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1. Introduction
2. Special features of LRS
3. *Not* examining a doctrinal area of common law; instead, we are learning about the process by which statutes and regulations are produced, as well as the players who are involved in this process.
4. Because of the separation of powers written into our governmental structure by the constitution, lawmaking in the regulatory state is negotiated between related but distinct actors (executive, executive agencies, various factions in congress, the judiciary, etc.). Thus, we must pay attention to the intersection of law and **politics** in this realm.
5. Our positive question: What does lawmaking look like? Normative question: What role should judiciary play in the way the law is made?
6. Capsule history of the Regulatory State
7. Through the 19th century, there was very little regulation by the federal gov’t; mainly implemented by states in common-law courts.
8. Two trends in the latter part of the 19th century changed this.
9. Rise of federal gov’t’s power in the wake of the Civil War during Reconstruction
10. Industrialization
11. Creates new set of social problems, giving rise to the idea that society needed special “scientific” agencies to regulate the new social forces which seemed outside the control/expertise of individual citizens or current gov’t entities.
12. The early New Deal era further bolstered the rise of the regulatory state.
13. Distrust in markets increased people’s willingness to accept gov’t intervention through large gov’tal agencies (ex.: TVA)
14. Lawyers, regulators became skeptical of courts as regulators; courts typically resisted New Deal programs.
15. 1930s also saw the rise of **legal realism,** which resisted the notion that common law principles somehow represented “natural” principles of governance. Instead viewed these as rules of power which should not necessarily be created by an unelected judiciary.
16. 1950s-70s = burst of regulatory law (civil rights, environmental, etc.)
17. Legislation and Statutory Interpretation
18. Foundational Theories of Statutory Interpretation

The court’s method of statutory interpretation has long been guided by two basic principles: (1) the court’s primary responsibility is to enforce congress’s intent, and (2) when the text of a statute is clear, the court’s duty is to enforce that law. However, sometimes the text of a statute appears clear, but reasonable minds find that the application of this clear language to a specific problem seems to oppose the perceived congressional intent behind the law. (See *TVA v. Hill*.) At other times, the language of the statute may be so ambiguous that a plain reading of the text cannot reveal any satisfactory intent by Congress. For such cases, courts have developed varying rationales to guide how they weigh the conflicting obligations to hew to the text and to honor congressional intent. The basic theories are:

1. **Intentionalism**/**purposivism**

When a statue is unclear or dictates a troublesome result, the judge tries to reconstruct the likely intent of the legislature respecting the problem at hand.

1. Professor Cox says that we can use the terms “intentionalism” and “purposivism” interchangeably, but the casebook seems to distinguish them by the level of generality of congressional purpose to which they refer. Thus, the casebook suggests that an intentionalist judge strives to figure out what the legislature specifically intended to happen if the given problem faced by the court occurred. A purposivist judge, by contrast, would say this specific intent is impossible to divine, but would instead call upon congress’s general aims in drafting the legislation in order to determine how it would wish the text of the statute to be interpreted and applied.
2. ISSUE: How can a coherent, fairly unitary “legislative intent” be divined if Congress itself is made up of multiple factions? Where does the judiciary locate legislative intent in that situation? (For example: say the senate writing the statute at issue in *Holy Trinity* split 50 for labor restrictions and 38 opposed. But, of the 50 in support, 30 would limit the restriction to manual laborers only, 10 would restrict all labor, and 10 would ban all immigrants. Is it appropriate, then to say legislative intent was to restrict manual laborer immigration only, given the coalition which passed the act?)
3. **Textualism**

Bases statutory interpretation on a consideration of how reasonable people would understand the *semantic import* or usage of the **precise statutory language** that Congress adopted.

1. Motivated, at least in part, by fear that going beyond text to infer a notion of congressional intent is not actually true to how congress works and could lead to judicial overreach in lawmaking. (See *Holy Trinity*)
2. N.B. Even though textualists stress the importance of not going beyond the text of a statute when it is clear, judges using a textualist approach may still sometimes need to go beyond the text to explain what a term or phrase usu. means. See *West Virginia Hospitals* and Scalia’s explanation of “attorney’s fees,” for example.
3. ***The Fundamental Question at Issue:***

Undergirding both the purposivist position and that of the textualist is the notion of **legislative supremacy**—that acts of Congress enjoy primacy as long as they remain within constitutional bounds. Judges should serve as Congress’s **faithful agents.** However, the two approaches diverge when it comes to questions about which approach better **constrains judges** from importing their own values into statutory interpretation. Indeed, *behind almost every disagreement about statutory interpretation lies a disagreement about the* ***proper role of the judiciary*** *in relation to the leg. and its legislation.*

1. A Brief Overview of the Legislative Process
2. Bicameralism and Presentment

A bill must be passed by both chambers of Congress (bicameralism) and then be signed by the President (presentment) in order to become law.

1. Congressional Rules of Procedure
2. Introduction of bills and referral to committees
3. Currently 90 standing committees in the House and 16 in the Senate. The committees specialize in particular areas of law, and a proposed piece of legislation is assigned to one of potentially multiple appropriate committees by the Speaker of the House or Senate Majority Leader.
4. Committee system serves several purposes:
5. Allow development of expertise in particular legal areas (interesting to ask why congress eventually outsourced most expertise to agencies rather than developing a bigger committee system…)
6. Facilitate collective decision-making
7. Find a way to manage agenda-space
8. Political interests (committee membership something to leverage)
9. Committee consideration

Committees may send the bill to the parent chamber as submitted, they may amend and submit, rewrite it, or refuse to act on the bill and let it die.

1. Floor debate and amendment

After bill clears committee, it must get to the floor. In the House, Rules Committee (heavily weighted to majority party) sets agenda. Current rule asserts that only bills with support by majority party in that chamber will get to floor (bipartisan majority not enough). Less structured in Senate.

1. Reconciliation (getting one version of the bill to which both chambers agree)
2. Basic tools for statutory construction
3. The **text** (“plain meaning” interpretation)
4. Rely on **the words’** common meaning (of course, this can be problematic, for are we talking about the meaning assigned to them by Congress? by the public? What about multiple meanings? Etc.)
5. **Intra-statutory comparison** (presumes that Congress uses terms consistently)
6. **Statutory definitions**
7. **Surplusage** (Presumes Congress won’t include redundant language, though Roberts, J. asserted in *King* that the court’s preference for avoiding surplusage constructions is *not* absolute. *Example*: This allowed him to read “exchange established by a State” as “State or Federal exchange established by a State.”)
8. **Legislative history**

Courts can point to various legislative records to support an interpretation of congressional intent. They might cite Committee records, debate transcripts, acts of congressional committees, etc. Also note the way Roberts uses leg. history in *King*—not citing leg. documents or records, but simply noting how ACA was passed to help explain “unartful drafting.” (A “four-corners” text and “inn-the-air” purposivism blend?) However, note that the apparent intent of one committee may not necessarily represent that of Congress as a whole. (See *TVA v. Hill* for example of how majority and dissent rely on different congressional evidence from legislative history to support differing interpretations of legislative intent.) *Big Q regarding what evidence is most persuasive. Also,* should *the way laws get made have a bearing on the way judges interpret statutes?* How a judge answers this question may influence the interpretive methods s/he prefers…

1. **Purpose** of the statute as a whole

Evidenced by social context, legislative history, etc. Also from the **structure of the legislation** as a whole (see Roberts’s majority opinion in *King*), though this would seem almost always to also involve discussion of the social context and leg. history surrounding the bill.

1. Avoidance of “absurdity”

See e.g., *TVA v. Hill*, *Riggs,* dissent in *Marshall*

1. Canons of construction
2. The Letter Versus the Spirit of the Law (text vs. intent/purpose)

This is the classic dichotomy in approaches to statutory interpretation, but it’s important to note that the two approaches are not, by any means, mutually exclusive. Indeed, the split between them seems, to me, artificial and unproductive. (See majority opinion in *King v. Burwell* for a fascinating synthesis of the two.) Nevertheless, with Scalia, J. on the Supreme Court and prominent legal minds such as Easterbrook, J. advocating the “New Textualist” school of thought, the debates between these theoretical positions must be noted. At stake in discussions regarding the superiority of one approach to another are questions of (1) Which is more faithful to leg. supremacy? (2) Which better keeps judges from importing their values into the leg. project? (3) Which approach produces more predictability/certainty/consistency in statutory interpretation?

1. Classic Approach
2. *Riggs v. Palmer* (1889) – statute regarding wills and estates
3. Text of statute clear, but application in this case leads to an “absurd consequence manifestly contradictory to common reason” which may thus be voided—it is clearly not within the “spirit” or intention of the law and its makers.
4. Also, this consequence goes against a common law principle that no one should profit by his or her own wrongdoing. Thus, cannot be regarded as a consequence intended by the legislature.
5. *Holy Trinity v. United States* (1892) - migrant labor statute
6. Actual potential ambiguity in the text, but the court reads it as plainly covering the situation at issue.
7. Employs “background principles” argument comparable to the one used in *Riggs*—America is a religious nation, so the legislature couldn’t possibly have intended an outcome that would bar an alien preacher from immigrating to serve here.
8. BUT, goes further, with more purposivist (higher level of generality) analysis relying upon social context and legislative history (committee and amendments).
9. Also a quick textualist argument using title for evidence!
10. New Textualism
11. Scalia, J. (see *West Virginia Univ. Hospitals*) and Easterbrook, J. represent prominent proponents of this method.
12. Stems from idea that, because the political process in Congress is messy, one should not try to read a consensus purpose into a statute; such consensus doesn’t exist or would involve a false, judicially contrived aggregation of legislators’ individual preferences. Instead, judges need to take the text of the statute as they receive it, for the text reflects the political deal-making process.
13. Of course, this is a “utopian” realism in the sense that it assumes that the text of the statute is an accurate reflection of the political deals made. Overlooks possibility that sometimes legislators use words that don’t capture what they really mean.
14. However, may not be utopian if the stance is simply: “because there cannot be coherence of purpose and/or because the multitudinous purposes are so fine-grained, complex to identify and prioritize, we can only rest our faith in the text itself.” Still, odd reification of the text (and, of course, the specific textual understanding of the judges on the bench…) Professor Cox argues that Scalia’s acceptance of absurdity and scrivener’s error doctrines indicates that he accepts a certain level of coherence of purpose (the coherence necessarily imposed by language).
15. See *Marshall* for Easterbrook’s suggestion that a textualist approach is also superior because its method makes it harder for judges to import their preferences into legislation—promotes **value neutrality,** leg. supremacy.
16. This, oddly, seems to be the concern which motivated Roberts’s approach in his majority opinion for *King*: If he relied upon the absurdity = or scrivener’s error doctrines to support his position, he could easily be accused of importing his own notions of what is “absurd” or what must have been erroneous into his statutory construction. Instead, unlike the typical Scalian textualist, he called upon leg. history (in a very textualist way) to support his interpretation of the ACA.
17. In response to the *King* opinion, the strongest argument for Scalian textualism which rejects any attempts to go beyond the text is Scalia’s assertion in dissent that Roberts’s approach **encourages sloppiness/laziness** in Congress. Legal *formalism* will prompt better politics, Scalia suggests.
18. Mistakes in expression are correctable under the New Textualist view (hence acceptance of absurdity and scrivener’s error doctrines), but mistakes in design are *not*.
19. Judicial Correction of Legislative Mistakes
20. The **Absurdity Doctrine**

From *Kirby*: It will always be presumed that the leg. intended exceptions which would avoid results that lead to injustice, oppression, or an absurd consequence through application of the statute’s general terms.

1. This doctrine is typically a position of common ground for textualists and purposivists.
2. ***N.B.*** the difficulty in labeling a consequence “absurd.” By whose lights is the court determining that the consequences is absurd? Is there truly social consensus around this question? Difficult to assert in a pluralistic, politically divided society. Hence, Roberts’s reluctance to invoke the doctrine in *King v. Burwell.*

***Example:*** Though the court in *Kirby* treats the outcome of strict statutory application as absurd, might it not be reasonable that Congress wanted a categorical rule against detainment of federal employees during Reconstruction, esp. given that the U.S. attorney chose to prosecute this apparent violation of the statute?

1. The **Scrivener’s Error Doctrine**

On rare occasions, the federal judiciary will correct what is known as a “scrivener’s error”—an obvious mistake in the *transcription* of the legislature’s policies into words.

