I. INTRODUCTION TO THE COURSE

A. From the Common-Law Regime to the Regulatory State

1. Common Law as a Regulatory Regime
   The common law served as the main source of regulation until the mid-20th century through tort and contract law. However, such regulation had limited effectiveness based on the nature of the judicial system and market forces.
   a) Discretionary, not mandatory—companies could chose to pay off liability for injuries rather than hold higher standards
   b) Reactionary, creating general rules based on specific facts and parties
   c) Retroactive regulation addresses the problems too late
   d) Individual states may have different rules, creating uncertainty
   e) Judges are generalists, not experts, so court-made law had limited informational competence
   f) Implementation issues because courts are not set-up for ongoing supervision and enforcement of decisions
   g) Cost v. Benefits—the cost of litigation may outweigh the benefits
2. Justifications for Regulation
   a) Economic—based on market failures
      (1) Ability to pay—affected individuals shoutatld have the ability to pay for the cost differences to avoid unwanted effects; however, not everyone who wants the changes will be able to pay for them, leading to issues of inequity and fairness
      (2) Information asymmetries—in order to demand change, a consumer must know what is important to demand; often the manufacturers, not the consumers, are the ones who hold this information
      (3) Cognitive biases—individuals do not rationally evaluate risks, and the market force theories assume rational actors
      (4) Collective Action problems—individually, people do not have enough market power to demand certain features, so they must join forces to demand what they want
      (5) Classic Market failures
         (a) Monopoly—used their power to coerce the people
         (b) Destructive Competition—driving out competition defeats the healthy competition needed to for the market to self-regulate
         (c) Public Goods—no one individual wants to pay for something that will benefit society as a whole
         (d) Externalities—costs imposed on others by the choices we make; few decisions fully internalize all costs
   b) Social

(1) Rights revolution—people have a 'right' to safe products

(2) Paternalism—the stigma of 'the state knows better than you'

B. **Constitutional Principles and Interpretation**

1. U.S. CONSTITUTION, Art. I-VII & Amendments I-X
   a) Creates three branches of a federal government, separates powers between the federal government and state governments, and protects individual rights
   b) Regulatory agencies combine legislative power through rulemaking with implementation (executive power) and adjudication (judicial power)
   c) Questions left to answer:
      (1) What is the proper role of the states in a federalist system?
      (2) What is the proper role of the judiciary?
      (3) What do we do when the answer is not in the text?
2. The Authority for Judicial Review: *Marbury* v. *Madison* (1803)
   An act pungent to the constitution must be reconciled with the constitution. For the limits of the constitution to be valid, there must be some process to deal with these conflicting laws. The constitution gives the Court the power to decide cases arising under the Constitution, so the Court must have the power to review congressional and executive actions.
   a) Court review of Executive Actions
      (1) Ministerial acts—create an individual right that must be protected, so the Court has the power to review
      (2) Discretionary acts—political acts are not subject to judicial review
   b) Judicial review of Congressional Actions
      (1) All acts of Congress must be within Congress's constitutionally enumerated powers
      (2) In defining the judiciary, Congress must stay within the powers outlined by the constitution
3. Principles of Constitutional Interpretation
   District of Columbia v. *Heller* (2008)
   a) Circumstances requiring interpretation
      (1) Constitutional silence
      (2) The Constitution (intentionally/unintentionally) uses broad, open-textured language
      (3) It is necessary to balance competing rights and interests under the Constitution
   b) Theories of Interpretation

(1) Originalism/Interpretivism—Judges should only protect values that are clearly stated in the constitutional text or clearly implicit from the framers' intent
    (a) Protects minority rights, while limiting judicial power and giving deference to the legislature.
    (b) Criticized as being inflexible and impossible to apply because the framer's intent is difficult to figure out and the text of the Constitution is unclear.
(2) Non-originalism/Non-interpretivism—Judges may protect values that are not state in the text or intended by the framers
(3) Variations of Originalism/Non-originalism--tensions between flexibility and constraint on the judiciary
    (a) Modified or abstract originalism—We should follow the founder's general intent, but each generation should come up with their own reading of the constitutional
    (b) Original meaning—focuses on the practices at the time the Constitution was written
    (c) Tradition—should the court only protect longstanding traditions?
    (d) Process based theory—court should focus on creating a fair process of government
    (e) Aspirationalism—what are the values we regard as particularly important to protect from the majority—allows the constitution to evolve

II. PART I: THE CONSTITUTIONAL SOURCES OF FEDERAL REGULATORY POWER

A. The Framework for Analysis of Federal Legislative Power

McCulloch v. *Maryland* (1819)

1. What is the issue the Court is asked to decide?
2. What is the act of Congress in question?
3. Did Congress have the power to take this action?
4. How has this issue been dealt with in the past?
5. Does anything prohibit Congress from taking this action?
6. If the Congressional action is constitutional, how does the act apply to the facts of the case at hand?

