

Constitutional Law and Regulatory State

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Outline

- I. Introduction:
 1. What is constitution? Idealistic sense + structure
 2. Articles I, II, III and supremacy clause
 3. Bill of rights + 13/14/15, change the federal-state balance, giving congress power to enforce them
 4. Regulatory state:
 - Rise: auto safety matters, more than torts and contract.
 - Justification: economic + society
- II. Federal judicial power
 1. Judicial Review: legislature + president, mentioning the non-political review.
 2. Authority: few textual authority + Marbury
 3. Marbury v. Madison: conflict of jurisdiction of the act and constitution.
 - Constitution is paramount and wins + the Court decides the matters of dispute between branches.
 - It also extends to state's decision, but NOT on an absolute and independent state law grounds.
- III. Limits on Judicial Power:
 1. Interpretive limits: see statute interpretative canons
 2. Congressional limits: ex parte McCardle (Congress could make exceptions to Supreme Court's appellate jurisdiction)
 3. Justiciability: "cases and controversies" requirement, or another way to say jurisdiction. 5 major doctrines
 - No advisory opinions: **does not** exist. [but not necessary on the state law level.]
 - Standing
 - Constitutional: injury, causation, redressability
 - Prudential elements: no 3d party (mutually beneficial interest is okay); no generalized taxpayer or citizen standing (if the claim is based on tax and spending power and the power is based at establishment clause, which prohibits the Congress from doing so); zone of interest (implicit)
 - Ripeness: **not yet** exist. FACTORS: fitness for judicial decision, hardship to the parties
 - Mootness: **no longer** exist. EXCEPTION: repetition yet evading (pregnancy), voluntary cessation (the actor could resume the activity), class action (name party might drop the case).
 - Political questions: **inappropriate** for judicial branch to consider. 3 factors
 - Textually demonstrable constitutional commitment of the issue to a coordinate **political** branch
 - A lack of judicially discoverable and manageable **standards** for resolving (no standard to decide). E.g., gerrymandering,
 - Prudential considerations counsel against judicial intervention. (4,5,6 of the six factors)
- IV. Federal Legislative Power: federal v. state
 1. Federalism Decision:
 - Limited **Authority**: only if there is express or implicit authority in the Constitution.
 - Otherwise, according to 10th Amendment, it will be to the State power, i.e., political power, health, safety and welfare of the people.
 - Test: if the congress has such power? If there is limits on that power? Then according to supremacy clause, the law is supreme.
 2. **Necessary and Proper Power**:
 3. **Commerce Power**: Lopez test, 1) Channels of Interstate Commerce; 2) Instrumentalities of IC; 3) activities that substantially affect IC (must be **economic** activity)
 4. **Tax and spending power**: Congress can attach conditions to the state, but must be 1) general welfare, 2) conditions must be unambiguous; 3) conditions must be related to a federal interest in a particular national project/program.

5. §5 of Fourteenth Amendment:
 6. Eleventh Amendment: state sovereignty immunity. alternative ways to sue state: 1) sue officers; 2) state waive immunity; 3) Congress may authorize suits against state government --> according to COURT's decision of what is "appropriate legislation" (not Congress's) prevails.
- V. Limits on State Regulatory and Tax Power: state power derive from the existence of a national government
1. [ACT] Preemption: **Congress's Intent**
 - Express preemption: clear language of statute
 - Implied preemption: 1) field preemption; 2) conflict preemption; 3) federal objective
 2. [NOT ACT] Dormant Commerce Clause: where judiciary determines state government puts an undue burden on interstate commerce.
 - Discriminatory Purpose: if yes, struck down; if no, go to step 2.
 - Balancing:
 - On FACE: strict scrutiny-like test
 - In EFFECT: intermediate scrutiny-like test
 - Evenhanded: rational basis-like test
 - Exception:
 - Congressional Approval
 - Market Participant Exception
 3. [NOT ACT] Privileges and Immunities Clause: Constitutional Rights or Important Economic Activities
 - Does law effect constitutes rights or important economic interest?
 - If yes, go to 2; If no, no violation
 - Does the state have 1) substantial reason/objective for discrimination AND 2) discrimination "substantially related" to the state's reason/objective?
 - If yes to both, state law UPHELD
 - If no to either, state law STRUCK DOWN -- consider "availability of less restrictive means" for the "substantial related" requirement.
- VI. Legislation and Statutory Interpretation
1. Legislation: structure of a modern statute
 2. Statutory Interpretation:
 - Ordinary Meaning v. Technical Meaning
 - Degree to which terms have accumulated under common law
 - Audience to which statute is addressed + industry understanding + technical context.
 - Textual Canons of Construction
 - Linguistic Canons:
 - a. "of the same kind:" look within provision to construe, list of items ended with a general term.
 - b. "a thing is known by its companions:" interpreted consistently with surrounding words.
 - c. "the mention of one thing is the exclusion of the other:" infer from inclusion that omission of another term is intentional.
 - d. Others: last antecedent (adj only modifies the noun it follows), conjunctive v. disjunctive.
 - Whole Act Canons:
 - a. Identical Words: consistent meaning
 - b. Avoiding redundancy and surplusage
 - c. Titles and Provisions: used to confirm or inform interpretation
 - Whole Code Canons:
 - a. Statue addressing the same subject matter generally should be read as if they were one law
 - b. Even if not a), the court may draw inference from separate statues
 - c. Repeals by implication: it can only be overcome by clear language to the contrary.

- Substantive Canons of Construction
 - **Rule of Lenity:** ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.
 - It only applies when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.
 - Constitutional Avoidance:** if there is ambiguity, a statute must be construed so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.
 - Federalism Clear Statement Rule:** if the congress intends to alter the usual balance between federal and state government, it must make tis intention to do so unmistakably clear in the language of the statute.
 - 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.

Intent and Purpose-Based Tools

Forms of Legislative History: committee reports, author or sponsor statement, member statements, hearing records, presidential and agency statement

Judicial Reliance on Legislative History: *Moore v. Harris*

Tools for Considering Changed Circumstances: *Bob Jones University v. U.S.*

Theories of Statutory Interpretation

Textualism: the ordinary meaning of words

- Directs courts to stop with the text of the statute; not to engage in broader search for legislative intent.

Intentionalism and Purposivism: determining the intent/purpose of the legislature.

- a. **Intentionalism:** suggests collective legislative intent is coherent (general intent of majority is ascertainable)
 - b. **Purposivism:** once legislative purpose is determined, interpret the text to carry out that purpose as best it can.
- Imaginative Reconstruction: the intent of the legislative with respect to an issue it did not consider
 - Dynamic Interpretation: the statute's meaning in light of changed circumstances.

VII. Federal Executive Power: president v. legislation

1. Inherent Presidential Power

- Express Constitutional Provisions
- Relationship between President and Congress:
 - President's power is at **MAXIMUM** when he acts pursuant to Congress's authorization (express or implied)
 - President's power is at **MEDIUM** (relies only on President's own independent power) when he acts in absence of Congress's authorization (silence)
 - President's power is at **LOWEST** when he acts in a way against Congress's will (express or implied)

2. The authority of Congress to expand executive power

3. Separation of power and Foreign Policy

- Lawmaking
- Treaty Power

4. Terrorism: writ of Habeas Corpus

- The **citizenship and status** of the detainee and the **adequacy of the process** through which the status determination was made,
- The **nature of the sites** where apprehension and the detention took place, and
- The **practical obstacles** inherent in resolving the prisoner's entitlement to the writ.