1. Understanding of the doctrine’s scope seems to vary. On the one hand, you have Stevens, J. in *Locke* suggesting scrivener’s error in something that just looks like unartful drafting (an assertion that’s justified, it seems, by a background assumption or theory about legislative purpose or simply legislative rationality); on the other, you have Scalia, J. writing that the doctrine applies only “where on the very face of the statute it is clear to the reader that a mistake of expression (rather than leg. wisdom) has been made.” Such a division suggests that this doctrine may be invoked loosely and is a bit malleable; perhaps there are only a narrow band of cases where textualists and more purposivist judges both find “scrivener’s error.”
2. Legislative History
3. The Post-New Deal Approach to Legislative History

Before the New Deal, the dominant legal theory was **formalism**—the idea that law was an objective and autonomous system of logic and that the answers to questions about the laws meaning and other matters could be answered internally to the law. The rise of scary entities in the world, such as Nazism, made this vision of the law less plausible, and **legal realism** prevailed. This school of thought was famous for suggesting that how a judge decided a case at lunchtime was more about what s/he ate for breakfast than the case’s actual merits. In response to such nihilism and during a time of perhaps peak social cohesion (1950s), Hart and Sacks style **legal process** school became popular. This way of thinking emphasized the notion that judges should act as faithful agents to the leg. process, thereby emphasizing the importance of attending to leg. history when interpreting statutes.

1. The Post-New Deal Consensus and the Forms of Legislative History
2. Committee Reports
3. Statements of Individual Legislators
4. Floor statements in general
5. Sponsor’s statements
6. Statements made during hearings
7. Successive versions of a statute
8. Subsequent legislative action (or inaction)
9. The Textualist Critique of Legislative History

Backlash against the legal process method came as political scientists, economists, and others in the academy highlighted the ways in which ideals of legislative consensus were problematic if not downright impossible. This coincided with a move away from social cohesion as well. Finally, the rise of the conservative legal movement advocating new textualism and the increased number of conservative appointments to the bench resulted in pushback against the use of leg. history during statutory interpretation.

i.. Out of Scalia’s concurrence in *Blanchard* comes the critique based on the idea of **ignorant Congress**—we shouldn’t rely on documents from leg. history, for it is unlikely that many folks in Congress actually attended to these details. *Not* a good indicator of leg. intent.

ii. Also in *Blanchard*, a critique of using leg. history due to delegation inherent to committees—a committee report is not an accurate picture of congressional intent, on Scalia’s view, since it was completed by a specialized group of legislators (and their staffers) **delegated specially** to do the job. Thus committee opinion could represent that of extremist outliers or be a tool of the majority.

iii. Easterbrook opinion in *Continental Can* supports the textualist position against leg. history on the grounds that the leg. history can be manipulated to support a specific view (by larding the record w/ statements about text’s meaning, for ex.)

1. ***N.B.,*** though, trade-off between bias and info; leg. history may be biased, but probably more info-rich than the O.E.D.

iv. Another arg. implicit in Easterbrook’s *Continental Can* opinion is that the lawmaking process was deliberately designed to be difficult in the Constitution, so relying on statutory interpretation to make the leg. clear could be making lawmaking process too easy.

iv. Something potentially hypocritical in the textualist position toward leg. history, for to say some “texts” related to the statutory text are less relevant to its interpretation than others begs questions about what kind of political/purposive coherence this methodology is imposing upon the statute itself. Is this a method that really better reflects political reality? Or just refusing to deal w/ the messy reality?

1. **Textual Tools and Canons**

Textual canons are employed as a tool to construction, not controlling law. However, considered useful for helping get interpretation right and for improving certainty/predictability in statutory interpretation. N.B., underlying all such arguments based on textual canons there is still typically lurking an argument/justification based on an idea about leg. intent. See divide between Ginsburg and Kagan in *Yates*.

 1. Colloquial meaning and dictionary meanings

See *Smith* for example of a case in which the debate over which meaning to use is relevant issue.

 2. *Expressio Unius* Canon

 If leg. lists some things, then it didn’t intend to include stuff it didn’t list.

1. *Noscitur A Sociis* Canon

A word’s meaning can be clarified and often narrowed by the words around it

1. The Presumption Favoring Consistent Meaning

Same word or phrase has same meaning in different sections of the same statute

1. Presumption against Surplus Language

Each word in a statute has independent meaning, so interpretations which would render statutory language redundant or otherwise superfluous are disfavored

1. *Ejusdem Generis* Canon

A broad residual term should be construed more narrowly, so that it encompasses only things that are similar to the items that are specifically mentioned (in a list before the residual term, say).

1. **Substantive Canons of Construction**

As opposed to textual canons, which are plausibly value-neutral, substantive canons presume a value which is given decision-making weight in specific situations.

1. Forms

i. **In one form** of the substantive canon doctrines, an ambiguity within the statute that cannot be resolved in any other way (text, structure, history analysis leads to a dead end) triggers the invocation of any relevant substantive canon of construction. Since leg. history provides insuff. guidance, the substantive canon provides a mechanism for delegating lawmaking power when the ambiguity of a statute leaves the court uncertain about where to locate authority.

ii. **A second form,** the more aggressive implementation of the substantive canons evidenced in *Zavydas*, however, shows how they can be tools used by judges to basically rewrite a statute. When you see a substantive canon being invoked, ***ask:*** What form is the doctrine taking in this context? *Why* is the substantive canon being employed?

1. Possible justifications

i. **Faithful agent** model

a. The “tie-breakers” ensconced in the substantive doctrines simply mimic Congress’s preferences.

b. The substantive canons **constrain** judges from importing their own preferences into a statute in a situation of true ambiguity.

ii. **Reformist** impulses

1. Use of substantive canons may improve lawmaking process in Congress by, in effect, sending ambiguous statutes back for Congress to further deliberate and clarify.
2. The substantive values embedded in these canons raise the legislative cost (by increasing the need for clarity in drafting) of statutes dealing w/ these values.
3. **Avoidance of Serious Constitutional Questions Canon**

Courts are the arbiters between Congress and the constitution, charged w/ the responsibility of deciding when Congress has overstepped its boundaries and is overruled by constitution. This canon says that when one possible interpretation of an ambiguous statute gives rise to constitutional question(s), the court should go with any alternate interpretation which avoids the question.

i. ISSUE: Why the rule? (1) Not answering the question pushes the matter back onto Congress to self-evaluate its own constitutionality. This is preferred to maintain separation of powers, not extract power from Congress; (2) “Faithful agent” idea in the sense that, on its surface, the principle constrains judges from unnecessarily dealing w/ tough constitutional questions, presumes Congress wouldn’t act unconstitutionally. But also opens the door for judges like Breyer in *Zadvydas* to, in effect, rewrite statutes. Thus *tension* w/ faithful agent model.

 2. The Rule of Lenity

When a criminal statute is ambiguous, puts a thumb on the scale for defendant by “breaking the tie” in favor of the interpretation most lenient to defendant.

i. ISSUE: What justifies this tie-breaker? Background semi-constitutional reasons? Judges imposing values? **Note tension** between this canon and faithful agent model.

 i. Presumption Against Retroactivity

The Constitution places few restrictions on the enactment of leg. that imposes retroactive *civil* liability, but the Court has, however, adopted the presumption that Congress intends to impose new liability only *prospectively*, unless the statute clearly indicates the contrary. It has defended this position as supporting a constitutional value embodied in the *Ex Post Facto* Clause, which flatly prohibits retroactive application of *penal* leg. N.B., however, there seem to be suff. Qs about this constitutional grounding for one to argue that retroactivity for civil liability could be permitted.

1. Designing Administrative Agencies
2. The Constitutional Position of Administrative Agencies
3. The Constitutional Backdrop

i. The Constitution, as well as the Federalist Papers which were written to promote its ratification, deliberately imposed both vertical (in the form of Federalism) and horizontal (in the form of three-branch gov’t structure) **separation of powers.** In LRS, we focus on the horizontal separation of powers between the **executive**, **legislative**, and **judicial** branches of gov’t.

ii. ***N.B.*** The Constitution itself actually provides very little guidance on such matters, doesn’t really seem to envision the kind of bureaucracy that’s part of the executive branch today. Thus, most answers to constitutional Qs such as this one come from common law rather than the Constitution itself.

iii. Why *separation of powers?*

1. Avoid **abuse of power** through **checks and balances**; promote deliberative political process (*Federalist 51*)
2. From Madison’s idea that “ambition checks ambition.” ***N.B.,*** however, that in order for this to work, different branches of gov’t must have the *motivation* to check each other. In some cases, it doesn’t appear that the requisite motivations are in effect (see *Schechter Poultry*). Sometimes, a branch may want to push tricky issues on another branch’s shoulders. Additionally, partisan politics means that sometimes you may have divided gov’t in which Congress and President have motivations to check each other, but at other times, you may not.
3. Prevents 2 potential tyrannies – gov’t over people (framers anticipated Congressional oppression of rest of gov’t, weak President) AND majority faction’s oppression of minority
4. **Separation of functions** vision – divide power by type in order to reap benefits of **specialization** and achieve **efficiency** in gov’t (explained in *Federalist 47*)
5. **TENSION:** first purpose is about slowing the lawmaking process; second purpose is about making gov’t more efficient.
6. The Delegation of Legislative Power
7. The Virtues (and Vices?) of Delegation

i. *Consistent w/ specialization* within the different branches of gov’t

a. Congress may have insuff. info at time that it is drafting leg., so through delegation, it can provide for the gathering of knowledge nec. to effective policymaking.

b. Factors relevant to specifics set in the leg. may be subject to changing circumstances. By delegating, Congress ensures that it will not have to re-legislate the matter many times, for response to such contingencies may be addressed by the agency to which policymaking power has been delegated.

c. While these delegations could conceivably happen within Congress (w/ congressional *agencies* springing up in the same way that congressional committees have), Congress’s limited agenda space militates against this. If Congress was bogged down in *all* the nitty-gritty of policymaking, hard to see how it could pass things like the Affordable Care Act, respond to changing circumstances, etc.

ii. BUT could this *upset the horizontal balance of power* within gov’t?

1. The **Nondelegation Doctrine**

i. The **Canonical Formulation** of the Nondelegation Doctrine [from *J.W. Hampton* (flexible tariff provision case)]

a. It is a breach of nat’l fundamental law if Congress gives up its legislative power and transfers it to the President, judicial branch, or another authority.

b. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed (an **“intelligible principle”**), such legislative action is NOT a forbidden delegation of legislative power.

1) *Example - Yes, intelligible principle:* tariff provision of *J.W. Hampton* both provided a precise **goal** (equalize production costs) and gave clear **procedures** (Tariff Commission acting somewhat like a specialized court as it holds hearings, sets tax rates) as to how the goal would be met. (Specific **end/substance** and **means**)

ii. Foundations of the Nondelegation Doctrine

Crucial constitutional text (Art. 1, Sec. 1): “**All** legislative Powers herein granted shall be vested in a Congress of the U.S.” - A key constitutional Q becomes, then, *to what extent, if at all, may Congress delegate its power(s)/function to another branch of gov’t w/o violating this constitutional statement?* (Quasi-textualist args. involved.) The challenge, of course, in answering this Q is where to draw the line. The model of gov’t envisioned by the framers is one of **mixed gov’t,** in which there is *overlap* between the branches (presidential veto power over bills written by Congress, for example). So how do we know what counts as an exercise of legislative power as opposed to executive power in borderline cases (U.S. AG directing all U.S. attorneys not to prosecute low-level marijuana possession, for example)?

iii. The (Brief) Rise and (Long) Fall of the Nondelegation Doctrine

1. *Schechter Poultry* (1935 “sick chicken” case) represents the “rise” of the nondelegation doctrine in the context of the Great Depression and New Deal. FDR had a nat’l mandate to save the country’s economy, and he attempted to do so w/ a surge of economic leg., including the NIRA, which provided for the Live Poultry Act under dispute in *Schechter*.
2. The NIRA represented demand-side economic policy that already appeared to be fairly ineffective, so the Court’s unanimous rejection of the Act as an unconstitutional delegation of congressional authority did not go very much against popular/political attitude toward the law.
3. Here, the goal (ends) of the Act was clear: save the economy. ***Discretionary constraints*** on the executive were minimal. Yet the Court had upheld other New Deal acts which left similarly expansive discretion to the executive as legitimate delegations of congressional power. Here, however, the goal proved so huge, that, coupled w/ minimal discretionary constraints, the discretion amounted to handing Roosevelt a “constitutional dictatorship,” **immense policymaking power.** Violated **balance of powers** notion, if not functional separation idea.
4. After *Schechter*, Roosevelt was reelected in a landslide and threatened court packing to get the judiciary onboard w/ his policies. Ended up not having to – Court shifted course and since *Schechter*, SCOTUS has never explicitly overturned a statute on the basis of nondelegation doctrine.

iv. The Demise of the Nondelegation Doctrine?

