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ATTACK OUTLINE

I. Statutory Interpretation

A. Trad'l Purposivism
  1. Riggs v. Palmer (1889): ct read ≠ murder into inheritance statute avoid absurd outcome
  2. Holy Trinity (1892): "work/serv any kind" = only manual labor (intent > plain meaning)

B. TVA v. Hill (1978): Inter-agency: Hydro power v. Snail darter; Trump: clear statute Interior > all

C. Textualism
  1. Brogan (Scalia 1998): §1001 lying to agent: clear literal reading ≠ exculp no exception
     a. Ginsburg concur: clear, but warn Cong of risks
     b. Stevens dissent: longstanding interp
  2. Marshall (Easterbrook 1990): LSD "mixture" incl paper in ord'y parlance
     a. Cummings dissent: sent guidelines distinguish
     b. Posner dissent: self-rev'l → dynamic: Cong ignorant of LSD practice
  3. Text-Based Tools: plain meaning, evident meaning, technical meaning
     a. Harris v. GA (2009): "motor vehicle" ≠ mower (dissent: traffic ≠ crim laws)
     b. Nix v. Hedden (1893): "tomato" = taxable veg under ord'y ≠ tech meaning
     c. Muscarello (Breyer 1998): "carry gun" = in car by ord'y meaning (≠ ambig for lenity)
        a. Ginsburg dissent: add'l sources (Black's); context; 5-4 → lenity
     d. FCC v. ATT (Roberts 2011): "personal privacy" ≠ corp by ord'y meaning
  4. **Text-Based Canons**
     a. Ejusdem Generis: catchall "…or other…"
     b. Noscitur a Sociis: context – Dolan (2006) "loss, miscarriage & negl trans"
     c. Expressio/Exclusio: "Cong knew how to in/exclude."
     d. Whole Act
        a. Identical Words: Lundy IRS "claim," but Cline ADEA "age" (old/absolute)
        b. Surplussage
        c. Titles, Provisos (but ≠ enacted law)
     e. Whole Code
        a. In Pari Materia: same subj matter read as unified body of law
        b. Inferences Across Statutes: repetition of language intends same interp
        c. Repeals by Implication disfavored unless clear Cong'l directive
           i. Morton v. Mancari (Blackmun 1974): BIA pref'l tribal hiring valid – 1934 Indian Reorg Act ≠ repealed by 1972 Equal Empl't Opp'y Act
     f. Scrivener's Error: Locke (Marshall 1985): upheld 12/30 mining claim filing deadline
     g. Absurd Results: Bock Laundry (Stevens 1989): R Evid balancing prob > prej "to Δ" = "crim Δ" avoid absurd civ handicap – Scalia concur: leg'v history only source ambig
        a. Blackmun dissent: better to read "Δ" as "any litigant"
  5. **Substantive Canons** (value-based thumb on scale)
     a. Lenity: Santos (2008): only ambig crim law – $ laundering "proceeds" = "profits"
        a. Breyer dissent: fix merger prob (all gamb → laund) by "promote" >1 crime
        b. Alito dissent: primary def "revenue;" analogous laws – 2009 am: "receipts"
     b. Avoidance: Almendarez-Torres (Breyer 1998): alien re-entry sub§ enhanced sentence
        a. Scalia dissent: must be separate crime b/c grave doubts 5th/6th
        b. Trad'l strong: is unconst'l vs. Modern weak: grave doubts re const'lity
           i. But Roberts misapplication in ACA? (≠ ambiguity, but which power)
     c. Retroactivity (but some inherent to CL adjudication)
  6. Gluck/Bressman (2013): disconnect cong'l drafters, jud'l interpreters

D. Legislative Intent & Purpose
1. Hart & Sacks, Purposivism (1950s): Cong = reas'l people, reas'l ends, reas'ly
    a. Stevens/Breyer, Intentionalism (1980s): interp'v fiction assign group norm'v intent
2. Posner, Imaginative Reconstruction (1980s): reas'l enacting Cong, foreseeable issue
3. Legislative History (Conf, S/HR Reps > Author > Mbr > Hearings > Other > Exec)
    a. Scalia: Art I §7: only enacted text = law – Breyer: interp'v tool, like dictionary
    b. Blanchard (White 1989): "reas'l" atty fees: multifactor test; conting-K ≠ disp'v
        a. Based in part on S Rep finding 3 Dist Ct holdings > Cir Ct holding
        b. Scalia concur: right (multifactor holding, K-cap dictum) but ≠ leg'v hist
    c. In re Sinclair (7th 1989): leg'v history ≠ override unambiguous statute
        a. Statute ≠ conversion Ch 11 to 12 bkrpt – Leg'v hist = judge's discretion
    d. Alito, Signing Statements Memo (1986): persuasive b/c Art I §7 enactment role
4. Intent and Purpose: Moore v. Harris (4th 1980): Black Lung: whole act/code, leg'v history

E. Dynamic Interpretation & Changed Circumstances
1. Alenikoff, Nautical Model (1988): eg excl gay aliens Immigration Act "mental defect"
2. Bob Jones (Burger 1983): racist school ≠ charity exempt b/c IRS apply antidiscrim policy
    a. Rehnquist dissent: text clear (≠ mention policy), consistency over time, ≠ use subseq
3. 2001 AUMF; Ali v. Obama (2013): "covered person" → co-resident terrorist guesthouse

F. Stare Decisis & Statutory Precedent
1. Flood v. Kuhn (Blackmun 1972): MLB ≠ free agency upheld
    a. Burger concur: grave doubts re precedent, but leg'v solution
    b. Marshall dissent: reserve sys = servitude – Cong'l inaction b/c ghettoized players

G. Executive Interpretation: OLC Torture Memo (2002): applied health-benefits "severe pain"

II. Agencies' Role in Administering Statutes (lurking legitimacy/constitutionality concern)

A. Congressional Control
1. **Non-delegation**
    a. Schechter Poultry (1935): unconst'l delegation (ind capture) unless intell principle
        a. Cardozo: Cong ≠ delegate uncanelized, unconfined, vagrant leg'v power
    b. Benzene (Stevens 1980): nondeleg risk – saved section by invalid benzene 0ppm std
        a. Powell concurrence: DOL should show cost-benefit calc to justify
        b. Rehnquist concurrence: strike down whole section for nondeleg (a la 1935)
        c. Marshall dissent: Act suff'ly clear, but maj imposing own cost-ben analysis
    c. Whitman v. Am. Trucking (Scalia 2001): EPA may set NAAQS w/o cost calc
        a. Nondeleg dead: "almost never" unconst'l: ltg principle > magnitude of power
        b. Thomas concur: fits precedent, but open to reviewing extraconst'l doctrine
2. Oversight hearings/contempt: Anne Gorsuch (EPA), Bush2 WH aides Bolten/Myers (2008)
3. **Legislative Veto**: INS v. Chadha (Burger 1983): deportation ruling; no veto
    a. Powell concurrence: wrong vehice – narrower cong'l overreadch into jud'l function
    b. White dissent: realist/functionalist leg'v veto as check on admin state (OK veto gate)

B. Presidential Control: Executive (at-will) vs. Independent (for cause; Datla/Revesz: etc?)
1. **Appointment & Removal**
    a. Myers (Taft 1926): unitary exec removal (incident to appt power) Postmaster
        a. Holmes dissent: leg'v supremacy: agency creature of Cong
        b. Brandeis dissent: const'l value inter-branch dependence > efficiency
    b. Humphrey's Ex'r (1935): FTC chair "for-cause" removal: quasi-jud'l/leg'v powers
    c. Weiner (Frankfurter 1958): War Claims Comm'r implied for-cause b/c quasi-jud'l
    d. Buckley v. Valeo (1976): Cong can't appoint to FEC: Off (Pres), Inf Off (cts, cabinet)
        a. White dissent (~Chadha): OK cong'l experimentation leg'v tech chg times

e. Morrison v. Olson (Rehnquist 1988): Ind Counsel for-cause b/c ≠ "core exec/so ess'l"

a. Scalia dissent: unconst'l exec pwr ≠ Pres control – foresaw Ken Starr risk

f. PCAOB (Roberts 2010): Myers redux: no 2d for-cause layer indep (stip) SEC

a. Breyer dissent: no cong'l addition; policy reasons indep; 1 layer = prob; ≠ stip

g. Noel Canning v. NLRB (DC 2013): NLRB recess appts inter-session, "happen"

a. Concur: "happen" unnec'y to disposition, < historical support

2. OIRA cost-benefit: Reagan (downsize) → Clinton (streamline) → Obama (retrospective)

a. BorisB: roles: process cop, analytical, WH coord – reforms: resources, explain basis

C. Judicial Control

1. CFTC v. Schor (O'Connor 1986): CFTC jud'l auth state countercl (≠ priv/pub rights dicho)

a. Brennan dissent: pres'v narrow excep ArtIII excl auth – Sep Pwr → litigants' rights

2. Subst'v Due Process: Public Benefits

a. Londoner (1908) & Bi-Metallic (1915): public (tax) vs. private (apportion) actions

a. K. Culp-Davis: leg'v (≠ due p) vs. adjud (info adv → due p)

b. Goldberg v. Kelly (Brennan 1970): dignity revolution – pre-loss opp'y heard

a. Black dissent: const'lize → ossify; slippery slope; practical conseqs

c. Mathews v. Eldridge (Powell 1976): efficiency counter-rev: < erroneous deprivation

a. Logical extension: drone strikes; Hamdi (2004) indef detention

3. Subst'v Due Process: Public Employment (case-specific)

a. Roth (1972): ≠ right 1yr non-tenure K – Marshall dissent: pres'v right pub emplymt

b. Perry v. Sinderman (1972): = right de facto tenure (obj reliance: customs, K)

D. The Administrative Procedure Act

1. §551 Exec & Indep Agencies

2. §553 Informal RM: Vt Yankee (1978): Atomic Energy hearing ≠ discovery, cross-ex

a. AEC discretion RM procedures – end DC: Leventhal subst'v > Bazelon proc'l

3. §554 Formal Adjudication

4. §556 Hearings: Fla E Coast Ry (1973): ICC freight rates w/ only written N&C

a. ≠ Magic words: "oral hearing/presentation" – Douglas dissent: > fees, > procedure

5. §557 Agency Review

III. Judicial Review

A. Hard Look Review of Agency Policy (+ guidance docs?)

1. APA §706: stds: RM: arbitrary & capricious – ADJ: supported by subst'l evidence

2. Overton Park (Marshall 1971): hard look informal adj: remand consider full agency record

a. Strong presumption reviewability agency decisions

3. Nova Scotia (2d 1977): FDA informal RM smoked whitefish arb&cap (≠ sci data)

4. State Farm (White 1983): Std 208 rescission arb&cap b/c ≠ consid airbags as alt

a. Rehnquist dissent: politics reas'l factor in agency policies

5. Tummino (EDNY 2013): cynical HHS rev'l of FDA Plan B was arb&cap

6. Heckler v. Chaney (Rehnquist 1985): FDA inaction presumptively unreviewable threshold

a. Marshall dissent: inaction reviewable unless prohibited: non-delegation > discretion

7. FCC v. Fox (Scalia 2009): indecency pivot valid; ≠ diff std from RM

a. Breyer dissent: explain basis, engage w/ 1st Am precedent; same std diff circs

B. Judicial Review of NLRB **Fact-finding** (facts as policy?)

1. Universal Camera (L Hand 2d 1950): ignore ALJ's (thorough) findings, NLRB rev'l

a. Frankfurter (1951): whole-record review, engage w/ all facts incl countervailing

2. Allentown Mack (Scalia 1998): A'town reas'l doubt union supp – NLRB ≠ secret std

a. Breyer dissent: "obj" reas'l doubt – reasons to ignore several statements

C. Chevron Doctrine: Agency Statutory Interpretation

1. Chevron (Stevens 1984): EPA "stationary source" bubble – chg interps → zone reas'lness
   a. Legal deference: Step1: ambiguous? (deleg) Step2: reas'l? (expertise, pol account'y)
2. Step Zero: too big for Chevron? (formal Step 1 analyses)
   a. MCI v. ATT (Scalia 1994): FCC "modify" unambig (Step 0? 40% mkt)
      a. Stevens dissent: Step 1 ambig enough → Step 2 reas'l, if not best
   b. FDA v. B&W (O'Connor 2000): FDA whole-act harmony, subseq leg unambig
      a. Underlying Step 0? Recognize pol/econ importance Big Tobacco
      b. Breyer dissent: Step 1 ambiguity (plain meaning); new data explained pivot
3. Too small for Chevron?
   a. Mead (Souter 2001): Customs Serv "diary" tariff ruling letters outside Chevron world
      a. (1) Cong'l deleg agency force of law (sub'v/proc); (2) Agency exercise auth
         i. → Skidmore (1944)? DOL "employee" persuasive weight
      b. Scalia dissent: all Chevron, all the time – Skidmore is dead
   b. Barnhart (Breyer 2002): defer to SSA disability "inability," "expected to last"
      a. Reworked Mead into flex multifactors: interstitial Q, expertise, complexity…
   c. Brand X (Thomas 2005): prior jud'l construction nonbinding if Step1 ambiguous
      a. Scalia dissent: risk allowing agency overrule ArtIII, ossification
   d. City of Arlington (Scalia 2013): FCC "reas'l time" = Chevron (≠ Mead, ≠ FDA/MCI)
      a. Breyer's lone concurrence: see Barnhart
      b. Roberts's new salvo: undemocratic admin state – need clear cong'l deleg
4. Constitutional Avoidance (threshold ambiguity)
   a. DeBartolo (1998): NLRB leafleting: avoidance > Chevron
      a. But also hard look review? NLRB fail const'l issue beyond own precedent
   b. Rust v. Sullivan (Rehnquist 1991): abortion regs: Chevron if unavoidable issues
      a. Blackmun dissent: ambig statute, avoid const'l issue
      b. O'Connor dissent: incorp avoidance into Chevron Step 2 (un)reas'lness
         i. ≠ like Whitman (Scalia: non-deleg incurable by agency) b/c fix reg
5. Politics: Sunstein&Miles empirical data; Posner theory of "ideology"
6. Yates (2014?): fish = "tangible objs" under Sarbanes-Oxley post-Enron law?

