**THE ADMINISTRATIVE AND REGULATORY STATE**

CHAPTER ONE. LEGISLATIVE PROCESS AND STATUTORY INTERPRETATION.

1. **FOUNDATIONAL THEORIES OF STATUTORY INTERPRETATION**

Intentionalism: when judge confronts difficult issue of statutory interpretation, try to reconstruct, as best as she can, the likely intent of the legislature respecting the problem at hand.

Purposivism: Looks to Congress’ general aim or purpose in crafting the legislation (as specific legislative intent is more difficult to divine)

* Democratically elected Congress enacts laws to achieve a purpose determined to be beneficial to the public/community, courts and administrators should obey
* Underlying assumption- Courts should presume Congress rationally fulfills its apparent goals and that its work product is relatively coherent.
* Background purposes, legislative supremacy not only permits, but sometimes requires Court to deviate from conventional meaning of the text.
* “function of the courts is to construe language so as to give effect to the intent of Congress.” [*American Trucking Ass’ns* (U.S. 1940)]

Textualism: How would reasonable people understand the semantic import or usage of the precise statutory language that Congress adopted?

* Legislative process is one of compromise, so we should rely on actual text that was agreed upon, enacted.
* Apparent misalignment b/w text, messiness, is result of process of compromise
* Protects minority stakeholders in leg process
* May force/encourage Congress to be clearer in leg’ive text it enacts, b/c courts will take what Congress says seriously
  + Courts’ reliance on text more likely to provoke Congress to clarify ambiguous/imprecise statute

1. **BRIEF OVERVIEW OF THE LEGISLATIVE PROCESS**
2. Article I, Section 7: Bicameralism and Presentment
   * Checks and balances
   * Deliberation and cooling off- may facilitate rational deliberation and public participation. Make it more likely leg process will result in public airing/discussion of disagreements and pros and cons of policy alternatives
   * Promotes caution, deliberation
   * Gives special protection to smaller states and other political minorities
   * Filters out bad laws by raising decision costs of passing any law
3. Congressional Rules of Procedure
   1. Introduction of bills and referral to committees
   2. Committee consideration
      * Committee will (1) report to house as submitted, (2) amend and submit, (3) rewrite (4) refuse to act on it
      * To determine action, committee conducts hearings
      * After hearings, committees “mark up” bill
   3. Floor debate and amendment
   4. Reconciliation- If bill passes house in different forms, must be reconciled. Sometimes on chamber will recede to other’s bill. Other times a conference committee will be formed w/ members from both houses.

1. **STATUTORY CONSTRUCTION & INTERPRETATION**

Presumption: Congress legislates w/ knowledge of basic rules of statutory construction.

All three dominant foundational theories of stat. interp assume that judges must act as Congress’ faithful agent (principle of legislative supremacy)

* + - 1. **The text**

1. Starting point- “ordinary meaning of the plain language” of the statute itself
   1. Why? Starting presumption is that legislators choose their words to express intended meaning
      1. Not that words have “intrinsic” meaning, but reflects practices/conventions shared by community of speakers and listeners
      2. Perhaps object of interpretation must be to ascertain SOME degree or version of legislative intent, or else it would de hard to justify the interpretive outcomes as the product of a system of legislative supremacy – plausible assumption- leg’ors intend to enact laws to be decoded according to interpretive conventions prevailing in relevant legal culture
   2. Unless otherwise defined, words will be interp’ed as taking ordinary, contemporary, common meaning
      1. Colloquial meaning or dictionary meaning?
         1. Dictionaries can provide historical record of how ppl use lang. in context. Starting point for determining how a reasonable person would have understood word/phrase.
         2. Don’t have infinite capacity for nuance, technical or colloquial meanings.
      2. Ordinary meaning or legal meaning?
   3. Where court finds statute to be clear in context- usually end of inquiry
   4. Dictionary meaning? (Smith v. US – “Use” of firearm during drug trade)
   5. Terms of Art ?

* Incl. “legal term of art” – Moskal dissent, “falsely made”
  + Technical terms, specific meaning for certain communities professions, groups of people.
  + How do we know when to give specialized meaning? Consider whom legislation is addressing, subject-matter
  + Where a federal criminal stat. uses a CL term of established meaning w/o otherwise defining it, the general practice is to give the term its CL meaning
  1. Coherence of the whole statute – read in context, in light of overall statutory structure; do other provisions still make sense given this interpretation?

**2. Canons of construction**

Interpretive principles/presumptions judges se to discern/construct statutory meaning.

Semantic/linguistic/syntactic: Generalization about how English lang is conventionally used/understood. Textual analysis.

When to apply? To determine “clear meaning” of stat text, or only the text is ambiguous?

* Ejusdem generis “of the same kind or class”. When a general/residual word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. Humans – incl leg’ors – tend to group together words that have a common characteristic.
  + Ex. Horses, cattle, sheep, pigs, goats, or any other farm animals. The general language “or any other farm animals,” despite seeming breadth, would probably be limited to other four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.
  + If (as is possible in Circuit City) ejusdem generis is merely an application of presumption against redundant lang, open to criticism that this presumption may be inconsistent with ordinary communication and w/ what we know about how leg process works.
* Expressio Unius Canon – expression unius est eclusio alterius. To express or include one thing implies the exclusion of the other, or of the alternative. Ommision > exclusion.
  + Ex. Rule “each citizen is entitled to vote” implies that non-citizens are not entitled to vote.
  + Ex. Silvers v. Sony Pictures Ent. (9th Cir 2005): Congress’ explicit listing of who may sue for copyright infringement should be understood as an exclusion of others.
  + Does not apply to every statutory listing or grouping, only when the items are members of “associated group or series” justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.
* Noscitur a sociis “it is known by its associates” Meaning of an unclear word or phrase can be clarified – often narrowed – by the words [immediately] surrounding it. Ejusdem generis is a narrower application of this principle.
* In pari materia: (“on the same subject”) where two stats use similar lang, appropriate to read as strong indication that they should be interp’ed side by side.
* Presumption favoring consistent meaning – same word or phrase has same meaning throughout the statute .
  + Varying opinions as to how strong this presumption is.
  + J.G. says: don’t go overboard with this, insisting on consistent meaning regardless of contextual clues to the contrary.
  1. Presumption against surplusage/redundancy/irrelevance: give effect, if possible, to every clause and word of a statute
     1. Very strong presumption
     2. Interpretations that would render certain stat lang redundant/superfluous are disfavored (“Navigable”)
     3. Counterargument: Lawyers are “addicted” to repetitive lists (J. Scalia, dissenting in **Moskal v. U.S**. – “falsely made”)

Substantive canons: Judicial presumptions in favor of particular substantive outcome. Generic approximations of presumed congressional intent. Grounded in commitment to certain systemic (perhaps const’al) values, not empirical belief re: cong intent. Explicitly puts thumb on scale for one side or other.

* + “Clear statement rules”: instruct courts to construe statutes to promte a favored value or avoid a disfavored one unless the statute demands the contrary w/ greater clarity than would ordinarily be req’d.
  + **Constitutional avoidance canon** – Where an otherwise acceptable construction/interpretation of a statute would raise serious constitutional problems, the Court should construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.  
      
    a) Courts should always try to resolve the issue first on statutory grounds before addressing const. objections.  
    b) If there is serious doubt about constitutionality of a fed statute, court should see whether a construction of stat is “fairly possible”/reasonable that would not raise “grave” or “serious” constitutional questions.   
    c) Construction does not have to be determined to be *actually* unconstitutional.  
    - Prudential concern that Const. issues should not be needlessly confronted (judicial restraint.), const decisions are a much more significant judicial restraint on other branches of govt than are other statutory decisions.
    - Recognizes Congress is bound by/swears to uphold Const, so ct won’t lightly assume Congress intended to infringe upon const. protected liberties or usurp power constitutionally forbidden it.
    - Protecting const. values
    - While within judicial power to do so, countermajoritarian difficulty in overriding the will of the elected Congress
    - But may lead to excessive caution, interpretations that Congress wouldn’t want
    - \* If construction isnt’ “fairly possible” may be “avoiding a difficulty to the point of disingenuous evasion.” (Catholic Bishop dissent)

* + Pro-federalism Canons: Clear, explicit statement is needed before a federal stat will be read to interfere with certain core aspects of state government operations. (federalism; state sovereignty and autonomy)
    - State govts have general auth to legislate on affairs w/in respective j’ds, fed govt limited to powers enumerated in Const: taxation, reg of foreign/interstate commerce, enforcement of equal protection and due process, etc.
    - Supremacy clause says where state and fed laws conflict, fed law takes precedence- as long as fed govt acting pursuant to legit source of const auth, fed law “preempts” state law.
    - Canon against finding preemption of state law: In fields which states have traditionally occupied, court will presume that the state law/power was not meant to be superseded by the fed stat u/l that was clear and manifest purpose of Congress

Courts must determine when a federal statute actually preempts state law – issue of interp.

* + - * Express preemption
      * implied preemption
        + Impossibility preemption
        + Obstacle preemption
        + Field preemption
    - Applies even where there is no plausible concern that a statute may actually be unconstitutional
  + Rule of lenity: if the law is ambiguous, narrow the scope/interpret in favor of defendant. Law must really be ambiguous. Last resort.
  + Statutes in derogation of the common law are to be narrowly construed so as not to overturn CL unless explicit (c0ntroversial)
    - Most will be… ex. UCC = codification of subject treated by CL, but w/ significant alterations
  + In case of doubt, tax/customs statutes are construed against the gov’t and in favor of citizen
  + Presumption against retroactivity: Congress intends to impose new liability only prospectively unless the statute clearly indicates the contrary.

1. **Legislative history**
2. Lawyers still cite, many judges use, but SCOTUS will generally first try to ascertain whether stat. text speaks clearly to issue. Wouldn’t uncritically treat LH as primary indicum of leg intent.
3. Can argue never reliable, or specifically unreliable
4. See Exxon Mobil Corp v. Allapattah (US 2005)Permissible for curt to consult stat’s LH IFF ct first determines stat is ambiguous. May not be used to *create* stat ambiguity or to overcome the clear semantic meaning of the text. Particular LH in question subject to close scrutiny.
5. Can be used to flesh out meaning, May provide insight into specialized meaning, industry practice, problems being addressed by legislation [Corning Glass works (U.S. 1974) – what constitutes “work conditions”?]
6. Assumptions authors entertained re: how words would be understood. Searching for rules of language authors used, helps the reader understand the context surrounding the words, rather than a search for what the authors actually were thinking or intending. Not THE basis of interpretation, but a clue as to the context within which the words were written.
7. Committee Reports
   * 1. Conventional wisdom: most reliable form of LH, prep’ed by H and S committees, accompany bills favorably reported to the chamber
     2. Conference committee reps accompany reconciled version of house and senate bills.
     3. Rank-and-file members may look to committees for understanding of leg.
     4. Allapattah explicitly rejects idea that committee reps are entitled to any special status.
8. Statements of individual legislators
9. But these only indicate the intent or understanding of individuals, not Congress; plus those who speak may differ from one another, and not everyone speaks
10. (1)Sponsor’s statements- expressed view of key legislators
    * + 1. Most likely to know what proposed leg is about, help shape views of other members
        2. BUT still only indiv pronouncement, can’t say that specific interp. would have made it through leg process of compromise
11. Floor debate (sponsors, managers)
12. Colloquy (read out loud or inserted in record, to provide understanding of legislation; pre-planned b/w rank-and-file member and the bill’s sponsor or floor manager
13. Statements made during hearings, colloquies b/w legislators and witnesses at hearings

1. History of changes/ amendments to a bill

* Successive versions of a statute
* Ex. Deletion of provision
* BUT we don’t necessarily know why the Congress changed or deleted a provision, or why amendments were rejected- maybe deemed unnecessary, rather than unwise policy

1. Subsequent legislative action or inaction

* Legislative acquiescence to judicial interpretation, or simply a matter of political impossibility or impracticality?

