LRS Attack Outline

* Article I, section 7 – bicameralism and presentment
* Consider a section of the statute against other sections of the statute
* Make sure to say if not Chevron, then Skidmore

Potential Attacks on Agency Promulgation

1. Procedure for adjudication or rulemaking overall wasn’t followed
2. Should have been rulemaking instead of adjudication
3. Organic statute specifies different procedure than one followed
4. Are there so few procedures and the policy is really vague and the jurisdiction is broad, are non-delegation doctrine issues implicated?

Checklist:

1. Availability of Review – 701, 704 (but see 701(a)(1) and 702(a)(2))

2. Nondelegation

3. Interpretation – Chevron v. Skidmore

* Chevron Step Zero (Mead factors)
* Chevron Step One
* Chevron Step Two
* Major Questions Doctrine
* Auer Deference

4. Bimetallic Factors – Rule or Order

5. Procedural Review (Adjudication, Rulemaking, General Statement of Policy, Interpretive Rule)

* Chenery I
* Due Process (Adjudication)
* ALJ authority (Adjudication)
* Reliance Interests: NLRB v. Bell Aerospace (Adjudication)
* PG&E & Hoctor (Legislative Rule vs. General Statement of Policy or Interpretive Rule)
* Nova Scotia (Rulemaking)

6. Rationality Review

* Overton Park
* State Farm
* Fox v. FCC
* Heckler

**Formalism vs. Realism**

**TVA v. Hill (1978) (Snail Darter Case)**

* **Institutional formalism vs**. **institutional realism**: Argument over significance of appropriations bill. Should courts be pragmatic about how legislation actually gets passed or imagine that Congresspeople read every statute – disciplining effect of holding Congress to its function; argument that Congress isn’t supposed to function in a formal way based on the Constitution – it’s supposed to be messy.
* **Takeaway**: Both sides think they are being faithful agents of Congress. Majority believes Congress wanted drastic result – it is not the duty of courts to be utilitarian. Dissent believes Congress did not intend absurd result and that court shouldn’t be so formalist.
* **Takeaway**: Courts do not get the last say – in this case, Congress continued to hold hearings on this; but in a hyper-partisan environment, can Congress actually fix a wrong interpretation?
* **Takeaway**:Sometimes Congress loses control of agencies – whose interpretation governs?
* Canons of Construction
  + Burger: Appropriations bills do not repeal congressional laws; Subsequent bills do not repeal earlier ones unless unmistakably clear
  + Powell: Bills cannot apply retroactively.
* Purposivism
  + Broader purpose was to protect endangered species
* Legislative History
  + Final version omitted a passage stating that species needed to be protected “insofar as it is consistent and practicable with their primary purpose”
  + Congressional testimony cited a specific case where they wanted discretion to be taken away from a director so as to protect an endangered species (the whooping crane), suggesting that this applied to ongoing projects as well as new projects.
  + Powell: Congressional silence: If Congress wanted the act to interfere with long-standing and extensive government projects, there would have been an extensive record of this question given the amount of waste this result produces.
* Textualist Arguments
  + Burger argues the plain meaning is clear that all actions are covered; Powell only believes it covers prospective actions

**Intent and Purpose**

**Church of the Holy Trinity v. United States (1892)**

* Absurdity doctrine
* **Takeaway**: What is the frame of the problem? Do we want to look at the preferences of this particular legislature or what a reasonable legislature would want when trying to honor the Congressional intent?
* Can courts distinguish the “real purpose” of a statute? If so, should it pay attention to the “real purpose?”
* How can a single purpose be found when there are multiple purposes that might motivate different voters?
* Should dominant social norms inform purpose (and should Congress require a more clear statement when legislating against social norms?)

**Purposivist Methods/Questions**

* Narrow or broaden the frame.
  + **Actual** preferences of this Congress or references of a **reasonable** Congress
  + Specific intent or general intent? Focus on this specific case or how the Congress would have dealt with this broader class of cases?
  + How do you frame the purpose of this statute? Narrowly or broadly (when there are multiple purposes)?
  + What level of generality you frame the problem?
* Look at social history / national values to inform purpose (especially if an interpretation of a law would lead to a result that seem to contradict the purpose based on social history/national values)
* Look at “evil,” problem that Congress is addressing
* Should Court honor the “real purpose” of an act or the purpose as manifested in the text? Can courts be separate and distinguish “the real purpose” of an act?
* If there are multiple purposes and different senators voted for different reasons, can one purpose be distilled?

**Legislative History**

**Train v. Colorado Public Interest Research Group, Inc. (1976)**

* Marshall uses multiple sources of legislative history to justify that FWPCA contemplated radioactive materials not regulated by the AEC.
* Legislative history is a strengthened authority when all the legislative history points in the same direction
* There was a colloquy between two senators on the floor asking if it changes the AEA’s federal preemption authority. Respondents argue this means that the AEC still has authority but that it does not limit the EPA’s authority and that the AEC must defer to the EPA – the court disagrees.
* Further cites Senator Muskie’s reference to **Northern States Power Co. v. Minnesota (1972),** which affirmed the AEC’s exclusive authority over the states to regulate source, special nuclear, and by product material, preempting states from such discharges, as evidence of the type of authority the bill envisioned for the AEC.
* Representative Wolff also proposed an amendment to give states control to further restrict radioactive waste from nuclear power plants, which was defeated by a 3-to-1 vote, suggesting it is the exclusive province of the AEC. A co-sponsor of this amendment particularly saw it as an attempt to overturn Northern States. Opponents of the Wolff amendment did not think the states were ready for that level of control. The respondents argue that this was only in reference to state power, not EPA power. But the court believes the Wolff amendment would have been redundant then, and Wolff and his co-sponsors did not contest that the purpose of the amendment was to expand the FWPCA into the regulatory control that the AEC held.
* The **conference committee** further emphasized this interpretation and made reference to both the Muskie colloquy as well as the Wolff amendment.

**Legislative History Methods**

* **Committee Report** is “best available evidence” and is the lesser evil of plain meaning.
* **Committee Report** encapsulates the thinking of those most invested in putting forth the law
* **Conference Committee Report** also gold standard
* **Floor Statements** – however, some floor statements are not actually spoken on the floor but are bullet statements.
* **Sponsor’s Statements** have more weight given that they have public shepherded the bill through the floor, but there is no bargaining over what they say.
* **Statements made during hearings** are made by those most involved in the process but are also sometimes puppet shows.
  + Special suspicion towards statements made during hearings that do not make it into the committee report since it suggests it is not endorsed.
* **Failed Amendments**
* **Silence**: When one interpretation would be a major, controversial change and another would not be, the silence on this issue can be interpreted as proof that the controversial change was not contemplated; court has rejected this method at times.
* **Subsequent Legislative Action**
  + Legislative acquiescence – if a court interprets it and Congress, aware of the interpretation, does not correct it, doesn’t that suggest Congressional assent?
    - Court has grown skeptical of legislative acquiescence – Cent. Bank of Denver v. First Interstate Bank of Denver (1994) – it might have only been a court of appeals decision rather than the Supreme Court – the override legislation might have been bottled up in committee despite its popularity; an override bill might be a pawn in negotiations
  + Congressional **ratification** through re-enactment, significant revision of a bill except for the relevant passage, identical language in a new statute.
    - Could be problematic – are legislators really aware of a court/admin interpretation of a passage anymore than they are aware of legislative history?
  + **Ratification** is found to be a weightier authority than acquiescence.

**Critique of Legislative History**

* Textualist critique believes that legislative history approach runs afoul of Article I, Sec. 7 requirements of bicameralism and presentment
* Does it provide incentive for Committees to be ambiguous and to hide the real meaning in Committee reports?
* Scalia’s textualism is not that the purpose of the text doesn’t matter – he doesn’t think purpose is discerned through the sources of legislative history that legislative history purposivists rely on
* Maybe the purpose of bicameralism and presentment is to make law-making hard to achieve compromise and a critique of legislative history is that it doesn’t respect the compromises made in that process – there might be a lot of merit to slowing the process to make sure inflamed passions don’t lead to hasty bills and protect minority interests that has to be respected that legislative history purposivists do not respect
* **Formalist critique – bicameralism and presentment makes the text the only appropriate source**
* **Functionalist critique – law-making is supposed to be hard and you are ignoring that purposeful design when you are looking at the sources in the early stages/process of law-making and ignoring that law-making is supposed to be narrow in order to protect the status quo or minority interests**

**Blanchard v. Bergeron (1989)**

* Blanchard was awarded $10,000 damages when a sheriff’s deputy deprived him of his civil rights under 42 US § 1983. The district court awarded Blanchard $7,500 in attorney’s fees under 42 U.S. § 1988 – “reasonable attorney’s fees.” The court of appeals reduced the fee award to $4,000, ruling that petitioner’s 40% contingent-fee arrangement with his lawyer served as a cap on fees. Reasonable fees are not defined in the statute – must the award be limited the amount in a contingency fee?
* **White Opinion** cites legislative history of House and Senate Committee Reports refer to the 12-factor test of Johnson v. Georgia Highway Express, Inc. (5th Cir. 1974), and the Senate Report mentions 3 cases where *Johnson* was applied and the fee arrangement was merely a single factor and not determinative.
* **Scalia Concurrence** argues that by referring to the Johnson ruling as dicta and the other three examples from the Senate report as the holding, it seems to think that these three examples (included in the Senate report) are the superior exemplars even though the House only mentioned Johnson. Scalia argues that none of the committee members read these cases and it was probably inserted by a staffer (perhaps the behest of a lobbyist) to influence judicial construction.

**Continental Can Company, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (7th Cir. 1990)**

* The Senate passed a withdrawal liability rule for certain trucking industry pension plans where substantially all of the contributions are made by employers primarily engaged in the trucking industry.
* The question is whether “substantially all” means a majority.
* The House manager, Rep. Thompson, on the floor said that they understood “substantially all” as the IRS understood it, which was around 85%.
* There was a conference committee. The committee report did not mention the § 4203 language.
* Rep. Thompson’s accords with a common understanding, whereas Senator Durenberger’s does not and came after the initial adoption of the law. Durenberger’s intent is the author’s, but the assent of everyone else doesn’t mean the author’s intent holds. Accords greater weight to the text which survived multiple rounds of review as opposed to a casual statement that was easy to make. Emphasizes that “substantially all” is a term of art with a special legal meaning that means 85%. Senator Durenberger’s interpretation did not influence anyone in their vote because they came after the fact.

**Textualism**

Broader Question: What is your theory of the appropriate judicial rule – should judges make things right – should they be minimalists doing as little as they can? Should judges be a countermajoritarian force to check the majority or are there democratic roots to judging?

Some debate among textualists whether looking at the texts is the best way to get a sense of what Congress intended by the meaning of the words or how the public understands the words

**Two Theories of Textualism**

1) **Democratic theory** – congress is rough and tumble so we only look at the text, which they agreed to; judiciary is not democratic institution and should be constrained by the text

2) **Reformist theory** – we’re going to send a clear message to Congress to hold them accountable to what they have written to force Congress to write clear statutes (to protect the separation of powers - argument that judiciary is supposed to have discretion as part of a co-equal branch of government to check on the political branches (and the role of the judiciary is to force the legislative branch to be more clear and this produces better governance))

**United States v. Locke (1985)** (Mining Deadline on December 30)

* **Marshall** – plain meaning argument about “on or before December 31;” argues that if there is nothing remotely in the legislative history to suggest an alternative interpretation, Congress shouldn’t re-write the statute. Cites Mobil Oil Corp. v. Higginbotham that filling in congressional silence is different from re-writing congressional rules clearly written even if the result is harsh.
* **Stevens** – “prior to” is ambiguous and potentially is a legislative accident. Also points out that some of the regulation guidelines interpret the statute liberally – for example, even though it must be filed in the office of the bureau, the BLM will accept those put in the mail on December 30 as long as they arrive by January 19. Also does not want to hold appellees to what was in the regulation, citing Federal Crop Insurance Corporation v. Merrill (1947) that business do not need to know every regulation to its exact detail. Notes that BLM changed the language to “on or before” in the regulation, which suggests that prior to was unclear or else the language would have been changed. The bureau also issued a previous guideline on mining claims where “on or before Oct. 21, 1976 meant including October 22, 1976.”
* Scrivener’s Error: Scalia argues that you can still take a textualist approach if it is clear on its face to any reasonable reader that the meaning suggests one thing (such as a misspelling or the omission of a “not”) instead of the absurdity doctrine. Sometimes Congress makes a clear semantic error – United States v. Scheer (2d Cir. 1984); Commonwealth ex. rel. Smathers v. Taylor (Pa. 1894). And there are cases where a cross-section can only logically refer to a nearby section – United States v. Coatoam (6th Cir. 2001), King v. Hous. Author. (11th Cir. 1982).
  + Amalgamated Transit Union v. Laidlaw Transit (9th Cir. 2006) – “less” should have been “more” in a filing deadline to act as a time limit rather than an arbitrary waiting period
  + In Spivey v. Verture, Inc. (7th Cir. 2008), Easterbrook said that the judiciary cannot reverse the meaning of a statute when plain meaning is clear
* Supreme Court has been exacting about how grammar construes a statute, especially commas – Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund (1991), United States v. Ron Pair Enters., Inc. (1989). Some argue that Congressmen are not intimately familiar with the rules of grammar. Previous court opinions regarded the punctuation

**West Virginia University Hospitals, Inc. v. Casey (1991) (Attorney’s Fees – Expert Witnesses)**

* WHUV and Stevens dissent cite the House Committee Report and Senate Committee report about “full and complete” compensation rights. Scalia rejects Committee Reports where they disagree with the text; argues that a statute’s purpose is not just what it means to change but what it means to leave alone. The best evidence of that purpose is the text submitted for bicameralism and presentment and if Congress wanted the text to include expert fees or reasonable litigation expenses, it could have altered the plain meaning (semantic meaning) as understood by all parties.
* Scalia grants “semantic meaning” of “attorney’s fees” including paralegal fees since those had typically been included, whereas expert fees had not.
* Scalia uses Whole Code Canon to argue that the meaning of attorney’s fees in other statutes made clear distinctions about when expert fees were shifted. Reformist Textualism to discipline Congress to use the same terms.
* Stevens also notes that the times when the Court has been strictly literal, Congress has usually responded by amending the statute (arguments also cuts in favor of Reformist Textualism, however).

**Clash of Purposivism and Textualism**

* Justice Stevens’s purposivism believes that Congress is acting from a coherent background purpose since the drafters of 42 U.S.C. § 1988 were focused on responding to the Alyeska ruling and giving broader purpose to civil rights legislation.
* Justice Scalia believes that Congress involves trade-offs and compromises and that a resulting text may have been part of that compromise. Judge Easterbrook uses the metaphor that it is like a vector rather than an arrow. Smoothing over rough edges of an untidy piece of legislation risks upsetting those compromises which were achieved.
* Judge Posner believes that “a legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute’s aim but is not a good fit with the text.”
* **Tradeoff of Purposivism vs. Textualism**: Manning positions it as a desire for more coherent and just laws as opposed to the protection of minorities in the political process who have achieved a compromise.

**United States v. Marshall (7th Cir. 1991) (LSD Case)**

Easterbrook

* Easterbrook interprets **“mixture or substance containing a detectable amount”** as including carrier medium and language of “containing a detectable amount” suggests something being contained within something else
* **Presumption of Consistent Usage Canon with the term “mixture”** / **Inferences from Statutory Structure** suggest that in PCP, the statute distinguished between “pure” and “mixture” and thus if Congress meant to refer to the pure form without carrier medium, it could have specified as such
* **Absurdity Doctrine’s lack of persuasion** when no real cases put forth showing that manufacturers are receiving lower sentences than dealers
* Congress has made distinctions between different types of drugs before; also, most common method of taking LSD was through blotter paper at the time

Posner

* Absurdity doctrine: Drop of LSD in orange juice example
* **Legal Realism:** Argues that this dose confusion shows that Congress does not understand how LSD is sold. Compares the number of doses in other drugs as they translate to weight to show its disproportionate nature.

**Textualist Methods**

* Plain meaning (or meaning understood by public at the time of enactment): 1) Expertise (does the subject matter at issue drive whether expertise should control) 2) Etymology / dictionary 3) Purpose, function
* Textualism assume that there is consistent usage of words (assumed within a statute or across statutes) Presumption of Consistent Usage Canon (e.g. Marshall - statute distinguishes PCP doses – Congress knows how to distinguish and chose not to with LSD; Scalia’s use of other statutes in WVUH v. Casey); Whole Code Canon
* Textualism assumes that differences mean something (the choice to include or the choice to omit)
* Textualism assumes no surplusage
* Textualism assumes the ordinary meaning of a word (sometimes semantic meaning)
* Allowance for absurdity doctrine but if the practice isn’t actually producing the absurd result, its significance weighs less (e.g. Easterbrook in Marshall)

**Critique of Textualism**

**Absurdity Doctrine**

**United States v. Kirby (1868)**

* “knowingly and willfully obstruct or retard the passage of the mail”
* Sheriff was charged for arresting a mailman in the course of his duties for a murder warrant.
* “General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.”
* Absurdity doctrine fits comfortably with intentionalist or purposivist arguments that Congress would have amended the language had it been aware of this absurd situation. They are just giving measure to what Congress would have intended. Most textualists would accept *Kirby* in that it doesn’t reflect a clear bargain of the legislative process, but rather an oversight.
* Field argues Judiciary does not have authority to impose absurd result – faithful agent argument

**King v. Burwell (2015)**

Question: Are the ACA’s tax credits available in States that have a Federal Exchange instead of a State exchange and if that exchange qualifies under the language of “an Exchange established by the State” under section 1311 of the ACA even though the act provides that tax credits “shall be allowed for any applicable taxpayer” under 26 U.S.C. 36B(a).