B. The Necessary and Proper Clause

Art. I, Sect. 8, Cl. 18. *"Congress shall have the power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."* Grants Congress the residual power to enact legislation necessary and proper to carry out other enumerated powers.

1. *McCulloch* v. *Maryland* (1819) (holding the N&P clause does not require that the act be essential, rather a national bank was within the necessary and proper powers of Congress to use <u>any reasonable means</u>, not otherwise prohibited, <u>to</u>

achieve legitimate ends; also striking down the MD tax on the federal bank as an impermissible 'power to destroy' acts of the federal government).

2. *U.S.* v *Comstock* (2010) (holding Congress had the power to civilly commit sexually dangerous individuals after they would otherwise have been released because the statute was rationally related to Congress's Necessary and Proper powers and a reasonable extension of the already established power to criminalize conduct and administer a prison system); Thomas & Scalia dissenting (arguing that the tie to constitutionally enumerated powers is to attenuated, and supporting a single-step test that leaves the police power to the states).

C. **The Commerce Power**

Art. 1, Sect. 8, Cl. 2. *"Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."* The Commerce Clause (CC) serves as Congress's main authority for enacting modern legislation. The scope of interpretation of the CC has shifted over the years, debating the meaning of the language and the application of the 10th Amendment as a limit.

1. The Commerce Power to 1995
    a) *Gibbons* v. *Ogden* (1824) (holding Congress can regulate trade that is within a state if it is connected to trade between the states, so Congress may regulate steamboats travelling on waters within a state)
        (1) "Commerce" is intercourse between nations or parts of nations
        (2) "Among the states" is intermingled with, not just crossing the border from one state to another
    b) Dual-Federalism Era—Production vs. Commerce
    Striking down *E.C Knight* (anti-trust of sugar refineries); *Carter v. Carter Coal Co.* (working conditions in coal factories); *Hammer v. Dagenhart* (child labor); but upholding *Shreaveport Rate Cases* (stopping different intra/interstate railroad rates)
        (1) "Commerce"—narrowly defined as one stage of business, separate and distinct from earlier phases such as mining, manufacturing, and production
        (2) "Among the states"—must be a substantial, direct impact on stream of interstate commerce
        (3) 10th Amendment reserved a zone of activities (mining, manufacturing, and production) to the states
    c) New Deal Era—Broadened to include regulation of production
    NLRB v. Jones & Laughlin Steel Corp. (1937) (holding permitted the regulation of unfair labor practices); *U.S. v. Darby* (1941) (upholding wage restrictions for production of goods shipped in interstate commerce); *Wickard v. Filburn* (1942) (upheld the regulation of wheat produced for home consumption because the aggregate effects of such wheat production effected commerce)
        (1) Congress may regulate anything that directly impacts the stream of commerce

(2) "The power to regulate commerce is the power to enact all appropriate legislation for its protection or advancement; to adopt measures to promote its growth and insure its safety; and to foster, protect, control, and restrain." *NLRB v. Jones*

2. The Commerce Power, 1995-2013
The Court has once again started to narrow the scope of the CC, identifying three areas of permissible regulation: (1) Regulation of the use of channels of interstate commerce (highways, railroads) (*Darby, Heart of Atlanta Motel*); (2) Regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce (but no IC jurisdictional hook) (*Shreveport Rate Cases*); (3) Regulate the activities having substantial relation to interstate commerce (*Jones & Laughlin Steel*). Recent disputes revolve around the scope of this last category.
    a) *U.S. v. Lopez* (1995) (ruling guns in school zones statute was unconstitutional because the regulation was a criminal statute, not an economic regulation, and so the statute did not have substantial relation to interstate commerce)
    b) *U.S. v. Morrison* (2000) (holding non-economic activity cannot be aggregated and the Violence Against Women Act had no jurisdictional hook, so there is no substantial effects on interstate commerce).
    c) *Gonzales v. Raich* (2011) (upholding the CSA's regulation of marijuana because Congress had a rational basis for concluding that these activities had a substantial effect on interstate commerce).
3. Tenth Amendment Limit on Congress' Commerce Clause Authority
There has been much debate over whether the 10th Amendment is a truism that merely reaffirms the relationship between the federal and state governments (*Darby*), or a limit on Congressional power (1990s). Recent trends have been to revive the 10th Amendment as a limit on Congressional power to regulate at the expense of state sovereignty.
    a) *New York v. U.S.* (1992) (holding the radioactive waste statute was unconstitutional because Congress cannot commandeer the states by compelling them to regulate).
    b) *Printz v. U.S.* (1997) (holding a federal law that commands state executive officials to carry out a federal statute is unconstitutional).
    c) *Reno v. Condon* (2000) (upholding statute sale of private information in DMV records because the statute regulates both the states and the entities using the information for commercial activities)
    d) *National Federation of Independent Business v. Sibelius* (2012) (holding Congress's commerce power does not give Congress the power to compel commerce).