1. “Social History”? (See General Dynamic Land Systems p 68; age discrimination doesn’t work both ways, even if literal meaning would indicate that, “natural meaning” informed by context of history of discrimination)
2. Bald faced purposivism (Holy Trinity) v purposivism that tries to remain faithful to the text of the statute (General Dynamics Land Systems)
3. One view: supremacy one enacting legislature, not the current leg. (this goes along w/ both textualist, purposivist views of leg process)

1. **Textualist critique of Legislative History**Illegitimate/simply not the law! Has not gone through constitutionally-mandated process of bicameralism, presentment req’d by Article I §7
   1. Breyer” “statute-is-the-only-law” argument misses the point. No one is saying LH = statute, or that it is, in any strong sense, the law. Judge can’t interpret words of ambiguous statute w/o looking beyond the words where words cease to provide unequivocal guidance.
2. Unrealistic to think that Congress really understands holdings of cases it references. “Heady feeling for a lowly staffer” – Scalia, Concurring in Blanchard v. Bergeron
3. Some actors may deliberately manipulate LH to circumvent the process
4. Concerns that judges acquire added policymaking discretion through use of LH b/c LH is relatively elastic, open to interp.
5. **Purpose of the statute as a whole**

* *What is the mischief?*
* Legislative Hist.
* Bill itself
  + Statute’s title (Church of Holy Trinity)
  + Overall structure created by statutory scheme
  + Preamble

1. **Absurdity Doctrine**: leg interp’ed so as to avoid absurd results. Where absurdity would result , reason of law should prevail over its letter.

* Assumption: the legislators (or their constituents) represent a cross-section of society, Court presumes application that is contrary to widely/deeply held values (“common sense”) must represent a failure of expression or foresight, which legislators would have corrected had it come to their attention
* Intentionalist/purposivist modes of stat interp.
* Even textualists have endorsed absurdity doctrine: in case of true absurdity, courts might conclude absurd result couldn’t possibly be product of deliberate compromise
* **U.S v. Kirby (U.S. 1868):** Arrest of mailman for murder was not obstruction of the mail within the meaning of the act. Court applies balancing test: “public inconvenience from delay of mail v. extending immunity to a criminal.
* **Public Citizen v. DOJ (U.S. 1989)** Where the literal meaning of a statutory term would “compel an odd result” we must search for other evidence of congressional intent to lend the term its proper care. “utilize” is a “woolly verb.” Says that a broad application of term would compel an inclusion of a group of people, like the NAACP. But isn’t it possible that some members of Congress intended the broad interpretation?  
  Kennedy in concurrence warns that unconstitutional ≠ absurd
* Textualist view of legislative process may make Court less likely to apply absurdity doctrine: Absurdity doctrine may take for granted the idea that Congress would have been able to frame its legislation precisely enough to avoid absurd application even if the problem had come into view, because a change in an individual provision may unravel the delicate compromise.
* Some warn risks of “false positives” (finding absurdity where there is none) greater than false negatives (failing to find absurdity when it’s there)- if an application of a statute is truly absurd, one would expect Congress to quickly remedy the error. But false negatives may go uncorrected b/c those who favor court’s interp can block leg.

1. **Scrivener’s error doctrine**: “is this a typo or is this a think-o”? p 101
   1. Rare. Obvious mistakes in transcription of legislature’s policies into words. “where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made.
   2. Maybe statute, as written, doesn’t make sense given policy underlying the provision (see U.S. v. Locke; J. Stevens, dissenting)

* **U.S. v. Locke (U.S. 1985)** “Prior to December 31” case- “while we will not allow a literal reading demonstrably at odds with the intentions of its drafters, w/ respect to filing deadlines a literal reading of Congress’ words is generally the only proper reading of the words. Dissent points to other errors in the text, extrapolating “prior to” is also likely an error.
* Importance of punctuation: textualists use grammatical structure, punctuation to decipher “plain meaning” of statute

1. **Other jurisdictions’ interpretive practices**
   1. b/c this j’d knew about, but didn’t include, must consciously have rejected
   2. Evidence that concept/interp is viable
2. **THE CONSTITUTIONAL POSITION OF ADMINISTRATIVE AGENCIES**
3. **Role and Function of Administrative Agencies**

* “Awkward” position in 3 branch gov’t b/c although nominally part of judicial branch, much of regulatory power activity is difficult to distinguish from leg power, which is vested in Congress by Art. I.
* Admin agencies promulgate statute-like regs, enforce them, and (in first instance) adjudicate them as well
* Legislative power = making and altering the general rules of society
* Executive power = the execution of the general rules
* Judicial power = the interpretation and application of the laws to controverted cases in standing tribunals circumscribed by settled rules of proceeding.

1. Constitutional Backdrop: Separation of Powers.

* Strict conception of separation of powers: no branch may interfere w/ work of other branches lawfully operating w/in respective spheres.
* Delegation of auth. is problem b/c reassigns Congress’ Art I leg auth.

1. Vesting Clauses and Separation of Powers
   1. Nothing in const. explicitly req’s that exec, leg, judicial powers be exclusive to each branch
   2. Usually traced to vesting clauses – arg is that assignment of specified powers to a partic branch is implied preclusion of exercise of power by the other branches.
   * Legislative: Art I. § 1: “ALL” legislative powers “herein granted”
     + limitation. i.e. no other leg powers not here enumerated
     + Art. 1§8 Clause 18: Necessary and Proper Clause
       - What does “proper” mean?
       - Presumably, there could be things that are necessary, not proper and vice versa.
   * Executive: Art. II § 1: “The Executive Power shall be vested in a President of the United States of America”
     + Art II § 1 [8]: faithfully execute, preserve, protect, defend the Constitution
     + Art II § 2: Describes duties- commander-in-chief, nominations for exec offices
     + Art II § 3 – State of the Union
     + Art II § 4 – Subject to criminal laws, impeachment
   * Judiciary: Art. III § 1: “The Judicial Power of the United States shall be vested in one supreme court and such superior courts as Congress may from time to time ordain and establish.”
     + Section 2: subject matter enumerated.
   1. Inferences from the Constitutional Structure

Look at document holistically, consider way component parts relate to one another

1. Structural Evidence of Separation of Powers
   1. Constitution seeks to minimize each branch’s role in the selection of the others.
   2. Ability of branches to remove an official of another branch is limited and cumbersome
   3. The Constitution provides a number of limitations of congressional control over the salaries
   4. Incompatibility Cl. Art. I §6, cl. 2- prevents any member of leg. Branch from serving simultaneously as a judge or exec officer, precludes both a parliamentary-style system in which legislators hold the senior executive positions any arrangement in which leg members play a judicial role
      1. but note Incompatibility Clause does prevent joint service by the same individual in exec and judicial branches
   5. Bill of Attainder Cl. Art I § 9 – prohibits leg imposition of penalties, serves as a “general safeguard against leg exercise of the judicial function, or more simply – trial by legislature”

\* Arg for SOP: Drafters would not have taken such pains to provide for independence of branches from one another if Congress could simply reassign one branch’s function to another branch.

1. Structural Evidence of Blending
   1. Through exercise of veto power, Pres participates in leg process.
   2. Senate has responsibility for trying impeachments, and Chief Justice presides when Senate is trying POTUS
   3. Although apt of exec and judicial officers traditionally an exec prerogative, Appts Clause says Pres must secure “advice and consent” of Senate before appt’ing “Officers of the United States”
   4. Although power to make treaties traditionally exec prerogative, conditioned on ability to secure advice and consent of 2/3 maj of Senators present.  
        
      \*Should blending provisions cut for further blending – implying that mixing/delegation is okay – or as targeted exceptions suggesting that separation is the norm?
2. Arguments for SOP, Functionalist Flexibility
   1. Montesquieu: Preserves liberty by requiring concurrence of all 3 branches
   2. Madison, FP 51: Security against gradual concentration of powers in one dept. – gives each the necessary means and motives to resist encroachments of the others. Protection against tyranny.
   3. Effective and efficient division of labor.
   4. Formalist view: Views C as drawing relatively sharp lines of demarcation b/w powers/responsibilities of branches. Argue it is unconst. For Congress to reassign power from assigned branch. More likely to be originalists/textualists.
   5. Functionalist view: Think C leaves much undecided. Founders defined const structure a “high level of generality.” To insist on strict/unyielding SOP risks compromising the workability and adaptability of modern govt w/o necessarily furthering underlying aims of SOP. Argue embrace of formalism would entail disruptive unraveling of post-ND administrative state. More likely to be purposivists/libing Const scholars.
3. **THE DELEGATION OF LEGISLATIVE POWER**

Delegation’s Historical pedigree – Cong has been delegating broad RM power since beginning of republic – unlikely that Congress dominated by Framers would have immediately acted in manner inconsistent w/Const (but SCOTUS has expressed concern). Reality -agencies make more legally-binding policy decisions than Cong.

