saying “how much [of the regulated harm] is too much”
 - Scalia: we are lenient on Congressional delegation and have only held two regulations as unconstitutional, because they gave legislative authority for President “to prescribe” code instead of actually setting any standards
 - Reasons:
 - 1) congress lacks expertise to give specific recommendations for more technical agency authority
- Costs determined by industry, and determined by agency when “costs begin to outweigh benefits” - suffices as intelligible principle here
- What does Stevens say concurringly:
 - Let’s not pretend that this is not legislative power to the agency, when it is. Stevens makes analogy to President delegating authorities to Cabinet, nothing new in political branches

Can/How Agencies Consider Costs in their Discretion?

- **“Elephants in Mouseholes” Doctrine**
 - The **elephant-in-mousehole doctrine** holds that "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). This doctrine is an exception to the textualism approach to constitutional interpretation.
- Scalia: Statute mentions costs elsewhere, other provisions mention costs, but not in this provision but merely the public health. Therefore one should read the exclusion of the topic of costs here
- Breyer: looks at legislative history that suggests costs should not be considered along with “public health” initiative
 - Public health does not mean zero risks, but based on particular context, costs, feasibility

Agencies and Analysis of Evidence in Rulemaking

- Scientific Analysis
 - Science can demonstrate data but level of uncertainty associated with it
 - IE. Compliance - who will comply with safer auto but detachable seat belt
 - Risks - 2 step analysis
 1. Assess the risk - how likely is it to occur, what is probability, severity of risk
 2. Manage the risk - how are we going to approach and treat the risk / requires policy judgment
- Economic Analysis
 - Cost-benefit analysis
 - Every agency needs to account costs when promulgating rules
 - Assess costs even when statute precludes cost consideration, but cannot be inconsistent with statutory purpose, delegation
 - Demonstrate benefits justify costs, or benefits outweigh costs
- Political Analysis

Presidential Control of Agencies

- US Const. art II Sec. 2
 - Vests power of appointment in President, with advice and consent of Senate, for ambassadors, other public Ministers, Consuls, Judges of SCOTUS and all other officers of US

- Re: Pure Executive Officers, may have some authority to appoint Inferior Officials
- Inferior Officials, however, also in realm of Congress' power of appointment

Morrison

- Is the Attorney General's "for cause" removal of an Independent Counsel Constitutional? Separation of Powers Problem?
 - Removal for "good cause" of Independent Counsel
 - Physical disability, mental incapacity, or any condition that significantly impairs abilities to carry out duties
- Court: Independent Counsel is Inferior Officer or Purely Executive?
 - Appellant is subject to removal by a higher Exec Branch official. Even though they are not "subordinate" to Pres or Attorney General, in possessing independent discretion to a degree to exercise powers delegated to hereunder the ACT, the fact that she can be removed by Attorney general infers that she has inferior rank
 - Appellant only empowered by act to perform only certain limited duties: investigation, prosecution of certain fed crimes.
 - Appellant's office is limited in tenure. There is no time limit on appointment of particular counsel - so it is "temporary" appointment to do single task
- Holding: Act gave "special court" power of appointment for Independent Counsel, is not restricting on the President's role to give Attorney General power to remove IC for good cause
 - PEO: only can be appointed by Pres
 - IO: can be appointed by either Pres, heads of departments, or by judiciary

Myers (1926)

- Tenure and Office Act provides President may not remove his appointed officers without advice and consent of Senate - **T+O Act is UNCONSTITUTIONAL**
- Myers tries to bring suit for just compensation after President removes him at will.
- Court:
 - *Myers* Court holds TOA unconstitutional
 - Act I, which enumerates powers, would have specifically mentioned power of removeable vested in Congress if that's what drafters implied
 - Act II, which gives general, "Executive Power shall be vested in President" - ie. all Exec power should be in Pres - is more persuasive to Pres having power to remove
 - Defects in an officer are more privy to President than Congress so Pres is better to remove even if Congress is able to appoint them
- Rule:
 - Pres has power to remove Executive Officials - full stop - even at will.