5. Checks on the President

- Immunity
 - Absolute Immunity: President has complete protection from civil suit for all official actions while in office.

- Not for unofficial acts or acts that take place before he takes office.
 - Impeachment
- VIII. Agency and Checks on its Administrative Power
1. Agency
 - Legitimacy
 - Regulatory State
 2. Implementation of Statutory Mandates
 - APA requirements
 - Notice and comment rulemaking
 - Tools of statutory implementation
 3. Controls of Agency Action
 - Presidential and administrative controls
 - Appointment Power
 - Removal Power
 - Legislative Controls
 - Judicial Controls
 - Statutory Interpretation: Chevron
 - Statutory Implementation

I. Federal Judicial Power

A. Introduction

1. What is a "Constitution?"

- The Constitution (and constitutional law, more of interpretation of Constitution)
 - The cornerstone for all laws in the U.S.
 - In modern terms, the Operating System: all other subjects, such as contracts, criminal law, torts, civil procedure, are the application programs which must comply with the principles of the OS.
 - Proclamation of: 1) the most fundamental beliefs of society; 2) how government shall be structured.
- Government Structure:
 - Art. I – Legislative Power
 - Art. II - Executive: well-defined in the Constitution, 17 different powers listed. Vague about the president's power.
 - Art. III – Judicial Power
 - Art. IV - State's provisions (Full faith and credit; **Privileges and Immunities**)
 - Art. V: Amendments to the Constitution
 - Art. VI - **Supremacy Clause**; Oath Requirement: power sharing between federal and states; federal law and treaties are supreme over the states'.
 - Supreme law of the land; judicial is bound by the federal law.
 - VII - Ratification: 9 out of 13 to consent
- Bill of Rights: limit Fed Gov, actually 28
 - 1st: Freedom of Expression, Press, Assemble, Religion Clauses (association with people)
 - 2nd: keep and bear arms clause, individual right to xxx, question about whether the state should obey this amendment ("Congress shall make no law") 1865, fourteenth amendment: applies the entire bill of right to the states. The McDonald case applies it to the states.
 - 3rd: Quartering Soldier Clause: not applied to the states. There is never a case coming to the S.C., for no controversies.
 - 4th: Search and Seizure Clause
 - 5th: Grand Jury, Double Jeopardy; Self-Incrimination; Due Process; Taking Clauses.
 - Not vital of Grand Jury to the states; not applies double jeopardy to states;
 - 6th: Criminal Trial Clause, incorporated in states
 - 7th: Civil Jury, not incorporated in states
 - 8th: Bail/Punishment Clauses (excessive fines not for state)
 - 9th: Unenumerated Rights Clause "shall not be constructed to deny or disparage others retained by the people" - board consideration of liberty
 - 10th: Reservation of Powers to States Clause, scope of federal power, usually means to the Congress.
 - 13th: Abolition of Slavery
 - Used in practice, for punishment to the people in color.
 - Sec. 2: federal balance. Congress shall have power to enforce the article by appropriate legislation. --> for after 10th, the Congress only have "enumerated" power
 - 14th Civil Rights (citizenship privileges or immunities; due process; equal protection)
 - 15th Reconstruction

2. Regulatory State:

a. Definition:

- The process by which Congress uses its powers to **enact** legislation
- The tools regulatory Agencies use to **implement** statutory mandates
- The means by which *Congress, President, Judiciary, and the Public* control regulatory agencies (how do they oversee it)

- b. Rise of the Regulatory State: Auto Safety as exemplar
 - Fact: (1915) 6,779 / 6.7 out of 100,000; (1935) 34,434 / 27.1
 - Pre-20th Century: contract and tort were primary mechanism for addressing risks to human safety
 - Winterbottom v. Wright (England, 1842): no liability for those who is not in direct contractual relationship (privity of contract).
 - Limitation of Tort and Contract:
 - Late 1800/1900, rise of wholesalers, retailers (led to less privity of Contract between manufacture and users) --> recently, there is usually no contract
 - MacPherson v. Buick Motor Co.: 1) it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger; 2) irrespective of contract, the manufacture is under duty to make it carefully.
 - Rotche v. Buick Motor Co.: 1) the fact give inference or presumption the manufacture is negligent; 2) burden on the plaintiff to prove the manufacture is negligent.
- c. Justification for Regulation
 1. **Economic**: to adjust for market failure - sometimes the market, reinforced by the common law, will not supply consumers with their preferred option.
 - To **compensate externalities** (environmental effect); inadequate information.
 2. **Social**: as a society, we may aspire to certain norms of conduct for their own sale
 - Unequal bargaining power; rationalization, mental hazard.
 - Electorate's response to **social subordination** (i.e. discrimination), **irreversibility** (e.g. climate change, moral obligation to future generations, animals).

B. Judiciary Review:

1. Scope
 - a. Art. III, sec.1
 - Judicial power of United State shall be vested in one supreme court, and in such inferior courts as Congress may establish.
 - b. The power of the judiciary to decide the constitutionality of
 - **Laws**: created by elected legislatures
 - **Executive Action**: taken by elected representatives
 - c. Note:
 - If there is question about it, the court should decide --> counter majoritarism, unelected judges overturned the elected legislature.
 - The majorities rule: Roll over the minority --> one of the meaning contribution of U.S. Constitution
2. Authority
 - a. Scant textual authority:
 - b. Marbury v. Madison
 - Fact: Constitution's appellate jurisdiction v. Congress Act's original jurisdiction.
 - Judicial review of executive actions, depends on nature of act:
 - If the action is political, no review
 - If action involves duty assigned by law, or affects individual rights → review
 - Summary:
 - C is a paramount law: consequently, an act of the legislature, repugnant to the constitution, is void.
 - The court decides: It is the province and duty of the judicial department to say what the law is.
 - Rationale:
 - Art. III: extend to all cases and controversies arising under this Constitution.
 - Art. VI: requires all federal judicial officers to be bound by oath or affirmation to support Constitution.

- Art. VI: **Supremacy clause** first mentions Constitution as supreme law of land, then mentions US law made in conformance.
 - Note: they are not that solid, but this case establishes that principle and is frequently cited.
- c. Review for STATE judgement:
- Confirmed in *Martin v. Hunter's Lessee*. VA claimed sovereignties, no obligation to obey S. Ct. The Court cited Supremacy Clause.
 - But, Supreme Court will NOT review at state court opinion that is decided on "**adequate and independent state grounds**."

C. Limits on Federal Judicial Power

1. Interpretive Limits: Constitutional Interpretation

- Textualism
- Originalism
- Non-originalism
- Structuralism: separate of power, equal government, 10th dual sovereignty (no branch can have too much powers).