Roberts Opinion

**Ambiguities from Statutory Structure**

* **Qualified Individual:** Argues that since statute defines state as “each of the 50 states and DC,” it cannot fit, but within the overall statutory scheme, “established by the state” is not so clear. The Act contemplates there will be qualified individuals on every exchange even if it not established by the state and so introduces an ambiguity in tension with the phrase “qualified individual” is an individual that “resides in the State that established the Exchange.” This is a **textualist** argument as well.
* **Definition of Exchanges:** Roberts argues that all of the requirements that an Exchange must meet are in Section 18031, and the definition of an Exchange refers to 18031, so it is sensible to regard all Exchanges as under that provision. If Federal Exchanges were not established under Section 18031, then none of the Act’s requirements would apply to them. Thus, “an exchange established by the State under 18031” is ambiguous (and thus plain meaning cannot be applied).

**Whole Text Purposivist Argument**

* Roberts also argues that since the state purpose is to avoid death spirals and the requirements of 18031 are designed to combat that, it would seem to contradict the statute’s purpose (as discerned from the text) for them not to apply.
* **Ancillary Provision Doctrine: Congress does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions**, citing Whitman v. American Trucking Assns. (2001).

Scalia Dissent

* Plain-meaning Argument: What reason is there for writing “established by the State” if not to limit that provision to the state?
* Scalia argues that there could be a reason why the statute is structured this way; reminds Roberts that legislation can have multiple purposes. Also points out that a State would have much less reason to take on the different burdens of setting up an exchange if its citizens could receive tax credits no matter who establishes its Exchange. Argues that finding this tax credit only applies to states would give states incentives to set up their own exchanges, which is another purpose of the statute.
* Scrivener’s Error

**Critiques of Textualism**

* Absurdity doctrine – what is the value in letting a crazy result stand?
* Congress does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions.
* Textualism is only selectively realist about the bargain but ignores Congress’s lack of understanding about the text or ability to correct text after disciplined
* Needlessly formalist against purpose/reason Congress passed the statute; not a faithful agent

**Linguistic Canons**

Examples

* Eiusdem generis (of the same type) – when a catchall term appears at the end of a list of specific terms, it is narrowed by those terms
* Expressio unius canon – the expression of one thing implies the exclusion of another
* Noscitur a sociis – a word is known by its associates – e.g. we don’t know what a “bank” means until we get more context whether it is about financial institutions or rivers
* Rule of the last antecedent – a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that immediately precedes it
* Series qualifier principle – when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modified at the end of the list normally appliers to the entire series (in tension with nearest-reasonable referent canon)
* **Refers to the canon “when Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” Stone v. INS (1995).**
* Surplasage Canon
* Whole Text Canon – words mean the same throughout a statute
* Specific governs the general

**Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (1995)**

Section 9 of the Endangered Species Act of 1973 makes it unlawful for someone to “take” any endangered or threatened species. The Secretary of the Interior had promulgated a regulation that defines the statute’s prohibition on takings to include “significant habitat modification or degeneration where it actually kills or injures wildlife.” The term “take” is defined in the act, including “harm.” The regulations that implement the statute defined “harm” as an act which “actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”

Question: Did the Secretary of the Interior exceed his authority by interpreting “taking” of an endangered species as “significant habitat modification or degradation where it actually kills or injures wildlife?”

Stevens Opinion

* Plain meaning
* **Surplusage Canon**: Stevens responds that harm supports direct and indirect action, otherwise “harm” has no meaning compared to the other definitions of take in Section 3. Could argue that they are so similar that there is already redundancy, so the surplusage canon is not the right canon to go to.
* **Broad Purpose**: “the ESA’s broad purpose to protect endangered and threatened wildlife.”
* **Amendment** **Canon** suggests indirect takings: The fact that Congress gives the Secretary permission to grant a waiver under 9(a)(1)(B) “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity” suggests that Congress understood indirect and as well as direct acts as being encompassed. Rejects that incidental only applies to accidental killings.
* **Rejection of noscitur a sociis:** Rejects that “harm” must be a direct application of force because the words around it do – an application of *noscitur a sociis*. First, some of the words, such as “harass” and “pursue” do not require direct applications of force.
* **Legislative History**: Refers to legislative history to support interpretation of “take.” Points out that “harm” was not originally in the bill but added intentionally to fit purpose.
* **Rejection of Rejected Language**: Much broader definition of “destruction, modification, or curtailment of the habitat or range.” Deletion does not mean that the Senate did not intend a more moderate habitat protection (only when it injures or destroys wildlife).

O’Connor Concurrence

* Agrees that the regulation is limited to habitat modification that causes death or injury to identifiable protected animals. Also finds that application is limited by ordinary principles of proximate causation, which encompasses issues of foreseeability.

Scalia Dissent

* Argues that 1) “significant habitat modification” occurs whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury 2) it does not require an “act”, an “omission” will do 3) thinks the statute encompasses harm to individual animals but not harm to a general population (through disruption of breeding patterns).
* **Narrow purpose argument**: Believes the legislation forbade the hunting and killing of endangered animals and focused on using federal lands and funds to protect endangered species, not on private lands.
* Take is a **term of art** meaning to reduce wildlife to man’s dominion. Believes the Act’s expansion of the definition of take only includes acts that are in the process that accompany taking. Believes the court gives too much weight to 1532(19)’s definition as self-executing and ignores 1538(a)(1)(B)’s enactment (which uses take in isolation). **Finds the agency’s choice of definition of take unreasonable since the meaning adopted doesn’t conform with the term of art meaning of take. Believes that the agency’s definition of harm stretches the meaning of the operative term “take” too far past its definition**.
  + **Question of whether a term of art’s operative meaning should limit a statutory definition or whether a statutory definition, once defined, should govern over the term of art’s operative meaning.** In Bond v. United States (2014), Roberts resorted to plain meaning that “chemical weapon” implies combat and not toxic chemical irritants. Scalia maintained that the statute provided its own definition of chemical weapon and in dissonance between ordinary meaning and the unambiguous words of a statute **should be resolved by the unambiguous words of the definition of the statute**. It may be that because the definitions in *Sweet Home* created uncertainty about the meaning of “harm” such that one has to return to the plain meaning of “take” as the operative term. That did not happen with the definition of chemical weapon in Bond because the definition was not as ambiguous.
* **Noscitur a Sociis**: Believes that all the words surrounding “harm” connote affirmative conduct intentionally directed against a particular animal or animals (and even ones w/o direct applications of force have **direct intent to take an animal**)
* **Rejects the broad purpose** of endangered species act argument that Stevens uses to justify approach. Argues **legislative history** (though he argues its invalid and engages merely to rebut the point) shows that habitat and takings were seen as two separate provisions.
* **Plain Text:** The amendment in 1982 for taking waivers refers to incidental hunting accidents and that Congress has referred to incidental takings in other statutes as well. Scalia acknowledges that the House and Senate Committee Reports contemplate the Secretary to permit environmental modification, which supports Stevens’s argument. But the text of the amendment doesn’t support that meaning, especially since this would be a huge change within an act that doesn’t prohibit private environmental modification.
* No **Proximate Cause** Requirement: Agrees that the statute contains proximate causation or foreseeability limitation in 1538(a)(1)(B) because it is action directed at animals. But points out that the Court rejects this reading when it finds that harm encompasses direct and indirect injuries. Finds that that the regulation’s definition of “harm” as “actually causing” **dispenses with a proximate cause requirement.**
* The Court concedes that the statute requires that injury be done to particular animals but the regulation still includes impairment of breeding, which only affects species as a whole, which, to Scalia, contradicts this statutory requirement.

**Substantive Canons**

* **No retroactivity – presumption that statute does not apply retroactively unless Congress explicitly says so**
* **Rule of Lenity**
* **Constitutional Avoidance**

**Rule of Lenity**

1. A criminal statute is ambiguous
2. Tie goes to criminal defendant barring a clear statement for the harsher rule

United States v. Bass (1971)

Language of 1202(a)(1): “who receives, possesses, or transports in commerce or affecting commerce …any firearm”

Does “in commerce or affecting commerce” of 1202(a)(1) apply to “possesses” and “receives” as well as “transports?

Holding: 1202(a)(1) is ambiguous and so will be read, under the rule of lenity, to cover only firearms using in commerce.

* **Surplusage Canon Rejection:** Natural construction suggests it applies to all three. It wouldn’t make sense to outlaw all possessions but then allow transportation that is not in commerce. Government argues such a reading would conflict with Title IV and make it redundant since Title IV is about transportation. But Marshall argues that Title IV covers a different class of people (largely misdemeanors) and punishes for a narrower set of crimes – mostly interstate commerce activities whereas Title VII is meant to cover a broader range of activities (any commercial activity). Also points out that there is redundancy anyway since both cover transportation.
* **Lack of Clear Leg. History:** Marshall believes the legislative history lacks a clear overwhelming direction in the face of an ambiguous statute.
* Marshall affirms the rule of lenity and that the statute hasn’t “clearly and unmistakably” made the rule. Argues rule of lenity for notice reasons and because of moral condemnation of criminal law requires legislative action (not to be made by courts). Also wants more clear statement if federal government is going to meddle in a domain traditionally associated with state affairs.

Blackmun Dissent

**Last Antecedent Canon**

* Blackmun would require a comma to read “commerce” to only apply to transports. Finds clear evidence of where the drafters meant an referent to refer to the previous three verbs. Believes that the limitation shrinks it to a duplication of 18 USC 922 (g) and (h).

Arguments for Lenity

* Fair notice (does fair notice matter if no one reads the law – yes, legitimacy of the system depends on it)
* Rule of law argument – we want to encourage Congress to be clear – a kind of reformist textualism – also, this allows the judiciary to be predictable about how it will respond to unclear rules – clear so that you can’t have vague, broad statutes that law enforcement can interpret too broadly – provides notice to law enforcement officials
* Nondelegation argument – broad, vague statute leaves too much power to the courts to determine what the law is – argument is that it should be read narrowly or else the court taking too much authority – but why does this not apply in civil cases? – argument that the stakes are higher in criminal law; also, an efficiency argument that it would be difficult for judiciary to interpret the law; constitution advances criminal law special protection in 4th, 5th, 6th, and 8th amendment
* Institutional Structure - Lenity is a counter to how congress would have passed the statute because Congress has incentive to criminalize – opposite of a faithful agent rule – protects minority rights – and Congress will have incentive to be clear about when it wants to be harsh – enhances separation of powers
* Judges applying this policy isn’t just independent judicial legislating - comes from authoritative source of legal command – either the common law or the Constitution
* Statute has to be ambiguous before lenity can kick-in

**Constitutional Doubt**

**Doctrine of Constitutional Avoidance**

A statute should be construed if **fairly possible** to avoid a question that would raise a serious doubt as to the statute’s constitutionality

* Has to be a serious, tough constitutional problem
* Has to be “fairly possible” reading to avoid constitutional question
* With avoidance, court decides not to decide that something is unconstitutional – so you cannot cite this case for the proposition that the other interpretation is therefore unconstitutional – they just choose not to decide

**Zadvydas v. Davis (2001)**

Money Text: "[3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, **may be detained beyond the removal period** and, if released, shall be subject to [certain] terms of supervision ....” 8 U.S.C. § 1231(a)(6).

Holding: We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.\* \* \* . Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit “reasonable time” limitation, the application of which is subject to federal-court review. \* \* \*

Breyer Opinion

**Constitutional Avoidance**

* In our view, the statute, read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States. It does not permit indefinite detention.
* The Fifth Amendment’s Due Process Clause forbids the Government to “depriv[e]” any “person ... of ... liberty ... without due process of law.” And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or in special circumstances like an asylum commitment.
* Breyers says it would be different **if there was a clear intent** to give the Attorney General indefinite power, but there is no clear intent and that that is true whether protecting the community from illegal aliens is a primary or secondary purpose.
* The Government points to the statute’s word “may.” But while “may” suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word “may” is ambiguous.
* If Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms. Cf. 8 U.S.C. § 1537(b)(2)(C) (1994 ed., Supp. V) (“If no country is willing to receive” a terrorist alien ordered removed, “the Attorney General may, **notwithstanding any other provision of law**, retain the alien in custody” and must review the detention determination every six months).

Kennedy Dissent

**Constitutional Avoidance**

* Argues this is a separation of powers issue where the judiciary has re-wrote an amendment against Congressional intent.
* The rule allows courts to choose among constructions which are “fairly possible,” *Crowell v. Benson,* 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932), not to “ ‘press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.”

**Lack of Ambiguity**

* The majority does not demonstrate an ambiguity in the delegation of the detention power to the Attorney General. It simply amends the statute to impose a time limit tied to the progress of negotiations to effect the aliens’ removal. The statute cannot be so construed. The requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design.

**Whole Text Canon**

* Other provisions in § 1231 itself do link the requirement of a reasonable time period to the removal process. See, *e.g.,* § 1231(c)(1)(A) (providing that an alien who arrives at a port of entry “shall be removed immediately on a vessel or aircraft” unless “it is impracticable” to do so “within a *reasonable* time” (emphasis added)); § 1231(c)(3)(A)(ii)(II) (requiring the “owner of a vessel or aircraft bringing an alien to the United States [to] pay the costs of detaining and maintaining the alien ... for the period of time *reasonably necessary* for the owner to arrange for repatriation” (emphasis added)). That Congress chose to impose the limitation in these sections and not in § 1231(a)(6) is evidence of its intent to measure the detention period by other standards. \* \* \*

Why Avoid Constitutional Questions?

* Judicial modesty – worse to say that Congress acted unconstitutionally than to just fix the problem for Congress
* Stabilizing function – shocking for judiciary to invalidate and overpower another branch – is it healthy for a court to frequently declare unconstitutional laws? Destabilizing if this happens; want to keep their legitimacy by not getting ahead of popular opinion
* Legislative supremacy – faithful agent will assume that actions are constitutional
* Promote deliberation – if Congress doesn’t like it – it can change it

Downside

* Declaring it unconstitutional would discipline Congress not to be bailed out
* Or should the Court get ahead of popular opinion?
* Should Court raise the cost to do legislation?
* Doesn’t actually answer constitutional question or create precedent

Rationale / Arguments of Constitutional Avoidance

* Judicial Modesty – to avoid striking down a law because it is unconstitutional, stability argument as well / it’s inappropriate for judicial power to create a new standard
* Legislative Supremacy – assume legislature wouldn’t violate constitution, faithful agent/ Counter: majority is not being a faithful agent and just re-writing the statute
* Provoke Congressional response and Congress can amend it / Counter: Congress can amend it if the whole thing is struck down

**Interpreting Statues Over Time**

Is meaning established at T1 (when statute was passed) or T2 based on updated meaning)

Conditions for Dynamic Statutory Interpretation

* Statute contains a dynamic term susceptible to changed meaning
* Statute is old and ripe for updating
* More concrete and abundant the evidence of change

Arguments for Dynamic Statutory Interpretation

* Supports broad construction of statute’s purpose
* Different for Congress to contemplate every situation; judicial discretion is built into the institutional design of separation of powers
* Notice argument that statute should track to meaning understood now
* Pragmatic – inevitable and Congress has difficult doing this
* Discretion is restrained by other statutory enactments and common law (precedent) – legislature deliberately chooses ambiguous terms, delegating and empowering judiciary to update as times change (this is the most faithful agency)

Arguments against Dynamic Statutory Interpretation

* Separation of power concerns – not the responsibility of the judges to update law – significant that Congress has not done this
* Which is more countermajoritarian (dead hand – frozen in time – or letting unelected people decide)?
* Undermines predictability and stability
* Do we want narrow updating if society becomes more narrow? If politics were inverted, would you be okay with judges updating?

Variations

* Specific Intent Purposivists (language fixed at T1)
* General Intent Purposivists (language can change along with general purpose)
* Frozen Meaning Textualist/Originalist (frozen at original public meaning)
* Updated Meaning Textualist (Legislature chose a broad term that would be pegged to public perception in the future)
* Imaginative Recreationists (How would drafters approached problem? If no answer, judge uses best discretion)
* Dynamic Statutory Interpretation (Posner – separation of powers – judges are given discretion to update when a large gap between society of enactment and present society)

**Specific Intent**

**Imaginative Reconstruction**

* Commonwealth v. Welosky (Mass. 1931) – read “all persons qualified to vote” as only referring to men in jury requirement considering when the statute was enacted in the 19th century, only men could vote – thought that lowered property requirements were within the scope of the legislators but not women voting
* “But statutes do not govern situations not within the reason of their enactment and giving rise to radically diverse circumstances **presumably not within the dominating purpose of those who framed and enacted them**.”
* If the legislators did not envision flexibility in that particular way, it cannot be

**Dynamic Statutory Interpretation**

* Judiciary is a relational agent – whose ongoing contractual relationship whose “primary obligation is to use her best efforts to carry out the **general goals** and specific orders [of her principal] over time” – leaving the work to the judge to “**fill in details and implement the statute in unforeseen situations** over a long period of time.” Sometimes **those decisions will be at odds with the specific intention** of the original direction. However, Eskridge argues that there is a general intent and a meta-intent about how to reconcile conflict between the specific intent and the general intent. A relational agent must “first understand the assumptions underlying the original directive, including its purpose and then must figure out how the statute can best meet its goals in a world that is not the world of its framers.” relational agent uses best judgment to determine the best decision (Posner) – Also **interpreting based on common law** (Oberfell, Oncale) – updating in light of judicial precedents that have come in the interim

Drawbacks:

* Judges may not always be good at figuring out when new developments justify deviation from a clear, specific statutory directive that the principal would have approved of
* **Does not respect the constitutional and other safeguards built into the lawmaking process** that favor deliberation, the status quo, and protection of minorities against populism
* **Legislators might have wanted a rigid directive** despite changing circumstances and judges changes laws undermines legal stability and predictability – so defies Congressional purpose

Combination

* Some Congressional statutes could be drafted with bright-line rules such that Congress is signaling whether it wants a faithful agent or a relational agent

Textualism vs. Dynamic Interpretation

* **Legislative intent or purpose could be broader or narrow** than the norms embedded in the text
* Scalia will argue that once another statute changes the meaning of “elector” then the court must honor the original statute pegging itself to particular language

**Hampton v. Mow Sun Wong (1976)**

Does discrimination in employment on the basis of “national origin” violate the Due Process Clause?