D. **The Taxing and Spending Power**

1. The Taxing and Spending Power
Art. 1, Sect. 8, Cl. 1. *"Congress shall have Power To lay and collect Taxes, . . . to pay the Debts and provide for the common Defense and general Welfare*

of the United States." There has been debate over whether Congressional taxing and spending must be related to another enumerated power or not. In *U.S. v. Butler*, the Court held Congress as the power to tax and spend for the sole purpose of promoting the general welfare without any other enumerated power basis. Recently, the court has recognized 10th Amendment limitations on the taxing and spending clause. *See Sabri v. U.S.* (2004) (applying the ends and means rationality test to uphold law prohibiting bribery of state and local officials receiving federal funding); *National Federation of Independent Business v. Sibelius* (2012) (holding the individual mandate is a valid exercise of Congress's power to tax because Congress's commerce power does not give it the power to compel commerce).

2. Conditions on Grants to the States
   Congress may place conditions on money they give out; however, such conditions must be unambiguous and reasonably related to the federal interest.
   a) *See South Dakota v. Dole* (1987) (holding conditions on grants to states must be in pursuit of the general welfare, unambiguous, and related to the federal interest in the program; withholding 5% of highway funds was reasonable to promote the federal interest in an increased drinking age).
   b) *See also National Federation of Independent Business v. Sibelius* (2012) (holding the Medicare expansion which penalized the states by threatening to terminate significant unrelated federal grants was unconstitutional).

E. **Limits on the States' Regulatory Power**
   Limits on state regulatory power are determined by the courts through statutory interpretation and interpretation of lack of Congressional action. The court is trying to interpret Congressional intent. Congress has the power to overturn the courts by legislating accordingly.

   1. Preemption of State and Local Laws
      Dual sovereignty and the Supremacy Clause require that Congressional action on a particular subject must limit state power to regulate. The nature of each statute determines whether and to what extent state laws are preempted.
      a) Express Preemption
         Where Congress clearly and unambiguously manifests intent to preempt, state and local laws are preempted. *See Lorillard Tobacco Co. v. Reilly* (2001) (holding MA law regulating tobacco ads within school zones was preempted by the FCLAA which regulated the adverting and promotion of cigarettes).
      b) Implied Preemption
         (1) Conflicts Preemption—Where federal and state laws are in conflict with one another making it impossible to comply with both, the state law is preempted. However, when it may be possible to comply with both, the court must determine whether the federal standard sets the floor and ceiling, or just the floor. *See Florida Lime & Avocado Growers* (1963)

(holding the growers could have left the fruit on the trees longer to comply with both laws, so the state law was not preempted)

(2) State Laws that Impede a Federal Objective
Even when it may be possible to comply with both laws, a state law may be preempted if it impedes a federal legislative objective. The Court must determine the federal objective and decide the point at which state regulation unduly interferes with achieving the goal. *See Pacific Gas & Electric Co.* (1983) (holding the federal regulation allowed for state regulation of certain aspects of electricity production within the state, so the state regulation was within the permissible bounds).

(3) Federal Laws that Occupy the Field
Preemption will be found if there is clear congressional intent to have federal law occupy a particular area of law. *See Arizona v. U.S.* (2012) (striking down AZ law provisions that criminalized being an unauthorized alien in the state, but upheld provision that required law enforcement to attempt to determine immigration status of anyone stopped on other reasonable grounds).

2. <u>Dormant Commerce Clause (DCC)</u>
Inferred from the Interstate Commerce Clause, the Dormant Commerce Clause renders unconstitutional state and local laws that place an undue burden on interstate commerce.

a) Why a DCC?

(1) *HP Hood and Sons v. Du Mond* (1949) (holding NY milk licensing statute violated the commerce clause because it attempted to protect NY milk producers by refusing to license a MA producer).