2. Congressional Limits

- **Appellate jurisdiction** besides original jurisdiction. But there are exception and regulation by Congress. Art. III, sec 2[2]
 - "*Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulation as the Congress shall make.*"
- **Board reading** (Congress has authority to do whatever they want) and narrow reading (probably limited to certain portion) fact? Fact and law?
 - In practice: boarder reading prevails
 - Establishment: *Ex Parte McCardle*, where Congress passed a new law to repeal the court's jurisdiction after the Court heard the case. Court decided it can withdraw jurisdiction.
- **Limitation**: no separation of power violation.
 - E.g., the statute provided jurisdiction, but it then ascertains a certain state of things that if they existed, the jurisdiction would cease to exist.
 - This effectively required the Supreme Court to reach a certain result; it prescribed the rule of decision in a particular case.
 - Congress cannot tell the court how to **apply** a preexisting law to a particular circumstance. But it can adopt a new legal standard in a pending postjudgment enforcement proceeding.

3. Justiciability Limits: cases or controversy

- It deals with the proper role of the federal judiciary in a democratic society.
- Principle of Avoidance: it will reach constitutional questions only when necessary.
- Cases and Controversies, Art. III, sec 2[1]

a. *No Advisory Opinion: does not exist*

- Advise, not based on controversy --> case or controversy does not exist in this situation.
- The judicial power is one to render dispositive judgments.

b. *Standing: whether a specific person is the proper party to bring a matter to the court for adjudication*

- Constitutional Elements (cannot be altered by statute or Congress):
 - (1) Injury in fact,
 - (2) Causation,
 - (3) Redressability (resolve or remedy the injury)
- Prudential Elements (Congress could alter them, "changeable"):
 - (1) No 3rd party standing,
 - (2) No generalized **taxpayer or citizen** standing (taxpayer may disagree with gov, but that is not enough in prudential term --> need more specific term);
 - (3) Zone of interest

- 1) Injury in Fact: concrete, particularized injury that P **personally** suffered or **immediately** will suffer.
 - *Allen v. Wright*: 1) **Personally suffered** → yet the P did not even apply for the private schools. 2) simple failure to comply with the law is not an injury; 3) Causation: IRS's tax-exempt is not fairly traceable to segregated education.
 - *MA v. EPA*: might be minor, an incremental step could be redressed + a risk, which is widely shared, does not minimize MA's interest.
 - *LA v. Lyons*: 1) past injury is not the standing for future injury; speculative of whether that will happen to him again. 2) hard to challenge the whole police officer's conduct unless there is a policy issue or prove every police officer does so.
 - *Endangered Animals*: Their theories regarding an ecosystem, animal, or vocational nexus justifying standing for individuals who want to study, see, or work with such animals are too speculative.
 - *Clapper*: plaintiffs do no more than speculate that the surveillance may occur in the future and that is not sufficient to meet the standing standard.
 - Principle:
 - Specific injury --> "injury in fact" not "too abstract"
 - Reasoning: go through the elements analysis --> whether this case is appropriate for a jury to hear the case
 - Assumption: 1) Congress gives the right, more leeway if there is statutory right given by Congress; 2) MA as a state give rise to the issue --> federalism, they are equal sovereignty in some point; but by submitting state's power --> **special solicitude in our standing analysis**
 - Injury: the injury exist for "climate-change risks are "widely shared" does not minimize MA's interest in the outcome of this litigation"
 - Causation: so insignificantly --> hard to have the causation; Just because it is small incremental step does not mean that it can never be attacked in a federal judicial forum; U.S. could make a meaningful contribution to the global warming.
 - Redressability: it will slow the peace anyhow.
- 2) Causation and Redressability: a favorable court decision would remedy the injury.
 - **Fairly traceable**: **Actual Causation**: look at the question represented and remedy; **Proximate Causation**: look at if there is intervening causation, such as other countries' action to global warming issue.
 - **Redress**: whether legal remedy (monetary) v. equitable remedy (injunction)
 - e.g. It is speculative that appropriate housing would be constructed without the exclusionary zoning ordinances.
- 3) No third party Standing
 - Balancing Test:
 - The closeness of the relationship between the plaintiff and injured third party: such as doctor and patient/ landlord-tenant.
 - The likelihood/ability that the third party can sue on its own behalf.
 - Whether it is a private issue;
 - Imminence/Efficiency of injury (a pregnant who is prohibited from abortion);
 - Whether the injured party has made a deliberate decision not to sue (the mother who had custody/the son who would be sentenced did not sue)
 - Exception: **Mutual beneficial interest is permissible**. Doctor/patient; the black tenant who cannot sue on his own behalf.
 - Note: *a prudent course* is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.
- 4) No Taxpayer or citizen Standing: no generalized grievance
 - If the taxpayer wants to challenge, it must be brought:
 - (1) challenge under the Taxing and Spending Clause, and

- (2) the enactment exceeds specific constitutional limitations imposed on such power.
 - E.g., mere seeking information does not he would be injured + such enactment exceeds constitutional limits.
 - Exception: Tax and spending power in violation of Establishment Clause of First Amendment.
 - Expenditures is NOT tax credit or property disposing;
 - The challenged enactment must be pursuant to an express and specific mandates.
 - Justification: Governmental system decides that many crucial decisions to the political process.
- 5) Zone of Interest (administrative law)
- If a plaintiff is suing pursuant to statutory provision, the plaintiff must be part of the group intended to benefit from the law.
- c. Ripeness: *does not yet exist*
- Factors a court will consider:
 - A. Fitness of the Issues for Judicial Decision: if it is justiciable or is it more a matter of **law**.
 - B. Hardship to the parties to permit pre-enforcement review
 - Sufficient when 90% supply companies challenged an FDA label regulation, otherwise they have to destroy all their manufacture line and have another one.
 - Insufficient when 1 cosmetic company challenged regulation about color additives, which at most lead to a suspension of certification service.
 - Efficient: Inevitability of the operation of a statute → shows the risk of suffering from a possible sanction.
- d. Mootness: *no longer exist*
- An actual controversy must exist at all stages of federal court proceedings, at both trial and appellate level.
 - Three **exceptions** where a court will hear a moot case:
 - 1) Capable of repetition yet evading review: pregnancy, policy of short-term election.
 - 2) Voluntary Cessation (but free to return to it at any time)
 - Whether the alleged wrongful behavior could not reasonably be expected to recur.
 - 3) Class action: a properly certified class action suit may continue, even if the named plaintiff's claims are rendered moot.
- e. Political Question: *inappropriate for judicial branch to consider*
- Issues that it is better for the political branches (legislative and/or executive) to consider
 - Factors to consider
 - 1) Textually demonstrable constitutional commitment of the issue to a coordinate political department; OR
 - 2) A lack of judicially discoverable and manageable standards for resolving it; OR
 - 3) “Prudential consideration counsel against judicial intervention.”
 - a. The impossibility of a court’s undertaking independent resolution without expressing lack of respect for coordinate branches of the government; OR
 - b. An unusual need for unquestioning adherence to a political decision already made.
 - c. The potentiality of embarrassment from multifarious pronouncement by various departments on the questions.
- 1) Application: Partisan Gerrymandering – Guaranty Clause
- Guaranty Clause (guarantee to keep republican form of government) is NOT justiciable.
 - Remain uncertain: whether political gerrymandering is a political question.
 - A. *Baker*: equal protection is justiciable v. state sovereignty
 - B. *Vieth*: redistricting is justiciable, partisan gerrymandering is not.
 - Lack of standard to decide after 18 years of judicial effort
 - Plural opinion does not foreclose all possibility if some standard could be found.
 - C. Afterward, it is required to allocate the district roughly equal mathematically.
- 2) Application: Congressional Self-Governance
- Congressional judgment of its internal government is political question.
 - Exclusion of Congress member is NOT a political question