If Congress when passing the statute believed that immigrants were undesirable at the time of the passing of the statue, should that be frozen in time or should that be updated?

* Judiciary could argue that they can update Pendleton Act based on modern sentiments (Stevens avoid this)
* Judiciary could turn this into a non-delegation case (which is what Stevens does)

Marshall and Brennan make clear that it is not decided if Congress and President can do this – Stevens seems to be avoiding the constitutional equal protection question

* General view at the time were immigrants were less desirable than citizens to the public (explicitly repudiated by caselaw that non-citizens deserve respect – 1886, Yick Wo v. Hopkins - court finds that non-citizens are covered by the equal protection clause) – 14th amendment refers to not being allowed to deny to any person (doesn’t say citizen) equal protection

**Hively v. Ivy Tech (7th Cir. 2017)**

Does “sex discrimination” cover sexual orientation?

Wood Opinion – Comparative Methodology

* **SCOTUS Common Law & Updated Meaning Textualism:** Refers to SCOTUS’s ruling in *Oncale* that male-on-male sexual harassment was clear that even if Congress was not concerned with this particular form of harassment when enacting the bill, **“it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed; our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”** Points to other expansions of Title VII to other protected class that the particular Congress did not envision.
* **Argues that Supreme Court rulings have affirmed that the correct rule of law is not decided by what someone thought several years ago.**
* **Manning: textualism can be broader than purposivism in a case such as this; textualists could peg a term to update meaning (though there could be a textualist who freezes at original public meaning); purposivists can go both ways (statute was meant to be a general protection against discrimination; statute had in mind women being treated differently than men)**

Posner Concurrence

* Three flavors of statutory interpretation: original meaning of statue, interpretation of unexpressed intent, judicial interpretive updating. Posner is okay with the last one as long as there is a lengthy interval between enactment and reinterpretation. **Wants to be clear that judges are using their discretion to update the meaning of a word, which he feels is in the discretion of judges, not interpreting a text as it is written**.

Sykes Dissent

* Agrees that it does not matter what the legislators thought the meaning was – that what matters is “**the meaning the statutory language conveys to a reasonable person** at the time of the enactment.” Argues that there is no overlap in description of characteristics.

**EEOC v. R.G. and G.R. Harris Funeral Homes (6th Cir. 2018)**

* Does discrimination on the basis of sex cover transgender status?
* General Intent Argument: “**statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed**.” .

**Big-Picture Agency Questions**

* **How much legislative power can be given away?**
* **How much the legislature control power that has been delegated?**
* **How much can the legislature limit executive power?**
* **What is the right amount of insulation from politics?**
* **If there are problems, is it an issue with the constitutional structure, or because of partisan politics?**

**Nondelegation Doctrine**

Summary

* Intelligible principle is doctrine
* Unclear if it’s too broad a domain or too broad guidance within a narrow domain
* Fixes for Nondelegation Problems
  + Procedural constraints (notice and comment, findings of fact)
  + Substantive constraints (supply factors)
* 2 visions of Sep. of Powers: separation of functions (expertise in function) – to make government more efficient; mixing of functions to create checks and balances – to create more slow deliberation
  + Does the Constitution want government to be efficient or inefficient?
* If Sep. of Powers is about checking each other’s power to prevent tyranny, are institutions actually striving to get more power?
* Does the overlaying of a two-party system mess up the structure of governance in the Constitution?

Constitutional Backdrop

1. No explicit constitutional requirement of separation of powers; traces this power to the Vesting Clauses – I, i; II, i; III, i; some find that affirmative words are negative of other items.

* Cass Sunstein argues that it may reflect inadvertence, an inability to agree, or factors other than to make enumeration exclusive.
* Could it be just an initial delegation of power that can later be mixed and matched?
* Massachusetts Constitution states it more explicitly, as do several other earlier provisions

1. Structural Arguments
   1. Structural Evidence of Separated Powers
      1. President and legislators don’t choose each other as in parliamentary systems; selection of judges, but once judges are chosen, they are insulated
      2. Difficult for members of different branches to remove each other (President and Judiciary cannot remove members of Congress; it requires a lot of effort for Congress to remove others)
      3. Congress has limited control over the salaries of both the President and the Judiciary
      4. I, §6, cl. 2 – Incompatibility Clause prevents simultaneous offices from being held as in a parliamentary system between Congress and the President and Judiciary, but you can hold executive office and judiciary office at the same time
      5. I, §9, cl. 3 Bill of Attainder Clause prevents Congress from exercising judicial function
   2. Structural Evidence of Blending – do the exceptions show that separation is the norm or that powers are meant to be blended?
      1. I, §7, cl. 2 – President participates in Legislature through veto power
      2. I, §3, cl. 6 – Chief Justice and Senate preside over impeachment
      3. II, §2, cl. 2 – Appointments Clause - Senate provides input on officers
      4. II, §2, cl. 2 – treaties must be approved by Senate
      5. I, §3, cl. 4 – Vice President serves as president of the senate with tie-breaking vote
2. Inferences from Historical Understandings and Practice – historical experience of legislature dominating the other branches – Madison’s Federalist No. 51 – importance of each branch being able to check each other and suggested that blending of authority helped prevent encroachments from the other branches

* Numerous Purposes of Separation of Powers
  + 1. Create greater governmental efficiency
    2. Assure statutory law is made in common interest
    3. Assure that law is impartially administered and that all administrators are under the law
    4. Allow people’s representatives to call executive officials to account for their abuse of power
    5. Establish a balance of governmental powers
    6. Avoids one branch of government overstepping, but also allows each branch to specialize in its practice

Different Philosophical Justifications for Separation of Powers

* Formalist argument – Vesting clauses establishes separations
* Structuralist argument – aspects of the Constitution establish specialized roles
* Functionalist Argument – government is more efficient in carrying out policies and government works better
* Is the guidance for separation of powers embedded within the clauses rather than a general, overall philosophy?
* How much did the founders suppose that practical construction by responsible government officials would resolve the ambiguities – Madison’s Federalist #37; courts have respected legislative processes followed since the founding – Ex parte Quirin (1942)
* How much deference should the judiciary give to congressional determinations? Scalia would argue that if two branches disagree, neither can be presumed correct; James Bradley Thayer argued that the courts should only disturb a legislative judgment only when there has been a “very clear mistake” about its constitutionality, relying on the Necessary and Proper Clause
* McCullough v. Maryland (1818) – Marshall finds that when Congress sets up the governmental mechanisms for carrying out a “legitimate” governmental end, Congress may use “all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.” But Marshall also gave the judiciary the final say as to what is the law in Marbury v. Madison (1803)? Can the courts use the necessary and proper clause to limit Congressional power – SCOTUS said yes in Printz v. United States (1997)

1. Formalists vs. Functionalists

* Formalists believe the Constitution draws relatively sharp boundaries between the powers and responsibilities assigned to different branches; unconstitutional to reassign a power from the branch to which it is assigned; believe that Constitution is fixed by historical understanding of 1789, not some abstracted purpose behind the constitution; Brandeis viewed it as the preclusion of arbitrary power
* Functionalists believe the Constitution left things undecided and left the constitutional structure “at a high level of generality”; view Necessary and Proper Clause as a way to determine the shape of the government, especially since the Constitution says little about admin. agencies; favor purposivist approach that leaves core functions in tact and preserves appropriate balance of power to adapt to modern times ; fear unraveling of post-New Deal admin. state due to formalism
* Does functionalism give too little weight to specific agreements on structural questions from the text or history? Can functionalism glean those purposes and their determinacy?

1. Defining the Three Powers: How can one distinguish the different powers (FRCP is a good example – Congress delegates to the judiciary – is this the judiciary taking on a legislative power?)

**Delegation of Lawmaking Power**

**The Virtues and Vices of Delegation**

* What’s the purpose of putting Congress as a central figure in the branches of government if it just delegates itself out of power? But Congress can also just take the power back and amend the statute

Benefits

* Administrative Agencies have expertise that makes them more effective policy makers, especially in more technical fields
  + Since admin. agency heads are usually political appointees, why couldn’t Congress just add more members of staff to committees?
  + Does the day-to-day experience of adjudicating real cases give the agency more expertise?
* Congress has too little time to nail down the details of the complexity required for regulations
* Legislative process is slow and cumbersome and makes it difficult for Congress to react to new information quickly and effectively
* Partisan politics may prevent sensible, pragmatic decisions being made on the best information (in some cases, e.g. military bases, pork might be the biggest interest; interest-groups might be too controlling)

Drawbacks

* Founders believed that cumbersome process protected government from overreaching on individual liberty and to preserve the states as principal lawmakers – perhaps Congress should legislate less?
* Isn’t it anti-democratic to insulate Congress from politics? Couldn’t this provide a greater propensity for arbitrary, incompetent, or even abusive decision-making without voter recourse?
* Legislators can also evade responsibility for decisions – they can take credit when the agency decision works on their favor and deny responsibility when it is unpopular – perverts democratic accountability; also, some congresspeople might have more influence with agencies than others and could influence agency implementation in a way that other congresspeople aren’t aware of (e.g. in judicial dependence on legislative history and committee reports)

Checks on Admin. Agencies

* Congress has the **ultimate power to expand, contract, or eliminate the admin. authority by statute** (Congress sometimes delegates less to agencies far from the opinion of Congress)
* Voters can hold congresspeople accountable for the amount to which they are delegating to admin. agencies
* Committees can oversee agencies (which sophisticated voters can pay attention to)
* President and Senate select agency heads
* President head executive agencies, which is accountable to voters

Benefits of Robust Admin. State

* Industrialization made flexible responses to external environment more essential than balance struck by 18th century understanding of the role of federal government (which was more limited)
* SCOTUS cases recognize that circumstances have changed – American Power & Light Co. V. SEC (1946)
* Without delegation, there could be open-ended statutes or crude, ill-thought-out statutory response; could lead to de-facto delegation to the judiciary, which might be unqualified

J.W. Hampton, Jr. & Co. v. United States (1928)

Customs collector charged six cents per pound for barium dioxide. This was two cents more than that fixed by statute. The rate was raised by the collector by virtue of the proclamation of the President issued **under §315 of Title III of the Tariff Act** which is the so-called flexible tariff provision.

Tariff Act gives President power to adjust duties “whenever the President, upon investigation of the differences in costs of production of articles of the United States and of like or similar articles of competing foreign countries, shall find that the duties fixed in this act do not equalize the said differences in costs of productions in the United States and the principal competing country.” President is empowered to make changes to equalize those costs of production. President is supposed **to take account of four factors to make this determination**.

All **investigations are to be made by the United States Tariff Commission**, which was required “to give reasonable public notice of its hearings and reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.”

* Intelligible principle should be some kind of clear order – problems could be too many things over which you have power (domain) or the domain could be limited but the guidance within that domain is not that clear (lack of rules) – they could be related (e.g. you could limit the domain very narrowly but allow discretion or a very broad domain but clear rules)
* Potential Cures:
  + Procedural constraints – adding steps in the process
  + Substantive constraints – adding factors
* But no defined caselaw around intelligible principle – so it’s unclear how much discretion or how many rules are required

1. Nondelegation doctrine – affirmed in Mistretta v. United States (1989)
   1. Separation of Powers – general Constitutional commitment embodied by Locke; however, even Locke reserved for Executive the right to change the law to adapt to circumstances

* 18th century agency theory said that delegated power could be sub-delegated;
* some believe that English constitutional tradition came to regard as unconstitutional the Crown’s exercise of power to make law through proclamations even with Parliament’s assent
* others believe that “delegated authority” constitutes a form of executive authority
  1. Article I Vesting Clause –
* Only this clause uses the word “all” when vesting “all legislative powers”
* Necessary and Proper might allow Congress to delegate or transfer that power
* Some argue that the “proper” is a term of art limiting delegation
* Promulgating rules might not be legislative power
  1. Bicameralism and Presentment
* Canon of structural interpretation that when a law gives a new power and provides a specific, full, and adequate mode of executing the power or enforcing the right, the implication is that will exclude any right to resort to any other mode of executing the power or enforcing the right (why go through the trouble otherwise)
* However, if delegation occurs through bicameralism and presentment, then surely the process will weed out bad delegations

1. Historical Practice

* Delegation of broad rulemaking power since the beginning of the republic, from payment of military pensions to negotiating licenses to trade with Native American tribes
* Wayman v. Southard (1825) – SCOTUS sustained a statute authorizing the Court to prescribe rules governing the execution of judgments in the federal courts
* Other SCOUTS cases have emphasized that not everything can be delegated
* But given Congress’s self-interest, should the judiciary’s longstanding assertions about the meaning of the Constitution count for more than competing constructions implicit in legislative practice?
* Court has always articulated a strong non-delegation principle but almost never applied it to strike down an act of Congress; should the modern court go by what the Court has said or done?

1. The Intelligible Principle Test

* Assumption that Courts can draw a distinction between an agency implementation of a policy decision and an agency’s exercise of legislative power
* Does it distinguish legitimate delegations of legislative power from illegitimate?
* Does it distinguish between legislative and executive lawmaking?

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

* The Courts only have used the nondelegation doctrine to strike down laws in two cases: Panama Refining Co. v. Ryan (1935) and A.L.A Schechter Poultry Corp. v. United States (1935) which struck down provisions of the National Industrial Recovery Act (NIRA), a centerpiece of the New Deal. Schechter Poultry struck down central provision of NIRA to allow President to approve “codes of fair competition” (production and price controls) to be submitted by trade or industrial groups. Under § 3, once the President approved a code of fair competition, it became binding federal law, and any firm in the relevant industry that did not comply with the code could be prosecuted and sanctioned.
* New Deal reformers saw separation of powers as an impediment to needed social and economic reform

A.L.A. Schechter Poultry Corp. v. United States (1935)

* No intelligible principle
* Vague terms might be constitutional with background of narrow term in common law or **public procedure and judicial review** to narrow the meaning of the term
* It could be that the domain (improving the economy) is too important to just give sole discretion to the president
* Looks like both a broad domain (every industry) and big discretion (no limits on the codes) – unclear if one factor is predominating
* Actual production of the code looks too much like a law so it looks like legislation, but in Hampton, production of codes were allowed
* Court finds that this term is **vague** – refers to other terms – FTC Act defines “unfair competition” and common law for the term “unfair competition”
* In common law – illegal misrepresentation, fraud – narrow legal definition
* **If it were a narrow legal term of art**, this might be constitutional
* FTC Act has an administrative structure with public procedure and judicial review to define “unfair methods of competition”
* It could also be that private parties are involved (industry groups play role in proposing codes) (but the president is making the codes, so there is a check)
* Doctrine is inchoate because this is the only case that fleshes out the nondelegation doctrine, so we don’t know which themes is driving the decision
* Hampton was concerned with each branch fulfilling its special function; Schechter is concerned with the executive having too much power and no checks and balances
* Cardozo points to “ambition counteracts ambition” as the guiding concern
* Checks and balances produces deliberation that produces better laws
* Checks and balances also protects minorities from the tyranny of the majority

**Demise of the Nondelegation Doctrine**

Summary

* Nondelegation doctrine is still dead; nondelegation canon is still alive
* Kagan has a theory of checks and balances as a means to **create efficiency (separate government)**; Gorsuch sees checks and balances as a mixing to **limit each branch and protect interests** (mixed government)
* Kagan’s Clarification on the “Intelligible Principle” test
* 1) what task has been delegated 2) what instruction Congress has provided

Industrial Union Department, AFL-CIO v. American Petroleum Institute (1980) **(Benzene Case)**

OSHA of 1970. Litigation is about standard promulgated to regulate occupational exposure to benzene, a substance which causes cancer at exposure at high levels. In § 3(8), “occupational safety and health standard” is defined as “standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, **reasonably necessary or appropriate** to provide safe or healthful employment or places of employment.” Where toxic materials or **harmful** physical agents are concerned, the standard must also comply with §6(b)(5) – “most adequately ensures to the **extent feasible** on the basis of the best evidence…**no employee will suffer material impairment of health** or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”

