Statutory Interpretation 3

Overview 3

Church of the Holy Trinity v United States—1892—SCOTUS 5

Riggs v Palmer—1889—NY Court of Appeals 5

(I) Brogan v United States—1988—SCOTUS 5

(I) United States v Marshall—1990—7th Cir 5

(I) United States v Locke—1985—SCOTUS 6

(III) Green v Bock Laundry Machine Co.—2002—SCOTUS 6

(I) United States v Santos—2008—SCOTUS 6

(I) Almendarez-Torres v United States—1998—SCOTUS 7

(II) Blanchard v Bergeron—1989—SCOTUS 7

(II) In re: Sinclair—1989—7th Cir 7

(II) Montana Wilderness Cases—1983—SCOTUS 8

(IV) Bob Jones University v United States—1983—SCOTUS 8

[Stare Decisis] Flood v Kuhn—1972—SCOTUS 8

The Relationship Between Congress & Agencies 9

Overview 9

Schechter Poultry Corp v United States—1935—SCOTUS 11

AFL-CIO v American Petroleum Institute (Benzene)—1980—SCOTUS 11

Whitman v American Trucking Ass’ns Inc.—2001—SCOTUS 12

Immigration & Naturalization Service v Chadha—1983—SCOTUS 12

The Relationship Between the President & Agencies 13

Overview: 13

Buckley v Vaelo—1976—SCOTUS 15

Myers v United States—1926—SCOTUS 15

Humphrey’s Executor v United States—1935—SCOTUS 15

Wiener v United States—1958—SCOTUS 16

Morrison v Olsen—1988—SCOTUS 16

Free Enterprise Fund v Public Company Accounting Oversight Board (PCAOB)—2010—SCOTUS 16

The Relationship Between the Judiciary & Agencies 17

Overview 17

Commodity Futures Trading Comm’n v Schor—1986—SCOTUS 18

Goldberg v Kelly—1970—SCOTUS 18

Board of Regents of State College v Roth—1972—SCOTUS 18

Perry v Sindermann—1972—SCOTUS 19

Mathews v Eldridge—1976—SCOTUS 19

Rulemaking 20

Overview 20

Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council—1978—SCOTUS 22

United States v Florida East Coast Railway Co.—1973—SCOTUS 22

The Role of Reviewing Courts 23

Overview 23

(I) Citizens to Preserve Overton Park, Inc v Volpe—1971—SCOTUS 26

(I) United States v Nova Scotia Food Products—1977—2nd Cir 26

(I) Motor Vehicle Manufacturers Ass’n v State Farm Mutual Insurance Co.—1983—SCOTUS 26

(I) FCC v Fox Television Stations, Inc—1978—SCOTUS 27

(II) Universal Camera v National Labor Relations Board—1951—SCOTUS 27

(II) Allentown Mack Sales and Service, Inc v NLRB—1998—SCOTUS 28

(III) Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc—1984—SCOTUS 28

(III) Babbitt v Sweet Home—1995—SCOTUS 29

(III) MCI Telecommunications v AT&T—1994—SCOTUS 29

(III) FDA v Brown & Williamson Tobacco Corp.—2000—SCOTUS 30

(III) United States v Mead Corp—2001—SCOTUS 30

(III) Skidmore v Swift & Co.—1944—SCOTUS 31

(III) Barnhart v Wilson—2002—SCOTUS 31

Executive Enforcement Discretion 32

Overview 32

Conley v Gibson—1957—SCOTUS 33

US v Board of Harbor Commissioners—1977—SCOTUS 33

McCormick v Kopmann—1959—SCOTUS 33

Mitchell v A&K—1978—SCOTUS 33

Tellabs v Makor Issues & Rights—2007—SCOTUS 33

cz v Sorema—2002—SCOTUS 33

Bell Atlantic v Twombly—2007—SCOTUS 33

# Statutory Interpretation

## Overview

There is a widely shard assumption that the primary role of courts it to serve as **“Faithful Agents”** of Congress in interpreting statutes -- that is to identify and enforce the legal directives that an appropriately informed interpreted would conclude the enacting legislature meant to establish -- Most theories use this as their foundation, but differ on how to achieve this goal

A **theory of statutory interpretation** is a normative view of how courts should interpret statues -- thus concerning the role of courts in our system of governance

* *(I) Textualism* -- *Ask “what do the words of the statute mean objectively”* -- The text is the sole source of authority -- permits courts to rely on dictionaries as a source of statutory meaning but prohibits them from relying on indications of legislative intent in legislative history
* *(II) Intentionalism* -- Ask “what would the reasonable legislature have in mind” -- instructs courts to implement legislative intent even when that intent is not clear from the plain meaning of the text and is discernable only through other sources
  + Imaginative Reconstruction (Posner) -- See: Green v. Bock Laundry Machine Co.
* *(II) Purposivism* -- Ask “what is the purpose of the legislation? What problem was the legislation seeking to address? -- Operates on a broader level of generality than Intentionalism
* *(III) Imaginative Reconstruction* -- requires a thought experiment, where courts ask what the enacting Congress would have done within the context of the statute -- based of admitting that Congress probably dint consider the particular problem at hand, because if they did they would have included it within the statute
* *(IV) Dynamic Interpretation* -- Courts are working as “partners” with Congress to apply modern understandings and values to give substance to statutes -- these theorist see statutory language as “evolving and changing” over time to reflect modern society -- generally argue the statute was purposefully left vague so it could be influenced by community norms

**Tools of Statutory Interpretation** -- these are instruments for ascertaining the meaning of a statute -- i.e. dictionaries in the textual sense or legislative history for purpose arguments

* *Linguistic canons* are useful for interpreting words as they appear in a statute -- they are therefore useful in determining how a word first with other words i.e. rules of association among words in a phrase
  + ***Ejusdem Generis*** -- “of the same kind” -- When a statute sets out a series of specific items ending with a general term, the general term is confined to cover subjects comparable to the specifics it follows
    - Note: Where the list contains one specific category and one general category separate by the disjunctive “or”, the general term is not limited by the specific (Ali v Federal Bureau of Prisons)
  + ***Noscitus a Sociis*** -- “A word is known by the company it keeps” -- Terms are interpreted consistently with surrounding words to not unduly expand statutes beyond reasonable reach when a term, given its ambiguity, could have unwanted results
  + ***Expressio unis est exclusion alterius*** -- “Mention of one is exclusion of another” -- this negative inference s justified when the terms themselves are members of an associated group or series; justifying the inference that words excluded were by deliberate choice
  + ***The Last antecedent rule*** -- a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that immediately follows -- although it can be overcome by indicia other of meaning
  + ***Others***: (1) The last antecedent rule (2) conjunctive/disjunctive (3) May/shall
* *Whole Act/Code Canons* are applied when a court is interpreting a statutory word or phrase by not only looking at the immediate provision but to the rest of the statute
  + The ***Whole Act Rule*** presumes Congress views each statute as a whole and intents the words to have the same meaning throughout and for the provisions to work together -- (1) Identical Words = Consistent meaning (2) Avoiding redundancy and surplusage
  + Courts occasionally reference ***titles and provisions*** found elsewhere to confirm an interpretation reached through other means -- not given controlling weight but a good additional tool
  + ***Repeal by implication*** -- a rule against considering laws repealed by implication of other laws unless Congress expressly repeals the law in question
  + ***Dog Didn’t Bark / Elephant in a Rabbit-hole*** -- If Congress meant to address an issue/delegation this important or broad, they would have done so with more specific language
* *Substantive Canons* are rules about how the law should look -- they expressly protect or reflect substantive values
  + The Rule of Lenity
  + Constitutional Avoidance -- “serious likelihood the alternative is unconstitutional”
  + Federalism Clear Statement Rule [In general the entire Clear Statement Canon]
  + The Presumption against Retroactivity -- Courts decline to give retroactive effect to statutes burdening a private right without a clear statement -- “New provisions attaches new legal consequences to completed events
  + The Presumption Against Preemption
  + The presumption against extra-territorial application
* *Remedial Purposes Canon* -- Remedial legislation, or legislation passed to cure a specific problem, should be construed broadly to effectuate its purposes -- remedial statutes must be directed at remedying a prior problem; generally the product of a lengthy and highly publicized investigation by a senate committee -- examples include banking regulations, anti-discrimination laws, and reform statues
  + This canon has a long pedigree (Overton Park) but has not been invoked recently by SCOTUS
  + Best used to help an expansive ruling -- generally won’t be used to limit otherwise unqualified language (Brogan)
* Two interpretative principles sit *on the line between textual and substantive canons*
  + ***Scriveners Errors --*** Directs courts to correct drafting mistakes to effectuate what Congress meant to say or what otherwise makes sense given the statute
  + ***Absurd Results --*** a principle which directs courts to avoid interpretations that produce absurd results; based on an assumption that Congress intends its legislation to have sensible effects

**How to Make Arguments**

1. I will on the text (if not…)
2. The text is ambiguous (if not…)
3. Literal reading of the text would lead to an absurd result or there has been a Scrivener’s Error

* Language “as applied would lead to injustice, oppression, or an absurd consequence”
* One is permitted to profit from his own fraud, take advantage of his own wrong, to found any claim upon his own iniquity (immoral or grossly disproportionate behavior) or to acquire property by his own crime
* Note: Absurd results should always be the last resort because it leads to debate at the onset, before you can make arguments about what the text should be interpreted it 🡪 what constitutes an absurd result to one reasonable person may not to another

***Legislative History*** can be used s a source of meaning, intent, or purpose -- the use of legislative history picked up during analysis of the New Deal statutes; generally with broad purposes and liberally construed to fit a broad range of circumstances

* Legislative history has its greatest value when a purely textual analysis produces an absurd result -- not all judges want to resort to legislative history to decide ambiguity; but in reality nearly all will
  + In response to the use of Legislative history to broaden federal statutes, Reagan decided to appoint more conservative justices who are considerably more textualist and do not like the use of legislative history [Scalia & Easterbrook are the most known opponents]
  + Legislative history is still a strong tool to use in defense of one interpretation or another -- it is good evidence of the “Faithful Agent” doctrine

***Sources of Legislative History (In Order to Strength***

* Conference Reports
* Committee Reports
* Sponsor Statements
* Bill History / Rejected Proposals
* Floor Statements, views of non-legislative drafters, legislative inaction, and subsequent legislative history

***Three Keys to Good Arguments Using Legislative History***

* *Clarity of the text* -- The clearer the text, the harder to use legislative history -- you really need to show (1) ambiguity (2) absurd results (3) contrary to the spirit of the law
* *Source* -- There is a hierarchy of legislative history sources -- the higher the source, the stronger the appeal
* *Timing* -- It is better if the material is before the passing of the bill because the views could have influenced/guided the debate on the legislation