Humphrey's Executor

- Humphrey's Estate/Court
 - The two cases are distinguished, because *Myers* officer was purely executive, so Pres could remove at will, but here Humphrey is a quasi judicial, quasi legislative official and Congress intended it to be a non-partisan, non-political entity without the President overseeing it directly
 - Thus, *Myers* does not apply and Pres cannot remove Humphrey at will

Wiener (1958)

- President may not remove a Commissioner of War Claims Commission at will, why?
 - President cannot remove appointees confirmed by the Senate at will.
 - The court looked to the Act and found the intent behind the Commission's creation was to form an apolitical body that could remain outside the influence of politics – both the influence of politics inside the executive and within the legislature.
 - Granting the President sole dismissal power subjects the appointees to political pressures of the Executive.
- Separation of Powers issue:
 - Granting the President exclusive authority to remove appointees would render the Senate confirmation process meaningless, since the President could just remove any appointee he did not prefer.

Morrison (cont'd - Shift in Pres' Power to Remove)

- Purely Executive Official (Independent Counsel) under Attorney General
- Prosecution is generally a purely executive function
- Why can't President terminate Purely Executive Official at will, if it ruled so brightline before?
 - SCOTUS changed mind
 - Can't base power to remove solely on categories of Purely Executive Official / Inferior Officer.
 - BIG consideration: **Does the restriction that Congress places on removal, does it impede President's power to perform Constitutional duties?**
 - Attorney has enough control over official, "for cause" in this case, as a faithful agent of the President, to fulfill Constitutional duties
- Scalia dissents- why?
 - Ignores brightline established rule of Pure Executive Officers and their removability by President:
 - President must have at will power to remove PEOs "at will" - the majority contradicts that

Free Enterprise (2010)

- Security Exchange Commissioner (SEC) must show “good cause” for removal of PCAOB while President must show “good cause” to remove SEC member
- Constitutional problem?
 - Creates Multi-level removal process
 - Control issue - Pres cannot directly remove board member
- Board members = Inferior Officer
- SECs are “Head of the Department and their appointment/dismissal is correctly vested in the Commission
- PCAOB’s argument? - Why it believes multi-level removability is Constitutional:
 - Executive in SEC has better idea of who is performing or removable “for cause”
 - *Morrison* - President has enough power through SEC to remove if “for cause”
 - Judiciary body of experts, technical know-how, accounting science, limited set of technical issues, having “for cause” protection does not impede on President’s power to perform his Constitutional duty
- Court’s Rule:
 - One extra level of “for cause” removal is too many and may impede on President’s Constitutional power and duty, as more potential layers piles up
 - EXCEPTIONS:
 - Administrative Officers
 - Civil Service employees
 - SEC can now remove board member at will

INS v. Chadha

- Immigration officials were going to deport Chadha, an alien from Kenya, then the agency’s judge suspended the deportations. Then the House (but not bicameral) vetoed the suspension, without floor debate
- Is the Legislative Veto, by one house, unconstitutional?
 - Requirements for law:
 - Presentment to president
 - Bicameralism - Must be passed by both houses
 - Presumption that acts of Legislature are legislation
 - Is this legislative veto effectively legislation?
 - Yes- it altered legal rights, duties and relations of persons, incl. Attorney General, Exec Branch officials, and Chadha, all outside legislative branch
 - The veto altered Chadha’s status to be deported
 - Overruled Attorney General’s delegated duty to execute

- Constitution enumerated only 4 powers of Congress or houses to act alone - legislative veto was not one of them
 - Absent veto
 - The whole Congress (and not just one house who veto'd) was the entity that delegated to the Executive Branch (AG) and now they are revoking it
 - Congress cannot bypass legislative process because for sake of efficiency etc, because the Constitutional process is what ensures the legislative process, and careful consideration
- Congress is driven by majority coalitions and not focused with individual rights so they should not be interfering with individuals rights like they are with Chadha
- Veto Violates Checks and Balances
 - AG's discretion is subject to judicial review; a House's legislative veto is not
- Principle:
 - Congress must be checked by anyone that is not itself (veto is legislation, not subject to judicial review, or bicameralism, or presentment)