* Where the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that §6(b)(5) requires him to set an exposure limit at the lowest technologically **feasible** level that will not impair the viability of the industries regulated. The Secretary set an exposure limit on airborne concentrations of benzene of one part benzene per million parts of air (1 ppm).
* OSHA concluded unequivocally that benzene is a carcinogen. It concluded that the industry had **failed to prove that there is a safe level** below which no excess cases of leukemia would occur. It concluded that in the absence of such proof, that any level above zero represents some increased risk of cancer. It reiterated its understanding that §6(b)(5) mandates that it **must be at a safe level or that lowest feasible level**, whichever is higher. Concluded that benzene was **essential** and that **1 ppm was workable** without threatening the economic welfare of the affected firms.
* The government interprets “**feasible” as meaning technologically achievable at a cost that would not impair the viability of the industries subject to the regulation**. Industry representatives argue that feasible means a **cost-benefit analysis that is about equa**l.
* Stevens Majority
  + believes the question is unnecessary because the Secretary failed to answer the threshold finding that a **significant risk** of material health impairment exists with respect to a toxic substance.
  + the language and structure of the Act, as well as its legislative history, indicate that it was intended to **require the elimination, as far as feasible, of significant risks of harm.**
  + Reads § 3(8) to control §6(b)(5) and he interprets “reasonably necessary” to mean “significant risks,” and that it’s the agency’s burden to show that the risk is significant – gets “significant” from the meaning of “**harm**” (Marshall makes a surplusage canon argument about 3(8) controlling (b/c then 6(b)(5) would be redundant) and the specific should govern the general, not the opposite)
  + **believes the mandate is too broad and reads into the statute a significant risk requirement that must be quantified: “Safe” is not the equivalent of “risk-free.”** Before the Secretary can promulgate any permanent health or safety standard, the Secretary must make a threshold finding that a place of employment is un-safe – in the sense that s**ignificant risks are present and can be eliminated or lessened by a change in practices.** Believes that § 3(8)’s definition of a standard is incorporated by reference to § 6(b)(5) and all other references to standards must be routed through § 3(8). Expert testimony that a substance is a human carcinogen would justify regulation limited only by the constraint of feasibility. Argues that Gov’t’s interpretation would impose enormous costs that might produce little, if any, discernable benefit. Argues that **quantification of risk is required** for constitutional avoidance of such a broad standard.
  + Finds that since it is difficult to quantify the risk, that the burden is on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not **that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment**.
  + Stevens says that in the absence of a clear mandate, it can’t be assumed that the gov’t wanted to give such **broad power** to OSHA
* Powell Concurrence: If threshold requirement is met, would require **balancing of economic impact to expected benefits**. Legislative history and purposes of the statute do not support OSHA interpretation that for significant risks, such risks must be reduced regardless of any economic consequences beyond massive viability failure. Interprets feasible as **economically** feasible.
* Rehnquist Concurrence:
  + **Believes that § 6(b)(5) does not provide enough guidance as to how the Secretary is to balance safety with economic impacts.**
  + Points out that feasibility is not limited and that in legislative history, Congress has been able to define such limits. “To the extent feasible” is just a wish, precatory. Points out that Secretary declined to adopt standard lower than 1 ppm for some industries because of “administrative difficulty” and extrapolates that if he can reject for this reason, he can reject for any reason, including political feasibility.
  + Reaffirms importance of nondelegation – Congress makes the most important decisions, provides an “intelligible principle,” and allows the Court to test admin. actions against this principle. Believes it fails on all three counts since there is no guidance on what feasibility means. Believes that finding the first sentence of § 6(b)(5) an invalid delegation would preserve the authority of Congress.
  + Rehnquist doesn’t want nondelegation to die by association with Lochner era substantive due process and Commerce Clause jurisprudence
* Marshall Dissent
  + Legislative History: Disagrees with plurality construction of “reasonably necessary or appropriate” to require “more likely than not” that the risk is a “significant one. Believes that first sentence of § 6(b)(5) sets the standard that **“no employee will suffer material impairment of health.”** Argues there was a lot of legislative attention to develop the first sentence of § 6(b)(5), **there was no attention paid to the “reasonably necessary or appropriate” construction.**
  + Finds that the plurality ignores the plain meaning of § 6(b)(5). Finds that the Secretary was in full accord with mandate. **Congress has made the hard policy choice to let the Secretary do as he must to ensure worker safety**. Believes that plurality’s understanding of feasible (cost-benefit) contradicts the “no employee will suffer material impairment
  + Believes that Secretary did find a significant risk, hence the issuance of the ruling.
  + **Points out that science may be inadequate to quantify the risk in a manner the Court asks for and make it impossible to protect American workers.**
  + Specific governs the general, not the other way around

**Doctrine of nondelegation has created pressure for Courts to read statutes narrowly to avoid constitutional questions (and thus a canon of statutory construction). Potential for this in the nondelegation context to amount to just judicial rewriting of statutes (or usurpation of legislative power).**

* In the case of two readings of a statute, one of which presents a nondelegation doctrine and one that doesn’t, read the narrower meaning, avoiding the constitutional issue (canons are not doctrine, but they are persuasive)

**Gundy v. United States (2019)**

Kagan’s Clarification on the “Intelligible Principle” test

1) what task has been delegated 2) what instruction Congress has provided

Caption: Gundy argued below that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to “**specify the applicability**” of SORNA’s registration requirements **to pre-Act offenders**. The District Court and Court of Appeals for the Second Circuit rejected that claim as had every other court (including eleven Courts of Appeals) to consider the issue. Today, we join the consensus and affirm.

Question: Does 34 U.S.C. §20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violate the nondelegation doctrine?

Answer: 34 U.S.C. §20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), does not violate the nondelegation doctrine.

* Kagan Opinion
  + The constitutional question is whether Congress has supplied an **intelligible principle** to guide the delegee’s use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.
  + That is the case here, because §20913(d) does not give the Attorney General anything like the “unguided” and “unchecked” authority that Gundy says. The provision, in Gundy’s view, “grants the Attorney General plenary power to determine SORNA’s applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.” If that were so, we would face a nondelegation question. But it is not. **This Court has already interpreted §20913(d) to say some-thing different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible.** And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General’s discretion extends only to considering and addressing feasibility issues.
  + Gundy’s view that AG has expansive, broad power bases that argument on the first half of §20913(d), **isolated from everything else**—from the second half of the same section, from surrounding provisions in SORNA, and **from any conception of the statute’s history and purpose**
  + **Purpose:** So begin at the beginning, with the “[d]eclaration of purpose” that is SORNA’s first sentence. §20901. There, Congress announced . . . that “to protect the public,” it was “establish[ing] a **comprehensive** national system for the registration” of “sex offenders and offenders against children.” That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. Gundy argues placement of purpose in preface renders it unable to be considered in interpretation. Kagan responds that purpose, wherever it appears, can be used for statutory interpretation.
  + **Tense:** The Act’s definition of “sex offender” makes the same point. Under that definition, a “sex offender” is “an individual who was convicted of a sex offense.” §20911(1). Note the tense: “was,” not “is.” This Court has often “looked to Congress’ choice of verb tense to ascertain a statute’s temporal reach,” including when interpreting other SORNA provisions . . . Here, Congress’s use of the past tense to define the term “sex offender” shows that SORNA was not merely forward-looking. The word “is” would have taken care of all future offenders. The word “was” served to bring in the hundreds of thousands of persons previously found guilty of a sex offense, and thought to pose a current threat to 4 the public.
  + **Legislative History**: According to the House Report, “[t]he most significant enforcement issue in the sex offender program is that over 100,000 sex offenders” are “‘missing,’ meaning that they have not complied with” then-current requirements. H. R. Rep. No. 109–218, at 26. There is a “strong public interest,” the Report continued, in “having [those offenders] register with current information to mitigate the risks of additional crimes against children.” Id., at 24. Senators struck a similar chord in the debates preceding SORNA’s passage, repeatedly stressing that the new provisions would capture the missing offenders. See, e.g., 152 Cong. Rec. 15338 (2006) (statement of Sen. Kyl) (“The penalties in this bill should be adequate to ensure that [the 100,000 missing offenders] register”);
  + **Statutory Interpretation:** Gundy maintains that “specify the applicability” gives Attorney General full discretion. “Specify the applicability” thus does not mean “specify whether to apply SORNA” to pre-Act offenders at all, even though everything else in the Act commands their coverage. Kagan argues the phrase instead means “**specify how to apply SORNA**” to pre-Act offenders if transitional difficulties require some delay.
  + looks at practical practice that AG never uses this power (similar to LSD case) (if someone isn’t using a power in practice as a means of statutory interpretation – strikes Kaufman as a weak argument)
  + Kagan says that if SORNA is unconstitutional, then so is most of government
  + **Nondelegation:** Court has stated that a delegation is permissible if Congress has made clear to the delegee “the general policy” he must pursue and the “boundaries of [his] authority.” By stating its demand for a “**comprehensive**” registration system and by defining the “sex offenders” required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority.
  + Kagan echoes **separation of powers promoting efficiency** – “wisdom” and judicial modesty – “humility”
* Alito Concurrence: If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.
* Gorsuch Dissent
  + Vesting Clauses
  + Check and balance theory of separation of powers (fair notice (all coming from the statutes instead of multiple places), protecting minorities (needs supermajority rather than just simple majority), to ensure lines of accountability, protect liberty, promote deliberation)
  + Wants bicameralism and presentment; SORNA gives AG too much power
    - **retains difficult and deliberative processes**
    - **promotes fair notice and the rule of law**, ensuring the people would be subject to a relatively stable and predictable set of rules
    - holds **Congress accountable** for the laws they would have to follow.
    - avoids will of president being only determination
    - protects minority interests
    - provides stability and fair notice.
  + Gorsuch believes he is just policing delegation to make it more explicit

**Congressional Control of Delegated Power**

Congressional Control of Agencies Takeaways

* Limits to how much power Congress can give agencies, but unclear what those limits are
* Congress has many mechanisms to control agencies
* Is Congress political unwilling or functionally unable to control the agencies?
* Is Congress acting as it should (since it’s hard to make law) or is this a problem with governance?

Can Congress control the Executive Branch? Why would it want to?

* Oversight when admin. agency veers off path
* Oversight when Congress think communication in statute was unclear and agency is misinterpreting it
* Congress could discipline agency and hold hearings to make it seem like they are responding to the problem (but are really displacing blame)

Arguments against Legislative Veto

* Formalist Arguments: fails bicameralism and presentment, judicial in character (Powell concurrence)
* Functionalist Arguments: Admin. agencies are experts – undoing that work doesn’t make sense; special interest groups can influence Congresspeople (counterpoint is that all these decisions are political) but you could argue that both houses have to deal with the issue (but it could give one admin. head too much power); agency’s process might be better
* Why do functionalists join the formalists? It could be a particularly sympathetic case

**Immigration and Naturalization Service v. Chadha (1983)**

Chadha overstayed nonimmigrant student visa. INS issued order to show cause. Chadha appealed to Attorney General for suspension of deportation under 244(a)(1) of the INA. Attorney General granted under “extreme hardship.” House rejected grant under “legislative veto.” of 244(c). Chadha appealed that the provision was unconstitutional.

* Why would Congress like legislative veto: 1) avoids president and other chambers
* **Burger Opinion**
  + Majority is worried about **unconstrained power of Congress**; okay with agencies having power as long as there are limits and judicial review
  + Concedes utilitarian nature. But refers back to Separation of Powers
  + **Presentment** Clause: Founders wanted to preserve executive veto given that Congress needed to be restrained and wanted to check populist impulses for bad laws and for executive to defend himself.
  + **Bicameralism**: Importance of deliberation.
  + In 244(c)(2) is legislative in purpose and effect in establishing a “uniform Rule of Naturalization.” Points out that absent the provision in 244(c)(2), Congress could only enforce a deportation granted relief by the Attorney General through amendment or repeal. Notes that Amendment and Repeal can only happen in accordance with Article I. **Executive action under legislatively delegated authority that might resemble “legislative” actions in some respect is not subject to the approval of both Houses of Congress and the President**. (Burger is okay with this). Judicial review can police the executive within the bounds of statutory limitations. **Bicameralism and presentment must accompany any alteration to a delegation unless that delegation is revoked (through bicameralism and presentment)**.
  + Notes the four places where the Const. was explicit about when one house could act alone (impeachment, impeachment trial, appointments, treaties).
* **Powell Concurrence**
  + Congress assumes a **judicial** function with this particular legislative veto
  + Legislative veto is in hundreds of statutes.
  + Passing a specific law and **reviewing the specific findings** of the INS is judicial in character.
  + Notes the danger of this, as Congress is **not constrained by internal substantive and procedural rules as judiciary and administrative agencies are** – it can just deny the decision without reason.
* **White Dissent**
  + Worries that Congress faces **impossible choice of not delegating authority and having to write super-specific laws** or **give its law-making function to the executive branch and administrative agencies.** To choose the former leaves major national problems unresolved; to choose the latter risks unaccountable policy-making.
  + Notes that the **veto has been used defensively** rather than offensively when it has been used.
  + Argues that it doesn’t allow law-making since it is **vetoing something proposed by the Executive rather than passing a law**. Finds that there is no record that **bicameralism and presentment should restrain scope of Congressional power** for a law that passed both bicameralism and presentment.
  + Argues that Necessary and Proper clause covers “to accommodate its legislation to circumstances.” McCulloch v. Maryland (1819). **Doesn’t read Article I to put a check on power delegated to executive.** **Worries about power of executive agencies** absent this veto since they can issue regulations without bicameralism and presentment.
  + Notes that the **Court has acceded to quasi-legislative function** of agencies and so meet court’s definition of “affecting legal rights.” Since Congress is the ultimate legislator, **shouldn’t they have veto-power over quasi-legislation as the highest authority**? Believes Article I is more about Congress not giving away its power rather than constraining it. “Reservations of legislative authority…by Congress should be upheld if the exercise of such reserved authority is consistent with the distribution of and limits upon legislative power that Article I provides.”
  + The central concern of the presentation and bicameralism requirements of Art. I is that when a departure from the legal status quo is undertaken, it involves bicameralism and presentment. **Argues that suspension of deportation is a change in status quo, not the deportation**. If the change is all right, the President has signed off and Congress has signed off by not vetoing. **The disagreement of any one of the three maintains the alien’s pre-existing status: President can not recommend it; House or Senate can veto it.** Thus, nothing is changed within the limits of presidential power.
  + The history of the separations-of-powers doctrine is also a history of accommodation and practicality. Harks to the sep-of-p as efficiency doctrine instead of disciplining.
* **Because Court presumes an action is within branch’s power, it assumes that the suspension is an executive act and the veto is a legislative act.** Court finds that this was still executive b/c it is subject to the check of the bill that authorizes the power. It all depends on the framing of this action – if it is executive, then the delegation doesn’t encroach on legislative power, **but the legislative veto does encroach on executive power**. Notes how the same act (giving relief for the breaching of a government contract) could be characterized as different depending on which branch carries it out.
* Bicameralism and Presentment as **Exclusive Legislative Method**: Canon of interpretation that if Constitution carefully delimits how a power is to be exercised, then that specified manner is exclusive. Founders were most concerned about restraining Congress’s unchecked power. But if **broad delegation is an underlying purpose**, **doesn’t a legislative veto restore some of the balance** that bicameralism and presentment hoped to achieve?
* In sep-of-p thinking, there is a **norm against self-delegation**. 1) Makes it harder for oppressive laws to be written that spare supporters. (could use it to exempt themselves or to favor interest groups) 2) lowers incentive to create clear, transparent, and discretionary-constraining statutes – lawmaker could then control exercise of that discretion. Arguably Congress has less pressure or motivation to pass laws if they know they can always maintain discretion.
* Is this a retreat from New Deal critique of sep of p formalism or just drawing a line from further expansion beyond the nondelegation doctrine?
* Is delegation between legislative/executive functions harder to delineate than an institutional mechanism? Is the **Const. much more clear about the legislative power** and its limits than the executive power?
* Respecting settled practice is built into the founders’ expectations – should there be more deference accorded to Congress for the length for which this practice has existed. Should the court be less deferential when it involves the accumulation of power? Burger suggests that such acts carry more scrutiny.
* Legislative vetoes still inserted and still on the books – they have no legal effect – but this may cause compliance given that agencies know they can be threatened with other legal forms of congressional review.
* Congress should only give agencies the power to propose regulations and Congress could retain power to approve them. **Conservatives have pushed the REINS Act to say that any new major regulations should go through bicameralism and presentment**. They argue it is constitutional because no regulation could go into effect without legislation meeting requirements of I, vii. Others argue that this is too similar to Chadha and may be found unconstitutional.
* **Congressional Review Act (CRA)** – an agency must submit a rule to Congress 60 days before it goes into effect; **if both the House and the Senate pass a disapproval resolution, signed by the President (or overridden by 2/3 veto), then the agency rule is vetoed**. Comes with expedited processes to bypass committees in the Senate and that a disapproval passed by one house must be brought to the other chamber (can’t get stuck in committee). Only has been used once for an OSHA promulgation at beginning of Bush presidency – some argue it still influences administrative promulgation. Trump administration used CRA to eliminate many Obama-era regulations.

**Other Forms of Congressional Control**

Structure of Agency

* Congress makes the agency and what powers to give to the agency
* Organic statute can impose substantive restraints – Sunshine Commissions (early agencies) were restricted to issuing reports
* Congress can structure the head of the agency (terms, mandatory partisan requirements)
* Congress can impose procedures
* 1946 – APA (Administrative Procedure Act) – Founding document for agencies

Congress lacks authority to veto agency provisions but has other powers.

a. Appropriations

Congress funds agencies (some funded by direct taxes on regulated parties)

1) Can attach “riders” to prevent money from being spent on disfavored activity or requiring it be spent on favored activities. **Easier to pass** than substantive statutory amendment since bills must be passed to keep government running.

2) Committee overseeing an agency is given significant control over that agency and has incentive to keep them happy.

3) Congress can control how aggressively or expansively an agency pursues its tasks, but it’s a blunt instrument since it cannot control precisely what it will do with more or what it will cut with less. Can create a mismatch as sometimes Congress can pass expansive laws with shoestring budgets to make it seem like they are addressing an issue. Suggestion that drastically-underfunded budgets should be considered repeals. Federal Reserve has more independence since funding is not tied to Congress.