- A. The expulsion of a member, regarding how to be a Congressman, is a political question: §5 requiring 2/3 vote from Congress
 - B. The exclusion of a member, regarding how to become a Congressman, is not a political question, where the Constitution only lists requirements like age, citizenship.
- 3) Application: Foreign Policy
- Cases related to the conduct of foreign affairs pose political question. Such as:
 - A. Determination of when a war begins or ends
 - B. Recognition of foreign government
 - C. Ratification and interpretation of treaties, including rescind a treaty.
 - But not every case or issue relating to foreign affair is political
 - A. Constitutionality of a Congress's statute, even though it is about whether Congress should recognize Jerusalem as Israel's capital.
- 4) Application: Impeachment
- The constitutionality of Senate impeachment proceedings is a non-justiciable political question incapable of judicial adjudication.
 - A. "Senate shall have the **sole** power to **try** all impeachments." Art. I, sec 2.
 - Sole: constitutional commitment to the political branch.
 - B. Where Senate appointed committee to receive evidence and hear testimony → permissible
 - Note:
 - A. Even if the statute gives such right/standing, lowering the bar, actual injury must be showed
 - E.g. animal life, the four ladies still needs to visit
 - B. The extent of reviewing executive or president is that 1) in president's political character, no judicial review; 2) if the Congress imposes other duties required by acts, and individual liberty is dependent on such performance of acts --> judicial review

II. Federal Legislative Power: federal part v. state

A. Background

- Limited **Authority**: only if there is express or implicit authority in the Constitution.
 - o Otherwise, according to 10th Amendment, it will be to the State power, i.e., political power, health, safety and welfare of the people.
- Two questions to ask are if Act of Congress is constitutional (i.e. valid under the Constitution)
 - o Does Congress have the power?
 - o Is there a Constitutional LIMIT on that power?
- McCulloch: Congress may choose any means, not prohibited by the Constitution, to carry out its lawful authority.

B. Necessary and Proper Clause

- A **grant** of power to Congress, not a limitation.
- McCulloch: not indispensable, but useful and desirable.
- Test: whether statute constitutes a means that is **rationally related** to the implementation of a constitutionality enumerated power.
- Whether the means chosen are **reasonably adapted** to the attainment of a **legitimate end** under commerce power or other powers that Constitution grants Congress the authority to implement.

C. Commerce Power

- Questions to be answered
 - a. What is Commerce? Does it include all stages of business, even the life in U.S.?
 - b. What is "among several states?" Direct effect (substantial effect) or any effect on interstate activities suffice?
 - c. Does Tenth Amendment limit Congress? If Congress is acting within the scope of its commerce power, can a law be declared unconstitutional as violating the 10th Amendment?

1. Initial Era: Gibbons
 - Commerce: intercourse of commerce, including navigation.
 - Among states: Intrastate commerce if it has impact on interstate activities. But completely internal commerce of one state is not.
 - Limitation: to utmost extent and acknowledge no limitation.
2. 1980-1937: limited power
 - Commerce: only one stage of business, not including mining, manufacture or production.
 - Among states: only substantial effect. Congress may regulate stream of commerce.
 - 10th Amendment: reserved a zone of activities, others are for state to regulate.
 - (1) Zone of interest: mining, manufacture, and production.
 - (2) Economic conservative: e.g., antitrust law and employment regulation
 - (3) Moral conservatives: lotteries and regulating sexual behaviors.
3. 1937-1990s: Board Federal Power
 - Commerce: all stages of business
 - Among states: intrastate or interstate that has substantial effect on interstate commerce, including that themselves have little effect if the activity, looked at cumulatively throughout the country, has a substantial effect on commerce.
 - (1) Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential and appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.
 - (2) That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where his contribution, taken together with that of many others similarly situated, is far from trivial.
 - (3) Whatever their motive and purpose, regulation of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.
 - 10th Amendment: truism. Simply a reminder, no longer seen as reserving a zone of activities for exclusive state control → great deference to Congress.
 - Application: regulatory law, rational basis review.
 - It has to prove both there is no rationaly related and no legitimate gov't interest.
 - E.g. must show the law is "arbitrary" and/or "unreasonable."
4. After 1990s: Lopez Test
 - a. *Test for Commerce*
 - (1) **Use of channels** of interstate commerce: such as hotel, restaurant, shipment of goods.
 - (2) **Instrumentalities** of interstate commerce, and persons or things in interstate commerce: highway, aircraft. (even though the threat may come only from the intrastate activities)
 - (3) Activities having a **substantial relation** to interstate commerce
 - Must be an **economic** activity, not a violence against women.
 - Traditionally state practice such as police power is usually reserved to state.
 - Other possible arguments: 1) more rigid definitions; 2) balance between state and federal; 3) just rational basis test: if the means Congress adopted is reasonably related to the legitimate end.
 - Cumulative Impact:
 - (1) Morrison: in areas traditionally regulated by the states, Congress cannot regulate noneconomic activity based on a cumulative substantial effect on interstate commerce.
 - (2) Raich: cultivation and possession of marijuana is an economic activity → substantive effect can be based on cumulative impact.
 - Avoid Constitutional Doubts: if a statute could be dissolved in another way, the court would not address the constitutional issue.
 - Note from Nat'l Federation of Independent Business:

- (1) **Regulation:** only to already **existing commerce**, but not compel to participate or create a commerce. Purchasing is commerce; failure to purchase is not.
- (2) **Rational basis:** legitimate interest + reasonableness connection + acted reasonably.

b. *Tenth Amendment:*

- *New York v. U.S.:* It is unconstitutional for Congress to compel state to adopt law. But it can set up standards that state must meet [Where Congress has authority to regulate private party's conduct] + attaches strings on federal grants (Spending Power) instead of expressly compulsion.
- *Printz v. U.S.:* Congress cannot compel state's executive officers conduct background check.
 - (1) Congress cannot command state to implement federal mandates.
 - (2) Congress cannot compel state executive officer to act (the executive power is vested solely at the President, not Congress) ↔ Congress can impose affirmative obligation upon executive, legislative officers at state level.
- *Reno:* Congress can impose **prohibition of a conduct** on state and private individuals, but not **affirmative mandates/obligation** on states.
 - Prohibition on disclosure of personal information → Commerce Clause, for it contains resale and redisclosure of information.

D. Tax and Spending Power

a. *The Scope of Taxing and Spending Power*

- **Authority:** expansive authority unless contradicted to Con's provision.
 - (1) Article I, §8: "Common defense or General Welfare of the U.S."
 - (2) "Congress has authority under the Spending clause to appropriate federal monies to promote the **general welfare** and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact **spent for the general welfare**."
 - Even when there is no nexus between the prohibited conduct and actual spending of federal fund.
- **Requirements:**
 - (1) In pursuit of **general welfare**
 - (2) The conditions must be **unambiguous**.
 - (3) The conditions must be **related to** a federal interest in a particular national project/program.
 - Impose a lower drinking age + federal fund for highway. Promote safety on highway ↔ attenuated to change regulations in other areas of social and economic life.
- Whether it is a tax or penalty: **recitals do not matter** but look at the nature of it.

b. *Limitation imposed by 10th Amendment*

- Very board as *New York v. United States* pointed out that it is permissible for Congress to attach conditions to grants.
- Financial inducement might be so coercive as to pass the point at which pressure turns into compulsion
 - (1) Drinking age: 5% of federal highway fund is relatively small portion.
 - (2) Individual mandate: NO
 - Large **expanding** the act, if state did not comply the new one, it will lose **all** fund, which is **10%** of their budget --> **not change in degree, but in kind**.
 - State must have a genius choice; Congress cannot threat existing funding.
 - (3) Hard to draw the line: by money? By portion or by state?
 - It's not state's reliance on federal funds limits Congress authority to alter its spending program. This gets thing backwards.

