**ARS Outline – Prof. Katzen**

**Spring 2012**

1. **Statutory interpretation**
	1. **Introduction to Legislation and Statutory Interpretation**
		1. **TVA v. Hill (1978 p. 2-28)**
			1. **Facts:** Dam construction begins, Endangered Species Act is passed 6 years later (1973). Snail darter is discovered and declared an endangered species in 1975 in a rule-making proceeding. At 1975 budget hearing, TVA and Congress made clear belief that ESA shouldn’t apply to nearly complete projects. District Court said that following the rules here would lead to an absurd result; Congress passed a budget to complete construction. Court of Appeals then reverses District Court.
			2. **Issue:** What does the word “action” mean in the ESA?
			3. **Holding (Burger):** Construction cannot continue. You can’t imply a repeal of a law through an appropriation.
			4. **Dissent (Powell):** Cannot reasonably interpret statute to apply to projects that are completed or nearly completed; should be read to avoid absurd result.
			5. **Appropriation bills:** Must-pass legislation, or the government shuts down. So you can’t assign the level of deliberation to them that would be necessary for a repeal. The canons limit the impact of substantive riders in appropriations bills.
		2. **Tools of construction**
			1. **The text:** plain meaning, but there can be disagreement on operative terms (like “action” in TVA)
			2. **The legislative history:** Long used by the Court, but contested in recent years
			3. **The purpose of the statute as a whole:** Perception of broad goals can help strengthen argument
			4. **Avoiding absurdity**
			5. **Subsequent legislation:** Continued appropriations are considered by the dissent
			6. **Canons of construction:** First, they apply the canon that subsequent bills don’t impliedly repeal unless intent is clear. Dissent said that Congress does not impose regulatory burdens retroactively without explicitly saying so.
	2. **Letter v. Spirit**
		1. **Riggs v. Palmer (NY, 1889, p.31)**
			1. **Stands for:** Look to legislative purpose when a statute is ambiguous
			2. **Facts:** Francis Palmer had made his last will and testament in 1880 and left to his daughters small legacies, but left most of his estate to his grandson, Elmer Palmer. Elmer, age 16, poisoned grandfather to get the money. Statute says that grandson should get the property.
			3. **Holding:** Grandson should not get the inheritance. Looking at the legislative purpose, it’s clear that legislators didn’t want this outcome. People should not be rewarded for wrongdoing according to common law.
			4. **Dissent:** Criminal punishment is sufficient, so the estate should not be withheld. It is not the role of judges to rewrite the decedent’s will. Other statutes mention this situation explicitly but NY’s does not.
			5. **Background principles:** Invoked the common law maxim that a person shall not profit from his or her own wrongdoing.
		2. **Church of Holy Trinity v. US (US, 1892, p. 38)**
			1. **Stands for:** Look at various indicia of legislative intent when attempting to resolve a statutory ambiguity
			2. **Facts:** Law made it illegal to prepay transportation or encourage importation. It had been enacted to counter actions of people who were importing low-cost labor from foreign countries to tamper with labor costs. Church wants to pay to bring Pastor to the US.
			3. **Holding:** Bringing him over is fine; the act was clearly only meant to apply to manual labor, and was addressing a specific issue which is not present in this case.
			4. **Five factors** used to discern intent of the legislature:
				1. The statute’s title
				2. The “mischief” the statute was enacted to prevent
				3. Legislative history, including the fact that the term manual labor was considered but was not added to aid speedy passage of the bill
				4. Societal values – religious language
				5. Other evidence of statutory purpose (maybe not present here)
	3. **Judicial Correction of Legislative Mistakes**
		1. **Absurdity Doctrine**
			1. **Introduction**
				1. Statutes should not be construed to create absurd results. Even decisions that have defended “plain meaning” rule have also acknowledged an exception for absurd results.
				2. Even if it’s not absurd under the instant fact set, if it’s absurd in relation to other plausible fact sets than it should be avoided (Public Citizen)
				3. **Downsides:** Does it encourage legislature to write unclear legislation and delegate to courts? Sometimes unclear legislation is purposeful to reach legislative compromise.
			2. **US v. Kirby (US, 1868, p. 86)**
				1. **Stands for:** Avoid reading that is so clearly not in line with statutory intent
				2. **Facts:** Kirby, sheriff, was arresting Farris, who had been indicted for murder, and entered a steamboat to do so. Kirby thus temporarily delayed the delivery of mail, in violation of federal statute.
				3. **Issue:** Is arresting/charging a sheriff for unavoidable temporary delay of mail during an arrest within meaning of the statute?
				4. **Holding:** No, statute should be read to avoid absurd results.
			3. **Public Citizen v. DOJ**
				1. **Stands for:** Absurdity doctrine can always apply to setting an absurd precedent
				2. **Facts:** Federal Advisory Committee Act passed to minimize reliance on advisory committees and ensure access to information. Statute says you’re an advisory committee if President or agency ‘utilizes’ you. Is ABA serving as an advisory committee under FACA definition when it advises President on judicial nominations?
				3. **Holding (Brennan):** Not an advisory committee because it’s not in the intent of the law. Such a reading would allow absurd results, even if this result doesn’t reach level of absurdity (slippery slope).
				4. **Intent argument:** Since FACA was enacted to cure specific ills, particularly wasteful expenditure of public funds for worthless committee meetings, we cannot believe that it was intended to cover every formal and informal consultation between the President or Executive agency and a group rendering advice.
				5. **Concurrence (Kennedy):** It’s not absurd, and intent argument is not persuasive. He also doesn’t think the extension argument examples (advice on a ropeline). But it violates appointment clause of the Constitution.
		2. **Scrivener’s Error**
			1. **Introduction**
				1. An obvious mistake in the *transcription* of the legislature’s policies into words.
				2. Not the same as avoiding unintended results: Scalia describes the distinction between cases in which “the legislature obviously misspoke” (scrivener’s error) and where it “obviously overlegislated” (unintended results).
			2. **US v. Locke (US, 1985, p.102)**
				1. **Facts:** Federal Land Policy and Management Act (FLPMA) required annual filings prior to Dec. 31st, or owner loses claim to mining rights. D filed on Dec. 31, and claims this was in part due to misleading information from a BLM employee he contacted. Is there a scrivener’s error here, and did Congress intend to require filings to be made on or before Dec. 31?
				2. **Holding:** No, since it’s an arbitrary date, the fact that it’s in the statute is enough to make is binding. Regardless of intent, Court has no power to change such a clear requirement.
				3. **Dissent:** Clearly error here. Even a BLM pamphlet had wrong information, and other BLM documents felt the need to change the language to clarify. Also, denying D’s livelihood because of 1-day delay is not within the intent of the statute, since it arrived in a timely manner.
	4. **Textualism and What is Text?**
		1. **WVA University Hospital v. Casey (p. 49-63) (Expert fees)**
			1. **Facts:** Statute permitted award of reasonable fees in Civil Rights litigation. Court says the provision does not permit expert witness fees (except for $30/day given to all witnesses). Is it clear what attorney’s fees mean?
			2. **Holding (Scalia):** Expert fees are not included. While paralegal and law clerk fees are included, there has been a practice of including those fees in attorney’s fees, so the law is just keeping up with changes in business practices. He also looks at similar legislation from the same time period, and finds that in some statutes experts fees are separately enumerated. Since they’re not here, he assumes they’re excluded.
			3. **Dissent (Stevens):** He would correct an omission rather than say explicitly that attorney’s fees include expert witness costs. Legislative history tells us that the purpose was to enable private citizens to bring civil rights legislation, particularly where multiple people are impacted. In these cases it wouldn’t be possible for a single plaintiff to finance a suit, and that’s why costs are being shifted.
		2. **Nix v. Hedden (US, 1893, p.113) – Tomato case**
			1. **Facts:** Statute (Tariff Act) imposes duty on vegetables but not fruits. Question is whether tomatoes are to be classified as fruits or vegetables. Specialists see tomatoes as a fruit but in ordinary usage it’s considered a vegetable.
			2. **Judgment:** Tomatoes should be considered a vegetable, since that is their primary use. The Court says that the ordinary meaning is the default if no evidence that technical meaning was implied.
			3. **Tax rule:** In case of ambiguity of tax statutes, they should be construed most strongly against the government. Presumption of ordinary meaning and the tax rule point in opposite directions – court goes with the ordinary meaning.
			4. **Ordinary v. Special meaning:**
				1. Starting presumption is that the ordinary meaning of the language expresses the legislative purpose
		3. **Smith v. US (US, 1993, p.127) – “Using” a firearm**
			1. **Facts:** Statute enhances penalty if there is “use” of a firearm during and in relation to a drug trafficking crime. Defendant exchanged gun for drugs.
			2. **Holding (O’Connor):** Court said he was using it, even though it was part of the transaction and not used as a weapon. Majority uses a dictionary to say that use just means employ.
				1. Elsewhere in the statute, “used” means things besides use as a weapon. This includes uses like transporting, exporting, and selling. This is pretty convincing.
				2. Refuses to apply rule of lenity because it decides that the statute isn’t ambiguous. Rule only appropriate when statute is ambiguous
			3. **Dissent (Scalia):** He would read use more narrowly to mean using a gun as intended (as a weapon). He reasons by analogy – do you “use” a cane to beat someone? Under this reading, Smith would not get the sentencing enhancement.
			4. **Using dictionaries**
				1. They provide a historical record how people use/used language in context
				2. However, they cannot conclusively answer questions of statutory construction.
	5. **Legislative History**
		1. **Types of legislative history, from most to least important**
			1. Conference and committee reports
				1. Generally, it is fair to assume that Congress has adopted as its intent the intent of the committee
			2. Sponsor statements
				1. The Court has described the views of sponsors as weighty, or even authoritative
				2. But they’re also more susceptible to manipulation, since sponsors are aware the weight, and they’re the statements of a single person
			3. History of bill, rejected proposals
				1. Some reject them entirely because things change and are rejected for various reasons that aren’t reflective of legislative intent
				2. Need to look closely at why something was rejected, or why there was a major change; then it can maybe be useful
			4. Floor and hearing colloquy
				1. One view is that all that can be determined from debates and reports is that various members had various views. Sometimes they are taken as a whole.
				2. Legislators are able to insert statements into the record that they did not raise on the floor. There is a system to distinguish these
			5. Views of non-drafters
			6. Legislative inaction
			7. Subsequent legislative history (including presidential signing statements)
				1. If Congress has persistently refused to overturn prior judicial or administrative decision, this may amount to an implicit legislative judgment that the prior interpretation was correct.
				2. Court has recently shown skepticism about this argument, so use with caution
		2. **North Haven Board of Ed. v. Bell (US, 1982, p. 142)**
			1. **Facts:** In 1975, Depart of Health, Education, and Welfare issued regs interpreting the term person as either student or employee. Petitioners contend that Title IX was not meant to reach the employment practices of educational institutions. Senator Bayh, who introduced the legislation, had said in precursor legislation that the act reached faculty employment.
			2. **Holding (Blackmun):** Employees should be let in, since they’re not excluded.
				1. He starts with the plain meaning of the statute and says that employees are persons.
				2. Then he talks about Bayh’s statement. Bayh was the legislation’s sponsor. His statements make it pretty clear that faculty employment should be included.
				3. He also looks at House statement, which said it didn’t apply, but House acceded to Senate version so it’s not relevant.
				4. Finally, he says that Bayh’s words are an authoritative guide to the statute’s construction.
			3. **Dissent (Powell):** The standard should be clear and unambiguous evidence of legislative intent, which we don’t have here. There’s no explicit reference to employees in the bill, or in committee reports. The only remedy is fund termination, which is drastic compared to other employment discrimination statutes which complex schemes (structural argument).
		3. **Blanchard v. Bergeron (US, 1989, p. 163) – Reasonable Attorney’s Fees**
			1. **Facts:** 42 USC 1988 says that judge may award reasonable attorney’s fees in civil rights litigation. Blanchard successfully won a $10,000 verdict in a 1983 case. He has hired his attorney on a contingency-fee basis.
			2. **Holding:** Contingency-fee agreement does not impose a ceiling but should be taken into account. It refers to Senate Committee report, which in turn refers to District Court decisions and Johnson (5th Cir. case).
			3. **Scalia dissent:** He doesn’t think that the committee’s endorsement of some cases should be of any concern to the Court, particularly since they were probably written by some low-ranking staff member, maybe at the instigation of lobbyist.
		4. **Continental Can Co. v. Chicago Truck Drivers (7th Cir., 1990)**
			1. **Stands for:** Textualist critique of legislative history, since it can be manipulated
			2. **Facts:** Special exceptions to pension law if “substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry.”
				1. In Congress debate, 1 person inserted a statement about how substantially all mean 50.1%, after the House passed the resolution but before the Senate did. He later inserted a statement clarifying that it meant majority 3 months after the bill had been signed by the President. In other legislation, substantially all means 85%.
				2. Thompson, floor manager, gave his 85% reading shortly before voting in the House.
			3. **Holding:** It means 85%, the common reading. One person’s remarks, inserted into the record, should not control. We need to go with the reading that congresspeople were likely to believe when they voted for the bill.
			4. **Analysis:** Even the forms of legislative history the textualists like to look to can be manipulated and unreliable, as shown by this case and *Blanchard*. 2 views of committee members:
				1. **Preference outliers:** Committee members are likely to be preference outliers – why should we trust them?
				2. **Reasonably representative:** Another view holds we should trust committees because they’re specialized yet representative of Congress as a whole.
		5. **Exxon Mobile Corp. v. Allapattah Services, Inc. (p. 184-189) – Diversity Jurisdiction**
			1. **Facts:** In 1990, Congress passed 1367 to clarify diversity jurisdiction. Zahn (1973) said that Federal courts cannot hear class actions in diversity if any plaintiff has less than $75,000 in controversy. The question is whether 1367 overruled Zahn.
			2. **Holding (Kennedy):** Statute overrules Zahn. They do not look at legislative history because the text is clear and unambiguous.
			3. **Dissent (Stevens):** There is ambiguity in the text. He looks at the House report, which apparently shows clear intent of the House that 1367 will not override Zahn. He would support narrow interpretation that specifically targets Finley and not Zahn.
			4. **House committee report:** Majority says that it’s from a draft proposal, and that the one comment is in a footnote. But Stevens says its existence introduce ambiguity.
			5. **3 Law professors:** The Court talks about the 3 law professors who participated in drafting 1367, who wrote in a law journal article that one has no choice but to concede that it wipes out Zahn.
				1. Stevens said it was read out of context, and suggests they were referring to an overly broad reading.
		6. **Corning Glass Works v. Brennan (US, 1974, p.193)**
			1. **Facts:** Statute is Equal Pay Act. Women weren’t allowed to work night shifts at P and men were paid incentive wages to work at night. Act says “working conditions” can be a factor affecting pay. But technical definition of working conditions only takes into account surroundings and hazards.
			2. **Question;** Is day work and night work “equal work”?
			3. **Holding (Marhsall):** Time of day is not a relevant criterion in assessing “equal work”. The Court bases this, in part, on testimony by a Corning rep at a prior hearing on evaluation plans.
			4. **Technical vs. Colloquial definition:** Reps, including Corning rep, testified that working conditions had a trade meaning that was more narrow than the general meaning. Since Equal Pay Act has broad significance, do we want to confine it to trade usage?
			5. **Changes in specialized meaning over time:** The most common view is that changes don’t matter, because what’s relevant is what the statute was intended or understood to mean at the time of enactment.
	6. **Canons of Construction**
		1. **Semantic canons**
			1. **McBoyle v. US (US, 1931, p.219)**
				1. **Facts:** Statute applied to motor vehicles, listing some vehicles, and then saying “any other self-propelled vehicle not designed for running on rails.” McBoyle is charged with stealing and transporting an airplane.
				2. **Holding (Holmes):** Airplane is not a vehicle under the statute. While this is a pre-canons case, he’s invoking the canon ejusdem generis, which says that words grouped together should have common characteristics.
				3. **Timing:** Holmes says that airplanes were well-known when this statute was passed, but they were not mentioned in the reports or debates. It’s unlikely that they accidentally forgot it.
				4. **Ejusdem generis:** The string of items are linked by a commonality. How should this commonality be defined – Holmes seems to think it’s vehicles on land. This is a semantic canon.
				5. **Rule of lenity:** Reasonable and fair warning if you want to criminalize something – we don’t have that here. This is a substantive canon.
			2. **Expressio Unius - Silvers v. Sony Pictures (9th Cir., 2005, p.225)**
				1. **Facts:** The statute says that “the legal or beneficial owner of an exclusive right under a copyright is entitled…to institute an action for infringement.” Silvers was granted rights by the owner of the script for the purpose of suing Sony for infringement. The issue is whether only a legal or beneficial owner is entitled to bring suit, or if others can as well.
				2. **Holding:** Majority applies the canon to say that all other people are excluded when Congress explicitly grants power to a certain group. It should be viewed as an exclusion of others. Stick to the text.
				3. **Dissent:** Courts should consult legislative history when text is ambiguous. Under 1909 act, assignees could sue for infringement of their property rights. Under the 1976 act, whose language is in question here, Congress clearly recognized the need to divide copyright uses. The history shows that Congress intended to enlarge the ability to bring suit.