* Congress can stop agency functionally by underfunding mandate (but does this actually make the agency more powerful to determine what to do with their funding)

B. Hearings, Investigations Audits, and other Forms of Oversight

* Holding hearings
* Conducting investigations
* Press releases criticizing agencies
* Sharply worded letters
* Request information (e.g. House Judiciary Act requested information from the judiciary about drone kills)
* Subpoenas of Executive Branch
* Harassing agency and requesting volumes of documents

These are effective because they are preludes to more drastic Congressional action (cutting budget, amending statutory authority, eliminating agency); threat of oversight even influences behavior. Congress can also interact with lower-level agency officials, which incentives supervisors to listen to Congress lest they be unable to control their subordinates. Hard to disaggregate Congressional influence from other influences (President, public outrage, agency prerogatives, lobbying).

C. WACOs Confirmations

**Presidential Power**

**Big Questions:**

How much power can Congress give away?

How much can the President control the agencies?

What is the right amount of insultation from politics for bureaucracy?

Do you want Congress to be able to limit Presidential power to police the bureaucracy?

Are problems with the Constitutional framework or the two-party system grafted on the Constitutional framework?

**Appointments Clause**

**Larger Question:** How insulated do we want an agency to be? Do we want to it to reflect the President’s will as elected by the voters? Or do we want to insulate an agency in order for the functioning of a modern government. Also, is it better to answer these questions case-by-case as Morrison suggested or do we want rules like PCAOB?

Art. II, section II, clause 2 – presidential appointment power

**Hiring**

* For principal officers – has to go through advice and consent
* Permits inferior officers to be appointed without WACOs – Congress can vest in the President, Courts of Law, and Heads of Departments
* **Morrison Four factors of inferior officers**: subordination, duties, jurisdiction, and tenure.
* Court does not provide guidance about how to balance these factors.
* **Edmond**: inferior officers only because they have one of the factors – some question of whether the holding in Morrison is good law (regardless, subordinate is critical factor) but unclear how Edmond interacts with Morrison
* Sometimes norms have governed when advice and consent applies and it hasn’t been tested in the court
* Buckley: Officers exercise significant authority; Lucia – indicia of significant authority; employees aren’t governed by Art II, section ii, clause 2

**Firing**

* Tenure protections are permissible for principal officers / inferior officers (unless the principal officer already has tenure protection – PCAOB) unless it unduly trammels executive power (so independent agency heads are okay) – Morrison, Myers/Humphrey’s
* Functions of office at issue and authority of the officer at hand dictate permissibility of removal restrictions; **Myers/Humphrey’s Test is a factor in this consideration**
* Test is slightly unclear because there is not caselaw on different officers of executive branch, but independence of SEC, FTC is secure
* Slightly unclear if the executive bypassing chain of command is legal
* PCAOB probably only applies to officers, not employees otherwise the whole administrative state would come apart (but this isn’t entirely clear) (Lucia)

**Classic Theories of Presidential Power**

**Takeaway**: **Myers** stands for a broad view of executive power and restrictions on removal violate vesting clause, take care, and appointments clause and that the Constitution envisioned a plenary power for the Executive

**Takeaway**: In **Humphrey’s Executor**, President’s power to remove is restricted depending “upon the character of the office.” He may remove executive officers unilaterally (via Myers), **but he may not remove administrative officers who have mixed executive/legislative/judicial functions with fixed terms except for causes named by statute**.

* Theories of Executive Power
  + **Unitary Executive Theory** – President must directly control all exercises of executive theory and has plenary power because all of executive theory is vested in the President
  + **Weak Executive Theory** – President is in charge of executive branch but there are functional and pragmatic limits on executive theory to prevent President from having too much authority
* Can Congress write a **statute that limits the power of the President to remove**?
  + Take Care Clause – this statute limits power of the President to actually make sure the laws are faithfully implemented
  + Vesting Clause – “all executive power” – vested power in Executive – if they wanted to limit the President’s power of removal; listing suggests a limit – that these are the only powers, strong executive theory suggests these are just pointing out what are the limits
  + Appointments Clause – appointments and removals are two sides of the same coin; a pretty vast power is read into something that is not explicitly stated; if Congress has the power to create and destroy the office, why doesn’t the Congress have the power to control it

**The President’s Removal Power**

**Myers v. United States (1926)**

The relevant act of Congress states “Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.”

Question: Does the President have the exclusive power to **remove executive officers** who have been appointed with advice and consent?

Holding: The President has exclusive power to remove executive officers who have been appointed with advice and consent.

* **Taft Opinion**
  + President argues that Article 2 empowers him to have sole removal. There is **no express provision** respecting removals in the Constitution.
  + Madison argued that it should be an exclusive power, arguing for the separation of powers and that the “Take Care” clause governs this duty. Since **the President needs to trust that his subordinates can take care to fulfill their duty**, this appointment is inherently an executive power about the implementation of the laws. Also argues that the Crown appointed and removed executive officers.
  + Also argument that **power of appointment inherently carries the power to remove**. However, since the power of appointment is limited, should not the power of removal as well? Notes historical reason for appointment limitation – to make sure the President didn’t only appoint from large states.
  + Also noted that a veto on removal is a **much more significant limitation** than a rejection of a proposed appointment. The President can always select someone else to be appointed and Congress can always reject a bad candidate. Argues that the **President has better information about how a subordinate is carrying out his/her/their policies**. Power of removal is incident to power of appointment, not appointment limited by advice and consent.
  + Believes that it gives Congress too much discretion to weaken the Executive, which is precisely what the founders were trying to avoid. Believes since the idea of exclusive authority is more logical, **the Constitution would have specifically vested the power in Congress or specifically limited the power of the Executive if it wanted that.** Notes the difference between the **specific grants to Congress** and the **more general grant to the Executive**, where power is only strengthened by specific terms and limited where necessary.
  + Notes that Madison would not have wanted to thwart the Executive by insubordinate people or people whose policies clash with the President’s priorities.
  + **Take Care Clause**: Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.”
  + Notes that the First Congress processes show how this was implemented in practice since the Constitution was not conclusive.
* **Holmes Dissent**: Argues that Congress controls the duration and pay of executive agencies and creates the office, so it makes sense that Congress should be able to control how long a head stays in office
* **McReynolds Dissent**
  + McReynolds is skeptical that the President can remove a duly appointed admin. officer when **Congress had prescribed a fixed term and is worried about Presidents arbitrarily removing officers**.
  + Notes that Congress has enacted many statutes prescribing restrictions on removals.
  + Wants super clear language for such Executive authority.
  + **Broader view of Congressional Power**: Wonders if any constitutional provision limits plenary power of Congress. Believes that Congress can vest the authority to remove in another besides the President. Notes instances where Congress limited removability of federal officers in territories.
  + **Limited Executive Power**: Subscribes to the theory that Article II provided carefully defined grants of power to the President rather than broad executive authority. Refers to canon that general words are limited by the specific words that follow them and the president is limited by specific grants of executive authority
  + Even if executive authority is that broad, Congress can use **necessary and proper authority** to pass laws on removal.
* **Brandeis Dissent**
  + **Broad View of Congressional Power**: No express grant of removal, to imply such a grant is a limitation on Congress’s power.
  + Notes that none of the 13 states gave this power to their state governors.
  + Notes that removal restrictions in other statutes became law with approval of President.
  + Wants to give judicial construction status to 50 years of court practice.
  + Notes that a minority of the founding Congress believed that the President had the unique power of removal.
  + Brandeis notes formalist views of **separation of powers** that each power was checked by the respective power of a different institution to avoid tyranny.
* Taft sees **Article II sees it as sweeping** and sees legislative power in Article I as much more limited; **Dissent sees Article I as making more expansive legislative power with “Necessary and Proper” clause** – these go back to core debates about which branch we are more afraid of.
  + Founders fear legislature and wants it limited (both from England and Articles of Confederation)
  + Founders gave legislature expansive power and limited Executive Power (fear of one-person rule)
  + Legislature has power to check executive power, but often just isn’t using it (impeachment, appropriations)
* Myers argues that removal power is more powerful and more important than appointment power – is the removal power necessary for the president to be effective?
* **Arguments for Broad Removal power**
  + President has more insight into officer’s implementation than Congress
  + President needs someone to implement his/her policy
  + Power to fire is an incentive for stronger performance (not incentive not to be bad)
  + Power to fire prevents sabotage
* **Arguments against Broad Removal power**
  + Maybe you get better people with tenure protection (selection and investment effects), better working environment
  + You avoid creating a team of “yes men”
* Taft tells us First Congress had a broad view of executive power; post-reconstruction, you see limits on the removal power and many presidents sign bills containing removal provisions (including Taft)

**Humphrey’s Executor v. United States (1935)**

* Rise of independent agencies: Interstate Commerce Commission - concern about railroads; end of Progressive Era – explosion of independent agencies, including FTC (1914)
  + Commissions begin getting tenure protections
  + Heads of these agencies have for-cause removal protections
  + Multi-member bodies with group decision-making
  + Staggered terms and offices – trying to keep some partisan balance
  + Explicit partisan-balance requirements

President Roosevelt asked for Humphrey’s resignation (who had been appointed by Hoover for a seven-year term). Reason for resignation was completely policy-based. Roosevelt terminated Hoover when he declined to resign.

Question: Is it constitutional for an agency head to have a good cause restriction?

Holding: President’s power to remove is restricted depending “upon the character of the office.” He may remove executive officers unilaterally, **but he may not remove administrative officers who have mixed executive functions with fixed terms except for causes named by statute**.

* Sutherland Opinion
* Notes that the language of the act, legislative reports, and general purposes all point to creating a body independent of executive authority and free to exercise its judgment. Length and certainty of tenure guarantee these.
* **Rejects Myers as a precedent** because postmaster is restricted to executive functions and is not charged with duty relating to legislative or judicial power. Notes that it is dicta that Myers covers all executive officers. Finds that holding does not cover executive officers outside of the executive department and who exercises no part of the executive power. Notes that FTC is an administrative agency to which legislative and judicial power is delegated. **Notes that it must be free from executive control**.
* Notes the authority of Congress to establish agencies to act independent of Executive Control. Notes that Meyers’ precedents hold up – Decision of 1789 referred to an **executive office and an executive office** which was truly responsible to the president. Notes that Madison proposed a different rule for Comptroller of the Treasury. In Marbury v. Madison, Marshall found that a justice of the peace for DC was not removable at will – only those executive officers for whom “their acts are his acts.”

Notes

* **Justification of agency insulation** was based in faith in consistent, expert, technocratic knowledge. Two trends have eroded this faith.
  + First, the realization that it is impossible to be free from political value judgments
  + Second, that interest group capture might be easier on agencies (people switching back and forth between the two, reliance on political support and expertise).
* **Multi-member boards with staggered terms are features of independent agencies and partisan balance requirements**. President still gets majority and usually retains ability to name chair. Only DC Circuit has touched issue about constitutionality – **Federal Election Commission v. NRA Political Victory Fund (D.C. Cir. 1993)** – narrow opinion that the only test case could be if the President nominated and was confirmed someone who tipped the balance (otherwise, the President might just be exercising political restraint rather than actually be influenced by the statute). But the implication is that it **probably violates the Appointments Clause.**
* Scalia believes this a product of an anti-New Deal court suspicious of executive power (comes down around the same time as Schechter Poultry) – but this case becomes the centerpiece of the administrative state
* Humphrey’s sees that the Constitution should accommodate diverse arrangements of shared government power

**Modern Theories of Presidential Power**

**Morrison v. Olson (1988)**

* Is this person a principal or an inferior officer? Does it violate WACOs from appointment clause?
* Is a removal restriction a violation of separation of powers?

Ethics in Government Act requires AG to report to a special court (Special Division) if someone covered by the act might have violated federal law. Section 596(a)(1) provides that “an independent counsel appointed under this Chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”

**Question**: Is the independent counsel provision of the Ethics in Government Act of 1978 constitutional under the Appointments Clause and under separation of powers?

**Holding**: Independent counsel provision is constitutional as independent counsel is an inferior officer and it does not violate the separation of powers.

* **Rehnquist Opinion**
  + Four Factor Test for inferior officer:
    - Independent counsel can be **removed** by Attorney General, and is under AG suggesting inferiority.
    - Counsel can only perform **limited duties** – investigation and prosecution. No authority to formulate policy nor any administrative duties outside of these grants. Counsel must comply with department guidelines to extent possible.
    - Counsel can only act **within jurisdiction** granted by Special Division.
    - **Tenure is limited.**
    - These factors correspond to “ideas of tenure, duration,…and duties” United States v. Germaine (1878). United States v. Eaton (1898) – vice consul is an inferior officer – “limited time and under special and temporary conditions.” Ex parte Siebold (1880) – federal supervisors of elections are inferior officers. Go-Bart Importing Co. v. United States (1931) – United States commissioners, who had various “judicial and prosecutorial powers.”
  + More analogous to Humphrey’s Executor than Myers because this is not Congress establishing its authority to remove – the discretion remains solely within the Executive Branch under the Attorney General.
  + **Rejects rationale of Humphrey’s Executor that analysis cannot turn on what is “purely executive.”**  Notes that what is considered “judicial” in Humphrey’s Executor would probably be considered executive now. Affirms Myers. **The real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed against that.**
  + Notes that “good cause” provision does not affect executive authority. Fails to see how independent counsel impairs the central functioning of the Executive Branch. Since counsel can be removed for “good cause,” the President retains some power to remove. As a result, it does not impair his ability to make the laws are faithfully executed.
  + This case **isn’t about Congressional overreach**. Goes back to good faith provision as the manner in which the AG can monitor the independent counsel. **AG can also choose not to appoint special counsel.** Jurisdiction of independent counsel is limited by facts submitted by AG.
* **Scalia Dissent** – **Unitary Executive Theory**
  + Emphasizes importance of sep. of powers and to prevent encroachment. Notes that Founders were worried about legislature dominating and creating a weak executive. Notes that executive power was vested in president and that Constitution declined to divide executive power among advisers.
  + Worried about accountability of executive officers who the President cannot get rid of (**whereas President is accountability to voters**)
  + Argues that Constitution vests all power in **one single executive** and that **counsel’s functions are clearly executive**, which the majority concedes.
  + Argues that retaining some control is not the same as retaining all control. Notes that AG’s power to not start investigation is really confined by the language of “no reasonable grounds” to start an investigation. Special Division defines scope and duration.
  + **To remove prosecutorial discretion** after appointment is to fundamentally impair the power of the executive. Notes many examples where branches have power over themselves (justiciability of judges’ salaries). Branches should use independent power to check (impeachment, prosecutorial discretion, and dismissal of suits) to check the other branches. Voters should use elections.
  + Argues clear constitutional principle has been replaced by a balancing test and is **frustrated that court doesn’t even come up with standards for that balancing** (nothing that those standards would be outside of the constitution).
  + Also notes that president should be able to protect his staff and that executive officers perform their duties with the knowledge that they will be judged by the executive branch. Notes that Constitution wanted to give executive this power just as Congresspeople are not prosecutable for anything said or done in their legislative capacities (Gravel v. United States 1972).
  + Disputes that independent counsel is an inferior officer.
    - Majority says she is subject to removal by AG – limited nature of removal does not make her inferior. At will removal would make her more inferior.
    - Majority says that her powers are limited – this is relevant to whether she is inferior, but her powers are not limited – she is given full power and independent authority.
    - Majority says that her office is limited in jurisdiction and in tenure. Disputes the tenure limitation, since she can stay for a long period. And just b/c her jurisdiction is small doesn’t mean she does not have full power over that jurisdiction. Also notes that this is a slippery slope argument – cabinet members responsibilities could be made smaller so that all officers are inferior officers.
  + **Take Care Clause Argument / Congressional Slippery Slope**: But argues that if prosecutor can be removed from presidential oversight as it doesn’t impair the executive power, how can one square this with the need to faithful execute the laws? Any officer can be removed from presidential oversight. Believes Congress will create other cabinet members with independence.
  + Scalia also used whole code argument that inferior (as applied to courts of appeals) meant subordination.
  + The purpose of unitary executive is individual freedom. **President is trusted with power of prosecution and if he chooses not to investigate things, people will punish him at the ballot.** Notes that judges pick the counsel and the scope of power – notes that this is just as prey to partisan politics. Finds structure of temporary counsel (where lawyers have to leave their offices with little incentive to investigate an important person) to incentivize criminal prosecution (since otherwise they would have no purpose). But even if that’s okay, there’s no one to blame for the prosecution **since judges have life tenure**. Worries that what is taking “too much power” away from the executive is merely ad hoc judgment rather than a standard rule based in law.
  + **Edmond v. United States (1997)** – Court gave dispositive weight to subordination factor. Holding that CGCC (Coast Guard Court of Criminal Appeals) judges were inferior officers – appointed by Secretary of Transportation – even though they failed ¾ factors of the Morrison test. CGCC judges were supervised by Judge Advocate General who set rules of procedure, can remove judges without cause, and the Court of Appeals for the Armed Forces reviews every decision of the Courts of Criminal Appeals in sentences resulting in death sentence, where JAG orders such review, or court itself grants review. Scalia noted that there was narrow review but noted that CGCC judges cannot render a final decision unless permitted to do so by other executive officers. Souter concurrence noted that one can have a superior and still be as superior officer (uses example of Solicitor General). Question of whether this is a **dispositive test given the amount of supervision on the CGCC judges**.
* How can one tell if a removal restriction “unduly trammels” on executive authority?
  + **Types of function still matters – the less executive the function, the more likely it will not trammel on executive authority**,
  + while President would likely have **plenary removal power over officers performing functions related to core aspects of the President’s executive authority**.
  + The **degree of authority matters** (independent counsel had limited jurisdiction, tenure, and limited policy-making authority).
  + Third, the Court found that since the AG could supervise the independent counsel, it could assure that the laws were carried out properly (and is balanced by the need for independent counsel’s evidence).
  + **Court seems less bothered by Congressional restriction of Presidential power than Congressional aggrandizement.**

**Free Enterprise Fund v. Public Company Accounting Oversight Board (2010)**

Congress passed Sarbanes-Oxley Act of 2002 which included tighter regulation of the accounting industry under a new Public Company Accounting Oversight Board. Board has five members appointed to staggered 5-year terms by the SEC. Board has expansive powers to govern every detail of an accounting firm’s practice. Board has severe sanction power including permanent revocation of a firm’s registration, a permanent ban on a person’s associating with any registered firm, and money penalties. SEC can only removed board members for good cause and in accord with certain procedures, including **willfully abusing authority and through judicial review.** SEC members cannot be removed by executive except under Humphrey’s Executor standard of “inefficiency, neglect of duty, or malfeasance in office.”