E. "Enforce" Clause of 14th Amendment

- "Congress shall have power to enforce this article by appropriate legislation."

1. Whom may Congress regulate? [Private Conduct]

- 13th Amendment: applies to private party

- §5 of 14th Amendment: only to governmental action or state officials, not private party.
2. What is the Scope of Congressional power? [what kind of conduct is prohibited]
- a. *Nationalist Perspective*
- Congress can use its §5 authority to **expand the scope** of rights / prohibited conduct, but it cannot dilute or diminish constitutional rights: NO restrict, abrogate or dilute.
- b. *Federalist Perspective [Major]*
- Congress cannot expand or create new rights; Only the rights recognized **by the Court** + There must be a congruence and proportionality between the injury to be prevented or remediated and the means to adopted to that end.
 - The Court as the sole interpreter of Constitution.
 - 15th Amendment, *Shelby County*: not treating states the same + A federal law that departs from the fundamental principles of federalism must be justified by current needs.
- F. Eleventh Amendment: State Sovereignty
- **11th Amendment**: the judicial power of the U.S. shall not be construed to extend to any suit against one of the United States by Citizen of another State, or by Citizen . . . of any foreign state.
 - **Exceptions**:
 - 1) Sue state officers: for **injunctive** relief; OR for damage **paid by them**; but it cannot be sued where the state treasury will pay damages to compensate for past wrongs.
 - 2) States waive immunity: (ideally) notion of responsibility or justice;
 - 3) **Congress** may abrogate the state immunity, due to violation of 14th Amendment.
 - ONLY under **§5 of 14th Amendment**, not Interstate Commerce Power
 - 14th follows 11th and thus could modify it + 14th intends to bound state power.
 - Other possibilities: 11th only applies to *diversity jurisdiction* (not whole subject matter jurisdiction.)
 - **The Test presented**:
 - 1) Whether the Congress has unequivocally expressed its intent to abrogate the immunity
 - 2) Whether Congress has acted pursuant to a valid exercise of §5 of 14th Amend
 - **Congruence and proportionality** between injury and means
 - Subject matter subject to different standard of review
 - If the discrimination is under **heightened scrutiny**, Congress has board authority to legislate or abrogate the state immunity.
 - If it is under rational basis, it is unlikely to be enough to against state.
 - For invalid exercise of power
 - Age: rational basis, such requirement is “**disproportionate** to unconstitutional conduct.”
 - For valid exercise of power
 - Gender-based discrimination: heightened scrutiny
 - Disabilities → access to court room (due process?), heightened scrutiny.
 - NOT extend to state suits at **state courts**.

	Means	End	Burden	Rights
Rational Basis	Rationally related	<u>Legitimate</u> gov’s interest	Challenger Presumed constitutional	
Intermediate Scrutiny (Heightened)	Substantial advances	<u>Important</u> gov’s interest	Government Presumed un constitutional	a. Fundamental Rights by Bill of rights + due process + liberty
Strict Scrutiny (Heightened)	Narrowly Tailored (no alternative)	<u>Compelling</u> gov’s interest	Government Presumed un constitutional	b. Suspect Classification (5) : race, gender, national origins, alienage, non-martial children.

III. Limits on State Regulatory: state part v. federal

A. [Acted] Preemption of State Laws: Congress's Intent

- Supremacy Clause: This Constitution and the Laws and all Treaties shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the Contrary notwithstanding.
- 1. Express Preemption:
 - Clear language of statute, will also look to legislative history, etc.
 - Court decides **scope of the regulation**; not only the text but also the prior version of the statute.
 - o Great discretion for the Court to decide → arbitrary and inconsistent answer.
- 2. Implied Preemption
 - a. *Field Preemption*
 - Where **scheme of federal regulation** is so persuasive that a reasonable inference will be Congress left no room for state to supplement it.
 - **Foreign policy** as example: the scope of it
 - (1) Federal law preempts where state law serves the *same purpose* as the federal law; it cannot contradict or contemplate federal law.
 - [F] exclusive discretion v. [S] boarder discretion for state officer to arrest or remove.
 - (2) In absence of express languages, e.g.
 - [F] no mention of bringing paper all the time v. [S] bring ID paper all the time.
 - [F] ONLY mention liability on employer v. [S] liability on employee.
 - b. *Conflict Preemption*
 - Where compliance with both federal and state law is **physically impossible**.
 - If CA makes it illegal to over 7%, while federal requires it less than 7%.
 - c. *Federal Objective*
 - Where state law impedes or stands an obstacle the achievement of federal objective.
 - The question is how to characterize the objective of federal law and state law
 - o If federal law is to promote nuclear power in general → state law to stop it for economic reason is preempted
 - o If CA law it to stop for fear of safety → preempted by federal law; BUT here the Court characterized CA law as economic consideration, even though the law is written in terms that “unless the safety of disposal was ensured.”

B. [Not Acted] Dormant Commerce Clause

- Where judiciary determines that state government puts an undue burden on interstate commerce.
- 1. Test
 - Old Test (Cooley): national (uniformity of regulation) v. state (diverse local regulation)
 - Balancing Test: whether the **benefit** of the state law **outweigh** its **burden** on interstate commerce.
 - o Whether it discriminates against out-of-staters OR
 - o Whether it treats all alike regardless of residence.
- 2. Balancing Factors
 - 1) [Discriminates on PURPOSE: there is no other alternative explanation of it.
 - Most of the “discrimination” is claimed to have legitimate purpose such as police power of state to protect health, safety or general welfare of its people.
 - It is on purpose if it favors in-staters economically at the expense of out-of-staters.
 - E.g., *in-stater is funded entirely by taxes of out-of-stater.*]
 - **Test**: it is per se invalid and struck down.
 - 2) on FACE:
 - Usually when statute *draws a distinction* between in-staters and out-of-staters.

- E.g., N.J. prevents importation of wastes from out of state → exclusive for residents + limit accessibility of out-of-staters.
- **Test:**
 - **Heavily** presumed invalid.
 - State has heavy burden of providing the measure **is almost certain** to achieve its legitimate purpose, and the **unavailability of adequate nondiscriminatory alternative**.
- 3) In EFFECT: disparate impact against out-of-staters
 - Decided if there is **substantial discriminatory impact**.
 - **First**, if its effect is to exclude virtually all out-of-stater from a particular state market, but NOT if it only excludes one group of out-of-staters.
 - **Second**, if it imposes cost on out-of-staters that in-staters would not have to bear.
 - a. E.g. Washington Apple: 1) in-staters are not affected, while all WA dealers are affected; 2) strips away WA apples' competitive and economic advantages; 3) operates in leveling effect.
 - [**Third**, facially discriminate or having a discriminate purpose.]
 - **Test:**
 - Presumed invalid.
 - State has burden of providing the measure **is likely** to achieve its legitimate purpose, and the **unavailability of adequate nondiscriminatory alternative**.
- 4) EVENHANDED: treat in-stater and out-of-stater alike
 - **Test:** challenger has burden of proving that the measure's burden on interstate commerce is **clearly excessive** in relation to state benefits.
 - Assumption of constitutional
 - Invalid a statute when
 - a. **substantial burden** on interstate commerce (while the prohibited standard is permissible in 40 states)
 - b. no specific evidence to support its **safety benefit**.