Canons should only be used when Congressional intent cannot be discerned, so you shouldn’t get to canons.

* + - * 1. **Llewellyn** – fore every canon there is a counter-canon. Does the conflict render the approach useless. Does it enable one to pluck the canon that’s most attractive to reach a preferred outcome?
			1. **Noscitur a Sociis - Gustafson v. Alloyd Co. (US, 1995, p.234)**
				1. **Noscitur a Sociis:** When a word is ambiguous, you can look to the rest of the statute for proper usage. This is a form of contextual interpretation.

Designed to avoid giving a word a broad meaning unintended by Congress

Typical case involves a statutory term that can have a broad or narrow meaning; look to the rest of the statute for clues as to which meaning is intended.

* + - * 1. **Facts:** Petitioners want a rescission of a securities purchase on grounds that the financial state of the company was misrepresented prior to the sale. The statute they are trying to use says rescission is available for fraud “by means of a prospectus or oral communication.” Does this apply to the statements made in the written contract that was clearly not a formal prospectus?
				2. **Holding (Kennedy):** The contract was not a prospectus, so suit is not available.

**First**, look at how the term is used elsewhere in the statute, which clearly states it requires elements that the contract doesn’t have.

**Next,** look at definition section which makes clear a prospectus needs to be widely disseminated.

**Third,** look at the redundancy principle – if communication is read broadly, it’s redundant. Court will read to avoid redundant results.

* + - * 1. **Dissent (Thomas):** Start by looking at the language itself.

Don’t look outside the four corners of the statute when it’s not necessary.

There are inconsistent uses of the word prospectus in the act. In the more specific instance, it’s being as a prospectus for an IPOS, which is not the case here.

The Act supplies a definition in 2(10) to be used in the context of the act, and the word communication should be read broadly to encompass the written contract.

Thomas says that the majority’s term would mean that every time a broad term appears in a list with more restrictive terms, the meaning of the broad term would be artificially narrowed. He rejects this approach.

* + - * 1. **Usage elsewhere:** The canon creates a presumption, but it can be overcome b y evidence to the contrary. For instance, usage elsewhere can be overcome by suggesting that usage only applies to a specific instance (like the dissent did with IPOs).
			1. **Ejusdem Generis - People v. Smith (MI, 1975, p.250)**
				1. **Facts:** Statute prohibits carrying a “dagger, dirk, stiletto, or other dangerous weapon except hunting knives.” Defendant is arrested, carrying a large rifle. Trial court and appeals court say he’s within the statute.
				2. **Holding:** Supreme Court of Michigan says the catch-all is only meant to apply to stabbing weapons. Motivation may have ben hand-to-hand combat?
				3. **Application of canon:** Look for commonalities, use a narrow interpretation if you don’t want to be included and a broad interpretation if you want to be more inclusive. Judges must make implicit judgments about which common characteristics of the enumerated terms are relevant.
				4. **Distinction between Ejusdem and Noscitur:** Ejusdem is meant more for determining the meaning of catch-alls that are commonly used at the end of sentences. Noscitur stands for the more general proposition that “a word is given meaning by those around it.” Sometimes they’re conflated.
				5. **When to use canons?** Issue is whether to use canons to determine clear meaning of statute, or to only resort to them if you can’t determine a clear meaning. Here, the court applies the canon without concluding that the statute is ambiguous; in fact it concedes that the term “dangerous weapon” is not ambiguous and would generally include guns.
		1. **Substantive canons**
			1. **NLRB v. Catholic Bishops of Chicago (US, 1979, p.271) (Constitutional avoidance)**
				1. **Canon:** Courts should construe statutes to avoid serious constitutional problems.

**Brandeis in Ashwander:** “If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”

* + - * 1. **Modern v. Classic canons:**

Under modern avoidance, the presence of a serious constitutional *doubt* or *question* about one possible construction of a statute is a sufficient reason to adopt a different construction, so long as the alternative construction is “fairly possible”.

Classical avoidance does not allow the court to avoid deciding the constitutional issue, because the court cannot apply the classical version of the avoidance canon until the court first determines that a given interpretation of the statute would render the statute actually unconstitutional

* + - * 1. **Facts:** Teachers at schools operated by Church who taught secular subjects wanted to unionize.

**Statutory language:** According to National Labor Relations Act, “employee” includes any person acting as an agent of an employer [and some more irrelevant qualifications]. Doesn’t seem to speak directly to the question.

**Constitutional issue:** Worried about 1st amendment issues that would arise from NLRB’s exercise of jurisdiction over religious schools.

* + - * 1. **Holding (Burger):** First determines that there is a constitutional issue here, since serious 1st amendment issues would be raised per the free exercise clause. The Court then finds that there is no affirmative intention of Congress that teachers in Church-operated schools should be covered by the Act.

**Legislative intent:** Burger finds that during Taft-Hartley Act (different act) discussions, consensus was that NLRB’s jurisdiction did not cover nonprofit institutions in general, because they did not affect commerce. A later amendment brought non-profit hospitals under discussion. In another discussion about an amendment, debate showed concern that employees of religious hospital might be forced to join a union contrary to religious beliefs, and provided an alternative.

**Avoidance:** In absence of clear intention of Congress, majority decides to avoid the issue by construing the statute in a reasonable manner.

* + - * 1. **Dissent (Brennan):** Dissenters think the Court’s interpretation is not fairly possible. The plain meaning of the act, the fact that it has 8 explicit exemptions, and legislative history all show that employers is meant to include secular employees at religious school.

Explicit expressions of congressional intent in broad statutes aren’t commonplace, so the majority’s reading isn’t appropriate. Constitutional avoidance should be limited to constructions that are fairly possible and reasonable. Since the Act provides 8 express exceptions, but not religious schools, that should be a definite list. Also, the Hartley bill had a proposal exempting religious schools that was rejected.

* + - * 1. **When can you avoid?** Brennan thinks the canon can only be applied if an interpretation is reasonable or fairly possible – so you can only use avoidance canon to resolve an ambiguity that would exist regardless of the canon. Under Burger’s approach, avoidance canon can be applied whenever the statute lacks clear statement of intent.
				2. **Clear statement rule:** Absence of a clear statement of intent is enough to trigger constitutional avoidance canon.
			1. **US v. Bass (US, 1971, p.327) (Rule of Lenity)**
				1. **Preemption:** General presumption is that a federal law won’t preempt a state law without clear indication.
				2. **Facts:** Defendant is convicted of possessing firearms in violation of Federal statute. Statutory language has an antecedent (“in commerce or affecting commerce”) and question if it modifies only last item in list, or all items.
				3. **Holding (Marshall):** The statute is ambiguous in the critical respect, so should be construed in favor of defendant.

**Plain reading** would suggest that the commerce requirement applies to all three antecedents in the list. It would tamper with federalism, since it involves a huge grant of federal power if it doesn’t apply to all 3.

**Legislative history:** While one Senator’s statements make it clear that he intended the bill to reach all possession, it’s also apparent there’s confusion among senators.

**Rule of lenity:** Having established ambiguity, Marshall invokes the rule of lenity

* + - * 1. **Dissent (Blackmun):** Blackmun thinks you need an extra comma if you want it to apply to all three. He also cites that somewhere else in the statute the same construction is used but it’s clear they’re only referring to the third thing.

**Legislative history:** Cites explanatory comments which broadly state that anyone who has been convicted of a felony should not be able to possess a firearm (doesn’t mention commerce).

**Rule of the last antecedent:** SK says the weight of authority is probably with Blackmun regarding the antecedent. Rule says that clause relates to last antecedent where no contrary intention appears.

**Footnote 3:** In Congress’s findings, they make it somewhat clear that the commerce requirement is meant to reach all possession, because it viewed all possession as a burden on commerce.

* + - * 1. **Rationales for Rule:**

It is reasonable that a fair warning should be given in language that will be understood

Legislatures should define criminal policy, and not leave it to the courts to interpret. This is something of a non-delegation doctrine.

It is an age-old doctrine, and statutes have been written with the rule in mind.

**Tax and Veterans:** Rule of lenity also applies in these situations. What is the motivation? Legislature has the responsibility to write the statutes so the presumption should generally be against it. Arrestees, taxpayers, and veterans are an individual against the government, whereas enterprise doesn’t have the same unequal bargaining power.

* + - * 1. **When to apply**

In Moskal (p.335), Court did not apply rule of lenity despite significant disagreement among Justices. Marshall thought the term (“falsely made”) was clear in light of statute’s purpose.

Scalia thinks the rule has limited use because it “leaves open the crucial question of how much ambiguousness constitutes and ambiguity.”

* + - * 1. **Presumption against retroactivity (p.336):** Presumption that Congress intends to impose new liability only prospectively, unless the statute clearly indicates the contrary.

**Constitutional value:** Recently Court says this reflects constitutional protections including prohibition against Bills of Attainder and the Due Process Clause.