**Question**: May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?

**Holding**: Such multilevel restriction violates the executive power clause.

* **Roberts Opinion**
* Roberts cannot overrule SEC protections because of Humphrey’s Executor
* Roberts makes a formalist and a functionalist argument – because he argues that there is too much insulation – that the President cannot actually control the executive authority if there are two layers
  + Notes that dual-cause provision results in Board that is not accountable to the President, and a President who is not responsible for the Board. If Commission can remove a Board member at any time, President can hold Commission to account as he can hold it to account in all matters it controls. The President cannot hold the Commission accountable for its oversight of the Board b/c they can only fire with good cause. He can disagree with their account of “good cause,” but can only remove if it is so reasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office.”
  + Impairs President’s ability to ensure that the laws are faithfully executed.
  + Worries about **Congress sheltering bureaucracy through multiple layers** of “good cause” provisions.
  + **Rejects convenience** as a reason to circumvent constitutional requirements (cites Chadha).
  + Worries about **people being able to hold bureaucracy to account** if President cannot control bureaucracy.
  + Affirms again the President’s need to **protect against encroachment by the other branches.**
  + Court of appeals noted that Commission retains broad authority over Board functions. But broad power over Board functions is not equivalent to the ability to remove Board members. It is still difficult to control inferior officers even if you can control budget, etc.
* **Breyer Dissent**
  + Cites **Necessary and Proper Clause** and McColloch v. Maryland that Congress needs flexibility to meet the demands of the modern world and that rigid limitations are not helpful in that regard.
  + Notes tension with “take care” clause and vesting clause for the President. Notes that Humphrey’s Executor strikes a balance reflecting this tension. No side has absolute power to restrict or to fire at will.
  + Notes that Constitution is not helpful because it is silent on power of removal.
  + Notes that First Congress limited President’s ability to oversee, but not to remove and different members expressed different opinions.
  + Notes that if President seeks to **regulate through impartial adjudication**, then insulation of the adjudicator from removal at will can help him achieve that goal. Notes legitimacy created by the **insulation of technical decisions** from nontechnical pressure. Notes **judiciary’s lack of expertise about the administrative state** and should be modest in striking down Congress’s decision to create “good cause” removal.
  + Rejects that two-layer cause provision restricts more than one layer. Notes Commission’s power to control Board’s functions, describing Commission’s control over Board “absolute,” **including overruling any sanction the Board imposes**. If President’s control over Commission is sufficient, and Commission’s control over Board is absolute, then President’s control over Board should be sufficient.
  + Technical expertise of Accounting Board is important and Congress and President in bicameralism and presentment, found it wise to insulate this technical expertise.
  + Notes other two-layer “good cause” positions such as administrative judges and civil servants.
* Ways of Viewing Conflicting Perspectives
  + Is this a **formalist vs. functionalist debate** or is there a more considered use of the effects of political accountability and the dangers of political diffusion.
  + Most previous Supreme Court cases had only struck down cases where Congress inserted itself in removal proceedings – so SCOTUS was formalist about Congress’s intrusion on executive power to remove but functionalist about congress legislating executive limits on removal.
  + Is this the **Morrison balancing test**, but where Congress went too far?
  + Or is it that the **PCAOB’s power is much broader** than an independent counsel? Would Morrison have been decided differently if there were two-layer “good cause” protection for the independent counsel?
  + Or did the novelty of the two-layer structure put off the court? Should novel arrangements be constitutional suspect? Is such suspicion a violation of the Necessary and Proper clause?
  + Does this represent an iteration of the Morrison balancing test and its functionalist approach or does it represent a **newer analysis of Congressional encroachment even where there was no Congressional aggrandizement**?
  + Perhaps the reasoning in Free Enterprise is that **President need someone to squeeze** – but then what is left of Humphrey’s Executor?
  + Would the court have upheld Free Enterprise if the removal restrictions for PCBAO were only good cause?
* You might be more concerned about tenure protections lower down if you think there is going to be a difficult relationship between career appointees and political appointments

**Takeaways from PCAOB**

* View #1: Guts whole layer of insulation and amplifies President’s power
* View #2: 2nd layer of tenure protection is irrelevant and this is inconsequential
* View #3: All these rules don’t matter because practical and political norms do enough work to keep people from being fired

**Current Debates about Presidential Power**

Question of whether a removal restriction trammels on executive power

* Removal restrictions are okay – what role does the officer serve and the more expansive the role and the more power the officer has (but in Morrison, the role was pretty powerful), the more likely it trammels on executive power
* Free Enterprise – what does two layers mean? Is it only direct subordinate? Could it be having any power? Could it be through funding?

**Buckley v. Valeo (1976)**

* FEC regulates federal elections
* Doctrine to distinguish officers from employees: Exercising significant authority pursuant to the laws of the United States
* Court finds **appointments clause exclusivity** – the necessary and proper clause does not supersede appointments clause.
* Congressmen cannot serve as officers of the United States
* Finds that House ratifying President’s pics don’t fit within WACOS. Speaker of the House and President Pro Tempore also don’t fit within language of inferior officers appointment, as “Heads of Departments” suggest some connection with the Executive Branch, notes that Congress is excluded.

**Lucia v. SEC (2018)**

Commission could oversee an administrative proceeding against a wrongdoer, but they usually delegate it to an ALJ. **Other staff members**, other than the commissioners, select the ALJs. ALJ has extensive powers including all oversight of procedure in an adversarial setting and the ability to issue sanctions. Thus, ALJs have power equivalent to a federal district judge. ALJs issue “initial decisions.” The Commission can review the decision de novo upon request or sua sponte, but if it doesn’t review it, the decision becomes final. Lucia argued that since the ALJs were appointed by staff members rather than the Commissioners, it was constitutionally invalid under the Appointments Clause. SEC argued they were employees. Commission argued that ALJs do not “exercise significant authority independent of [its own] supervision.”

* Doctrine for officer: 1) “continuing and permanent” 2) “significant authority”
* Kagan has a functionalist approach; case-by-case approach analogizes to *Freytag* and looks at the factors of power in Freytag to determine what constitutes significant authority; no bright-line rule
* 4-factor test: Kagan says that ALJs are just like STJs. They can 1) “take testimony,” “examine witnesses,” 2) “conduct trials,” and “regulate the course of a hearing” 3) “rule on the admissibility of evidence,” shaping the admin record, they can punish “contemptuous conduct” including violations of those orders, including excluding the accused from the hearing; and 4) ALJs can issue decisions containing factual findings, legal conclusions, and appropriate remedies. And because if SEC chooses not to review, it becomes final, ALJs have more power than the STJs. Amicus SEC argues that ALJs had less authority to sanction misconduct b/c STJs can imprison. Also, SEC does not have a deferential standard for reviewing ALJs findings of fact – it is de novo. Kagan argues that ALJs still have power to enforce compliance, just different powers; also, even if regulation doesn’t provide deference, SEC often does provide deference in findings of fact and acceptance is near automatic; also, “final binding decisions” are relevant but not dispositive
* Sotomayor wants “final binding decisions” to distinguish officers from employees – formalist opinion
  + Believes ALJs are not officers because SEC retains the right to overrule them – ALJs only issue initial decisions, especially since the SEC’s review of a decision is de novo. SEC is also not confined to fact findings of ALJs.
  + Sotomayor believes the holding in Freytag made STJs officers because in some areas they could make final decisions – believes the significant discretion part was unnecessary to the ruling.
* Thomas would expand to all people in the civil service who have statutory responsibility
* Breyer Dissent
  + Case should be decided through APA rather than the Constitution. APA governs appointment of admin. law judges, no statutory provision to delegate authority to its staff. APA specifies that the agency should appoint judges, in this case the Commission. The Commission is a “Head” of a “Department.” Wants to avoid constitutional question about officers (Constitutional Avoidance). Notes that SEC originating statute allows delegation of its function to any employee with a published order or rule, but no order/rule was published. (notes it might be different for other agencies depending on their originating statute).
  + Notes that “other officers established by law” suggests that Congress gets to decide who are officers for the most part (not in every case as the Constitution makes clear).
  + Breyer wants to look to Congressional intent – how much authority they wield and if they are protected from removal; faithful agent model of effecting Congressional intent; Breyer pushes that an interpretation of the Appointments Clause should be based on how the statute shows whether Congress intended for a particular position to be an officer or an employee.
  + Breyer believes that if Free Enterprise takes away good cause protections, then these ALJs are not officers. If it leaves those protections intact, then Congress did mean for them to be officers. Breyer believes that Congress did intend to make administrative law judges officers of the United States. Breyer believes court has to first answer the constitutional removal implications of Free Enterprise Fund first before addressing the Appointments Clause Question.
  + If this applies to all ALJs – Merit Systems Protection Board – independent agency oversees the firings of ALJs – and the members of the Merit Systems Protection Board have tenure protection – but also, independent agencies (like SSA) usually have good cause protection, so it would take out removal protections for all ALJs
  + Possible that you could distinguish these ALJs from other ALJs – but Breyer is concerned that this is an attack on civil service protection

Question: Are there any remaining ways to appoint people outside of WACOs?

* Recess appointments – Senate is in recess – that person must be confirmed by the next Senate session
* Acting appointments – **Federal Vacancies in Office Act** – when a senior executive officer dies/resigns/unable to perform the functions and duties – authorizes the President to choose either the official’s first assistant or any other currently serving officer who has been WACOs or any senior official who has served in the same department for the last 90 days – questions come up about whether acting appointments cover firings – if you demand someone’s resignation, does the statute cover? Limits the serving period to 210 days.
* Senate can hold President hostage; President can circumvent advice and consent of Senate
* Federalist 78 – appointments process is supposed to restrain the President
* Statute was passed through bicameralism and presentment

**CFPB v. Seila (9th Cir. 2019)**

CFPB’s powers include, among other things, the authority to promulgate rules (§ 5512), conduct investigations (§ 5562), adjudicate administrative enforcement proceedings (§ 5563), and file civil actions in federal court (§ 5564). Congress classified the CFPB as “an Executive agency” and chose to house it within the Federal Reserve System. § 5491(a). The Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments, at least some of whom, it has long been assumed, must be removable by the President at will.

Potential Challenges

* Argument that one person has too much power since the CFPB has one head (FTC has 5 heads)
* Argument that if someone has broad enforcement power and sounds like an attorney general, that person should be accountable to the president

Holding

* **Holding**: Single director of CFPB is constitutional
* Humphrey’s Executor – Independent agency heads are constitutional, and it didn’t turn on the fact of multi-headed commission.
* **Morrison and PCAOB left in-tact for “good cause” removals for agencies similar to CFPB**
* However, in Morrison, tenure protection was upheld for independent counsel who had huge amount of executive authority; we’ve also left behind distinctions between executive authority and quasi-legislative authority
* Also, in Morrison, there was one person in power (independent counsel) who was found to be okay in exercising that authority independently
* **President can arguably exert more effective control over the agency if it is headed by a single individual** rather than a multi-member body
* Cites PHH (D.C. Circuit in 2016) and concerned an identical challenge to CFPB – Kavanaugh held that the structure was unconstitutional originally – Kavanaugh says that the holding of Humphrey’s Executor was limited to multi-member independent agencies – when measured in terms of unilateral power, it is the single most powerful official in the US government; en banc review, reversed the panel and Kavanaugh writes a lengthy dissent

Adjudicating vs. Rulemaking

|  |  |  |
| --- | --- | --- |
|  | Rulemaking | Adjudication |
| Informal | * Notice (553(b)) in federal register * Opportunity for comment (553(c)) * Statement of basis and purpose (553(c)) | * Nothing specific, though some generic APA requirements that apply to all agency action apply here (but includes judicial review) * Substantive statute can specify guidelines for informal adjudication |
| Formal | * 553(c) * Notice (553(b)) * Hearing and on-the-record decision (556-557)   Adversarial procedure  Agency bearing burden  ALJ presiding  “**on the record after opportunity for hearing**” – triggering language in organic statute | * Notice (554(a)) (maybe b, c(2) as well) * Hearing and on-the-record decision (556-557)   “**on the record after opportunity for hearing**” – triggering language in organic statute (court are also more willing to require formal adjudication) |

Is it a big separation of powers issue that the adjudicators, the enforcers, and the lawmakers are all housed under an agency?

Why agencies?

* Agencies are nimble and can act more quickly
* Agencies provide expert advice
* Agencies provide insulation from political pressures
* Agencies can deflect accountability for legislators, can look like it’s taking action by holding agencies accountable (without even funding it)
* Agencies less susceptible to interest groups (maybe)
* Adjudications have three categories: 1) enforcement cases – immigration removals 2) entitlement cases – social security benefits 3) regulatory adjudications – setting rates and licensing
* Why can agencies adjudicate at all given Article III?
* What are the limits of what agencies can adjudicate? Is there judicial review? What kind of process does the agency have to go through for rules to have the force of law?

APA

* APA’s rules are default rules that can be overridden by specific statutory directives, but it must be explicit that it is superseding or modifying the APA’s procedural or judicial review requirements
* Rulemaking leads to a rule
* Adjudication leads to an order
* Formal or informal
* APA 706 provides for judicial review of all adjudication
* Formal rulemaking is pretty much dead; formal adjudication is the baseline because more organic statutes have the triggering language for formal adjudication than formal rulemaking
* Notice and comment doesn’t apply to general statements of policy and interpretive rules (question of whether the informal rulemaking has pushed agencies to make eve more informal interpretive rules (e.g. DACA)
* 551 has future effect (rules are future-looking); adjudication can have future affect
* 551 says rules can have general or particular scope
* Agencies can make common-law and policy in adjudication

Forms of Administrative Action under the APA

* a “rule” is defined as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 551(4)
* “rule making” is “an agency process for formulating, amending, or repealing a rule”
* An “order” is pretty much any authoritative agency action other than a rule – “a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but **including licensing**” 551(6)
* An adjudication is an “agency process for the formulation of an order” although this term is misleading because any process producing a final agency action that is not a rule is an “adjudication,” including without an adversarial process

Formal Rulemaking

* Adversarial hearing at which agency proposes rule and carried burden of proof on contested issues and must show that proposed rule is supported by “reliable, probative, and substantial evidence” – ALJ presides (ALJ has special statutory civil service protections)
* Interested parties can participate and present evidence and conduct cross-examination unless the agency concludes that they will not be prejudiced by the absence of such procedures
* Final rule must be based on official record adduced in formal proceedings, and there are strict prohibitions on ex parte contacts with agency decision-makers
* Process of appeal from ALJ’s determination to the agency leadership, and a final disposition must include formal findings of fact and conclusions of law

Informal Rulemaking

* Notice-and-comment rulemaking.
* Three procedural requirements: 1) public notice in Federal Register (time, place, nature of public rule, reference to legal authority, terms or substance of proposed rule or a description of the subject and issues involved) 2) public opportunity to comment 3) must publish an explanation of the rule – “concise general statement of their basis and purpose” but doesn’t have to be based on record compiled

Formal Adjudications

* Adversarial hearings where agency imposes penalty on regulated party or resolves disputes between parties under regulatory scheme
* Opportunity for formal presentation (except in cases involving claims for money or benefits or applications for initial licenses, where the agency may forgo those procedures if the parties “will not be prejudiced”)

Informal Adjudications

* No formal APA section, subject to generic APA requirements, subject to procedural restrictions found in other statutes, the agency’s own regulations, and the Constitution

Distinguishing Rulemaking from Adjudication

* Rule can include general or particular applicability
* Rule-making is future-oriented (legislative) – more concerned with policy considerations
* Adjudication concerns events in the past (judicial) – relate more to evidentiary facts – unlawful conduct, rights to benefits
* Temporal distinction is slightly problematic because adjudication can be future-oriented
* Also problematic to say that rulemaking is about making law while adjudication is about applying law to facts since adjudicators announce general principles of law and policy
* Most times, organic statute dictates rules vs. orders

Formal vs. Informal

* Formal procedures are required if it is **“required by statute to be made on the record after opportunity for an agency hearing” 553(c);** not always clear whether the agency’s organic statute imposes the requirements specified in this provision. Some statutes use same 553(c) triggering language; some use more suggestive language but do not use the same language; others only explicit reference either the “hearing” or “on the record”

Rule vs. Adjudication from Londoner & Bi-Metallic

* Number of people
* Exceptionally affected
* Individualized determination

**Londoner v. Denver (1908)**

Plaintiffs challenged tax against them to pay for public street in front of their property.

* Property owners had a property interest and the Constitution requires an opportunity for a hearing before the assessment of this **individual tax**
* **Holding: Opportunity to be heard is required before changes in taxation if legislature delegates work upon subordinate body. (probably because it was on individuals)**

**Bi-Metallic Investment Co. v. State Board of Equalization (1915)**

State increased valuation of houses and increased taxes and it was challenged if this was an adjudication or a rule.