***Dynamic Interpretation*** allows a court to ask what a statute means now in light of changed circumstances -- it is good to show widespread public consensus via SCOTUS decisions, legislation, and executive orders -- i.e. Bob Jones / Racism

***Stare Decisis*** reflects the importance of stability and notice in our legal system -- judges will sometimes uphold dumb precedents or ones that they do not agree with out of fear of overturning them and any implicit reliance interest -- .i.e. Kuhn

## Church of the Holy Trinity v United States—1892—SCOTUS

**Old US statute prohibiting paid transportation of aliens for labor purposes applied to church who contracted to have a European priest preside over their church in the United States**

* There is always an *implied presumption* that *legislatures intended to allow exceptions to its language which as applied would lead to injustice, oppression, or an absurd consequence* -- a thing may be within the letter of the statute and yet not within the statute because it is (1) not within the spirit nor (2) the intention of its makers
* Although it must be conceded that π’s acts are within the letter of the law; we cannot believe that Congress intended to denounce with penalties a transaction like the one at bar -- no one would suppose Congress would bar ministers of any class “whose toil is that of the brain”
* The title of an act may be used to help interpret its meaning, but not to add/remove from the body of the text
* *Another guide to meaning is the evil which the statute was designed to remedy*; i.e. the situation as it existed & came to the attention of the legislature -- It appears from petitions, testimony, & the legislative record that *cheap unskilled labor was causing trouble* in the labor market; the influx of which Congress sought to prevent

## Riggs v Palmer—1889—NY Court of Appeals

### Grandson poisons his grandfather when notified he was going to be removed from the will -- argues the will must be enforced according to the letter of the law, as such he is entitled to property

* If the lawmakers could be consulted, would they say they intended the general language of the statute to apply to such a case? Such intention is inconceivable, it would be a reproach to jurisprudence and against public policy
* *No one shall be permitted to profit from his own fraud, take advantage of his own wrong, to found any claim upon his own iniquity (immoral or grossly disproportionate behavior) or to acquire property by his own crime*
* Something within the intention of the legislature is as much within the statute as if it were within the letter of the law and something within the letter is not within the statute unless it be within the lawmakers intention
* Writers of statutes do not always express intention perfectly but judges may collect that intention from probably or rational conjectures only -- this is the business of rational interpretation

## (I) Brogan v United States—1988—SCOTUS

**Δ lied (replied “no” to a question) about receiving cash gifts from his company while a union officer -- claimed the exculpatory no doctrine from common law is necessary to cabin prosecutorial abuse/discretion -- As an alternative, only those general denials which pervert government functions are meant to be penalized**

* *It cannot be the practice of courts to restrict the unqualified language of a statute to the particular evil Congress was attempted to remedy* -- even assuming such evil is discernable from something other than the statute; statutes apply as broadly as they are drafted
* It is one thing to accept well-defined and generally applicable principles of legislative intent in interpretation -- it is quite another to accept the broad proposition that statutes do not have to be read as broadly as they are written -- even where the penalty for lying is higher than that for the substantive crime

## (I) United States v Marshall—1990—7th Cir

**Challenge to federal drug trafficking statute -- Δ argued the weight provisions should apply to the weight of the pure drug, not LSD and the weight of the paper carrier -- the interaction of the statutes creates “a unique probability” of unwanted results given weight for distributors would in theory exceed that of wholesalers/makers thus unfair**

* Past cases interpret a “Carrier” to be “any mixture or substance containing a detectable amount” of a drug -- there is no basis to interpret the words differently for LSD than Cocaine in the name of the Constitution
* All the statutory language is identical except for the PCP statute which differentiates from the pure substantive and a mixture ***(Expressio Unis)*** *-- Congress has once distinguished the pure substance from mixtures, but such language is absent under the LSD statut***e** -- it will therefore be interpreted the same as other drugs
* Canons are doubt-resolvers, useful only when language is ambiguous -- *neither the rule of Lenity nor the Avoidance Canon justify disregarding clear language* -- The Avoidance canon must be used with care; it is a closer cousin to invalidation than to interpretation
* As for pending legislation, subsequent debates are not grounds for avoiding enacted statutes -- *the views of subsequent Congresses may be entitled to respect, but ongoing debates do not represent the views of Congress*

## (I) United States v Locke—1985—SCOTUS

### Mine operator files “Notice of Intention to Hold” a grant of federal land one day late -- claims he was misled by a employee -- relocation was prohibited due to the materials be barred by a statute enacted after the original claims (to the land) had been obtained -- Argued “Prior to Dec 31st” language should be construed to allow the additional day

* While a literal reading cannot produce results demonstrably at odds with Congressional intent, with respect to a filing deadline a literal reading is generally the only proper reading
* The fact that Congress may have acted with greater clarity & foresight does not give courts a blank check (Carte Blanche) to redraft statutes to achieve that which Congress is perceived to have failed to do -- there is a difference between filling a hap and rewriting affirmatively enacted rules
* Going beyond the plain meaning in search of contrary congressional intent must be done cautiously, even after taking this step nothing remotely suggest a congressional intent contrary to the plain meaning of the chosen words -- any further steps places the court in the domain or legislating

## (III) Green v Bock Laundry Machine Co.—2002—SCOTUS

**π was on work release for a conspiracy conviction when his arm was torn off by a heavy rotating drum inside a large dryer -- π testified he was instructed inadequately but was impeached by Δ’s questions about his criminal past -- argued F.R.E. 609 should be construed to requiring weighing to prejudice to Civil πs & Criminal πs,**

* The rules plain language commands that impeachment detrimental to the prosecution “shall” be admitted -- it follows that info detrimental to a Civil π would have to be admitted but prejudice to a Civil Δ allows weighing -- yet no interpretation can deny equal protection [Avoidance Canon] so turn to other methods of interpretation
* [Imaginative Reconstruction] The denomination as a civil π is often happenstance based on (1) filing or (2) the nature of the claim -- Research (common law & legislative history) indicates emphasis in the criminal context; the textual limitation on impeachment to criminal cases seems to have resulted from deliberation, not oversight

***Concurrence/Dissent***

* *Scalia(C-1)* -- Adding a qualification to defendant (Criminal Δ only) does less violence to the text than to give the word a meaning it simply cannot bare (to encompass Civil π) -- the qualification could understandable be omitted in inadvertence and such a reading is consistent with the policy of affording criminal Δs extra protection
* *Blackmun (D-3)* -- Prefers to rely on the underlying reasoning of the report rather than its unfortunate choice or words in ascertaining the proper scope -- the rule is best read as expressing a preference for balancing when there is a chance justice will be denied due to unduly prejudicial nature of criminal convictions

## (I) United States v Santos—2008—SCOTUS

**Δ is charged under federal money laundering statute (RICO/reinvestment) for operating an illegal lottery for 24 years which was illegal under state law -- dispute arose over the interpretation of “proceeds”; whether gross or net**

* Under either interpretation, (1) all provisions are coherent (2) no provisions are redundant (3) and the statute is not rendered utterly absurd -- lenity favors Δ’s interpretation of net proceeds
* π’s congressional intent argument regarding other extrinsic statutes does not show the drafters of this statute used proceeds in the same manner -- Probability is not a guide a court can safely take with regard to a dubious (suspect) congressional intent argument
* ***Dissent (Alito-4)*** -- We should ask what “proceeds” customarily means in the context of a money laundering statute -- lenity does not require us to put aside the usual tools of statutory interpretation

## (I) Almendarez-Torres v United States—1998—SCOTUS

### Statute forbids a deported alien from returning without special permission from the AG -- 20 year punishment for returning if the initial deportation was subsequent to conviction for an aggravated felony -- Δ argued the sentence justified a separate offense, not simply a statutory penalty

* After considering the matter in context (Language, structure, subject matter, context, & history) the circumstances point significantly toward one interpretation -- the additional punishment is a penalty
* Separate offense is at odds with the presumption against punishing one two crimes where one is a lesser crime included in the first -- and would render the words “subject to” obscure or pointless -- and would require proof of prior conviction risking prejudice to Δ
* Titles and headings are tools open for resolving doubt about the meaning of a statute -- a title that contains “penalties” is a strong signal
* The *Avoidance doctrine*seeks to minimize inter-branch disagreement by preserving enactments that otherwise founder on unconstitutionality -- The statute must be susceptible to two constructions after its complexities are unraveled, and *one must believe the alternative is a serious likelihood the statute is unconstitutional*
* Avoidance does not apply mechanically anytime there is a serious constitutional question without an obvious answer, the court need not apply the doctrine even when claims are not “without some force” unless a majority of justices gravely doubt the constitutionality

## (II) Blanchard v Bergeron—1989—SCOTUS

**π’s attorney in §1968 case is awarded attorney fees beyond the established contingency fee -- section gave judicial discretion to allow “reasonable attorneys’ fees” -- Δ challenged arguing the pre-established rate should apply**

* While the fee quote is helpful in demonstrating the expectations of the attorney, a fee contract does not impose an automatic ceiling to “reasonable” attorney fees -- to hold otherwise would be inconsistent with the statute, its purpose, and congressional intention to provide civil rights π’s help to bring claims
* Civil Rights πs seek to vindicate important civil and constitutional rights which cannot be valued solely in monetary terms -- if a fee arrangement were a strict limitations, an undesirable emphasis may be placed on damages to the neglect of effective injunctive or declaratory relief
* Court cities three cases which are mentioned in the House committee report as setting the standard which Congress meant to adopt -- under that the attorney fees
* *Concurrence (Scalia-1)* -- That the court should refer to the citation of three district court cases in a document issued by a single committee of a single house as the action of the entire Congress display the level of unreality that our unrestrained use of legislative history has attained

## (II) In re: Sinclair—1989—7th Cir

### Farmer tries to convert Chapter 11 Bankruptcy to Chapter 12 after the passage of its enacting statute -- The language forbid conversions of cases commenced before the effective date, but the conference committee report suggested conversions should be allowed where it is equitable to do so -- which controls?