* Non-delegation doctrine
  + Stands for principle that Congress may not delegate its leg’ive power (to make legally-binding policy decisions/making, altering general rules of society) to Exec.
  + Possible that Court could revive if there were a particularly egregious example of standardless delegation of vast auth. Otherwise- moribund!
  + Conventional app: affirmation of intell princ test + upholding broad, open-ended stats
  + SOP, Art I. Vesting Clause, Bicameralism and Presentment
  + Prevents circumvention of constit’ly prescribed legitimating process; constrains arbitrary agency action
  + Embraced through much of nations hist, only twice used to invalidate admin stat as unconst- New Deal – Schechter and Panama Refining Co. v. Ryan (1935)
  + ALA Schechter Poultry Corp. v. U.S. (US 1935) NIRA §3 “Live Poultry Code” authorized Pres to approve “codes of fair competition” Broad discretion, very few restrictions- discretion of Pres in approving/prescribing codes = enacting laws. “Virtually unfettered” discretion. ∴ unconst, delegation of legislative power. *No prescribed admin procedure*, delegated auth. to *private groups* major partics in industry being reg’ed, no rep. of consumer interest grps, primarily done in *secret*. Makes crim law. “*Preface of generalities” no clear, intelligible principle*.
* Intelligible Principle Test: J.W. Hampton, Jr. & Co. v. U.S. (U.S. 1928) : if Congress lays down an “intelligible principle” w/ which the agency to whom authority is delegated must conform/limits agency’s discretion, it is not a forbidden delegation of leg power
  + Governing doctrinal formulation for distinguishing legit from illegit delegations
  + Purports to reconcile formal ND req’ment w/ reality that Congress frequently grants agencies broad auth to flesh out the binding policy details of open-ended reg’tory stats.
  + Underlying idea: cts can draw meaningful line b/w agency’s implementation of a policy and the exercise of (delegated) leg power
  + Whitman v. American Trucking Associations, Inc. (US 2001): Clean Air Act §109a reqs Admin’or of EPA to promulgate National Ambient Air Quality Standards for air pollutants. AT challenges, saying violation of ND. Held: §109 reqs EPA to set standards at “requisite” level to protect pub health w/ adequate margins of safety. *Fits comfortably w/in scope of discretion permitted by precedent.*
    - Exec, not leg power wielded by agency.
    - “determinate criterion” for saying how much of the regulated harm is too much
    - Certain degree of discretion inheres in most exec or judicial action
  + **Ct in Whitman reaffirms it wouldn’t enforce a meaningful nondel principle**!
    - Line-drawing prob: all law implementation entails policy-making discretion, too hard to distinguish b/w statutorily conferred discretion consistent w/ agency’s legit implementation of law and that which crosses over into illegit exercise of genuinely leg power.
    - Practical necessity
    - Expertise – better equipped than over-burdened Cong, generalist judiciary
    - W/o admin agencies w/ power to issue rules + adjud disputes in area of expertise, difficult for gov’t to continue to perform myriad functions it does today, complex modern society [BUT B+P make cumbersome on purpose – may shouldn’t be circumvented]
* Alternative Approaches to Nondelegation
  + SCOTUS declines to give intell. Principle standard teeth, but has endorsed softer, more indirect doctrinal strategies.
  + Statutory delegations are to be construed narrowly in order to avoid serious nondel prob, so that del’ed power isn’t too sweeping (version of const avoidance canon)  
    - ***Industrial Union Department AFL-CIO v. American Petroleum Institute (U.S. 1980)***
      * Occupational Safety and Health Act of 1970 (OSHA) §3(8) defined “occupational safety and health standard” as “a standard which req’s the adoption of practices reasonably nec or approp to provide safe or healthful emp” Re: toxic mats: “sec shall set standard which most adequately assures to the extent feasible, on basis of best avail evidence, no employee shall suffer even q/ reg exposure to hazard.” Benzene – known to cause cancer at high levels. Sec says: no such thing as safe level. Sets exposure limit at lowest technologically feasible. 1ppm – even though no ev that 10 ppm is dangerous.
      * Plurality - Ct construes statutory del of auth narrowly to avoid ND problem, save the statute from potential unconstitutionality for broad delegation.
        + Artificial narrowing- ct must make threshold determination under 3(8) that it is reasonably nec and approp to remedy significant risk
        + In absence of clear mandate, unreasonably to assume Cong intended to give Sec unprecedented power over industry that would result from govt’s interp
      * Concurrence (Powell) – Even if threshold test met, statute also reqs agency to engage in CBA (are expenditures disproportionate to expected health benefits?)
      * Concurrence (Rehnquist) – Advocates reinvigorating NDD, says OSHA violates. Statute is too broad.
    - ***FDA v. Brown & Williamson Tobacco Corp (US 2000) :*** concluding gen terms of FDA don’t auth FDA to reg tobacco and suggesting Cong couldn’t have intended to delegate a decision of such economic and political signif to an agency in so cryptic a fashion. For del of power of this magnitude, must have clear statement of such intent from Cong.
    - ***MCI v AT&T (1994):*** deemed highly unlikely Cong would leave determination of whether an industry will be entirely or even substantially regulated to agency discretion
    - Problems w/ Canon: Same concerns as const avoidance
      * Cts fail to respect cong’l decisions based on vague const concerns
      * Authorizes/reqs judges to displace most natural/probable rdg of stat
  + General avoidance canon/clear statement rules may have collateral effect of promoting goals of NDD
  + Req’ing Agencies to Narrow Open-Ended Dels:
    - Whitman v Amer Trcking Ass’n (DC Cir)- SCOTUS rejects approach but woot to JG!
      * Even if stat itself didn’t supply intel princ, might remedy the prob by adopting clear, self-constraing regs to limits its auth. Stat didn’t inevitably lack intel princ, just that agency’s interp construed lang too open-ended. Give it to agency to articulate more definite criteria.
      * BUT SCOTUS says that very choice of portion of power to exercise is itself and exercise f forbidden leg auth.

1. **CONGRESSIONAL CONTROL OF AGENCIES**

Congress’s nat impulse to try to attach strings to delegated auth. – veto + removal pwr

1. Legislative veto

* + **INS v. Chadha (U.S. 1983)** Imm + Nat’lty Act gives AG discretion to suspend deporation order based on statutorily auth’ized ground of “extreme hardship.” House uses unicameral leg veto to overrule and order Chadha’s deportation.
    - Held: Congress may not promulgate a statute granting itself leg veto over actions of exec branch inconsistent w/ B principle + P clause of Const.
    - House’s action is leg: purpose and effect of altering legal rights, duites, relations of persons (Chadha, AG, Exec Br officials) – all outside leg br. Therefore subject to Art I.
    - AG’s action is presumptively exec
    - White (Dissent) – Leg veto is nec tool. Otherwise Cong must choose b/w not del and giving too much power to exec. Leg veto is not exercise of leg power, just veto of suggestions by exec.
    - At stake: SOP, B+P, checks+balances, accountability
    - Ways to view exercise of power here: AG wielding leg (b/c delegated), exec (b/c his function), judicial (b/c fact-bound decision)

HR wielding leg (b/c its function), exec (b/c altering exec decision) or jud (fact-bound)

-If delegated auth characterized as leg- easier to justify attaching strings. But if characterized as exec: much stronger arg that Cong can’t interfere b/c of SOP

- Another alt. to NDD: LVs encourage Cong to delegate broad authority, b/c have check

2. Alternatives to Legislative Veto

- Statute itself – Narrow delegation

* + Congressional Review Act (CRA) 1996– agency must submit “major” rule to Cong 60 days before goes into effect; if both houses pass disapproval res, + Pres signs (or 2/3 maj override), rule vetoed. For both major + non-major rules, at any time during 60-day period Cong can nullify rule by passing joint res. Idea: reign in agencies, accountability. Const of course, BUT toothless – before CRA Cong could do all same stuff by enacting a stat!
    - Since enactment, 58,900+ new rules, incl 1050+ major rules. 72 JRs introduced, only 1 enacted.
  + Congressional Control over Law Execution
    - **Bowsher v Synar (1986)** Comptllr Gen office created by Budget & Accting Act; apptd by Pres w/ advice + consent of Senate. To remove comtrller gen, joint res. Removable only by Cong.
      * Holding- Cong cannot itself control an agency that has typical powers of Exec agency- powers to adjudicate disputes, issue rules. Congres can’t act in legally binding manner w/o B+P! (follows from *Chadha*)
      * Congress can’t completely insulate officer or inferior officer from Pres pwr of removal, can’t make itself in charge of removal!
      * Stat is unconst, b/c although CG exercises exec pwr, CG is agent of Cong b/c it can remove him by process other than impeachment. Violates SOP – Cong can’t control how laws are executed.
      * To permit an officer controlled by Congress to execute laws would be in essence an LV!
      * Broad stat lang allows Cong to remove CG arbitrarily
      * Stevens –Concurrence – unconst b/c CG exercise leg pwr, Cong can del pwr to less leg agent to circumvent B+P
  + Appropriations, appropriations rides (“no monies herein expended” – interp’d as broadly as possible so as not to be evaded in any way)
    - Can limit or preclude agency from using appropriated funds for specified purposes
    - Encourage agencies to become more active in certain area by making more funds available for specified purposes
  + Hearings, Investigations, Audits, and other Forms of Oversight
    - Hearings- can take administrators away from work, prohibit from doing whatever Cong object to
      * Exposes agency to public criticism, can influence decision
    - Documentation reqs (can be demanding, extensive, time-consuming)
    - Can also refuse to confirm Presidential nominees for agency leadership u/l nominee agrees to take actions agreeable to Congress

1. **EXECUTIVE CONTROL OF AGENCIES: Appointment and Removal**

President has power to remove all Officers of the U.S. and Inferior Officers. Vast majority cases- plenary removal power: can remove for any reason.

**-Appointments Clause**

[Art II](http://en.wikipedia.org/wiki/Article_Two_of_the_United_States_Constitution), § 2, Cl. 2 [Appointments Clause], empowers the [President of the United States](http://en.wikipedia.org/wiki/President_of_the_United_States) to appoint certain public officials with the "advice and consent" of the [U.S. Senate](http://en.wikipedia.org/wiki/U.S._Senate). This clause also allows lower-level officials to be appointed without the advice and consent process.

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

**- Officers of US v Inferior Officers**

**Buckley v. Valeo (U.S. 1976)–** Held: FEC members are “officers of the US,” b/c they are appointees exercising significant authority pursuant to the laws of the United States, and therefore must be appt’ed in concert with reqs of Appointments Cl. **INDEPENDENT AGENCIES**

* 1. Humphrey’s Executor (supra) “blesses” congressional practice of creating independent agencies
  2. Typically collegial, multi-member body w/ term of apptment
  3. Specified term/tenure, not to be ended except for cause! (Humphrey’s)
  4. Independent Agencies and Statutory Limitations on Removal
     1. New Deal Optimism about capacity of ind agencies, staffed by experts and insulated from politics, to solve difficult reg’tory polcy qs ahs cooled… virtually all signif reg policy decisions shot thru w/ value j’ments. Political- don’t require just empirical evidence but j’ments re: priorities. Concern that bureaucrats aren’t sufficiently insulated from interest groups
  5. Partisan Balance Req on Multi-members Commissions

**President’s Removal Power**

**Myers v. US (Plenary removal power)** Held: Statute that limits Pres auth to remove officials of Exec Branch is unconstitutional (here, postmaster) Initially interp’ed to announce complete prohibition on any stat restriction of Pres pwr to remove exec br official (plenary removal pwr).

Today- narrowed. Myers stands for proposition Congress can’t restrict Pres’s power to remove Officer or inferior Officer u/l Congress has good reason for doing so, and restrictions leave Pres w/ enough auth to exercise Art II §3 power to faithfully execute laws.

**Humphrey’s Executor v. US (US 1935) –** narrows Myers. Upheld stat in which Cong specified term of office for Officer of U.S. (Fed Trade Comm, Comm’er) that exceeded term of appting Pres, limited pwr of Pres to remove Officer. Because FTC Comm’er exercises “quasi-legislative” and “quasi-judicial” functions, independence is important and Pres’s removal power is justly limited. Removal at will by Pres not necessary to faithfully execute the law (Art II) Here, cong can severely limit Pres’s removal pwr simply by characterizing as indep agency.

* + Functional arg re: need for agency independence. If one actually believes in expertise, cannot happily coexist with political control
  + Inquiry: What functions does agency perform? Would these functions be better performed if isolated from political control of Pres? If yes – good cause. So long as it doesn’t prevent Pres from faithfully exec laws, OK.
  + Today- narrowed. Congress can limit Pres’s pwr to remove and Officer of US or inferior Officer by req’ing Pres to state cause for removal if Congress can give good reasons for imposing such a limit that does not “unduly trammel” upon Pres’s duty to faithfully execute the laws
  + But “for cause” reqment might not be much of a limitation on Pres in practice
    - Ct may be reluctant to review Pres’s decision, and even if they do find it reviewable, may accept explanation that officer wasn’t willing to comply with policies of Pres
* **Morrison v. Olson (US 1988)** - Morrison was indep counsel, appt’ed by ct to investigate alleged wrong-doing by senior official of Exec Br.
  + - Inferior Officer Test: if inferior officer, not subject to Appts Clause. (1) Removable by higher exec official? (2) empowered by Act to perform only certain, delimited duties? (3) Office limited in j’d? (4) tenure
      * If no>> appt must be by Pres w/ advice & consent of Senate
      * If yes >> are removal restrictions of such a nature that they impede pres’s ability to perform his duty, and functions of officials must be analyzed in that light (balancing test) Consider exec pwrs in Q: foreign rel? commander-in-chief?
    - Here, features of the Act (power to remove for “good cause,” no apt w/o AG request, j’d defined w/ reference to facts supplied by AG) Exec Br has sufficient control over indep counsel to ensure Pres is able to perf const. duties.
    - \*MODERN APPROACH TO APPOINTMENT AND REMOVAL
* **Edmond v. US (US 1997)** May have overruled Morrison balancing test: Scalia says judges of Coast Guard Ct of Crim Appeals are **inferior officers** b/c subject to supervision by higher exec br official (only factor he wanted to use in Morrison dissent), even though 3 other Morrison factors not satisfied.
* **Current test for validity of presidential removal pwr, or restrictions on**
  + Will removal restrictions interfere w/, “unduly trammel upon” Pres’s ability to “faithfully execute the laws” considering: (1) type of function- if quasi leg, quasi-judicial, less likely that central to functioning of exec br, independence is good (2) degree of authority exercised (if more limited, more restrictions OK) (3) whether the removal restriction would impermissibly burden Pres’s power to control
  + **Congressional aggrandizement, encroachment**
    - Congressional aggrandizement (Cong taking pwr for itself, like in Bowsher) Cong encroachment (Cong limiting Pres power of removal w/o taking any for itself

Meaning of “Good Cause”: Morrison implies ct will continue to uphold “good cause”-type rmvl restrictions that routinely appear in organic acts creating Independent Agencies. But Morrison avoided defining “good cause,” but said that it at least allowed AG to rmv IC who was no “competently performing hi stat responsibilities in a manner that comports with provisions of the Act.”