* One factor is if effect is individualized or general (there can be disparate effects)
* If the rule is issued for a limited number of people, this also seems more adjudication-like
* Also, if you are exceptionally affected (even if it is broad), potentially it could be an adjudication (less important part of the doctrine)
* Note: Courts tend to defer to agencies as to what agencies think they are doing
* **Constitution requires more of an adjudication than a rulemaking** – it requires an individualized hearing – when the law is singling out you for individualized treatment, a hearing is required, perhaps because adjudicative facts are relevant to the outcome, whereas in rule-making, legislative facts are all that are necessary, which don’t require individualized statements
* Adjudicative facts vs. legislative facts: adjudicative facts are types of facts that would normally go to a jury. Legislative facts do not concern immediate parties but are general facts that help the tribunal decide questions of law and policy. Kenneth Culp Davis argues that adjudicative facts ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them – essentially an opportunity for trial. Parties know more about themselves than others and are in the best position to rebut the information. But agencies are masters of legislative facts
* Principle that the Constitution does not impose any procedural requirements when legislative or administrative agencies adopt general law or rules.
* **Minnesota Bd. for Community Colleges v. Knight (1984)** rejected claim that university was required to give forum to present views before administrators formulated policy about labor relations in college teaching matters. O’Connor noted impossibility of enforcement of allowing a right to be heard by public bodies. Notes Smith v. Arkansas State Highway Employees that first amendment does not provide a constitutional right to have government policymakers listen or respond to individuals’ communications on public issues. Notes that structure of government is representative, not direct democracy.

Florida East Coast Railway Company

* Per diem charges so that boxcars are being used more frequently
* ICC has a paper hearing, no oral presentation
* Is “after hearing” enough to trigger 556-557 or formal rule-making

Argument for Railroad Company

* Dissent invokes ICC v. Louisville & Nashville R. Co. to state that ratemaking must be based on evidential facts as in an adjudicatory setting – statute was passed a few years after this case
* Legislative history about House Committee’s commentary
* Plain meaning of hearing
* ICC thought it had to do a full hearing – invoked 553, 556, and 557

Rehnquist Opinion

* **APA Applicability**: In United States v. Allegheny-Ludlum Steel, language of 1(14)(a) about acting after hearing was held not to be equivalent to APA requirement that rule be made “on the record after an opportunity for an agency hearing.” Plaintiffs contend that in 1966 amendments, there is a provision that the “Commission shall give consideration to the national level of ownership.” Rehnquist believes that amendments didn’t specify method by which Commission should acquire information. Rejects two district court interpretations that hearing under 1(14)(a) requires a more formal hearing. Rehnquist argues that “after…hearing” **is not a term of art** and there could be other similar language that triggers 556 and 557, but that “after hearing” does not qualify in part because of the absence of the term “on the record” (Rehnquist uses a whole code canon move here).
* Railroads offer ICC v. Louisville & Nashville R. Co. (1913) where ICC set aside rates after complaint. Rehnquist believes that is a different type of agency structure (pre-APA) than at present where the Commission is empowered to set national rates. Court distinguished due process in Londoner, where a particular set of facts were adjudicated, with Bi-Metallic, where a broader policy was implemented. Cites Ohio Bell Telephone Co. v. Public Utilities Comm’n (1937), where a company was required to refund previously charged rates, could not act with undisclosed evidence that was never made a part of the record before the agency. This is similar to ICC v. Louisville & Nashville R. Co. in that it is an adjudication of disputed facts in particular cases. Determines that that this was a quasi-legislative judgment rather than an adjudication.

Douglas Dissent

* Maintains that hearing is required under 556 as 556 applies to hearings required by 553. Section 553 requires that 556 applies “when rules are required by statute to be made on the record after opportunity for an agency hearing” – Douglas believes that fixing rates is adjudicatory because they fix the financial responsibility of one road for its use of the rolling stock of another road. Promulgation of these rules pursuant to 1(14)(a) is conditioned on the preliminary finding that the supply of freight cars to which the rules apply is inadequate.
* Invokes ICC v. Louisville & Nashville R. Co. to state that ratemaking must be based on evidential facts as in an adjudicatory setting. Believes Congress was cognizant of Louisville & Nashville decision when adopted hearing requirement in 1(14)(a). Also uses legislative history of the chairman of the House Committee on Interstate and Foreign Commerce stating on the floor that full hearings would be required before the Commission acted. Commission also initiated rulemaking procedure by saying it was acting under the authority of 553, 556, and 557. Believes Commission’s interpretation is afforded great weight.

Outcome

* Death of formal rulemaking – unless magic words are in statute, you don’t have to do formal rulemaking procedure
* This opens the floodgates for informal rulemaking – massive amount of regulation done through notice and comment

**Non-Article III Tribunals**

Do you want to have lots of non-article III adjudication to promote efficiency?

* Which aspects of Article III makes it feel legitimate (procedural rights, life tenure, impeachment as only removal)
* Tension between formalists and functionalists – the more it looks like a court, the less efficient that it is
* Formalists are liberals in this case whereas in the nondelegation cases, the conservatives were the formalists – conservatives don’t like being pragmatic about regulation and legislative power and liberals don’t like being pragmatic about allowing agencies to do adjudication and judicial power
* Why is trial-like adjudication permitted in the Executive Branch? Anything that doesn’t have article III tenure protection

Long tradition of admin. tribunals; earliest tribunals are claims for veterans’ benefits; no judicial review until 1899 - United States v. Duell (1899)

Court begins to carve out which categories of cases can be decided by non-article III tribunals

* Territories and DC
* Military Justice
* Public Rights (disputes between individuals and the government) (Tax Liability, radio licenses)
* Private rights (where admin. tribunal is adjunct to article III court)

**Public Rights vs. Private Rights**

From *Benson*: Court made distinction between public rights, creations of federal statute, and private rights, involving “the liability of one individual to another under the [common] law as defined.” Disputes about public rights, between an individual and the government” could be assigned by Congress exclusively to admin. tribunals. Access to Article III courts were only necessary for private rights disputes.

**Crowell v. Benson (1932)**

* Longshoremen had a workers’ compensation system; Commission gives employee award (essentially private tort system); Benson (employer) sues in federal court to challenge constitutionality of commission
* Court holds the Commission is constitutional – acting as an adjunct to an article III court – Article III court can review *de novo* and Commission was acting like a special master (just a first pass)
* **Question**: Can an administrative proceeding adjudicate private rights disputes?
* **Holding**: An administrative proceeding can adjudicate private rights disputes so long as the losing party **may appeal to a federal court**. Affirmed.

**Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (1982)**

Northern Pipeline had initiated reorganization in bankruptcy court and sued Marathon on contract claims related to state law. Marathon moved to dismiss on ground that bankruptcy court judges lacked tenure and salary protection and violated Article III.

* Constitutionality of US bankruptcy courts in question
* **Judges had most powers of Article III courts** except life tenure, enjoining another court, or punishing criminal contempt outside the court’s presence.
* Huge amounts of dispute resolution are happening inside bankruptcy courts
* Can bankruptcy courts hear state law contract claims?
* **Brennan plurality** – not constitutional – relies on Crowell v. Benson – these courts are not mere adjuncts and **are more powerful**
* **White dissent** – distinction between public rights and private rights is untenable – wants functional test: is the transfer of power to a non-article III court **a political attack** by Congress on independence of judiciary
* Northern Pipeline forced Congress to amend Bankruptcy Act. It now requires an affirmative referral from district court. Supplemental claims are subject only to judge’s proposed decision and are reviewable de novo. But bankruptcy judge can determine final issues if all parties consent (which is likely given expediency and preserving good relations with the judge). Courts of Appeals now has appointment power of bankruptcy judges.

**Commodity Futures Trading Commission v. Schor (1986)**

CEA prohibits fraudulent and manipulative conduct with regard to commodity futures transactions. CFTC created as an independent agency. Administers a reparations procedure for customers of professional commodity brokers to seek redress for brokers’ violations of CEA. Congress wanted this procedure to be “inexpensive and expeditious” as opposed to courts and arbitration. CFTC promulgated permissive counterclaim rule so that the defendant in a reparations claim can seek relief against the reparations claimant. CFTC polices violations of CEA – creates a reparations procedure – allows agency to review state law counterclaims that arise out of the same transaction and occurrence. Court of appeals tried to avoid constitutional problem and said that CFTC could only hear counterclaims based on CEA or agency’s regulations (not state tort claims), but SCOTUS believed the act authorized state counterclaims outside of same transaction and occurrence and so confronted constitutional problem.

* **Question**: Does the Commodity Exchange Act, section 1 empower the Commodity Futures Trading Commission (CFTC) to entertain state law counterclaims in reparation proceedings, and, if so, whether that grant of authority violates Article III of the Constitution.
* **Holding**: **Multi-factor test** to determine if private rights are implicated, none of which has been deemed determinative. Basically, is judicial authority is being usurped by Congress.

1. the extent to which “the essential attributes of judicial power” are reserved to Article III courts,
2. the extent to which the non-Article III court exercises the range of jurisdiction and powers normally vested only in Article III courts,
3. the origins and importance of the right to be adjudicated, and
4. the concerns that drove Congress to depart from the requirements of Article III.

* O’Connor takes a functionalist approach – in order to make the regime workable, you can bring **a class of claims related to the underlying transaction** – court doesn’t go through the four categories – **closer to White’s dissent if it is a power grab to limit judicial power**. There may be greater constitutional difficulties if an agency imports wholesale supplemental jurisdiction, but O’Connor declines to rule that out absolutely
* O’Connor finds that CFTC can hear state law counterclaim
  + CFTC under grant of jurisdictional power – small slice of claims – “particularized area of law” (Northern Pipeline Courts covered all civil claims related to Title 11)
  + Optional to file with the CFTC – Conti could have proceeded in federal court (voluntarily dismissed claim); O’Connor doesn’t believe that Congress is withdrawing from “judicial cognizance” Conti’s right to the sum.
  + CFTC rulings are subject to judicial review and no deference given to agency’s findings (*de novo*)
* **Finds that Congressional authorization of limited CFTC jurisdiction over narrow class of counterclaims as incident to CFTC’s primary and unchallenged adjudicative function does not create a substantial threat to Article III power.**
* O’Connor also notes that CFTC’s adjudication is **limited to making reparations claims workable.** The claims must arise out of same transaction or occurrence and dependent on adjudication of reparations claims.
* **Brennan Dissent**
  + Finds the “sharing” of power with district court illusory because convenience will always pressure to go the CFTC route. Finds the reasoning could justify any legislative necessity and party consent that allows other supplemental issues ancillary to federal issues.
  + Worries about individual litigants being deprived of impartiality given agency susceptibility to executive and congressional pressure. Assignment to non-Article III judge is harmful only where legislative or executive branches have encroached on judicial authority. Believes that someone can never waive one’s right to an Article III trial.
* Public rights vs. private rights still shows up (Stern v. Marshall) **but factors from Schor are dominant (outside of bankruptcy courts) for determining private rights**

Public v. Private Rights Schor and Beyond

|  |  |
| --- | --- |
| Case | Holding |
| Schor | **Balancing test** (not as intrusive on judicial authority given review and scope) – limited jurisdiction **on same transaction and occurrence** (**Commodity Futures Trading Commission**) |
| Northern Pipeline Construction Co. v. Marathon Pipe Line Co. (1982) | Bankruptcy judge has too much authority and scope – intrudes on private right – compels consent and limited review (more formalistic) (**Bankruptcy Judge**) |
| Thomas v. Union Carbide Agricultural Products Co. (1985) | Pesticide companies submitted data to EPA and then were part of binding arbitration for compensation. Companies surrendered **state law claim** by submitting data – so wrapped up in regulatory scheme as to **become a public right** (since compensation claims were about marketing scheme) (**EPA ALJ**) |
| Granfinanciera S.A. v. Nordberg (1989) | Affirms public/private distinction b/c of similarity to state law claim (legal right as opposed to equitable right) (although here it was jury trial, not judge power) (**Bankruptcy judge**)  In a bankruptcy trustee’s suit to recover allegedly fraudulent payments made to the defendant by the bankrupt’s corporate predecessor, is the defendant corporation entitled to a jury trial? Brennan found that such claims were legal, not equitable and **that such a recovery asserted a private right**. Emphasized resemblance between trustee’s federal statutory action and a state common law contract action to increase the size of a bankruptcy’s estate. **Congress may not deny a jury trial in an action at law if the statutory right is a private right (and if not closely intertwined with a federal regulatory program).** |
| Stern v. Marshall (2011) | Court **rejected constitutionality of final judgment on state law counterclaim** (that was slightly outside of the transaction and occurrence) as it is a final judgment on a common law cause of action when the action neither derives from nor depends on any agency regulatory regime. (**Bankruptcy court**) |

Reasons for Administration Judges

* intertwined with executive power
* delays of going through an article III court
* expertise rationale (specialized set of judges taking the first pass)
* keep federal judiciary on ballooning
* cynical reason: maintaining prestige of federal judiciary – in tension with federal judiciary being expert
* Do you want less independent adjudicators in order to effect the policy of the agency (e.g. EPA adjudicators are more likely to be on board with agency’s missions) but also an argument for agency capture

**Wong Yang Sung v. McGrath (1950)**

Mix of inspectors sitting as prosecutors and also judges creates problems. Judges then have the mindset created by being an investigator as well as cross-communication between colleagues. Immigrant inspector recommended deportation. Acting Commissioner approved, and Board of Immigration Appeals affirmed. Sung sought release through habeas corpus. Sung was arrested for overstaying shore leave.

* Question: Do administrative hearings in deportation cases have to conform to the APA?
* **Holding**: **APA procedures cure a constitutional requirement of an agency adjudication but are not necessary**
* **reads APA governing Immigration Act or otherwise it would be unconstitutional**
* APA requires separation of adjudication and prosecutorial functions (however, does that matter if judges’ background comes from DHS lawyers or former ICE investigators)
* Immigration judges are ALJs
* **1952 Immigration and Nationality Act overrules Wong Yang Sung** and **adopts INA section 242** – the particular administration approvals – those particular proceedings are found constitutional later on
* The Court didn’t say that it required APA proceedings – it just said there would be a constitutional issue if there wasn’t some kind of protective proceeding – APA provides constitutionally adequate procedures – but later finds that 1952 INA also provides constitutionally adequate procedures
* If not full APA-type procedures – how much process do I have to have in an admin. adjudication to be constitutionally permissible as a baseline?
* **APA procedures cure a constitutional requirement of an agency adjudication but are not necessary** – question left as to what are minimum due process for a tribunal?

**Due Process**

Due Process (Two-Step Process)

* Does the due process clause apply at all? Is there a life, liberty, or property interest at stake?
* How much is the process that is actually do?

Step 1: Does Due Process apply?

* Historically – distinction between rights and privileges – licenses and contracts were privileges – look to common law to determine distinction (constitutional law depends on state common law)
* Four Classifications
  + Regulation (licensing) and taxation
  + Government insurance and assistance benefits
  + Proprietary functions of government: employment, contracting, management of gov’t owned enterprise and resources
  + Custodial enclaves: schools, prisons, mental hospitals

Right-Privilege Distinction

* Licenses were originally deemed a privilege and so could be rescinded at will
  + Courts drew distinction between activities it could prohibit entirely (e.g. alcohol) and those that it is merely regulating
  + For those that the state was regulating, due process rights remained (e.g. taxi driving, cosmetology license, practice of medicine)
  + Cigarettes were found somewhere in between – eventually decided to grant due process hearing
  + Distinctions could differ as to what was a right and what was a privilege depending on the state
* Goldberg – rejects rights/privileges distinction – alternative test for process clause created

Goldberg v. Kelly (1970)

* Question: Does the termination of financial aid under Aid to Families with Dependent Children (ADFC) require a hearing?
* Gov’t concedes that welfare is a right rather than a privilege
* “new property” – by the time this case came around, welfare benefits were much more like old property than gifts of government

New Test

* Brennan’s idea of “grievous loss” as compared with government interest, but no firm test here

Holding

* 1st possible test: Grievous loss test – severity of deprivation
* 2nd possible test: Balance loss against government interest
* Alternative Theory: Reich idea of statutory rights – does a statute confer a right (once it’s granted, it becomes a right, but a privilege before its granted) – but then raises the question of why you don’t get hearings earlier and earlier when it is conferred
* Fourth Theory: Analogizing to common law ideas of property and tort “property” (probably rejected)
* Is due process protecting the individual property right (Brennan) or protecting the administrative cost-benefit analysis and efficient administration (Black)
* **Black Dissent**: Thinks this creates a slippery slope where eligibility will eventually require full judicial hearing with the appointment of counsel. Since it will take so long to kick someone off the rolls, it will incentivize the government not to put people on in the first place.