(2) For DCC:

(a) Protects Congressional power to regulate commerce

(b) Protects free trade economy by preventing state laws that discriminate

(c) Individuals should not be harmed by laws of another state without political representation

(d) Congress won't act to police state regulation or action might be worse

(3) Against DCC:

(a) No textual provision for DCC

(b) Congress can act to supersede the state statute

(c) Federalism concerns stop states from acting when they should

(d) Court shouldn't be interpreting Congress's inaction

(e) In tension with judicial restraint

b) The DCC Before 1938
The Court held that state regulations of commerce cannot exceed the *usual fit and scope* of state law. *Cooley v. Board of Wardens* (1851) (permitting state regulation requiring ships entering/leaving the Port of Philadelphia to obtain local pilots or pay a fee).

c) The Contemporary Test: The Shift to a Balancing Approach
After 1938, the Court shifted towards an approach that balances interstate commerce interests and state regulatory interests by first determines whether a state law is discriminatory, then applying a benefits/burdens balancing test to non-discriminatory laws and a strict-scrutiny test to facially discriminatory laws.

(a) *Compare South Carolina v. Barnwell* (1938) (permitting state regulation of trucking size and weight that was facially non-discriminatory; roads were traditionally considered an area of state control); *with Southern Pacific v. Arizona* (1945) (striking down a state statute limited length of trains in the state as having to high of a burden on railroads, a quintessential means of interstate commerce).

d) Determining whether a Law is Discriminatory

(1) A facially discriminatory law explicitly applies different rules to in-state and out-of-state commerce.

(a) *See City of Philadelphia v. New Jersey* (1978) (striking down New Jersey restriction on bringing out of state waste in to N.J.); *Hughes v. Oklahoma* (1979) (striking down statute prohibiting the shipment or sale of Oklahoma minnow out of the state).

(2) Laws are also discriminatory if they have the purpose or effect of discriminating against out-of-staters.

(a) *See Hunt v. Washington State Apple* (1977) (struck down N.C. statute requiring apples to only be labeled with USCA standards because the purpose/effect was to discriminate against Washington apples with a distinct state grading system); *West Lynn Creamery v. Healy* (1994) (holding tax on milk sold in the state and subsidy for in-state milk farmers, though individually permissible, created a discriminatory policy beneficial to MD dairy farmers).

(b) *But see Exxon Corp. v. Gov. of Maryland* (1978) (finding statute prohibiting oil refining companies from operating gas stations within the state was not discriminatory even though 95% of affected stations were out-of-state companies and 99% of those protected were in-state); *State of Minn. v. Cloverleaf*

Creamery (1981) (holding statute banning use of non-returnable, non-refillable plastic milk containers did not make a distinction between in-state and out-of-state industries).

e) Strict Scrutiny Analysis if Law is Deemed Discriminatory
Does the statute serve a legitimate local purpose? Could the purpose be served by available nondiscriminatory means?

(1) *Compare Dean Milk v. City of Madison* (1951) (holding ordinance making it unlawful to sell milk not produced locally was unconstitutional because the purpose of safety and health could be achieved by regulating inspection or some other means); *with Maine v. Taylor* (1986) (upholding facially discriminatory law prohibiting importation of live baitfish because the state had a legitimate interests in preventing parasites and invasive species that could not effectively be served by other means).

f) Balancing Test Analysis if Law is Deemed Non-discriminatory
Do the benefits of the regulation outweigh the burden on interstate commerce? As long as state interest is greater, the law is permissible.

(1) *See Pike v. Bruce Church* (1970) (holding AZ had minimal state interest in requiring cantaloupes grown in-state to be packaged in closed standard containers before being taken out-of-state); *Bibb v. Navajo Freight Lines* (1959) (holding that IL requirement of certain type of mud flaps on semis was an undue burden on interstate commerce because other states had different requirements and this specific type posed safety risks); *Consolidated Freightways v. Kassel* (1981) (striking down statute prohibiting use of 65-ft double trailers in IA because of undue burden on IC).

3. <u>Exceptions to the DCC</u>

a) Congressional Approval
The dormant commerce clause is only in effect where Congress has not acted. Therefore, if Congress acts to permit state regulation, the state regulation is permissible.

(1) *See Western & Southern Life v. State Board* (1981) (upholding the imposition of different tax rates on in-state and out-of-state insurers because Congress granted states the power to freely tax and regulate the insurance industry).

b) Market Participant Exception
When the state is action as a participant in the market itself (i.e. purchasing a state police car fleet), the state can favor its own citizens.

(1) *See Reeves v. William Stake* (1980) (upholding SD's confinement of cement sales from a state operated cement plant to SD residents).

(2) *But see Southern-Central Timber Develop. v. Comm.* (1984) (holding AL could regulate post-sale processing of timber purchased from the state).