I. INTRODUCTION

A. What Is an Agency?

- Created by statute (or, sometimes, exec order ratified by statute)
- Great power: issue rules, regs, orders; conduct research, inspections; give guidance; publish opinions, manuals
  - E.g. 2008: 80 statutes, 3807 regs; 2011: 284 statutes, 3955 regs
  - More agency cases than federal judiciary cases
  - 1/10 GDP goes to reg compliance costs

B. The Need for Regulation

- Pre-20th C: contract and tort law were primary risk-mgmt mechanisms
  - Contract: consumer's choice of seller, negotiation
  - Tort: personal injury for negligence
    - 1842-1916: mainly brought solely by direct customers
    - Winterbottom v. Wright (1842): coachmen employed by contractor of USPS barred from suing carriage manufacturer b/c ≠ privity relationship
  - Limits of common-law adjudication:
    - Retrospective (unfair penalty/windfall) vs. prospective
    - Reactive vs. proactive regulation of bad conduct
      - Patchwork vs. full coverage
    - Uncertainty: potential to transform precedent w/o explicit overrule
    - Institutional competence, technical expertise
    - Political accountability
    - Parties in suit vs. interested participants
    - Collective action problems
- Why regulate?
  - Manage risks caused by market failures
    - Information asymmetries
    - Externalities (tragedy of the commons)
    - Collective action incentive
    - Control monopolists
    - Social engineering via behavioral economics
  - Noneconomic, ethical social choices
- Methods of regulation:
  - Fees, taxation, price controls, limits on market players
  - Investigation, sanction, recall
  - Standard-setting, testing
  - Disclosure req'mts: to agency, to public
  - Incentives: tax credits, grants, seal of approval
- 1980s Reagan Era through Clinton: deregulation
  - OMB → OIRA cost-benefit analyses, but continued predominance of admin state

C. Statutes and Regulation – TVA v. Hill (US 1978)

- 1967-72 litigation to enjoin TVA from finishing construction of $100m Tellico Dam
- 1973: DC dissolved injunctions; concurrent discovery of new snail darter fish
  - Sec'y Interior declared snail darter protected under Endangered Species Act

- Conflict: US agency vs. US agency
  - Unusual litigation approach: AG (not SG) rep'd TVA, but appended Sec'y Interior's position to brief
- Trump card: Act subordinated all other agency actions to species protection/Interior
  - Text: unambiguous
  - History: draft language considered weakening Act, excised those portions
  - Implied repeal? Especially disfavored if based on appropriations bills
- Legacy: Congress passed statutory exception for Tellico Dam
  - Rascoff: "platonic conversation between the Court and Cong…separation of powers working just as it should."
    - Legislative power: big picture, ethical, policy choices
    - Agency power: targeted expertise

II. LEGISLATIVE AND STATUTORY INTERPRETATION

A. The Legislative Process

- "Veto gates" – responses: omnibus legislation, strict textualism
  - Article I:
    - Section 5: Congressional rule-making authority
      - Death by committee (80-90% of bills, which anyone may write)
      - Senate filibuster: effective 60-vote threshold at multiple stages
        - Const'l issue: enumerated supermajority req'mts elsewhere
        - 2012 reforms: exec branch, lower courts, but ≠ laws, SCOTUS
    - Section 7:
      - Majority (simple) votes in both houses
      - Conference committee harmonization
      - Presentment to President (10 days, ≠ Sundays, to veto)
        - Antebellum: belief unconst'l → Post-Civil War: undesirable

B. Statutory Interpretation

- Statutory interpretation by the courts
  - Tools: instruments for ascertaining meaning
    - E.g. dictionary, leg'v history, reports
  - Theories: normative views of how courts should interpret
    - Textualism (Scalia): text alone, w/ legal context but w/o leg'v history
      - Law-econ support: limit horse-trading deals to bargained-for text
    - Intentionalism: specific purpose of each word/phrase
    - Purposivism (Stevens): broad purpose of whole statute
    - Legal Process Purposivism: legal fiction of "reas'l legislature" interp
    - Imaginative Reconstruction: what would Congress do?
    - Dynamic Interpretation: Court as legal partner; recog'z subjectivity of law
  - Method:
    - First, read the text of the statute (vocabulary, enumerated exceptions)
    - Then, if ambiguous, look beyond the text for meaning (title, history/reports)

1. Riggs v. Palmer (NY 1889)

  - Grandson killed grandpa Palmer b/c majority share of will. Daughter-legatees sued

- Court gave "rational interpretation," read in leg'v intent re absurd outcome
  - "Fundamental maxims of CL:" can't profit from own fraud/wrong/crime
- Dissent: legislature provided explicit exceptions to irrevocability of will (≠ murder)
  - Public policy served by faithful execution of laws
  - Punishment for murder = prison, not civil penalty

2. Holy Trinity v. U.S. (1892)

- Episcopalian church hired rector/pastor from London agst fed law (K before immig)
  - Methodist lobbying to even score for Scots-Irish discrimination?
- Textual arguments:
  - Δ: 1) rector's activities ≠ work/service; 2) activities fall w/in exceptions
  - π: 2) work/service "of any kind" incl rector's activities; 2) ≠ w/in exceptions
- Arguments beyond the text:
  - Exceptions suggest coverage both labor & service
    - But title omits "service," "of any kind"
  - Leg'v history:
    - House Report: socioecon context, protectionism, nativism
    - Senate Report: would've limited to manual labor only, "if had time"
- Court reversed for Δ, reading in manual labor limitation
  - Cited precedent: US v. Kirby: presume Cong'l intent to avoid unjust conseq
  - Title, socioecon context, Sen report
  - History of religious fervor in America (can't impute anti-religious purpose)

C. Textualism

1. Introduction

- Basic terms:
  - "Ordinary meaning" – by a reasonable reader
  - "In context" – w/in the broader body of law
  - Ignore legislative intent, history
- Justifications:
  - Constitutional: only text enacted through leg'v process, only text = law
    - Forecloses propriety of other statutory interp theories
  - Normative: legislative supremacy in rep democracy (direct election, Art I)
  - Public Choice Theory: cynical recognition/limiting extracted deals to pure text
- Constraints:
  - Necessary product of limiting tools, or correlated w/ pol ideologies of users?
  - Easterbrook (1983): discipline legislators by strictly interpreting their statutes

a) Brogan v. U.S. (Scalia, 1998)

- Δ union officer lied to DOL, IRS agents about illegally accepting mgmt cash
- 18 U.S.C. §1001: felony false statements to federal agent
- Court aff'd for US, reversing longtime, implicit "exculpatory no" exception
  - Undisputed literal statutory reading prohibits exculpatory no
  - Even exculpatory no perverts government functions by misdirection

- Court can't restrict unqualified statutory language based on "evil" Cong intended to address
- Claims of prosecutorial abuse unfounded, moot given Cong'l criminalization

▪ Concurrence (Ginsburg): accept clearness of law, but warn Cong of conseq
- Risk of prosecutorial generation of felonies by priming suspects
- Prior iterations suggested real Cong'l intent: aff'v lies to agencies
- DOJ policy/US Atty Manual supported exculpatory no exception
- Ongoing reform efforts: 1980 MPC, 1981 Sen Report

▪ Dissent (Stevens): absurd extension of "well-settled interpretation"

b) U.S. v. Marshall (Easterbrook, 7th 1990)

▪ 4Δ LSD dealers sentenced to 20, 5+ mand mins for 12k (100g), 1k (5g) doses
▪ 21 U.S.C. §841 weight-based sentencing: "mixture or subst…detectable amt"
▪ Court aff'd sentences, incl LSD blotter paper (as "mixture") in weight
- "Ordinary parlance": paper = mixture (which ordinary?)
- Cong chose to except PCP, not LSD

▪ Dissent (Cummings): Sent'g com'n ≠ final position re pure/mixture weight
- Dosage-pure weight conversion incl in guideline tables
- Leg'v history: Sen attempts to amend

▪ Dissent (Posner): self-critical (Rose wrong), pragmatic/dyn interp argument
- Departure from "faithful agent" theory of statutory interpretation
  - o Omission of LSD exception b/c Cong ignorant of use/sale
- Paper = carrier; no more mixture than glass vial, vehicle
- Absurd in context unless pure weight (sentence/dosage)
  - o "All interpretation is contextual"

2. *Text-Based Tools and Canons*

a) Tools:

- o Plain meaning rule
- o Evident meaning by gen'l agreement
- o Dictionary, trade usage, expert usage, canons
- o Ordinary meaning vs. technical meaning

b) Harris v. Georgia (GA 2009): "motor vehicle theft"

- o Δ stole riding mower form Home Depot (> sent for "motor vehicle" theft)
- o Court reversed mv theft conviction, remanded for sentencing on plain theft
  - ▪ Likely same outcome
  - ▪ Ordinary meaning: designed for/primarily used on roads
  - ▪ Statutory context:
    - Undefined in crim section, so looked to traffic section of code
      - o "Special mobile equip" equip carve out
    - Subseq chop shop, carjacking laws explicitly added farm equip
  - ▪ Leg'v intent: ease of escaping IN, ≠ with
- o Dissent: chop shop, carjacking inclusion = reiteration ≠ modification of "mv"

- Illogical for "mv" diff meanings in diff sections
- Inappropriate application of traffic defs to crim statute
- Leg'v intent: protect property from theft

c) Nix v. Hedden (1893): "tomato"

- π imported tomatoes; Δ port collector taxed as veg (fruits tariff-free)
- Court aff'd directed verdict for Δ on ordinary meaning when ≠ tech meaning
  - Served with dinner, grown in kitchen gardens = veg
  - Botanical meaning inappropriate for food; industry custom ambiguous
  - Dictionary as peripheral tool, not direct evidence
  - Choosing ordinary vs. technical meaning:
    - Existing meaning at CL?
    - Audience of statute? (Penal: ord; Reg: tech)
    - Industry understanding, technical context

d) Muscarello v. U.S. (Breyer, 1998): "carry a firearm"

- Δs sold weed/planned stick up while guns locked in glove box/trunk
- 18 U.S.C. §942(c)(1): "carry" gun "during & in rel to drug traff crime"
- Court aff'd convictions: "carry" = "convey"/"transport"
  - Ordinary meaning (dictionary, etymology, literature, news)
    - Primary: convey, transport
    - Secondary: support, as column
  - Cong'l intent:
    - Basic purpose: persuade pot'l dealers to leave guns at home
    - History: no unified intent to limit "carry" to "on person"
  - Lenity (subst'v) only applicable if "grievous ambiguity or uncertainty"
  - "During & in rel to" sufficient to protect lawful conduct
- Dissent (Ginsburg):
  - Souter's sources ≠ dispositive (plus Black's limits to on person)
  - Not only "carries" but "carries a firearm"
  - Failure to consider broader statutory framework, consistency of defs
  - Lenity should apply given 5-4 disagreement on meaning
    - Fair notice to pot'l offenders

e) FCC v. AT&T (Roberts, 2011): "personal privacy"

- FOIA req by CompTel (trade ass'n ATT competitors) for 2004 FCC investig
- ATT challenged req on FOIA Exemption 7(c): "personal privacy"
- FCC denied ATT challenge, but 3d Cir rev'd: "person(al)" incl. corporation
- Court rev'd 3d Cir: "personal privacy" ≠ corporation
  - Derivative adj sometimes different meaning from root noun
  - Precedent: ordinary meaning unless defined (usage, dictionary)
  - No clear legal usage
  - Construed in context: Restatement Torts; Prosser on Torts
    - Included Exemp 6: personnel, med files (noscitur, expressio)
    - Excluded Exemp 7: trade secrets, financials (expressio)
  - Ideal: consistency of meaning w/in statute

- AG memo: "personal privacy" = individual ≠ corporate

f) Canons

- Ejusdem Generis ("of the same kind") – "a, b, c, *or other*."
  - Read catchall term in light of preceding series
  - Keffeler (2003): ltd fed law protecting SS bens fr "execution, levy, attachment, garnishment, or other legal process" to QIR2, allowing WA to manage foster SS bens
  - BUT Ali (2008): fed law barring claims against "any officer of customs or excise or any other officer" b/c "disjunctive" phrase ≠ series, so "other" ≠ limiting – denied π's claim against prison officer
- Noscitur a Sociis ("known by its company")
  - Context matters; make sense of juxtapositions
  - Dolan (2006): ltd USPS immunity "loss, miscarriage and negl transmission" to process of delivery – allowed π's suit for negl placement of pkg on porch
  - Williams (2008): ltd "promotes," "presents" in child porn law to transactional acts in context of "advertises," "distributes," "solicits"
  - BUT Warren (2006): ≠ limit "discharge" in Clean Water Act to pollutants
- Expressio Unius Est Exclusio Alterius ("expression of one is exclusion of other")
  - E.g. Holy Trinity: enumerated exceptions exclude omitted terms
  - "Cong knew how to include, so would've if wanted to"
    - Impute cong'l deliberativeness re in/exclusion
- Whole Act Rules
  - Identical Words – consistent meaning across statute, but flex if variation reas'l
    - Lundy (1996): IRS "claim" same as other provision b/c "interrelationship and close proximity"
    - BUT Cline (Souter, 2004): ADEA "age" meant "old age" re discrimination, but "# years" elsewhere, b/c purpose of law
      - Despite illogical defense provision of age as bona fide req'mt
      - Despite EEOC brief for consistent broad meaning
  - Avoid Redundancy & Surplussage
    - May work together w/ noscitur a sociis or ejusdem generis
      - E.g. so "or other x" exclusive of preceding terms
  - Titles – used primarily to confirm analysis, but ≠ controlling weight b/c ≠ law
  - Provisos – clauses stating exceptions/limits on application ("provided that…")
- Whole Code Rules
  - In Pari Materia – statutes addressing same subj matter comprise single law
    - Later act = leg'v interp of earlier act
    - E.g. Harris theft statutes vs. traffic laws

- Inferences Across Statutes – unified theory of statute book
    - Repetition of language as intent to replicate jud'l interp, too
    - Similar to expressio/exclusio canon
    - Casey (1991): read out expert witness fee from atty fee-shifting statute based on exclusion elsewhere in code
- Repeals by Implication
    - Disfavored unless cong'l intent "clear and manifest"
        - But "implied" < clear/manifest/explicit?
    - Hawaii v. Office Haw'n Aff. (2009): 1993 Jt. Res. Cong apology ≠ interp'd as implied repeal of 1959 Admission Act (statehood)

- Gluck & Bressman (2013):
    - Massive disconnect between leg'v drafting and jud'l interp
    - Superfluities:
        - Coverage/just in case
        - Purposeful inclusion of to satisfy member, interest group
        - Challenge faithful-agent justification of canon
    - Whole act/code barriers:
        - Committee system: islands ≠ communication
        - Bundled/omnibus deals, esp defense spending auth
        - Challenges:
            - One of most widely used jud'l interpretive canons
            - Jud'l influence on drafting ignores structural barriers
    - Dictionary: 50% rarely/never (15% often/always)
        - But increasing in SCOTUS: 1960s: 16 → 2000s: 225
        - Only justifiable if accurate measure ordinary meaning

g) Morton v. Mancari (Blackmun, 1974)

- 1934 Indian Reorg Act impliedly repealed by 1972 Equal Empl Opp'y Act?
- Δ BIA preferential hiring and promotion (auth'y of Sec'y Interior)
- Court rev'd π's (white BIA empls) verdict, keeping tribal prefs
    - Primary: illogical to repeal via Acts serving opposite purposes:
        - 1934 IRA: aff'v promotion Indian self-rule
        - 1972 EEOA: bar discrim by white males
    - 1964 Indian exemptions/same Cong passed separate preference laws
        - Pro: cong'l intent to protect Indian preferences
        - Con: expressio/exclusio

3. Scrivener's Errors and Absurd Results

a) Scrivener's Error: U.S. v. Locke (1985)

- "A little tough love from J. Marshall"
- 12/31 πs' 1d-late filing ("prior to 12/31) "abandoned" 20yr mining cl $1m/yr
    - π's arg: "of each year" = annual = end of year
- Court rev'd π's judgment below; claim irreversibly abandoned to US
    - BLM reg corroboration: "on or before 12/30"
    - No evid of leg'v intent re deadline – inherently arbitrary

- No good reason to depart from ordinary meaning
- Underlying bias: assume messiness of drafting in Congress, but expect jud'l clarity, philosophizing
- Scrivener's Error – high bar, e.g. 12/32, 11/31 – 2/29?
- Chapman (1991): cited Holy Trinity for doctrine of limiting broad meaning of some words to avoid absurd results, Public Citizen to "look beyond naked text" when apparent result ≠ cong'l intent

b) Absurd Results: Green v. Bock Laundry (Stevens, 1989)