* Although committee reports help courts understand the law -- when the text and the report are in conflict, the statute must prevail -- Leg. History is simply evidence of the real rule, not the basis of the interpretation -- Statues are law, not evidence of the law
* Reports are written by the staff and not members of Congress, as such it is often a losers history and easily manipulated by choosing snippets to emphasize or hypothetical questions
* To decode words, one must frequently reconstruct the legal and political culture of the drafters which legislative history helps to do -- the search is not for substantive content but for rules guiding the use of language
  + Invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood
  + May show that seemingly clear words are terms of art with different meaning to an insider
  + May show that, in context, gaps leave the executive and judicial departments the task of adding flesh to bones
* The goal of interpretation is to inquire not what the legislature meant but what the statute means -- to find out what congress meant by what It said rather than what the statute means by itself / what Congress meant to say

## (II) Montana Wilderness Cases—1983—SCOTUS

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## (IV) Bob Jones University v United States—1983—SCOTUS

**1970s change led to a prohibition on tax-exempt status to private schools who had discriminatory racial admissions policies -- π challenged the implied common law “charity” requirement and that “shall” in the statutory language leaves no room for discretion [Dynamic Interpretation]**

* Changed Circumstances may be considered when the change has been manifested by all three branches and/or would lead to absurd results -- “that the change may be seen as belated does not undermine its soundness”
* The right of a student not to be segregated in education is so fundamental that it is embraced in the concept of due process -- the IRS could not ignore policy conclusions made by all three branches; the sum total is a firm public policy against racial discrimination
* The Congressional record reveals that underlying part of this code is the intent that statutes depend on common law standards of “charity”; that one serve a public purpose not contrary to public policy -- this view is embodied in §170 of the same statute containing nearly an identical list of “public purposes”
  + This is true from the origins of the privilege which revel the legal backdrop Congress acted against

## [Stare Decisis] Flood v Kuhn—1972—SCOTUS

**Challenge to MLB’s historical status as being exempt from Federal Antitrust Laws**

* Federal Baseball is an aberration confined to baseball; it is an anomaly that other professional sports do not enjoy -- but the court is loath to overturn longstanding decisions when joined by Congressional positive inaction -- although the existing precedent is flawed, it is better to maintain settled precedent than risk reliance interest
* Far beyond inference & implication, Congress has clearly evinced a desire not to disapprove of Federal Baseball legislatively -- amendments that have passed one house or another would have expanded the exemption
* In the years that followed Federal Baseball, new attacks laid some stress on new factors such as radio, television, and substantial revenues -- but if there are evils in the field which now warrant application of the antitrust laws to the sport of Baseball, it should be by legislation, not judicial decree
* There are four main reasons for affirming these cases:
  + (1) Congressional awareness for 30 years coupled with positive inaction
  + (2) The face that baseball has been left to develop upon the understanding that the “Reserve Clause” was not subject to existing antitrust laws (reliance interest)
  + (3) Reluctance to overrule, which would have a retroactive effect unlike legislation (retroactivity)
  + (4) A professed desire that any remedy be by legislation and not judicial decree

# The Relationship Between Congress & Agencies

## Overview

Agencies in the Constitutional Structure -- “***The Headless Fourth Branch***”

* Nowhere does the Constitution mention agencies; however Art II does mention the “heads of executive departments” which indicates that the framers did somewhat anticipate the Federal government’s expansion
* Many believe that agencies are not subject to any central control, but each branch has its own mechanisms to check agency action
* The two main approaches to agency power are formalist and functionalist
  + *Formalist* (ex. Scalia) generally believe each delegates power should go to its respective branch and nowhere else
  + *Functionalist* (ex. Breyer) powers can overlap and spread around as long as you do not disrupt the basic ability of each branch to conduct its own affairs without undue interference from the others

The main way laws get passed in the United States is through **Agency Action** -- the legislative branch and the administrative state are closely linked since agencies are creations of legislation

* Once Congress decides to delegate authority, it has an immediate and ongoing ***interest in ensuring subsequent action roughly tracks legislative preferences***
  + *Strategic reasons* -- ensuring action reflects the preferences of the constitutes who can help its members get reelected
  + *Public Reasons/ Accountability* -- To ensure action comports with statutory mandates and popular preferences
* ***Congressional influence*** can range from *informal contacts* (private phone calls, etc.) [Think Dick Cheney) -- to a number of *formal and public tools* that can be used to ensure compliance with the preferences of Congress
  + New Legislation
    - Only new legislation is certain to produce change; when a statute is amended an Agency has no choice but to comply with the changes -- New legislation can also be used as a threat to control agency action; but Agencies are free to evaluate if the threat has the political capital to succeed
  + Appropriations Legislation
    - Appropriations legislation can restrict funds for a particular agency or regulatory program -- Money is a powerful motivator -- Note that the appropriations committee is different than the committee responsible for monitoring the substantive mandate; given that funding is one part of a much larger bill, it is relatively easier to alter than provisions in other bills
  + Oversight Hearings
    - Hearings can be used to uncover fats in aid of further legislation (*information forcing tool*) -- they can also give further guidance (*guidance tool*) -- they can also be used to hold officials “accountable” in the traditional sense of the word (*accountability tool*)
      * Note that you could run into Executive Privilege concerns in some agencies
  + Fire Alarms
    - Positions constitutes to monitor agency action and alert Congress when intervention is necessary -- Administrative procedures like “notice & comment”, private rights of action, and the Freedom of Information Act are some examples
  + Legislative Vetos (Declared unconstitutional, but still within most statutes)
    - A statutory provision enabling Congress to reverse an agency decision without enacting a new statute -- either by one house, both houses, or committee
    - Rules unconstitutional in Chadha, but Congress still puts them in agencies and agencies generally comply -- the reason is Agencies must keep Congress happy in order to have money
  + Senate Votes on Appointments
* Agencies charged with ***regulating risk*** follow a two-step process -- the first is to acquire and process information about a possible risk; which is known as “*risk assessment*” -- the second is to determine to take action or withhold regulatory action; which is known as “*risk management*”
  + The distinction between “Scientific questions” and “policy questions” is what separates risk assessment from risk management -- both must be considered before an agency regulating risk takes action
  + A decision how or whether to regulate cannot turn solely on the scientific facts involved -- it necessarily involves policy questions such as the acceptable level of risk and the appropriate regulatory response
* ***Non-Delegation Doctrine*** toes the line between power and discretion -- The Central issue is “*whether Congress has given an agency so much rulemaking discretion that Congress has abdicated its responsibility to exercise ‘all legislative powers’ granted in the Constitution* --
  + The Court has only struck down two statutes on non-delegation grounds; both of these occurred before the “New-Deal Switch” when agencies were still viewed with much suspicion (Both NIRA codes)
    - Since 1935, the court has not struck down any agency rule on Non-Delegation grounds -- Although we want Congress to be politically accountable, *the truth is that Congress has delegates wide swaths of power to agencies*
  + Generally, the wider the scope of the delegation or the more important the subject matter is, the more specific you want the intelligible principle to be -- Congress may get away with vagueness when the delegation is narrow or involves less important subject matters
    - Non-Delegation doctrine can be used as a Canon of interpretation to favor an interpretation that places reasonable limitations on agency power/discretion.
  + *Note*: Formalist/Functionalist distinctions are important for non-delegation doctrine -- you must argue to both to make a successful non-delegation argument
    - Formalist-- If the power is legislative in nature (Chadha), then it must go through the legislative process of Article I [if it “has the purpose or effect of altering the legal rights, duties, and relations of persons (CB 644-45)]
      * How you frame a power can sometimes determine how the case is decided
    - Functionalist-- If you want to show a delegation is bad, you must show why the mechanism used does not work or is disruptive to separation of powers -- three main SOP concerns
      * ***Deliberation*** -- Threat of presidential veto engenders compromise and deliberation in Congress; if the delegation cuts the executive out of the process, it may be bad
      * ***Constituents / Political Accountability*** -- Each house represents the interest of different constitutes and the president represents the national interest -- if the delegation creates an implicit democratic problem, it may be bad
      * ***Liberty*** -- The higher the procedural safeguards, the more liberty is protected

## Schechter Poultry Corp v United States—1935—SCOTUS

### The National Industrial Recovery Act allowed trade associations to petition the President to create “codes of fair trade” which in reality became law for the local industry -- Non-Delegation Challenge -- US argued NIRA was a broad & intensive co-effort by government & trade to address the economic crisis

* The NIRA supplies no standards, no procedure, and no rules of conduct to be applied to particular states of fact -- the result is virtually unfettered legislative power and such is unconstitutional
* (1) Codes of “fair competition” has a much broader range and no established common law meaning on which to guide or evaluate agency action ***[No intelligible principle]***
* (2) The NIRA dispenses with any meaningful procedures based on findings of facts, small industry groups set the standard ***[No Procedural safeguards]***
* (3) The ability to create codes is in reality given to private individuals ***[Lack of political accountability]*** and
* (4) The authority relates to a host of different commercial and industrial activities extending discretion to create all varieties of laws that may “tend to effectuate” its aim ***[Nearly unlimited Scope]***
* *Extraordinary conditions may call but extraordinary remedies but do not create or enlarge constitutional power merely because such is deemed necessary by those person’s holding public office*

## AFL-CIO v American Petroleum Institute (Benzene)—1980—SCOTUS

**Challenge to OSHA secretary interpretation that “whenever the toxic material is a carcinogen, that no safe exposure level can be determined and OSHA was statutorily required to set the limited at the lowest technologically feasible level that would not bankrupt…” -- argued the ability to nearly bankrupt an industry was too broad a delegation**

* If OSHA was correct, such a sweeping delegation of legislative power might be unconstitutional -- *a construction avoiding an open-ended grant of power is favored absent a cleat statement*--read another section to require any standard be “reasonably necessary & appropriate to remedy a significant health risk” (Implied cost/benefit analysis)
* It is unreasonable to assume Congress intended to confer unprecedented power over industry

***Concurrence (Rehnquist)*** [Would have found unconstitutional, but is instead the 5th vote]

* The rule against delegation is not so cardinal a principle as to allow for no exception, but the extent & character of the exception must be fixed according to common sense and the inherent necessities of governmental coordination -- the widely varying positions advanced by both parties and separate opinions demonstrates that Congress has improperly delegated this choice to the Secretary of Labor and derivatively to SCOTUS
* Congress must lay down the general policy and standards that animate the law, leaving the agency to refine those standards, fill in the blanks, and apply the standards to particular cases [Intelligible Principle]
* *Decisions to delegate are strongest when*:
  + (1) Congress may wish to legislate but a particular field is sufficiently technical, the ground to be covered is sufficiently large, and the expertise is absent from Congress
  + (2) Because the delegatee’s residual authority over particular subjects of regulations (Arms transfers/foreign policy) or
  + (3) Where it would be unreasonable and impracticable to compel Congress to provide detailed rules regarding a policy or situation
* The Non-Delegation doctrine serves three purposes (1) ensures important decisions of social policy are made by Congress (2) ensures an “intelligible principle” is provided to (a) guide discretion and (b) ensure courts charged with review will have standards to test that discretion

## Whitman v American Trucking Ass’ns Inc.—2001—SCOTUS

**Challenge to EPA authority given under the intelligible principle that regulation of pollutants to be “requisite to protect the public health with an adequate margin of safety” -- Challenger argued the meaning of “public health” should not have its ordinary meaning but the secondary meaning requiring a cost/benefit analysis**