Bowsher v. Synai (1986)

- Comptroller General is an Executive Official
 - He is executing the law by looking at the law, interpreting it, applying it by interpreting the certain facts, how to make the budget cuts etc.
 - Congress has role in removal of Comptroller -> therefore legislative agent
 - Therefore, Comptroller's executive duties, with Legislature's control, is unconstitutional
- Mismatch: CG is an Agent/Member of the Legislature practicing Executive Power
 - Legislature retains removal authority over CG (an Executive Officer)
 - Agent of Legislature cannot exercise Executive Power
- Principle:
 - Congress cannot give power to agent of itself (*Chadha*)
 - If they want to practice legislative power must be through 1) bicameralism and 2) presentment
 - "For Cause" removal would have been fine, coming from President, but only President

Rule from *Chadha* and *Bowsher*:

Congress may delegate to anyone but themselves

Myers, Humphrey's Executor & Morrison v. Olson

- Legislative, Executive, and Judicial Power

- In *Morrison*, the Court says Congress's power to restrict the President's removal authority doesn't depend on rigid categories of pure executive versus quasi-legislative
- **Morrison: Question is whether restriction impedes the President's power to perform constitutional duties**
- Is the officer so central to the function of the Executive Branch that President needs at will removal power

Looking Past Formalist Definitions

- Congress must be complete when it delegates - may not retain authority to implement statutory mandates
- When Congress makes policy - whether we label it executive, legislative, or judicial - it must do it through 1) bicameralism and 2) presentment - *Bowsher* and *Chadha*

Schechter; Clinton

- Congress may not delegate (way) too much of its policymaking power - (ie. line item veto act looked a little too close to Congress' power of repeal, gave too much of its power to executive)

Morrison; Humphrey's

- Congress may limit the President's removal power of officers of the US to "cause" if it doesn't interfere with President's constitutional duties.

Myers; Morrison

- There might be some officials that the President must be able to remove at will (*Myers*), but after *Morrison*, they are probably few (and powerful)

Free Enterprise

- Congress may not create more than one layer of "for cause" protection between President and officer of the United States*

(*). many exceptions apply.

Chevron

- Landmark case giving wide deference to administrative agencies
- Statute
 - Clean Air Act does not define "stationary source"
 - Is it the plant-wide interpretation the EPA used in its regulation, or the individual sources
- EPA rule

- Used “bubble” interpretation (which was never explicitly mentioned in statute), using the entire plant-wide pollution, which gave flexibility to plants to offset its own individual sources with the total amount of pollution falling below limit
- Issue?
 - Is it the “bubble” definition permissible within “stationary source” term in the Clean Air Act, or is the individual smokestack sources that the statute required?
- Two-Step Test:
 1. Has Congress spoken directly to the precise issue in question,” or “whether the intent of Congress is clear?” (use all tools in statutory interpretation)
 - If Yes - Enforce unambiguous will of Congress
 - If No - go to Step 2
 2. Is agency interpretation reasonable? (analyze purpose[s] of the statute, does the agency’s interpretation interfere with the purpose)
- Court’s tools in Step 1:
 - All traditional statutory interpretation tools: textual canons (dictionaries, context) Legislative history (Committee hearings, notes etc.)
- Two Step Test Application:
 1. Using statutory interpretation, Judge finds that Congress did not speak specifically on issue, but generally that the purpose is to a) improve environment and keep b) economic interests in mind
 2. Is “bubble” interpretation reasonable? Yes, it is in line with Two main purposes: improve environment and reasonable economic development. The “bubble interpretation” allows plants to grow economically, without increasing pollution, which is a reasonable interpretation of statute.
- Why do agencies get wide deference from Judicial Branch?
 1. Judges not politically accountable, like Congress and agencies are
 2. Expertise of agencies (Step 2: Policy gap, as long as it’s reasonable interpretation Court will defer to agency, even if there is unclear intent of Congress)