*Whitman v. American Trucking* (2001)

In all but name, this decision (by Scalia) appeared to do away w/ the nondelegation doctrine.

1. Citation of precedent upholding delegations of power with similarly wide discretionary power for executive officers suggests an implicit acknowledgement of the **dramatic shifts in American economic and gov’t structure** that require abandonment of the doctrine.
2. Scalia’s acknowledgment of the positive relationship between ***policy-making power delegated*** and the ***discretionary constraints*** placed on the delegated policymaker suggests that the theoretical line between acceptable an unacceptable delegation might vary along two dimensions, where lots of discretion may be given in instances where little power is delegated, but larger delegations of power must be constrained by more constraints on discretion.
3. BUT Scalia’s opinion also suggests hesitance on the part of the Court to formulate a clear rule for drawing this line between acceptable and unacceptable delegations of power. Lacking a “bright line” rule, the Court retreats behind **judicial humility** and **lack of capacity.** Basically, the only clear “unconstitutional zone” is when there’s HUGE delegation of power w/ very low discretionary constraints.
4. It is NOT a constitutional solution for an agency to set the discretionary standard which would constrain its power—this would be, in effect, making it act as a “congress” over itself.

 v. Alternative Approaches to Nondelegation

*Industrial Union Department v. American Petroleum* (1980) – “The Benzene Case:” Dispute over OSHA’s benzene exposure limits.

1. Justice Stevens [joined by Burger, Stewart, and Powell (who also wrote concurrence asserting that cost/benefit analysis should be test of reg.)] posits two readings of the relevant statute delegating authority for setting Health and Safety Standards regarding benzene to the executive. Gov’t argued that the statute meant “regulate any risk,” while Petroleum argued that it should be read only to “regulate sig. risk.”
2. Stevens raised nondelegation concerns to “break the tie” between the two readings. He ends up reading the statute as providing for the regulation of *sig.* risk because the other reading appears to grant too much policymaking power to the executive. ***N.B.*** this reading gives the agency *more* discretion.
3. Thus, the nondelegation doctrine appears to live on as a *substantive canon/*variant on the constitutional avoidance doctrine, where courts pass on the nondelegation Q by interpreting the statute in the way that less implicates it.
4. **Rehnquist concurrence** asserts that the relevant statutory provision, standing alone, violates nondelegation doctrine because it involves a sig. policy decision that Congress should have made. The statute, as written, punted key Qs about what should be done in the case of scientific uncertainty (who should bear costs, industry or workers?) and the role economic analysis should play in the agency’s policymaking. It was thereby ***unconstitutional*** under the nondelegation doctrine. He claims there’s value in keeping the doctrine alive.
5. Forces political accountability
6. Reduces degree of arbitrary gov’t behavior (agency has clearer instructions)
7. Facilitates judicial review – makes it easier for Court to determine if agency complied w/ Congress’s standards.

***N.B.*** Rehnquist goes along w/ Stevens because otherwise the court would be split 4/4 and the decision would revert back to that of the lower court, w/o any precedential authority coming from the Sup. Ct. *Rehnquist and Brennan* both known for such strategic voting practice.

1. **Marshall dissent** (joined by Brennan, White, and Blackmun)points out that Stevens is allowing the general part of the statute to control the specific; canonic construction would dictate the reverse. Would hold the delegation constitutional and uphold the statute under the gov’ts broad interpretation.
2. **No majority opinion on this one,** so the precedential value of Stevens’s opinion is somewhat uncertain.
3. **ISSUE:** Majority holding doesn’t, in effect, force Congress to deliberate and clarify its delegation as it seems Rehnquist would like them to do—just shifts the policymaking burden to the Court rather than agency. **Violation of faithful agent model? Should court be making policy like this?**
4. *Congressional Control of Delegated Power*

The idea of delegation seems to assume some level of collaboration on the part of Congress and the branches to which it delegates. Nevertheless, Congress seeks to control delegated power in various ways. Even if Congress and the Executive branch are on exactly the same page, **oversight** is useful to avoid miscommunications and to facilitate coordination required in large organizations. When Congress and the Executive are in conflict, Congress will want to exercise oversight to ensure that policy is executed in accordance w/ its agenda, rather than the President’s. **Symbolism** is also involved here, for the exercise of oversight can help Congress make itself look good.

1. The **Legislative Veto**

i. A mechanism of ex post oversight that appealed to Congress because it provided a way for them to ensure that later Congresses would have a means to pull the contemporary executive closer to their policy preferences if theirs diverged from that of the Executive – idea of bureaucratic and legislative **“drift.”** Allowed just one house to override executive decision, thereby avoiding threat of presidential veto (executive branch protecting executive branch policy agenda) or assembly problem of passage (bicameralism).

**ISSUE:** Where should the policy preference lie? W/ that of enacting Congress, current Congress, current President?

ii. Ruled **unconstitutional** in *Chadha v. INS.*

1. Court says the legislative veto is an act of lawmaking because it alters the purpose and effect of individuals’ legal rights and duties; as such, it is not legitimate unless it goes through the constitutional process for lawmaking outlined in Art. I, sec. 7 (bicameralism and presentment).
2. Difficult to understand why, given the Court’s willingness to allow broad delegations of authority despite nondelegation doctrine, it resists allowing legislative veto on such grounds. After all, it looks like the AG, under the immigration statute of *Chadha*, for example, is making law regarding Chadha’s deportation status w/o the Art I, sec.7. Poor ct. justifications:
3. The job of the person doing the action determines its type (but then there would be no nondelegation issues ever . . . )
4. Executive agents delegated legislative power are constrained by limits imposed by constitutional statute; Congress isn’t (but legislative veto provision went through Art. 1, sec. 7 process . . . )
5. The bigger thing going on here is the same dispute we saw between Scalia and Stevens in *American Trucking*. Is the delegated authority actually an exercise of legislative authority? If so, then there *is* a problem w/ delegation under a formalist approach because law is getting made w/o constitutional procedures. If you take the Stevens view and thus imply that this means Congress can legislate around the constitutional procedural requirement, are you eliminating nec. checks on congressional power/disrupting the structure of American federal gov’t?

iii. **Functionalist arguments** for/against

1. Allows current Congress to distort policy as enacted. On this view, it should have to pass new leg. of its own if it wants changes. Counterpoint is that we might want policymaking to be dynamic/responsive to shifts in the popular will, and legislative veto would facilitate this. **Democratic accountability issue.**
2. Congress lacks the **expertise**/on-the-ground info to which an executive agency embroiled in administration of the law has access. Thus not suited to exercising the oversight authority of the legislative veto.
3. Powell’s Bill of Attainder fear – the legislative veto gives Congress the power to single out individuals (like Chadha) and penalize them. This is taking on an adjudicative function that has been ruled out of Congress’s proper purview. Suggests that Congress might be better suited to making certain ***kinds of decisions***—namely, broad ones that will apply to lots of people, as opposed to narrow ones applying to only one person.

***N.B***. These kinds of arguments could have led to different outcomes than the strict ban resulting from the formalist arg. against.

1. Other Forms of Congressional Control

i. Ex ante mechanisms

The manner in which Congress creates and designs executive agencies is one way it can control the scope of their discretion and of its future oversight. Such design questions may be . . .

1. Structural – who runs the agency? How is s/he/are they appointed/selected?
2. Substantive – What kinds of power will agency exercise?
3. Procedural – How will the agency go about its work? Will outside interest groups be involved to facilitate oversight? Rules under either Administrative Procedures Act or specific to statute.

ii. Appropriations (ex post)

a. By controlling funding levels to the various agencies through its budgetary decisions, Congress can limit or enable agency action.

b. Congress can make instructions about how funds must be spent by agencies (see *TVA v. Hill*).

c. Finally, it can insert **riders** to appropriations bills that change substantive law, as in the aftermath of *TVA v. Hill* (forcing Tellico Dam completion).

iii. Hearings, Investigations, Audits, and Other Forms of Oversight (ex post)

*Examples*: Benghazi hearings; subpoena of Eric Holder for “Fast and Furious” docs, etc.

1. *Appointment and Removal*

While there is some constitutional language specifying requirements for the appointment and removal of officers within the executive branch, common-law interpretations of the Constitution have given rise to a perhaps incoherent/practically content-less set of principles regarding appointment and removal mechanisms. The key themes running through the appointment/removal cases are **ISSUES** of:

***Formalism vs. Functionalism*** in relation to the bureaucracy

Given constitutional concerns about separation of powers, how do we maintain/balance sufficient separation (often achieved through formalist interpretations) w/ functionalist concerns, given the transformative growth of the administrative state since the New Deal? What *is* the right balance?

***Rejection of case-by-case adjudication*** by Congress, through ex ante mechanisms. General lenience toward *ex ante* good-cause removal requirements, for example. **BUT** see *PCAOB* for a limit on the use of this mechanism as well. A trend going forward?

***The precedential authority of gov’tal practice*** through time

Some courts seem to reference long-time congressional or executive practice as having precedential authority of a sort (see *Myers*), but others reject it (see *Chadha* and rejection of the legislative veto). This factor might play a bigger role in situations like hiring and firing, where there is little *case* precedent and thus historical precedent could fill a void.

1. **FOUNDATIONAL CASES ON APPOINTMENT and REMOVAL**

i. **Appointments Clause Exclusivity**

*Buckley v. Valeo* (about FEC appointments)

1. Court held that the “appointments clause” of the Constitution provides a floor *and* ceiling to congressional power in relation to the appointment of “officers of the U.S.” Following Art. II, sec. 2, cl. 2, President nominates and appoints all “principal ***Officers of the U.S.”*** w/ advice and consent of Senate; Congress may vest appointment of ***inferior officers*** in President, courts, or heads of executive departments, but Congress may only itself appoint “officers” of purely legislative function. (See principal/inferior language on p. 431.)
2. **Employee distinction**

“Officers of the United States” does not include all employees of the United States; **employees** are “***lesser functionaries subordinate to officers*** of the United States, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.” (footnote 162, p. 430)

1. “Any appointee exercising significant authority pursuant to the laws of the United States is an “Officer of the United States,” and must, therefore be appointed in the manner prescribed by Art. II, § 2, cl. 2.”
2. The opinion vacillates between a formalist reading of the Constitution (strictly reading the appointments clause) to functionalist (coming up w/ definitional distinction between officer of U.S. vs. employee in footnote).
3. Key procedural constraint on how Congress may design administrative bodies: can’t *appoint* heads. ***BUT N.B.:*** *Buckley* is silent on whether or not Congress can *constrain the pool* the President may choose from (i.e., must have ½ Republican, ½ Democrat leadership). One reading of Art. II suggests this is impermissible, but *Buckley* says nothing on the extent to which such constraints are constitutional. **ISSUE**
4. **Appointments Clause as Separation of Powers Tool**

*Buckley* emphasizes that “the principle of separation of powers . . . was woven into the” Constitution and that strict adherence to the provisions of the Appointments Clause ensures fidelity to this principle by limiting Congress’s control over executive action.

1. **The President’s** **Removal Power**

*Myers* (1926 - President fires postmaster Myers w/o advice and consent of Senate, a requirement specified in statute; Myers sues).

1. Senate sign-off requirement for removal of postmaster (ex post mechanism of restraint) not OK. Must “serve at the pleasure of the President” (be SATPOP).
2. Lacking explicit text in the Constitution regarding presidential removal power, Taft opinion illustrates the development of two camps of SCOTUS justices, both of which he seems trying to appease.
3. One camp gives priority to an analysis of patterns of Congressional practice over time, esp. those of the first Congress (thus extensive discussion of “decision of 1789”), as if adoption of such practices through history might have precedential value. (**ISSUE:** which historical period should get priority? There *had* been fluctuations in preferred practices pre- and post-Civil War . . .)
4. The other camp is more concerned w/ formalist arguments about text and structure – how the authority for Presidential appointment power is located in the Vesting Clause, Take-Care Clause, and Appointments Powers articulated in the Constitution. Uses an *expressio unio* style arg. about how absent the explicit A&C requirement articulated regarding appointment, removal should not be read to have this requirement implied.
5. There’re also less-stressed functionalist args. about the practical importance of executive control over officials in order to fulfill presidential duties vs. desire to insulate these officers from presidential whim.
6. *Myers* came in period after Reconstruction era attempts by Johnson administration to remove Lincoln appointees. Congress tried to stop him by passing the Tenure Protection Act and then seeking to impeach. Then, in 1883, Congress passed the Pendleton Civil Service Act to protect civil service employees from patronage-based hiring and firing as a result of the spoils system. Otherwise, Presidential removal power had not really been tested, though it certainly wasn’t well delineated. Myers was a party hack using his position to dole out political favors; Wilson wanted him out.
7. **The Rise of the Independent Agency** [head(s) don’t SATPOP]

*Humphrey’s Executor v. U.S.* (1935) – FTC Commissioner sues for removal that wasn’t for good cause specified in statute.