Appointment and Removal Pwr (& Threat of Rmvl!) Most Pwrful tools Pres has to control agencies. Imperfect!

Probs w/ appt power:   
(1) Pres can’t always predict which appointees will consistently act to advance his policies.   
(2) Appts not always based on loyalty to Pres’s reg’tory vision- may be based on technical competency, rewrdng key supporters/constituencies  
(3) reqment of Senate confirmation is constraint- rarely reject, but threat of rejection is powerful. (esp difficult if govt is divided)  
(4) preferences of agency officials may shift after appt. “capture” by lobbyists, career civ srvnts.

Probs w/ removal power:  
 (1) For ICs, Cong can impose limits on Pres rmvl pwer  
 (2) Rmvl is blunt instrument- drastic measure (political costs)  
 (3) If pres dismisses official whose appt is w/ advice&consent of Sen, can make public issue,  
 block/delay appt of replacement

**H. Centralized Regulatory Review and Presidential Oversight of the Administration  
Presidential Control of Agencies: OMB & OIRA**

- All presidents since FDR struggle to control sprawling bureaucracy, control policymaking  
- Limitations on appt and rmvl power led Pres to seek other mechanisms for exercising influence over administ

(1) **Centralized review** of regulations by WH’s Office of Management and Budget [**OMB**] - evaluates the effectiveness of agency programs, policies, and procedures, assesses competing funding demands among agencies, and sets funding priorities. The OMB ensures that agency reports, rules, testimony, and proposed legislation are consistent with the President's Budget and with Administration policies.help improve administrative management, to develop better performance measures and coordinating mechanisms, and to reduce any unnecessary burdens on the public.

(2) **Executive Orders and Directives**

* + OIRA is in OMB in Executive Office of the President
  + Centralized Review (CR) – designed principally to review reg proposals that originate w/ programmatic agencies.
    - May enhance pres influence over regtory policy making by stopping, delaying, suggesting improvements to agencies’ regtory intiatives.
    - OIRA may also issue “prompt letters” encouraging agencies to take reg action to perceived prob
  + PROS:
* “Effective government” arguments:
  + Improves quality of regulation
  + Agencies specialize. W/o centralized review, they will go nuts. Over-invest, over-spend, over-do their mission, because their outook is myopic, narrowly focused. Not good at balancing against other worthy goals.
  + If they under-regulate, they get blamed, so excessive caution is incentivized.
  + Nature of risk reg- costs are widely dispersed. Patients waiting for a new drug, for example, don’t know it is being held up by FDA, won’t mobilize
  + Pres is more likely to take a broad view of nation’s [economic] interest than agency heads: pres has uniquely “holistic” viewpoint on reg policy qs which facilitates coordination, coherence, and rational priority-setting
  + OIRA-
    - “inexpertise” – may be good o have stage of rvw with relatively low pol bias
    - Ask relatively “naïve” Qs for which agency will need good, coherent answer
    - Audit function- skepticism vis-à-vis agencies is approp, healthy
* “Democratic accountability” arguments
  + Improves democratic pedigree and accountability of agencies by tying them to pres
  + Shifts influence from congressional oversight committees, more likely to be dominated by special interest groups, to Pres, who has broader, national view
* CONS:
* Anti-Regulatory Bias:
  + See expansion of centralized rvw as an attempt to stifle reg, entrench-antireg bias in agency decisionmaking by imposing substantive CBA standard focused excessively on costs; implements burdensome rvw process that is deterrent to reg
  + Status quo bias- b/c delays of review entail signif costs.
* Undermines democratic accountability
  + Shifts from transparent/participatory agency RM to obscure/secretive OMG rvw process
  + Some (moderate) degree of agency insulation from political process alleviates counter-majoritarian tendencies inherent in bureaucratic policy-making
  + Places ultimate RM decisions in hands of OMB personnel- neither competent in reg nor meaningfully accountable to Congress or electorate. Given constraints on time, doesn’t increase presidential control over agencies, but rather control of unelected OMB bureaucrats vis-à-vis unelected bureaucrats of other agencies.
  + Pres may be trying to achieve through regulation what he can’t through legislation

**Cost-Benefit Analysis (CBA)**

* 12866 says: must assess all costs and benefits of reg and reg alternatives, to extent permitted by law propose or adopt a reg only upon reasoned determination that benefits justify the costs.
  + Note, explicit statutory mandate may make this impossible, susceptible to judicial review under APA 706
* Must provide OIRA w/ assessment, incl underlying analysis, with CBA assessment
* Pros:
  + Vital to formulating “rational” reg policy
  + “science”/evidence-based approach helps establish priorities based on relative risks, promote wise investments, minimize unintended risks and burdens
  + Ppl overreact to small risks and misdirect efforts. Ordinary pp have diff calculating probabilities, CBA is natural corrective. Overestimate likelihood of outcomes based on emotional reactions, leading to inefficient allocation of resources to target the perceived risk or problem.
* Cons
  + Human life, health, nature cannot be easily monetized, entered into CBA equations
  + CBA may further muddy the waters when it comes to prioritization of values. Proceeding as if assumptions are scientific, when often methodology used to find evidence will be impacted by the desired result, therefore also representing value judgments.
  + Has been used as pwrful tool that opponents of health, safety, environmental reg can manipulate to undermine regulation

**Presidential Directives (pp 572-573)**

* + EOs, Centralized Review are way of exerting some degree of Pres influence over reg process. Particular kind of influence: stops, delays, suggests improvements to regs
  + If WH wants to encourage agencies to undertake , rather than abandon or modify reg
    - OIRA “prompt letters”
    - Executive Directives to specific agencies
      * Not invariably pro-regulatory, may request that agency stop or suspend rulemaking, initiate deregulatory rulemaking
  + legal status?
    - BUT a commissioner’s failure to comply may constitute “good cause” for rmvl, but IFF pres has lawful auth to direct agency action

**EO 12991 and 1248 Reagan – First establishes centralized review**

* + 12291 applies to any “major” RM by exec br agency
  + “Major rule” – any rule expected to have at least $100M/yr in reg costs
  + Requires CBA of each rule, consideration of alternatives, choice of alternative with greatest net benefit, except where a statute mandates that the agency prioritize other considerations (ex. Environmental statutes)
    - For ex. If stat req’s that agency NOT consider costs, must still complete CBA to comply with central review scheme, but agency is not required (and, in accordance with stat cannot) consider costs in determining ultimate course of action.
  + Also req’s submission of all major rules to OIRA- OIRA can then delay issuance of rule until it has had opp to adequately review. OIRA may also req agency to meet with it, other interested agencies to consider suggested changes/amendments to rule.
  + 12498: “regulatory planning process” Allows OIRA to get involved earlier. Reqs agency to notify OIRA of reg agendas. OIRA reviews for consistency with Pres’s priorities, send comments back to agency
  + Does NOT purport to give Pres power to dictate substantive results to agencies, but does increase Pres control over reg process

**E.O 12866 Clinton**

* Incorporated all basic elements of Reagan order (left intact by Bush I).
* 2 changes:
  + Added time limits and transparency rules to OIRA process
  + Extended some, but not all, reqs to independent agencies like FTC and FCC
    - DOJ tells Pres legally he can extend all reqs, but Clinton doesn’t want political fight, doesn’t want Rep Congress to get surly about it
* “Significant reg action” any reg likely to result in a rule that may (1) Have annual effect on economy of $100M+ or adversely affect in a material way the economy, jobs, environment, pub hlth or safety, or state local tribal govts or communities; (2) Create serious inconsistency w/ or otherwise interfere with action taken or planned by another agency (3) materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or rights/obligs or recipients (4) raise novel legal or policy issues arising out of legal mandates, presidents priorities, or pinciples in this EO
* Relaxed reqs that agencies could only adopt rules of +CBA, instructed agencies to include non-quatifiable considerations
* Agencies should identify & assess alternatives to direct regulation

**E.O 13563 (Obama)**

* Mostly aff’d 12866. Supplemental to 12866.
* 1(c) says agencies may consider (and discuss qualitatively) values that are difficult or impossible to qualify incl equiy, human dignity, fairness, and distributive impacts (!)
  + But DG says may lead to too much discretion. Brings idiosyncratic values of agency bureaucrats into the picture
* Calls for reviewing current regs- v. difficult, usually better to use resources on new things

**REINS Act Proposal**

* Based on premise that Congress has excessively delegated while failing to conduct appropriate oversight or retain accountability for laws – seeking “true accountability”
* CRA not effective. Not enough power to control agency action.
* Major rules would need joint resolution of approval to take effect
* When agency proposes a reg, would send to Congress. 60 days to pass a join res. If don’t approve, dies. If do approve, goes to Pres.
* Major rule: if likely to result in (a) annual economic impact of $100M+ (b) major impact in costs or prices for consumers, individual industries, Federal/state/local govt agencies or geographic regions; (c) signif adverse effects on competition, employment, investment, productivity, innovation, or on ability of US-based enterprises to compete w/ foreign-based enterprises in domestic and export markets
* Exception: pres can notify Cong and enact major agency rule for 90 days if (a) imminent threat to health/safety/emergency; (b) necessary for enforcement of crim laws; (c) necessary for nat’l sec; (d) issued pursuant to sat implementing an intl trade agrmnt.
* **Arg for:**
  + REINS gives CRA teeth -CRA default position is pro-reg’tory; gives Pres too much pwr- will likely veto if agency is under his control, necessitates a 2/3 maj. Additionally, gives Pres too little power if he disapproves of reg, Cong must initiate
  + Cong takes final step of giving leg rules legal effect
  + **Constitutional –** Chadha was an objection to the *process*, not the *result*. REINS in good under Chadha b/c preserves B+P- B+P needed to pass regs; also more limited b/c it only applies to major rules
  + Just Cong reclaiming some of its power. Morrison not implicated. When Congress delegates pwr to Exec, may tie strings. Plenty of leg includes procedural reqs necessary to make binding rules.
  + Congress often shirks responsibility, leaves major questions up to undemocratic agencies. This way agencies and Cong will have to work together, rules will need broad support.
  + Will reduce costs of regulation by reducing regulatory output. Dudley/Crain study says cost for average household $15K/yr
* Args against:
  + Katzen says unconst’al!
    - No different from objections to unicameral veto in Chadha
      * One house’s inaction could stop regulation. Effectively a unicameral veto.
      * Effectively amends all delegation of regulatory auth. Hundred/thousands of enacted laws.
      * Aggrandizement: Cong attempt to increase pwr at expense of exec, impermissibly interferes w/ Pres’s exercise of const appointed function to take care that laws are faithfully executed (*Morrison, Mistretta*).
      * SOP concerns- Congress would have effective control of agencies, agency action. (See *Bowsher*)
  + May sweep up deregulatory rules, other rules that actually streamline regulations for industry, or rules with major net benefits (public safety)
  + May hamper agencies’ ability to act in public interest by politicizing reg process (one of reasons for having delegation in first place). Politics may trump expertise, reason, public good.
  + May hamper/ render largely irrelevant statutes, or signif portions of them. Ex- Dodd Frank has about 250 statutorily req’d regs
  + Based on false premise that reg is bad for business, stifles jb creation. Study relied on only considers costs, overestimates them.
    - Does not adequately acct or benefits
  + Congress already has sufficient tools for oversight- statutory del of auth, appropriations, oversight committees
  + Procedural chokehold that will undermine public health, safety. Completely impracticable.
* President’s veto threat: Issued memo saying Adminstration strongly opposes. Says if presented w/ bill, senior advisers would recommend veto.