* [Scalia] We refuse to find an authorization to conduct cost/benefit analysis implicitly in ambiguous sections where it is elsewhere expressly granted (Expressio Unis) -- Congress does not alter the fundamental details of a regulatory scheme in vague terms or “hide the elephant in mouse holes”
* The lack of an intelligible principle has been found only when one statute literally provided zero guidance and the other dealt with authority to regulate the entire economy on the basis of assuring “fair competition
* The court has almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law -- even in sweeping regulatory schemes, determinate criterion has never been demanded, a certain degree of discretion is inherent in executive action
* ^^^Argues EPA doesn’t exercise “legislative” power -- the delegation is “incidental” to the legislative power; which the court deems as “quasi-legislative”

Concurrence

* Thomas (C-1) -- There is a genuine constitutional problem which the parties do not address -- there are some cases in which there is an intelligible principle and yet the significance of the delegated decision is simply too great to be considered anything other than “legislative power”
* Stevens (C-2) -- We should be honest that the power delegated to the EPA is in fact “legislative” instead of pretending the authority delegated is somehow not “legislative power” -- but such is constitutional because it is adequately limited by the terms of the statute

## Immigration & Naturalization Service v Chadha—1983—SCOTUS

**INS act allowed the AG to suspend deportation under certain requirements, but for such decision to be overturned by either oversight committee within Congress -- the right of one branch to invalidate a decision of the executive branch was challenged**

* Without the challenged provision, the result could be achieved only through legislation -- since it is not within the express Constitutional exceptions authorizing one house to act alone, it was an exercise of legislative power and must be subject to the standards prescribed in Article I [Both Houses & President]
* Although the legislative veto may be more efficient, it is crystal clear that the Framers ranked other values higher than efficiency -- *Congress must abide by its delegation of authority until that delegation is legislatively revoked or altered -- a one house veto cannot be justified as an attempt to amend or repeal executive discretion*
* Not every action taken by either house is subject to the requirements of Article I -- whether action taken is legislative depends not on the form, but upon “whether it contains matter which is properly regarded as legislative in its Character and effect”
* *Note*: Chadha is a “formalist” opinion supported by “functionalist” justices -- note the disruption in the political process

Dissent

* White (D-3) -- This decision invalidates nearly 200 other statutory provisions and has become an important tool to resolve policy differences between the executive and legislative branch -- *SCOTUS should always be weary of striking an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class*

# The Relationship Between the President & Agencies

## Overview:

**Division**. Agencies are divided between Executive Branch Agencies and Independent Agencies

* *Executive Branch Agencies* appear under the president in the government organization chart and are run by officials who serve at the will of the President -- they are generally ran by a single administrator and not a multi-member group -- examples are State, Justice, FDA, EPA, and Commerce
* *Independent agencies* are independent in the sense that their heads are removable only for cause or good cause -- the heads usually serve fixed terms that expire in staggered years and are usually multi-member commissions or boards -- examples are the FCC, Federal Reserve, SEC, OSHA, FDIC, and NLRB
  + Some, such as the FTC, contain a bi-partisan requirement that serves as an additional check on political imbalance given their leaders are not removable by the President at will and are thus less accountable

Article II, Section II, Clause 2 **-- Appointment & Removal** -- *The president “shall nominate, and by and with the advice and consent of the Senate, shall appoint…officers of the United States; the Congress may by law vest the appointment of such inferior officers…in the President alone, in the courts of law, or in the heads od departments”*

* The appointment of agency heads is an important task for the president -- For structure & political reasons, it is hard to remove an agency head once the Senate has confirmed them
* *Appointment* [Buckley]
  + Principle Officers
    - Principle officers are heads of all the executive departments and the members who head independent agencies in the executive branch -- You know someone is a principle officer when he has been appointed by the President with the advice and consent of the Senate
  + Inferior Officers
    - Someone is an inferior officer when they report directly to/are supervised by someone who has been appointed by the President with the advice and consent of the Senate
      * “Significant Authority” under the laws of the United States (Buckley)
  + Employees
    - Nothing is said about this in the Constitution -- generally civil service employees have lots of job protection and work at the agency for life -- Under Buckley, those who do not exercise “significant authority” and “are lesser functionaries subordinate to officers of the United States”
  + *Note*: Where you fall in this spectrum is vital to how easy it is for the president to remove you
* *Removal* [Myers, Humphrey’s, Wiener, Morrison, PCAOB] -- Determined by the nature of the office from which the president is trying to remove someone and the nature of the power wielded by that person
  + If purely executive function: The president has complete/unitary power of removal with no need for Congressional approval
    - Unless a restriction does not interfere with the President’s power to exercise his authority & does not involve Congressional aggrandizement (Morrison)
  + If not purely executive (quasi-legislative/ judicial): the president does not have unitary power of removal -- Congress may restrict a President’s removal power with these people (*Humphrey’s*)
* *Bypass* -- President’s have pushed back against Congressional interference with the appointment power in a number of ways
  + Czars -- don’t need senate confirmation and are generally responsible for executive oversight of an entire industry or area of law
  + Special Advisors -- act as de facto agency head when the President cannot get someone confirmed through Congress
  + Recess Appointments -- When the senate is in recess, the president may appointment people without senate confirmation --they only last until the end of the next Congressional session

Practical Significance of Independence

* Agency structure matters -- As a general; formalist will strike things down where they see aggrandizement (+ PCAOB but that’s new) -- Functionalist will permit encroachment as long as it does not present one of the Separation of Powers issues

**Other Mechanism of Presidential Control**

* ***Budget Allocation (OMB)*** -- every agency must go through OMB to get their budget cleared -- sometimes Congress allows agencies to submit budgets directly, but this is rare and the President can still “impound” the funds if he chooses to do so
* ***The Office of Information and Regulatory Control*** -- this is the most important mechanism of Presidential Control and is housed within OMB -- became extremely important during the Reagan administration who required that all “significant regulatory action” [$100M+ price tag] be submitted for cost/benefit analysis
  + *Return & Prompt Letters* -- These are formal, publicly accessible documents that are addressed to particular agency officials and communicate executive branch preferences in response to information learned about planned or proposed regulatory action
    - Return letters remit proposed regulations to the agency that produced them for reconsideration -- they give explanations for the deficiencies and suggestions for further development
    - Prompt letters address an agencies plans/priorities for a given year; it may suggest an agency explore a certain issue, accelerate its efforts on a regulatory matter, or consider rescinding/modifying an existing rule -- Agency response is usually requested/mandated
  + *Cost/Benefit Analysis* -- Every president since Reagan has chose to leave in place the Cost/benefit requirement for major regulatory action -- it ensures President’s are atleast aware of major policy decisions before they are made
    - Independent Agencies do not have to submit major plans to OIRA for Cost/benefit analysis
  + *Effectiveness* -- Few doubt OIRA’s effectiveness in asserting control of agencies, but many question whether this control is a good thing or bad thing
    - Supporters -- (1) increases accountability of unelected bureaucrats (2) increased coordination, efficacy, and efficiency of agency rulemaking (3) “outsiders perspective increasing rational regulation as opposed to “tunnel vision”
    - Opponents -- (1) Emphasis on cost/benefit analysis and the difficulty in monetizing certain things leading to systematic under-evaluation (2) broader concerns such as adequacy of staffing (3) timeliness of intervention and (3) whose viewpoint is being expressed? [OIRA is bureaucrats]
* ***Signing Statements*** -- Announces the President’s interpretation of a particular statute to the public and the agency -- similar to a Presidential Directive in the sense it allows communication of the President’s opinion
* ***Presidential Directives*** -- The president may issue pre-regulatory directives to executive-branch agency heads in the form of “Official Memos” -- they instruct an agency to take particular action under its existing regulatory authority -- they are signed by the President and no doubt reflect presidential preferences
* ***Litigation*** -- although agencies may litigate in lower courts, if they lost they must go through the Solicitor General to file cert. with SCOTUS
* ***Informal/Invisible Methods*** -- Other executive officials and agencies often contact agencies in informal and invisible methods such as phone calls, private meetings, or using OIRA to advocate on their behalf
  + Raises questions about whose view is being communicated -- what if they hold conflicting views with the President?
  + Involvement by other agencies can sometimes contribute to a sense of “turf-wars” rather than collaboration or convey narrow interest as opposed to more broader governmental/public concerns

Separation of Powers (PG 29 of Outline)

* Encroachment -- Was ok, but after PCABO, who knows
* Aggrandizement -- No-No
* Relinquishment -- This doesn’t happen

## Buckley v Vaelo—1976—SCOTUS

### Challenge to the appointment procedure of the Federal Election Commission -- allowed the Speaker & President Pro Tempore to select two members; the President to select two members; and the Speaker & President Pro Tempore serving as non-voting members -- Challenged as beyond Article II, Section II, Cl. 2

* The constitution clearly divides all of its officers into two classes and lists the ways in which they may be appointed -- it is difficult to see how members of this commission may escape conclusion -- Checks & balances are the Constitutional self-executing safeguard against encroachment/aggrandizement from one branch
* “Officer of the United States” refers to all persons who hold an office under the government -- any appointee exercising significant authority pursuant to the laws of the US -- no class or type of officer is excluded because of some special function it performs
* Primary officers require nomination an confirmation -- Congress may vest the appointment of Inferior officers in the President alone, the Courts, or in the individual Department heads -- BUT NOT THEMSELVES
* No doubt Congress may create “offices” in the generic sense, but unless the method of appointment comports with Article II, the holders of this positions are not “officers of the United States” and may perform only duties in aid of those functions Congress may carry out by itself [Research, etc]

## Myers v United States—1926—SCOTUS

**π postmaster refused a demand to resign from a 4-year term -- was removed by order of the Postmaster General by direction of the President -- Congressional statute required advice & consent of the senate for removal; challenged as a violation of Article II power to remove inferior officers**

* [Formalist Approach] The reasonable construction of Separation of Powers is that the branches should be kept separate in all cases in which they were not expressly blended and the Constitution should be interpreted to blend them no more than it affirmatively requires ***[Read this case as a prohibition against aggrandizement]***
* The Advice & consent provision was a single check on an otherwise limitless power to choose executive officials -- formidable opposition indicates its effect should not be construed to extend beyond express application
* [Functional Approach] Defects in ability, intelligence, or loyalty of an officer are facts to which the President is better informed than the senate -- removal should be confined to the President for very sound & practical reasons -- Postmasters are purely executive officers, they serve no legislative or judicial purpose
* *Implied executive power is stronger because the Constitutional grant is given in general terms* (“All executive power shall be bested…) as opposed to specific grants which imply more specific limitation
* The charge that laws be “faithfully executed” implies that in the absence of express limitations, the power to select & remove administration officials is essential to the execution of laws; it surely is not legislative or judicial

## Humphrey’s Executor v United States—1935—SCOTUS

**Challenge to the removal provision of FTC commissioners -- allowed removal “for inefficiency, neglect of duty, or malfeasance in office” -- Hoover removed officer 5 years before his term was up**

* The commission is non-partisan and from the very nature of its duties, must act with entire impartiality -- its duties are predominantly quasi-judicial or quasi-legislative and are outside the purview of unlimited removal power under Myers
  + Myers was concerned with purely executive officers, it does not reach one who occupies no place in the executive dept. & exercises no part of the executive power vested by the Constitution in the President
* It is evidence that one serving “at the pleasure” of another cannot maintain their independence; the FTC is charged with the enforcement of no policy or law which is not its own -- it must exercise the trained judgment of a body of experts “appointed by law and informed by experience” -- must be free from political dominion
* Independent Agencies (quasi-legislative / quasi-judicial functions) are outside the purview of unlimited removal power and must be removed according to the standards proscribed by statute
* *Note*: Humphrey’s is not the baseline for removal; no one (even Scalia) wants to overturn it because it could fuck up the entire independent agency structure -- so the question is always “Can I allow the President to remove this person at will without overturning Humphrey’s?”