III. PART II: LEGISLATION AND STATUTORY INTERPRETATION

A. The Legislative Process

1. A bill begins as idea from politicians, interest groups, constituents, industry, or the executive branch. A bill is introduced by a sponsoring Member of Congress or Committee, then sent to committee. Most bills die in committee (V). When a committee passes a bill, it issues a Committee Report. A bill is then put on a calendar for floor scheduling (V). The House Rules Committee controls expedited review on the floor through open, closed, or special rules (V). In the Senate, floor votes are delayed through filibusters during debate (V). On the floor (V), the bill can be amended, and debate and member colloquies are entered into the record. Once a bill passes, it is sent to the other house for the same process (V). After passage by both houses, the bill is sent to Conference Committee (V) to create identical bills. Following a final vote in each house, the bill is sent to the President for signing (V).
2. Parts of a statute:
   Purpose, enactment clause; Chapters/titles; Definitions; Operative provision; Preemption clause; Provision for Judicial review of agency action; Penalties for violation of statute; Injunctions for court enforcement; Powers of the agency; Reporting to Congress; Appropriations

B. Statutory Interpretation by Courts

1. Introduction to Statutory Interpretation
   a) *Church of the Holy Trinity v. U.S.* (1892) (determining whether contracting with a European pastor to minister at an American church violated the law making it illegal to contract for the immigration of an individual to perform labor or services.)
2. Text-Based Tools
   Courts look to dictionary definitions, word origin, classical usage, and modern usage to determine the meaning of statutory language.
   a) Ordinary Meaning v. Technical meaning:
      For tax and criminal statutes, a court will generally apply the ordinary meaning because the audience is the general public. Whereas in industry regulations, the court is more likely to apply the technical meaning because the audience is presumed to be experts. *Nix v. Hedden* (1893) (holding tomatoes, as used in the tariff act, have the ordinary meaning of being a vegetable grown in the garden).
   b) Words with multiple meanings:
      The Rule of Lenity states that, where there are ambiguities in statutory meaning of a criminal statute, the court should rule in favor of the defendant. *Muscarello v. U.S.* (1998) (interpreting carrying a gun to include having it in your trunk; did not apply rule of lenity because the court deemed the was no grievous ambiguity).

3. Textual Canons of Construction
    a) Textual cannons are used by attorneys and the court to make arguments for/against a particular interpretation of a statute. *Babbit v. Sweet Home* (1995) (holding the secretary's interpretation of the word 'harm' as including habitat modification was reasonable).
        (a) Linguistic Canons of Construction
        (2) Amendments are to have real effects
        (3) *Ejusdem genaris* = when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.
        (4) *Noscitur a sociis* = "a word is known by the companions it keeps" This canon aims to ensure that a term is interpreted consistently with surrounding words.
        (5) Each word should have independent meaning—words shouldn't be redundant
        (6) *Expressio unius est exclusio alterius* = the inclusion of one thing means the exclusion of the other
    b) Whole Act Canons
        (1) Whole Act rule = identical words are given consistent meaning unless there is indication Congress used the term in different ways
        (2) Rule Against Surplusage = avoid reading a statutory provision or words within a provision in a way that would render something else in the statute redundant
    c) Whole Code Canons
        (1) Construe language in one statute by looking at the same language in other statutes. (stronger when the statutes are related)

4. **Substantive Canons**
Substantive cannons are used to determine how to read statutes in cases of doubt.
    a) **Rule of Lenity** = the court will give a criminal defendant the benefit of the doubt when a criminal statute is ambiguous. (Instructs courts to construe ambiguities in criminal statutes in favor of defendants. –must be criminal statute and ambiguous for rule to apply. ONLY USE FOR CRIMINAL
    b) Remedial Purposes Canon
    c) Constitutional Avoidance Canon = the court will avoid interpreting ambiguous statutes in ways that raise serious constitutional questions. If the court can resolve using statutory interpretation, judicial minimalism favors not reaching the constitutional question. *Zadvydas v. Davis* (2001) (determining the AG may only detain a removable

alien for a reasonably necessary period of time to secure the alien's removal, not indefinitely); *Almendarez-Torres v. U.S.* (1998)

d) Federalism Clear Statement Rule = the Court requires a clear statement by Congress when it seeks to alter the traditional balance between federal and state governments. *Gregory v. Ashcroft* (1991) (holding judges could be within the policy maker exclusion of the Age Discrimination Employee act, so MO's statute requiring mandatory retirement for judges at age 70 is permissible). (Courts will not interpret statutes to intrude on states' rights unless Congress makes its intent to do so unmistakably clear.

(1) The Presumption against Preemption = the historic police powers of the states are not to be superseded unless that was the clear and manifest purpose of Congress. Courts will tend to apply a preemption (express or implied) narrowly to avoid direct conflict between state and federal laws but allow other

e) Remedial Purpose Canon: Remedial statutes (statutes aimed at remedying a problem) should be construed broadly to effectuate goals of statute.