1. **HOLDING:** “For-cause” (“inefficiency, neglect of duty, or malfeasance in office”) constraint on removal of Federal Trade Commissioner (a principal officer) is OK.
2. This decision seems hard to square w/ *Myers* – Why must one officer be SATPOP while others may have removal restrictions imposed?
3. Type of restriction? (ex post vs. ex ante?)
4. Type of officer? (where they are in hierarchy/amt. of power wielded?)
5. **COURT’S RULE:** In a formalist vein, the Court says that the distinction rests upon the **type of power/decisions** being made by the agency over which the officer presides. If the agency does not administer *purely executive* power but instead serves “quasi-legislative” or “quasi-judicial” functions, then it ***may be*** subject to good-cause removal restrictions, because since the agency itself is already a mix of powers, restricting presidential authority is consistent w/ **separation of powers concerns.** FTC, in carrying out legislative policy (fact-finding, making reports) AND adjudicating, but also acting as a prosecutor, falls into the “quasi-powers” agency category.
6. Despite the formalist vein of the opinion, behind it may lie a *functionalist* rationale about how the transformation of the economy and gov’t in the modern era requires a new vision of the regulatory state and presidential powers. **Expertise ISSUE:** agencies need to be insulated from political judgments in some ways.
7. **The Modern Approach to Appointment and Removal** - Functionalist

*Morrison v. Olson* (1988) – Morrison, the independent counsel prosecuting Olson, subpoena’s him, and he protests, arguing that the statute governing her position’s appointment and removal (passed in wake of Watergate scandal) is unconstitutional—she wields purely exec. power and does not SATPOP.

1. The opinion identifies the independent counsel as an **“inferior officer”** and establishes 4 factors distinguishing inferior from principal officers.
2. Subordinate to Officer other than Prez (AG removes, not Prez)
3. Duties limited (1 circumscribed investigation)
4. Limited jx (only authorized to investigate senior officials)
5. Time limit on tenure (position dissolves once task completed)
6. Potential veto-points on the official’s decision? (not stated in *Morrison*, but something to consider, probably. See SEC ALJ practice problem.)

***N.B.*** Rehnquist’s analysis here is debatable—can the independent counsel truly be characterized as an “inferior officer” if s/he is vested w/ entire power of AG, FBI, etc., *and* can prosecute senior executive branch officials, including President?!

1. **NEW RULE:** If insulating an inferior officer from removal doesn’t interfere w/ the Prez’s exercise of Art. II duties, the removal restriction is constitutional. (Use *Morrison* factors for distinguishing principal from inferior officers as an aid in thinking about whether insulation from removal is an impediment to Presidential duties.)
2. ***N.B.*** Functionalist rationale results in a pretty content-less rule. **ISSUE:** Do courts get better guidance from this style of standard or a more formalist rule, à la *Humphrey’s*? Which constrains judges more?
3. Scalia’s dissent: On an originalist unitary executive theory, he expresses concern that the independent counsel provision gives the appointed counsel unchecked power that unconstitutionally impinges on executive authority.
4. For Scalia, it’s *never* OK for Congress to create independent agencies that diminish Prez’s plenary power. So he would call even the independent agencies under *Humphrey’s* unconstitutional.
5. ***But, N.B.*** today, the big issue is the imperial presidency, which was not anticipated by founders. So is Scalia’s arg. really that valid?
6. Clinton impeachment and special prosecution by Ken Starr under this statute led Congress to let it expire. Its failure, on one account, proves Scalia right. On another account, the Ken Starr situation illustrates how politics will push back and lead institutions to establish appropriate separation of powers boundaries when things go wrong—judicial intervention unnec.
7. **The Next Word on Removal** – swing back to **limited formalism**

*Free Enterprise Fund v. PCAOB* (2010) – Sarbanes-Oxley nested PCAOB, org. created to regulate accounting, within SEC. Free Enterprise Fund challenged the two tiers of “good-cause” removal separating President from PCAOB members.

1. **RULE:** Two-level “for-cause” restrictions are not OK. Doesn’t formally overrule *Humphrey’s*, and doesn’t say *any* 2-tier removal is wrong.
2. Roberts’s opinion represents a swing back to more formalist analysis.
3. **ISSUE:** Unclear, going forward, how this decision will apply to inferior officers, such as Administrative Law Judges and Assistant U.S. Attorneys whose removal follows a 2-tier “for-cause” structure.
4. **ISSUE:** Is it “good cause” for a president to fire an SEC member because s/he won’t fire a PCAOB member? What’s the real effect of this rule?
5. ***N.B.*** In striking the offensive portion of the PCAOB statute, the court may have rewritten the law to a form that wouldn’t have been able to have been enacted by Congress. Is it a true reflection of the political bargain, then?
6. *Presidential Control of Agencies*
7. Congressional restraints on Presidential Control
8. While we talk quite a bit about how congressional restraints on presidential appointment and removal powers and tools like the legislative veto may be employed by Congress to limit the President’s control of agency action, a key **ISSUE** is the extent to which these theoretically restrictive mechanisms *actually* constrain the President’s ability to influence the policy agenda of even “independent agencies.”
9. Congress can still utilize its budgeting, design, and power to hold hearings as ways to hold agencies, even those which are “independent,” accountable.
10. Courts have generally assumed that when Congress is silent on presidential removal, for-cause restrictions apply. **ISSUE:** unclear why this is so. Shouldn’t silence imply at-will employment, by default? *Assuming agency independence is a powerful convention*. (Alberto Gonzales example)
11. Congress may also seek to limit presidential control in the way it sets department-head terms. For example, PCAOB members serve at staggered 5yr. terms, FTC Commissioners staggered 7yrs., etc.: intentionally longer than one presidential term so as to prevent a president from establishing unitary partisan control.
12. Why insulate agencies from presidential control?
13. Protect them from the pressure of President’s executive power and his/her policy agenda, thereby insulating **expertise** from politics.
14. Congress doesn’t want its policymaking authority subsumed/diluted by that of President.
15. Centralized Regulatory Review

i. OIRA, an office within the President’s office of management and budget (OMB), oversees non-independent (and independent? See Vermeule old exam) agencies.

a. Requires agencies to submit a list of all major actions for the yr., including guidance docs under Obama.

b. Requires that quantitative and qualitative cost-benefit analyses be conducted.

c. Is a main tool in the President’s arsenal for managing agency actions. Was created thru executive order.

ii. President’s persuasive power in Congress

iii. President’s publicity power > that of independent agencies

1. “Behind the scenes” pressure by President on independent agencies + general probable desire not be seen as out of step w/ President’s wishes
2. Pros of Presidential control
3. Counteract interest-group pressures (regulators tend to work in industry pre- and post-agency tenure)
4. Insulate the agency from congressional pressure
5. The Regulatory Process (and its Regulation…)

Agencies’ regulating powers and functions include rulemaking, investigation and reporting, composition of policy proposals, enforcement through litigation, self-governance regarding the principles to which agency practice will adhere, etc.

1. Overview
2. ***Sources*** ***of Agency Power***

Ultimately, Congress must expressly or impliedly confer upon agencies their powers. However, occasionally agencies will invoke the authority of the President to justify their actions,which gets to political accountability.

1. ***Constraints on Agency Power***

For agency action to be legitimate, it must meet the same kind of two-tier requirement that applies to jx Qs in Civil Procedure: (a) is the action being carried out so that it meets ***constitutional due process requirements?*** (b) Is it consistent w/ relevant ***statutory authority?***

1. The Constitution
2. nondelegation doctrine
3. requirements as to how personnel may be hired and fired
4. **Procedural requirements** mandated by the Due Process clause.

*Londoner* and *Bi-Metallic* takeaways: the size of the group being affected by the decision might be one factor in determining whether an in-person hearing is constitutionally required. However, the main distinction between the two cases appears to be the divide between an issue regarding the application of a policy decision (as in *Londoner*, where a hearing was required) and a dispute of a policy decision (*Bi-Metallic*, no hearing). Justifying this distinction is the sense that the first is the kind of matter courts are better equipped to address whereas the second is a global policy rule which a legislature should debate and decide AND the principle that individuals have a right to dispute how a rule is being applied to their property (notice and opportunity to be heard in accordance w/ due process), but they have already had their “opportunity to be heard” in relation to the policy Q through the representation of their legislators who made the decision.

***ISSUE****:* Divide between legislative and adjudicative action is not always clear—be on guard for ambiguity!

*FL Railway case:* Affirms *Londoner*/*Bi-Metallic* distinction along the adjudicative/legislative rule dichotomy. (Note that the rule established was deemed legislative even tho it applied only to a small # of RRds.)

1. Congressional constraints
2. Organic Act creating each agency
3. The Administrative Procedure Act (APA)

A major statute which sets the default procedures for agencies; written as a way to legitimate them.

-The APA divides agency action into 2 categories: **rules** (generally considered quasi-*legislative* in function; *prospective*) and **orders** (categorized as *adjudication;* typically more *retrospective* in nature). These can be completed **formally** (requiring a hearing in accordance w/ §§ 556 or 557) or **informally** (notice and comment paper hearing).

**ISSUES:** How much discretion do agencies have in choosing which policymaking vehicle they utilize? To what extent and when can they make decisions that don’t fall into any of the boxes? (e.g. creating “non-legislative” rules or selectively enforcing the law, etc.) These Qs drive the cases in this section.

1. Self-imposed procedural norms of the agencies
2. **Why do we want procedural constraints?** – They might address different concerns we have about delegating so much power to executive agencies.
3. Protection of individual due-process rights (see *Londoner* and *Bi-Metallic*)
4. Might make it easier for courts to oversee/review agency decisions
5. Requiring certain procedures could shape decision-making process so that it is…

i. more expertise-driven

ii. more accountable to . . . Congress? The public? Interest groups???

iii. better. Tho, note that there could be a disjunction between the kind of decision-making to which the procedures we have in place give rise and the kind of decision-making we qualify as “good.”

1. Avoid “agency capture.” ***N.B.,*** however, that adding a lot of procedural requirements onto a rulemaking process could, in fact, aid agency capture, as the time/money required to be involved in this process is only worth it to the major players, not the public at large.
2. Agency Rulemaking

-Sec. 553 of the APA, governing rulemaking, specifies certain situations in which a formal process is required. For all others, it says an informal process is suff.

-After *FL East Coast RR*, only impose formal rulemaking requirements if the organic statute conferring agency powers uses the specific words “on the record after opportunity from an agency hearing” from § 553. This pushes almost all rulemaking into the informal, notice-and-comment category.

1. Notice-and-Comment Rulemaking
2. The Paper Hearing Requirement
3. From *Nova Scotia Foods*: Due to the requirements in **§553(c)** of the APA that agencies “give interested persons an opportunity to participate in the rule making” and that the agency provide “a concise general statement of [their rules’] basis and purpose” upon issuing the final rule, coupled w/ the judicial review provision of **§ 706(2)(A)**, agencies must **disclose** certain scientific information used as the basis for their decisions AND they must provide enough **rationale** and information in the concise statement of purpose to enable reviewing courts to see what major issues of policy were discussed in the informal rulemaking and why the agency reacted to them as it did.
4. Note the adversarial quality of this procedural set-up—the natural result when judges and lawyers design process. BUT no evidentiary rules, thus many issues arise:
5. **ISSUE:** When must an agency disclose publicly available information?
6. **ISSUE:** What comments must an agency respond to? When must they commence a new comment period after releasing new info? When may they end the notice and comment cycle?
7. **ISSUE:** What makes a response to an interested party’s comment “adequate?”

***N.B.*** Uncertainties about required procedures after *Nova Scotia* prompt really lengthy notice-and-comment periods and, ironically, push agencies toward adopting *more* formal rulemaking procedures for good measure.