* + - 1. **Spector v. Norwegian Cruise Lines (US, 2005, p.340)**
				1. **Facts:**

Class action against NCL accusing them of not complying with the ADA (Title III) in providing accommodations for people with disabilities.

These people are claiming that various policies and procedures were discriminatory: waive all liability, pay extra fees, not allowed if they would disturb other customers, had to have someone accompanying them.

Title III applies to all public accommodation – this is certainly a public accommodation

The ship is a foreign ship from the Bahamas but it ports and docks in the US, and most passengers are US citizens

5th Circuit says ADA does not apply because of presumption that laws do not apply to foreign-flag ships without clear indication of Congress.

* + - * 1. **Issue:** Does the ADA apply to NCL cruises – foreign flag ships?
				2. **Holding (Kenndy):** Case-by-case application is required under Title III to see if the rule applies to foreign-flag ships. Clear statement rule operates only when a ship’s internal affairs are affected. So no reason to invalidate the entire ADA because some of its provisions implicate internal affairs rule.
				3. **Concurrence (Ginbsburg/Breyer):**
				4. **Partial Dissent (Thomas)**
				5. **Dissent (Scalia)**
				6. **Benz/McCulloch canon:** General statutes do not apply to foreign-flag vessels in United States territory absent a clear indication of congressional intent.
				7. **Three approaches to scope of Benz/McCulloch**

Justice Ginsburg says the Benz/McCulloch clear statement rule only comes into play when an otherwise plausible construction of ambiguous term is likely to cause *actual* international discord.

5th Circuit said that Benz/McCulloch established a broad clear statement rule that general federal statutes don’t apply to foreign-flag vessels.

Justice Kennedy’s plurality opinion charted middle course and emphasized a distinction between matters that affect the interests of the United States and matters that concern foreign affairs.

* + - * 1. **Internal affairs rule:** All things that happen aboard a foreign-flag ship, that do no involve peace or dignity of the country or port, should be left to be dealt with by the local government of the nation to which the ship belongs.
				2. **Charming Betsy canon:** Broad statute shouldn’t be construed to violate an international treaty. You don’t want to create hostilities.
	1. **Executive interpretation**
		1. **Signing statements**
			1. **Constitutional basis**
				1. If a president doesn’t sign, he’s supposed to veto it and send it back to Congress.
				2. Constitution doesn’t say a President can’t comment on a bill while signing
				3. In the past, hostile signing statements have been criticized by Congress as a line item veto
				4. By 1950, more use of this but it’s still rare
			2. **Reagan shift**
				1. Alito memo from OLC calls for use of signing statements in legislative history; added to Federal Register
				2. Alito and his team want President’s views on legislation to be given same (or greater) weight as Congress’s views.

Rationale: President’s approval is an integral part of passing legislation, therefore his understanding of bill should be as important as Committee reports.

Will help President shape the law, and curb “abuse” of legislative history by courts

* + - * 1. Alito memo is part of the “unitary executive” movement during the Reagan administration
				2. Reagan wants his interpretations of bills to affect the executive agencies’ application of the bills
			1. **Evolution since Reagan**
				1. Reagan had 260 signing statements, 86 (34%) of which objected to one or more statutory provisions
				2. George H.W. Bush had 287 signing statements, 47% of which raised constitutional or legal objections

Bush I introduced another tool – he instructed AG to prepare “remedial legislation” which would correct concerns with the bills, submit remedial legislation to Congress

This seems to be a sensible way to do things, good relationship between branches

* + - * 1. Clinton: 381 statements, 18% of which voiced objections
			1. **Nussbuam:** **functions of signing statements**
				1. Explaining bill to the public
				2. Direct subordinate officers in how to interpret and apply the bills
				3. Raise constitutional concerns about the bill in certain applications or on its face.

But if President really thinks it’s unconstitutional, shouldn’t he veto it? The problem is that so much omnibus legislation is being passed, and you don’t want to veto a whole bill

* + - * 1. Using signing statements for legislative history (**more controversial**)

Concerns with adding comments and changing legislative history after Congress has closed it records.

* + - 1. **Bush II era**
				1. Sheer number of signing statements was dramatic escalation as vehicle to further unitary executive
				2. Only 161 statements, but 127 of them (79%) voiced objections
				3. Virtually all of them voiced multiple objections
				4. Bush II also never vetoed any legislation; exclusive device
				5. Other great departure: Bush’s signing statements were very broad and didn’t voice specific remedies
			2. **Obama**
				1. Promised not to use signing statements, and then still used it, but much less than Bush
				2. Also set out principles for when he’ll used them

Executive will take timely steps to inform Congress of constitutional issues

Only voice Constitutional concerns that are “well-founded”

Will only use “legitimate construction” of statutes to avoid constitutional problems

* + - 1. **Practical effect of signing statements**
				1. Regardless of legal effect, president’s interpretation has great practical effect on implementation of the legislation once agencies read it
1. **Administrative Agencies and the Legislative Branch**
	1. **Administrative State and the Delegation Problem**
		1. **Formalism v. Functionalism (p.376)**
			1. **Formalists** tend to view the constitution as drawing relatively sharp demarcations between the powers and responsibilities assigned to the respective branches.
			2. **Functionalists** think of constitution as leaving a lot undecided, and favor a purposive approach to interpreting the constitution. They’re satisfied if a scheme preserves core functions of each branch and balance of power.
		2. **Agencies and the Executive branch**
			1. Crowded legislative agenda means that Congress simply does not have the time to study and address the myriad issues and questions
			2. Legislative process is slow and cumbersome by design, which makes it difficult for Congress to react quickly or update things
			3. Pressures of partisan politics may inhibit sensible, pragmatic application of best solutions to the problem
		3. **Scope of Agencies**
			1. Regulations have the force and effect of law, and there are thousands (4-6k) issues every year
			2. Many of the rules are very ministerial
			3. Only 300-400 are substantively important, and 75 or so are economically significant.
			4. Agency plays the role of all three branches – makes rules, enforces them, and adjudicates
		4. **J.W. Hampton Jr. Co. v. United States (US, 1928, p.384) (Non-delegation doctrine / Intelligible principle)**
			1. **Facts:** Hampton imported barium dioxide, which the customs collector assessed at a rate greater than that fixed by statute. The rate was raised by the collector after proclamation of the President, under a statute that authorized President to do so after comparison with other countries.
			2. **Issue:** Is the statute constitutional in authorizing this delegation to the executive?
			3. **Holding (Taft):** If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.
				1. **Reasoning:** Congress’s intention was to ensure that domestic producers could compete on equal grounds. Congress adopted a plan for executive to carry out. The three branches are coordinate parts of one government, and each may invoke the action of the others if it doesn’t violate constitution. Since so many rates need to be fixed under Congress’s tariff power, no problem with Congress establishing a commission to do this.
			4. **Relevance:** Remains the governing doctrinal formulation for distinguishing legitimate from illegitimate delegations.
		5. **Non-delegation doctrine**
			1. **Reasons**
				1. **Separation of powers:** Inherent consequence of constitution’s general commitments to separation of legislature and executive.
				2. **Article I vesting clause:** All legislative powers herein granted shall be vested in a Congress of the United States
				3. **Bicameralism and presentment:** Prevents bad laws by making to more difficult to pass any law; promotes deliberation and protects minority interests.
		6. **Whitman v. American Trucking Ass’n, Inc. (US, 2001, p.410)**
			1. **Facts:** Trucking companies are suing the EPA and questioning the constitutionality of setting pollution regulations for the trucking industry. The DC Circuit has said that the statute did not provide an “intelligible principle”. Language said that regulations need to be “requisite” to protect the public health.
			2. **Holding (Scalia)**: Requisite means “sufficient, but not more than necessary”, and this forms a reasonable principle. The scope of discretion this allows is within the Court’s non-delegation principles.
				1. **Limits:** The court has only rejected two statutes on non-delegation grounds. *Panama* provided no guidance for the exercise of discretion, and *Schecter* conferred authority to regulate the entire economy on the basis of assuring fair competition.
			3. **Concurrence (Thomas):** This is in line with precedent of the Court – but he’d be open to overturning the non-delegation doctrine in a different situation, and looks forward to the opportunity. He says the Constitution doesn’t speak of intelligible principles.
			4. **Concurrence (Stevens):** The executive is doing legislative, and we shouldn’t deny that, but as long as there’s an intelligible principle for the delegation it’s Constitutional. The vesting clause vests power to the legislature, but doesn’t forbid delegation (i.e. reassignment) of legislative duties.
				1. This is in contrast with Scalia’s view, which holds that the EPA is not exercising legislative power (even though they’re issuing legislative rules)
		7. **Industrial Union Department, AFL-CIO v. American Petroleum Institute (US, 1980, p.418) (Benzene case)**
			1. **Facts:**
				1. **Statutes:** OSHA of 1970 permits Sec. of Labor to set standards for toxic substances in the workplace “which adequately ensures, to the extent feasible…that no employee will suffer material impairment of health.” They are tasked with creating a standard that is “reasonably necessary or appropriate to provide safe or healthful employment.”
				2. **Benzene**is a colorless liquid used in manufacturing. Original draft standard was 10ppm., but before publishing rule it decided to reduce to 1ppm. This was because it determined Benzene was a carcinogen, so no level was safe.
			2. **Holding (Stevens):** Looks to general provision (3.8) which looks for conditions reasonably necessary or appropriate to remedy a significant risk of material health impairment. He reads this to mean that a finding requires there be a reduction of significant risk, since “safety” does not mean absolutely no risk. He finds evidence insufficient to show that the reduction further reduces significant risks of harm. A workplace is not unsafe unless it threatens employees with significant risk of harm.
			3. **Concurrence (Powell):** Feasible and “reasonably necessary” includes economic considerations – he would do a cost/benefit analysis to determine if it’s feasible.
			4. **Concurrence (Rehnquist):** He thinks “adequately ensures, to extent feasible” language is unconstitutional on the basis of non-delegation. He thinks:
				1. It’s too important a choice to not be made by Congress
				2. No intelligible principle, since Secretary has little guidance
				3. Courts not able to make a determination if the Secretary abused his discretion or not, because standard of “feasibility” is too vague
			5. **Dissent (Marshall):** Goes to dictionary and says synonym for feasible is possible. Given plain meaning, and the fact that no safe level of Benzene could be shown, it could not be plainer that the Secretary’s decision was in accord with statutory mandate.
				1. “Reasonably necessary or appropriate” clauses are routinely inserted in regulations…[as] general provisos that regulatory actions must bear a reasonable relation to those statutory purposes set forth in the statute’s substantive provisions.
			6. **Nondelegation avoidance doctrine?:** The plurality seems worried that this delegates too much power, so reads in the reduction of significant risk as a requirement. Most think that plurality essentially rewrote the statute.
			7. **Constitutional avoidance:** Is it possible that the plurality is reading narrowly to avoid a constitutional issue – that being impermissibly broad delegation of legislative power?
			8. **Narrow reading:** This case is an example of how courts may invoke nondelegation principles to interpret statutory delegations narrowly.
			9. **Kent v. Dulles (US, 1958, p.436):** Statutory provision granted Sec. of State the exclusive authority to grant and issue passports. They then prohibited issuance of passports to Communist Party. Court invalidated on statutory grounds – reads statute narrowly to avoid the Constitutional question.
			10. **Mistretta v. United States (US, 1989, p.440):** Nondelegation challenge to congressional delegation of binding sentencing guidelines to a commission. Majority upheld the delegation under intelligible principle test. Scalia, dissenting, said it amounted to delegation of naked legislative power.
	2. **Congressional Control of Agencies**
		1. **INS v. Chadha (US, 1983, p.443) (Legislative veto)**
			1. **Facts:** INS issued deportation order for Chadha after student visa expired. Attorney General used his statutory discretion to suspend deportation for extreme hardship. Congress overturned this suspension of the deportation, and Chadha was ordered deported. Congress had written into their statute a process whereby they could veto AG’s decisions. Court notes that legislative vetoes are appearing in legislation with increasing frequency.
				1. **Why was veto exercised?** SK thinks that Congress may have objected to the whole category (extreme hardship) that they were pardoned under.
				2. **Proc. Posture:** Ninth Circuit said the legislative veto procedure was unconstitutional.
			2. **Holding (Burger):** Legislative vetoes are not permissible. Constitutional structure, including separation of power, must be respected because it involves “hard choices consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”
				1. **Presentment:** Under Constitution, we must have presentment of Congressional action, which isn’t the case here
				2. **Bicameralism:** We also don’t have bicameralism since this is House of Reps only
				3. **Legislative in effect:** Since the veto altered rights, duties, and relations, including those of AG, it’s legislative activity and is subject to constitutional requirments
				4. **One-house duties:** Constitution enumerates exceptions to bicameralism, which we don’t have here. These include power to initiate impeachements (House) and power to conduct trials following impeachment (Senate).
			3. **Concurrence (Powell):** Powell isn’t ready to invalidate all uses of legislative veto. He agrees with the judgment here because there were no internal constraints on Congress’s power. “Its action raises the very danger the Framers sought to avoid”
			4. **Dissent (White):** He thinks since Congress has power in the first place, it can reserve some and it’s fine. He’s afraid of the consequences, and thinks it will reduce amount of delegation. He notes that the legislative veto is not a power to write new law, and must be authorized with a statute that goes through bicameralism and presentment.
				1. **Madison 37:** White is not a formalist; Madison said that you can’t expect a document to answer all questions for all times, and thinks issues will be worked out through practical machinations as government continues to carry out powers
			5. **Private bill system:** This system was rampant before delegation. Individaul members of Congress would vote on things like immigration status.
			6. **Norm against self-delegation:** Locke and Blackburn – too great a power to both legislate and execute in the same branch
			7. **Legislative veto growth:** The existence of legislative veto provisions was encouraging Congress to enact statutes that delegated broad power to agencies subject to few if any limits on agency discretion.
			8. **Applicability:** Chadha clearly says one-house vetoes are unconstitutional, but Congress still slips them in all the time. These are sometimes addressed in signing statements.
		2. **REINS Act**
			1. Major rules now would have to be affirmatively approved before they can take effect, non-major rules would be treated same as before
			2. Debate is limited to 2 hours. With 50-75 major rules per year, that’s 150 hours in the Senate. The Senate and House would not have time for this
			3. Supported by Tea Party members and other conservatives; interesting since the Bush Administration was so much in favor of a more powerful executive, and this would shift lots of power to the legislature
			4. It’s practical effect would be to shut down rulemaking – even rules that benefit public safety and are necessary
		3. **Katzen Testimony I**
			1. She argued that net benefits exceed costs of regulations, drawing from OMB report
			2. There still exist regulations where cost exceeds benefits
				1. Certain interest groups need protection
				2. Large companies might support enacting barriers to have entry that will have more impact on newcomers than established businesses
				3. Sometimes statute requires it and the agency has to follow
			3. Constitutional objections
				1. Similar to INS v. Chadha since it’s the same in effect as reserving a legislative veto. One house can refuse to pass the rule and thus void it.
				2. Per Morrison, it upsets the separation of powers by assigning a traditionally executive function (at least since the new deal) to the legislature
		4. **Bowsher v. Synar (US, 1986, p.461)**
			1. **Stands for:** Congress can’t create an executive functionary in the legislative branch
			2. **Facts:**
				1. Gramm-Rudman-Hollings Act is passed in Congress; it sets a maximum deficit and requires cuts if deficit is exceeded.
				2. Once deficit exceeded, Comptroller General, an agent of the legislature (but relatively independent) has to decide on cuts for different parts of government to reduce the deficit to acceptable levels
				3. The act allows for the removal of the Comptroller General by a joint resolution of Congress (has to be signed by President)
			3. **Issue:** Do the provisions of the act, allowing for the Comptroller General to execute the laws, and be removed by Congress, violate separation of powers?
			4. **Holding (Burger):** Yes, they violate separation of power. Comptroller General is an Executive functionary, and Congress cannot reserve for itself the power of an officer charged with the execution of the laws except by impeachment.
				1. **Which branch?** Appellants urge Comptroller General is independent. Burger says that since he’s removable only by Congress (President can’t remove him), then he’s acting on behalf of Congress. President appoints CG with advice and consent of Senate. But Burger is focused on removal power.
				2. **Framers’ view:** They were particularly concerned that the legislature would take over Executive functions
			5. **Concurrence (Stevens):** He thinks it’s a legislative action, so it needs to go through bicameralism and presentment. Congress cannot “authorize a lesser representative of the Legislative Branch to act on its behalf). Here, the Comptroller General’s report will have a huge impact on the government. Congress should deal with this itself OR trust the agencies, and not try to sidestep the constitutional limits.
			6. **Dissent (White):** Echoing dissent in Chadha, he thinks the act is useful and necessary to curb the deficit issue. He rejects the Court’s formalism in its approach to separation of powers.
				1. **Democratic issue?:** White is concerned that Congress was trying to tackle something difficult, did so with enormous attention and national acceptance, and the solution was rejected (for no good reason). This did go through bicameralism and presentment.
				2. **Interference with Executive powers:** White says that restrictions on Executive removal power are fine if they don’t prevent Executive Branch from accomplishing its constitutionally assigned function.
		5. **Congress’s informal control over agencies**
			1. **Appropriations:** Power of the purse gives Congress three important sources of influence over agencies
				1. Congress can attach substantive riders to appropriations bills
				2. Members with influence over agency’s budget can threaten retaliation if an agency antagonizes members of Congress
				3. Congress can control how much funding an agency gets. If Congress thinks agencies are enforcing too aggressively, it can cut back their budgets