5. **Intent and Purpose-Based Tools—Legislative History**

The most prominent source of information about legislative intent/statutory purpose apart from text is history of the statute.

a) Conference and committee reports (strongest)
b) Author & Sponsor statements
c) Member statements
d) Hearing records
e) History of the bill, rejected proposals
f) Floor and hearing colloquy
g) View of non-drafters
h) Legislative Inaction
i) Subsequent legislative history (including signing statements) (weakest)
j) *Moore v. Harris* (4th Cir. 1980) (using legislative history to determine that Congress intended the Black Lung Benefits Act to benefit all persons who contracted lung disease as a result of their work in coal mines).
k) Criticism of Reliance on Legislative History
Legislative history is criticized because Congress is a body of 535 members who all have different reasoning for voting the way they did. It is hard to discern what intent and purpose of Congress truly is when reasoning is divided and unclear.

6. Tools for Considering Changed Circumstances
    a) Courts will update a statute using a **dynamic term** in the statute (i.e. public policy), **abundant evidence of change**, and **passage of time**. *See Bob Jones University v. U.S.* (1983) (holding that the requirement of 'charitable contribution' for a 501(c)(3) did not permit racial discrimination that was against the public policy limitations of 'charitable').
7. Theories of Statutory Interpretation
    a) Plain Meaning/New Textualism—what would an ordinary person believe those words to mean?
        (1) Law as text that satisfies constitutional requirements of bicameralism and presentment
        (2) Rule of law = law of rules
        (3) Judge as faithful agent, linguist, grammarian
        (4) Arguments in favor: relatively objective, transparent, democratic, predictable
        (5) Arguments against: limits of language, blind to its own subjectivity, unconnected with consequences, assumption of a coherent "code" can upset legislative compromises
        (6) Proponents: Holmes, Scalia
        (7) Examples: *Santos*
    b) Intentionalism/Imaginative Reconstruction—Congress didn't think of this, so how would they have ruled if they had considered this?
        (1) Law as legislative deals/bargains
        (2) Judge as deal enforcer, Sherlock Holmes looking for clues of what they wanted
        (3) Arguments in favor: relatively practical, realistic, helpful
        (4) Arguments against: expensive, manipulable, questions of judicial competency to do this, paradox of a "group" intent (how can so many people can look at this) (nothing will stop a bad judge or stupid judge)
        (5) Proponents: Posner, Stevens
        (6) Examples: *Holy Trinity*, *Almandarez-Torres*, *Moore*
    c) Purpose and Dynamic Approaches For what purpose did Congress pass this statute? (close to intent); Asks courts to participate in lawmaking by updating statutes.
        (1) Law as solving social problems
        (2) Judge as deal adapter
        (3) Arguments in favor: relatively helpful and practical, emphasis on public policy reasons, justice. (Bob Jones- proper parameters to consider change)

(4) Arguments against: questions of judicial competency and democratic accountability, could unsettle expectations. (thought that it makes congress lazy)

(5) Proponents: Dworkin, Eskridge

(6) Examples: *Holy Trinity*, *Bob Jones*- *"Congress should go and change statue not us."*

Notes From Lab:

Textual Canons #3

Whole Code Canons: Direct courts to construe language in one statute by looking at language in other statues.

In pari material

Inferences across statues

Repeals by implication

IV. PART III: THE REGULATORY STATE AT WORK

A. The Federal Executive Power and the Administrative State

1. Inherent Presidential Power
   a) No inherent Presidential power—President can only act in accordance with Constitutional or Statutory authorization. *See Youngstown Sheet & Tube Co.* (1952) (Black, majority) (holding the President does not have the power to seize the steel mills).
   b) President has inherent power that allows him to act unless he violates a Constitutional or statutory provision *Id.* (Jackson, concurring). Jackson divides executive action into two categories:
      (1) Express or Implied authorization of Congress
      (2) Absence of grant/denial of authority—Independent Presidential power
   c) President's inherent power allows him to act unless he usurps the power of Congress *Id.* (Douglas, dissenting).
   d) President's inherent power allows him to act unless he violates an explicit Constitutional provision
2. Executive Privilege
   The president has a duty to interpret the Constitution, but when a case arises before the Court, the judiciary has the ultimate power to say what the law is. Therefore, the Court can review executive action. Legitimate needs of the judicial process may outweigh Presidential Privilege. Absent a claim of need

to protect military, diplomatic, or sensitive national security needs, when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of justice. *U.S. v. Nixon* (1974).