Chevron Two-Step Analysis

- Chevron: Step One
 1. Did Congress speak to the issue?
- How to dissect? Use statutory interpretation tools
- Textual Canons
 - Linguistic EJ; NA; EU
 - Whole Code: In part: Inferences across statutes; repeal by implication
 - Whole Act: Surplusage; Redundant meaning; Title / Provisos

- Substantive Canons: Lenity (if criminal); Const. Avoid.; Clear Statement; Remedial Purpose
 - Essay question will bury prior bills or proposed acts etc. before the actual statute. Do not interpret that as issue, but look at contextually, when other bills were passed, discussed etc.
- Intent and Purpose: Legislative history

Question to Answer after the statutory interpretation: Did Congress leave a gap? Did they pass the decision onto the agency?

- Options at Step One
 - NO Gap: Easy - Agency do what it was told?
 - If they didn't - Agency loses.
 - Challenging party will want to say "of course....."

Chevron: Step Two

- Was the agency's interpretation a reasonable way to deal with the gap that Congress left?
 - Ask a different question: Would Congress have wanted this outcome?
 - Put another way: Whether the statute - even if subject to more than one interpretation - can support the interpretation adopted
 - Tools
 - Intent and purpose based tools (not theories)
 - Legislative History
 - Substantive Canons
 - Rule of Lenity
 - Constitutional Avoidance Canon
 - Federalism Clear Statement
 - Presumption Against Preemption
 - Remedial Purpose
 - Why some lower courts think A+C overlaps
 - Really asking whether agency is logically reasoning from statute?
- Step One and Step Two may overlap- reference "similar to remedial purpose in step one.."

Last Chance for Agency Rule to be Vacated:

- If challenger fails at Step One AND Step Two
- The Clear Error of Judgment Check: ("Hard Look" review)
 - Relied on factors that may not be considered; ignored ones that should be (statutory question) (ie. considering costs to a regulation when statute said not to)
 - Failed to consider an important aspect of the problem
 - Failed to respond to major comments/arguments

- Interpretation is unsupported by explanation, or rests upon flawed reasoning
- No justification for not taking alternative solutions

MCI Telecommunications Corp. v. American Telephone & Telegraph Co.

- AT&T owned monopoly of long distance services
- ‘Communications Act’
 - Requires filed rate provisions
 - Arguments for wide deference to agency?:
 - FCC “may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable..”
 - One exception - 120 day notice
 - In its “discretion” FCC may “modify” “any requirement” Particular instances” or “by general order”
 - “Modify” is ambiguous, so give a wide breadth to agency - “Modify” could be enlarged or minimized by its plain definition or in context of statute
 - Arguments for narrower deference to agency (Losing argument):
 - “Modify” is not as strong as “eliminate” or “dispense with” could have been in giving discretion to agency
 - The one exception is a small exception (can’t change time of notice) but can eliminate whole tariff for group of nondominant companies, seems a bit of a leap
 - “Modify” typically means “minor” or “moderate” change - Webster definition that gives a broader definition (and contradictory, moderate limited change AND fundamental change
 - Scalia’s analysis ends at Step 1 because he finds the statute speaks clearly to “modify” issue and scope of agency’s ability to enforce
 - If we did get past Step 1:
 - Is it reasonable to remove filing tariff to nondominant carriers (40% of market)?
 - The purpose of the statute is to prevent monopoly and promote efficient telephone service. The filing requirement prevented price discrimination and unfair practices while AT +T maintained monopoly over long distance service, it frustrates the same goals now that there is great competition on the market.
- FCC rule:
 - Dominant carriers must file tariff rates with agency
 - Nondominant carriers do not have to file tariffs

Arbitrary + Capricious - “Hard Look” Review Apply If Agency Rule Survives Chevron Two-Step