This is a blunt instrument – can’t control how the cuts will impact an agency.

Some argue that drastically underfunded bills should be treated as quasi-repealed by Congress

* + - 1. **Hearings, Investigations, Audits, and other oversight**
				1. When called up, agency has to prepare written testimony, which takes time and resources from normal business
				2. Individual members can send agencies letters, requesting response (e.g. weekly reports on milestones). Dingel was famous for Dingelgrams
				3. Congress can introduce a bill, like joint resolution of disapproval, under CRA
1. **Presidential Controls on Agencies**
	1. **Appointments and Removal of Agency Officials**
		1. **Constitutional background**
			1. **Article II, Section 2:** President shall appoint enumerated officers with advice and consent of Senate. Congress can vest appoint power of inferior officers as they think proper in the President, Heads of Departments, or Courts of Law.
			2. **Current state:** PAS = President Appointment Senate Confirmed. Over 1000 people have to be confirmed by the Senate – has resulted in substantial backlog and political hold-ups, positions not being filled
		2. **Removal test**
			1. **First ask if it’s an inferior or principal officer**
				1. **(Edmonds) –** Are they subject to supervision by a higher-ranking executive branch official? 4-part test under Morrison (Limited jurisdiction, Limited time period, Interference with
				2. If inferior, Congress can insulate from presidential removal so long as it doesn’t interfere with ability to “take care” under 3 factors from Morrision:

Look at type of function: related to core aspects of President’s authority?

Look at degree of authority: Limited jurisdiction and tenure?

Does the restriction impermissibly burden President’ power to control and supervise? Can some other executive official remove? Removal for cause?

* + - * 1. If a principal officer, do they have purely executive functions?

If yes, then removal power can’t be restricted (Myers)

If no, quasi-judicial or quasi-legislative function, then Congress may restrict removal but only if doing so does not impair the president’s ability to take care (see above for Morrison factors)

* + 1. **Buckley v. Valeo (1976, p.478) (did not read):** Concerns appointees to FEC, which had party restrictions (split between parties) and bicameral confirmation. Court said this wasn’t a constitutional procedure, and affirm that Constitution contains the exclusive method for appointments. They also distinguished officers from employees.
			1. **Officers v. Employees:** Any appointee exercising significant authority pursuant to the laws of the United States is an Officer.
		2. **Myers v. United States (US, 1926, p.487):**
			1. **Stands for:** Can’t restrict President’s ability to remove Executive officers
			2. **Current rule:** Congress cannot restrict the President’s power to remove an Officer or inferior Officer unless Congress has good reasons for doing so and the restrictions leave the President with enough authority to exercise the take-care power.
			3. **Facts:** Postmaster in Oregon is appointed by President, approved by Senate. The statute he’s appointed under requires Senate approval for removal as well. His resignation is demanded, and when he refuses he is removed by the President acting alone (Senate does not consent). Myers sues for his salary from the date of his removal.
				1. **History:** During the First Congress, they apparently removed a clause about Presidential removal power for Secretary of Foreign Affairs because it was thought to be inherent in the Constitution.
			4. **Holding (Taft):** Provision of the law requiring Senate approval for removal is constitutionally invalid. President cannot do his job alone, and must be responsible for his helpers. If he cannot remove them, then he can’t perform his executive functions.
				1. As expressed by Madison, the power of removal is incident to the power of appointment. The Senate has full power to reject newly proposed appointees whenever President removes incumbents, so it retains some control.
			5. **Dissent (Holmes):** The 1800 Office of Tenure Act was passed with bicameralism and presentment, so it should be seen as law. Since Congress can abolish the office, he sees no reason why they can’t reserve some removal controls
			6. **Dissent (McReynolds):** Congress created the position, and they fund it, so they should be able to retain involvement in removal.
				1. Not so convincing. First, to defund it they’d need to go through bicameralism and presentment. Second, Congress can’t delegate power to itself. SK thinks this argument proves too much.
			7. **Dissent (Brandeis):** Doesn’t find that take care clause grants President uncontrollable power of removal. “A power implied on the ground that it is inherent in the executive must…be limited to the least possible power adequate to the end proposed.” Can’t make up inherent powers. Checks and balances are good.
		3. **Humphrey’s Executor v. United States (US, 1935, p.508)**
			1. **Stands for:** Congress can limit the President’s power to remove an Officer or inferior Officer by requiring the President to state a cause for removal if Congress can give good reasons for imposing such a limit and if the limit does not interfere with the President’s ability to take-care.
			2. **Facts:**
				1. Background: Appointed by Hoover and Roosevelt wanted to fire him. Under FTC Act, President could only remove for good cause (inefficiency, malfeasance, etc).
				2. IRCs: FTC is an Independent Regulatory Commission. They are always multi-headed, odd-numbered. Good cause removal thought to provide some kind of restriction on President’s removal power to retain independence. Requirement that no more than 50%+1 are of the same party.
			3. **Holding (Sutherland):** Restriction on removal is within Congress’s powers. Myers only applies to purely executive officers, not independent agencies like the FTC. Furthermore, the coercive influence of removal power threatens the independence of the agency.
				1. **Quasi-judicial and quasi-legislative functions**

In making investigations and reports thereon for the information of Congress, it acts as a legislative agency

It acts as a judiciary under rules prescribed

* + - 1. **Congressional involvement:** Myers limited removal by involving the Senate; the limit in Humphrey’s is just good cause. Is this why the Court draws the distinction, because there’s no Congressional encroachment concern?
			2. **IRC Control:** On one view, the IRCs aren’t so much independent of political control as they’re independent of the President’s control. Scalia argues that “their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”
		1. **Morrison v. Olson (US, 1988, p.523)**
			1. **Facts:**
				1. Statute (Ethics in Government Act) allows special court to appoint Independent Counsel to prosecute certain high-ranking government officials after AG submits a report.
				2. Independent counsel can only be removed by AG and only for good cause; seeks to insulate counsel from President since investigating their high-ranking officials. There’s also some Congressional oversight.
				3. Olsen, Assistant AG for OLC, testified before House committee about documents, and there were suggestions he had given false or misleading testimony. Morrison was appointed Independent Counsel.
			2. **Holding (Rehnquist)**
				1. **4-part test:** Independent Counsel is an inferior officer (rather than principal officer). (1) Subject to removal by a higher Executive Branch official (AG in this case); (2) empowered by Act only to do certain limited duties; (3) office is limited in jurisdiction, granted by court pursuant to AG’s request; (4) Limited in tenure, which ends when the case ends
				2. Does Congress interfere with the President’s exercise of executive power? No, the President retains ample control because the AG can remove for good cause.
				3. Does it violate separation of powers? No, it doesn’t pose a danger of congressional usurpation of Executive branch functions (unlike Chadha). The Act gives the Executive a degree of control over the power to initiate an investigation by the independent counsel.
				4. Main factors in decision

Conflict of interest concerns provided a good reason for Congress to insulate the independent counsel from presidential control

The independent counsel has no policymaking power

The independent counsel is required to comply with the policies of the Department of Justice

The independent counsel can be removed by the AG for cause

* + - 1. **Dissent (Scalia):** Independent counsel is the essence of executive function, and President must retain removal power.Rejects majority’s test for identifying inferior officer, thinks it doesn’t set a rule. He thinks that all of the Executive power should be vested in the President. Some control, through Attorney General, is not enough. Limiting removal power to good cause is an impediment to Presidential control.
				1. “If the removal of a prosecutor, the virtual embodiment [of the take-care clause] can be restricted, what officer’s removal cannot.”
			2. **Edmond v. United States (1997, p.541):** Turns 4-part test into 1-part test: Is the officer subject to supervision by a higher-ranking executive branch official?
			3. **Humphrey/Myers?:** Morrison seems to reject both Myers’ position that executive officers are subject to the President’s illimitable removal power, and Humphrey’s position that Congress can restrict president’s removal power for agency officials that perform quasi-leg or quasi-jud functions.
			4. **Does a removal restriction “unduly trammel” on exec authority?**
				1. Look at type of function: Quasi-roles are no longer dispositive, but Morrison indicated that they have some impact, in that President would be more likely to have full removal powers over officers performing functions related to core aspects of the President’s executive authority
				2. Look at degree of authority: Limited jurisdiction and tenure?
				3. Is there congressional self-aggrandizement?
				4. Does the restriction impermissibly burden President’ power to control and supervise? Here the Court thought the controls were sufficient – AG was able to remove for cause.
		1. **Funcitonalist approach:** Unlike Chadha, Bowsher, and Valeo, this is a functionalist test which sets a standard and looks at the goals of Constitutional structure
	1. **Other Executive control of agencies**
		1. **Role of Centralized Review**
			1. **RARG** was created under Carter. It just gave advice to agencies
			2. With Reagan, OIRA was created to review all regulations. As a result, agencies had to do economic analysis to maximize social benefits before promulgating regulations.
				1. Reagan was elected on anti-regulatory platform
			3. When Clinton took office, decided to keep centralized regulatory review but rewrote at EO 12886.
			4. **Advantages**
				1. Coordination between the agencies (eliminates inconsistencies)