- π inmate on work release lost arm in dryer, impeached at trial for prior felony
- Fed R Evid 609(a)(1) req jud'l balance probative > prej "to the defendant"
  - Absurd inequity in civil case, potential constitutional (5th) issue
    - Civil π/Δ designation "often happenstance"
- Court construed as "criminal defendant," req'd admission impeachment evid
  - Leg'v history (esp Conf Cte) → thorough deliberation, hard choices
- Scalia concurrence:
  - Admit absurdity of plain meaning, need to go beyond text
  - Admit recourse to leg'v history, but only in search of problem's origin
  - "Criminal" modifier "does least violence" to the text
- Blackmun dissent:
  - Read "defendant" as "any litigant"
  - Focus on fairness: improper influence on trial, ≠ narrow plain meaning
- X-Citement Video (1994): absurd results unless "knowingly" applied not only to verbs but also fact of child pornography (avoid netting ignorant couriers)

4. Substantive Canons

- Rules about how law should look when statutory language ambiguous
- Values-based, "thumbs on the scale"
- May be relied upon by Cong when legislating: anticipate jud'l interp

a) Lenity: US v. Santos (2008)

- Preliminary threshold: ambiguity (how much may depend on theory of interp)
- Lenity only applies to criminal statutes
  - Legality: fair notice, burden/std of proof
  - Institutional: legislative > judicial condemnation
  - Public Choice: elected officials > influence on Cong than Δs' lobby
- Δ Indiana lotto operator and employee – fed $ laundering law: "proceeds"
- Scalia plurality:
  - Defined term in statute? No
  - Ordinary meaning, dictionary? Ambiguous
    - Challenge strictness textualism w/ extraneous dictionary use?
  - In pari material/whole code meaning? Ambiguous
  - Dissent's Model Act, state laws, treaty postdate law at issue, unhelpful re why "proceeds" undefined here
  - Purpose inquiry circular: purpose = f(construction)
    - Arguendo Hart/Sacks, both purposes ≠ absurd

    - Merger problem if proceeds=revenues (all gambling → laundering)
        - Similar to surplussage, whole code harmony canons
- Breyer dissent: Merger problem better addressed in other ways, eg require distinct crimes for separate punishment, construe "to promote" as > 1 underlying crime
- Alito dissent:
    - Primary dictionary def: "revenue"
    - Analogous laws: Model Act, 14 state statutes, treaty
    - Purposes of law: deter luxury, inhibit growth of criminal orgs
    - Perverse results of proceeds=profit: immunity when in red, diff proof
    - Merger problem unavoidable, but minor subset of cases
- 2009 amendments: proceeds = receipts

b) Avoidance: Almendarez-Torres v. US (1998)

- Law: crim penalties for re-entry of deported aliens
    - Ambiguity: (b) = separate offense or enhanced sentence?
- Breyer majority: enhanced sentence
    - Not ambiguous upon analysis
    - Even if ambiguous, no "grave" const'l doubt implied
- Scalia dissent: separate crime
    - Ambiguous interp
    - Suff'ly grave const'l doubt: 5th due process, 6th jury right
- Purposes of avoidance canon:
    - Honor Cong's good-faith efforts to legislate w/in Const'l limits
    - Protect SCOTUS legitimacy by discretion in overturning
        - Not a worry for exec interp b/c indep legitimacy via election
- Origins in Marbury v. Madison (1803)
- Threshold Q of ambiguity, secondary Q of unconstitutionality
    - Traditional (strong): is unconstitutional
        - Challenge: risk advisory opinion beyond Art III authority
    - Modern (weak): grave doubts re constitutionality
- Roberts ACA opinion (2012):
    - Adopted strong, classical version (misguided application? Here, issue ≠ ambiguous meaning of ACA itself, but which const'ly enumerated Cong'l power was the basis for ACA enaction: interstate commerce vs. taxation)
    - Holding or dictum that nec'y/proper clause unconst'l basis for ACA? Depends on whether weak or strong avoidance canon being applied

c) Retroactivity

- Intuitive reluctance to give retroactive effect to limitations on private rights
    - Unless clear intent by Cong
    - Fairness, stability peace of mind
- Tension: retroactivity inherent to common-law lawmaking

5. The Canons Considered

- Textualism's distinctions, internal consistencies:
  - Context: semantic > policy, to distinguish from purposivism
  - Admit some extrinsic tools: dictionary, custom
  - Allow some substantive canons, though conflict w/ theoretical foundation
- Llewellyn's criticisms of canons: every thrust = parry
  - 1920/30s legal realism school: undiscoverable intent
    - Mask judgment w/ legal-sounding analysis
- Scalia's retorts:
  - Llewellyn cited many "vapid statements" by "law-bending judges"
  - Merely showed that canons ≠ absolute
- Gluck & Bressman: 81% leg'v staffers said consistent interps would influence

D. Legislative Intent and Purpose

- Thumbnail history
  - 100+ years of "soft-core Intentionalism-light" (Holy Trinity, Riggs)
  - 1920s Legal Realist (Radin) critique: corporate intent undiscoverable
  - 1950s Hart & Sacks rehab Purposivism against Legal Realist critique
    - Assume Cong = "reas'l people, reas'l ends, reas'ly"
  - 1980s Critiques
    - Textualism (Scalia): reject any leg'v history
    - Imaginative Reconstruction (Posner): leg'v history in Public Choice context
- Intentionalism (Stevens): What did the enacting legislature mean to do/say?
  - Advance rep'v democracy as faithful agent of Cong
  - Questions: Specific or broad intent? Whose intent is relevant?
  - Coherence of collective intent:
    - Legal Realism (Radin): undiscoverable
    - Social Choice Theory: "vote cycling" to make deliberative groups work
    - BUT Marmer (2005): purposeful, normative intentions essential to legislating – intent often attributed to other groups: teams, political mvmts, businesses
  - Anything beyond legislative self-interest?
    - Public Choice Theory (Easterbrook): steak dinners, reelection
    - BUT Mikva (DC Cir, Cong, WH Counsel): honorable public officials
    - BUT Breyer (1992): legal fiction, judicial interpretive tool
  - Intent ≠ law: Art I power to pass statutes
  - Is Holy Trinity intent > plain meaning OK?
- Purposivism (Hart & Sacks): What lurking evil/social problem did they intend to fix?
  - Interpret word/phrase in line w/ provision/statute's general goal
  - Hart & Sacks (1950s)
    - 1) attribute purpose, 2) interpret words in line w/ purpose, 3) avoid contradicting meaning, 4) don't violate clear statement policy
    - Attributing purpose
      - Statutory statement of purpose – persuasive if designed as guide
      - Challenges: varying degrees of definiteness; multiple, hierarchical purposes; whole code/system harmony
      - Technique:
        - Put self in enacting legislature's place

        - Assume "reas'l people pursuing reas'l ends reas'ly"
        - What mischief adhered in law to be replaced?
        - Reference points: post-enactment applications
    - Contextual aids:
        - Prior state of the law
        - Public knowledge of evil/mischief
        - Leg'v history: to shed light on gen'l purpose
    - Post-enactment aids:
        - Judicial construction mandatory, unless contradictory
        - Admin, popular construction persuasive
- Imaginative Reconstruction (Posner)
    - What would a reas'l enacting Cong do/have done re foreseeable but unforeseen issue
        - E.g. pregnancy under anti-sex-discrimination statute
        - But not ???
    - Risk of error from expecting judge tos to make "numerous synthetic judgments from a variety of sources" to advance Purposivist inquiry
        - Hard to separate own policy views from legal analysis
    - Underlying assumption of good-faith, reas'l judge nec'y to any theory
    - Tools/sources:
        - Shared w/ Intent/Purposivism: lang, apparent purpose, bkgd, structure, leg'v history (cte rep., floor statements), statutory context
        - Unique: values/attitudes of the period, intended judicial construction
    - Technique: acknowledge Public Choice Theory compromises, deal-making
        - First seek compromise itself, its contours
        - If unclear, defer to judicial creativity (acknowl artificiality of intent)
    - Any canon of consistently strict, loose interp nec'ly political/activist

1. The Debate Surrounding Legislative History

- Drafting:
    - Leg'v history by staffers, accountable to legislators
    - Statute text by independent Cong lawyers, unaccountable
- Cong'l staffers' support for use as interp tool, differing weights on which pieces
- Leg'v history in SCOTUS workplace cases: 1970s: 50% → since 1985: 30%
- Scalia (1997)
    - Leg'v history (floor statements, cte reps/testimony) ≠ authoritative meaning
    - Textualism as traditional US/Eng practice
    - Leg'v history as 1920/30s reaction to Intentionalism
        - But intent nonexistent, so false/contrived "intent"
        - Even if intent, modern procedure unilluminating
        - Leg'v history exists b/c courts rely on it
    - Art I §7: only text = law
        - Cong'l knowl/understanding precondition for supposed authoritativeness of cte rep (? p425)
        - Legislative power non-delegable to select committee
    - Leg'v history → cte's policy prefs, but ≠ neutral legal princips
        - Augment manipulability of other canons
    - Goal: save judges, lawyers, clients wasted time analyzing

- Other arguments:
  - Easterbrook (1989): unconst'l to intent > text as force of law
  - Manning (1997): empowering subset of Cong: cte or mbr
- Defenses:
  - Breyer (1992):
    - Interpretive tool like dictionary, agency interp
    - No more a delegation than to dictionary authors
    - No Const'l prohibition on Cong using staff, supports
  - Katzmann (2012): reports as principle pre-vote briefing tools
    - Cong'l guidance when statute ambiguous

a) Blanchard v. Bergeron (1989)

- Civ Rights Atty Fee Award Act 1976: ct's discretion allow "reas'l" fee
- π atty contingent-fee contract: 40% of damages
- Procedure: trial award $10,000 damages, $7,500 atty fees
  - 5th Cir limited atty fees to K: $4,000
- SCOTUS (White) rev'd, reinstated $7,500 atty fee award
  - Johnson (5th Cir, pre-Act): 12 factors, but < K fees
  - 3 Dist Ct cases holding K as one factor ≠ dispositive
  - Leg'v history: S Rep: DC holdings "correct" distinction: 12 factors = holding; K cap = dictum
- Scalia concurrence: right analysis, wrong emphasis on S Rep
  - Use of DC to clarify CC inversion of trad'l judicial hierarchy

b) In re Sinclair (7th Cir 1989)

- Unambiguous contradiction:
  - Statute: no conversion pre-Act Ch 11 bkrpt to Ch 12
  - Leg'v history: judge's discretion to allow conversion
- Easterbrook aff'd denial of conversion – plain meaning > history
  - Analysis: 1) read text; 2) use history to illuminate but ≠ override
  - Judge Friendly quote: "look for what Cong meant by what it said, not what it meant simpliciter"
  - 180 difference suggests Cong oversight, so unhelpful re meaning

c) Alito, Presidential Signing Statements (1986)

- Trad'ly only const'l problems, but gradually disagreement
- Since const'l approval power, should have interp'v persuasion too
  - Goals: 1) Expand exec power; 2) Curb "prevalent abuses of leg'v history"
  - Challenges:
    - Leg'v drafting process vs. Pres'l binary approval power
    - Confirm Scalia Textualist worry: allow some history must allow all
- Obstacles:
  - Resources, staff – new office?
  - Timing – 10d to sign – sign pending statement?

- Official objections: Exec agencies, Cong

2. *Intent and Purpose-Based Tools*

- Forms of legislative history:
  - Committee Reports (≠ vote, ≠ amendments)
    - Each chamber's report (≠ disagreements)
    - Conference Committee Report (only disagreemenst)
  - Author/sponsor statements
  - Member statements (winners, but losers too?)
  - Hearing records
  - Other legislation (whole code canon, statutes = law)
  - Presidential, agency statements

a) Moore v. Harris (4th Cir 1980)

- Black Lung Benefits Act 1969 (Am 1972, 1979)
  - 1) miner, 2) totally disabled, 3) fr Black Lung, 4) as result of mining
  - Presumptions fr employment: 15yr satisfied 2-4; 10yr satisfied 4
- 1970 Secy HHS added "employee" to regulation
- π Moore >16yr as miner, but <10 as statutory employee of mine
- ALJ denied claim, sustained by Dist Ct.
- Issue: whether Agency auth to interp "employed" as "employee"
- Reversed for π, remanded to grant presumptions

E. Dynamic Interpretation and Changed Circumstances

1. *Aleinikoff (1988): "Nautical" Model*

- Archaeological: uncover, reconstruct static meaning
- Nautical: present-minded process of navigating orig structure through changing times
- E.g. exclusion of gay aliens under Immigration Act
  - 1952 Act exclusion grounds incl "mental defect"
  - 1967 Boutilier v. INS: leg'v history: mental defect incl homosexuality
  - 1979 Surg Gen discontinued referring gays to Pub Health Serv for psych testing: 1) no longer DSM disorder; 2) undiagnosable by test
  - Hypo: exclude gay immigrant today?
    - Originalist: exclude b/c clear Cong'l intent, SCOTUS interp
    - Dynamic: intended to limit to contemp recognized psych disorders? Value precedent, but informed by today's coherence
- Defenses of model:
  - Recognize Cong'l intent to leave flex future resolution issues
  - Interpreters (cts, agencies) ≠ historians, but = creators of meaning against bkgd values of legal sys, e.g. fairness, equality, notice (Hart & Sacks)
  - Law creates, and is part of, a normative universe
  - Faithful to text – most plausible meaning that "words will bear"
- Incomplete model: still req roles of reliance, leg'v acquiescence, stare Decisis, etc
- Critique (Scalia 1997): too much flex for judge's preferences
  - Response (Elhauge 2002): consider "enactable preferecnces" today

  - Paradoxical effect of < watershed legislation, if known reinterp?
- Not always progressive/social justice

2. Bob Jones v. U.S. (1983): tax exemption

- Issue: whether racist, nonprofit private schools = 501c3 tax exemption
- 1/1970 DDC prelim injunction of IRS 501c3 to racist schools
- 7/1970 IRS policy ≠ 501c3 exemption, 170 deduction to racist schools
- 6/1971 DDC perm injunction, IRS policy based on "nat'l policy", CL "charity"
- Burger: upheld IRS policy
  - CL "charity" = w/in statutory categories & nonviolative public policy
  - Underlying assumption: charity → public benefit
    - Compensate lost tax revenue w. services otherwise provided
  - 25yr public policy anti-discrimination by race in ed (cases, leg, orders)
  - IRS "broad authority" to interp IRC
  - Subseq cong'l acquiescence to IRS interp:
    - 13 failed repeal efforts; 501(i) social clubs req'mt, leg'v history
- Rehnquist Dissent:
  - Text: clear categories; no mention of public policy
  - Context: 170 tracks 501c3, so ≠ indep'ly useful
  - Leg'v history: 1894-present: few changes to exemptions
    - Alternative, bad interps of majority hoolding:
      - Cong wasted 50+ years legislating a CL term of art
      - Cong set some std but intended IRS to augment
  - Subseq history should "bear no weight"
    - 501(i) anti-discrim shows Cong ability to define, if it wanted to
- Statutory interpretation, or American Story/Justice?
  - Reagan DOJ initially supportive of IRS, but Ed Mees, AAG, pivoted
  - Rex Lee, SG, recused for conflict
  - Ass't SG incl fn in brief indicating personal disagreement
  - IRS hired private amicus lawyer
    - SCOTUS app't Bill Coleman, 1st black SCOTUS clerk (Frankfurter)

3. 2001 AUMF and Ali v. Obama (2013)

- Declaration (whereas clauses): 9/11 treacherous violence, nec'y & appropriate self-defense, nat'l secu & foreign policy, unusual & extraordinary threat, Pres'l auth terror
- Authorization:
  - All nec'y & appropriate force against "those nations, orgs, persons who planned, auth'd, comm'd, aided" 9/11
  - In order to prevent future attacks by "such" groups
- Hypo: 2010 AQAP born, seen as sig nat'l secu risk – target?
  - Archaeological: impossible b/c nonexistent at AUMF
  - Nautical: changed circs w/in basic structure of Act, envisioned future attacks
- Ali v. Obama (2013) Edwards concurrence:
  - 2012 NDAA reaff'd 2001 AUMF w/ added provision: "covered persons" = "part of or subst'lly supported…incl committed belligerent act."