## Wiener v United States—1958—SCOTUS

**Statute establishing the War Claims Commission made no provision for removal -- Weiner was chosen by Truman (1950) and refused resignation by Eisenhower (1953) -- removed and replaced with a recess appointment -- π sued for back pay claiming he was removed improperly by the executive**

* The Commission was established as an adjudicating body with finality not subject to review -- the fact that Congress gave jurisdiction to another court does not alter the intrinsic judicial character of the task which the commission was charged
* The statute precluded the president from influencing the commission’s decisions; the inference is Congress did not want the removal sword hung over their head for no reason other than “having men of his choosing”
* Humphrey’s drew a sharp line between officials who are apart of the executive establishment thus removable and those who are members of a body who are free “too exercise judgment without leave or hindrance of any other official or department as to whom a power of removal exist only if Congress has conferred it”

***Note:*** *The lack of a removal provision does not de facto create safety -- it is the function of the body and the implied will of Congress which create safety in this case ----------- The de facto presumption is that under silence, the president retains the power of removal and that power must be challenged based on the background assumptions of Congress*

## Morrison v Olsen—1988—SCOTUS

**Challenge to the statute authorizing “Independent Counsels” to investigate crimes by high-level executive officials**

* [Functionalist Approach] “The essence of Myers was judgment that the Constitution prevents Congress from drawing to itself, the power to remove or the right to participate thereof -- this case would go beyond words and implications and would clearly infringe upon the separation of powers “
* Because Congress didn’t give itself the removal power, this is a permissible encroachment rather than aggrandizement -- it is essential that the IC remain independent of the executive branch because it is his job to investigate it -- the “for cause” removal provision is sufficient to ensure this independence
* The judgment of the removal restrictions propriety “cannot be made turn on whether or not that official is classified as purely executive” -- this executives discretion is very limited but they need independence

## Free Enterprise Fund v Public Company Accounting Oversight Board (PCAOB)—2010—SCOTUS

### PCABO members were not considered government “officers or employees” but rather officers of an established nonprofit corporation [allowed for salaries above scale] that issues rules & sanctions subject to SEC approval -- members were removable only for “good cause” -- challenged as unduly limiting executive removal power

* *By delegating executive power without executive oversight, this act subverts Presidential authority to ensure faithful execution of the laws and the public’s ability to pass judgment on the Board* [Accountability]
* Dual-layered protection withdraws from the President any decision on whether good cause exist; the result is a board not accountable to the President and a President not responsible for the board -- here neither the President nor anyone directly responsible to him has full control of the board
* Even if the President determines a board member is neglecting his duties or discharging them improperly; that judgment is committed to another officer whom the president cannot remove simply for disagreement -- the result is an inability for the President to ensure the laws are “faithfully executed”
* This idea violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that accompanies the single executive structure of Article II -- it does not add to the Board’s independence but transforms it such that it is incompatible with Separation of Powers doctrine

Dissent

* Breyer (D-4) -- *Would allow dual protection when agency independence rest “upon the need for technical expertise” as apart of a “workable government*” -- Sees PCAOB as an example of a vast number of statutes which provide for their own execution or administration through organizations “of many different kinds, of different structures, exercising different kinds of authority, to achieve legislatively mandated objectives”
* *Note*: PCAOB is the first case striking legislation that does not involve aggrandizement by another branch but simply encroachment -- this suggest that aggrandizement is not the “end all be all”

# The Relationship Between the Judiciary & Agencies

## Overview

**Agency Exercise of Judicial Authority**

* Agencies exercise a massive amount of judicial power -- there are over 1200 ALJs (almost the same amount of Federal judges) and they cannot be removed without notice and a hearing for cause --
  + Judicial power: the application of legal principles to the facts of a particular case
* A good indicator as to whether an agency is properly exercising judicial authority over a claim is whether it is a “public right” or a “private right”
  + Public Right -- Adjudication Acceptable -- Agency adjudication is based on the notion of sovereign immunity; if the government is nice enough to allow you to sue it, they can choose the forum
  + Private right -- Gray area after Schor -- Historically this was not adjudicated by agencies, but after Schor SCOTUS seems ready to accept limited jurisdiction as long as it is reviewable

**Agency Adjudication**

* Agencies adjudicate a number of issues that technically fir the parameters, but look nothing like a court proceeding; this world is called “Informal Adjudication” [student loans, permits, etc.]
* A good way to tell *the difference between adjudication and rulemaking* -- Adjudication is retrospective and rulemaking is prospective -- Adjudication is binding only to individual parties [although precedential] while rulemaking is applicable to large groups of people
* The *main categories of cases adjudicated by agencies* are (1) Rate regulation & licensing approval (2) entitlement schemes [welfare, SSI] and (3) Enforcement cases [violation of a rule they promulgate]
* Formal Adjudication generally looks a lot like Article III trial courts and certain procedures are required -- to figure our if formal adjudication is required, you need to look at its organic statute
  + “Determined on the record after an opportunity for an agency hearing”
* Informal adjudication refers to all other decisions that don’t require formal adjudication -- Congress delegates broad authority to establish agency procedures
  + This is the area most DPC challenges are made -- this can be distinguished from other agency procedures by seeing if the agency action was retrospective and individualized (Case specific determination based on things from the past)

**Due Process and Administrative Agencies**

* Agencies must meet the floor requirements of the Due Process Clause when informal adjudication could lead to the deprivation of life, liberty, or property -- the requirement of state action is met by agency action
  + The most common challenge to agency action is on DPC grounds -- i.e. “Did the agency follow the proper procedures and did it make the right decision on the merits” -- This is usually only about informal adjudication because the APA procedures for formal adjudication satisfy the minimum requirements
  + Note: When you want challenge agency procedure as below the constitutional minimum, you need to come up with reasons for the extra process -- there must be a rationale behind the needed process
  + *Goldberg* was a major turning point in DPC jurisprudence -- it constitutionalized these proceedings making them a “floor” rather than a “ceiling”

## Commodity Futures Trading Comm’n v Schor—1986—SCOTUS

### Statute gave CTFC private-right -of-action jurisdiction for violations of its statute; regulation allowed adjudication of compulsory counterclaims (same transaction/occurrence) under stipulation of the parties as a “inexpensive and expeditious alternative” to article III courts; Δ challenged after agreeing and losing

* [Functionalist Approach] The Constitutionality of a delegation of adjudicative functions to non-Article III bodies must be assessed by reference to the purposes underlying the requirements of Article III -- it preserves impartial and independent adjudication of claims and prevents aggrandizement by one branch at another’s expense
* TO the extent these structural principles are implicated, the parties cannot by stipulation cure the defect -- here a number of factors point toward no conflict with the constitutionally assigned role of the federal judiciary
* Here, (1) the CFTC deals only with “a particularized area of law (2) orders are enforceable only by District Court order (3) in that regard they are reviewed de novo under a “weight of the evidence” standard and (4) CFTC does not “exercise all ordinary powers of district courts” such as preside over jury trials and issue writs of habeas
  + *Northern Pipeline v. Marathon Pipeline [SCOTUS 1989]* -- Court strikes down congressional delegation to bankruptcy courts to adjudicate any claim dealing with the person filing for bankruptcy; gave them “all the ordinary powers of district courts”
* In general, ***the four relevant factors*** to weigh are (1) quality of judicial review (2) the scope/breadth of jurisdiction (3) the origin of the right to be adjudicated [public are best] and (4) Congressional rationale for departing from Article III courts [expertise, efficiency or for jurisdiction stripping purposes?]

Dissent

* Brennan (D-2) -- [Formalist Approach] This authorization of judicial authority does not fit under one of the 3 long established exceptions to the erosion of Article III’s mandate -- those are (1) territorial courts (2) court-martials and (3) courts that adjudicate certain public rights

## Goldberg v Kelly—1970—SCOTUS

**Challenge to the pre-hearing termination of welfare benefits in the state of NY; challenged on DPC grounds**

* In context, DPC requires that a recipient have timely and adequate notice detailing the reasons for a proposed termination, an effective opportunity to confront adverse witnesses, and to present his own evidence orally
* The extend to what procedural due process must be afforded is influenced by the extent to which one “may be condemned to suffer grievous loss” and upon whether the interest in avoiding that loss outweighs the government interest in summary adjudication
* One immutable principle is that when government action seriously injures person/property and the reasonableness of that action depends on fact-finding; the evidence used must be disclosed and where evidence consist of testimony then cross-examination must be allowed
* The “opportunity to be heard” must be tailored to the capacities and circumstances of those who are to be heard -- written submissions do not work for this population

## Board of Regents of State College v Roth—1972—SCOTUS

**Roth was not rehired at the end of a one-year teaching contract -- Roth had no tenure rights, and was notified before the statutory deadline that he could not be retained -- Roth received no rationale for the decision and no opportunity to challenge it -- challenged the procedure as violating procedural due process**

* While protection of liberty & property is paramount, the range of interest is not infinite--it stretches the concept to far to say one is deprived of “liberty” when he is not rehired but remains free to seek other employment
* Procedural DPC safeguards the interest one has already acquired in specific benefits or entitlements; Roth has no legitimate claim of entitlement which would reasonably induce reliance interest -- to have a property interest, one must show more than an abstract need or desire; more than a unilateral expectation to receive
* State law leaves the decision to rehire to the unfettered discretion of university officials; Roth received his statutory notification; therefore there is no legitimate claim
* There may be cases where refusal to re-employ could implicate liberty concerns when the state may otherwise impose a stigma or other disability that forecloses one’s freedom to take advantage of other opportunities -- yet the state made no charge that may seriously damage his standing/associations in the community

## Perry v Sindermann—1972—SCOTUS

**π was employed for 10 years in the Texas college system -- controversy arose after public disagreements with the policies of the Board of Regents -- when the board declined to renew his contract without hearing; π sued**