3. Extending Presidential Power
   Congressional delegation of powers to the President cannot violate Constitutional separation of powers. *See Clinton v. City of NY* (1998) (holding the Line Item Veto Act unconstitutionally gave the President legislative powers by allowing him to cancel certain provisions of appropriations bills).
4. Agencies in the Structure of the Federal Gov't
   Each authority of the Government of the US, whether or not it is within or subject to review by another agency, is considered an agency. Most top agency officials serve at the pleasure of the president. Some independent agencies and government corporations serve independent of the White House.
5. Agencies and Delegation
   In order for Congress to delegate its power to the Executive, Congress must give the executive some guidance on how to exercise that power. Power must be given to an agency, not directly to the president; the delegation must include procedures to guide rulemaking; and most delegations provide for judicial review of agency codes.
   a) *A.L.A Schechter Poultry Corp.* (1935) (holding the Live Poultry was adopted under an unconstitutional delegation of legislative power because it gave the president unfettered power to make rules and it contained no procedures for determining unfair competition)
   b) *Whitman v. American Trucking* (2001) (holding the Clean Air Act was a proper delegation of power by Congress, the act did not allow for the agency to consider costs in setting air quality standards, and the agency's implementation policy was unlawful).

B. **Implementation of Statutory Mandates by Agencies**

1. Notice and Comment Rulemaking
   a) The Administrative Procedures Act (APA) sets out uniform policies and procedures agencies must follow when making decisions. APA provides for informal rulemaking, formal rulemaking, and adjudications.
   b) "Rule" = whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization procedure.
   c) The agency rulemaking cycle begins with the agency issuing a Notice of Proposed Rulemaking (NPRM) stating the proposed rule, the agency's rationale (statutory, economic, scientific, public opinion/behavior analysis, other statutory/agency required analyses), and requesting comments from the public, industry, and other groups.

Then starts a comment period. The agency has to read all the comments, but does not have to follow the majority rule. The comment period may include a hearing. After reviewing the comments, the agency issues a Final Rule, which includes rationales and summaries of comments, or the agency decides to issue another NPRM.

d) The rulemaking process allows the agency to gather information, promotes fairness through notice and an opportunity to comment, allows for transparency and public information, and provides a basis for judicial review.

2. Tools of Statutory Implementation:

a) Statutory Interpretation—What requirements does the statute place on the agency in providing the agency with rulemaking power? (Includes tools of statutory interpretation).

b) Scientific Analysis—What are the risks of the rule? (Toxicology--poisons, Epidemiology—what has/is happening to real populations in the real world, Statistical Analysis)

c) Economic Analysis--Often required by statutes/executive orders in different forms.

(1) Measured in statistical lives—the willingness to pay or accept. Agencies typically value lives from $500,000 to 8 million.

(2) Problems arise with trying to monetize the cost of things where there is no clear link to $ amounts.

(3) Approaches: Don't consider costs; Require a benefit threshold be met before regulating; Consider costs of creating other risks; Regulate only if reasonable cost to industry; demonstrate that benefits justify the cost; demonstrate that benefits outweigh costs.

d) Political Analysis—Anyone can petition an agency to make a rule. However the courts have said agency's can't rely on presidential policy to deny rulemaking

V. PART IV: POLITICAL CONTROL OF AGENCY ACTION

A. Presidential Control of Agencies

1. Appointment and Removal Powers

a) Appointment power—the Constitution gives the President the power to appoint principal executive officers with the advice and consent of the Senate. Appointment of inferior officers, however, can be vested in the president alone, courts, or agencies, as Congress defines by statute. Senate confirmation of inferior officers is not constitutionally required, but may be statutorily required if Congress so choses. *See Morrison v. Olson* (1988) (holding that an independent counsel is an inferior officer because s/he is subject to removal by the AG and has limited duties, jurisdiction, and tenure; therefore, the independent counsel need not be appointed by the Presidawent).

b) Removal power—the Constitution does not explicitly provide for removal of agency officials. Approaches to this constitutional gap include:

(1) President has at will removal/to extent impairs executive power

(2) Congress can design removal as it wishes

(3) Removal through advise and consent of Senate.
See Myers v. U.S. (1926) (holding the Tenure in Office Act's requirement of the Senate's advise and consent for removal of post masters because it interferes with the president's power).

(4) Impeachment by Congress (Constitutionally supported)

Today, most appointees serve at the pleasure of the president unless the appointee is an inferior officer that Congress has provided for limited removal power. *See Humphrey's Executor* (1935) (holding if the official is a member of a quasi-legislative or quasi-judicial body, Congress may place limits on removal; but if the official has a purely executive purpose, the President has the sole power to remove when for cause removal of an FTC official was challenged). However, Congress cannot place excessive limits that interfere with the President's power to faithfully execute the laws. *See Free Enterprise Fund v. PCAOB* (2010) (holding two layers of for-cause removal protecting PCAOB officials exceeded permissible limits on the President's removal power; either removal of the SEC by the President or removal of PCAOB by the SEC needs to be at will).