1. Judicial Regulation of Administrative Rulemaking Procedures
2. According to *Vermont Yankee*, “no common law of administrative procedures.” Any procedural requirements must have grounding in APA or Constitution. Possible that even *Nova Scotia* requirements could be invalidated, but they have not yet been walked back. This suggests, then, that some common-law element is retained…
	1. Result of the decision was to free up agencies to choose between formal or informal process. Set a ceiling on what procedures were required. NOT A FLOOR.
3. Pre-*VY*, courts were a bit split on whether they should be reviewing agency ***procedures*** or agency ***outcomes***. This partially came out of arguments about judicial competence—some said that judges might be better suited to evaluate procedures than the expertise-informed outcomes of agency decision-making and should thus stick to that.
4. *Chenery* cases confirmed the “consistent explanation”-y kind of standard from *Nova Scotia*, but in the adjudicatory context. Suggests across-the-board “common law” of administrative law.
5. Courts reviewing agency decisions will only review those decisions on the basis of the rationale that was provided at the issuance of the decision, not an explanation provided ex post. See *Chenery*. This standard is meant to promote good decision making by disincentivizing the creation of post-hoc rationalizations and encouraging consistency w/ *Nova Scotia* notice and comment standards.
6. Agency Adjudication

-APA says nothing about informal adjudication, only provides procedural requirements for formal adjudication. Says these must be followed in every case of adjudication ***required by statute.*** BUT the *FL East Coast* holding that formal *rulemaking* procedural requirements are only triggered by the magic words “on the record” and “after opportunity for a hearing” has been applied to adjudications by most lower courts even though the SCOTUS has not ruled on the matter in relation to formal adjudications

-Congress delegates adjudicating authority to agencies, as in the worker’s comp commission discussed in *Crowell* for purposes of **expertise** (a commission devoted to calculating this kind of damages, as opposed to a general federal court), **efficiency** (move cases that could clog federal cts. unnecessarily to a specialized tribunal. N.B., though, such streamlining might dilute quality of the adjudication…), and **conformity w/ a certain policy** (Congress could be worried that plaintiffs aren’t recovering sufficiently… or that they’re recovering too much.)

1. Adjudicating . . . and Prosecuting?

i. *Crowell v. Benson* (1932) established that delegation of certain adjudicatory power to agencies is fine so long as the federal courts retained power of review, in effect treating the Commission as a “special master.” Federal cts. must be able to:

a. Order a de novo trial for questions of law.

b. Rule on jurisdictional facts having to do w/ the agency tribunal’s authority over an individual’s matter.

c. Certain disputes involving private rights can only be resolved by administrative courts when federal courts retain ability to review Qs of fact *and* law.

***N.B.*** NOT clear that any of these restrictions are still really important—a lot of adjudication is delegated to agencies these days.

ii. *Crowell* limits on power of agency tribunals and its various dichotomies (private vs. public rights; law vs. fact) stem from a fear of “Tocqueville’s nightmare”—that the bureaucracy, if left to its own devices, would run roughshod over the traditional judiciary.

iii. *Wong Yang Sung v. McGrath* (1950) – The constitutional requirement of procedural due process permeates every valid enactment of Congress, and if due process requires a hearing, read in hearing requirements of the APA, §§ 556, 557.

1. Procedural requirements for hearing under APA require that prosecutorial and adjudicatory functions are carried out by different officials—fears that becoming acculturated in a specific role undermines an official’s ability to fulfill the other kind effectively. Also potential quid-pro-quo between shifting prosecutors and adjudicators as well as entrenchment of a certain bureaucratic enforcement stance.

BUT: couldn’t prosecutorial experience provide adjudicators in deportation court w/ a special kind of expertise that might be valuable?

1. BUT, APA procedural requirements *NOT* constitutionally required (from a later decision after *Wong Yang Sung*).
2. ISSUE: In the end, court’s suggestions about separating prosecutorial and adjudicative functions and professionalizing immigration court were implemented. But post-9/11 it still suffered from poor quality, lots of appeals to federal courts. This suggests that:
3. Hearing procedures maybe are not the most important tool to ensure quality adjudication by agencies.
4. Personnel deficiencies (among judges and attorneys) might be a bigger issue. (Poor quality and/or political staffing decisions impacting quality?)
5. Lack of oversight procedures undermines positive effect of hearing procedures?

iv. The larger idea in *Crowell*, *WYS*, and *Benslamine* is that moving lots of dispute resolution out of the courts and into agencies creates some concerns. The Supreme Court accepts the constitutionality of this shift in *Crowell*, but it still leads other legal actors--like the drafters of the APA, and later courts--to try to put some restrictions on agency adjudication in order to ameliorate those concerns. And the materials surrounding *Benslamine* (including the history of streamlining, etc) show that those concerns are still present today.

1. Some Kind of Hearing – Determining *when* and *what kind* is required
2. Procedural due process requirements come from the 5th (federal) and 14th (state) Amendments.
3. Pre-*Goldberg v. Kelly* (1970) – a “rights” and “privileges” dichotomy prevailed: gov’t interference w/ an individual right required a full-blown trial proceeding in an Article III court, otherwise no hearing requirement.
4. *Goldberg*: marked final demise of rights/privileges distinction. Says welfare benefits are such that due process requires that agency provide an oral hearing before benefits are terminated. The case raises open questions as to how and when due process will apply w/o the rights/privileges divide.
5. *Roth* and *Perry* – 2-step Due Process analysis
6. Is the agency action depriving an individual of ***life, liberty or property?*** For property, there must be a ***legal entitlement*** stemming from a nonconstitutional source of law to trigger due process. Liberty doesn’t have same legal-entitlement standard as property, but does extend beyond freedom from physical incarceration. (2) Use Constitution to determine due process requirements.
7. In *Roth*, no hearing or statement of reasons was given, and court held these were not required before deciding not to rehire Roth. In *Perry*, same lack of hearing, but case remanded to see if hearing was required. Why the difference?
8. Promise to rehire in *Perry* was more well-documented, supported by customary evidence than was that in *Roth*.
9. 1st Amendment violation issue addressed in *Perry*, but not *Roth*. Supports idea that legitimacy of gov’t’s rationale needs to be investigated.
10. Ultimately, can find a **legal entitlement** in a property interest through the “common law” of the university in *Perry*, but not in *Roth*.
11. Implications
12. State has sig. control of individuals’ access to procedural protection because it controls access to legal entitlements.
13. State *doesn’t* have control over your access to a certain quantity of procedural mechanisms—this is controlled by the due process clause.
14. Less emphasis now than there was in *Goldberg* on the significance of the property’s interest to individual since the existence of a legal entitlement is really the core question.
15. *Mathews v. Eldridge* (1976) – provides a cost/benefit analysis for determining what kind of procedures are required by due process:

**Value of extra procedures** for entitlement recipient (private interest in entitlement x change in risk of wrongly losing it due to procedure) vs. **cost of extra procedure** to gov’t. If value exceeds cost, go for it. Otherwise no.

1. ISSUES w/ the *Mathews* CBA
2. Prioritizes *accuracy* of the procedural mechanism. But is this really the key thing due process is meant to protect?
3. Provides no *practical directions* or clear example of how the quantities are to be estimated or calculated. This is probably because the Court, and courts in general, are not super confident in their ability to conduct CBA. In effect, the calculus gets delegated to the agency.
4. Assumes CBA is the primary motivation, perhaps undervaluing concerns about expertise, dignitary respect toward complainants, legitimization of gov’t action through procedural process (particularly since democratic accountability of agencies can be questioned), etc.
5. *“private interest of claimant”*

A lot of the incommensurable values (subjective value of losing one’s home, being unable to pay bills, etc. as opposed to economic value, for example) that may not be accounted for expressly in the *Mathews* balancing test can be packed in to this term. It’s the element that often stands in for judicial concerns about the significance of the interests at stake (primary focus in *Kelly*) and which judges today still take seriously.

1. What met the CBA for Mathews?

An evidentiary hearing was NOT required prior to the final decision to terminate Mathews’s disability benefits. Notice and an opportunity to respond in writing prior to termination was OK, given the opportunity for an evidentiary hearing to challenge the final decision, which terminated benefits beginning 2months after month in which medical recovery was found to have occurred.

1. Flexibility of Policymaking Form?
2. The Choice Between Rulemaking and Adjudication

i. *Chenery* I and II (1947)

a. Agencies are required to provide consistent explanations as to their decisions in order for those decisions to have validity. (I)

b. \**The APA permits agencies to choose between adjudication and rulemaking.*(II)

c. **Retroactivity**

-If the decision is made through *adjudication*, use a balancing test to determine if retroactive effect is OK.

-If the decision is a *rulemaking*, may only have retroactive effect if Congress has made some kind of “clear statement” that the agency has retroactive authority. (See *Bower*, note case, p. 626.) This presumption against retroactivity is yet another example of something which looks a helluva lot like administrative common law.

***N.B.*** Determining whether a decision has retroactive effect is tricky! (Think EPA and CAA grandfathered coal plants suddenly told to install scrubbers.) The seriousness of the ***reliance interests*** at stake tends to play a role in retroactivity analysis.

**ii.** Caveat: Agency discretion as to whether it implements policy through adjudication or rulemaking could be modified by Congressional statute. The default rule is that of the APA, however, which *Chenery* interpreted to give agencies full discretion as regards the adjudication/rule choice.

**iii.** Potential issues w/ Agency Flexibility

1. Agencies are strategic actors – they could simply pick the easiest route to their policy goals, but would that be the best for all? The agency could sidestep oversight and thus be less accountable to relevant parties. Decisions might also not be as good if not put through wringer of procedural requirements. Doesn’t this go against goals of the APA?
2. Does it allow agencies to make law as they go, filling in gaps within the statutory scheme w/o **providing notice** in advance to affected parties and retroactively penalizing them? (See Jackson’s dissent in *Chenery*.)
3. BUT: is this really all that different from common-law adjudication?
4. No, but if agency has alternative (unlike common-law courts), shouldn’t it use that instead?
5. Allowing agencies to make rules through adjudication **narrows the scope** of relevant parties involved in the policymaking process (as opposed to rulemaking). This could undermine the legitimacy of the decision reached.
6. Whereas Constitution requires adjudication in certain contexts (see *Londoner*/*Bi-Metallic*), it imposes no requirements on when the notice-and-comment rulemaking process must take place. This creates an **asymmetry** between the two modes of policymaking. Why wouldn’t we require that when a rule will have broad applicability, it be created through rulemaking process?
7. Reasons for Agency Flexibility
8. Sometimes there are situations a statute doesn’t anticipate, but the agency can’t imagine the statute was possibly meant to allow X, Y, or Z. Being able to develop policy through adjudication allows them to respond to the statutory ambiguity.
9. The world changes over time and so sometimes creating a rule that will be made to govern the uncertain future is less desirable than *ad hoc* adjudication.
10. Adjudication can be individualized whereas rules may be better suited to broad policy that can be set in advance widely. Adjudication could also support creation of flexible ***standards*** when those are needed to supplement more bright-line ***rules***.
11. Expertise arg.: adjudication of individual cases allows agencies to acquire valuable information over time.
12. ***N.B.*** This is a controversial arg.: there are definite advantages to gathering info from a broad swath of relevant parties through notice-and-comment process in order to craft a good rule.
13. Separating “Rules” from “Orders” under the APA

While agencies have discretion to choose which decisionmaking process they follow, if we define “rules” and “orders” in terms of the procedures used by an agency to formulate them, then affected parties are left w/o ability to challenge the adequacy of procedures used to formulate a rule/order which affects them. Agency would have free reign.