- ∆ Ali captured in terrorist guesthouse where lived 18d w/ senior al Qaeda – no evid involvement 9/11 or harboring, or belligerent act
- Maj "personal ass'ns" test follows precedent, but precedent itself hamstrings/allows bizarre interp of statute to allow indef detention during endless war, rendering habeas proceedings useless

F. Stare Decisis and Statutory Precedents

1. *Flood v. Kuhn (Blackmun, 1972): MLB free agency*

- ∆ MLB comm'r refused π Flood's, all star, free agency request; traded STL-PHL
- MLB reserve clause: drafting team unilateral contract/ass'mt control entire career
- Blackmun: upheld 50yr stare decisis MLB antitrust exemption
  - 1922 Federal Baseball (Holmes): exhibitions predominantly intrastate
  - 1952 HR Rep: reserve cl essential
  - 1953 Toulson aff'd exemption b/c 1) Cong'l awareness, inaction; 2) MLB reliance; 3) worry retroactivity; 4) leg'v > jud'l authority
  - 1953-71: 50 failed bills, many of which would've > exemption
    - But denied exemption to theater, boxing, NFL, NBA
- Burger concurrence: grave doubts re Toulson, but leg'v solution
- Marshall dissent: reserve sys = servitude (Civ Rights overtones)
  - Cong'l inaction caused by Ct's ghettoizing < 600 players (Public Choice)
  - Antitrust most important safeguard to free enterprise
  - Retroactivity solution: prospective ruling

G. Statutory Interpretation in the Executive Branch

1. *2002 OLC Torture Memo*

- Theory: agency lawyer should be applying same norms/judgment as court would
- Reality: DOJ get-out-of-jail-free card for AUSAs
- Act: codification of treaty oblig under Convention Against Torture & Other Cruel, Inhuman, & Degrading Treatment
  - Penalty: fine and/or 20yr (if kill, then life/death)
  - Torture: 1) outside US; 2) under color of law; 3) victim under ∆'s control; 4) specific intent; 5) severe phys, mental pain, suffering
    - Memo only addressed 4, 5
- Specific intent
  - Theoretically, knowl insuff w/o precise aim inflicting injury
  - Reality: jury would convict on knowl unles reas'l belief actions ≠ result
- Severe pain or suffering: "severe" undefined
  - Ordinary meaning: difficult to endure
  - Other USC usage: health benefits determination re emergency med conditions
    - Pain = death, organ failure, serious impairment bodily functions
    - Integrity out the window

III. THE ROLE OF AGENCIES IN ADMINISTERING STATUTES

A. Agencies in the Constitutional Structure

- Ambiguous references in Constitution (Depts, Ministers, Officers)
  - Lurking anxiety: is admin state legitimate?
  - Legitimacy through process, cong'l mandate, exec oversight, jud'l review
- Articles vest, enumerate powers in each Branch:
  - I: leg'v to Cong: enact statutes w/in scope of powers
  - II: exec to Pres: sign, enforce laws
  - III: jud'l to SCOTUS & fed cts created by Cong
- Principles: federalism separation of powers, balancing
- Agencies/admin state gen'ly extra-constitutional (but ≠ unconst'l, as SCOTUS has long recognized Cong's auth to grant auth to exec officers)

B. The Relationship Between Congress and Agencies

1. *The Nondelegation Doctrine*

- Constitutionality: virtually limitless deleg power as long as "intelligible principle"
  - 1966: Motor Vehicle Safety Act
  - 1989: Fed Sentencing Comm'n
  - 1991: AG authority to add drugs to statute coverage
  - 1996: Pres auth to define aggravating factors in ct martial death penalty
- Only SCOTUS limit: 1935 Nat'l Industrial Recovery Act

a) Schechter Poultry v. US (1935): Delegation's Const'l limits

- 1930s NIRA (15 USC 701…)
  - Sec 1: declaration of policy: promote economy in Depression
  - Sec 3: Pres'l auth to approve industry-made codes
    - Result: more pages of law than entire prior code
- 4/1934: NYC Live Poultry Code (hours, wages, practices)
- Δ Brooklyn Jewish slaughterhouse challenged const'lity of delegation
- Rev'd Δ's conviction b/c unlawful delegation
  - Power: promote "fair" > auth than curb "unfair"
    - Power^2: agency to "run riot" x industry to self-regulate
      - Public Choice: agency capture
  - Discretion: insuff limits, intelligible/limiting principle
    - Guidance for execution, jud'l review
- Cardozo concur: delegated power "unconfined and vagrant", "uncanalized"

b) Assessing Risk

- Viscusi (1992):
  - Risk: precise probability of known outcomes
  - Uncertainty: interpretation of physical observations
  - Ignorance: undetected threats
- Campbell-Mohn & Applegate (1999):
  - Risk assessment: calc probability and magnitude of adverse effects

  - Risk management: subst'v policy decision to take agency (in)action
- Ropesk & Gray (2002) Risk!
  - Look to sciences to assess risk, but still imprecise
  - Toxicology: animal surrogates, max dosage tests, isolated variables
  - Epidemiology: confounding variables?
  - Statistics: underinclusive, human interp, imprecise groupings

c) <u>Benzene</u> case (Stevens, 1980): Nondelegation as avoidance

- 1970 Occupational Safety Health Act
  - Sec 3(8) defined "occup'l safety and health std"
  - Sec 6(b)(5) auth'd Sec'y Labor to set toxicity stds to assure "to extent feasible" that "no employee suffer material impairment"
- 1977 OSHA emerg std re benzene exp: 10ppm → 1ppm b/c carcinogen unsafe at any level (max dose toxicology), but 0ppm ≠ feasible
  - Exemption for gas stations, largest employer w/ benzene – political
  - Expertise justification of agencies → higher std of review of decisions
  - 5th Cir restraining order → OSHA made std perm → 5th Cir: invalid
- Stevens aff'd invalidation of benzene std
  - "An expensive way of providing some add'l protection for a relatively small no of employees"
  - Resurrected nondelegation doctrine w/in const'l avoidance
    - Sec 6(b)(5) alone would be unconst'l delegation
    - Lting principle = sec 3(8) threshold Q of materiality of risk
      - Leg'v history: incorp opp amendment
  - Too much power to DOL
- Powell concur: Agency should've show cost-benefit calculation
- Rehnquist concur: don't save the section
  - Nondelegation doctrine à la 1935
  - Leg'v history: feasibility req'mt was mirage (all things all ppl)
- Marshall dissent: plurality invented threshold test to impose own cost-ben analysis even though Act suff'ly clear

d) <u>Whitman v. Am. Trucking</u> (Scalia, 2001): Death of trad'l nondelegation

- Clean Air Act sec 109a → EPA Admin'r to set air qual stds (NAAQS)
- DC Cir for π truckers, remanded to EPA to reinterpret
- Scalia rev'd for Δ EPA b/c suff intell principle
  - Delegation "almost never" held unconst'l, "even in sweeping reg'y schemes we have never demanded, as DC Cir did here, that statutes provide a 'determinate criterion' for saying how much too much"
  - Statute ≠ reference to cost calculation
  - "Public health" = biological ≠ community econ
  - Unconst'l deleg incurable by agency reinterp (jud'l function)
  - Intelligible principle > magnitude of delegated power
  - Even Rehnquist in "Benzene" would uphold > power if > ltg principle
- Thomas concur:

        - Holding fits intelligible principle doctrine, but open to reviewing propriety of doctrine, given extra-constitutionality
    - Stevens concur:
        - Better to acknowledge const'ly ltd Agency auth as still "leg'v power"
    - Legacy: death knell of trad'l nondelegation doctrine, w/ caveats:
        - Still avoidance canon; relevance in many state courts; relevance/influence of Thomas's strict originalism

e) Political Reasons for Delegation

- "Organic statute" – law through which Agency created, empowered
- Public interest: expertise, internalize externalities, info gathering
- Public Choice: take credit, shift blame
- Problems:
    - Political accountability
    - Separation of powers, federalism
    - Agency power (& limits), discretion
- Background principles at work?
    - Geopolitical positioning (anti-state corporatism, minority rights)
    - Regulatory hostility (Lochner, Reagan)
- Epstein & O'Halloran (1999)
    - Inverse correlation: trad'l legislating vs. agency delegation
    - Costs:
        - Legislation: internal time, energy
        - Delegation external principal-agent control problems; federalism Q (sep pwrs), locational Q (whom to empower)
    - Empirical predictions: greater delegation when
        - Same-party President
        - Com mbrshp = floor mbrshp
        - Complex policy (exec #s, expertise, unfiltered through votes)
    - Implications
        - Delegation dynamic over time, depending on circumstances
        - Strengthening nondelegation would decrease efficiency
- Normative implications of delegation:
    - Schoenbrod (1993): antidemocratic blame-shifting, indirect costs of prolonging process/disputes – Cong will always punt hard issues
    - Mashaw (1997): Public Choice ackn'mt of obfuscation via trad'l leg
    - Rubin (1984): Agency directives ≠ "delegation" at all, but faithful exercise of leg'v power to allocate resources
        - Rulemaking unavoidable function of agencies applying statutes
    - Bressman (2000): new delegation doctrine proposal:
        - Broad statutory grant w/ expectation of limits w/in rules
        - Burden of limiting principle on Agency, not Cong
        - Would encourage Cong'l oversight, hearings

2. Legislative Control over Agencies

- Reporting requirements in organic statutes: gen'ly retrospective
    - 1996 Cong'l Review Act: major rules prospective review (60 days)

- Congress can pass/threten new legislation abolishing, restricting, precluding, or compelling agency
- Appropriations under Cong's Const'l power (ea chamber's Cte → 12 sub-ctes)
  - Basic unit = account: 1) transfer authority (btwn), or reprogramming (w/in)
  - Omnibus measures
  - Continuing resolutions: temp extensions beyond FY (every FY since 78 except 89, 95, 97)
  - Supplementals: war, disaster, unforeseen needs
    - Coordination problem btwn subst'v & appropriations ctes
- "Fire alarms"
  - Admin procedures, eg notice-comment rulemaking → distrib oversight public
  - Citizen-suit provisions → shift monitoring costs to public, cts
  - Public info gathering via eg FOIA, Sunshine Act

a) Oversight hearings as "police patrols"

- More frequent when divided gvt, high-profile issues (costly)
- Functions: uncover facts, pressure agency conformity, hold offs to pub actt
- Process: request → compromise? → subpoena → contempt of Cong
  - Executive privilege? SCOTUS: inherent in sep of powers
- CASE STUDY: Anne Gorsuch, EPA (Reagan)
  - Lawyer, st legislator (states' rights, strict constructionist)
  - Made office in Dept Interior, ≠ EPA; industry ties; pol hit list
  - 2/82 suspended hazmat dumping ban
  - 6/82 Rep Dingell (D-MI) Energy Cte inquiry → subpoena
  - 11/82 OLC/Pres: Exec privilege → 12/82 Gorsuch contempt
  - DOJ suit v contempt charge, dismissed after more waste spills
  - 3/83 Gorsuch resigned
  - 1984-87 Cong most proscriptive (content + timeframe) env'l leg
- CASE STUDY: GWB 2008 Exec privilege of WH aids
  - HR investigation mass firings US Attys, politicization DOJ
  - 223-32 contempt Josh Bolten (Chief Staff), Harriet Myers (Counsel)
    - Most Rs abstained, but some (Ron Paul) supported
  - GWB had agreed to allow only testimony, ≠oath, ≠ transcripts
  - 1st contempt cabinet-level staff since Gorsuch EPA 1982/3
    - Prob ≠ crim chg b/c DOJ pros, staffers under DOJ legal advice
    - 10/08 civil suit dismissed DC Cir: serious inter-branch dispute ≠ resolvable before 1/09 expiration subpoena
- CASE STUDY: 1/25/2008 EPA hearings
  - SF Chronicle: "EPA Chief Sits and Takes His Punishment"
  - EPA had rejected CA attempt stricter emissions stds
  - Ds: environmentalism; Rs: states' rights
  - Sen Inhofe (R-OK, climate-chg denier): "political theater"
  - Sen Boxer (D-CA) + 14 introduced bill to override EPA

b) Legislative Veto: <u>INS v. Chadha</u> (1983)

- Statutory provisions allowing Cong to reverse/req prior approval for agency action w/o enacting new statute (forms: 1-house, 2-house, cte)

- Immig & Nat'l'y Act: 1-house veto of AG's delegated decision allow deportable alien to remain after INS deportation hearing
- Facts:
  - 1/74 Chadha INS hearing on visa overstay: deportable
  - 6/74 INS judge suspended deportation b/c resid'y, moral, hardship
  - 12/75 House veto 6 aliens w/o debate, recorded vote
- SCOTUS (Burger) aff'd unconst'l'y leg'v veto under formalist reading
  - Presentment cl Art I § 7
  - Bicameralism Art I §§1, 7
  - If delegate by legislation, must revoke by legislation
  - Expressio/exclusio 1-house Const'l provisions
  - Framers: procedural deliberation > efficiency
- Concur (Powell): narrower grd: Cong'l overreach into jud'l function
  - Wrong vehicle to test Const'l limits of doctrine
- Dissent (White): realist/functionalist view of Art I §7 convergence
  - Veto indispensible to restrain growth admin state
  - = shield to protect leg'v power, ≠ sword to grab exec, jud'l power
  - INS statute atypical (indiv rights) of leg'v veto cases (pub rights)
  - Leg'v veto ~ Pres'l veto, ≠ law-making
  - Reality: legal status quo = deport
    - Departure fr status quo (allow remain) requires assent all 3 leg'v parties (HR, Sen, Pres)
    - Each party can veto to keep status quo (Pres/AG, HR, Sen)
  - Immigration = leg'v power, so INS statute only partial delegation
- HYPO: Rand Paul's proposed REINS Act: req Cong'l approval (Art I §7 procedures) of any big-ticket agency regs – formalistically OK
  - Transgress Exec power/function?
  - Self-delegation problem: partial delegation
  - Public Choice critique: special interests' 2d/3d bites @ apple

C. The Relationship Between the President and Agencies

1. Executive vs. Independent Agencies

- Prevailing view:
  - Exec = acct'l to Pres (@ will)
    - Ea Dept headed by Secy (+ AG of DOJ)
    - Dept subdivisions eg DOT → NHTSA; HHS → FDA
    - EPA
  - Indep: term appts (for-cause termination)
    - FCC, Fed, SEC, FDIC, etc.
    - Diff structures among indep agencies: # mbrshp, bipartisanship, removal procedures
    - Common Const'l challenge: for-cause removal
- Datla and Revesz (2013)
  - Goals of indep agency structure:
    - Expert, impartial decision-making
    - Insulation fr political control
    - Adjudicative power to appease judiciary (due process)

- Humphrey's Ex'r legacy: Const'l status → 4th branch
  - If ≠ Pres'l removal power, then outside Exec (except appts)
  - Conseqs of binary exec vs. indep view:
    - Expansion indep protection to agencies, eg FTC
    - Expansion protections beyond statutes, eg WCC
    - Const'l doubt any Pres'l control, influence
- Scholarship
  - Trad'l acceptance centrality for-cause removal as lynchpin
  - Recent, comprehensive analysis factors beyond for-cause
  - 2014 still unclear what distinguishes indep agencies
  - Implication: Weiner wrong to read "for-cause" into silent statute after determining independence based on quasi adjud
    - Unlike Humphrey's explicit "for-cause" language
    - But Blackletter still recognizes for-cause as defining factor