Problems are not one-dimensional

No issue has limited effects such that each agency can understand all possible implications

OIRA sends out drafts to other agencies and presides over those meetings

* + - * 1. Systematic review is better because it will get less headlines
				2. More political accountability
				3. Counterpoint to “lack of expertise” argument is that if the presentation from the agency is transparent, OIRA officials can look at the assumptions and ask questions.
			1. **Disadvantages**
				1. OIRA does not have the specialized expertise to review these regulations
				2. Diffusion of executive power
				3. Analysis is cost-free, need to pay money for reviewing these regulations
				4. Frustrates congressional mandate – power delegated by statutes should be sufficient to control agency action
				5. Secrecy – lack of transparency during Reagan Administration
				6. Why would public participate and provide comments if the power ultimately rests with OIRA?
				7. Costs are easy to monetize, but benefits are very difficult to monetize
			2. **Centralized review under Clinton**
				1. Only looked at significant regulations ($100 million or more, inconsistencies between agencies, novel legal issues, having a large effect on the budget)
				2. Regulatory philosophy

Primacy of the regulatory agencies in the regulatory decision-making process

Emphasize the discretion that is delegated to the agencies by Congress

Respectful of the agencies even if there is centralized review

* + - 1. **IRCs:** Planning mechanism does not extend to IRCs
				1. Loss of perception of impartiality if you tie them to OIRA
				2. However, quality of decision-making is at stake. Why not have a little extra oversight?
				3. Under 12866, IRCs are required to submit an annual Regulatory Plan
			2. **OIRA Prompt letters**
				1. OIRA sometimes issues these letters encouraging agencies to take regulatory action to deal with some perceived problem.
		1. **Presidential directives**
			1. Apart from ORIA, President will sometimes issue directives to specific agencies. Sometimes they instruct an agency to stop a rulemaking process
			2. They became Clinton’s primary means of setting administrative agenda
			3. **Memorandum on Clean Water Protection (1999):** Directs Park Service and EPA to take actions to strengthen water quality protections and standards.
			4. **Sierra Club v. Costle (DC Cir., 1981, p.574)** confirms President’s right to send these letters, because the Constitution vests executive duties exclusively in the President. Even if they’re not legal, does it matter? Agencies feel pressure and are faced with removal threats. Legal status might affect political threat, though.
1. **Administrative Agency Procedures**
	1. **The Regulatory Process, the APA, and Forms of Agency Action**
		1. **The APA**
			1. **Goals of Proceduralization**
				1. Improve quality of agency decisions by ensuring agency properly considers all relevant information, and that affected parties have a sufficient opportunity to state their views, present evidence, and make reasoned arguments to the agency
				2. Guard against the capture of agencies by interest groups
				3. Ensure that the right people within the agency have the greatest influence over the final decision
			2. **Disadvantages**
				1. Even well-designed procedures can impose significant costs on agencies, which leads to “ossification” and resistance to change
				2. Procedures may end up disempowering the agency’s technical experts and empowering the lawyers, who better understand how to navigate the procedures.
			3. **The Act**
				1. **Enacted in 1946**, and considered a “quasi-constitutional” statute
				2. Framework statute, laying out basic structure and procedures, and subjecting them to legal and political controls
				3. **Not the exclusive source of procedural law for agencies.** The Constitution, other statutory law, and an agency’s own regulations may impose procedural restraints

**Sec. 559** says that APA’s provisions don’t “limit or repeal additional requirements imposed by statute or otherwise recognized by law.”

* + - 1. **Rules** concern future actions
				1. “An agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”
				2. **Formal rulemakings** are governed by 556 and 557

**Are required** **when** the agency rule in question “is required by statute to e made on the record after an opportunity for an agency hearing.” These are the magic words

Adversarial hearing at which the agency carries the burden of proof on contested issues.

ALJs preside

Interested parties are entitled to participate in the hearing and present evidence, oral testimony, and cross-examination

* + - * 1. **Informal rulemakings** are governed by 553

First, an agency must give “notice of proposed rulemaking”

Second, agency must provide opportunity to comment

Third, if it decides to publish a rule it must publish an explanation including basis and purpose

553 requires no requirement that a final rule be based on any record compiled during proceedings

* + - 1. **Orders** concern past action
				1. **Formal adjudications** are governed by 556 and 557, as well as 554

Trial-like adversarial hearings where an agency is usually seeking to impose some sort of penalty

* + - * 1. **Informal adjudications** aren’t covered by APA
		1. **United States v. Florida East Coast Railway (US, 1973, p.588)**
			1. **Stands for:** Formal rulemaking is now exceedingly rare.
			2. **Facts**
				1. **Background:** Congress passed Interstate Commerce Act to enlarge Interstate Commerce Commission’s authority to prescribe per diem charges to alleviate chronic freight car shortage. After analysis and conference, Commission announced tentative decision to adopt incentive per diem charges and put forth proposed rule. It asked for comments within 60 days, including requests for oral hearings. ICC originally thought this was formal rulemaking, but switched after they were pressured to move faster. District Court said the Commission violated 556 (formal rulemaking) by refusing oral arguments, and set aside Commission’s order.
				2. **Holding (Rehnquist):** An informal rulemaking is sufficient. “After hearing” was not a requirement that the ICC allow oral arguments, and hearing requirement had been met by written comment period. Since this applies to all common carriers across the board, and no particular railroad is being singled out for special treatment, this is an informal rulemaking and not an adjudication.

Points to APA 553, which says that agency is exempted from formal rulemaking “when the agency finds for good cause…that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest” and reads this to mean the trigger language is necessary.

* + - * 1. **Dissent (Douglas):** He thinks it violates due process to impose new rates without right to present oral testimony, cross-examine witnesses, and present oral argument. He distinguishes Allegheny by saying these rules involve the creation of a new financial liability.
				2. **United States v. Allegheny-Ludlum Steel Corp.:** In prior case, Court decided that the ICC “after hearing” language was not the equivalent of magic-word language that a rule had to be made “on the record after opportunity for an agency hearing” which would trigger formal rulemaking. Although there was an amendment between cases, hearing requirement was not modified
			1. **Londoner:** City wanted to tax people abutting a road to build that road. Hearing was required because people were exceptionally affected
			2. **Bi-metallic:** No hearing was required because it impacted all residents of Denver.
			3. **Attorney General’s manual:** Says that ICC hearings need to be formal rulemakings
			4. **Reading APA broadly:** In Jackson concurrence in Wong Yang Sung v. McGrath (1950, p.600), Jackson said that the APA is quasi-constitutional and effect should be given to remedial purposes where the evils it was aimed at appear.
	1. **Notice and Comment Rulemaking**
		1. **Why NCRM?**
			1. **Fairness**: Informs regulated entities that something might be coming
			2. **Educates the agency**: Comment improves outcome, saves agency cost by getting information from entities. Industry might come u with a better way of doing something, and propose new solution to the agency
			3. **Buy-in:** Results from feeling of participation. It leads to appreciation of the trade-offs the agency has made.
		2. **United States v. Nova Scotia (2nd Cir., 1977, p.605)**
			1. **Stands for:** Courts can impose requirements beyond the basic requirements of the APA.
			2. **Facts:** Regulations require fish to reach 180 degrees for 30 mins at certain salinity level. This ruins the whitefish. FDA issued a proposal for control of botulism, and whitefish maker submitted comments stating that it would make smoked whitefish production impossible. The commissioner issued final regulations which included improvements based on some comments, but the whitefish comment was ignored without explanation.
				1. **APA:** At the beginning of the process, APA 553 requires that the agency provide advance notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”
				2. At the end, they’re required to provide a “concise general statement of the rule’s basis and purpose” if they choose to promulgate a rule
			3. **Issue:** Was the process of notice and comment properly conducted? Is the basis and purpose statement adequate in addressing concerns and explaining agency’s position.
			4. **Holding (Gurfein):** Regulation voided as applied to smoked whitefish.
				1. The agency didn’t meet its burden (in notice) of making available the information it used to determine temperature and salinity levels
				2. There is a clear error standard under which the reviewing court will consider whether the agency has taken account of all “relevant factors and whether there has been a clear error of judgment”
				3. Concise reason and basis statement should “enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” This standard was not met.

In particular, comment that the regulation would destroy the commercial product was not adequately addressed. He did say that fish-specific regulations had not been demonstrated.

* + - * 1. US had argued that notice only required legal reasoning through expressio unius, since legal reasoning was explicitly required but not factual. Court doesn’t buy this, because it looks at the requirements of the comment period which clearly require the factual information to be commented on.
			1. **Portland Cement v. Ruckelshaus (DC Cir., 1973, p.611):** “It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on that [in] critical degree, is known only to the agency.” Need to make data public if you’re relying on it.
			2. **Basis and Purpose statement:**
				1. What needs to be in it? McGowan in Automotive Parts said “concise general statement of basis and purpose mandated by Section 4 will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”
				2. How thorough does the response need to be? Here, there was a terse and general response (that species-specific levels weren’t demonstrated). No general rule here.
			3. **Evolution of Basis and Purpose requirements**
				1. The APA only requires that agency provide a concise and general statement with the rule.
				2. Courts have expanded this by making a connection between the procedural requirements for informal rulemaking in 553 and the APA’s general judicial review provision in 706(2)(a).
				3. Since Court’s need to review an agency’s decision according to arbitrary and capricious standard, it needs a sense of how the decision was reached; thus the APA requires this level of detail.
				4. Alternative reading: This might just meant that Courts have misinterpreted their obligations under 706; maybe it’s a lot more basic and 553 doesn’t need to be expanded.
		1. **Supplemental notice**
			1. **Data or Studies generated during or after comment period**
				1. No consensus on this; SC has not addressed the issue and courts of appeal are split.
				2. Old Scalia (DC Cir) court opinion says that there’s no obligation to provide an opportunity to comment if the studies “did not provide entirely new information” but merely “expanded on and confirmed” the conclusions of earlier studies.
				3. Several other opinions have held that agency may generate additional data using disclosed methodology even if results aren’t made public until after close of comment period.
				4. **Rybachek v. EPA (p.619):** EPA proposed certain regulations under the Clean Water Act that affected Alaskan mining operations. EPA relied on the comments, which presented new info, but didn’t provide opportunity to comment on those. 9th Cir. said it was fine because you can’t get into never-ending circle.

**Exceptions:** In **Ober**, the information was relied on and critical to the EPA’s decision, so additional comment period should have been given.

* + - 1. **Chocolate Manufacturers Association v. Block (4th Cir., 1985, p.627)**
				1. **Logical Outgrowth test:** The agency does not have to initiate a new round of notice and comment if the final rule is the “logical outgrowth” of the proposed rule and is “in character with the original scheme.”

The key question is whether a new round of notice and comment is important to serve the policies underlying the notice requirement – in particular, the principle that “affected parties….should receive a fair opportunity to participate.

Another formulation: “sufficiently foreshadowed”

This test has been turned from sword to shield. Agencies would often respond to OIRA suggestions of changes by saying that proposed change would not be a logical outgrowth and would require agencies to do a second notice.

* + - * 1. **Concerns about supplemental periods**

May make agencies reluctant to modify proposed rules in response to comments

Agencies might also respond by making their initial rulemakings broader and more general.

* + - * 1. **Can others’ comments provide adequate notice**

Comments are part of public rulemaking docket.

There is no guarantee that a party will see the comments. The DC Circuit has asserted that parties “cannot be expected to monitor all other comments submitted to an agency.”

However, it’s reasonable to assume that sophisticated parties will have a sense of what other significant comments will be submitted, and which will be taken seriously by the agency?

* + 1. **Vermont Yankee Nuclear Power Co. v. NRDC (US, 1978, p.740) – Judicial Review of Administrative Procedures.**
			1. **Assignment: pp.739-56**
			2. **Stands for:** Courts should not impose procedures on top of what APA requires, besides the requirements which courts have already imposed. Also, rejection of Bazelon’s idea that a reviewing court should focus on the adequacy of procedure.
			3. **Facts**
				1. Case arose because of enormous pressure placed on 553 in the face of high profile and costly public health, safety, and environmental regulations. It followed a decade of bickering between Bazelon and Leventhal on the DC Circuit.

Vermont Yankee wanted to construct and operate a nuclear power plant and needed permits in order to do so. Building permit was granted after adjudication. Operating permit granted after adjudication, but NRDC claims their evidence was withheld.

Rulemaking proceedings began as to environmental effects. Question is whether they can be measured quantitatively.

Why a rulemaking? Lots of nuclear power plants were being proposed at the time and there was interest in resolving efficiently, not case-by-case.

What did the Atomic Energy Commission provide in terms of process?