1. The APA definition of a “rule” is so broad that basically everything agencies do could be classified as such. Thus, typically folks distinguish “**substantive**” (subject to 553 informal/formal procedure requirements) rules/orders from “**nonlegislative**” rules (guidance docs, interpretive rules, etc.)
2. Exceptions to § 553 procedural requirements

i. The “Good Cause” Exemption

ii. General Statements of Policy

1. From *PG&E*: The key difference between a substantive rule and a guidance doc is that a rule has the ***force of law*** and ***creates rights and obligations*** whereas a guidance doc is “just a suggestion”
2. From *Appalachian Power* (NOT canonical approach): if the practical effect of a facially nonlegislative rule is binding, then it is a substantive rule which requires notice-and-comment rulemaking procedures.
3. Practical implications of the substantive/nonlegislative rule divide: are that for substantive rules, given one’s “earlier bites at the apple” when policy was set, less chance to challenge that policy down the line. Rule review can also happen immediately upon creation. By contrast, for nonlegislative rules, no final agency action until the policy gets applied, so can only be challenged once enforced, adjudicated, and rule created.
4. Why use these?
5. Emergency response
6. Insulate agency decisions from judicial review?
7. Threaten affected parties w/o giving them opportunity for comment.
8. “Interpretive Rules”
9. **ISSUES**
10. (Why) should courts police the distinction between agency decisions which require APA procedures and those which do not?
11. **Procedural benefits** of legitimization through expertise/accountability (***N.B.***, though, formal rulemaking through adjudication already cuts out many of the parties who might otherwise be involved in rulemaking.)
12. Makes a difference as to ***when* judicial review** is available (see handout)
13. How to distinguish substantive rules from “guidance docs?”
14. Force of law? (Legal entitlements created?)
15. Binding? legally or *practically*? On agency (over time) or private parties? (Might this have anything to do w/ where the particular decision lies on the rule -> standard/categorical -> individualized spectrum?)
16. **Harvard Law’s complaint:** agency policymaking through exceptions to §553 doesn’t technically have force of law, but in practice, they *may* preclude judicial review, given the reputational costs of noncompliance and subsequent litigation for individual institutions of higher ed. This point about the **practical realities** which influence **access to judicial review** extends farther—immigration context and 4-yr. olds being expected to represent themselves, for example.
17. **Bottom line:** Given the difficulty in drawing the line between a substantive rule and a guidance-doc-style decision, courts will typically be informed by considerations about how their decision will affect agency action when deciding into which category a particular decision falls. *For example,* a court might ask: “if I say this must be done through formal rulemaking, will the agency really start moving to rulemaking, or will it simply not issue the guidance doc. but pursue the doc.’s policy anyway?
18. **Enforcement Discretion** (another EXCEPTION to formal rulemaking reqs)

i. DACA/DAPA controversy illustrates how agency exercise of prosecutorial discretion raises issues of legitimacy, procedural reqs similar to those which emerge in the context of policy guidance doc “non-legislative” rules.

-Guidance doc./substantive rule args that DACA was **procedurally defective** from *Texas v. U.S.:*

Department of Homeland Security’s Jay Johnson announced the criteria his department would use for deferring deportation actions, and this was challenged by several states as a substantive rule, issued in the guise of a guidance doc, that had not undergone required APA procedures.

1. One arg. is that the policy must be a rule because it was **binding** on the agency.
2. But while it bound *lower-level officials’* discretionary conduct to the policy preferences of the department chiefs, it did NOT bind the agency over time or beyond the current administration. Discretion *not* eliminated, just shifted in the hierarchy of the agency.
3. This can’t be suff. to establish the guidance doc as a substantive rule.
4. Another arg. by Texas: policy creates **legal entitlements** (access to driver’s license, social security benefits, etc.)**,** so it has **force of law.**
5. BUT: these entitlements weren’t created precisely by the guidance doc—actually have other (non-guidance) source.
6. This is like exercise of prosecutorial discretion in criminal law—can’t sue prosecutor for violating promise not to prosecute you; can change decision not to prosecute at whim.
7. Maybe the concern w/ the guidance doc is actually a ***functional*** concern about procedural sidestepping, decreasing accountability and expertise in the process of enacting a MAJOR change in policy…
8. Accountability may *not* be compromised, for the policy is tied to the President, who remains democratically accountable. Granted, he *is* a 2d-term president, announcing this executive policy *after* Congress failed to pass legislation... Maybe not so accountable.
9. Expertise could be compromised, for taking authority away from the low-level officials and their exercise of discretion, informed by on-the-ground experience.
10. What big ideas behind the APA are being compromised? Didn’t it hope to legitimize somehow agency policymaking thru procedures?
11. This case highlights the bedeviling line between ***law/rule creation*** and ***interpretation***, a line which gives rise to much of the difficulty in distinguishing substantive rules from “guidance-doc” rules under the APA.

ii. *Heckler:* statutory **presumption against judicial review of agency prosecutorial discretion** (why Texas did not want to wait and challenge until agency carried out policy in individual cases—sets precedent that Texas would then lack a means to challenge exercise of discretion in court)

1. APA § 701 allows Congress to preclude judicial review of agency action, within constitutional bounds. (See, e.g., *Crowell*)
2. Additionally, 701 says that *“to the extent that agency action is committed to agency discretion by law,”* it is **not** reviewable. This occurs in situations where there “is no law to apply,” so there is thus no standard by which a court might review the agency’s discretion.
3. BUT, 706(2)(a) says that reviewing courts may strike down agency action that constitutes *“an abuse of discretion.”* This provision holds when the court has statutory authority by which to review the exercise of discretion.
4. *Heckler* holding: there’s a general presumption against judicial review of agency discretion, and further, a *greater* presumption against review of agency *in*action than against review of agency action.
5. ***N.B.*** Very difficult to distinguish action from inaction. What, for example, is the exercise of discretion in the DAPA/DACA context?
6. If the justification is that we’re not as worried about agency inaction as we are about agency action because it seems less coercive, note the coercive effect of the agency *in*action in *Heckler* (allowing lethal drugs to be used to execute people in a way that had not been tested and approved by the FDA).
7. Maybe the justification for Heckler’s inaction/action distinction is that you simply can’t enforce against everyone, and it would be impractical for courts to review the various factors weighed in this decision. BUT: Marshall’s dissent—courts could review specific instances of non-enforcement through review of agency rationale. (Still would have problem of deciding whether court should hear case in the first place—jx to hear and the merits are different Qs)
8. *Texas v. U.S.* arguments

The gov’t said DAPA was insulated from judicial review under the holding from *Heckler*. ***Texas argued*** (1) that *Heckler* didn’t apply to DAPA because it was actually *positive* action rather than non-enforcement. (***N.B.*** Had court accepted this arg., could have made it very hard for gov’t to insulate its actions from judicial review.) Maybe Texas is right, but then what are the ways this prosecutorial discretion is unlawful? (2) That DAPA was not like other instances of prosecutorial discretion because it ***conferred legal benefits.*** Cox sayz: “Lawful status” isn’t a legal benefit, could be revoked at any point. BUT deportation deferment *did* entitle recipients to benefits w/ a protected property interest… a property interest they received as the result of regulations which had been developed through ***notice-and-comment rulemaking!***

1. The 5th Circuit suggests two reasons why *Heckler* might not preclude review of TX's claims against the DAPA policy documents:

 A. Maybe *Heckler* doesn't apply to a situation where prosecutorial discretion is embodied in a guidance document laying out the agency's policy of prosecutorial discretion, rather than embodied in an unexplained, one off decision of a prosecutor not to initiate an enforcement action.

B. Even if *Heckler* would preclude review of a true guidance document describing prosecutorial discretion policies, it does not preclude a court from considering a lawsuit alleging that the agency's document is not a true guidance doc but, instead, is a disguised substantive rule.

1. Substantively unlawful
2. Action might not be authorized by statute (not the arg. in *Texas v. U.S.*)
3. *Heckler* justification for presumption against judicial review for prosecutorial discretion 3: Article II “take care” clause grants President the authority to decline to exercise prosecutorial powers. Review could thus raise constitutional concerns. ***N.B.*** This notion *further* insulates prosecutorial discretion from judicial review. ***N.B. 2:*** This is not a principal arg. upon which challengers to agency action often rely. Usu. go admin. law route rather than Constitution
4. Judicial Review of Agency Rules/Orders/Decisional *Outcomes*
5. Judicial Review of Agency Statutory Interpretation (Is the action ***unlawful*** because ***not authorized*** by the empowering ***statute***?)
6. Early Cases

i. *Crowell v. Benson, Hearst,* and *Skidmore* line of cases speak to notion that reviewing courts have an obligation to decide all **“pure Qs of law”** de novo. This comes from an idea about supremacy of judicial review when interpreting statutes, dating back to *Marbury v. Madison.* APA embodies this approach in the reviewing power it grants to courts in §706.

ii. On **mixed Qs of law and fact,** the court would defer the factual element to the agency, as in the appellate/trial court division of labor. *Examples:* in *Hearst*, court says how to interpret “employee” is pure law Q, whether newsboys are employees is mixed; In *Skidmore*, Q of the legal def. for work/wait time is pure law, whether firefighters were due unpaid workers’ comp. is a mixed Q.

***N.B.*** The greater deference given to agency discretion by the court in *Hearst* than by the *Skidmore* court bears out the different rigor of judicial review we expected would be employed when evaluating a decision made through formal procedures (order created thru adjudication in *Hearst*) vs. a guidance doc (circular in *Skidmore*)

1. The Modern Approach: *Chevron v. NRDC*

This 1984 case involved a challenge to the EPA’s interpretation of “statutory source” in the CAA. In the shift from the Carter to the Reagan administrations, the way the EPA constructed this term changed.

**i. *Chevron* 2-step:**

a. Has ***Congress spoken directly*** to the question at issue and resolved the statutory question clearly? If so, the court and administering agency must give effect to the ***unambiguously expressed intent*** of Congress.

***N.B.*** The kind of ambiguity nec. to move a court on to Step II is *not* the kind of ambiguity that could, say, trigger use of a substantive canon in the statutory interpretation courses we read at the beginning of the semester. This is ambiguity after the court has attempted to ***“squeeze out”*** all possible ambiguity, using all the tools of construction we discussed during the first 7 classes.

b. If the statute is ***silent or ambiguous*** w/r/t the specific issue, the court must then decide if the agency’s interpretation is based on a ***permissible construction*** of the statute. If it is, the ***agency’s interpretation receives deference.***

ii. HOLDING: Court found that the statute was ambiguous as to the proper construction of the term and that the EPA’s interpretation of “stationary source” as a “bubble” of polluting sources was a plausible construction, meriting deference.

1. The *Chevron* framework suggests that if there’s a single correct way to interpret the statute, then that interpretation must prevail. However, if it’s ambiguous, we intuit some range of reasonable constructions in which the agency’s may fall. *Chevron* does NOT provide guidance as to ***how*** a court should determine whether an agency’s construction falls within range of permissible constructions (simply must be ***reasonable***, maybe?), but DOES say that if there is such a range, it’s not for the court to decide where in that range the “point-estimate” construction should lie. Such a decision has been ***implicitly delegated*** by Congress to the agency which administers the statute.
2. ***N.B.*** how the first-step question of *Chevron* is really asking: Is there a range (of meanings) or a point meaning? This heightens the significance of the analysis of ***statutory ambiguity*** in that it suggests that at the Step I level, courts are determining the clarity of the statute ***as a matter of law***—to the point where statutory construction “runs out,” and policymaking steps in. On this view, Step II is not purely legal; it’s the place where politics comes into play and is thus better determined by agencies.
3. Note that the *Chevron* framework is *not* derived from the APA. While APA language suggests that Art. III courts may strike down agency action that is substantively unlawful in relation to the agency’s authorizing statute, it does not say *how* courts should determine whether agency action is so unlawful. (Another example of that pesky ***“administrative common law??”)***
4. *Chevron* also doesn’t make clear if an agency interpretation can be within the permissible range of constructions and still be found, under *Chevron*, to be impermissible. (Perhaps, for *EXAMPLE,* an agency

construction seems permissible, but it was chosen by flipping a coin. Could a court strike down this interpretation based on the “arbitrary and capricious standard?)

1. Seems like one could challenge a construction within the range of permissible constructions on constitutional (DP, equal protection)/APA grounds w/o *Chevron*.
2. Differences from the old approach
3. No distinction between questions of pure law and mixed Qs of law and fact
4. NOT a balancing test regarding deference to agencies, as had been suggested in *Skidmore*.
5. ISSUES
6. Is the court’s deference to agencies under *Chevron*, which transfers authority from courts to the bureaucracy, a good thing? ***N.B.*** This relationship ties in ***deeply*** to concerns about the appropriate role of courts and the law in statutory interpretation, given reality of politics. Is this a job for courts or executive agencies?
7. Formal position: The “pure Q of law” which *Chevron* acknowledges is that statutory gaps are ***implicit delegations*** of authority by Congress to agencies.
8. Rationale 1: Congress may intentionally make these delegations given its lack of foresight and the inherent limits of communication. (Courts adopting this rationale will care more about what enacting Congress actually wanted to delegate)
9. Rationale 2: General arg.s for delegation: ***expertise*** and ***accountability*** (to current Prez, rather than the enacting Congress—supports a vision of evolving/***dynamic*** application of the law, rather than a model wherein Congress must rewrite the law when circumstances require a different approach from that appropriate at time of enacting Congress.) ***N.B.*** A formalist account of *Chevron* allows courts to say that their deferment to the policy preferences of the *current* executive is faithful to the intent of the *enacting* Congress, for that Congress provided for such delegation in its statute.
10. Is it **reasonable** for the law to impute *intentional* delegations to *all* congressional gaps? Not clear that Congress is thinking about statutory gaps in this way; also, when ambiguity results from a divided Congress, can such ambiguity really be considered an *intentional* delegation to the agency?
11. *Chevron* and Textual Interpretation

What does it mean for a statute to be ***“clear”*** such that *Chevron* step 2 is not nec.? The **philosophy of statutory interpretation** that guides Step I analysis will influence how a court answers this Q.