2. Appointment and Removal

- Questions:
  - Subtraction of Pres'l power?
  - Addition of Cong'l power?
  - Exercise of wrong sort/branch of power?
- Tension: admin/exec efficiency vs. political accountability

a) Myers v. US (1926): Unitary Exec removal

- 1876 Tenure in Office Act – civil service approach to agencies
- OR Postmaster 4yr term, removable by & w/ advice & consent of Sen
  - Addition problem: Sen role in firing
  - Subtraction problem: < Pres'l discretion
- SCOTUS (Taft): Pres inherent removal power b/c removal incident to apt
  - But removal ≠ incident to leg'v advice/consent power
  - Essential to effectiveness/efficiency of Pres execution of laws
  - Pres > knowl of work performance (tautology? Cong also informed)
- Dissent (Holmes): Cong created, funded, may abolish agency
  - Cong conferred apt pwr to Pres, so Cong may remove
  - Art II §2 cl 2 power to transfer apt auth
  - Leg'v supremacy: Pres'l auth to exec laws ltd by Cong'l legislation
- Dissent (Brandeis): Pres'l power derived from Cong'l grant
  - Sep of powers forces interdependence > efficiency
- Background: 6-3 opinion, 3yr delib, 100s pp opinion
  - Brandeis so many fns that offered to pay for printing himself

b) Humphrey's Executor v. U.S. (1935): Limited Exec removal

- FTC organic statute: Pres'l removal for cause
  - 1931 Hoover appt FTC Chair, 1933 Roosevelt fired
  - Subtraction problem: < Pres'l discretion (≠ addition problem)
- SCOTUS (same day as Schecter Poultry) rev'd firing
  - Plain meaning "for cause"

    - Nonpartisan character, leg'v history: fixed term avoid unfair admin
    - Nature of power:
      - Myers Postmaster purely exec, inferior officer
      - FTC quasi-jud'l, quasi-leg'v agency
  - Effects: Pres ltd by Cong'l power, agency-type distinctions, jud'l function

c) Weiner v. U.S. (Frankfurter, 1958): Limited Exec removal

  - War Claims Comm'n (silent on removal)
    - 1950 Truman appt Chair, 1953 Eisenhower removed
    - Subtraction problem: < Pres'l discretion (≠ addition problem)
  - SCOTUS rev'd firing
    - WCC indep, quasi-jud'l function
    - Pres ≠ auth fire indep agency head @will unless delegated org statute
    - "Cong did not wish to hang over the Comm'n the Damocles' sword of removal by a Pres for no reason other than that he preferred to have on that Comm'n men of his own choosing."

d) Buckley v. Valeo (1976): No Cong'l apt to FEC

- Fed Election Comm'n: 6 voting mbrs: 2 Sen, 2 HR, 2 Pres appt
  - Functions: admin investigation, adjudication, rulemaking
- SCOTUS invalidated Cong'l appts as ≠ Art II appts cl
  - Sep of Pwrs = check agst tyranny; interdependence → governance
  - Art II §2 appts:
    - "Officer of the US" = "significant auth" → Pres'l appt
    - "Inferior Officer" → Cong may delegate appt to "Courts of Law" (eg Morrisson), "Heads of Depts" (eg PCOAB)
    - Cong ≠ unilateral appt to jud'l/leg'v agency
      - If pure exec functions, OK
      - Addition problem: Cong ≠ enact own leg (exec fct)
- Dissent (White): ~Chadha, ~Holmes in Myers: OK for Cong to experiment w/ new leg'v technologies in changing times
  - Leg'v supremacy, duly enacted laws, oppy challenge Pres'l cronyism

e) Morrison v. Olson (1988): ltd Indep Counsel removal

- Ethics in Govt Act 1978: Indep Counsel appt'd by Sp Div Ct, AG
  - "Inferior Officer" b/c ≠ Sen confirmation
  - For-cause removal, tenure ltd only by finishing investigation/pros
  - Post-Watergate, -Saturday-Night Massacre legislation
- SCOTUS (Rehnquist) upheld appt/removal limitations
  - Blur distinction of "Inferior Officer" appt by Heads of Depts, Cts
    - Removal → inferiority, despite independence
    - Proscribed duties, ltd jx/tenure
  - No interference w/ Pres's execution of laws
    - No Cong'l addition problem as in Myers
    - Quantity of power: not "core executive function"

            - Partial overturn Humphrey's/Weiner "quasi" nature of power test
            - Q: whether "so essential" to Pres's Const'l duty
        - No supervisory burden b/c good-cause strong enough
- Dissent (Scalia):
    - Art II violation: IC exercise exec power, but beyond Pres control
    - Humphrey's Ex'r: for cause as Pres'l limitation
        - Any limit on control exec fct unconst'l
    - Maintain distinction Inferior Officers vs. Officers
    - Most clearly foresaw risk Ken Starr-type roving mandate, limitless resources vs indiv target

f) Free Enterprise Fund v. PCAOB (2010): No 2-layer for-cause

- Sarbanes-Oxley Act 2002: SEC indep (stipulated): jud'l, monetary
    - Under SEC: PCAOB w/ for-cause bd members
- SCOTUS (Roberts): invalidated 2d layer for-cause protection
    - Limitation on Pres's even-indirect control of PCAOB
    - Rehab Myers view of world: unitary exec
        - Too much agency indep/insulation
    - Charitable reading of Rehnquist's Morrison view of for-cause as some Pres'l control (vs. Humphrey's/Weiner absolute limitation)
- Dissent (Breyer): No Cong'l addition problem
    - Important policy reasons for indep of PCAOB: tech expertise, adjud
    - Removing 2d layer does nothing to solve Pres's < control re SEC
    - Wrong to seek Const'l issue by stipulation (avoidance)

g) Noel Canning v. NLRB (DC Cir 2013)

- Facts: NLRB (adjud) 5mbrs: "Officers of US"
    - 12/20/11 – 1/22/12 Cong pro forma sessions (≠ Recess)
        - 1/3/12 112th Cong reconvened for 2d Session
        - 1/4/12 Obama appt'd 3 to fill vacancies which occurred on 8/27/11, 8/27/11, 1/3/12
- Rev'd for Canning b/c unconst'l appts, so ≠ quorum
    - Avoidance? N/A b/c Bd's decision ≠ "patently unsupportable"
    - Const'l issues:
        - "The Recess" (Art II §2 cl 3) – inter-session (≠ intra)
            - Text, intent, established practice: plain meaning "the", dichotomy recess/session, Const'l history, Historical practice, Sep Pwrs, absurd alts (20d? weekend?)
                - ~Chadha/Myers historical practice near passage
                - Moral ballast for textualism/formalism
            - Reject 11th Cir Evans
        - "Happen" – must arise during Recess
- Concur: "Recess" sufficient to dispose, so "happen" should await case for which it is necessary – also stronger historical case in support of alt view

3. *Other Means of Presidential Control over Agencies*

a) Reasons and Implications

- Why Pres'l control?
    - Ensure ~ admin prefs (> reelection, > legacy)
    - Const'l duty to exec laws → supervise agency execution of laws
        - Unitary Exec theory (<u>Humphrey's Ex'r</u>)
- Normative Implications:
    - Accountability for agency action
    - Efficacy via coordination
    - But may contravene science (eg Plan B), statute
        - Expertise: Pres < agency
- Means:
    - Control agency personnel through apt, removal/threat
    - Control appropriations:
        - Budget cuts
        - Impoundment: request Cong'l delay, rescission
        - But line-item veto unconst'l (<u>Clinton v. NYC</u> (1998))
    - OIRA regulatory planning and review
        - 1970s: central planning to control inflation
        - Reagan: downsize gov via OIRA review
        - Bush I: agency oversight VP's Council Competitiveness
        - Clinton: abolished VP Council
            - Purpose: streamline, reinvent government
        - Bush II: extend review to even guidance docs
            - Installed Compliance Officer in each agency
        - Obama: revert to Clinton Order
            - + retrospective ("look-back") analysis existing regs

b) Cost-Benefit Analysis

- Executive Orders since Reagan have req'd cost-ben analysis "sig" regs
    - Clinton Exec Order No. 12,866 (1993) governs under Obama
        - Objectives:
            - > planning, coordination
            - Reaffirm primacy of federal agencies
            - > legitimacy of regulatory review
            - Public accountability
        - §1 Principles
            - Cost-ben analysis:
                - ID prob, existing regs,
                - Alt solutions, risks, sci/tech/econ data,
                - Consult w/ local politicians,
                - Consistency/harmony
        - §§2-3 Organization, Definitions
            - "Agency" ≠ indep
            - "Significant Reg'y Action" > $100M, etc.
        - §4 Planning Mechanism

- INCLUDE indep agencies
- Regulatory Plan: obj, plan, legal basis, need, sched
- Regulatory Working Group
- §5 Existing Regulations
- §6 Centralized Review (≠ indep agencies)
- Valuing statistical lives: $50k – $8M variance among 50+ agencies
  - Viscusi (1992): economic basis sensitive to social decisions
    - Social willingness to pay for risk reduction (≠ certainty)
    - ≠ tort dmg measures (lost earnings)
  - Other issues
    - Heterogeneity of life
    - Stated vs. revealed preferences
    - Variations among agencies, issues
    - Updating valuations over time
      - Eg EPA 2005 $8M → 2008 $7M, reversal once publicized
    - Cognitive biases
      - Mistakes in estimation
      - Distortions in valuation: status quo bias, elimination of risk bias, co/omission
- Other econ assumptions: eg low gas prices in future
- Discount Rate – Cass Sunstein (2001):
  - OMB suggests 7% → controversy
  - Legal constraints on discount rate?
  - Statutory silence, so legal claim is that rates arbitrary
  - Agency variability (w/in, among)
  - Time value of $ rationales:
    - Investment value, opp'y cost = 5-7%
    - Indiv preference = 1-3%
  - Challenge: time-value of risk/life?
    - Clearly no investment value of life
    - But latent harms are discountable
      - Harms to future generations ≠ discountable
        - How much should we suffer for future gens?
- Process
  - Agency regulatory impact analysis → OIRA (office in WH OMB)
  - OMB Circular A-4 guidelines
    - Distinguish costs, bens: monetized, quantified, unquantifiable
      - Cross-ref w/ studies, data
    - Outcomes estimates, w/ probability distributions
      - Alt plausible scientific explanations, scenarios
    - Mkt simulations
- Controversy – Cass Sunstein (2001)
  - 1970s environmentalism: immediate responses to long-neglected problems – moral indignation (eg cost-blind Clean Air Act)
  - 1980s: CBA seek to econ incentives > command-control regs
    - Address 3 problems:
      - Poor priority-setting

        - Excessively costly rules
        - Side effects of regulation
    - But "willingness to pay" metric disadvantages poor
      - Solution: consider who bears burden, even when cost > ben, if bearers could more easily pay
      - Combine econ, psych, political, historical analyses
        - Cognition: correct biases, weaknesses
        - Democracy: public dialogue re conseqs

c) Boris Bershteyn on OIRA

- Bio: 09 Yale Law; J. Cabranes; J. Souter…WH Counsel…OIRA…Skadden
- Is OIRA legal?
  - Shaky foundation of OIRA/exec review agency action
    - Fuzzy boundaries: exec vs. indep; unitary vs. ltd exec
    - Exec vs. Leg'v tug of war
      - Eg can Cong compel Exec Const'l interp?
- Is OIRA good?
  - Return letters rare (1 under Obama: 2011 EPA)
    - Public airing of breakdown in decision-making
  - Disagreements more often resolved at lower levels
  - Transparency: §6(b) OIRA Responsibilities
  - Obvious & Necessary function in modern admin state
    - Agency action always puts President on hook
      - OIRA to keep tabs, oversee, avoid surprises
    - OMB/OIRA position: inherent exec power
    - Counterargs: delay, behind-the-scenes control
- Litigation-focused
  - Decisions in shadow of imminent lawsuits
  - Conformity w/ court orders requiring agency rulemaking
  - Regulations as strategy in ongoing litigation
    - Codify agency interp for deference
    - Change fact pattern to deter SCOTUS cert
- Regulatory look-back
  - Review efficacy of prior rules
  - Gen'ly applied to noncontroversial rules b/c controversial rules overturned before review
  - Synchronization w/ foreign partners' regs
- Takeaways
  - Which rules are reviewable by OIRA?
    - Include nonbinding guidance docs, often followed by industry?
  - Logic to unreviewability of indep agency action?
  - "Significant Reg'y Action" threshold:
    - > $100M
    - Serious inconsistency other reg
    - Materially alter entitlements
    - "novel legal or policy issues" (catchall?)
  - Roles of OIRA

        - Process cop
        - Analytical
        - WH coordinating (Pres'l accountability)
    - Possible reforms
        - More resources
        - Explanations of gen'l bases for changes

D. The Relationship Between the Judiciary and Agencies

1. Agency Exercise of Judicial Authority

a) CFTC v. Schor (1986)

- 1974 overhaul Commodity Exch Act → Commodity Futures Trad'g Comm'n
    - Alt forum for customer reparations from brokers
    - 1976 CFTC reg allowed permissive state-law counterclaims
    - 1980 Schor negative balance at Conti (brokerage)
        - Schor sued at CFTC for reparations under CEA
        - Conti counterclaim recover balance under state law, dropped fed diversity action to consolidate at CFTC
- SCOTUS (O'Connor) aff'd order for Conti
    - CFTC insufficient encroachment fed courts' Art III authority
    - Litigants may waive right to indep Art III adjudication
    - Separation of Powers jx (unwaivable)
        - Flexible std to allow for innovation
        - No Cong'l addition problem, only subtraction fr Courts
        - CFTC limitations: narrow area law, de novo review, ltd jud'l procedures
        - Private-rights (state-law) adjudication ≠ dispositive Art III encroachment
            - Public rights: Cong'l Art I auth (undisputed) empower agency to adjudicate CoAs defined by public law/statute
            - Some private rights incident to public-rights adjud
        - Cong primary intent CEA: regulation, ≠ allocate jud'l power
- Dissent (Brennan): only narrow exceptions to exclusive Art III power
    - Exceptions: Territorial courts, courts-martial, public rights
    - Litigants' rights & Sep Pwrs inseparable
    - Incremental erosion of jud'l independence (~Scalia Morrison dissent)
        - ~Chadha: Illusion of balancing efficiency vs. independence, but efficiency always wins short-term calculus

2. Due Process and Admin Agencies: Public Benefits

- 1215 Magna Carta: most basic Anglo-Am idea of rule of law
    - Protection vs. Exec overreach, of indiv liberty

a) Background: Londoner (1908) & Bi-Metallic (1915)

- Londoner (1908): no due process right to legislature's tax law (public), but due process obligation when agency apportions $$ case-by-case (private)
- Bi-Metallic (1915): no due process right re across-the-bd tax hike
    - Political solution: elect new reps
- Due Process concerns:
    - Holmes:
        - Individual/ltd application
        - Non-political agency action
    - Kenneth Culp-Davis:
        - Legislative policy ≠ due process
        - Adjudicative = due process (info/knowledge advantage)

b) Goldberg v. Kelly (Brennan, 1970): dignity revolution

- 1960/70s view of social science as important to Const'l interp (≠ blame poor)
    - Due process as preserving human dignity re cold admin bureacracy
- Public assistance/welfare termination
    - 7d notice ≠ per se unconstitutional
    - Opp'y to be heard only post-term written petition = unconst'l
        - Must be in person, oral, pre-termination
        - Rationale
            - Welfare entitlements ~ (New) property ≠ privilege
            - < educational attainment/literacy
            - Fact-, credibility-based analyses
            - > magnitude risk if error ("brutal need")
- Dissent (Hugo Black): anticipated Mathews logic
    - Q whether to Constitutionalize public policy, vs. leg'v flex
        - Constitutionalizing risks later Const'l erasure
    - Logical extension: right to counsel? Full jud'l review pre-term?
        - Untenable middle ground
        - If > admin costs, < benefits in first place
        - (Brennan tried to allow for rudim'y procedure, min safegds)

c) Mathews v. Eldridge (Powell, 1976): efficiency counterrevolution

- Retreat from dignity as bedrock of due process
- Upheld process SSA termination of disability
    - Notice: tentative termination, final w/ reasoning
    - Opp'y heard: questionnaire; challenge/new evid; access evid
        - But ≠ pre-term hearing
        - Rationale: justify backlash agst Goldberg
            - Information = hard science, medical facts
            - Class cross-section: "brutal need" < welfare recipients
            - Education < issue b/c specific Qs, med evidence
    - New due process rule (goal: prevent erroneous deprivation)
        - Algorithm to > effectiveness, accuracy

            - Private interest
            - Risk erroneous deprivation & value add'l safegds
            - Gov/public interest
          - Sufficient process to ensure gov didn't botch it (cost-ben)
    - Drone strikes in Yemen:
      - Hamdi v. Rumsfeld (2004) used Mathews test re detention enemy combatants
      - Analogy to drone strikes: due process to avoid killing wrong guy
        - High-level determination (irony: unilateral Pres'l decision ≠ due process
        - Infeasible capture
        - Consistent w/ laws of war
      - Alt: why not acknowledge ≠ due process toward enemies in war?