Notice (of two options)

Opportunity for comment

Hearing, with supplemental comment afterwards

**Did not provide**

Discovery and cross-examination

NRDC might want this to stall the agency

DC Circuit agrees with NRDC and remands to agency for cross-examination and discovery

* + - 1. **Holding (Rehnquist):** Agency determination was proper and should stand. The statutory minimum in the APA is fine, and it’s up to the agencies whether they want to use more process (with a few exceptions). The APA doesn’t even require the agency to hold a formal hearing for an informal rulemaking. AEC has already gone above and beyond the APA requirements, and the Court can’t say that’s procedurally inadequate.
				1. **Monday-morning quarterbacking:** Court criticizes DC Circuit for reviewing the agency’s choice of procedures on the basis of the record actually produced, and not on the basis of the information available to the agency when it made the decision to structure the proceedings in a certain way.
			2. **Nova Scotia is still good law.** There must be disclosure of material information because it’s read from APA review requirements. So while courts can’t impose specific procedures on agencies after Vermont Yankee, if they can draw something from the text they can use Nova Scotia for support.
			3. **Quasi-judicial exception:** In quasi-judicial cases, procedure is required that would afford due process. This is Florida East Coast discussion (Londoner example)
			4. **Applies to all of APA, not just informal rulemaking:** In Pension Benefit Guaranty Corp. v. LTV Corp. (1990, p.754), LTV argued that an informal adjudication lacked adequate procedural safeguards. Court sided with the agency, and said that the agency’s reasoning was sufficiently explained per Overton Park and met arbitrary and capricious standard.
			5. **Agencies and Congress can still add additional procedures**
		1. **Regulatory Accountability Act, Katzen Testimony**
			1. **HR 3010** (passed by all Republicans and a few Democrats)
				1. Advance Notice of Proposed rulemaking

Agency must provide information on which it’s relying (codifies Portland Cement)

Give 60 days (before NPRM) for comment

Probably will add 6 months to 1 year for rulemaking

* + - * 1. Notice of Proposed Rulemaking

Changes NPRM to a much more elaborate form than what is currently required

For all rules, agency must consult with OIRA (SK thinks this wouldn’t pass Senate and would be vetoed if it did)

Cost-benefit analysis (was decisional criterion in Executive Order, this would codify it as law). However this doesn’t incorporate the fact that some costs and benefits are difficult to quantify.

* + - * 1. Agency hearings

All major rules would require formal hearings.

* + - 1. **SK Response**
				1. Would add 6-10 years to rulemaking process
				2. Addition of 556/557 hearing requirement to informal rulemaking process (p.17).
				3. Has a strongly judicial bent – “Evidence”
				4. Will efforts to deregulate get mired in 3010?
				5. Agencies will bear the costs of the new procedure, plus OIRA is already understaffed
				6. Agencies would just have to move to adjudication
	1. **Adjudication**
		1. **Introduction**
			1. **Can agencies make new rules in the context of adjudications?**
		2. **SEC v. Chenery Corp. I**
			1. **Background**
				1. Congress passed statute to reorganize public utilities after depression. Utilities had to submit reorganization plans to the SEC; administrative adjudication to determine if a plan was adequate
				2. Federal Water Service Corp. (owned by Chenery) submitted a plan. SEC said it needed to be modified to distribute shareholder power. Chenery submitted another plan that converted preferred shares to common, which was accepted by SEC.
				3. Chenery then bought enough common shares to retain control (contravening SEC’s purpose). SEC refused to approve the reorganization plan if the shares bought by Chenery were given the same voting rights as other converted preferred shares.
				4. In Chenery I, Court says that the SEC’s legal reasoning is inadequate and rejects the adjudication results.
				5. Chenery reapplies, and SEC rejects the plan again, saying it’s in violation of the statute’s requirements:

Detrimental to public interest; unfair or inequitable distribution of voting power

Conflict of interest because holding company management obtains special powers; may introduce conflicts between the management’s normal interests and its responsibilities to the various classes of stockholders it represents.

* + - * 1. **Chenery I case:** SEC said its decision was based on a judge-made rule that fiduciaries of a corporation have a “duty of fair dealing” not to trade in the corporation’s securities while a reorganization plan is pending. Court (Frankfurter) rejects position that any such duty had been recognized by the courts. It also rejects agency’s alternative explanation, because the SEC’s order rejecting the plan had relied *only* on the assertion of a judge-made rule.

**Chenery I rule:** 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.

* + 1. **Chenery II (US, 1947, p.646)**
			1. **Background:** After Chenery I, SEC issued the same order, arguing that a prohibition on fiduciaries trading in their corporation’s shares during a reorganization would best effectuate the purpose of the statute.
			2. **Issue:** Can an agency announce what looks like a rule in an adjudication rather than a rulemaking?
			3. **Holding (Murphy):** Agencies can announce new policies in adjudications. However, they should usually do this through rulemaking. Problems may arise which an agency couldn’t foresee, and it doesn’t make sense to hold them to the letter of that rule. The test for reviewing court is to look at whether the Commission’s action is based upon substantial evidence and is consistent with the authority granted by Congress (Reasonable basis test).
				1. **Retroactivity:** Court acknowledges that it is retroactive and says that, in limited circumstances, retroactive laws are fine as long as harm being cured by law is greater than harm caused by retroactivity.

In Chenery II, the fact that the retroactive rule might prevent Federal’s management from securing the profits and control which were the object of its preferred stock purchase are outweighed by the dangers inherent in such purchases from statutory standpoint. (i.e. they’re in conflict with statutory purpose)

5-part test from DC Circuit in Retail, Wholesale & Department Store Union v. NLRB (p.660) to assess legality of retroactive administrative action under Chenery:

Whether the particular case is one of first impression

Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law

The extent to which the party against whom the new rule is applied relied on the former rule

The degree of burden which a retroactive order imposes on a party

The statutory interest in applying a new rule despite the reliance of a party on the old standard

* + - 1. **Dissent (Jackson):** The decision reduces the judicial process to a mere feint. It is a personal deprivation denying particular persons the right to continue to own their own stock and to exercise its privileges.
			2. **Better rules?** There’s an argument that this might lead to better rules, in the same way that common law creation might. But Justice Jackson thinks it’s a recipe for “administrative authoritarianism.”
			3. **Disadvantages of adjudication**
				1. Notice and comment rulemaking procedures are generally better designed to elicit input from a broad range of constituencies
				2. General policy considerations at stake may be more transparent to Congress and affected interest groups when they are ventilated by rulemaking
			4. **Advantages of rulemaking through adjudication**
				1. Slow and inconvenient to stop adjudication and begin a rulemaking when agency wants to create a new rule to apply
			5. **Consequences:** Some agencies, like NLRB, do virtually all of their rulemaking through adjudication. Some agencies still choose to do rulemaking; others are compelled by statute.
		1. **NLRB v. Wyman-Gordon & Excelsior Underwear**
			1. **Excelsior** concerned a claim that union election results shouldn’t be certified because the employer hadn’t provided a list of employees. The Court said the results could stand, but all future results would require employer to furnish employee list with names and addresses.
			2. **Wyman-Gordon** involved workplace elections. Company refused to apply Excelsior rule and provide names and addresses to union. They said the rule was invalid because it came from an adjudication. Court agreed that the rule was invalid, but said NLRB could compel W-G to produce the list because once it asked, it was compelled to obey.
				1. **Change in law:** Saying that Courts can’t make rules through adjudications? The limit here might be that they can’t do this *if* the rule only applies proactively.
		2. **Bell Aerospace v. NLRB (and vice versa)**
			1. **Stands for:** Affirming that agencies can choose when they want to use rules, and when they want to use adjudications.
			2. **Facts:**
				1. In the past, NLRB has said that managers couldn’t unionize, because they were too close to owners, and that buyers were managerial employees.
				2. In formal adjudication, Board had reversed its prior position and held that managerial employees could unionize if there wasn’t a conflict of interest
				3. In the alternative, it said that buyers were no managerial employees
			3. **Case 1 (2nd Cir., 1973, p.666, Friendly)**
				1. Board can reverse itself, but it must do so in a rule and not in an adjudication
				2. Court says that is in line with Wyman-Gordon/Excelsior, which said that you can’t avoid rulemaking with adjudications
				3. Rules for “all cases at all times” must go through rule-making. Case-by-case basis rules can go through adjudication.
				4. Friendly proposed rules for cabining adjudicatory rules

Can’t do changes in position through adj. – must come through rulemakings

Must have a limited scope – can’t apply to “all cases at all times”

Cases where “policy-making by adjudication can’t be avoided”. If delay is acceptable, then you should use rulemaking

* + - 1. **Case 2 (US, 1974, p.668, Powell)**
				1. Agencies can choose when they want to use rules and when they want to use adjudications
				2. In Chenery, Court said that regardless of process the agency had a statutory duty to decide the issue at hand according to proper standards
				3. In Wyman-Gordon, the Court said that adjudication can serve as basis for agency policies
				4. Although agencies can theoretically abuse the power, that’s not the case here. Because the decisions of the board are so case-specific (by company or industry), adjudications make more sense for it.
				5. Reaffirms the retroactivity balancing approach from Chenery
			2. **Bowen v. Georgetown University Hospitals (US, 1988, p.672):** HHS promulgated a rule that corrected reimbursement formula that applied retroactively. Although Medicare act required some authority to adopt regulations for the “making of suitable retroactive corrective adjustments”, Court read this narrowly to only apply to adjudications.
				1. **Scalia,** in his concurrence, says that the APA specifically forbids retroactive rulemaking. Rules only apply to future actions.
	1. **Guidance documents**
		1. **Exceptions to 553 rulemaking**
			1. Matters pertaining to a military or foreign affairs function, to maintain secrecy
			2. Matters relating to agency management or personnel
			3. Matters related to public property, loans, grants, benefits, or contracts
				1. These are particular, individual benefits
			4. **Good cause exemption**
				1. Compliance may be unnecessary if it’s a “**routine determination**, insignificant in nature and impact, and inconsequential to the industry and to the public.”

**Direct final rulemaking:** agency announces an interim rule, which it expects to be non-controversial, and solicits comments. If the agency does not receive adverse comments, it takes affect

* + - * 1. **Emergencies** which make ordinary NCRM impracticable
				2. Where NCRM would be **contrary to the public interest** as in price-control regulations, because they would prompt undesirable anticipatory behavior by affected parties.
		1. **General Statemets of Policy - 553(b)(A)**
			1. An agency memorandum, letter, speech, press release, manual, or other official declaration by the agency of its agenda, its policy priorities, or how it plans to exercise its discretionary authority
				1. Benefits people/industries because it brings predictability
				2. Benefits agencies because it brings simplicity – they get uniformity in an area of national concern. In effect, they have a rule, but they can change it easily. NCRM rules require another NCRM process to reverse, these don’t
				3. The APA does not define what a General Statement of Policy is, and committee reports don’t shed any light.
		2. **Pacific Gas & Electric v. Federal Power Commission (DC Cir., 1974, p.681) – General Statements of Policy**
			1. **Facts:** Under 1938 Natural Gas Act, FPC had the authority to regulate transmission and sale of natural gas. Shortage of gas in the early 70s, so pipeline companies had to limit their delivery of natural gas.
				1. FPC issued Order 431, which hinted that curtailment priorities should be based on the end use of gas rather than contracts
				2. FPC received curtailment plans reflecting a wide range of views as to the proper priorities for delivery
				3. FPC issued Order 467 indicating that national interest would be best served by considering end use, and cutting off fuel on interruptible sales since they’re most able to handle.
				4. PG&E says that the order is procedurally defective since it does not follow procedure for rulemaking.