If Pres wants less regulation: (1) Set up budget that decrease appropriations for commissions. (2) Appoint deregulators, instruct certain interpretations (via OIRA)

**Application to Independent Commissions (571-572)**

* Under 12866 (Clinton) req’d to partic in annual reg planning process, but excluded from OIRA review
* SCOTUS has never explicitly said whether it would be Const’al for Pres to req IAs t submit to OIRA review
  + Could argue no const prob, because doesn’t actually auth WH to dictate an substantive policy result. Just consultation and guidance, not control.
  + But consultation and guidance may effectively be policy dictation.
  + Potential prob if IAs required to submit to specific techniques, priorities in decisionmaking review. Encroachment upon indendence.
  + Could find in statutes that create IAs implicit grant of auth to Pres to supervise, notwithstanding express statutory limits on Pres’s removal pwr.
    - BUT Cong chose to insulate frm very sort of influence by limiting Pres’s removal pwr
  + Katzen says Pres has the power, but declining to exercise out of deference to Cong.

* + - 1. **OVERVIEW OF THE REGULATORY PROCESS**
  + **Administrative Procedures as a Response to the Delegation Problem**
  + **Uniformity re: decision-making procedures and standards courts apply in reviewing agency actions**
  + **Improving the Quality of Decision-Making**
    - Ensuring that agency considers relevant info
    - Ensures impacted parties have opportunity to state views, present evidence, make arguments
    - Prevents hasty action
    - Guards against capture by parochial interest groups
    - Facilitates [uniform] judicial review of agency action
    - Input from experts
    - BUT
    - Added procedure is costly, makes decision-making slower, more cumbersome, less flexible
  + **Enhancing Democratic Legitimacy** – greater public input, transparency
  + **Statutory framework: Administrative Procedure Act**
    - All administrative agencies are subject to procedural framework of APA unless statute specifically exempts/overrides req’ments.
    - “Quasi constitutional statute”
    - Lays out basic structure of govt for admin agencies, contain a number of open-ended provisions, terms that courts have interpreted flexibly, dynamically, purposively over the years (similar to const interp). Sort of CL tradition arises under stat.
  + Agencies are bound by APA and self-constraining agency regs applying/interp’ing APA, which differ by agency
  + **Forms of Administrative Action under the APA**
  + **Rule:** an agency statement o general or particular applicability and future effect designed to implement, interpret, prescribe law or policy or describing the organization, procedure, or practice requirements of an agency **[5 U.S.C. §551(4)]**
  + **Rulemaking: an agency process formulating, amending, or repealing a rule.” 5 U.S.C. §551(5).**
    - **Formal Rulemaking**
      * §§556-557.
      * Adversarial hearing at which the proponent of the rule (that is , the agency) carries the burden of proof on contested issues and must show proposed rule is supported by “reliable, probative, and substantive evidence.”
      * Presiding officer is Administrative Law Judge (ALJ)- agency official not Art III judiciary. Special statutory civil service protections, some degree of insulation from rest of agency
      * Hearing requirement- interested parties entitled to partic in agency hearing, to present evidence, oral test, cross-exam u/l agency determines parties will not be prejudiced by the absence of such procedures
      * “on the record after opportunity for agency hearing”
        + Word “hearing” without more, does not trigger formal rulemakig reqs. Hearing in its legal context has varying meanings depending upon circs. [US v FL East Ry Co (US 1973)]
      * Rare, narrowly cabined. If they can/ if not explicitly req’d, most agencies will opt out, won’t interp stat as req’ing FRM. Expensive! Crippling. 9 yrs of FRM fo FDA to decide whether 90% or 87.5% peanut products = PB
      * FDA is req’d by law to engage in FRM.
    - **Informal Rulemaking: Notice and Comment Rulemaking §553**
      * If not req’d by statute to use FRM
      * **Purpose/advantages of N&C process:**
      * Improves qualiy of rulemaking
        + Public participation, not just parties to particular dispute (as opposed to pre-APA, where agency would announce a generally-applicable rule in process of adjudicating a particular dispute)
        + Interested and knowledgeable parties (industry, labor unions, pub int grps, NGOs) may have args and inf agency doesn’t otherwise have re: impact of proposed regs
      * Democratic legitimacy- greater transparency, public participation
      * May highlight/isolate more contentious, disputed aspects of the rule
      * Transparency for leg Rulemaking
      * Process elicits reasoning for decisions on contentious issues
      * **Reasons why agencies might want to avoid N&C if they can:**
        + N&C is time-consuming, not most efficient way of getting things done
        + May facilitate marshaling of opposition to rule
        + May result in long record which provides basis for judicial challenge to rule if agency decides to promulgate it
      * **Notice req’ment 553(b)**
        + Issue notice of proposed rulemaking (NPRM)
        + Public notice- in Federal Register, u/l persons subject thereto are named and either personally served or otherwise have actual notice in accordance w/ law.
        + including:

Statement of time, place, ad nature of pub RM proceedings

Reference to legal auth under which rule is propose AND

Either the terms or substance of the proposed rule or a description of the subjects and issues involved

Potentially: scientific research behind the terms, not jut the terms of the proposed rule tself(See Nova Scotia)

Parties must have MEANINGFUL opportunity to comment

Notice is only adequate if the changes in the original plan are “in character with the original scheme” and the final rule is a “logical outgrowth” of the notice and comments already given (such that interested parties are on notice that their interests are implicated in the proposed rule.

Interested parties must be alerted by notice to the possibility of the changes eventually adopted from the comments [**Chocolate Mfrs Assoc v Block** (4th Cir 1947)]

* + - * Requirements re: opportunity for comment [553(c)]
        + Must give interested parties op for comment, participate in RM through submission of date, vews, args w/ or w/o opp for oral presentation (may be a “paper hearing”
        + Comments may in the end be futile, but so long as they aren’t irrelevant, they should be heard!
      * “Concise general statement of the basis and purpose” [553(c)]
        + After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose
        + Must address “vital questions” of “cogent materiality” raised by comments.
        + If rule is invalid b/c of deficiency in concise gen statet, sme cts will remand for further proceedings w/o vacating rule, b/c killing rule would be overkill, would cause instability in regulation.
      * **US v. Nova Scotia Food Products Corp**. (2d Cir 1977)[whitefish, botulism, and FDA regs based on bad science that P never saw case] Held:
        + If failure to notify interested persons of the scientific research upon which agency was relying actually prevented the presentation of relevant comment, the agency may be held not to have considered “all the relevant factors”
        + In the circumstances. The “concise general statement” was less than adequate b/c it left **vital questions, raised by comments and of cogent materiality** – here, *commercial feasibility* – completely unanswered.

Must disclose whether or not it considered the reg commercially feasible, and if not, whether and why other considerations prevail.

* + - * + \*Example of 706(2)(A) – court must invalidate agency action that is “arbitrary, capricious, an abuse of discretion, otherwise not in accordance w/ law”
  + Limits on the Announcement of New Policy Through Rulemaking
    - **Retroactivity**
      * **Bowen v. Gtown U Hospitals (US 1988)** pp 672-3 (organic act gave HHS Sec auth to adopt regs to make corrective adjustments –i.e., involving Medicare reimbursements. Ct reads narrowly to allow adoption of procedures for case-by-case adjustments. Strong presumptive against reading an organic act/stat grant of RM auth to permit retroactive RM. Clear statement rule.
        + Due Process, Takings Cause, Ex post facto clause
      * Cf. adjudications, Bell Aerospace allows more wiggle room, b/c adjudications will necessarily involve some retroactive policy-making when agency/ct applies ambiguous text to novel fact or situation
      * See R def 551(4) : AND FUTURE EFFECT
      * RM is supposed to approx. leg process

**ADJUDICATION & ALTERNATIVES TO NOTICE AND COMMENT RULEMAKING**

* + **Order:**
    - An agency action other than a rule. “A final disposition, whether affirmative, negative, or injunctive, or declaratory in form, of an agency other than rulemaking but including licensing” 5 U.S.C. §551 (6)
      * Adjudication is concerned with events that happened in past
      * Typically applying exitng law or policy to some set of facts
      * Resembles what courts do
* **Adjudication  
  Formal Adjudication**
  + - **“on the record after opportunity for agency hearing”**
  + **Informal Adjudication**
  + Issuing of licenses or permits, allocation of gov benefits, regulation enforcement action. Cases produce precedent.
  + Some agencies (notably, NLRB) rely almost exclusively on adj rather than RM to est agency policy. Others use mix.
    - Agencies can announce general principles/new policies in adjudicative proceedings
      * **Chenery I**: A court reviewing an agency action will consider only the basis for that action proffered by the agency in the rule or order at issue; agencies may not offer additional post hoc justifications during litigation
      * [**Chenery II** (U.S. 1947)] Held: The choice made between proceeding by general rule or individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. To hold otherwise would leave agency unable to deal with problems as they arose.
        + Administrative j’mnts entitled to greatest weight.
        + Retroactivity (on party) must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.
        + Preservation of agencies’ flexibility to address new, unforeseen probs as they arise. Sometimes simply not feasible to formulate rules on point in advance, b/c of great variety of situations agencies may confront
        + PRO: Gradual, case-by-case method of developing rules may actually lead to better rules b/c “not every principle essential to effective admin of a stat can/should be cast into mold of gen rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.”
        + CON: Jackson- may lead to administrative authoritarianism, allows agencies to make up rules as they go along, to govern w/o law
      * **NLRB v. Bell Aerospace Co. (US 1974)** NLRB determined that managerial employees were excluded from NLRA and that buyers were managerial emps. Subsequently revered position in formal adjudication, saying that they could unionize in certain circs.
        + 2d Cir says they can’t reverse position in an adjudication, saying RM is approp for general rules, esp those that reverse long-standing policy
        + SCOTUS says: “The board is n0t precluded from announcing new principles in an adj… the choice b/w RM and adj lies in first instance w/in Board’s discretion. There may be situations in which Board’s reliance on adj would amnt to abuse of discretion, but not so here.