* *A person’s interest is a “property” interest for DPC purposes if there are such rules or mutually explicit understandings that support a claim of entitlement to the benefit or a reliance interest therein*
* To determine whether a statutory conference is an entitlement, you must look to the substantive discretion given to decisionmakers -- a disclaimer is not dispositive
* Lack of tenure is highly relevant but not entirely dispositive in determining a property interest -- Δ has no formal tenure system and therefore some type of inquiry into the property interest is appropriate

## Mathews v Eldridge—1976—SCOTUS

### Challenge to the pre-hearing termination of Social Security Disability Benefits

* Procedural Due Process generally requires consideration of three distinct factors:
  + The private interest to be effected by state action
  + Consideration of the governmental interest in the procedure [including burdens of additional procedure]
  + The risk of wrongful deprivation and the probably value of additional or substitute safeguards
* Disability benefits are susceptible to written testimony because it is generally done by doctors who are able to write effectively and therefore do not present the same concerns as welfare benefit -- here there is notice and an opportunity to be heard pre-deprivation, it is just not in person
* Note: If you are dealing with a pre-deprivation/post-deprivation question, the private interest is only the time between deprivation and when the hearing would be help -- not the absence of the interest completely

# Rulemaking

## Overview

**Agency Policymaking**

* *Rulemaking* -- Agency policy can come from formal or informal rulemaking; the procedures for both of which are given in the APA -- Agencies may promulgate rules more specific than their organic statute
  + A rule (or regulation) is defined in §551 as ***“the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law/policy OR describing the organization, procedure or practice requirements of an agency…”***
    - *Legislative Rules* -- rules with binding legal effect -- a statute must give the agency authority to adopt such a rule and it must be done through formal/informal rulemaking procedures
    - *Non-Legislative Rules* -- Not legally binding -- merely express the agency’s view as to the meaning of a statute or regulation OR publicize an agency’s policy on the batter -- statutory authority is not required nor are formal/informal rulemaking procedures
      * “Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”
* *Adjudication* -- Agency policymaking can also come through the precedential effect given within those agencies who formally adjudicate their statutes -- similar to a little body of common law -- relies on the organic statute to bring enforcement against people who violate it -- meaning is derived through a series of cases
  + Agencies generally have atleast one, but maybe two, levels of appellate review within the agency and final authority is generally vested with the head or delegated by the head of the department
* *Informally* -- Agencies also implement their statutes through procedures less formal than adjudication or §553 procedures through routine use of (1) interpretative rules (2) statements of policy and (3) rules of “agency organization, procedure, or practice”; which are generally referred to as forms of Guidance
  + None are legally binding, but regulated entities often follow these statements because they assume agencies will do the same -- studies have found agencies use these from 2X-20X times as much as rulemaking
  + Although one is free to challenge guidance documents, the document still establishes the law for those unwilling to pay the expense or suffer the ill-will of challenging the agency in court

**Rulemaking and Adjudication Procedure** -- The APA gives default agency procedure that must be followed during rulemaking and adjudication -- Unless an Agency’s organic statute provides for other procedure/review, the APA is the default -- CONGRESS IS THE ONLY BODY WHO CAN INSIST ON ADDITIONAL PROCEDURE (The president kinda)

* APA procedures are considered to comport with Due Process, most DPC challenges will come from informal adjudication -- such refers to the world of agency discretion which is not required to follow any established procedure
* Remember: A good way to tell *the difference between adjudication and rulemaking* -- Adjudication is retrospective and rulemaking is prospective -- Adjudication is binding only to individual parties [although precedential] while rulemaking is applicable to large groups of people

|  |  |  |
| --- | --- | --- |
|  | Rulemaking | Adjudication |
| Formal | §553 Trigger 🡪 §556, §557 procedures | §554 Trigger (Unable to settle) 🡪 §556, §557 Procedures |
| Informal | §553 Procedures | All case/fact specific determinations made by agency officials 🡪 No procedure 🡪 Due Process? |

**§553 Informal Rulemaking (Notice & Comment)**

* **(a)** This section does not apply to the extent there is involved (1) military/foreign affairs functions or (2) matters related to agency management/personnel or to public property, loans, grants, benefits, or contracts
* **(b)** To start the process, an agency must issue a “Notice of Proposed Rulemaking” (NPRM) which contains one or more proposed rules and is published in the Federal Registry
  + **(b)(3)(a)** -- Except when required by statute, this subsection does not apply (a) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice ***[Non-Legislative rules]*** or (b) when the agency finds (and incorporates such findings) that §553 is impracticable, unnecessary, or contrary to the public interest
  + *Note*: Any proposed rules with an anticipated cost of over $100M must be submitted to OIRA in what is called an “Advance NPRM” (By Executive Order)
  + *Note*: “Good cause” is usually reserved for some type of emergency -- the agency will deal with the emergency and then seek post-promulgation comment -- the emergency rule is generally only binding while the emergency is happening
* **(c)** After NPRM, agencies must provide a reasonable time (30-60 days usually) for interested parties to submit written comment on the proposed rule; after consideration of each the agency must adopt a concise general statement of their basis ***-- When rules are required by statute to be made “on the record after opportunity for agency hearing, §556 & §557 apply instead of this subsection***
* (d) Publication of a substantive rule shall be made not less than 30 days before its effective date
* (e) Agencies shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule
* *Note*: After receiving comment, the agency is allowed to make any “logical outgrowth” changes, but it must submit any major change or any different rule for new comment (Supplemental NPRM) --

## Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council—1978—SCOTUS

**The Atomic Energy Commission promulgated a rule regulating the disposal of Nuclear Waste at large instead of considering disposal as apart of individualized license proceedings (informal adjudication) -- Δ challenged record produced during §553 as inadequate -- COA imposed additional procedure to gather more information**

* The adequacy of the record in this type of proceedings is not correlated directly to the type of procedural devices employed but whether if the agency has followed the statutory mandate of the APA and other relevant statutes -- §553 imposes the maximum imposable requirements -- Congress intended the discretion of the agencies and not the courts be exercised in determining when extra-procedural devices are employed
* It is obvious the court reviewed the agency’s choice of procedures on the basis of the record produced, not the information available to the agency when it decided to exclude evidence relating to the disposal/reposing of nuclear waste -- unwarranted examination of perceived shortcomings interfere with Congress’s process
* This is absolutely clear: absent Constitutional constraints or extremely compelling circumstances, agencies are free to fashion their own rules of procedure and pursue methods of inquiry capable of permitting them to discharge their multitudinous duties
* (1) A totally unjustified departure from well-settles agency procedure of long standing or (2) proceedings by which a very small number of persons are exceptionally affected” (Quasi-Judicial) might individually require some type of judicial correction, but that issue is not presented and is thus not decided

## United States v Florida East Coast Railway Co.—1973—SCOTUS

**After the ICC’s oversight committee expressed displeasure with the slow pace of proscribing per diem rates to alleviate chronic freight car shortage, the ICC proscribed rates via §553 procedures -- Δ challenged under DPC arguing the language allowing rates to be set “after hearing” required oral hearing to avoid possible prejudice**

* Language authorizing action “after hearing” is not the same as the requirement that a rule me made “on the record after opportunity for an agency hearing” -- Other statutes refer to hearing “on the record” and adherence to oral proceedings only to those occasions doesn’t render “after hearing” nugatory or ineffectual
* The term “after hearing” can have numerous meaning undoubtedly varying depending on the type and nature of the proceedings (rulemaking or adjudicative), the more precise inquiry is whether the hearing requirements necessarily includes the submission of oral testimony and cross examination in context
* Decisions show a recognized sharp distinction between proceedings for the purpose of promulgating policy-type rules; and those designed to adjudicate disputed facts in particular cases -- no effort was made to single out any particular railroad for special consideration and thus this is a broad rule applying prospectively
* In contrast, in the adjudication context, the word “hearing” may by itself trigger an oral hearing -- emphasis is applied in this context because an individual right is at stake

# The Role of Reviewing Courts

## Overview

**Judicial Review** -- The APA provides procedures and guidelines for review of agency action -- §706 gives us the Scope of Review

* The Reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed and (2) hold unlawful and set aside agency action, findings, and conclusions found to be
  + (a) Arbitrary, capricious, or an abuse of discretion
    - Based on the full administrative record before the secretary at the time of the decision (OP)
    - 4 Part Test (State Farm)
  + (b) Contrary to Constitutional right. Power, privilege, immunity
  + (c) In excess of statutory jurisdiction, authority or limitations
  + (d) Without observance of procedure required by law
  + (e)Unsupported by “substantial evidence” in formal adjudication (§556 & §56 or otherwise on the record of an agency hearing as provided by statute)
  + (f) Unwarranted by the facts to the extent facts are subject to trial de novo upon review
* Judges can review agency policy, fact-finding, or questions of law [interpretations]
  + There can be ***judicial review of any agency action/policy*** -- meaning “All Four Boxes”
    - Informal Adjudication (Overton Park); informal rulemaking (Nova Scotia) -- Both have the same “Arbitrary & Capricious” standard
  + There is also ***judicial review of Agency Fact-finding*** -- fact-findings within formal adjudications is reviewed under the *“substantial evidence standard”*
    - The “Substantial Evidence” standard after Allentown is quite deferential -- so these does not have much bite if the Agency & ALJ agree -- you ask “Could a reasonable jury have reached this same conclusion on a preponderance of the relevant evidence?” -- i.e. refusal to direct a verdict
    - The arguments you are making are basically the same, but you have an ALJ whose findings become part of the record -- Where the agency and the ALJ disagree -- substantial evidence challenges have a better chance
  + There can also be judicial Review of Agency Interpretations of law --the world of CHEVRON