3. *Due Process and Admin Agencies: Public Employment*

- Same-day decisions in 1972: what is property?
  - Whether these employment guarantees suff'ly well-founded to give rise to prop interests

a) Bd. of Regents v. Roth (1972)

- 1yr non-tenure K; WSU-Oshkosh denied renewal w/o reason
  - Upheld non-renewal: no right to explanation, process unless deprivation of liberty
- Dissent (Marshall): public employment core right of welfare state
  - Every citizen presumptive right to public job
  - Right to (even cursory) explanation for non-hire

b) Perry v. Sindermann (1972)

- Recognized property right in professor's K b/c de facto tenure
  - Customs, expectations, contract
  - Objective test of reliance interest
  - Ct also alluded to 1st Am violations re misconduct allegations
- Blackletter: property interest, for Const'l due process protection, is function of circumstances of the case

E. The Administrative Procedure Act: an Introduction to Rulemaking and Adjudication

1. *APA §§ 551, 553, 554, 556, 557*

- §551 Definitions: "agency" incl all indep & exec
- §553 (Informal) Rulemaking ("rule")
  - n/a US military, foreign affairs, agency mgmt./ops
  - Notice-and-comment process
  - General effect: "leg'v facts"
    - Tendency toward flexibility

    - Formal RM magic words: “on the record after opp’y for agency hearing”
- §554 (Formal) Adjudication (“order”)
    - Notice, opp’y to be heard
    - Individual effect: “narrow facts of controversy”
        - Tendency toward process
    - Agency custom whether rulemaking or adjudicative process
        - Unless statutory requirement
        - Eg, NLRB adjudication (political cover)
- §556 Hearings
    - Presiding employees: agency, agency mbr, ALJ
    - Quasi-jud’l powers
    - Burden of proof on proponent of rule
    - Transcript = exclusive record
- §557 Decisions, Agency Review

2. *Informal Rulemaking §553*

- Initiation
    - By agency initiative, OIRA prompt letter (rare), other agency recommendation, private Petition for RM
    - NPRM → Fed Reg (if > $100M or otherwise subst’l, → OIRA)
- Process
    - Written comment period – hearings optional
    - Publication to regs.gov
    - If new proposals ≠ logical outgrowth, then Supp NPRM
- Completion
    - Publish final rule (or absence) & basis (rationale, legal auth)
    - Often sup w/ impact analysis re pub/priv interests
    - Change/repeal only by new rule

3. *Formal Adjudication §554*

- Analogous to jud’l bench trial (except ALJ good-cause removal)
    - Neutral arbiter; limits ex parte communication
    - Notice, opp’y to be heard
    - Right to counsel (but not provided)
    - Oral or doc evidence, cross-exam
    - But ≠ Fed R Evid, so some hearsay admissible
    - Parties’ pre-decision proposed findings, conclusions, objections
- ALJs must justify decisions w/ statements (Record for review)
    - Agency internal review: 1-2 levels
        - Precedential effect w/in agency
- Criticisms: adjudication < notice-comment
    - Retroactive to parties (all adjudication)
    - < public participation, > idiosyncratic parties, < efficiency, < public acct’y

4. *<u>Vermont Yankee v. NRDC</u> (US 1978): Agency discretion RM*

- Facts/Timeline:

- 12/67 Atomic Energy Comm'n permit VY; VY app for op license
  - NRDC objected to VY's op license
- 8/71 AEC hearing excluded environmental effects
- 6/72 AEC App Bd aff'd VY ob license app
- 11/72 AEC rulemaking re environmental effects
  - = notice, opp'y heard (maybe oral), transcript
  - ≠ discovery, cross-exam
- 1/73 Rule: hearings → License Bd → AEC
- 4/74 AEC approved hearing procedure, adopted env'l rule

- DC Cir overturned AEC rule b/c inadeq process
  - Internal DC Cir debate:
    - Bazelon: jud'l expertise impossible, so process oversight above/beyond APA, org statutes
    - Leventhal: active judges should do the math
- SCOTUS (Rehnquist) "emphatic end to 1970s DC Cir efforts re admin state"
  - Rev'd for VY (remand to analyze substance of rule)
    - Agencies free to fashion own rules of procedure unless Const'l constraints or extremely compelling circs
      - Efficiency of informal rulemaking
      - Expertise: avoid Mon-morning QBing
      - Sep pwrs

5. <u>US v. Fla. E. Coast Ry.</u> *(US 1973): Informal rulemaking*

- Context: chronic freight car shortages, inefficient distribution
  - 1966 expansion Interstate Commerce Act: > auth per diem rates
    - Senate intervention, angry at slow pace
      - <u>Chadha</u>-style circus: change Agency head's mind
  - 1969 ICC tentative rule per diem rates (not only ROI but also incentive)
    - ICC suppl report after written comments (≠ oral)
    - Ry's arg: inadeq process under APA b/c unfair shift in medias res from Formal to Informal RM
- Dist Ct struck down as ≠ APA b/c ≠ trial-type hearing
  - Rehnquist rev'd for ICC: notice-comment suff "hearing"
    - Statute ≠ MAGIC WORDS: "oral hearing"
      - Blackletter boundary formal/informal rulemaking
- Dissent (Douglas):
  - ICA, not APA, governs initial analysis
    - ICA "after hearing" → APA §553 "hearing" → §§556/7
  - Significant fees require significant process

IV. <u>THE ROLE OF REVIEWING COURTS</u>

A. Judicial Review of Agency Policy

1. *APA § 706 "Arbitrary and Capricious" Standard*

- Informal Rulemaking std: "arbitrary & capricious" (read: is it insane?)
  - No similar std for legislation b/c direct elections, throw the bums out

- Formal Rulemaking std: “supported by subst’l evidence”
  - Same result?

2. *<u>Overton Park v. Volpe</u> (1971): informal adjudication*

- Begins process of moving §706 goalposts, allowing > micro scrutiny agency rules
  - Arbitrary & capricious std as way into mgmt of agency policy
- Facts:
  - 1966 DOT Act: ≠ hwys through public parks if “feasible & prudent” alt
  - 1968 Fed-Aid Hwy Act: hwy only if “all possible planning” < harm
  - 4/1968 Memphis City Council I-40 through part Overton Park (+ sever zoo)
    - Same day as Memphis garbagemen’s strike, MLK assassination
  - 1969 Sec’y Trans final approval w/o statement rationale
- J. Marshall rev’d 6th Cir’s SJ for Δ, remand to consider full agency record
  - Test: whether decision based on consideration of relevant factors & whether clear error of judgment
    - Holding: agency must produce record of informal adjudication, which is reviewable under §706
    - Tension: narrow inquiry, ≠ substitute Ct’s judgment for agency’s
    - Blackletter: strong presumption of reviewability of agency action
  - Despite Sec’y’s likely calculation that Memphis City Council already did important cost-ben analysis before submitting plan
    - Subseq: I-40 never rerouted, ends before Memphis
    - Criticism: Strauss (1992): even assuming Cong’l intent clear:
      - Minimized Sec’y’s political reality, feasible alts
      - Prefer jud’l restraint in face of political control of agency
      - Should’ve accepted Secy’s statutory framework

3. *<u>U.S. v. Nova Scotia Food Prods.</u> (2d 1977): informal rulemaking*

- Facts: FDA notice-comment rulemaking re botulism smoked whitefish
  - Industry, DOI requested species-specific stds
  - Industry complaint: high temp ≠ mktbl product
  - FDA Comm’t ≠ specific response, ≠ sci data
- 2d Cir rev’d injunction b/c FDA rule arbitrary/capricious
  - Miniscule rate botulism in smoked whitefish (0 by Δ)
  - Non-disclosure sci data made meaningful comment impossible
  - FDA burden on why such expansive rule
- Notes
  - Danger infinite loop notice–comment
  - Especially critical ≠ scientific data
  - DOI’s (Fisheries) expert recommendation > impact
    - But courts’ role in inter-agency turf battle?

4. *<u>State Farm</u> (US 1983): airbag politics*

- Timeline
  - 1966 Motor Vehicle Safety Act → NHTSA
  - 1967 NHTSA Std 208: manual seatbelt

- 1969 Notice Proposed RM: passive restraints
- 1970-72 Final Rule: revise Std 208: (1) front-seat passive restraints; (2) interlock (1971 Nixon to Big 3: pro-business, anti-Japanese)
- 1972 6th Cir (MI) invalidated restraints, airbags b/c crash test dummies insuff'ly objective – upheld interlock
- 1974 public backlash (delayed getaway!) → Cong am MVSA prohibit interlock, req preapproval passive restraints
    - o Ford Admin attempted compromise: vol'y demos safety features
- 1977 Carter Admin: new Sec'y Trans & Admin NHTSA modified Std 208 phase in passive restraints 1982 (large), 84 (small)
- 1979 DC Cir upheld revision
- 1981 Reagan deregulation (~see Alito Memo)
    - o 4/6 NPRM "changed assumptions" (mfgs noncompliance) → 3 alts:
        - ▪ Reverse order, stagger phase-in
        - ▪ All compliance by 9/83
        - ▪ Rescind passive restraints
    - o 10/29 Final Rule: rescission
        - ▪ Anxieties: strength of social sci data; pot'l public backlash
        - ▪ Comments summary (<u>Nova Scotia</u>: consider and respond)
            - Mfg: against restraints as costly
            - Ins cos: safety → cost savings
            - Consumer groups: Naderites
            - Suppliers & trade groups
            - Congress members
            - Private citizens (divided)
        - ▪ NHTSA "discretion" → public hearing (<u>Vt Yankee</u>)

a) White aff'd DC Cir: Std 208 rescission arb'y & capricious

- Unanimous: NHTSA ≠ consider req'ing airbag compliance as 4th alt
    - o External conditions under agency control via regs
    - o Agency logical flaw re causation
    - o Arbitrary & capricious tests:
        - ▪ Consideration of factors beyond Cong'l intent?
        - ▪ Failure to consider important aspect of problem?
        - ▪ Explanation runs counter to evidence?
        - ▪ "So implausible…"
- Majority: NHTSA too quick to dismiss safety benefits of auto belts
    - o Why not req nondetachable or spool belts?

b) Rehnquist concurrence/dissent:

- Agency free to choose to ignore ungeneralizable study (VW Rabbits)
- Politics = reas'l factor in admin decision-making
- Ct substituting own view of cognitive psch for that of Agency
    - o Rascoff: "the audacity of the hard-look doctrine"

5. *Plan B: <u>Tummino</u> (EDNY 2013)*

- Timeline:
  - 1999 Plan B Rx only use
  - 2006 FDA approved OTC ≥ 18, Rx < 18
  - 2009 EDNY ordered FDA approve OTC ≥ 17
    - FDA approved One Step (same ages): same drug, min side effects
  - 2011 Terra Pharma Supp New Drug App: One Step OTC all ages
    - FDA approved OTC all ages
    - HHS Sec'y Sebelius rev'd: ≠ data all ages, cognitive/behavioral diffs, available to 11yos? (Obama support: 10yos, improper use)
- EDNY (Korman) ordered HHS rev'l
  - Cynical PR game by Obama Admin? (DOJ ≠ appeal)
  - Even if ≠ political motivation, so unpersuasive as to Q good faith
    - ≠ data all ages ignored FDA waiver add'l studies
    - Cognitive diffs
      - (a) apply more to underlying sex than to labels;
      - (b) would make other OTC drugs impossible
      - (c) negligible slice of mkt (< 6,000)
    - Avail to 11yos – so what? Among safest OTC, vs. diet pills, dextromethorphan, laxatives, analgesics, acetomenophen
  - Agency decision legitimacy alternatives:
    - Apolitical, scientific
    - Popular will, democracy, politics, ideology – but how explicitly?