No notice or comment; no justification of their decision through basis and purpose statement

* + - 1. **Holding (MacKinnon):** Order 467 is fine, but it’s nothing more than a general statement of policy with no force of law.
				1. GSP is entitled to less deference; it’s entitled to some because the agency’s expertise should be respected
				2. Does not establish a binding norm; the agency cannot apply or rely upon a general statement as law

The agency is not binding itself; it’s a flexible standard

* + - * 1. Effect of Order is to inform the public of which plans they will give approval.
				2. Petitioners will have an opportunity to challenge the merits of the proposed plan, and to ask for an exception given their particular circumstances
			1. **Columbia Broadcasting System v. US (US, 1942, p.686):** Pre-APA case where the FCC promulgated a regulation requiring FCC to refuse to grant licenses to stations entering into a certain type of contract with chain networks. FCC maintained this was just a general policy, but Court said it had the effect of a substantive rule. It had immediate effect on CBS’s business.
			2. **Limitations on GSP’s force of law**
				1. Can’t rely on GSP as law in an adjudication. It would have to justify why, in the adjudication at issue, the proposed curtailment plan was “unjust” or “unreasonable” within the meaning of the statute.
			3. **Agency choice:** It can shoulder the procedural costs of 553, knowing that its final policy choice will be reviewed more deferentially, or it can dispense with 553 and accept more aggressive judicial scrutiny.
			4. **Flexibility factor:** If a policy isn’t flexible, it can be found to be a rule. In Community Nutrition Institute v. Young (p.661), DC Circuit said that a FDA policy statement which bound the agency to take action against certain food producers was a rule, and that action level’s lack of binding legal effect was not determinative because the FDA had bound itself.
		1. **Interpretive rules:** what the agency thinks its statute or rule means
			1. If the underlying statutory or regulatory provision that the agency is interpreting has coercive effects, then the interpretation does as well
			2. Interpretive rules are helpful because the give advance notice of how the agency will interpret something, provide uniformity
			3. **Distinction with GSP:** Some DC Circuit precedents ask if an interpretive rule genuinely interprets a statute or regulation.
				1. Looking for “reasoned statutory interpretation, with reference to the language, purpose, and legislative history of the relevant provisions. GMC v. Ruckelshaus (DC Cir., 1984)
			4. **American Mining Congress v. Mine Safety & Health Administration (DC Cir., 1993):** Mine operators supposed to give data to MSHA so that they could regulate health and safety of mines. Whenever a miner was diagnosed with black lung, they had to notify MSHA within 10 days. Question is what “diagnosed” means. MSHA issues interpretive rule that it means x-ray. Court held that it was a valid interpretive rule:
				1. It filled in an explanation from the original rule
				2. It’s clear that agencies can probably do more with an interpretive rule in terms of binding regulated entities and itself than it can through a GSP
			5. **A rule is legislative if:** (Test from AMC v. MSHA)
				1. The agency says that it’s legislative
				2. The rule amends a pre-existing legislative rule
				3. The agency would not be able to initiate an enforcement action in the absence of the rule
				4. The agency publishes the rule in the Code of Federal Regulations (They got rid of this one since they decided it was good for some interpretive rules to be published, to give notice)
		2. **Hoctor v. USDA (7th Cir., 1996, p.706) – Interpretive Rules**
			1. **Facts:** Under Animal Welfare Act, USDA issues rules for secure containment of animals. Hoctor is exotic animals dealer and makes fence six feet high. USDA issues internal memo addressed to inspectors stating that dangerous animals must be in 8 foot fence. Hoctor is cited by inspector
				1. **Statute** requires that facility is constructed of such material and strength as appropriate for the animals involved … structurally sounds”
			2. **Holding (Posner):** This rule is arbitrary and thus not interpretive. If the agency wanted this height, they should have specified through NCRM.
				1. When agencies base rules on arbitrary choices they are legislating. Acceptable alternatives could have included

A proficiency standard, rather than specifying a single height

They could issue a standard for each species (like Nova Scotia)

They could adjudicate on a case-by-case basis

* + - * 1. Scientific and technical areas: A rule that translates a general norm into a number may be justifiable as interpretation

If USDA had said in the internal memo that it could not imagine a case in which a perimeter fence for dangerous animals that was lower than 8 feet would provide secure containment, and would therefore presume, subject to rebuttal, that a lower fence would be insecure, it would have been on stronger ground.

* + - 1. **Posner’s approach**
				1. Book calls it “purposivist”
				2. He uses interpretation in the narrow sense of “ascertainment of meaning”, where it would be difficult to see 8 foot fence as reasonable ascertainment of the statutory “strength as appropriate” requirement.
			2. **Generality of statute?** Perhaps what makes an interpretation permissible is not the flatness/arbitrariness of the interpretation but the generality or specificity of the underlying state or regulation.
				1. In AMC, the reporting requirement was already fairly specific
				2. In Hoctor, the fence requirement was open-ended, so interpretation was a big leaps
			3. **Interpretive Rules v. Adjudications**
				1. In Bell Aerospace and Chenery, they were allowed to create new rules in adjudications. Couldn’t USDA set the 8-foot rule in an adjudication and set a precedent? Would it be more rebuttable?
			4. **Judicial Review of Interpretive Rules**
				1. JR of the reasonableness of an agency’s interpretation serves as a check on the agency’s ability or incentive to circumvent NCRM. JR provides an opportunity for affected parties to present their objections and receive a reasoned response.
			5. **Middle ground:** Judge Williams in AMC suggests that there are some statutory interpretations that, in JR, would be okay as rules but not as interpretive rules. So, a different standard for judicial review for the two.
			6. **Appropriate standard of review for interpretation of an agency’s own regulations**
				1. **Auer v. Robbins:** An agency’s interpretation of its regulations should be upheld so long as the interpretation is reasonable.
				2. Some argue that courts should be less deferential because agency can determine the precision of its regulation, and we want to encourage more precise rules rather than vague, mushy ones
				3. Two possible effects of restricting interpretations:

Might lead agency to make its legislative rules more precise and detailed

Or, might lead agency to do more of its interpretation in the context of adjudication, and not provide the advanced notice that might be helpful

* + - * 1. 2 exceptions to Auer deference

Cannot apply interpretation as basis to apply penalty on a firm unless there was a prior notice

Rule cannot parrot a statute

* 1. **Judicial Review of Agency Decisions**
		1. **NLRB v. Hearst Publications (US, 1944, p.792) (792-800)**
			1. **Stands for:** Mixed approach to agency with review, where agency decides mixed fact/law questions, and Court decides pure questions of law de novo. **(Pre-APA)**
			2. **Facts:** NLRB says that newsboys are employees for the purpose of union collective bargaining; Hearst disagrees and argues that they’re independent contractors. Since statute doesn’t define employees, Hearst argues that Court/agency should use the common law distinction between employees and independent contractors. No dispute about the facts, role of the newsboys.
			3. **Holding (Rutledge):** Newsboys are employees under the act; Court looks at the purpose of the legislation, in light of the mischief looking to be correct (purposivist approach). Since mischief also applies to independent contractors it reads the statute broadly.
				1. The question of law is whether the term “employee” incorporates state common law definitions (as in a tort suit). Court says no. Court then said the agency could determine what employee meant in NLRA context – mixed fact/law question.
				2. “The Board’s determination that specified persons are “employees” under this Act is to be accepted if it has “warrant in the record” and a reasonable basis in law.
		2. **Skidmore v. Swift & Co. (US, 1944, p.807) (807-12)**
			1. **Stands for:** Court gives agency deference based on an agency’s “power to control”. Skidmore respect gives agencies the “power to persuade” based on thoroughness of the considerations, consistency of positions taken, validity of reasoning, etc.
			2. **Facts:** Firefighters had contract to work in factory during the day and were paid weekly salary; however, they also had an oral agreement to stay in the fire hall 3-4 nights a week to respond if there was an alarm (they were paid if there was an alarm).
				1. Administrator submitted amicus brief suggesting that these are work hours, except for eating and sleeping time.
			3. **Issue:** What level of deference should be given to non-binding agency decisions?
			4. **Holding (Jackson):** No legal principle precludes saying that the tie employees spend overnight is work (reversing trial court).
				1. **Distinction from Hearst:**

Unlike Hearst, SC did not advise lower court to defer to agency.

Difference in agency deference arises from difference in responsibilities assigned to NLRB and Fair Labor Standards Administrator. Administrator of Wages and Hours doesn’t have authority to issue anything binding; no hearings or procedural safeguards.

* + - 1. **Skidmore respect:** Sliding scale that allows administrator to have a significant influence on decision.
				1. This can lead to greater uniformity, efficiency, predictability, and democratic accountability.
				2. Look to several factors to determine level of deference

Longstanding and consistent?

Issued contemporaneously with the enactment of the statute?

Whether Congress had acquiesced in the agency’s interpretation

* + 1. **Multi-factor test before Chevron**
			1. Pure law questions are decided by courts
			2. Application of law to facts where agency has binding power: defer to agency
			3. Application of law to facts where agency lacks binding power: “power to persuade, if lacking power to control”
			4. Hearst and Skidmore are in line with **APA 706**
		2. **APA 706**
			1. 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 agency action. The reviewing court shall –
				1. Compel agency action unlawfully withheld or unreasonably delayed; and
				2. Hold unlawful and set aside agency actions, finding, and conclusions found to be—

**Arbitrary, capricious,** an abuse of discretion, or otherwise not in accordance with 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 section 556 and 557 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 trial de novo by the reviewing court

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* + 1. **Chevron v. NRDC (814-35)**
			1. **Facts:**
				1. In Clean Air Act Amendments, Congress set requirements for States that hadn’t achieved air quality standards required by EPA pursuant to earlier legislation. Statute requires States to establish permit programs regulating new or modified stationary source of air pollution.
				2. EPA, in regulation, allows a State to adopt a plant-wide definition of the term stationary source (bubble concept). It had earlier suggested the possibility of a single source/smokestack approach (which NRDC is advocating for)
				3. DC Circuit said that since text of amendments and legislative history were unclear, Court had to determine the meaning of the statute according to legislative purpose. It set EPA regs aside, since purpose was to improve air quality.
			2. **Holding (Stevens):** Stevens rejects the multi-factor test developed in previous cases and develops a new, 2-step test:
				1. Has Congress spoken to the precise question at issue?

If Congress has spoken on this precise issue, courts follow this interpretation (pure issue of law). Use traditional tools of statutory interpretation to decide if Congress has spoken.

Note: Some judges (Scalia) don’t agree with using legislative history to determine whether Congress has addressed the issue

If Congress did not address the specific question, move to sept 2

* + - * 1. Is agency’s answer based on a permissible/reasonable construction of the statute? Agency’s permissible construction receives deference even if it is not what the court would conclude on its own.

**Distinction from Hearst:** Agency’s interpretation of law now receive deference.

* + - 1. **Policy reasons for expanded deference in face of ambiguity**
				1. Agency expertise, better to have agencies rather than courts define terms because they were created specifically to deal with a specific issue
				2. Democratic accountability, agencies are governed by elected executive branch

In practice, Congress may be tempted to write deliberately vague statutes and then influence agency interpretations (you can’t influence a judge in the same way)

* + - * 1. Implicit delegation: agencies have been delegated responsibility by Congress to implement statutes

What about the idea that legislation is compromise, so actual text is important?

Is it desirable to give executive agencies a freer hand?