(I) Judicial Review of Agency Policy

(II) Judicial Review of Agency Fact-Finding

(III) Judicial Review of Agency Questions of Law

**Deference to Agency Interpretations of Law** -- Whether the statute it administers or regulations it promulgates

* Informal Rulemaking (§553), Formal Rulemaking/Formal Adjudication (§556/§557) 🡪 **Chevron**
  + Step One: Has Congress directly spoken to the precise question at issue
  + Step Two: Is the agency’s answer based on a permissible construction of the statute?
* Non-Legislative Rules, Informal Adjudication 🡪 **Mead** (Force of Law?) + Barnhart Factors
  + - *Barnhart Factors*: (1) The “interstitial” (minute) nature of the legal question (2) the related expertise of the agency (3) importance of the question to administration of the statute (4) the complexity of that administration and (5) careful/consistent consideration the agency has given the question over a long period of time
  + Fail 🡪 Skidmore (No deference)
    - *Skidmore Factors*: (1) thoroughness evident in the Agency’s consideration (2) the validity of its reasoning (3) consistency with earlier & later pronouncements and (4) all those factors which give it a power to persuade since it lacks the power to control
  + Pass 🡪 Chevron
    - Yay!
* Why Chevron? (Note: The purposes of Chevron influence when you think deference should apply -- this can be apart of the Barnhart Analysis if it is otherwise a close decision)
  + *Agency Expertise* -- Under this rationale, Chevron may not apply to interpretations of jurisdiction or matters similarly not within agency expertise
  + *Congressional Intent* / Faithful Agent -- The broader the delegation, the more deference which should be granted -- the most specific/limited the delegation the less difference
    - Note; this argument can be ran the opposite way -- i.e the more specific the delegation, the higher the expertise; thus, the more deference
  + *Accountability* -- Under this view, Independent agencies may get less deference since they are less accountable to the political arms of government (Breyer in *FCC v Fox* Dissent)
  + *Uniformity* -- Where the challenged interpretation is important to uniformity in the statutory scheme; the agency should receive more deference -- where the legal issue is small in context, less deference may be necessary
* *Note*: Courts generally favor Avoidance over Chevron -- meaning a court will use avoidance to avid Chevron if the Secretary’s interpretation will raise a constitutional issue
* *Note*: When arguing two parts of a larger statute should be read together; you want to say why -- you want to link them of show that they are different -- i.e. the same/different topic, structure, purpose, problem etc.
* *Note (Too Big for Chevron)*: Depending on what one thinks the purposes of Chevron are, they may not agree with this argument -- if you think Chevron is all about political accountability; you will love this idea --
* *Note*: There is a circuit split on using “legislative history” when the statutory language seems clear on its face -- most circuits will consider it but the 3rd circuit will not
* *Note*: There is a circuit split on the test to determine whether agency action is “legislative” or not -- i.e. working test for determining whether something was meant to carry “the force of law”
  + ***5th Circuit***-- (1) Did the agency grant rights/impose burdens on affected parties? (2) Do agency decisionmakers have discretion in application or is it applied in a discretionary manner?
  + **D.C. Circuit** -- Is the agency action revoking or altering something the agency has already done? (Even guidance documents); if changing, then the agency must use §554

**Agency Policymaking**

* *Rulemaking* -- Agency policy can come from formal or informal rulemaking; the procedures for both of which are given in the APA -- Agencies may promulgate rules more specific than their organic statute
  + A rule (or regulation) is defined in §551 as ***“the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law/policy OR describing the organization, procedure or practice requirements of an agency…”***
    - *Legislative Rules* -- rules with binding legal effect -- a statute must give the agency authority to adopt such a rule and it must be done through formal/informal rulemaking procedures
    - *Non-Legislative Rules* -- Not legally binding -- merely express the agency’s view as to the meaning of a statute or regulation OR publicize an agency’s policy on the batter -- statutory authority is not required nor are formal/informal rulemaking procedures
      * “Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”
* *Adjudication* -- Agency policymaking can also come through the precedential effect given within those agencies who formally adjudicate their statutes -- similar to a little body of common law -- relies on the organic statute to bring enforcement against people who violate it -- meaning is derived through a series of cases
  + Agencies generally have atleast one, but maybe two, levels of appellate review within the agency and final authority is generally vested with the head or delegated by the head of the department
* *Informally* -- Agencies also implement their statutes through procedures less formal than adjudication or §553 procedures through routine use of (1) interpretative rules (2) statements of policy and (3) rules of “agency organization, procedure, or practice”; which are generally referred to as forms of Guidance
  + None are legally binding, but regulated entities often follow these statements because they assume agencies will do the same -- studies have found agencies use these from 2X-20X times as much as rulemaking
  + Although one is free to challenge guidance documents, the document still establishes the law for those unwilling to pay the expense or suffer the ill-will of challenging the agency in court

## (I) Citizens to Preserve Overton Park, Inc v Volpe—1971—SCOTUS

### Challenge to the Secretary of Transportation’s decision to route I-40 through Overton Park -- The decision was challenged as not considering feasible/prudent alternatives or attempting to minimize harm as required by statute -- US COA affirmed summary judgment on the basis of the Secretary’s affidavit

* Even though there is no “de novo” review or §556 proceeding, the generally applicable standards of §706 require the reviewing court to engage in a substantial inquiry which cannot be done on the basis of affidavits which contain only “post hoc” rationalizations
* Courts must decide is the decision was based on a consideration of all the relevant factors and whether there has been a clear error of judgment (Hard Look Review) -- upon a strong showing of bad faith or improper behavior the court may require all participating officials to testify explaining their action
* Although the court is not empowered to substitute its judgment for that of the agency, District Courts have plenary review of the Secretary’s decision based on the full administrative record before the secretary at the time of his decision

## (I) United States v Nova Scotia Food Products—1977—2nd Cir

**The Commissioner of the FDA issued a rule (§553) opting for hot-process smoked fish to be heated to certain levels; Agency did not respond to claims by the Bureau of Fisheries that nitrate could be added or to Δ’s claim that the rule was neither commercially feasible nor based on sound scientific evidence -- agency refused to disclose their study**

* There are no sound reasons for secrecy or reluctance to expose to public view the ingredients of the deliberative process -- except for trade secrets or national security; when the basis for a rule is a scientific decision, material believed to support the rule should be exposed to the view of interested parties for their comment
* To suppress meaningful comment by failure to disclose the data is akin to rejecting the comment altogether -- the inadequacy of comment in turn leads in the direction of arbitrary decision making
* *Note*: What happens if a study is presented within a comment? Does the Agency need to publish it for comment? -- This is unanswered, but Nova Scotia hints at the possibility of a never-ending cycle -- that would be too much but consider where the cutoff should be…

## (I) Motor Vehicle Manufacturers Ass’n v State Farm Mutual Insurance Co.—1983—SCOTUS

**Challenge to (Reagan’s) NHTSA’s revocation of the passive restraint requirement implemented years earlier (Carter Administration) against the comments from (1) Congressional members (2) insurance companies (3) consumer groups and others -- Challenged as Arb/Cap -- defended as reflecting a change in technology diminishing expected benefit**

* Agency rules are arbitrary/capricious if the agency (1) relied on factors congress did not intend it to consider (2) fails to consider an important aspect of the problem (3) offers an explanation that runs counter to the evidence or (4) is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise
* Congress intended safety be the preeminent concern -- that the industry opted for the detachable belt and deployed a system which will not meet the safety objectives of 208 hardly constitutes cause to revoke the standard itself -- the statute was passed because the industry did not sufficiently respond to safety concerns
* There is no suggesting in the long history of the rule (Safety Standard 208) that is only one option was feasible, no passive restraint should be required -- the agency failed to analyze continuous belts separately or consider airbags alone -- that is a failure to offer rational connection between facts and its decision
* While the agency is entitled to change its view [policy, not interpretation -- interpretation change = Chevron], it must explain its reasons for doing so -- No “presumption of constitutionality” -- Courts should not supply a rationed basis not articulated by the agency -- or attempt to make up for deficiencies in Agency rationale

Concurrence/Dissent

* Rehnquist (C/D-4) -- The agency should explain why it declined to leave the airbag and non-detachable belt rules in tact given they were explicitly approved in Standard 208 -- revocation of the standard focused only on the effectiveness of detachable belts -- insofar as detachable belts are concerned, the agency should be affirmed
  + “A change in administration brought about by the people casting their votes is a perfectly reasonable basis for a change in policy so long as the Agency is still within the scope of its statutory authority”

## (I) FCC v Fox Television Stations, Inc—1978—SCOTUS

**FCC expands its long-standing definition of “indecent” starting at “repeated occurrence” moving to “nonliteral use of fuck/shit could be actionable only if used once” -- Agency argued immunity rested on a guidance document i.e. staff rulings, and commission dicta; furthermore the Commission never held single usage was not actionable by rule**

* There is no basis for requiring all agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance -- an agency must show there are rational reasons for the new policy, but it need not demonstrate the reasons are better than those for the old policy
* It suffices that the new policy is permissible under the statute, there are good reasons, and the agency believes it to be better -- the new policy was neither arbitrary nor capricious; it (1) declined to access penalties (3) the rationale for the expansion if entirely sensible and (3) advances in technology support the position (bleeping)
* (1) When a new policy rest upon factual findings contradicting those which underlay its prior policy OR (2) when prior policy has cause serious reliance interest -- further justification is required -- a reasoned explanation is needed for disregarding facts & circumstances underlying prior policy
  + Justification is not required because there is a policy change, to ignore those factors would be A/C

Concurrence/ Dissent

* ***Breyer (D-4)*** -- The prior FCC rule explicitly rested in large part upon the need o avoid treading too close to the Constitutional lien of censorship; the FCC did not address that or the potential impact on small local broadcasting coverage which was A/C -- Argues that Independent Agencies should receive a stronger review --
  + Argues State Farm requires an agency to provide explanation for a “revocation” or a prior action that is more through than the explanation necessary when it does not act in the first place

*Note*: You may be able to argue that Independent Agencies are set up to avoid political whims, so they should receive some type of higher review if the only difference in the background facts is politics

## (II) Universal Camera v National Labor Relations Board—1951—SCOTUS

### Challenge to the NLRB’s fact-finding -- NLRB argued that it was enough that the evidence supporting the Board’s results were substantial when considered in isolation -- COA reviewed in isolation and found itself bound by the Board’ rejection of the ALJ’s findings as “practically impossible to consider” -- Δ challenged the deference

* According to the APA, all decisions shall become a part of the “record” -- the Taft-Hartley amendments were mean to mirror this provision -- The court must review agency fact-findings based on the entire record before the agency at the time of the decision, not merely the government’s evidence in isolation
* Judicial review of agency fact-findings must be (1) on the entire record and (2) substantial
* The ALJ’s findings need not be given more weight than reason and judicial experience say they deserve -- we intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial & experienced examiner has observe the witness, lived with the case, and drawn different conclusions
* The court aware that to give the ALJ’s findings less finality than the agency’s and yet entitle them to consideration introduces another unruly factor into the judicial process; but we ought not fashion exclusionary rules merely to reduce the number of imponderables to be considered

## (II) Allentown Mack Sales and Service, Inc v NLRB—1998—SCOTUS

**Δ Challenges the NLRB’s fact-findings (which is policy making for them) -- NLRB’s standard for internal polling of union standard was “good-faith reasonable doubt”; but which as applied was challenged as strict head count in practice**