State Farm

- Motor Vehicle Safety Act authorizes Secretary to improve motor vehicle safety, by mandating passive or automatic seat belts, airbags.
- Agency rescinds Standards and the rescission is under judicial review
- Industry was shifting toward passive detachable seat belts, despite the original understanding by the Agency that 60% would be airbags and 40% automatic seatbelts
 - Led to people detaching the seatbelts, rendering them useless
 - Agency never enforced the airbag-only component that would require airbags in these vehicles
- Why is there Judicial Review over rescissions of Agency rules?
 - APA (Administrative Procedure Act) - “orders establishing, amending or revoking a Federal motor vehicle standard,” authorized judicial review of rescissions just as if it was a newly enacted rule.
- “Arbitrary and Capricious” Standard of Review
 - Narrow standard - Rational connection between facts and choices made
 - A.K.A. “Hard look review” - Court takes a hard look at agency’s decision making to ensure that agency took a “hard look” at the issue before it.
 - Did it look at right factors
 - **rely on prohibited factors?**
 - **fail to consider required factors? (e.g. not looking at safety when it is the purpose of the statute)**
 - **fail to provide adequate explanation of choice?**
 - **make a decision that runs counter to the evidence?**
 - **use flawed reasoning?**
 - **fail to respond/consider substantial arguments or comments, or an important aspect of the problem?**
 - **fail to consider important alternative w/o justification?**
 - Clear error in judgment?
- Is the Court Authorized to Rule the Decision of Agency as Wrong?
 - No.
 - The Court, in its application of the A&C test is to merely look at the logic between the facts and the choices the agency made, rather than their technical or expert judgment, to decide if it is A&C.
 - Reason?
 - Transparency

- Agency is entrusted with technical expertise, and we trust their judgment, BUT we need to see the logic, evidence, how they got there. Agency must articulate basis for their choice.
- Court's Application of the "Arbitrary and Capricious" Test
 1. Agency *did not consider* the airbag-only rule.
 2. Agency *too quick* to dismiss benefits of auto-seatbelts / *inertia* in detachable seat belts in that people would not comply
 - a. Agency overlooked inertia, in that it takes an affirmative action to unlatch a seatbelt where manual seatbelts do not (*questionable whether the Court is acting as the expert rather than reviewing*)
 3. No reason for not requiring non-detachable belts, after agency declared them safe

MA v. EPA

- Agency conclusion that even if it has authority now is not the time to regulate because of President's other priorities or global nature of the problem.
- Conclusion of law (Chevron), policy choice (State Farm) or mixed question of law and fact.
 - Chevron: Look at statutory text of Clean Air Act, use textual canons, and whether Congress spoke to the precise issue; If not then see if not regulating because of President's other priorities is reasonable based on the purpose of the Clean Air Act. Is it reasonable to look at the nature of global policy for the purpose of the statute?
 - State Farm: Is there a logical or rational relationship between the facts and choice to yield to President's other priorities (should overlap with Chevron Step 2 analysis - is it reasonable to consider these global policy, presidential policy facts? Was it too quick to conclusion, did not consider a fact etc). Note that A+C review and Step 2 of Chevron are substantially the same, explain subtle differences.
 - Agency conclusion that scientific uncertainties make it inappropriate to regulate now
 - Probably no statutory argument that uncertainty is never an acceptable reason not to regulate (but depends on statute)
 - The question is whether this is a rational conclusion based on the facts found

Standing

- Definition
 - Standing is the second major justiciability requirement - question of whether a specific person is the proper party to bring matter to the court for adjudication

- Basis for Standing
 - Authority is Article III
- Justifications (primarily the injury requirement)
 - Courts would be overwhelmed by caseload
 - Facts need to be developed
 - “Cases” + “Controversies” (Article III)
 - Better litigants for cause
 - No intermeddlers
 - Separation of Powers - Limit the role of courts
- Two Sets of Requirements for Standing:
 - Constitutional Standing
 1. Injury
 - P must allege that he has suffered injury, or will imminently suffer
 - Concrete, distinct and palpable, not “abstract”, ideological or “hypothetical”
 - Actual and imminent, not speculative
 - Personal or particularized
 2. Causation
 - P must allege injury is fairly traceable to D’s conduct
 3. Redressability
 - P must allege that a favorable federal court decision is likely to redress the injury
 - Prudential Requirements
 1. No raising a third party’s legal rights
 2. No tax-payer standing / Generalized grievances (Constitution Req. Now)