6. *<u>Heckler v. Chaney</u> (US 1985): agency inaction*

- Facts: TX, OK misuse FDA-approved drugs for non-approved execution
  - πs death-row inmates requesting FDA intervention – FDA refused to act
- Procedure: DDC SJ for FDA – DC Cir rev'd for πs

a) Rehnquist: inaction presumptively unreviewable

- Surplussage canon → APA §701(a)(1) ≠ (2)
  - Whole Act:
    - (2) "action" incl inaction (identical words)
    - Tension: (2) vs. §706(2)(A) "arb & cap or abuse discretion"
- <u>Overton Park</u>: "no law to apply" → APA §701(a)(2) discretion
  - Action presumptively reviewable
  - Inaction presumptively unreviewable, rebuttable by statutory req'mts
    - Agency expertise & balancing, esp in enforcement
    - ~ prosecutorial discretion (irony: R's <u>Morrison</u> dissent?)
    - ≠ Const'l case on own terms

b) Brennan concurrence: inaction alone ≠ dispositive

- Eg, failure satisfy mandate

c) Marshall: inaction reviewable unless prohibited

- Defer to agency unless evidence of abused discretion (here, none)
  - §701(2) ≠ threshold barrier to review
  - APA was attempt to reign in agency discretion
- Criminal prosecution (past) ≠ admin enforcement (future)
- Marshall's different worldview (eg Perry v. Sinderman)
- Tension:
  - Agency discretion/no law to apply, vs.
  - Non-delegation/intelligible principle
    - Cardozo Schechter Poultry: uncannelized discretion

7. *FCC v. Fox TV (US 2009): agency pivot*

- Timeline:
  - 1978 FCC v. Pacifica: regulate George Carlin's indecency
  - 2001 FCC guidance: full context
  - 2002/3 Cher, Nicole Richie fleeting expletives Bilboard Awards
  - 2004 FCC Golden Globes Order after Bono: fleeting expletives
  - 2006 FCC Notice Apparent Liability to Fox (rev'd by 2d Cir)

a) Scalia rev'd for FCC: valid pivot

- State Farm applies to rescission, ≠ subseq change
- Same std rule creation, change – valid as long as suff reasons (≠ > prior)
- Const'l avoidance of 1st Am problem

- Thomas concurrence: majority followed precedent, but Pacifica was wrong

- Kennedy concurrence: some agency changes might be a&c if ignore prior facts (FCC reasons not great, but good enough)

b) Breyer dissent: agency must explain basis for pivot

- No change in bkgd assumptions/conditions to merit such change
  - Social science same
  - Some > technology: bleeping
    - Effect on local broadcasters w/o suff $ for tech?
- Agency must engage w/ court precedent (Pacifica) when so essential to regs
- ≠ politics b/c FCC = indep agency under Humphreys–Weiner–Morrison
  - Scalia response: indep = from Presid'l control, so Cong in charge
    - Art III judges ≠ "jackals stealing the lion's kill"
    - Describes Breyer's dissent as > std for changes
      - Breyer self-described same std, diff conditions (pivot)
- Ginsburg dissent: 1st Am concerns
- Stevens dissent: agency must explain major changes
  - Pacifica = outer limits of indecency regs

8. *Guidance Docs?*

- Formal rulemaking outnomoded after peanut butter delays, overburdened RM
- Informal N/C rulemakingthreatened by hard look litigation – ossification
    - Courts inspecting not only procedure but also substance
- Guidance docs as agency way out of APA oversights; > efficiency

B. Judicial Review of Agency Factfinding: facts as policy?

1. *<u>NLRB v. Universal Camera</u>: whole record review*

a) 2d Cir (L. Hand, 1950): ignore ALJ, NLRB rev'l

- Facts (supp): LH's detail as shout out to Examiner/ALJ?
    - 11/30/43 Chairman, ass't eng'r, testified at NLRB hearing
        - Kende, chief eng'r, dissatisfied – keep eye out
    - 12/30/43 Weintraub, personnel mgr, quarrel w/ C
        - W wanted to fire C, but Politzer, plant eng'r: wait resign
    - 1/24/43 W insisted that K fire C. P fired C for insubordination
- Procedure:
    - NLRB examiner/ALJ concluded that C's testimony ≠ cause of discharge
    - NLRB rev'd for C, overruled finding that P told W that C resign
        - Found K & W collusion to fire C in Dec/Jan
        - Found W's 1/24 complaint = cover up
        - Req'd Univ Camera reinstate C w/ back pay
- Issue: whether NLRB's reversal, findings were justified
- Upheld NLRB order for reinstatement, back pay
    - ALJ < trial ct "special master" (deference unless clear error)
    - Statute: admin findings conclusive is supported by substantial evidence on the record considered as a whole
    - NLRB shouldn't completely disregard ALJ findings
        - But Court can't use Board reversal as factor (≠ part of record)
            - Impossible middle grd: practically req any rev'l = error
    - Q: whether rational jury could've returned equivalent verdict

b) SCOTUS (Frankfurter, 1951): whole record

- (p866) Rev'd for ALJ, remand 2d Cir consider whole record, incl Bd reversal
    - LH made false dilemma: middle grd hard but possible
    - Modern approach: jud'l review must engage all w/ all facts
- Statutory framework: Cong'l mood → high proof, jud'l scrutiny
    - 1935 Wagner Act: "supported by [read: substantial] evidence"
        - Criticisms: allow disregard countervailing evid whole record
    - 1940 Walter-Logan Bill: "substantial evidemnce"
        - AG Cte Dissent: "whole record" (1st use)
    - 1946 Admin Procedure Act: "whole record
    - 1947 Taft-Hartley (NLRB) Act: "subst'l evid on record as whole"
- Rule: jud'l review of whole record for subst'l evid

- Include countervailing evidence
- Consistency "record" APA, Taft-Hartley Act
- Record = examiner's findings as well as complaint, testimony

2. *<u>Allentown Mack Sales v. NLRB</u> (1998)*

- Facts (p872):
  - NLRB precedent: 3 options when employer believes ≠ union support
    - Formal NLRB supervised election
    - Or, upon good-faith reas'l doubt:
      - Withdraw recognition & refuse to bargain
      - Internal poll of employee support for union
  - 5/90 Mack Trucks intent to sell Allentown factory
  - 12/90 mgmt formed Δ Allentown Mack Sales, rehired 32/45 employees
    - 10 employee statements < support union (8 during interviews)
  - 1/2/91 π AFL-CIO Local 724 req'd recognition
  - 1/25 Allentown refused upon good faith doubt
  - 2/8 Allentown secret ballot: 19-13 anti-union (priest oversight)
- Procedural history:
  - Union unfair labor practices charge at NLRB
    - ALJ: Allentown successor to Mack, inherited bargaining obligation
      - Poll = procedural compliance but ≠ good faith doubt
    - NLRB aff'd ALJ, ordered recognition, bargaining w/ union
  - DC Cir aff'd for union "over vigorous dissent"

a) Scalia Majority: rev'd for Allentown

- Issue: any reas'l doubt re majority support for union?
- ALJ credited 7 statements, but said 7/32 (~20%) ≠ reas'l doubt
  - But 50% = reas'l certainty, so what % = reas'l doubt?
- ALJ disregarded 3 add'l probative statements
  - Dennis Marsh: "not being represented" for $35 dues
  - Kermit Bloch: "entire night shift" anti-union
    - Unless reason to know lying, promotes reas'l doubt
  - Ron Mohr: "if a vote was take, the union would lose"
    - Can't disregard based on which of 45 employees rehired, b/c no similar requirement for bargaining obligation w/ union
- Math: given 7 anti-union, 17/25 remaining (2:1) would've had to support
  - Marsh, Bloch, Mohr statements → reas'l doubt
- NLRB can't apply "strict head count" std when official policy = reas'l doubt
  - APA, <u>State Farm</u> "reasoned decision-making" = do what you say
    - If divergence action-policy ≠ political oversight ≠ jud'l review
  - Agency free to change procedures (eg std of proof) to advance certain policies as long as make policy clear
    - But fact-finding, inferences based on logic

b) Breyer Dissent

- Departure from Universal Camera std: intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied"
- Majority omits "objective" from NLRB's "objective reas'l doubt" std
- Majority no problem w/ 5 other disregarded statements: not among rehired 32, equivocal, too long before transition
  - But majority claims 3 statements required Allentown decision:
    - Marsh: made during interview
    - Bloch: made during interview, unsubstantiated about others
    - Mohr: referring to larger group than rehired (32/23), no indication large or small majority
      - NLRB ≠ disregard completely, only insuff reas'l doubt
- State Farm: agency free to regulate by adjudication, dvp policy via case law interpreting regs
  - Case law available for all industry players' lawyers to reference
  - Unfairness of CL retroactivity inherent in CL adjudication

C. Judicial Review of Questions of Law

1. The Chevron Framework

a) Chevron v. NRDC (Stevens 1984): legal deference

- Facts (p530):
  - 1970 (Nixon) Clean Air Act defined "stationary source"
    - "smokestacks" framework
  - 1976 EPA Interp Ruling gap-fill on nonattainment until Congl action
  - 1977 (Carter) Amendments: state plan → permits
    - "major stationary source" ≥ 100 T/yr pollution
    - ≠ new definition "stationary source"
    - ≠ mention "bubble concept"
  - 1979 EPA plantwide "source" only if approved state-plan auth
    - Flex std: "bubble" exemption – offsets w/in same source
  - 1980 EPA response to DC Cir: stricter stds based on air quality program: maintain = bubble vs. improve ≠ bubble
  - 1981 (Reagan) NPRM/FM plantwide "source" in all instances
    - Same time as State Farm deregulation
      - Stevens throwing bone to Reagan Admin?
    - "It's all bubble all the time."
    - Justification: statutory silence
    - Policies:
      - Incentivize new investment, encourage new/clean tech
      - Consistency via simplicity (same def)
      - Further aims of Clean Air Act
- Procedure: DC Cir (Ginsburg) for NRDC, rejecting EPA change
  - EPA/Chevron brief:
    - Clean Air Act 2 purposes: (1) environmental, (2) economic

            - Cong'l delegation to agency via ambiguity or silence
- Stevens rev'd for Chevron/EPA
    - Test of jud'l review agency statutory interp:
        - STEP 1: clear Cong'l intent/no gap? (If yes, end of discussion.)
            - Explicit or implied
            - Canons of statutory interp
                - Open Q: all canons, eg lenity?
            - Courts = faithful agents of Cong
            - ≠ really deference, just statutory interp
                - Incl leg'v history? Probably yes
        - STEP 2: agency interp reas'l? If yes, deference. (Always yes)
            - ≠ inquiry whether appropriate re statute purpose
                - Zone of reas'lness
                - Agency can later change course
            - Toothless supervision of agency's work
    - Statutory Language
        - Ord'y meaning ≠ compelling either way
        - Overlapping statutory terms suggest broad delegation to EPA
    - Leg'v History (HR, Sen Reps)
        - Silent on issue, but consistent w/ broad EPA discretion
        - EPA's dynamic interp over time suggests flex definition
    - Policy
        - NRDC court battle it lost w/in EPA, never fought in Cong
        - EPA reas'l accommodation competing policy interests
            - Econ dvpmt vs. environmental protection
            - Agency's specific rationale n/a
        - Can't challenge agency's policy wisdom, only reas'lness of choice w/in statutory gap
    - Theories underlying opinion:
        - Cong'l delegation to agency
        - Technocracy: agency expertise
        - Political accountability
- Legacy:
    - Counter-<u>Marbury</u>? Holding some issues beyond Ct's purview
    - Among most cited SCOTUS cases (≈ <u>Erie</u>)
    - Slow-growing blockbuster case

b) <u>MCI v. AT&T</u> (Scalia 1994): FCC rule too big

- Facts (p759):
    - Rate filing 20th C common antitrust mechanism
    - 47 USC §203(a) common comm's carriers to file tariffs w/ FCC
        - §203(b) auth FCC to "modify" any req'mt of §203
        - 1970/80s FCC relaxing filing rules
        - 1985 FCC prohibited filing by nondominant carriers (≠ATT)
            - DC Cir struck down: "mod" = alter ≠ abandon
        - MCI continued ≠ filing under FCC permissive req'mt
- Procedure: ATT sued MCI/FCC/US for ≠ auth to allow ≠ filing

        - DC Cir for ATT, rev'd FCC permissive rule
    - Scalia aff'd for ATT
        - Formally STEP 1 analysis:
            - Statute clear: "modify" = moderate change
                - All but 1 dictionary (+ progen)
                - Prevailing def at time of Act, 1934
            - Policy of efficient phone service < plain meaning
        - Underlying STEP 0 issue?
            - Elimin req'mt 40% sector too major delegate by ambiguity
            - FCC effectively writing statute off books
            - Overtones of nondelegation problem
    - Stevens:
        - STEP 1: statute ambiguous enough
            - §203(c) prohibits elim tariff "unless otherwise provided"
            - §203(b)(2) "in particular instance or by gen'l order" = otherwise provided; broad flexibility
            - Dictionaries ltd use w/o context
                - Extent of change depends on core purpose of Act
                    - If filing process, then major change
                    - If monopoly control, then minor change
        - STEP 2: FCC tariff rules reas'l, even if not best means
    - ~~Babbitt v. Sweet Home (US 1995): deferred to DOI's reas'l interpretation of "harm" to incl sig habitat modification/degradation re Endang'd Species Act~~
        - ~~Stevens majority: broad Cong'l delegation based on agency expertise, complex policy choice~~
        - ~~Scalia dissent: no reas'lness inquiry b/c statute clearly precluded DOI jx over private land use~~

c) <u>FDA v. Brown & Williamson</u> (O'Connor 2000): tobacco too big

- Facts (p769):
    - 1996 FDA (David Kessler) rev'd prior disavowals tobacco regs
        - Tobacco = drug: article (other than food) intended to affect structure or any function of the body
        - Cigs/chew = combination prod: combination of drug, device, or bio prod
        - Regulations: access, promotion, labeling
        - Elena Kagan WH Counsel article: Pres'l engagement regs
            - Clinton signature tobacco reg
        - 700,000 comments: most ever to NPRM
- MDNC for π, 4th Cir rev'd for Δ b/c FDA ≠ jx under FDCA
- O'Connor aff'd for Δ Big Tobacco
    - Formally, STEP 1:
        - Overall statutory context, scheme, harmonious whole, subseq legislation, common sense (Scalia blew his gasket)
        - FDA conclusions "inevitable" → ban, but FDA only regs
            - FDCA "safe & effective"
            - Cong precluded ban by statute

            - Cong 6 subseq tobacco statutes since 1965
                - Warnings, no ads on FCC channels, HHS reporting
                - Backdrop FCC disavowals authority over tobacco
                - Aff'v actions by Cong comprehensive reg scheme
        - Underlying STEP 0?
            - Tobacco = major issue (econ, pol) ≠ clear delegation
            - Citing Breyer L Rev article (touché)
        - Wisdom of Scalia/O'Connor restraint? Cong'l responses: explicit grants of auth to both FCC (rate filing) and FDA (tobacco)
    - Breyer +4 dissent:
        - STEP 1 ambiguity:
            - Plain meaning: not food, alter body
            - Statutory purpose: public health
            - Leg'v history: regulate drugs
        - New data explained pivot
            - 1980/90s sci consensus of harms
            - 1990s documentary evid of Big Tobacco hidden intent
        - Clinton admin policy change
            - Citing Rehnquist State Farm dissent (touché)
            - No "too big" issue if political accountability via Pres control

2. *Chevron Step Zero*

a) US v. Mead (Souter 2001): tariff ruling letters too small

- Facts (p786):
    - Customs tariffs statutory delegation to Treasury Sec'y, Customs Serv
    - Customs Serv (46 offices + HQ) set indiv tariffs via ruling letters
        - Applicable only to 2d party, modified w/o notice/comment
        - Gen'ly little/no rationale given
    - 1989-93 Mead daily planners classified as "other" – duty free
    - 1993 HQ ruling letter changing to "diaries…" – 4% tariff
        - Mead protest → HQ rationale
- Procedure:
    - Mead sued in Ct of Int'l Trade: SJ for US
    - Fed Cir rev'd for Mead
- Souter remanded for consideration Custom Serv interp under Skidmore
    - Chevron & Skidmore alt stds of deference to agency
    - ≠ Step 2 reas'lness analysis
    - Outside Chevron world (≈ policy statements, manuals, guidelines)
        - ≠ (1) Cong'l delegation to make rules w/ force of law
            - Substantively force of law, eg binding on 3d parties
            - Process:
                - Relatively formal admin procedure tending → fairness/deliberation about imp issue
                - Gen'ly adjudication, notice/comment RM
                - "other indication of comparable Cong'l intent"
        - ≠ (2) Agency process in exercise of that authority