* The court must decide on the basis of the entire record, *would it have been possible for a reasonable jury to reach the same conclusion* i.e. refusal to direct a verdict the other way
* NLRB’s findings rest on evidentiary demand which pass the substantive objective standard the board purports to apply -- even the most consistent and predictable departure from the proper application of NLRB’s standards will not alter the legal rule by which the agency’s fact-findings is to be judges -- this is the rule of law
* It is conceivable that an adjudicating agency may require evidence so far beyond that reason and logic would require making apparent the announced standard is not the effective one, but an agency may not impede judicial review and political oversight by disguising policymaking as fact-finding
* Statements which engender uncertainty about support for the union cannot be entirely ignored -- although unsubstantiated assertions don’t factually establish disfavor with the degree of reliability demanded in legal proceedings; it is the existence of “good-faith reasonable doubt” which is at issue -- absent reason to know the employee had no basis for the assertion or was lying, reason demands consideration of these statements

Concurrence / Dissent

* ***Breyer (C/D-4)*** -- Argues the court is applying a different standard then what is found in Universal Camera -- under that the Court should intervene only when the standard applied appears to have been misapprehended or grossly misapplied
  + Key technical words “objective reasonable doubt” have disappeared from the majority analysis leaving in their place a standard that may reflect common understanding but not NLRB’s specialized knowledge & expertise of the workplace -- this departs from broad leeway for agency’s to interpret their own rules
  + The realization that if NLRB makes its policy by fact-finding/ adjudication; such is entitled to deference as policy and as actual fact-finding [Willing to let the NLRB proceed in Secrecy)

## (III) Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc—1984—SCOTUS

**Challenge to the use of the “bubble concept” in States not meeting primary NAAQSs but consideration of individual stationary sources of pollution in states who has met the primary NAAQS required by statute**

* The basic legal error of the COA was adopting a static judicial definition when it decided Congress did not speak to the specific issue -- the power of administering a statute necessarily requires formulation of policy and rules to fill any gaps left in the statute
* Under an express delegation of authority to clarify a specific provision with a rule, that regulation has controlling weight unless arbitrary, capricious, or manifestly contrary to stature -- where the delegation to fill a gap is implicit -- a court may not substitute its own construction for a reasonable interpretation by the administrator
* When a court reviews an agency’s construction of a statute which it administers (1) The first question is whether Congress has directly spoken to the precise question at issue and IF NOT (2) the second question is whether the agency’s answer is based on a permissible construction
* An initial agency interpretation is not instantly carved into stone; on the contrary -- to engage in informed rulemaking, an agency must consider varying interpretations and the wisdom of its policy on a continuing basis
* When a challenge to an agency interpretation, fairly conceptualized, really centers on the wisdom of the policy and not if the agency made a reasonable choice within a gap left by Congress, the challenge must fail -- Courts, who have no constituency, have a duty to respect the legitimate policy choices made by those who do

## (III) Babbitt v Sweet Home—1995—SCOTUS

### Challenge to Dept. of Interior’s definition of “harm” to include significant habitat modification where it actually kills or injures wildlife -- Challenger argued it the definition should be limited to “direct applications of force”

* The Secretary’s interpretation finds support from (1) ordinary meaning / Redundancy canon (2) purpose argument / direct harm sought to avoid and (3) Amendment process / absurd result and (4) legislative history
* (1) Unless harm encompass indirect as well as direct injuries, the word has no meaning which does not duplicate the meaning of other words used to define “take” -- reluctance to treat statutory terms as surplusage supports the reasonableness of the interpretation
* (2) Among ESA’s central purposes is “to provide a means whereby the ecosystems upon which species depend may be conserved” -- Congressional intent to provide comprehensive protection supports reasonableness
* (3) When congress acts to amend a statute, The court presumes Congress intended real and substantial effect -- no one would request an “incidental” permit for “direct applications of force”
* (4) Legislative history does not specifically discuss the meaning of “harm” but it makes clear that Congress intended the term “take” to apply broadly to cover indirect as well as purposeful actions -- cites Senate and House Reports -- declines to place weight in wording from similar but un-enacted statutes
* When Congress delegates broad discretion due to special expertise, the court should be reluctant to substitute its views of wise policy for the agency’s -- the breadth of this delegation supports this view of reasonableness

Dissent?

## (III) MCI Telecommunications v AT&T—1994—SCOTUS

**FCC statute requires common carriers to file their rate with the FCC and charge only that rate -- in the 1970s the commission relaxed the procedures for non-dominate carriers in long-distance markets subsequently prohibiting their filing of tariffs -- such was struck down by US COA but MCI continued their practice of not filing; AT&T sued**

* Although the FCC has the power to modify the requirements; elimination of a crucial provision for 40% of a major industry is too extensive to be considered a modification -- what the FCC has is a fundamental revision of the statute to regulate only where effective competition does not exist; this is not what Congress enacted
* The FCC uses a single dictionary (Webster’s 3rd) to base its interpretation -- what the FCC demands is that we accept a rarity; allowing a meaning given in a single dictionary, which not only supplements but contradicts all other dictionaries -- That the court is not prepared to do
* For better or worse, the act established rate-regulation -- the FCC’s desire to increase competition cannot provide authority to alter the well-established statutory filed rate requirements -- these considerations are better addressed to Congress and not the courts
* When the word “modify” means both to change in some respects and to change fundamentally -- it will mean neither of those things, it will simply mean “to change” and some adverb will be called into service to indicate the degree of permissible change -- this goes beyond the basis meaning of the word “modify”
* Note: This case is an example of non-delegation doctrine as a canon of interpretation -- the idea that Congress would not delegate broad authority to make such sweeping changes in implicit language -- absent a clear statement giving such discretion, the court will not give it

Concurrence/Dissent

* Stevens (D-r) -- The Communications act of 1934 gives unusually broad discretion to meet new and unanticipated problems in order to fill the FCC’s sweeping mandate -- the court today abandons that approach in favor or rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the regulatory scheme in rapidly changing conditions
  + It is wrong to suggest that the mere process of filing rate schedules, rather than the substantive duty of reasonably prices and nondiscriminatory service is the heart of the common-carrier section of the act -- *dictionaries may be helpful aids but they are no substitute for close analysis of words mean in a particular statutory context*

## (III) FDA v Brown & Williamson Tobacco Corp.—2000—SCOTUS

**Challenge to FDA’s asserted power to regulate tobacco products after having expressly disavowed authority since its inception -- proffered rationale was new evidence relating to effects intended by the manufacturers**

* [Too Big for Chevron] -- we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an agency -- (1) creation of a distinct regulatory scheme (2) repeated & consistent denial of authority and (3) the incompatibility of the regulatory schemes all counsel against affirming jurisdiction here
* In determining whether Congress has specifically addressed the issue, a court is not confined to a particular statutory provision in isolation -- ambiguity is a creature of statutory context, not definitional possibilities -- the meaning of one statute may be affected by others subsequently enacted and more specifically on topic
* FDA provisions make clear that since tobacco products cannot be made safe; if regulated by the FDA they must be banned -- but this is prohibited by a subsequent statute -- clear intent to retain tobacco regulation for itself

Concurrence / Dissent

* Breyer (D-4) -- In its own interpretation, the majority nowhere denies that (1) tobacco products fall within the scope of statutory definition read literally and (2) the statutes basic purpose, the protection of public health, supports the inclusion of cigarettes within scope -- where reasonably linguistically possible, the statute should be interpreted in light of Congress’s overall desire to protect public health
* *Note*: The failure to overcome the “ban” language of the FDA stature is deadly here -- although the dissent would allow flexible interpretation to overcome the problem; it is hard to ignore clear Congressional language -- at the end of the day, Barkow notes this case is all about Congressional intent/ clear statutory language

## (III) United States v Mead Corp—2001—SCOTUS

**Challenge to the legislative effect to Customs “tariff classifications” allowed by statute -- challenge to agency deference while in informal adjudication -- Headquarters ruling letter was designed to lead all further classifications although classifications were generally treated as binding only to the parties with respect to that transaction**

* There may be an express or implicit delegation of specific interpretative authority to implement a particular provision or fill a particular gap -- yet Congress would expect an Agency to act with the force of law when an agency address ambiguity in the statute or fills a space in enacted law -- force of law 🡪 Chevron Deference
* Agency action qualifies for Chevron deference when it appears Congress delegated authority to make rules carrying the force of law and the challenge action was taken in the exercise of that authority
* There is no indication Customs set out with a lawmaking pretense in mind -- there were no formal procedures used and their treatment makes clear that a letter’s binding character stops short of third parties
* Agency interpretations may merit some deference given “specialized experience and broader information available to the agency and/or the value of uniformity in the particular area of law
* Classification rulings are bested treated as “interpretations contained in policy statements, agency manuals, and enforcement guidelines” -- such are entitled to deference proportional to their power to persuade

## (III) Skidmore v Swift & Co.—1944—SCOTUS

### Previously forgotten case which was brought back as a deference standard post-Mead

* The agency’s guidance document is a practical guide to employers as to how the office representing public enforcement will seek to apply it -- it does not constitute an interpretation of the act or a standard for judging factual situations which binds a court as precedent from a higher court may do
* Agency policies are made pursuant to official duty, based on specialized expertise and broader investigations & information than is likely to come to a judge -- Good agency/judicial administration require standards of public enforcement and those for determining private rights shall vary only where justified for a very good reason
* Yet rulings are not reached as a result of adversarial proceedings in which one finds facts from evidence and reaches legal conclusions based findings -- they are not conclusive in the cases which they directly deal with and much less in those to which they apply by analogy
* The weight/deference given in a particular case will depend on (1) thoroughness evident in its consideration (2) the validity of its reasoning (3) consistency with earlier and later pronouncements of law and (4) all those factors which give it power to persuade since lacking the power to control

## (III) Barnhart v Wilson—2002—SCOTUS

### SSA interpretation presumed that if an “inability” lasted less than 12 months, the durational requirement was not met regardless if inability “might have been expected” to last 12 mts. -- π challenged w/ regard to mental illness that lasted 11 months-- SSA passed a rule during the litigation proscribing the long standing guidance document into a rule

* Agency interpretations of their own regulations are afforded considerable legal leeway -- even assuming this interpretation was not passed in a regulation; the interpretation is long-standing and although it was derived through means less than §553/s554, that does not automatically deprive it of Chevron Deference
* Mead indicated that whether a court should give Chevron deference depends in significant part upon the interpretative method used and the nature of the question at issue; the lack of procedure is not dispositive
* In this case, (1) the minute nature of the legal question (2) related expertise of the agency (3) the importance of the question to administration of the statute (4) the complexity of that administration and (5) the careful & consistent consideration the agency has given the question over a long period -- all indicate that Chevron provides the appropriate legal lens through which to view the legality

# Executive Enforcement Discretion

## Overview

## Conley v Gibson—1957—SCOTUS

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## US v Board of Harbor Commissioners—1977—SCOTUS

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## McCormick v Kopmann—1959—SCOTUS

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## Mitchell v A&K—1978—SCOTUS

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## Tellabs v Makor Issues & Rights—2007—SCOTUS

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## cz v Sorema—2002—SCOTUS

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## Bell Atlantic v Twombly—2007—SCOTUS

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