Allen v. Wright

- Desegregation of public schools mandated, IRS no longer gave tax exempt status to segregating schools. Plaintiffs allege, in class action, that they have suffered injury because of IRS still giving tax-exempt status to schools that were resisting desegregation
- Court’s Application of ICR Test
 - Injury in fact
 - Parents’ children being injured by segregation policies not injury in fact because it was **merely speculative** that claimant’s were impacted by someone else’s injury (only real injury to black children who were actually denied admittance to a school)
 - **Stigmatization** of black children, who are denied education because of the school’s discrimination; again, too “**abstract**” because any black child’s parents could bring suit if plaintiffs here had standing

- Causation
 - The **link between IRS and its tax exemptions and Plaintiffs**, is an **“attenuated causal chain”** as it’s “speculative” that schools are rejecting black students based on getting tax exemption regardless of their desegregation policies. Also, impossible to know if students would leave school if desegregated, no incentive for school to discriminate?
 - **DISSENT: Economic incentive** and logic disproves majority’s argument because if a school gets tax exemptions regardless of desegregation policy, it has **no incentive to change its policies**

Lyons

- P, who was not resisting, was put in a chokehold, filed injunction among other charges against police officers and Los Angeles
- Injury?
 - Even though the chokeholds were allegedly common practice to people stopped by the police, he had no higher chance of getting chokehold again (future injury) than any other person in the city
 - P can seek damages for his own past injury, but **for an injunction he has no imminent or future injuries**

Lujan

- Statute does not extend to international animal/wildlife protection. Claimants argue they are going to become injured if this conduct continues overseas
- Court - Does not fulfill imminent injury requirement:
 - Inability to see animals (aesthetic injury) is an injury but does not fulfill the concrete requirement
 - Claimants lack of specific plans to re-visit wildlife area again (P said “i plan to revisit but not next year or any particular set plans), do not fulfill imminent requirement.
- No redressability
 - Even if Court said Secretary must be consulted about funding the overseas project, there is no remedy to Ps and the animals

Hypo

- P challenges U.S. Dept. of Agriculture (USDA) regulations concerning the treatment of primates by zoos and other exhibitors of animals, alleging aesthetic injuries resulting from observing primates living in allegedly inhumane conditions. P alleges that regulations permit exhibitors to maintain primates in inhumane conditions, even though such conduct would have been illegal in absence of those regulations.
- Standing?
 - Injury

- Concrete - aesthetic injury is concrete, observing primates living in inhumane conditions
 - Actual and imminent? - if P plans going to the zoo again in a specific trip, or bought a pass etc. then it would be sufficiently imminent probably
 - Personal? Yes. P themselves observed the inhumane conditions
- Causation
 - Regulations (promulgated by USDA) permit exhibitors to maintain primates in inhumane conditions, though such conduct would have been illegal in absence of regulations, is not too attenuated . yes, people may break law regardless of regulations permitting it or not, but this is a pretty close causal link compared to Allen v. Wright
- Redressibility?
 - There will be an impact in Court's decision, in granting an injunction or damages. Zoos would have to comply with new regulations that aren't inhumane/illegal and would remedy the grievance of Ps.

FEC v. Akins

- Prudential Standing
 - FECA states: “any person who believes a violation of the Act may file a complaint”
 - Any party aggrieved by an order dismissing a complaint may file a petition for review in district court.
- “Aggrieved” = indicates Congressional intent to cast standing broadly, ***beyond common-law interest or substantive statutory right***
- Casting standing net broadly (to obtain information about AIPC donors) - Congress delegating policing power for agencies to private parties.
- Injury
 - Concrete injury - Each voter, constituent is denied the information list of donors for which they vote for