Case-by-case rulings with precedential weight (but distinguishable) may be preferable to general rules

Although RM provides forum for solicitation of informed views of those affected, NLRB has discretion to decide that adj may also produce information necessary to mature and fair consideration of issues

* + - * Agencies (NLRB) may prefer adjudication over RM b/c rules are harder to make!
      * Limits on Making Rules Through Adjudication
        + *Bell Aerospace* says “there may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion” under 706(2)(A)
        + Some cts of apps have picked up on lang to strike down agency orders that rested on general propositions announced in the orders themselves, rather than in prior rulemakings (UNUSUAL)
        + *Bell Aerospace* usually taken to mean that agency can proceed by adj even in circs, that might call for promulgation of leg rule under *Chenery II*
        + **Retroactivity**: *Bell Aerospace* reaffirms *Chenery II* balancing approach-

Must show either substantial reliance on past agency policy OR imposition of some penalty (e.g. fines, damages) for past conduct that was consistent w/ agency’s then-prevailing policy

Reversals of adjudicative orders b/c of retroactivity are rare

Note on use of adjudications to declare general rules that apply prospectively: **NLRB v Wyman Gordon Co (1969)** plurality says this order was invalid. Holding narrowed by Chenery II, but prospective rules, with exceptions for present parties, announced through adjudication may be an unacceptable way of circumventing RM procedure

* **Exceptions to §553**
  + - N&C not req’d for matters re: a “mil or foreign affairs function of US” [§553(a)(1)], nor for matters re “agency mngmnt or personnel, or to pub prop, loans, grants, benefits or Ks [§553(a)(2)].
    - **Rules of agency organization, procedure, or practice (self-regulation)**
    - **The “Good Cause” Exemption §553(b)(B)**
      * **“**when the agency for good cause finds that notice and public procedure thereon are **impracticable, unnecessary or contrary to the pub interest.”**
      * **“Unnecessary”** if the rule is ‘routine determination, insignif in nature and impact, and inconsequential to the industry and public’ *South Carolina ex rel. Patrick v. Block* (D. S.C. 1983). Cts construe exception narrowly, limit to cases where there is no controversy whatsoever about the rule.
        + Some agencies have tried to maximize through **“direct final RMing”** in which it announces interim rule which it expects to be nonctroversial and solicits comments. If agency doesn’t receive adverse comments, rule stays in effect. If it does, interim rule withdrawn and normal process followed.
      * “**Impracticable**” if some kind of emergency situation makes delay assoc’ed w/ ordinary N&C process intolerable. i.e. post-9/11 FAA romulgated w/o N&C new regs for speedier revocation of pilots’ licenses for those deemed to pose a sec threat. Held valid invocation of exception in **Jifry v. FAA (DC Cir. 2004)**
        + Usually declare rule is temporary and simultaneously initiate N&C process, using emergency rule as proposed final rule (but won’t w/draw for adverse comments). Some cts indicate **temp status** is necessary precondition for validity **[Mid-Tex Electric Cooperative Inc. v Federal Energy Regulatory Commission (D.C. Cir. 1987)]-** rule’s temporally limited scope is among key considerations in evaluating good cause claim; agency has oblig to demonstrate it is engaging in good faith effort to complete RM process expeditiously
      * “**Contrary to the Public Interest**” when advance notice of the proposed rule would prompt undesirable anticipatory behavior by affected parties. Particularly relevant to price-control regs. Rarely invoked.
        + Nader v. Sawhill (Em App 1975) Increase of max allowable price of crude oil w/o N&C valid exception b/c announcement of future price increase could have resulted in producers w/holding crude oil from mkt until increase in effect.
    - **Non-Legislative Rules**
      * **General Statements of Policy**
        + APA doesn’t define; committee reports accompanying APA don’t shed light
        + From (mostly lower ct) case law- an agency “policy statement” (sometimes also ref’ed to as “guidance doc”) is a memorandum, letter, speech, press release, manual, or other official dec by agency of its agenda, policy priorities, or how it plans to exercise its discretionary auth.

Provides advance warning of how agency is likely to resolve Qs that come before it.

“Preliminary announcement by agency of how it intends to exercise its discretion in some future case, given a relatively open-ended grant of legal authority.

BUT has look and feel of rule, may be attempt to bypass N&C

* + - * + **PG&E v. Fed Power Commission (D.C. Cir. 1974)**

Agency releases order that states interruption of service due to nat gas shortage should be due to end use considerations (presumably rather than prior sales Ks)

Held: Order is a gen statement of policy b/c purpose of order was not to create inflexible, binding rule but to give advance notice of gen policy w/ respect to curtailment priorities agency prefers. Doesn’t est “substantive rule” No final, inflexible impact on parties.

Parties could challenge, show not approp in partic circs

Agency free to establish policy through RM, but apparently prefers to proceed through adjudication. Puts parties on notice of agency preference in advance of adjudication.

GSPs are neither rule not precedent, merely an announcement of pub pol which agency hopes to implement in future RMs or adjudication

PROS: encourages pub dissemination f agency’s policies prior to their actual application in partic situations. Facilitates long-range planning w/ reg’ed industry and promotes uniformity in areas of nat’l concern.

Note that under *Chenery II* agency could have kept policy a secret, announced in adjudication

* + - * + **“Force of law” Test (p 688)**

Critical distinction b/w substantive rules and general policy statements = diff of formal legal status of agency statement in subsequent administrative proceedings

Can the statement be relied on as legal authority upon which to base decision??

* + - * + **Scope of Judicial Review**

b/c adopted w/o pub partic, may be broader than for substantive rule, entitled to less deference than decisions expressed as rules or adjudication orders.

* + - * + **Limitation on the Agency’s Subsequent Discretion**

“Binding effect” and “(in)flexibility” are not same inquiries as “force of law” though often conflated.

Degree to which agency anticipates adjusting specific decisions to the circumstance of indiv cases.

Lower degree of limitation of agency’s subsequent discretion- may be general statement of policy

Greater limitation on subsequent discretion – starts to look like procedurally invalid rule, attempt to bypass N&C process

Some cts emphasize “flexibility” factor in distinguishing GSPs from substantive rules

Does agency “bind” itself to a particular legal position? [Community Nutrition Institute v. Young (DC Cir 1987)]

* + - * + **Practical effect on regulated parties**

Appalachian Power Co. v. EPA (DC Cir 2000) – if agency doc leads private parties to believe agency will declare permits invalid u/l they comply w/ termsof doc, agency’s doc is for all practical purposes “binding.”

Statements Issued w/o force of law can still have powerfully coercive effect on parties

* + - * + **INQUIRIES TO DISTINGUISH GSP from “Substantive Rule”:**

Does the action have “force of law” in sense that it is legally binding norm, may be relied upn as source of law in subs proceedings?

Is it practically binding on agency, allowing little flexibility or discretion down the road?

Is it practically binding on affected parties, who feel coerced to comply with standards set forth in alleged GSP?

* + - * + **Chamber of Commerce of US v US Dept of Labor (D.C. Cir. 1999) J. Ginsburg \*\* - focuses on practical coercive effect**

OSHA directive is substantive rule b/c it had only prospective effect (not adjudication) and would impact parties going forward. Although did not impose a binding norm in the sense that it gives rise to legally enforceable duty, can’t be shoehorned into exception for policy statements.

Here, effect was not to “announce agency’s tentative intentions for the future, but to inform employers of a decision already made” (doesn’t leave room for informed discretion in indiv cases)

* **Interpretive Rules**
  + Declaration of how agency interprets ambiguous statute or regulation
  + Reason for exemption from time-consuming N&C: interps of stats will always be necessary for agency to carry out its auth, u/l stat is incredibly precise, clear
  + Agency brings exertise tinterp that s to some extent a substitute for formal fact gathering [Hoctor]
  + **American Mining Congress v. Mine Safety & Health Administration (D.C. Cir. 1993)** MSHA says x-rays qualify as “diagnoses” of lung disease w/in meaning of agency reporting regs. Ct holds this is IR b/c:
  + Does the purported IR have “**legal effect**”
    - (1) Has agency explicitly invoked ints general legislative auth/said it is promulgating rule **pursuant to stat grant of auth**?
      * Or, conversely, did it *contemporaneously state it was issuing interp rule*?
    - (2)Has agency **published** the rule in Code of Federal Regs?
      * Later cases say this is mere “snippet” of evidence as to agency intention, not dispositive
    - (3) In **absence of rule, would agency lack stat auth** to take substantive legal action?
    - (4) Does the rule effectively amends/is it **irreconcilable with a prior leg rule**? If yes > leg rule, b/c you can only change/overrule a leg rule with another leg rule
    - If answer to any of Qs is aff’tive, legislative, not interpretive rule.  
      * + **GSPs v Interp rules**
    - Both entail lack of legally binding force- cannot incur legal liability simply by “violating” GSP or Interp rule.
      * Cf. violation of SEC prohibition on insider trading, which is a substantive, leg rule
    - Agency doc may qualify as interp rule even if it narrows agency discretion, or exerts coercive effect on leg parties (UNLIKE GSPs)

**Distinguishing Interp Rules, GSP, and (procedurally invalid) Leg Rules:**

* + - 1. **Does the rule “genuinely interpret” a statute or reg?**
         1. **Is the rule consistent with the stat or reg it is supposedly interp’ing?**
         2. “an interp rule simply indicates an agency’s reading of a statute or rule”
         3. If rule invokes specific stat provisions, and its validty stands or falls on correctness of agency’s intero > interp rule
         4. Ct looks for “reasoned stat interp, w/ reference to the language, purpose, and legislative history of the relevant provision
      2. BUT if agency by its action **intends to create new law, rights, duties > leg rule**
         1. An agency can declare its understanding of what a stat req’s w/o providing N&C, but cannot go beyond text of stat and exercise delegated pwrs w/o N&C
      3. Difficulty: like w/ NDD must draw line b/w law-making and law implementation
         * **Hoctor v. U.S. Dept. of Ag. (7th Cir 1996) “arbitrariness = leg. Rule”**
    - When a stat does not impose a duty on the persons subject to it but instead auths or regs an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency
    - Hoctor “arbitrariness” of interp rule– 8ft fence rule; reasonable, but arbitrary choice among methods of implementation so NOT derived from previous rule. None of candidates – 7,8,10 ft – is “uniquely approp to, and in that sense derivable from” the duty of secure containment. Rule is arbitrary in sense that it could well be different w/o signif impairment of any reg’tory purpose.
    - When agencies base rules on arbitrary choices they are legislating, and therefore N&C in req’d
      * b/c ppl may have real, legit concerns about way in which rule is implemented. If rule could well be otherwise, agency is obliged to listen before final rule
      * \*Potential key to distinction b/w 8ft “too flat”/arbitrary in Hoctor and xray = diagnoses in AMC not: what is generality/specificity of underlying statute or reg the agency is allegedly interp’ing?
        1. AMC- reporting req fairly specific. Q of whether xray alone can count as diagnoses can be characterized as interstitial or subsidiary Q that arose in the process of implementing a reasonably detailed set of reg reqs
        2. Hoctor- structural strength req was open-ended, req’ing only that facilities be “appropriate” to protect animals from injury and contain them (more wiggle room)

\*\*i.e. if underlying statute spells out rights and obligations in some detail, agency should be able to fill in interstices/gaps with interp rules. If underlying reg, statute is vague, agency should engage in N&C to avoid arbitrarily picking an interp

**Implications for Judicial review of the agency’s interp: p 714**

* + - * Standard doctrine: agencies’ interpretations of its own regs should be upheld, so long as it is reasonable. Significant deference. Essentially Chevron deference. No "sunlight" between doc interp'd and interpretation, like with a Congressional statute and agency interpretation. *See Auer v. Robbins* (US 1997) p 715
      * Interpretive rules [OF STATUTES] probably not given Chevron deference [because they lack "force and effect of law" - if Chevron deference were extended to interp rules of regs, that would be treating them as if they did have "force of law"]
        + Judicial review of Interp Rules serves as a check on the inclination to use IRs to circumvent the N&C process.

**J. Judicial Review of Agency Rules**

* One way legal system deals w/ concerns about delegation = imposition of procedural requirements for agency action (through the APA, additional statutory reqs).
* Judiciary has important role in ensuring these procedural requirements are adhered to – must interpret scope, content, and applicability of various procedural reqs of APA, other statutes.
* In addition to **enforcing procedural reqs**, 2 other forms of judicial oversight:
* **Interpretation of substantive statutory provision**: When Ps allege that agency has acted in a way that is inconsistent w/ terms of underlying statute, court must interpret the statute and decide whether the agency has acted lawfully
* “**Arbitrary and capricious” review**: APA also empowers cts to engage in more general review of agency decisions to ensure that they are not “arbitrary” or “capricious.” A ct may strike down and agency action even if agency complied w/ all procedural reqs and acted w/ stat discretion, if ct decides that agency’s decision was so unreasonable as to be arbitrary.