      - Did agency actually use that power?
- Scalia: Chevron deference
  - Background rule:
    - Skidmore is dead
    - Ambiguous leg'v instructions resolved by courts
    - Clear leg'v instructions defer to agencies
  - Likely effects:
    - Confusion in lower courts
    - Defensive procedures (informal RM) by agencies
    - Ossification of admin law
- Legacy: hurdles to Chevron Step 2 deference:
  - Mead Step 0:
    - Agency authorized to interp w/ force of law
    - Agency deliberative process
  - Chevron Step 1 clarity

b) Barnhart v. Walton (Breyer 2002): Mead is flexible

- (p798) SSA disability benefits
  - "inability" + "impairment" ≥ 12 mo
  - "expected to last" applied only < 12mo (≠ retrospective reas'lness)
  - Denied Walton's benefits b/c mental illness only 11mo
- 4th Cir rev'd SSA interp as unlawful
- Breyer upheld SSA (inability ≥ 12mo) under Chevron deference
  - Despite ≠ informal (notice-cmt) RM by SSA
    - Longstanding SSA interp
  - Read Mead = flex std: both agency process & nature of legal Q
    - Factors whether Chevron applies
      - Interstitial nature of legal Q (Chevron Step 1?)
      - Agency expertise (≈ Skidmore)
      - Importance of Q to administration of statute
      - Complexity of administration of statute
      - Agency's consideration over time
    - But hard to reconcile w/ Mead: (1) force of law, (2) actual use

c) Skidmore v. Swift & Co. (US 1944): persuasive weight

- Facts/Procedure (p753):
  - 7 πs action for overtime for on-call fire house duty (4nights/wk)
  - Dist Ct denied πs' cliam, 5th Cir aff'd b/c ≠ "work"
  - DOL wage/hour div Admin amicus brief: flex std under Bulletin
- Jackson rev'd for πs, remand to consider DOL interp
  - Persuasive authority if thorough, reasoned, consistent, persuasive
  - No statutory req'mt of deference level to Admin
  - Admin official duty, specialized experience, broader info than courts
  - Informal RM procedure ≠ count against persuasiveness
- Legacy:
  - Risk admin ossification by binding precedent of jud'l interp

- Ongoing debate:
  - Scalia: dead rule, overturned by Chevron
  - Breyer, Souter: alt std of deference, Step Zero

d) City of Arlington v. FCC (Scalia 2013): "all Chevron, all the time"

- 1934 Comm Act § 201(b): "prescribe such rules…to carry out its provisions"
  - Amended by 1996 Telecomm Act: req state/local response to wireless siting app w/in "reas'l period of time" after app filing
    - Saving clause: nothing except (above) limit state/local auth
    - Jud'l review clause
- 7/2008 CTIA–The Wireless Ass'n (sic) petitioned FCC for clarity
  - 11/2009 FCC declaratory ruling: "reas'l period of time" = 90d for collocating on existing poles, 150d all other apps
    - Arlington & San Antonio challenged FCC auth interp "reas'l"
      - 5th Cir Chevron deference for FCC
- SCALIA aff'd Chevron deference for FCC
  - Only Q: whether agency w/in bounds of statutory auth
    - False dichotomy/mirage: jx'l vs. non-jx'l interps
      - False analogy to "very real" ct dichotomy
  - Slay 2 dragons (too small, too big) at once:
    - Mead by relegating it to formula: ≈N&CRM → deference
    - FDA/MCI characterize Roberts: jx (big) vs. non-jx (humdrum)
  - Chevron applies to cases in which an agency adopts a construction of a jx'lp provision of a statute it administers (eg Schor "any countercl")
    - Classify cases as Step 1:
      - Eg Brown & Williamson: FDA auth over tobacco?
      - Eg MCI v/ AT&T: modify
    - Really just attack agst Chevron deference itself
  - Roberts would require prov-by-prov parsing for delegation of each
    - But Cong may delegate gen'l auth → agency (b/c exec pwr)
  - (≠ Federalism issue b/c only Q whether fed agency or fed cts interp)
- BREYER concurrence (alone): complexity theory of Mead
  - Rehash of his Barnhart opinion
  - Ambiguity nec'y but ≠ sufficient for Chevron deference (context)
    - Barnhart: interstitial nature, importance, complexity, consid
    - Subject matter, text, context, scheme, canons, purpose, history
  - Even if Cong'l delegation unclear, Skidmore deference may apply
    - Only Skidmore deference in all opinions – dead?
- ROBERTS dissent: new salvo in Chevron-world debate
  - Curtail unchecked agency power/influence → tyranny
    - Headless 4th branch w/ powers of all 3 others (PCAOB)
    - But Scalia: control by strict reading of statutes at Step 1
  - Chevron powerful weapon in agency arsenal
  - Agency auth to decide when Cong'l delegation? Too much (parasitic)
    - Marbury: ct's role to decide what law is (eg whether deleg)
    - Even Chevron itself Q: whether delegation specific provision

- Despite Scalia's characterization, Roberts ≠ making FDA/MCI too-big argument – rather, concern re const'l foundation Chevron/admin state
  - Exec oversight impracticable
  - Looking for Cong'l oversight by clear delegation each prov

3. *Agency Statutory Interpretation*

a) Jerry Mashaw (2002)

- (p544-53)
- Occasions, forms, and processes of statutory interp?

	Judicial	**Agency**
Occasions	Lawsuit	"myriad"
Forms	Opinon/judgment	Disputes, queries, political provocations, autonomous policy
Processes	Jud'l process	Varies w/ form

- HHS and EPA case studies in how agencies interpret
  - Textualism prevalent
  - Leg'v history less prevalent (Committee reps > floor statements)
  - Little reference to other political peers
  - HHS simple, straightforward, answer the Q and move on
  - EPA explanations more elaborate
    - Likely result of contentious issues, litigation, many statutes
    - Heavier use of case law
    - Chevron process:
      - Quick step 1: meaning
      - Longer step 2: reas'lness
        - Overall purposes of relevant statute
        - Canons of construction
        - Practical enforcement/admin problems
  - Agency effort positive correlation w/ uncertain jud'l acceptance
- Relevant evidentiary materials? (Citing Peter Strauss)
  - Agencies as faithful agents of statute, apart from political actors (exec, leg'v) at any given moment?
  - Agency need for leg'v history to maintain integrity of statute in changing political contexts
  - But leg'v history > specific than statutory language
  - Alt demo legitimacy: constant interaction w/ leg'v, exec branches
    - Agency as active implementer > passive interpreter
- Don Elliot (EPA lawyer)
  - Pre-Chevron: agency Gen Counsel was guardian of single interp of guiding statute – high power, policy-making by agency lawyers
  - Post-Chevron: Gen Counsel seeking to predict range of possible policy space, define boundaries of legal interp – no longer policy-makers

b) Nat'l Cable v. Brand X (US 2005): prior jud'l construction non-binding

- T1: Portland: 9th Cir Skidmore deference to FCC (modem = telecom serv)

- T2: FCC ruling interp "telecommunications service" ≠ cable modem
  - 9th Cir rev'd (= cable modem) b/c contrary construction in Portland
- Thomas rev'd for FCC b/c Chevron deference
  - Cong'l delegation to FCC: RM force of law; FCC exercise auth
  - FCC inconsistency ≠ take out of Chevron world (at most: arb&cap)
  - Court's prior construction only binding if statute unambiguous
    - Absurd to depend on first-in-time construction
  - Zone of reas'lness in ambig statutes: agency ≠ overruling court
    - Agency : court :: state court : fed court (differing interps)
  - Counterfactual analysis of T1: if Chevron Step 1 had been applied, would court have found statute ambiguous? (best vs. only interp)
    - Here, suff'ly ambig at Step 1, so Chevron deference
- Scalia: Brave New World beyond even Mead
  - Unless Chevron deference, ct's interp should be last word/law
    - Here, Ct could've just deferred to FCC, but out of way bad law
  - Effectively (exec) agency auth to reverse Art III judges (unconst'l?)
  - Likely confusion in lower courts
    - Cts must now clarify unambiguous statute in dictum?
  - Ossification: Skidmore = court's holding (≠ agency's reas'l interp)

4. *The Politics of Judicial Review*

a) Sunstein & Miles (2009)

- (p908) Empirical study political motivs jud'l reviews EPA, NLRB decisions
  - SCOTUS all cases referencing Chevron
  - Challenge by business group vs. public interest/union
  - Democratic or Republican appointee (SCOTUS indiv justices)
- Circuit Courts
  - Chevron cases: unmistakable politicization, esp in groups
    - Liberal agency action: 74% D, 60% R validation
      - 86% DDD, 51% RRR
    - Conserv agency action: 51% D, 70% R validation
      - 54% DDD, 100% RRR
    - Mixed panels diminish politicization (whistleblower effect)
  - Arbitrariness cases:
    - Liberal agency action: 71% D, 58% R validation
    - Conserv agency action: 56% D, 72% R validation
    - Similar problems of unified vs. mixed panels
- SCOTUS
  - Individuals:
    - Kennedy least partisan: 50/50
    - Thomas most partisan: +46% conserv
    - Stevens 2nd most partisan: +40% liberal
    - Breyer: 82% overall, 64% conserv decision validations
    - Scalia: 52% overall, 42% liberal decision validations
    - Ginsburg: overall? 58% conservative validations
  - Groups:
    - Rehnquist-Scalia-Thomas

- 57% overall validation
  - 76% conservative validations
  - 45.5% liberal validations
- Breyer-Ginsburg-Souter-Stevens
  - 75% overall validation
    - 85% liberal validations
    - 58% conservative validations
- Kennedy & O'Connor
  - 72% conservative validations
  - 65% liberal validations

b) Posner (2006)

- (p914)
- Formalism
  - Roberts confirmatin: judge as umpire
  - But judges applying rules they themselves have made
    - Importance of meta-prinicple: textualism, originalism, moral Const (Dworkin), active liberty (Breyer)
- Politics/attitudinalism
  - Significant predictor, but not 100% accurate (many cases < ideol imp)
- Pragmatism
  - Reas'l dispatch: political prefs, but also
    - Feasibility given knowledge & power of court
    - Effect on law's stability & court's reputation
    - Desire for ideological consistency
  - Formalism → zone of reas'lness
    - Politics when wide zone
- Judges as political actors, legislators
  - Certain constraints, other leeways
  - But understanding ≠ enough lever to eff'ly admin gvt progs (busing)
- "Ideology" as determining factor
  - Gen'l world view determining political, social, econ Qs
    - Eg pro-gvt, pro-Δ
  - ≠ party affiliation b/c parties less consistent
  - More likely moral, religious values
    - Products of upbringing, education, experiences, pers'l identity, temperament

5. *Chevron and Constitutional Avoidance*

a) DeBartolo (US 1988): Avoidance > Chevron

- Δ labor union leafleting in π's mall to pressure union-backed constr co
- NLRB for π, construing "coerce" to incl leafleting urging cust boycott
  - NLRB noted 1st Am concerns, but said precedent required reading
- 11th Cir rev'd for Δ (avoidance) "coerce" ≠ customer publicity
- SCOTUS (White) aff'd for Δ (avoidance)

  - Chevron satisfied: ambiguous statute, reas'l construction
  - But 1st Am Const'l serious problem
    - Ambiguity/breadth → avoidable; 11th Cir reas'l alt
  - ~ Hard Look: NLRB fail inquire const'l issue beyond own precedent
    - ~ Barnhart multifactor analysis (tech issue, expertise, etc)
- Justifications for avoidance > Chevron
  - Narrow Cong'l delegation to agencies in certain domains
  - Sunstein (2000)
    - Force Cong to make choice, take political heat
    - Avoidance as back-door nondelegation (Benzene)
  - But why not allow exec to force Const'l issue under Art II pwr?

b) Rust v. Sullivan (US 1991): Chevron if unavoidable (pot'l) issues

- 1970 (pre-Roe) Title X Pub Health Serv Act: ≠ fed funds "used in progs where abortion is a method of family planning"
  - 1988 HHS regs "family planning" = preventive ≠ pregnancy care
  - Conditions: ≠ abortion counseling, ≠ advocacy, phys/finan'ly separate
    - Challenge of justifying unconst'lity of fed $ conditions
- Title X grantees, docs sued as facially > statute, ≠ 1st/5th clients, 1st providers
- 2d Cir for HHS: ambiguous statute, ≠ facial Const'l violation
- REHNQUIST aff'd for HHS
  - Chevron: ambiguous, reas'l construction
  - ≠ Const'l issue to avoid
    - Any abortion regs, beyond toothless pre-1988 regs → some Const'l challenges, given Roe (1973)
    - Here, issues not grave enough
  - Applying avoidance canon when agency walled in by const'l issues would take many issues (HHS abortion, FCC censorship) out Chevron
- BLACKMUN dissent:
  - Maj "sidestep" Const'l issue w/ "feeble excuse…facile response"
  - Regs = viewpoint restrictions on protected speech
  - Avoidance duty strongest when ambiguous statute
  - Regs unconst'l
- O'CONNOR dissent:
  - Blackmun should've stopped short of Const'l analysis
  - Don't tell Cong what it can't do before Cong has acted
  - Incorporate avoidance into Step 2 reas'lness analysis
    - Can't come in at Step 1 b/c ambiguity req'mt
    - Avoids dinging statutory construction, just invalid reg
  - ≠ Whitman v. Am Trucking (Scalia: nondeleg uncurable by agency)
    - Here, agency can cure own regs of const'l issue
- Should there be heightened threshold for applying avoidance under Chevron?

6. Yates v. US (2014): are fish tangible objects?

- Facts/Timeline (supp)
  - 8/23/2007 Fish & Wildlife Comm'n officer (deputy of NOAA's Fisheries Serv) boarded Δ's boat, found 72 fish < 20" – boxed for seizure at port

- 8/26 NOAA recovered box: 69 fish, many different sized
  - Crew member admitted to throwing some overboard at Δ's direction

- Procedure:
  - After Δ's (measure) expert's cred impeached, Δ called gvt expert (shrinkage)
    - Trial court denied Δ's attempt to call gvt expert
  - Δ convicted Sarbanes-Oxley (18 USC 1519): "knowingly…destroy…any record, doc, or tangible obj w/ intent to impede fed investigation"
    - Δ 30d prison, 3yr probation, DNA (statute: no min; max 20yr)
  - 11th Cir aff'd conviction: "tangible obj" undefined – plain meaning → fish
    - Cong's laws may cover areas beyond "crisis du jour"
- Verilli's (US SG) brief in opposition to cert petition
  - "Tangible object" undefined term – plain meaning (dictionary) → fish
    - "Any" → broad meaning
  - Statutory context: any fed investigation, any matter w/in fed jx
    - ≈ discovery/inspection in Fed Rs Crim & Civ P
      - Whole act/identical words
  - No District/Circuit split on issue (broad vs. narrow construction)
    - Consistently broad application: cocaine (DC Cir), hard drive (3d), CD (7th), exhaust pipe (SDAL), cement mixer (DNJ), laptop (DCT)
  - Canons (gen'ly N/A b/c unambiguous text, but arguendo…)
    - Noscitur a Sociis: "record, doc, or tangible obj"
      - Q-begging: assume Cong'l intent limit "tangible obj" by ass'n
      - Ignores rest of statute – broad reach ("any")
    - Title/caption: "Destruction, Alteration, or Falsification of Recs in Fed invs & Bankruptcy" – but title ("records") can't restrict plain text
    - Ejusdem Generis: "or tangible obj" as catchall?
      - But no more or less specific than "record" or "doc"
      - Surplussage better: "tangible obj" must be distinct
    - Expressio/Exclusio: omission "evid, prop, contraband"
      - Why should Cong have to enumerate already incl "tang obj?"
      - <u>Dolan</u> "negligent transmission" of mail ≠ negl leaving on step
        - But based on 1st ambiguity, 2d precedent
      - <u>Zuni</u> "percentile" agency interp, technical term req context
        - But here, no agency-only interp, not technical
  - Legislative Purpose derived from words actualy enacted → broad
    - Even if beyond orign purpose, "reas'ly comparable evils" OK
  - Legislative History: S. author's section-by-section analysis → broad
  - Vagueness = notice under common understanding, ≠ broadness
    - Knowledge/intent req's mitigate any vagueness
  - Overcriminalization allegation beyond court's scope of review (leg'v fct)
    - Harsh max sentence irrelevant b/c no min
  - Lenity only if "grievous ambiguity," interps in equipoise