*i. MCI Telecom v. AT&T* (Textual Analysis and Structural Inference)

Scalia says that the elimination of the tariff-filing requirement is TOO big a modification for the agency action to comply w/ its authorizing statute. The meaning of “modify” is *not* ambiguous such that deference to agency interpretation is triggered. Notable args. about dictionary defs., but Scalia, though relying on textualism, really seems to be arguing for the statute as intended by enacting Congress; Congress must be forced to rewrite the statute to get the new policy FCC wants to follow.

1. ***N.B.*** Stevens’s dissent and arg. in support of ambiguity/reasonableness of agency interpretation does *not* show that statute must be ambiguous. Courts have *not* accepted the idea that the mere presence of a dissent automatically moves the *Chevron* analysis past Step I. If this were so, no cases would be resolved at step 1.
2. ***N.B.*** *Chevron* doctrine on its face does not tell us whether statutory interpretation in Step 1 analysis should be driven by the general sense of broadly conceived congressional purpose, à la Stevens, or the more particular sense of congressional intent implied by Scalia. ***Functionalist*** considerations might play a role in the choice here.
3. *Babbitt v. Sweet Home* (Semantic Canons and Terms of Art)
4. Stevens frames his opinion in favor of agency construction as a Step II situation where there is ambiguity and the agency’s construction falls within the range of plausible constructions. However, he expends a good amount of energy defending the *persuasiveness* of the agency’s interpretation. This raises the Q, even if this is *formally* a step-II decision, is it *actually* step I? Note this possible **strategy** for advocating on behalf of an agency construction.
5. Scalia’s dissent suggests (but does not explicitly invoke) the ***constitutional avoidance canon*** in relation to takings doctrine (agency construction mandates how some might be able to use their property).

***N.B.*** Both the majority (Stevens) and dissent (Scalia) employ the full gamut of textual analysis tools to support their apposite interpretations of “harm,” but the fact that they are able to do so does not automatically indicate ambiguity.

***iii. Substantive canons in* Chevron *analysis***

1. If we think the idea behind the *Chevron* 2-step is to leave policy judgments to agencies, then it might seem inappropriate to impose the ***value judgment*** embodied by substantive canons at Step I analysis. BUT we might think it’s unreasonable for an agency to employ a potentially unconstitutional construction and impose this value judgment on them as well… Their use at either point might also be justified by idea motivating the substantive canons: that we want Congress to be ***explicit about its delegations,*** particularly when they might challenge constitutional or other legal norms.
2. Modal approach is for courts to go ahead and deploy substantive canons at Step I analysis.
3. A court could justify deployment of a substantive canon at Step II to argue that an agency’s construction is outside the permissible range of meanings. The practical difference between use at Step I and Step II is unclear, but this feature of substantive canons does make them unique among interpretive tools as the only one which could invalidate agency construction at the Step II level.

***iv.* Structure, Context, History, and “Major Qs” in *Chevron* Analysis**

1. *FDA v. Brown and Williamson* - O’Connor’s majority opinion provides a range of reasons why, under the FDCA enacted in 1934, Congress “clearly precluded” the FDA from exercising jx to regulate tobacco (point meaning at Step I) in the face of a def. of “drugs” which FDA should regulate that is so broad and expansive it seems clear nicotine should qualify. She relies upon subsequent legislative history (weakest form of legislative history evidence, typically) to argue that policy preferences of *current* Congress are to NOT have tobacco contained within FDA regulatory scheme. She points to absurdity of the statute requiring FDA to ban nicotine products and its workaround, agency changes in position, all weak-ish supporting args. Ultimately, O’Connor’s opinion seems motivated by **delegational** **concerns** and the principle that Congress doesn’t hide “elephants in mouseholes.”
2. **“Major Questions Doctrine” (possible *Chevron* carve-out?):** If a decision is of major “political and economic magnitude” and Congress has not explicitly delegated such decisionmaking authority to the agency, then it lacks the authority to exercise such power.

**Why this rule?**

-Could mimic Congress’s actual preferences—Congress is comfortable w/ small delegations but wouldn’t reasonably delegate such major Qs. -BUT, haven’t we seen situations where it looks like Congress has wanted to “punt” such decisions? (Benzene case, for example…)

-So, on **the O’Connor view,** the idea is to force ***congressional accountability*** by requiring Congress to be explicit about its intention to delegate or not delegate such authority. (Not allowing Congress to punt Qs it needs to address.) BUT, **Breyer’s dissenting opinion** asserts that agencies have political accountability through their affiliation with the democratically elected President AND they have the expertise nec. to do the job of regulating tobacco, so an implicit delegation by Congress really makes sense here. ***A split on how to deploy “Major Questions doctrine,” turning on the reviewing justice’s faith in the agency as well as his/her expectations of Congress.***

Given the reality of the administrative state, where do we draw the line between Qs for which Congress and agency *should* be held accountable and those for which we require less of them, e.g.:

**What counts as a “major question?”**

-Couldn’t *Chevron* have counted as a major question? Seems like the doctrine has potentially wide scope…

-We see as clear *EXAMPLES* of “major Qs” for which the “doctrine” has been utilized: “economic and social impact” Qs of *B&W*, *Mass v. EPA*, Benzene case?, *King v. Burwell*; Qs central to the regulatory scheme—*MCI v. AT&T*; others???

**What does a court do when faced w/ a “major Q?”**

-Assert a kind of ***nondelegation issue,*** as in *B&W,* at *Chevron* step 1?

-Refuse to grant interpretive deference at *Chevron* Step 1 (*Mass. v. EPA*), making the “Major Qs doctrine,” in effect, part of ***“*Chevron *Step 0?”***

**\**N.B.*** If writing a brief to a court, standard is to embed Major Qs concerns in *Chevron* step 1.\*

**2) Irony:** O’Connor’s opinion asserts that she is supporting preferences of current Congress through narrow reading of statute, when typically, when we want to allow statutes to evolve w/ times, we choose *broad* interpretation of the statute by its administrative agency.

b. *Mass v. EPA*

Like *Brown & Williamson*, this case involves an old, broad statutory definition (this time about air pollutants), subsequent history w/ evolving knowledge about regulatory needs, actions by Congress that are not legislative but related to regulatory concerns, and agency flip flop on its position. Looks like a “major question” w/o explicit delegation to the agency, but Court says agency *must* issue an opinion as to whether GHGs have an effect on public health and welfare. What gives?

1. Seems dubious to distinguish from *B&W* on grounds that the CAA is clearer. Statutory meaning Q seems about the same, though, of course, Stevens, like O’Connor in her *B&W* opinion, employs all the tools of statutory interpretation we’ve seen before to support his reading…
2. Here we have agency *in*action/***abdication*** as opposed to agency aggrandizement. Typically, courts give even greater deference to discretionary non-enforcement, but Stevens works hard to explain why such deference is not warranted here. This seems to be because the agency’s decision not to act on the matter looks ***suspiciously politically motivated.*** Agency is ***not serving its function as a source of expertise***, so ***court forces*** it to exercise its expertise. ***N.B.*** tension between accountability and expertise agency functions in this context, ***ct. priority on forcing expertise.*** Note, though, the potential contradiction of court priorities here w/ those in *B&W*.

*c. King v. Burwell*

Roberts makes the move here to say, yes, the statute is ambiguous, but because this is an “extraordinary case,” there may be “reason to hesitate before concluding that Congress has intended an implicit delegation” to the agency interpretation. Then he gives the single construction he concludes is meant by the statute.

1. Roberts’s deployment of the “Major Qs doctrine” seems to affirm the more formalist perspective on Major Qs—that they shouldn’t be regarded as being delegated to agency because this would raise the specter of unconstitutional delegation of legislative function. Less about trust/distrust in IRS’s *actual exercise* of its interpretive authority in this instance.
2. Also affirms *Mass. v. EPA* way of deploying “Major Qs” doctrine—Major Q doesn’t trigger denial of agency power, but means that Court’s interpretation of statute controls.
3. The Limits of *Chevron*’s Domain

i. “Major Questions” doctrine

As a “*Chevron* Step Zero” element of analysis, having a Major Q involved in the statutory construction at issue can limit the agency’s authority to determine the scope of its power/jx. Such agency determinations are typically given deference under *Chevron* analysis.

*ii. Mead*’s “*Chevron* Step Zero” Questions

1. Did Congress delegate the agency authority to speak w/ the ***“force of law?”*** (standard-based question for court to answer)
2. Did the organic statute confer formal rulemaking/adjudicatory power to the agency?
3. Such procedural mechanisms are probative of congressional delegation of authority, but no specific procedural authority is nec. or suff. to pass this “*Mead* step 1” test.
4. *This might not be the agency to whom Congress intended to delegate interpretive authority.*
5. ***N.B.*** “force of law” in this context is slightly different than the similar concept of “binding” authority in guidance doc/formal rule distinction. In *Mead*, the ruling letter is practically binding on the parties to whom it applies, but the key for saying it lacks force of law is that it self-consciously lacks precedential authority beyond the specific application for which it was written. Otherwise, *Mead* might undermine *Chenery*. Guidance doc decisions have no precedential value either, but this wouldn’t necessarily undermine their identification as a substantive rule by a court, if they were practically binding in a meaningful way.
6. Did the agency exercise that delegated authority?
7. *Mead* points to the high volume of ruling letters, the low-level of the officials who wrote them, and the letters’ limited precedential effect according to the agency (only applied to involved parties, officially) as evidence that agency was NOT exercising its delegated force-of-law authority.
8. Uncertain whether guidance docs constitute “exercise of authority” meriting *Chevron* deference… *EXAMPLE:* Consider application of *Mead* to *Texas v. U.S.* controversy: Although DHS appears to have been conferred authority by Congress and agency action has political accountability through President, relied on the expertise of high-level lawyers and policymakers to design program, no formal procedures legitimize the decision. Scalia dissent suggests approval of high-level officials is relevant to *Chevron* deference. *Could some low-procedure agency action, orchestrated by high-level officials, merit* Chevron *deference, justified in this way? Maybe this would relate to whether a Court thinks the bureaucracy should function more like the common-law courts in the way it changes over time or thinks bureaucratic policy preferences should be more dynamic/politically responsive…? -B.B.O’H*

***N.B.*** The factors a court considers to answer the *Mead* questions go to the kinds of procedures/standards we typically think facilitate good decisionmaking, insulate agency action from certain pressures, and legitimate agency action by creating accountability through a legislative-like process. **We want indicia that deliberation, expertise, etc.—the values behind delegation to agencies—are being exercised.**

***N.B.*** NOT clear if *Mead* ct. gets off the *Chevron* wagon at *Mead* Q1 or Q2…

If the answer to either of these questions is “no,” the agency decision receives **“*Skidmore* (NOT *Chevron*) deference”**—weight of agency judgment depends upon *“thoroughness evident in its consideration, validity of its reasoning, consistency w/ earlier and later pronouncements, and all those factors which give it power to persuade.”*

1. Implications of *Mead*
2. Does this give agencies a strategic incentive to give their decisions precedential authority so as to receive *Chevron* deference? Or would they then run afoul of guidance doc/substantive rules divide as a consequence of pushing more decisions to that format?
3. Judicial predilection toward *Skidmore* functionalism

There’s **formalist** justification for the *Mead* modification of *Chevron* in the sense that it gestures toward an evaluation of the “legal fiction” behind Chevron’s presumption as to delegation. However, it primarily seems motivated by the Court’s desire to limit the ***transubstantivity*** of *Chevron* doctrine and provide for ***retail-level considerations*** as to whether this particular exercise of agency authority is one which merits *Chevron* deference, given specifics of what is going on procedurally, expertise-wise, etc.