3. Exception

- 1) Congressional Approval to Dormant Commerce Clause
- 2) Market Participation Exception
 - If the state was a participant in market not a regulator, the Dormant Commerce Clause does not apply.
 - **Exception to exception:** if the state both participates and **regulates**, the clause still applies.
 - The state produces; It requires buyer to process the products within the state.
 - It may not go further and impose conditions that have a substantial regulatory effect outside of that particular market.

C. [Not Acted] Privileges and Immunities

1. Definitions

- Article IV, §2, "Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States."
 - o Fundamental Rights: bill of rights
 - o **Important Economic Activities:** ability to earn a livelihood.
 - Such as excluding from participating a trade or profession, or charges discriminatory licensing fee, or mandates a preference to in-staters for employment.
 - But NOT non-important economic activity, like elk hunting.
- Relationship with Dormant Commerce Clause
 - o *Discrimination* against out-of-stater: yet commerce clause just requires substantial burden, not necessarily discrimination against out-of-stater.
 - o *Citizens* requirement: NOT aliens, or corporation.

- *No exceptions*: applies even if state is a participant or has congressional approval.
2. Justification
- Test: substantially related to a substantial state interest.
 - a. There is a substantial reason for difference in treatment
 - b. The discrimination against nonresidents bears a substantial relationship to the State's objective → **availability of less restrictive means** or "source of evil."
 - Does law effect constitutional rights or important economic interest?
 - If yes, go to 2; If no, no violation
 - Does the state have 1) substantial reason/objective for discrimination AND 2) discrimination "substantially related" to the state's reason/objective?
 - If yes to both, state law UPHELD
 - If no to either, state law STRUCK DOWN -- consider "availability of less restrictive means" for the "substantially related" requirement.

IV. Federal Executive Power: executive v. legislative

A. Inherent Presidential Power

1. Authority:

A. Express Act of Congress; and/or

B. Express Constitutional Provision; and/or

1) Treaty Power; Pardon; Appointment;

2) Vesting Clause: executive power shall be vested in a President

3) Take Care Clause: he shall take care that the law be faithfully executed.

4) Commander-in-Chief of Army and Navy of the United States.

C. "Inherent" authority: it is not limited by "herein granted" like legislative power

a. President's power is at MAXIMUM when he acts pursuant to Congress's authorization (express or implied)

- Presumption is in favor of authorizing presidential power
- Power consists of:

1. All of the president's own independent Constitutional power;

2. **PLUS** all the power that Congress can delegate

b. President's power is at MEDIUM when he acts in absence of Congress's authorization (silence) → power consists of

- President's own independent Constitutional powers only
- But there is a kind-of "twilight" zone where he and the Congress may have concurrent authority or where the distribution is uncertain → relies on different cases' fact, not a legal matter.

c. President's power is at LOWEST when he acts in a way against Congress's will (express or implied)

- President's own Constitutionally-granted power
- **MINUS** any power that Congress has over the matter.

2. Executive Privilege and extension

- The president does **not** possess an absolute generalized privilege to keep secrets all communication with advisor and others. E.g., material related to pending criminal prosecution.
- **Extension / Lime-item veto**: contradict to Constitution's lawmaking clause
 - [Art. I sec. 7] If he approves he shall sign it, but if not, he shall return it.

B. Foreign Policy

1. Power in foreign policy

- The President has very board power in foreign policy other than internal affairs.

- Difference in **origins**: where the internal was rested in states and then bestowed to national government, while the foreign affairs is inherently in national government.
- Difference in **nature**:
 - Internal affairs: enumerated in constitution + proper and necessary to carry out
 - Foreign: President is the sole organ + uniformity + confidential information.
- In justification of Israel case, it is a third type of dispute according to Youngstown Test, which deserves securitized review. E.g.:
 - Whether President's power is exclusive and conclusive by precedents and historical practice.
 - Whether the statute infringe the consistent decision to withhold recognition.
 - Maj: directly contradict v. Dissent: not implicate

2. Executive Agreement

- Authority:
 - A. **Treaty Power**: [Art. II, sec. 2[2]] President shall have power, by and with advice and consent of Senate, to make treaties, provided two thirds of the Senators present concur.
 - B. It also extends to executive agreement, where senate approval is not required.
- Current precedents are dealt with cases where it is implicitly approved by Congress [first prong of Youngstown Test] and the result is necessary incident to the resolution of dispute.

C. Terrorism

- Authority: "suspension clause" Art. I, § 9[2]
 - The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the **public Safety** may require it.
- Test:
 - a. The **citizenship and status** of the detainee and the **adequacy of the process** through which the status determination was made
 - the D in this case is a foreign citizen, but he was never tried by military, lack of legal counsel, environment of confinement.
 - b. The **nature of the sites** where apprehension and the detention took place, and
 - Guantanamo is within the constant jurisdiction of the United States.
 - c. The **practical obstacles** inherent in resolving the prisoner's entitlement to the writ.
 - Any compliance requires incremental expenditure of resources.
 - Here, the military mission would not be compromised by habeas corpus hearing.
- Dissent: 1) no list of due process rights owned to detainee; 2) political question for political branch.

D. Checks on the President

1. Immunity

- Authority:
 - a. Absolute Immunity: complete protection from civil suit for all official actions while **in office**.
 - Applies to president, *member of the Congress, judges and prosecutors*.
 - Concerns about "above the law."
 - b. No Immunity for his unofficial acts OR acts that take place before he takes office.
 - The unofficial aspect: when the president is a president but did something that is unrelated to his position as a president.
 - Dissent: occupy substantial amount of time + If the Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.

2. Impeachment

- Authority: Art. II, sec. 4
 - The President, Vice President and all civil Officers, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
 - One end of spectrum is the violation of criminal law and a serious threat to the society.

- One the other hand, the house of representatives has the sole power of impeachment - whatever a majority of the Hours of Representatives considers it to be + then the Senate has the sole power to trial and convict the president.
 - Punishment: Art. I. sec. 3 [7]
 - Subject to removal of office, disqualification of holding office
 - NOT criminal indictment or trial, judgment.

E. Legislative and Presidential Controls of Agency Conduct

1. Appointment Power

- Authority: Art. 2, sec. 2
 - 1) President shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, Minsters and Consuls, Judges, and **other officers** of U.S.
 - 2) But Congress may by Law vest the Appointment of such **inferior Officers** in the President alone, in the Courts of Law, or in the heads of Department.
 - 3) The president shall have power to fill up all vacancies that may happened during the Recess of the Senate by granting Commissions which shall expire at the End of their next session.
- Inferior v. Principle Officers: inferior if
 - 1) Removable by (Attorney General) higher executive officer for sufficient reason;
 - 2) Only inferior power compared to (Attorney General) | | perform only certain limited duties.
 - 3) Limited Tenure, Limited jurisdiction
- Recess Power:
 - 1) Scope of Recess: inter-session (by year); intra-session (days)
 - a. "three days is too short"
 - b. during the break, the senate has the "**pro forma**" session
 - c. It concerns with the Senate's procedure and it need to be maintained due to the separation of powers, because it has "the capacity to transact Senate business."
 - 2) Justification: (1) the ordinary meaning of the words, (2) the purpose of permitting the president to keep the government running when Congress is not available, and (3) historical use.