2. Other Means of Presidential Control

a) Appropriations—The President proposes a budget to Congress each year. In addition, some statutes allow the President to impound agency funds.

b) Regulatory Planning and Review: E.O. 12,866
The White House Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) has the formal power of regulatory review. E.O. 12,866 sets out NPRM requirements to provide information to OIRA and to involve OIRA in the agency's rulemaking process.

(1) Prior to issuing a NPRM:

(a) Policy meeting between the agency and the Vice President;

(b) Submission of agency's regulatory agenda;

(c) Submission of agency's regulatory plan;

(d) Meetings between the agency and parties benefited and burdened by a proposed regulation;

(e) Submission of cost-benefit analysis to OIRA for significant regulatory acts. Then, OIRA sends back guidance with President's priorities

(2) In the NPRM and Final Rule:

(a) Disclosure of changes instigated by OIRA;

(3) Before issuing Final Rule:

(a) Resolution of conflicts by the President or Vice President; and

(4) Periodic review of significant regulations.

B. **Congressional Control of Agencies**

1. New Legislation—Since agencies are created by statute, Congress can kill agencies through statute.
2. Appropriations—Congress can cut agency funding to influence agency action
3. Oversight Hearings—Congress can put pressure on agencies through time consuming and publicly-scrutinized oversight hearings
4. Fire Alarms—Congressional reporting requirements throughout the rulemaking process alert Congress to issues requiring legislative intervention.
5. Legislative Vetoes—Congress can require a "laying over" period before a rule goes into effect to allow for legislative intervention if needed. Most bills include these provisions, but Congress rarely (only once) uses it. However, Congress cannot create a negative legislative veto power that allows Congress to strike down agency action without bicameralism and presentment. *See INS v. Chadha* (1983) (holding the authorization of a one-house legislative veto of the AG's decision to allow a particular deportable alien to remain in the US was unconstitutional). Congress can delegate to anyone, but it cannot delegate to itself; delegation of powers must be complete in order to protect the balance of separation of powers. *Id.* The court has not determined whether Congress can require an agency to obtain legislative approval before a decision becomes effective (positive legislative veto), but the court would likely find that this process would still violate the presentment requirement even if it required action of both houses.
6. Removal—Congress cannot exercise removal power over an official exercising executive power. If the official has delegated legislative power, Congress cannot be involved any more after they delegate. Therefore, Congress can only control removal of officials through limitations of executive/judicial removal or impeachment. *See Bowsher v. Synar* (1986) (determining the responsibilities of the Comptroller are exercises of executive power of implementing law and making policy judgments; therefore, the act making the Comptroller removable by Congress was unconstitutional).

VI. PART V: JUDICIAL CONTROL OF AGENCY ACTION

A. Judicial Review of Agency Interpretations of Law: *Chevron* "Two Step"

1. Step One: Has Congress directly spoken to the precise issues in question? Is the intent of Congress clear? If yes, enforce Congress's mandate.
    a) Analyzed using the traditional tools of statutory interpretation, particulary textual arguments including dictionary definitions and purpose arguements.
2. Step Two: If Congress has not specified a statutory meaning, is the agency's interpretation of the statute reasonable? If yes, give deferance to the agency interpretation.
    a) Analysis focuses on the purpose arguements of statutory interpretation.
3. *See Chevron U.S.A. Inc.* (1984) (holding the statutory text and legislative history of the Clean Air Act did not define 'statutory source' so the agency's choice of the 'bubble concept' was in line with the purpose of the act and permissible); *MCI Telecommunications Corp.* (1994) (holding that the agency's interpretation of the power to 'modify' rate disclosure requirements went beyond Congress's clear intent that the agency could make minor changes, not major ones).

B. Judicial Review of Agency Policy Choices: Clear & Capricious Review

Agency action is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.' *See Motor Vehicle Manufacturers v. State Farm* (1983) (holding that NHTSA's decision to rescind the automatic restraint requirements was arbitrary and capricious because they failed to explain why airbags are no longer effective, they did not consider the impact of inertia of automatic seatbelts on seatbelt usage, and they didn't analyze non-detachable seatbelts in its own right).

1. Analysis: Did the agency . . .
    a) Rely on prohibited factors?
    b) Fail to consider required factors?
    c) Fail to provide adequate explanation of choice?
    d) Make a decision that runs counter to the evidence?
    e) Use flawed reasoning?
    f) Fail to respond/consider substantial arguments or comments, or an important aspect of problem?
    g) Fail to consider important alternative without justification?