* + - 1. **Results of Chevron**
				1. Eliminates distinction between mixed questions of law/fact and pure questions of law
				2. No more residual concern over consistency (as seen in Skidmore) – agency can change its view and still receive deference. EPA has changed its definition over time, and that’s fine
				3. “An initial agency interpretation is not instantly carved in stone…must consider varying interpretations and the wisdom of its policy on a continuing basis.”
			2. **Limits**
				1. Chevron deference only applies to agency interpretations of it own authorizing statute (no deference for an agency’s interepretation of APA)
			3. **Traditional tools:** Footnote 9 says courts should use traditional tools of statutory construction to ascertain whether Congress has spoken on an issue.
				1. However, Agencies don’t have to prove that their method of interpretation was valid. Courts can use a different method to reach same result
			4. **Criticisms of 2-step test**
				1. Redundant and misleading. If Congress has expressed a clear intention, then a contrary agency opinion would never be reasonable. So it’s really just a one-step test.
				2. In response, some courts have interpreted Step 1 as a requirement that the agency’s interpretation be permissible as a matter of statutory construction, whereas Step 2 requires it be the product of reasoned decision-making
				3. Judicial abdication of the responsibility to interpret the law
			5. **Normative advantages**
				1. **Expertise:** Policy choices are best left to agencies due to expertise
				2. **Democratic accountability** of executive
				3. **Coordination**: Promotes unity because courts of appeal are more likely to defer to agency’s interpretation
			6. **Legal justifications**
				1. Satisfies intelligible principle requirement
				2. Sees silence as implicit delegation, and then states that implicit and explicit delegations are equivalent.
				3. Presumption that reasonable member of Congress would intend courts to treat ambiguities as express delegations
				4. Presumption that Congress knows about Chevron and legislates with it in mind
			7. **Chevron as a clear statement rule?**
				1. Presumption that Congress wants to preserve the usual balance of authority, unless statute clearly upsets the balance
				2. So because our constitutional system’s commitment to democracy favors policymaking by more-accountable agencies rather than courts, ambiguity should reflect delegation to agencies.
			8. **Practical impact**
				1. Agency consistency is less important
				2. Doesn’t really depoliticize courts – politics of justice is likely to have impact on Chevron outcome
		1. **MCI Telecommunications Group v. AT&T (US, 1994, p.837) (835-53)**
			1. **Facts:** Per Communications Act of 1934, common carriers must file their rates charged for communication services with the FCC and must stick to those rates. In late 1970s, FCC wanted to make rate filing optional for non-dominant long-distance carriers to lower barrier to new entrants. FCC had authority to “modify” the filing requirements under the statute. ATT argues that removal is not a type of modification, so FCC action was impermissible.
			2. **Issue:** What does modify mean?
			3. **Holding (Scalia):** Modify means a small change, so wholesale elimination is not appropriate. Therefore, the statute is clear and no reason to go to step 2. He rejects Websters 3rd, which he feels adopts too much slang usage as legitimate. Scalia thinks he is in Step 1. Scalia’s textualist approach is less likely to result in ambiguity.
			4. **Dissent (Stevens):** Stevens thinks he’s in Step 2. He cites to Black’s Law Dictionary from 1934 (when statute was passed) which says that a modification can cancel some elements as long as it leaves *the general purpose and effect of the subject-matter* intact.
			5. **What is ambiguity?** It’s unlikely a case would get to the Supreme Court if the statute were truly unambiguous. So should Step 1 ever be used by Supreme Court? Scalia suggests that ambiguity should be read narrowly if it leaves too much agency discretion.
				1. Stevens doesn’t think it leaves too much discretion; there’s disagreement over whether filed-rate requirement is central to the overall scheme
		2. **FDA v. Brown & Williamson Tobacco Corp. (867-85)**
			1. **Facts:** FDA asserted jurisdiction to regulate tobacco products. It concluded that Nicotine is a “drug” within the meaning of the FDCA. Pursuant to this authority, it promulgated strict regulations intended to reduce tobacco consumption among children and adolescents.
			2. **Holding (O’Connor):** She is in Step 1, and says it’s clear that Congress has focused on the issue, and made it clear that FDA does not have the authority to regulate tobacco products.
				1. Under the FDCA, if tobacco is not safe it will have to be banned. This is not a decision that Congress wanted an agency to make.
				2. Historical argument: When FDCA was passed, there was no way that Congress would have intended the FDA to have this power. There is no evidence in text of the FDCA or its legislative history that Congress 1938 even considered applicability to tobacco.
				3. The FDA has said all along that it does not have authority to regulate tobacco.
				4. **Compare with MCI:** In both, conclusion is assisted by belief that it’s highly unlikely that Congress would have delegated this level of discretion.
				5. **Major questions exception?** Question still remains if there’s a presumption that Congress wouldn’t delegate such major questions, but it’s asserted both here and in MCI.
				6. **Changed positions:** O’Connor isn’t saying that FDA is entitled to less deference because it changed its position, only that FDA’s prior disavowals of jurisdiction provide “important context” for Congress’s subsequent enactment of tobacco-specific litigation.
			3. **Breyer (Dissent):** He says that, read plainly, nicotine is a drug and should fit within the FDCA. He compares nicotine to things like methadone and chemotherapy that are not safe, but not banned because they can be beneficial when used properly. Therefore, he concludes that FDA doesn’t have to ban unsafe products.
				1. Says that majority argument is curious because they have to accept that FDA can regulate tobacco before they get to the fact that it must ban them. But he says they don’t need to ban them, so it’s fine to regulate them.
				2. Takes issue with majority’s assertion that Congress’s failure to grant FDA jurisdiction is meaningful, since it always failed to take it away once asserted (Youngstown situation?)
				3. Better to have Agencies make the decision than the courts because they’re more democratic. Congress can serve as an effective check.
				4. The essence of Breyer’s argument is that the FDCA consistently gave the FDA the *option* to regulate tobacco, and that Congress consistently acquiesced in this understanding of the statute.
		3. **Christensen:** Involved a dispute over interpretation of Fair Labor Standards Act. FLSA allows state and local governments to compensate employees for overtime work by giving them comp time. Question of whether municipalities can force employees to take time off to reduce their liabilities. FLSA said they couldn’t in opinion letter. Thomas said that an interpretation was entitled to respect only to the extent that it had power to persuade.
		4. **United States v. Mead (916-40)**
			1. **Stands for:** Step 0 – first determine if Congress intended agency’s rulings to have the force of law
			2. **Facts:** Between 1989 and 1993, Customs Service treated day planners as “other” and they were not subject to tariff. In 1993, they changed the category, thus incurring a 4% tariff. Mead protested, and Customs issued a new letter, unpublished, citing dictionaries to reach the same conclusion.
			3. **Issue:** Does the agency statement get Chevron deference?
			4. **Holding (Souter):** Customs ruling does not have the force of law and isn’t entitled to full deference. A case-by-case determination should be made about whether Congress intended the Administrative ruling to have the force of law. Courts should take into account several factors, the most persuasive being the formality of the procedures prescribed.
				1. There remains a range of deference, with Chevron being the most deferential. Skidmore respect is still in effect for things like interpretive rules
				2. Formality of procedure is a “very good indicator of delegation meriting Chevron treatment.”

“It is fair to assume generally that Congress contemplates administrative action with the 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.”

* + - * 1. Customs ruling letter fails to get Chevron deference because:

No Congressional indication of force of law

Although there is precedential value, that’s not enough. Interpretive rules may have precedential value but don’t get Chevron deference.

Too many ruling letters, too little process

Too many different offices, lack of centralization

But, it does have force of law in that it binds Mead, but not others

* + - 1. **Dissent (Scalia):** He thinks this essentially reverses Chevron, and moves from general presumption of delegation to resolve ambiguities to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. He would defer to the reasonable interpretation of the Customs Service.
				1. He thinks there’s no necessary connection between formality and force of law. The most formal procedure, formal procedure, is modeled after trial courts, which get no deference
				2. Scalia is afraid that this means rules made through informal adjudications won’t be given Chevron deference
				3. **Practical issues with Mead**

More unpredictability in Chevron application, which will lead agencies to process up

But there’s always confusion in the lower court rulings

More notice and comment rulemaking to get more deference. This will reduce # of regulations, slow down process. Concern that agencies will issue broad rules, and then use interpretations of own rules to get deference under Auer.

Ossification through judicial construction – rules will be stuck once judges rule on them

This concern has shown itself to be overstated because agencies can and have overridden court interpretations, in cases where statute is ambiguous

* + - 1. **Rules v. Standards:** Scalia wants a clear rule – the presumption that agencies get deference for reasonable constructions. Souter wants a standard – a sliding scale depending on the force of law.
			2. **Force of Law test:** Traditional test would be to look at whether an interpretation has independent legal effect, but Mead seems to be more interested in degree of procedural formality.
		1. **Ethyl Corp. v. EPA (717-39) – Arbitrary and Capricious standard**
			1. **Pre-APA:** Judges should be very deferential when deciding whether agency decision is arbitrary and capricious: As long as “any state of facts reasonably can be conceived that would sustain the agency action, there is a presumption of the existence of that state of facts” and party challenging has the burden or showing that the action is arbitrary
			2. **Hard look review:** Judge Leventhal advocated an approach where Court was obligated to ensure that agency had taken a “hard look” at the issues through evaluation of their findings and reasoning.
			3. **Procedural review:** Judge Bazelon wants to ensure that the procedures employed were conducive to “reasoned decision-making”
			4. **Overton Park:** DOT decided to put a highway through a park. Under statute, they had to show there was no “feasible and prudent alternative.” Marshall concluded that the reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.” Decision was reversed on remand. Seemed to incorporate both procedural and substantive review.
			5. **Facts:** Under Clean Air Act, EPA can regulate gas additives that “will endanger public health or welfare.” After NCRM with cost-benefit analysis, EPA decides to ban leaded gasoline.
			6. **Holding (Wright):** Courts should conduct careful review of the record and look for minimum standard of rationality. Don’t need to find a single, dispositive study; it’s fine if decision is based on inconclusive but suggestive results of numerous studies. Review of the record shows that EPA met its minimum standard.
			7. **Concurrence (Bazelon):** In highly technical matters, judges can’t comprehend the issues. He wants to focus on the procedures used, and ensure that agency picked a process that will lead to good outcome. Bazelon is more confident that judges can understand process (not technical facts). He thinks that procedures are proxies for thinking (thought process).
				1. Note that Bazelon, in Vermont Yankee, wanted to see cross-examination and discovery at adjudication. This was rejected by the Supreme Court
			8. **Statement (Leventhal):** Judges can deduce enough background to make a determination by asking questions. This is similar to OIRA’s role. Judges can’t just give up when faced with a complicated record, nor are they meant to per Overton. If technical difficulties were a real issue, Congress could create specialized courts.

**“Restraint, yes, abdication, no”**

He agrees that judges may lose sight of their role and second-guess agency determinations; that is not what he wants

* + - 1. **Dissent (Wilkey):** The reasoning here isn’t thorough enough to meet the standard. He analogies reasoning process to a chain, and says that links are missing. There is little evidence to support Administrator’s conclusions. He proposes a two-step approach:
				1. Explore evidence for adequate basis
				2. Decide if it’s principle and reasonable

 Court is under an obligation to not act as a rubber stamp

* + 1. **Motor Vehicle Manufacturers Ass’n v. State Farm (756-90)**
			1. **Stands for:** Hard look process applied to agency decisions
			2. **Facts:** Under Carter, National Highway Traffic Safety Administration promulgated a rule that mandated passive restraints, but allowed manufacturers to decide if they wanted to use automatic seatbelts or airbags. 99% of cars had automatic seatbelts, but the detachable kind which proved to be less useful. After Reagan takes office, new administrator revoked the requirement, claiming in sufficient safety benefits to justify the costs.
			3. **Statute:** Purpose is “reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents”
			4. **Holding (White):** The agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. The agency failed to consider the alternative of mandating airbags, and didn’t even address it in its explanation. The agency was also too quick to dismiss the safety benefits of automatic seatbelts, since they don’t take into account the fact that passive seatbelts require an affirmative step to detach.
				1. **Vermont Yankee is not a talisman:** Court says petitioners present it as if it’s enough to uphold any agency process. Court doesn’t think this is true, and doesn’t think it’s requiring anything beyond what the APA says. This is a process/procedure distinction.
			5. **Concurrence (Rehnquist):** Does not believe that the view of detachable seatbelts was arbitrary and capricious, but does believe that failure to consider airbag alternative was. Also expresses the view that changes in administration policy are a valid, democratic reason for changing a regulation.
			6. **Getting rid of rule vs. making new rule:** MVMA says getting rid of a rule is almost like refusing to make a new rule, and agencies are given nearly full deference to decide not to create new rules.
				1. Decision not to initiate rulemaking is judicially reviewable under 706(1), but it’s limited to when statutes unambiguously require agencies to initiate rulemaking proceedings
				2. White rejects this comparison between getting rid of rule and refusing to create new rule because:

Proper baseline is the status quo (wherever the line is at the time)

When you are getting rid of a rule, you have two records to use in review, unlike when there’s no rule made

The first time they did it, presumably they were following congressional intent, so how can the flip also being following congressional intent? Need a reason for the change.

The presumption is not against regulation, but against policy change

* + - 1. **Level of deference for changes in agency policy**
				1. State Farm rejects the argument that there should be more deference for changes than original rules
				2. Some say there should be *less* deference for changes, especially a longstanding policy. However, Court rejects this view in FCC v. Fox (2009, p.785)

But Stevens, in dissent, said there should be less deference: “There should be a strong presumption that the FCC’s initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute.”

* + - 1. **Three forms of Arbitrary and Capricious action**
				1. **Agency entirely failed to consider an important aspect of the problem**

Here, the alternative was obvious so the agency is guilty of this. Airbags were in the original regulation, and it completely ignores them.

Agency should generally be clear if it responds to public comments and anything sufficiently obvious (like airbags)

* + - * 1. **Agency relied on factors which Congress has not intended it to consider**

Many statutes implicitly or explicitly supply factors that the agency is supposed to consider.

Merchant Marine example (p.772): Statute said to consider factors that were meant to further its role as naval and military auxiliary. Agency decision focused on making fleet more competitive. Bork said they could only consider the things Congress laid out.

Agency can consider other factors but can’t substitute them for the statutory goals

* + - * 1. **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 of agency expertise**

State Farm holds open the possibility that a court might strike down an agency action as substantively irrational

Court held that NHTSA has acted irrationally in concluding that passive restraint rule that included a detachable passive seat belt would not be worthwhile. Existing evidence of safety benefits was sufficiently strong

* + - * 1. **Costs and benefits of Hard Look review**

**Benefits**

Constrains administrative arbitrariness

Ensures that agency decisions are based on legitimate rather than illegitimate considerations

Results in more thoughtful agency decision-making because of the prospect of judicial review

Generalist judges can acquire the necessary background information to conduct meaningful but deferential assessment of reasoning process

Doesn’t substantially increase rulemaking costs, because agencies are still producing a large number of substantial rules

Alternatively, raising cost of new rules might be a good thing, because then interested parties may have a greater incentive to form coalitions to seek comprehensive legislative reform (as opposed to rulemaking)

**Cons/Criticisms**

Bazelon: Judges don’t know enough to do this, and can fool themselves into thinking they do

Might lead judges, perhaps subconsciously, to substitute their judgment for that of the agency

Formal reasons for decisions are usually concocted after the fact. Agencies lie about why they make decisions. So we wont actually get higher-quality results.

Elaborate records don’t reflect the decision-making process, and are very costly to make

* + - * 1. **Role and acceptance of political influence**

Rehnquist suggests that political influence is just fine, and change in administration is adequate reason for change in policy.

Does Agency need to argue this as its reasoning, and does it matter that it didn’t?

If one of Congress’s goals in creating an agency was to ensure that regulations were made by experts using the best available science, then why should politics or “regulatory philosophy” play an acceptable role?

IRCs: In FCC v. Fox, Breyer (dissenting) said that IRCs should not be able to use a political rationale in explaining its decisions. “Agency’s comparative freedom from ballot-box control makes it all the more important...that major policy decisions be based upon articulable reasons.”