2. Removal Power

- President may fire any executive official
- Congress may **limit** removal by statute if:
 - 1) It is an office where **independence** from the president is desirable; AND
 - 2) The statute does not prohibit removal but limits it to where there is **good cause**. [cannot be a multi-level restriction.]

V. Statutory Interpretation by Courts

A. Legislation: structure of a modern statute

B. Text-Based Tools

1. Ordinary Meaning v. Technical Meaning

1. Degree to which terms have accumulated under common law;
2. Audience to which statute is addressed + industry understanding + technical context.

2. Textual Canons of Construction

- Linguistic Canons:
 - 1) **ejusdem generis** - "of the same kind:" look within provision to construe, list of items ended with a general term, that general term is confined to covering subjects comparable to the specifics it follows.
 - 2) **Noscitur a sociis** - "a thing is known by its companions:" interpreted consistently with surrounding words.
 - 3) **Expression unius est exclusion alterius** - "the mention of one thing is the exclusion of the other:" infer from inclusion that omission of another term is intentional.

- 4) Others: last antecedent (adj only modifies the noun it follows), conjunctive v. disjunctive, shall v. may.
- Whole Act Canons:
 - 1) Identical Words: consistent meaning
 - 2) Avoiding redundancy and surplusage
 - 3) Titles and Provisions: used to confirm or inform interpretation
- Whole Code Canons:
 - 1) Statue addressing the same subject matter generally should be read as if they were one law
 - 2) Even if not a), the court may draw inference from separate statues
 - 3) Repeals by implication: it can only be overcome by clear language to the contrary.

3. Substantive Canons of Construction

- **Rule of Lenity:** ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.
 - It only applies when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.
- **Constitutional Avoidance:** if there is ambiguity, a statute must be construed so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.
- **Federalism Clear Statement Rule:** if the congress intends to alter the usual balance between federal and state government, it must make its intention to do so unmistakably clear in the language of the statute.
- **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.

C. Intent and Purpose-Based Tools

- Forms of Legislative History:
 - **Committee report:** written by those responsible/most-informed about bill; circulate with bill to whole chamber, read widely by members and staff (for fairly plain language);
 - Author or Sponsor Authorities: neg: reflects only one voice,
 - Member Statements:
 - Hearing Record:
 - Other legislative statements: legislature history of other statues, past and future might serve as independent source.
 - Presidential and Agency statements:
 - Others: floor debate
- Judicial Reliance on Legislative History: *Moore v. Harris*

D. Tools for Considering Changed Circumstances: *Bob Jones University v. U.S.*

E. Theories of Statutory Interpretation

- Textualism: the ordinary meaning of words
 - Directs courts to stop with the text of the statute; not to engage in broader search for legislative intent.
- Intentionalism and Purposivism: determining the intent/purpose of the legislature.
 - 1) **Intentionalism:** suggests collective legislative intent is coherent (general intent of majority is ascertainable)
 - 2) **Purposivism:** once legislative purpose is determined, interpret the text to carry out that purpose as best it can. (don't give words "a meaning they do not bear)
- Imaginative Reconstruction: the intent of the legislative with respect to an issue it did not consider
- Dynamic Interpretation: the statute's meaning in light of changed circumstances.

VI. Statutory Implementation by Agencies

- What our regulatory state looks like depends on who is in control of relevant decisionmakers and decisions. This is often a matter of politics.

A. What is Agency?

- o Creation:
 - **Federal legislation**
 - sometimes by president by an executive order, then followed by legislation. E.g., EPA and DHS.
 - o Powers:
 - [with **force of law**] by issuing regulation and issuing orders after adjudication similar to judicial hearing.
 - Conduct research, provide public info, produce guidance documents.
 - o Huge volume of regulations and adjudications (More than enter federal judiciary)
1. Regulatory State
 - o Comprised of **15 cabinet departments** and their **sub-cabinet agencies**, plus other agencies.
 - o Federal government employs over **2.5m workers**.
 - o Given the size/scope of agencies in the system, there is **continual quest for control of their decisions** by President, Congress, regulated parties, public interest groups, court.
 2. Legitimacy
 - o Expertise or institutional competence: broad access to info, specialized knowledge, trained staff, thought superior to Congress.
 - o Fairness and rationality: subject to APA, administrative procedure act (, and Due Process Clause).
 - Formal:
 - Formal adjudication (trial-type hearing), resolving dispute between parties
 - Formal rulemaking, rule with future effect and general application.
 - Informal: little procedure required.
 - **Notice and comment rulemaking**: relying on written submission from interested parties.
 - Guidance material and staff manual.
 - o Interest presented: through open process of notice-and-comment rulemaking.
 - o Political accountability: indirectly accountable through president
 - o Efficacy and flexibility: especially compared with Congress
 - o Coordination: with other agencies (unlike the independent three branches.)
 - o Efficiency: **cost-benefit analysis** for all proposed major regulations.
 3. What do agencies look like?
 - o Executive Branch agencies (under the president's government organizational chart)
 - Run by officials who can be fired at will by President
 - Includes: "department" headed by a "secretary"
 - Subdivisions of Departments:
 - such as National Highway Safety Transportation Administration (NHTSA) within the Department of Transportation; Food and Drug Administration (FDA) within the department of Health and Human Services.
 - o Independent Agencies
 - Heads serve fixed term that expire in staggered year
 - Removeable by president only "for cause" or "good cause."
 - Usually run by multi-member commissions by boards
 - Bi-partisan requirements
 - Such as Federal Communication Commission (FCC); Federal Reserve Board (the Fed); Securities and Exchange Commission (SEC).

4. Procedural Requirement of Administrative Procedure Act
 - Formal
 - Formal adjudication: requires agency to conduct trial-type hearing, resulting in order resolving disputes between 2 parties;
 - Formal rulemaking (much rare): rule with future effect
 - Informal:
 - "Notice-and-comment" rulemaking (agency relies on written submissions from interested parties)
 - Little procedure required for guidance material and staff manual.