1. Scalia worries that it will lead to **judicial inconsistency** by introducing **standards-based** review. Empirical evidence tends not to bear this concern out in the long run.
2. “Factual Basis” Review
3. Sources of legal standards for judicial review of factual basis

i. Constitution

*Crowell v. Benson* idea that some questions (jxal) mandate a right to judicial review of certain facts.

ii. APA

§706(2)(E) states that reviewing cts “shall hold unlawful and set aside agency action, findings, and conclusions found to be unsupported by substantial evidence in a case subject to sections 556 and 557 (provisions outlining procedural reqs for **formal** hearings/adjudications) . . . or otherwise reviewed on the record of an agency hearing provided by statute.”

iii. Organic Statutes

1. Administrative Common Law? (*Chevron* and *Mead* contrary to APA provision granting judicial review of law, for example)
2. Substantial Evidence Review

From *Universal Camera v. NLRB*: Factual review of FORMAL agency adjudication is typically very deferential, in model of appellate review of trial court decisions. However, the key to “substantial evidence review” required under APA (and read into Taft-Hartley Act here) is that the reviewing court look at the ***“whole record,”*** INCLUDING the findings/reports of line-level agency functionaries. Review doesn’t stop once there’s substantial evidence supporting agency decision; must take into account any substantial evidence *contradicting* agency decision, and agency must offer ***rational account*** of this contradictory evidence.

i. This notion of substantial evidence review diverges a bit from typical deference given by appellate courts to trial court fact findings. Is saying that agency heads must accord some ***deference*** to factual findings of “on-the-ground” agents.

ii. Such review seems motivated by concerns similar to those evident in *Mead*: We want agency heads to take into account the “expertise” of ground-level functionaries; at the same time, because an agency’s factual determinations are also bound up in policy evaluations which we think the agency leadership is better suited to make, we also want agency heads to retain stronger review power than would an appellate court over a trial court. AND we worry about giving excessive authority to low-level functionaries making judgments in mass numbers.

***iii. Similarities to rationality/reasonableness review***

Note that the SCOTUS in *NLRB* rejects the Circuit Court’s affirmation of the NLRB’s decision because the NLRB failed to provide a *rationale* to explain the difference between its conclusion and that of the examiner. W/o explaining why this “substantial evidence” does not fatally undermine the NLRB’s conclusion, the NLRB’s finding is both factually incomplete and lacks a coherent rationale. Fact review is n*ot* just about establishing an evidentiary threshold, then, but also requires courts to review how facts fit together as a whole.

1. ***Not a transubstantive standard***
2. “Substantial evidence review” requirement only covers certain situations. Moreover, many organic statutes specify their own standard of review. *For example,* the statute creating immigration court specifically provides for greater deference to the initial hearing judge’s findings than would standard substantial evidence review. And finally, judges may, ***on a case-by-case basis,*** determine that a particular agency decision merits a level of review *higher* than the standard authorized by statute.
3. Posner *EXAMPLE*

The *Iao* case illustrates one judge exercising review power over a case that was heard by an immigration judge and then reviewed by the Bureau of Immigration Affairs. But Posner does not accord the immigration judge’s findings w/ particular deference. Indeed, he basically says that the system is broken and given the ways it fails to exercise expertise (ignoring cultural difference, difficulties of translation, etc.) or give due concern to adjudicatory formalities like explaining the judge’s opinion in more than boilerplate, its finding merits no deference. Again, we see the court pushing against the ***categorical rule*** of substantial evidence review to, on a ***retail level,*** assess whether agency action merits deference in the specific context of the case. The *Mead* idea, but for fact review.

1. Rather than conducting de novo review, which could potentially clog federal courts and would presume a certain level of immigration expertise that the federal judiciary lacks, Posner writes a decision that presents some ***ex ante considerations*** to which immigration judges may attend so as to make their decisions worthier of the deference accorded them by statute. This echoes the *Nova Scotia* idea that more skeptical judicial review will prompt agency action that is more expertise-driven and accountable.
2. **ISSUE:** Should judicial review level of scrutiny be determined by a ***rule*** or a ***standard***? If we think that, in aggregate, judiciary isn’t capable of the kind of retail decision Posner makes here, maybe we think rules are preferable…
3. Rationality: The “Arbitrary and Capricious” Standard

-This style of review applies to ***all*** agency decisions (formal AND informal) and incorporates a rationality/reasonableness ‘fact’ review that is, in practice, the same as the “substantial evidence review” standard required of formal rules/orders in APA. N.B. Cox sayz: “arb and cap review and substantial evidence review can safely be thought of as ***basically the same standard,*** just applied to different agency actions.” Arb and cap review derives from ***§ 706(2) of the APA,*** which authorizes a court to *“hold unlawful and set aside agency action, findings, and conclusions found to be… arbitrary, capricious, or an abuse of discretion.”* This language has been interpreted by courts over time to authorize judicial review of the ***reasonableness or rationality*** of agency decisions.

-Crucial here to note that arbitrary and capricious review ***overlaps*** w/ statutory construction review and fact review. What this type of review *really* adds on to the judicial review inquiry is a consideration about whether, at the point where consensus conclusions about the mandates of fact and law reach their limit, a court feels comfortable with the ***policy decision*** made by the agency. Has the agency struck an appropriate balance between utilizing its own ***expertise*** and remaining responsive to the appropriate ***political authorities?*** To what political authority ought the agency’s decision be ***accountable***? What is the court’s proper stance in adjudicating such controversial Qs?

-Because of the way arb.&cap. review works in practice, it may serve as ex ante motivation for agencies to engage in full and fair deliberation and assemble a contemporaneous record of their decisionmaking. Otherwise, as in *Overton Park*, the decision will certainly be found arb.&cap./unreviewable.

1. Competing Factors for Arbitrary and Capricious Review

i. *Citizens to Preserve Overton Park v. Volpe* (1971)

1. Citizens challenged Secretary of Transportation’s approval of a plan to extend I-40 through a Memphis city park. Court held that, lacking an extemporaneous record of the agency’s rationale as to the decision, the case needed to be remanded for the initial reviewing court to determine if the Secretary’s decision met the following “arbitrary and capricious” standard:
2. *Overton* Arbitrary and Capricious Standard

To make a finding that an agency action is “arbitrary, capricious, or an abuse of discretion,” the reviewing court “must consider [1] whether the decision was ***based on a consideration of the relevant factors*** and [2] whether there has been a ***clear error of judgment.***

-Although this inquiry into the facts is to be searching and careful, the ***ultimate standard of review is a narrow one. The court is not empowered to substitute its judgement for that of the agency.”***

1) Consideration [1] goes more to rationality of agency ***process*** and compliance w/ statutory authority, requiring a *Chevron*-style analysis of what relevant factors are mandated by the statute and whether the agency’s *balancing* of these factors was legally acceptable.

2) Consideration [2] looks like a more ***substantive*** review of the **outcome**. *Courts are not in unison as to which element merits greater weight.*

c. ***N.B.*** If *Overton* was post-*Chevron*, NOT clear that court could have arrived at statutory interpretation it forwards as Congress’s clear intent. Might have had to defer to agency.

d. *Overton* is the “easy case” where the agency has no extemporaneous explanation, so the issue must be remanded to determine if there *was* a satisfactory extemporaneous explanation for the decision. ***Post hoc explanations will not do.***

1) This aligns w/ the rationale behind cases like *Chenery I* (consistent explanation req.) and *Nova Scotia* (standards for extemporaneous rationale behind decision coming out of notice-and-comment process) that we have a ***higher standard for agencies*** than we do for congressional decisionmaking because we are more concerned about agency ***accountability***—expect them to meet explanatory norms more like those of courts than those of legislature.

1. Modern “Hard Look” Review

i. *Motor Vehicle Manufacturers v. State Farm Auto Insurance* (1983)

State Farm challenged NHTSA’s rescission of a passive restraint safety standard under the Bush administration. SCOTUS holds that given the agency’s judgment in 1977 that airbags were an effective and cost-beneficial life-saving technology and the agency’s failure to consider an airbags-only req., the rescission was arb. and cap. ***N.B.*** Consequence of this holding is NOT that agency must issue an airbag req., but that it must EITHER justify its rescission w/ an explanation that meets the arb.&cap. standard [i.e., explains why cost of airbag req. outweighs benefit(s)] OR stick with old reg OR provide rational explanation for a *different* new reg.

1. **Rule 1:** Direction in which an agency moves does not alter the standard of judicial review established by law.
2. ***Overton* elaboration:** An agency rule may be found arb. and cap. If it ***(1)*** relied on ***factors which Congress had not intended*** it to consider, \****(2)*** entirely ***failed to consider an important aspect*** of the problem (key *State Farm* add on), ***(3)*** offered an explanation for its decision which ran ***counter to the evidence*** before it, and/or ***(4)*** was ***so implausible*** that it could not be ascribed to a ***difference in view*** or the ***product of agency expertise.***
3. First is like the *Chevron*-style process-oriented component of *Overton Park*, second goes to *Chevron* reqs but also might incorporate a substantive review element (maybe court could find an important factor not mandated by statute still ought to have been considered); final 2 go to substantive review elements.
4. SCOTUS says because NHTSA failed entirely to consider an important part of the problem—gave no reason for not considering an airbag only req.—rescission was arb.&cap. However, says that agencies are ***not compelled*** to address every possible alternative in their explanations. Court here finds the omission fatal since airbag CBA was crucial part of the agency’s decision. ***N.B.*** This echoes the *Nova Scotia* **ISSUE** of *where courts draw the line* when deciding which explanatory omissions are fatal to the agency decision’s legitimacy and which may be permitted.
5. SCOTUS’s reasoning as to arb.&cap.ness of automatic seatbelt rescission is not as solid, disputed in REHNQUIST’s partial dissent. The majority justifies its finding by discussing the lack of definitive evidence supporting NHTSA’s contention that requiring automatic seatbelts will increase safety sufficiently to justify costs (expertise/information-forcing move of *Mass. v. EPA*) but acknowledges it is within agency discretion to determine that no further research is nec. and to choose a course of action in the face of scientific uncertainty. Self-contradictory. Then, seems like the ct. might literally disagree w/ the agency’s factual account BUT this is hardly the proper role of the ct. Finally, it invokes congressional priorities, notes possibility of nondetachable belts that went unconsidered, etc. ***Cox suggests these reasons speak to a discomfort on the part of the Ct. that the automatic seatbelt rescission was overly motivated by* political *considerations…***

**ii. ISSUE:** Legitimacy/“rationality” of political influence in agency decisions

1. One of the benefits we’ve associated w/ delegation of policymaking to agencies is the agency’s ability to ***respond to the policy preferences*** of the current administration. But, in the course of arb.&cap.ness review, we see cts. particularly skeptical of changes in agency positions that appear tied to political shifts. This may be due to the **tension** between the values we place in agency ***expertise and political responsiveness.*** For this reason, *when agencies change position, cts. might impose a* ***higher standard*** *on agency rationale to ensure that politics are not compromising expertise.*
2. Given the reality of the discretion involved in resolving **law** and **facts** into ***policy***, is it ***proper*** for ct.s to reject political reasoning/rationale?
3. Such a rejection might lead to exactly the outcome we *don’t* want—agencies hiding political motivations behind other, apparently technical, reasons.
4. Is the Ct.’s resistance to agency flexibility perhaps due to a concern about the ***reliance interests*** of regulated parties who are affected by more extreme changes in agency policy? Trying to balance value of flexibility w/ reliance interests?
5. Are political reasons inherently arbitrary or, in fact, legitimate???
6. *FCC v. Fox* (2009)

FCC changed its policy regarding “offensive language” used on T.V. and did not enforce the policy retroactively. Challenged as arb.&cap. SCOTUS says it is not.

1. **Rule:** An agency that is changing its position must at least ***acknowledge*** ***the change*** and ***justify*** the new position on the merits. BUT it apparently ***need not*** directly compare the old and new policies and ***explain why the latter is preferable***.
2. **Breyer/Scalia divide**

Breyer’s dissent doesn’t argue that a heightened standard of review is nec. for changes in agency policy, but does highlight relevant factors agency might have failed to consider and contends that this is a situation where agency has burden to explain what factors justify its change. SCALIA, writing for the majority, concedes that there will be specific circumstances where such a justification is nec. (see case brief), but thinks that here the agency has accounted for reliance interests and the change is not based on new data which must be explained. Rather, it’s a justified change in what the agency believes to be the best standard, given the current environment.

1. The debate over what exactly an agency must account for in terms of changed knowledge, law, circumstances to justify its change in policy speaks to a dispute over what role politics/value judgements should play in agency decisionmaking. Requiring the greater level of explanation Breyer seeks suggests a position that politics should play less of a role. But isn’t this a reason we like agencies?
2. However, if we take the more relaxed Scalia position, then is there *no way* to invalidate an agency action that isn’t clearly in factual error?
3. Significance of ***Agency Independence***

In his dissent, Breyer suggests that an agency’s independence indicates that Congress wanted its decisions to be *less* influenced by the policy preferences of the current administration, more expertise-driven (*Mass. v. EPA* move, again). Stevens’s dissent alludes to this idea as well. ***N.B.***, however, that *State Farm* involved a purely executive agency, and there the court found the rescission arb.&cap., probably due to some skepticism as to the agency’s political responsiveness as well.