**APA §706 – Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action. The reviewing court shall –

1. Compel an agency unlawfully withheld or unreasonably delayed; and
2. Hold unlawful and set aside agency action, findings, and conclusions found to be-

**Arbitrary, capricious**, an **abuse of discretion**, or otherwise not in accordance with the law;

**Contrary to constitutional** right, power, privilege, or immunity

In **excess of statutory jurisdiction**, authority, or limitations, or short of statutory right;

**Without observance of procedure** required by law

**Unsupported by substantial evidence** in a case subject to sections **556 or 557** (formal proceedings!) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**Unwarranted by the facts** to the extent that the facts are subject to a trial **de novo** by the reviewing court

* + - **“Arbitrary and Capricious Standard**
      * **Initially, first 2 decades after APA enacted, JR extremely deferential**
        + **Pacific States Box & Basket Co. v. White (1935) [“Box & Basket standard”] As long as any state of facts reasonably can be conceived that would sustain the action, there is presumption of existence of that state of facts and the party carries the burden of showing that the action is arbitrary**
      * **Over time, agencies take on more importance. Concerns about “capture”**
        + **Greater Boston TV Corp v FCC (DC Cir 1970) Ct must intervene not merely in case of procedural inadequacies, but more broadly if the ct becomes aware that agency has not really taken a “hard look” at the salient problems and hasn’t genuinely engaged in reasoned decision-making. BUT if agency hasn’t shirked fundamental task, then ct act deferentially even if it would have independently decided differently.**
      * **Citizens to Preserve Overton Park, Inc. v. Volpe (1971)** (involved the Sec of Transportation’s decision to approve fed funds for highway project in Memphis that ran through pub park. Under statute, DOT could only approve federal highway funds for projects on public parklands if determined there was “no feasible and prudent alternative” to use of land and that proposed highway proj “includes all possible planning to minimize harm” to park. SOT did make this determination, but opposition groups say A&C 7062A.)
        + Held Marshall: To make a finding that an agency action is “*arbitrary, capricious or an abuse of discretion*” the reviewing ct must consider **(1) whether the decision was based on a consideration of the relevant factors and (2) whether there has been a clear error of judgment.** “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. **The court is not empowered to substitute its judgment for that of the agency.**
      * **Ethyl Corp. v. EPA (D.C. Cir. 1976)**[CAA Authorizes EPA Administrator to reg gas additives whose emission products “will endanger the public health or welfare.” The Ad’or decided automotive emissions caused by lead gas presented “signif risk of harm” to pub health, promulgated regs that reduced lead content of leaded gas. Petitioners claim Ad’or misinterp’ed the stat standard of “will endager” and application of standard w/o support of evidence was A&C]
        + Held: Ad’or did properly interpret meaning of CAA and the evidenced adduced by the rm proceeding did support final determination
        + **Deferential** but close reading of the evidence. Must find that agency decision was based on consideration of the **relevant factors**. Must engage in a “**substantial inquiry” into the facts** that is “searching and careful” especially in highly technical cases. Ct. must immerse itself in facts to determine whether the decision is **rational. Reasonably-explained decision req’d.**

After **studying record,** does it provide a **rational basis for the decision made?**

Ct must satisfy itself that agency has **exercised a reasoned discretion, with reasons that do not deviate from/ignore the ascertainable leg intent.**

* + - * **How rigorously should Courts Evaluate Agency Reasoning?**
        + Wilkey (Ethyl Corp dissent) – agency decision is “arbitrary id it relies on unstated or unsupported inferences, while for Wright (majority) arbitrary if no reasonable person, confronted w/ evidence b4 agency, could reach conclusion agency did
    - **Judicial Regulation of Administrative Procedures**
      * **Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. [**Atomic Energy Commission – broad reg auth over devel of nuke energy. Cases starts as adjudication then realizes issue will come up again and again, so switches to RM to deal w/ question of consideration of environmental effects associated w/ uranium fuel cycle in indiv CBA for light water-cooled nuke power reactors.
        + Agency has discretion to choose procedures it wishes to use for various purposes as long as the agency remains w/in the sometimes broad range of procedural options made permissible by the Const, applicable stats, and agency’s own regs. Absent constitutional constraints [due process] or extremely compellings circs.
        + WHY?
        + **Over-Proceduralization Concern :**If cts could determine based on own jmnt what procedures agencies must use, JR would be totally unpredictable an agencies would adopt full adjudicatory procedures in every instance
        + **“Monday morning QBing”** ct has more info at hearing than agency had when made decision. Hindsight bias.

**Reconciling Overton Park and Vermont Yankee**

* + VY stands for proposition that cts not free to impose on agencies specific procedural requirements that have no basis in APA. OP suggests that 706(2)(A) imposes a general “procedural” rqmnt of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of the decision. [Pension Benefit Guaranty Corp v LTV Group 1998]
  + J. GINSBURG: Occidental Petroleum Corp. v SEC (DC Cir 1989)
    - Performance standards [regs framed in terms of ultimate goals that must be achieved]
    - Design standards [regs that specify exactly how a product must be constructed
    - Overton Park = perf standard- to allow for meaningful JR, agency must produce record that shows how it reached decision.
    - VY = design standard – cts can’t impose upon agency specific steps that must be followed to create a reviewable record
    - **Modern “hard look” Review** – duty to engage in reasoned decisionmaking- or vacate + remand
      * **\*Motor Vehicle Mfrs Assoc. v. State Farm (US 1983) [Natl Traffic &MV Safety Act of ’66 gave Sec of Transportation auth to issue mv safety standards w/in stat grant. Sec initiated RM- proposed**
      * **The “Hard Look” Standard**
        + Although the **scope of review** under the ‘arbitrary and capricious’ standard is **narrow** and a court *is not to substitute its judgment for that of the agency*, the agency must nevertheless “**examine the relevant data** and **articulate a satisfactory explanation** for its action including a **rational connection** b/w the facts found and the choice made” and the reviewing ct must “consider whether the decision was based on **a consideration of the relevant factors [procedural inquiry]** and whether there has been a **clear error of judgment [substantive inquiry]**. While agency is entitled to change its view on the acceptability of a particular reg, it is obligated to explain its reasons for doing so.
        + **Standard of review for rule rescission** same as for promulgation of a new rule. Alteration of “**settled course of behavior**” unlike merely declining to promulgate a rule in first place.

BUT could arg that until rule goes into effect, not “settled course of behavior”

* + - * Typically greater deference for decision not to begin RMing (although technically reviewable under 706)
    - Deferential standard- there is a substantive element, but emphasis on reasonableness of agency analysis and explanation, not the reasonableness of policy result.
      * How did agency handle criticisms? What evidence did agency use to support conclusions? Did agency explain its choice adequately? Was explanation plausible?
  + Agency action is “arbitrary and capricious” if:
    - **Agency has entirely failed to consider an important aspect of the problem**
      * If agency has failed to address signif criticism or proposed alternative.
      * In SF- agency failed to consider possibility of adopting airbag only reg or continuously spooling belts- so obvious and glaring that easy to call a+c.
        + What counts as important aspect of the prob?
        + *Nat Res Def Council v Nuclear Regtory Comm’n* (DC Cir 1976) – boilerplate generalities brushing aside detailed criticism no good. Need reasoned response, in which agency pts to particulars in the record which support its resolution of the controversy.
    - **Agency has relied on factors which Congress has not intended it to consider**
      * Many statutes explicitly or implicitly supply factors agency is supposed to consider
      * Seems to bring element of statutory construction into a&c analysis
      * Rule can be struck down as a+c if agency fails to justify/exolain rule in terms of objectives specified by Congress in the Act [*Independent US Tanker owners Comm v Dole* (DC Cir 1987)]
    - **Agency has 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 or the product f agency expertise**
      * SF ct basically indicates that evidence that req’ing passive belts would increase usage was sufficiently strong that agency couldn’t reach contrary concl. w/o either more specific evidence or convincing refutation.
      * **Costs and Benefits of Hard Look Review**
    - Benefits of HLR-
      * Necessary to constrain agency arbitrariness, ensure agency decisions based on legit considerations
      * Incentive for agencies to be thoughtful/careful
      * Shadow of judicial review improves decisionmaking
        + May ensure broader participation by more diverse group of agency staff in developing regs
        + Reduction of various cognitive biases – overconfidence, tunnel vision
        + Mitigates ability of parochial special interest grps to exert undue influence
        + Facilitate meaningful citizen partic by giving agencies greater incentive to present analyses and conclusions in a form in ct that gen public can understand well enough to assess their reasonableness
    - Costs of HLR
      * Judges may not have necessary technical background to evaluate evidence.
      * Potential adverse effects of alleged incompetence
        + Generalist judges likely t misunderstand issues involved, make mistakes, leading to bad decisions on the merits.
        + Judges may (perhaps subconsciously) substitute their own judgment for that of the agency (by finding failures to adequately address important issues b/c they disagree w/ policy, for ex)
        + May not lead to higher qua l decision-making b/c “reasons” offered in official statements may bear little connection to the actual process of agency decision-making
        + Even though elaborate records required to “support” agency decisionmaking may in reality do little to improve or substantially change the decisionmaking process, record production is costly for agencies

**Judicial review of decision not to adopt a rule, rule rescission/changes in agency policy**

* **Standard of review for rule rescission** same as for promulgation of a new rule. Alteration of “**settled course of behavior**” unlike merely declining to promulgate a rule in first place. [*State Farm*]
  + - BUT could arg that until rule goes into effect, not “settled course of behavior”
    - No higher standard for rescinding/reversing a pre-existing policy. Under SF, agency must show good reason for new policy, but need not demonstrate reason why new policy is better than old policy. [Scalia in *FCC v. Fox TV Stations 2009*); Stevens + Breyer in sep dissents think there is strong presumption that initial view reflects Congress intent of del., should explain change.
* Typically greater deference for decision not to begin RMing (although technically reviewable under 706(1), and under 706(2)(A) a+c review, b/c “agency action” includes “failure to act”)
  + - Req’ing agency to defend decision not to adopt proposed rule will divert scarce resources into area that agency in expert judgment has determined not worth the effort already expended. Prospect of litig may give a proposal more elaborate consid that it merits. Agency decision not to reg activity is based in large part on factors not susceptible to judicial resolution.
  + **Role of politics**
    - Rehnquist – ok if change in administration
    - Pros:
      * Agencies shuld explicitly, transparently include political influences
      * Good if influenced by Pres- some modicum of democratic accountability
    - Cons:
      * One reasons for delegation is to insulate the decisionmaking process from someone from highly-politicized process
      * Agencies not supposed to be making policy, but implementing intelligible principle.

**K. Judicial review of agency statutory interpretation**

* How courts review an agency’s interpretation of the statute the agency is charged w/ administering.
* When, under what conditions should reviewing ct accept agency’s interp of the relevant stat lang even if the ct would reach a different conclusion in deciding the Q on its own?
* When, under what conditions, should reviewing court resolve the Q of interpretation itself, using the tools/canons?  
    
  Typically- judiciary, not the executive, has authority to “say what the law is” (Marbury v. Madison) BUT many issues of stat interp are linked with Qs of fact and policy- perhaps best resolved by specialist agencies under supervision of elected branches of govt.
* APA- §706: “To the extent necessary to decision and when presented, the *reviewing ct shall decide all relevant questions of law [and] interpret constitutional and statutory provisions*…”
  + 706(2)(c): Court can set aside agency action “In excess of statutory jurisdiction, authority, or limitations, or short of statutory right”

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* + - Pre-Chevron
      * NLRB v. Hearst (U.S 1944): Newsboys case. Can newsboys be classified as “employees” under the NLRA, so they can collectively bargain?
        + Pure Qs of Law v Mixed Qs of Law and Fact

In Hearts, degree to which ct defers to agency’s jment turns on degree to which resolution of interp’ive q (Q of law) is bound up with resolution of contested “questions of fact.” Pure Qs of law should be resolved de novo, w/out deference.