B. Implementation by Agencies

1. [General Difference:
 - Deploy technical expertise - courts as generalists;
 - Authorized by and familiar with few statutes in key operation - court over issues at margin and not at core of its operation;
 - Considerable control over agenda (discretion over content and timing), no obligation - courts are limited
 - Responsive and accountable to political officials (Congress and President create and monitor them) - courts as independent.]
2. **APA requirement:** Process once the agency decides to proceed with proposed rule
 - Publish *notice of proposed rulemaking* (NPRM) in Federal Register (Fed. Reg.) | | must contain
 - Reference to legal authority under which rule is promulgated
 - Either the terms or substance of the proposed rule or description of the subjects involved.
 - Statement of time, place and nature of any public proceedings.
 - Provide reasonable time for interested parties to submit written comments (more than one round)
 - Issue *Final Rule*
 - Must contain "concise general statement of rules" general basis and purpose (rationale and legal authority).
3. Notice and Comment **Rulemaking** Process
 1. **Initiating** the process --> publish notice (NPRM) in Fed. Reg.
 - Agency's own initiative:
 - Statutory mandates
 - Regulatory action plans
 - New scientific data
 - Triggering events (e.g., increase in accidents or lawsuits based on accidents)
 - Response to prompt letter from office of information and regulatory affairs (OIRA) calling for regulatory review.
 - Recommendations by other agencies or government bodies
 - Petitions for Rulemaking from private parties or groups
 2. **Conducting** the process: provide time for interested parties to respond
 3. **Completing** the process: final rules or not --> contain concise general statement
4. The Tools of Statutory Implementation
 - Background: Agency usually provides an extensive explanation for its rule, because
 - S.Ct. requires it to facilitate judicial review; APA requires the regulation cannot be "arbitrary, capricious, and or an abuse of discretion." or
 - Offering explanation reduces the chance of President or Congress reacting adversely to their decisions.

==> the explanation reveals the factors they considered when making a decision.
 - Statutory Analysis: agency must assure its regulations are
 - **within scope of statute:** the authority the statute grants --> **jurisdiction**

- **consistent with terms of statute:** guidance given, relevant factors
- Scientific Analysis: analysis helps agencies evaluate risk of bad event occurring and develop appropriate response
 - e.g. scientific data for the problem + existing and potential technology.
 - Agency must decide how to proceed in the face of scientific uncertainty + science cannot always produce a factual basis for making a decision.
- Economic Analysis: **cost-benefit analysis** (*required* for all proposed major regulations)
 - Form risk assessment to risk management, the agency must decide whether to regulate, and how stringently.
 - One of the major tools is the economic analysis.
- Political Analysis
 - Public Attitudes and distributional effects
 - Political preferences - large impact of current president's preference
 - EPA: notice of denial of petition for rulemaking

C. Control of Agency Action

1. Presidential / Administrative Control

1. Statutes (Congress)
2. Budget (Congress)
3. **Appointment Power:**
 - Principle Officer (President + Congress)
 - Inferior Officer (could be just President)
 - Recess Appointment: annual inter-session or short intra-session
4. **Removal Power:** inherent in appointment power
 - President discretion to remove
 - Congress may LIMIT (but not repeal) if 1) independence is desirable, 2) for good cause.

2. Congressional Control

- How could Congress obtain information about agency action? OIRA, office of information and regulatory affairs.
 1. New legislation:
 - Might abolish an agency or restrict its authority
 - Less drastically, it may preclude a particular agency regulation or compel a different regulation.
 - Mere threat of such legislation can assert some measure of control
 2. Appropriate Legislation:
 - Restrict funding for a particular agency or regulatory program
 - Funded on annual basis through separate appropriations legislation
 - Appropriation process enables Congress to assert continuous control of agency actions
 - Art. I, Sec. 9: "in Consequence of Appropriations made by Law."
 3. Oversight Hearings [informational tool - *police patrols*]
 - Uncover facts in aid of further legislative activity - conform their policy to legislative preferences.
 - Accountability hearings for agency officials (public airing) - the visibility of oversight hearings may improve their effectiveness.
 - Subpoena power: contempt of Congress for failure to comply.
 4. Fire Alarms [informational tool - *fire alarms*]
 - Other ways for Congress to obtain information about agency action
 - Tools that position constituents to monitor agency activity and alert Congress when legislative action is necessary.
 - Administrative Procedure - rule-and-comment rulemaking, having citizens to participate as a *legal*, not political, function.

- Judicial Procedure: "citizen-suit" - authorizes any person to seek judicial review of agency action. [much easier than the general judiciary requirement to satisfy.]
 - Others: Freedom of Information Act (FOIA) - directs agencies to provide records to "any person" upon a request that "reasonably describes such records."
- 5. **Legislative Veto** and its demise (struck down in *INS v. Chadha*)
 - Less than adopting a new law, but through a house resolution.
 - Based on Constitution and Framer's Intent
 - #1: Congress may legislate only if there is *bicameralism*, passage by both the House and the Senate, and *presentment*, giving the bill to the president to sign or veto.
 - #2: Agency's action "was essentially legislative in purpose and effect."
→ Unconstitutional to veto
 - Based on Function
 - Essential to check administrative power, as recognized by over 200 statutes.
- 6. **Nondelegation Doctrine** and its demise
 - No delegation without standard or rule → later dispose such requirement
- 7. Congressional Control of Agency Officials
 - Has role in appointment of agency officials (president appoints officers with advice and consent of senate)
 - *Bowsher v. Synar*: the Congress cannot delegate itself the power to remove agency heads.
 - Power to order appearance for oversight hearing
- 3. Judicial Control of Agency Action - limited and afterward
 - a. *Judicial Control of Agency Statutory Interpretation*
 - Agency and statutes: Agency's enactment and discretion is determined by the language of statutes.
 - Agency and courts: **Congress's delegation**.
 - If Congress wants to constrain discretion by precise language, the court makes sure agency **abides** language.
 - If Congress wants to increase the discretion by drafting a vaguely worded statute, the court must defer to agency as long as the agency's interpretation is **reasonable**.
 - ★ Chevron Doctrine: "*Reviewing courts should defer to agency interpretations of ambiguous statutory provisions so long as those interpretations are reasonable.*"
 - **Clear statutory meaning: clear or ambiguous.** Whether Congress has directly spoken to the precise question. If the intent of Congress is **clear**, then is the end of the matter.
 - [The court interpret statutory provisions applying the "traditional tools of statutory construction."]
 - **If no, Agency decision upheld so long as it is "reasonable."** If the Congress did not address the issue, whether the **agency's answer** is based on a **reasonable permissible construction of the statute**.
 - For the reasonable inquiry, it is basically the standard for a reasonable person.
 - Different tools we could use for different interpretation.
 - **Step One: Clear Statutory Meaning**
 - *MCI Telecom v. AT&T*: whether FCC's interpretation make it optional for some carriers to fill tariffs is within its discretion, i.e., "modify any requirement."
 - Majority: 1) dictionary, modification only means minor change, not a removal; 2) the statutory language is clear or not ambiguous for the purpose of Chevron.
 - Dissent: board discretion:
 - See "It has carefully and consistently explained that mandatory tariff-filing rules frustrate the core statutory interest in rate reasonableness. The Commission's use of the discretion expressly conferred by § 203(b)(2) reflects "a reasonable."

- Whole-act canon: the whole purpose of the act is to prevent monopoly or promote competition.

d. Judicial Control of Agency Statutory Implementation

- **Step Two: unreasonable agency interpretation**
- Admin Procedure Act (APA) authorizes judicial review
 - Courts determine whether agencies have **followed** APA procedures (as well as Constitution & other laws)
 - Specific standards for courts to use
 - Courts should set aside agency action that is "**arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.**"
- ★ Agency action is "arbitrary and capricious" where it
 - Relied on factors which Congress had not intended it to consider
 - Entirely failed to consider an important aspect of the problem
 - Offered an explanation that runs counter to the evidence before the agency; or
 - Is so implausible that it cannot be justified.

--> The "*hard look doctrine*," whether the agency itself look at its own decision making.