But sharp categorical distinction b/w Qs of law and fact difficult to sustain

* + - * Packard v. NLRB (US 1947): Findings of the agency as to the facts, if supported by evidence, shall be conclusive. Ct has power only to determine whether there is substantial evidence to support the agency, of if its order oversteps the law.
        + Agency inconsistency could lead to decreased weight given to agency’s decision by the court
      * \*\* **Skidmore v. Swift & Co. (US 1944)** [Firefighter at meat packing plant, what counts a “working time,” Administrator of Fair Wages and Hours- not officially job to determine which was fall w/in Act, but considerable experience. Issues interpretive bulletin and informal rulings, says inactive duty should be dealt w/ on case-by-case basis. General test- exclusion of sleeping & eating time, incl of other time.
        + Held: Respect should be given to the agency, b/c it represents a body of **experience and informed j’mnt** to which cts and litigants may properly resort for guidance. Weight or respect given to agency should depend on: **(1) thoroughness evident in its consideration, (2) the validity of its reasoning (3) its consistency** w/ earlier and later pronouncements**, and all those factors which give it power to persuade, if lacking power to control.** [**PERSUASIVE,** not binding**]**
    - **\*\*Chevron USA Inc v. Nat’l Resources Defence Council (US 1984)**   
      [CAA- EPA promulgated reg that allows a State to adopt a lantwide definition of the term “stationary source.” At issue is whether this is a permissible construction of “stationary source,” and what the applicable standard of review is.] Stevens writing for the Court.
      * Step 1: Has Congress spoken directly to the issue, or is the statute “silent or ambiguous as to the specific issue”?
  + In making this determination, court employs “traditional tools of statutory construction.” If Congress had clear intent as to the precise question, > court must give effect to that intent, regardless of the agency’s position.
    - * Step 2: If statute is silent/ambiguous- Has agency adopted a “permissible construction of the statute”/ is the agency’s interp. reasonable? If YES > should defer to agency
      * WHY give such deference? While agencies aren’t accountable to the people, Chief Exec is, and it is entirely approp for this political br to make such policy choices- resolving the competing interests which Congress itself either inadvertently didn’t resolve, or intentionally left to be resolved by the agency charged w/ administration of the stat in light of everyday activities.”
    - Normative evaluation of Chevron
* PROS of Chevron’s deferential posture
  + When stat is ambiguous/silent, law has “run out” and resolution of ambiguity is policy choice. Should then be left to agencies, rather than generalist judges. Expertise, dem accountability, promotes uniformity/coordination in interp of fed law (1 agency, many COAs)
* CONS
  + Concentrates too much power in exec br. Violates SOP.
  + Undermines dem accountability in long run by making delegation attractive to Cong, thinking they may be better able to influence agencies than the crts.
    - **Chevron and Textual Interpretation**
      * Textual analysis and structural inference
        + ***MCI v. AT&T* (U.S. 1994)**
    - Example of Chevron step one. Scalia writing for the ct, says that we must start with “ordinary meaning” of the word “modify.” Says that the ct need not prefer in all cases to the agency’s preferred definition. Since an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear, commission’s permissive de-tariffing policy can be justified only if it makes a less than radical or fundamental change in the Act’s tariff filing req, in line with the auth deleg’ed by Cong (“modify”).
      * Relies on body analogy- b/c tariff-filing req is “heart” of stat, taking it away is not “modification”
      * Stevens dissent- paradigm case for Chevron deference, esp b/c stat regime “so obviously meant to maximize administrative flexibility.
      * Scalia talks a lot about ambiguity- seems to be on Chev step 1. Stevens seems to have skipped to step 2!
  + **Textualism and Chevron Deference**
    - Looking beyond text of stat to other sources, like LH may open up to greater number of reasonable/permissible interps!
    - Textuaists may be more likely to discern a “clear” meaning from statute, not extend deference. Scalia strong supporter of Chevron, not inclined to extend deference
      * **Chevron, Semantic Canons and Terms of Art**
        + Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (US 1995)
    - Held: Reg valid, b/c stat text is “unambiguous” and agency’s interp is reasonable> Chevron deference.
    - Says ordinary understanding of the term, purpose of the statute support a def of harm that encompasses habitat modification.
    - Uses LH to show addition of harm signif
    - Scope of discretion delegated in stat is relevant- “when Congress has entrusted the Sec w/ broad discretion, we are especially reluctant to substitute our views of wise policy for his.
    - Dissent/Scalia: applies noscitur a sociis; also chides ct for looking at definition of “take” in isolation of the word the section was defining, a word that has CL baggage.
    - Majority emphasizes that Q is not whether Interior’s interp of “take” is correct, but whether it is sufficiently reasonable to merit deference under Chevron.
    - IF there is adequate evidence to overwhelmingly support a contrary interpretation, it may make agency’s interp unreasonable.  
      * **Structure, Context, and History**
  + In certain cases, cts have rejected agency stat interps as contrary to clear intent of Cong solely on basis of inferences from structure, purpose, history w/o real arg that semantic meaning of the stat term itself ia inconsistent w/ agency’s interp
    - * + **FDA v. Brown & Williams Tobacco Corp. (US 2000)**
    - Held: “It is clear that Congress has not given FDA the auth it seeks to exercise here (regulation of tobacco), and therefore no Chevron deference b/c contrary to Congressional intent.
    - Although agency interp is in line with semantic meaning of auth stat, the meaning- or ambiguity – of words or phrases may only become evident when placed in context.
    - Here, **statutory structure**, incl implications of agency’s interp for operation of other stat provisions and **history** of past agency and Congressional action
    - Also – **great significance of the issue**/major/extraordinary Q- *Congress doesn’t usually hide an elephant in a mouse hole.* Sort of a clear statement rule: if Congress meant to authorize a ban, it would not do so ambiguously  
      * **Chevron and Legislative History**
  + If assume that LH is one of traditional tools of statutory construction, then maybe court shouldn’t defer to agency’s
  + contrary interpretation. First, look to text. If ambiguous, look to LH. If LH doesn’t resolve, defer to agency.
  + Chevron itself examined LH of CAA in determining whether Congress had spoken to precise question.
  + BUT if take position that courts can generally only consult LH as a last resort to resolve statutory ambiguity- then inChevron, court has alternative and superior way to resolve ambiguity- can defer to agency. First, look to text. If text ambiguous, defer to agency. Look to LH only if no agency interpretation.
  + In many cases Court has suggested that only statute’s text and structure are relevant for Chevron step I. Empirically, courts reference LH in 2/3 of Chevron cases, and in 45% it is a determining factor.  
    - **Chevron and Substantive Canons of Interpretation**
* Canons come in at step one, as there are presumptions (maybe fictions) about Congressional intent. Even where the semantic meaning of statutory text support the agency’s interpretation, that interp may be deemed “impermissible” if it runs afoul of one of the canons, because it is contrary to Congress’ clear intent. In this way, it would be out under Chevron step one, but can also be characterized as knocking out the interpretation under Step 2 as well (“impermissible,” if not “unreasonable”)
  + - * **Constitutional Avoidance**
  + **DeBartolo Corp. v. Florida Gulf Coast Bldg & Construction Trades Council (US 1988),** Even if NLRB’s contruction of the Act were permissible in light of rule of construing stats to avoid serious const concerns, must independently inquire whether there is another interp that wouldn’t raise const concerns that may be fairly ascribed to the stat. “Every reasonable construction must be reached in order to save the stat from unconst”
    - * + WHY? In addition to normal args for const avoidance (prudence, avoid passing on const qs if you don’t have to; presumption in favor on Congress not massively f’ing up)way of narrowing cong delegations of power, promote purposes of NDD
        + CON: All exec officers swear oath to Const as well (Art II §3)- if exec official or Pres has determined (explicitly or implicitly) that a given interp is constitutionally permissible and decided to force the issue by explicitly adopting the interp as a basis for authoritative agency action, then avoidance canon might intrude on Executive’s Art II responsibilities
        + **Rust v. Sullivan**
    - Sec of HHS regs promulgated under Title X “none of the funds … shall be used in programs where abortion is a method of family planning.”
    - Held: While const args not w/o some force, the regs promulgated by Sec do not raise sort of “grave and doubtful const qs” that would lead us to assume Congress didn’t intend to authorize their issuance. Therefore, the regs need not be invalidated to “save” the statute from unconstitutionality, and Chevron deference is applicable.

Distinguishing Rust from DeBartolo

* + - * Federalism; Presumption against Preemption
        + Traditional State Functions
    - **Solid Waste Agcy Northern Cook Cty. v. Army Corps of Enginrs (US 2001)**

“navigable waters” case. First applies anti-surplusage rule, says that in order to accept agency’s interp, “navigable” would have to have no independent meaning. So court says that agency’s interp is contrary to Congress’ clear intent on the point.

But even if the stat were ambiguous, would not extend deference: “**Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended the result**.” Concern is heightened where interp alters federal-state framework by permitting federal encroachment upon a traditional state power [FEDERALISM]

Here. Congress’s auth to regulate commerce is being stretched to the limits, and impinges upon States’ traditional and primary power over local land use.

**The Limits of Chevron’s Domain**

**U.S. v. Mead Corp (US 2001)** Day planner case. Classification affects tariffs. Sec of Trans provides for tariff rulings before the entry of goods by regs authorizing "ruling letters"-

* Represents the official position of Customs Service with respect to particular transaction, binding on customs officials
* Legally binding on parties, but applicable only to that transaction, other "identical" transactions
* Subject to modification, revocation w/o notice to anyone except party to whom letter is addressed
* Most contain little or no reasoning
* Not subject to notice and comment
* Could be modified w/o n&c in most circs
* Can be issued from many locations, need not be published
  + - * Majority holding: Implementation of a particular stat provision qualifies for Chevron deference when it appears that Cong delegated auth to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority.
      * Delegation of auth to speak w/ force of law may be shown in a variety of ways, as by an agency’s power to engage in [formal] adjudication or NCRM, or by some other indication of a comparable congressional intent.
  + Procedure: “fair to assume that Congress contemplates admin action w/ effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”
    - But also says procedure (or lack thereof) not necessarily dispositive on this point
    - UNCLEAR if formal + informal or just formal adj qualify
    - UNCLEAR what “other factors” might indicate it intended deference to be given!
* However, even where agency interpretations are not made with Congressionally conferred authority to speak with the force of law, or where that authority is not invoked, and are thus not binding/controlling (no Chevron deference), they may still influence/persuade courts (Skidmore deference).
* Why? Because of "specialized experience, broader investigations and information" available to the agency, as well as value of uniformity in its administrative and judicial understandings of what a nat'l law requires
  + Relevant factors (Skidmore):
    - Thoroughness evident in its consideration
    - Validity of its reasoning
    - Consistency with earlier and later agency pronouncements
    - "and all those factors that give it power to persuade, if lacking the power to control" (open to other factors/arguments to give deference)
      * Do what degree would specialized experience be helpful? How complicated is the question presented? Is agency especially equipped to answer the question?
      * Potentially relevent who wrote it- is there reason to defer to their experience?
        + Skidmore deference may be approp here b/c customs regulatory scheme is highly detailed, so agency can bring benefit of specialized experience to subtle question involved in this case
        + NOTE -Skidmore - sliding scale. Starts at zero (with no deference)
* Scalia Dissent: Doesn’t think procedure is good indication of Cong intent. Parade of horrors: Unpredictability - what criteria are we basing this on? No one knows; Increase in notice-and-comment rulemaking: Agencies will rush to do N&C rulemakings, then do interpretive rules based on the N&Cs in order to get around this new rule, get Chevron deference; Ossification through premature judicial construction