**Board of Regents of States Colleges v. Roth (1972)**

* Re-hiring declined – no reasons or statements given
* No tenure assumption, so no property interest

**Perry v. Sindermann (1972)**

* Similar firing – employed for 10 years on a series of one-year contracts
* Reasonable enough to assume that he has tenure and thus has a property interest in continuation of job

Court’s distinction

* Roth’s contract says nothing about being re-employed or has no expectation
* Perry – faculty guide says that they should “feel that they have tenure” and that after 7 years, you have something akin to tenure even if it is not official
* Norms matter a lot and norms/external guidance can confer a property interest
* Neither case is looking at grievousness of the loss
* Looking at nature of interest at stake and whether there is an “**independent source of right from law”** – a statute, regulation, or guidance doctrine to convey a property interest and trigger application of due process clause (unclear if norms alone can create that right)
* Only constitution governs state actors; private deprivation is governed by statute

Implications

* **Delegation of rights to legislature to determine the scope of person’s rights**; move by courts to say that these rights do not arise from constitutional law
* Also looks like a **delegation of power to private employers** – given that faculty guide was independent source of law
* Also a delegation to the executive for their guidance as well
* Grievousness of loss no longer seems to be taken into account
* Retreat from thinking about property rights in caselaw – regulatory materials give fewer and fewer rights to prisoners over time – Standon v. Connor – eventually discards prison manual guides and finds rights granted by constitution (and looks like a return to Goldberg analysis of constitutional right)

Doctrine

* Need a statute, regulation, or manual/guidance (or maybe a norm) an “**independent source of right from law”** to trigger due process application for property interests – if you have a due process right (but some courts say that state common law can also still provide a property right)
* Court has delegated to legislative and executive branches power to determine what is a right
* Rejected common law distinction between right/privilege
* But court retains question of how much process is due
* These are mainly about property interests
* Liberty interests are implicated p. 665 (marriage, child-rearing, freedom from bodily restraint freedom to contract, acquiring knowledge, freedom of worship, getting a job) – is this a restriction of my ability to move – simpler doctrine

Due Process Policy Questions

* Can judges know what procedures to require without knowledge of the operational realities of every institution being challenged? Could the burden of proof be placed on administrators to justify due process choices?

Goals of Due Process

* Accuracy
* Legitimacy – more likely to buy into the process was fair if there are these procedural safeguards (is this trying to legitimate an illegitimate process or actually building legitimacy in the process)
* Consistency
* Individual responsiveness
* Efficiency – what is the quickest way to get at an accurate state
* Rationality – APA envisions a government is a reason-giving government (regardless of whether those reasons are fair)
* Transparency – providing reasons for giving decisions, providing a record
* Conduciveness to an atmosphere of cooperation
* Promotion of Dignity and participation values (opportunity to be heard) – self-affirming about having a role about your interactions with the state
* Informing Discretion (fully-informed choices)
* Agency effectiveness and accountability

**Step 2: How much process is due?**

Goldberg

* Constitution requires an in-hearing person, timely and adequate notice, present own arguments and evidence orally, oral presentation (to confront and cross-examine witnesses), impartial decision-maker, right to bring a lawyer (no comprehensive opinion or record), finding must be based on legal rules and evidence adduced at the hearing
* Black’s fear is that this is going to cost a lot since you won’t be able to terminate the benefits; also believes there is a slippery slope where judicial trial will be required with reviewability all the way up to SCOTUS – desire to produce a functional system

Matthews

* Gov’t concedes SSDI is a property protected by due process clause
  + Paper hearing
  + Agency re-considers hearing, affirms decision
  + Then his benefits get terminated
  + Post-termination evidentiary hearing in front of ALJ
  + Administrative appeal within agency
  + Judicial Review in Article III court
* Matthews v. Eldridge 3-Part Balancing Test
* Standard is providing meaningful opportunity to present their case
  + Private interest affected – level of deprivation to plaintiff
  + Government interest (fiscal and admin. burdens)
  + Risk of erroneous deprivation (procedures) + value of additional safeguards at producing a more accurate process
* Court finds that unlike welfare, disability benefits are unrelated to the worker’s income or support from many sources despite burden review will put on disabled worker’s family.
* Court also finds that nature of benefit is better proven through written documentation (such as doctor’s examination notes) rather than oral advocacy and so this additional safeguard is not necessary. Also, written testimony in welfare cases isn’t submitted by an expert whereas in this case, a medical professional will submit their recommendation with lab tests and x-rays. The disabled also still has full access to information relied upon by agency.
* Public interest is that people will just continue hearings if their benefits cannot terminate until that point and would create much greater cost and administrative burden for SSA. Also worried that if resources are tied up in litigation over taking away benefits, it will drain resources for original recipients.
* Standard is providing meaningful opportunity to present their case. Different administrative proceedings will differ as to which due process requirements are necessary to meaningfully present a case and deference should be given to admin. agency.
* Retreat from Goldberg
  + SSDI is not related to financial harm – it is worse to lose your welfare benefits and not as bad as losing your disability benefits – court views the loss of benefits as a determining factor – the worse the loss, the more process you get (resurfacing of grievous loss in this form)
  + Also thought that for these disability proceedings lend themselves to medical assessments and so oral testimony was less helpful – again, based on desire for accurate process
* Judicial Review
  + If there is a constitutional question, there is almost always review
  + There is not always judicial review of admin. decisions
  + Sometimes there is review but huge deference

Subsequent Liberty Interest Cases

Goss v. Lopez (1975) – suspending student

* Oral/written notice of charges
* Explanation of evidence that authorities have
* Opportunity to present his/her/their side of the story
* More formal procedures may be required for longer-term suspensions or expulsions

Winegar v. Des Moines Independent Community School District (8th Cir. 1994) – suspending teacher

* Liberty interest implicated
* Court should have provided opportunity for oral evidentiary hearing
* Presentation, cross-examination of witnesses
* Distinguished Goss because this is a higher deprivation and in Goss, school discipline was a consideration

University of Missouri v. Horowitz (1978) – dismissing student in medical school for performance and uncleanliness

* Informed in writing and orally
* Given chance to improve
* Opportunity to present before dean and other school officials
* Court found these sufficient as this was an academic and subjective judgment requiring expert judgment and not “readily adapted to the procedural tools of judicial or administrative decision-making”

Schweiker v. McClure (1982) – denial of claims for reimbursement of Part B of federal Medicare program

* Private carrier reviews claim for the government
* Disagreement results in review determination – review of the written record by different employee
* Oral hearing if claims is above $100
* New hearing officer oversees and renders a written decision based on the record
* Court found these sufficient – overseer did not have to be government employee because Medicare statute required hearing officer by “qualified” and “have a thorough knowledge of the Medicare program” – so little value added by a government employee

Gray Panthers v. Schweiker (D.C. Cir. 1980) – part B claims under $100

* Medicare Act says there is no oral hearing for claims under $100, but Court read into statute requirement for some informal oral hearing because of the importance of officials justifying their actions in person to avoid arbitrary action and in order to make those involved feel they have been dealt with fairly
* Must at least have access to the evidence the carrier relied on
* Opportunity to present evidence in written or oral form
* Final explanation for the reasons
* DC Circuit eventually accepted a toll-free telephone hearing system

Cleveland Board of Education v. Loudermill (1985) - termination

Loudermill dismissed for not writing that he had committed a felony – didn’t realize his prior crime was a felony. Loudermill was provided a hearing by Cleveland Civil Service Commission; hearing examiner recommended reinstatement; full commission upheld dismissal.

Court found due process deficient.

* Private interest is high in employment
* Oral or written notice of charges
* Opportunity to present side of the case before termination
* Affording opportunity to present before dismissal would not unduly burden employers nor provide significant delay
* Notes that both employee and employer have interest in avoiding delays and both benefit from keeping the employee on b/c of the cost of employing new worker (although can suspend with pay if it is a real problem)
* But opportunity to present doesn’t have to be elaborate

Gilbert v. Homar (1997) – suspension without pay for felony arrest

* Post-suspension hearing is required, but loss of pay is insubstantial for short-term suspension
* State has high interest in suspending employees who occupy positions of trust and visibility after being charged with felonies
* Pre-trial hearing function already assured by arrest and filing of charges

Formula: value of additional procedures x interest of claimant > increased burden on government

Government has interest in conserving resources for other claimants and in not being forced to make it harder to confer benefit. But in *Goldberg*, court also talked about government interest in not having unjust terminations (shows up in Loudermill (useful employement to avoid welfare), also Morrissey v. Brewer (1972) (unjustified revocation of parole), Memphis Light, Gas, and Water Div. v. Craft (1978) (public confidence in utility by avoiding unjust termination of utility services)). But does this interest really exist if the legislature didn’t put in additional safeguards?

Is disability something for which accuracy makes sense given the widely diverse interpretations of who qualifies?

Some argue courts don’t really follow Eldridge and instead groups into three categories: bureaucratic rationality, focusing on error costs; therapeutic and clinical values; one of fairness and justice based on ideal of trial-type judicial proceedings.

Some argue that instrumental goal of process isn’t always the goal – sometimes, in the case of disability, it might introduce more process to provide more leverage to disability claimant. Some also argue that the goal should be to conform to traditional community notions of fair play.

Does more procedure ossify rulemaking and deterring parties from rulemaking and pushing decision-making underground or does it protect the rights of affected parties?

**Policymaking Through Adjudication**

Adjudication or Rulemaking

* Two methods of promulgating policy – adjudication or rulemaking
* Sometimes statutes dictate whether agency must use rulemaking or not

**SEC v. Chenery Corp (1943) I**

SEC is in charge of reorganizing publicly-owned companies – companies can submit reorganization plans but if SEC thinks plan is not “fair and equitable,” it can reject plan. Federal Water Service Commission regulates; Chenery owns a controlling block of voting stock in Water Service Commission. SEC says that fiduciaries cannot buy preferred stock during a reorganization based on common law equitable doctrine that imposes duty of fair dealing – courts reject that and reject statutory interpretation offered later.

* **Question**: Does an agency need to have a consistent rationale?
* **Holding**: Established that a court, when reviewing an agency action, will consider only the basis for the action proffered by the agency; agencies may not offer additional post hoc justifications during litigation.
* **Rationale**: 1) Disciplines agencies and reforms it so that they give stronger rationale (otherwise, agencies could just promulgate policy with bad reasons and fix it later) 2) Facilitates clean judicial review; 3) Notice issue for opposing party
* In DACA case, we will find out if it is when the agency initially announces the policy or if they bring it up in the initial administrative tribunal

**SEC v. Chenery Corp (1947) II**

Commission found that the reorganization plan would not be “fair and equitable to the persons affected thereby” within meaning of 11(e) of PUHCA (Public Utility Holding Company Act) but had not promulgated rule that fiduciaries could not buy stock during a reorganization.

* **Question**: Can an agency choose to issue an order through adjudication rather than rulemaking?
* **Holding**: An agency can issue an order even if there are no standards on the particular factual issue before it. (policymaking through adjudication is permitted) (generally vague standard allows more wiggle-room; if there is a specific standard, it must be followed) (also, if there is no express procedure in the organic statute that triggers formal or informal rulemaking)
* **Holding**: Court will uphold an identical outcome to one it previously rejected after the agency gives a proper rationale for the outcome in the administrative process (before appeal in Art. III court)
* **Balancing Test**: Court announces a balancing test between fidelity in following statute and being concerned about notice and its ill effects – retroactivity does not end up being fatal (later refined by Bell Aerospace)
* **Rationale**: Choice between adjudication or policymaking is left in informed discretion of agency
  + Not all problems are foreseeable
  + Not all problems are best solved under general rule
* **Rationale for Fiduciary Rule**: Rational basis given that fiduciaries might have incentive to obscure information so as to buy stocks at lower prices and it’s impossible to prove intent. Courts can only review for abuse of discretion, not if it disagrees with policy.
* **Why would an agency pick adjudication over rulemaking**?
  + Can shield policymaking from public process of notice-and-comment
  + Adjudication can develop better policy through case-by-case adjudication
  + Less disruptive for individual adjudication
  + Issues are nuanced and better dealt with as standards in adjudication
* **What are the concerns about policy through adjudication**?
  + Public parties have no opportunity to participate – only based on participation on 1
  + Doesn’t provide notice for regulated parties to predict behavior
  + More difficult for Congress to keep track of agency if announcing in individual adjudications
  + If policies are only based on rule-breakers, you might get a narrow view of the regulated parties that is pathological
  + Jackson dissent suggests perhaps that required agencies to promulgate rules with sufficient clarity so as to cabin the law in a manner similar to how intelligible principle test limits amount of delegation from Congress to agencies
* **Procedural Safeguards in Rulemaking vs. Adjudication** (are there actually more?)
  + Constraints are focused on applying law to facts correctly, not necessarily policy decisions
  + Notice and comment elicit a broader range of interested parties and encourage agency to view its proposed rule from a more general, holistic perspective
  + General policy considerations are more transparent to Congress and interest groups whereas adjudication is more under the radar
  + Could it be better for an agency to suspend an adjudication until promulgating a rule through the rule-making process?
* After Chenery II, when can agency not announce policy through adjudication?
  + If there is evidence in the record that the agency is trying to do an end-run around notice-and-comment (e.g. if they rescind a rule after notice and comment, but then announce it in adjudication)
  + The statute only permits regulation through rulemaking
  + In practice, agencies have more or less total discretion
* **Implications of Chenery II:**
  + NLRB does all of its policymaking through adjudicative orders
  + Other do a mix
  + Some agencies are required by statute to issue regulations
  + But when given the choice, many still issue rules
    - Agencies might prefer higher-quality nature of process
    - Might prefer level of generality above that being considered in a case
    - Might want to clarify law ahead of time for efficiency
    - Political demand for rulemaking from Congress or interest groups

**Retroactivity Concern**

* Big Question: can retroactive policies be implemented in adjudication?
* **Retail, Wholesale, & Department Store Union v. NLRB (D.C. 1972)** outlined five factors for **weighing retrospective administration action**

1. whether the case is one of first impression
2. whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law
3. the extent to which the party against whom the new rule is applied relied on the former rule
4. the degree of the burden which a retroactive order imposes on a party, and
5. the statutory interest in applying a new rule despite the reliance of a party on the old standard

* **Concerns about Retroactivity** 
  + Imposing new liability for past conduct – no notice; also reliance on old rules
  + But adjudication is always retroactive (e.g. common law) – case of first impression
  + Retroactivity is also a problem in rulemaking

**NLRB v. Bell Aerospace Co. (1974)**

NLRB proceed through adjudication rather than rulemaking to determine if certain buyers are “managerial employees.” In Excelsior Underwear, N.L.R.B. announced rule about requiring companies to give lists to union heads for elections – but it said that this was only going to apply prospectively. Wyman-Gordon opposed this announcement of prospective policy through adjudication. Several justices in Wyman-Gordon, SCOTUS justices became concerned about agency adjudication.

* 2nd Cir. believes they should have proceeded by rules
  + Policy affects thousands with no notice
  + Overturning long-standing policy with reliance
* Subject to review for abuse of discretion
* Neither the APA or the Due Process clause requires rulemaking
* Doctrine: If a new agency policy implicates substantial reliance interests or subjects regulated entities to new liabilities or fines and damages involved, an agency cannot announce a new policy through adjudication. Bell Aerospace makes retroactive policies that create substantial reliance unconstitutional, but Wyman-Gordon makes purely prospective policies unconstitutional as well. (But all of this is in dicta). But cases where the court strikes down orders on grounds of impermissible retroactivity are rare.
* **Rationale**: Finds the situation similar to Chenery II in that there, the court found an adjudication did not require a previous rule in order to make a ruling. Cites Wyman-Gordon as well that agencies have discretion whether to use adjudication or rule-making power. Notes that there could be cases where relying on adjudication could be an abuse of discretion, but not this case. Finds that case-by-case adjudication of whether a particular company’s buyers are managerial makes more sense than a general policy. Also is okay with this result since no liability results from this decision and there are no substantial adverse consequences. Doesn’t stop Board from also promulgating a rule that allows for notice-and-comment.
* **Example of Struck-Down Policymaking through Adjudication**: Ford Motor Co. v. FTC (9th Cir. 1981) (cert. denied))
* Why are courts so hands-off with agencies?
  + Agencies could be experts on these issues
  + Efficiency argument – adjudications need to be completed and there are unique circumstances
  + Separation of powers concerns – the executive is more responsive to electorate
  + Lots of loopholes if you had to wait for prospective rules – lawyers could clog up the courts arguing it should have been promulgated the other way in order to wait for a change in administration
  + Shelter agencies from extreme oversight from a more politicized branch
  + Congress can always discipline through statutes
* **Retroactive Limits on Policy made through Rulemaking**: In **Bowen v. Georgetown University Hospitals (1988)**, Court gave strong indication that agencies should not apply new rules (done through rulemaking) retroactively. Blocked HHS Secretary from applying Medicare formula reimbursements retroactively since retroactive power was only meant to be done on case-by-case basis. Just as laws explicitly require retroactive provisions, so too does Congressional delegation to an agency specifically require retroactivity power. Court in general does not favor retroactivity given implied preference against retroactivity in Due Process, Takings, and Ex Post Facto clauses. Adjudication is treated slightly differently since there will always been some retroactivity to a novel situation when applying ambiguous rules to fact.

**Policymaking Through Rulemaking**

Doctrinal Takeaways:

**United States v. Nova Scotia Food Products Corp. (2d. Cir. 1977)**

Nova Scotia sells smoked whitefish but was doing so in violation of TTS Regulations contained in 21 C.F.R. Part 122 (1977) Nova Scotia contends that this regulation is 1) beyond the authority delegated by the statute and 2) the FDA improperly relied upon undisclosed evidence in promulgating the regulation and because it is not supported by the administrative record and 3) there was no adequate statement setting forth the basis of the regulation, and responding to comments about commercial feasibility.

* Arguably an administrative law common law, but has clear statutory hooks in APA to justify procedures
* Opportunity for meaningful comments
  + APA 553(c) – parties have to have an opportunity to participate – you have to provide a “**meaningful opportunity to comment**” – and you can’t do that if you do not have the evidence
  + APA 706 – courts may set aside any agency action that is “**arbitrary and capricious**” – in order to determine that, there needs to be a record and so in the judicial review provision, there is an implicit requirement so that it is sufficient for review - Court finds it “arbitrary or capricious” for an agency not to have considered all the relevant factors and if an agency is not making all the data available for proper comment, then there are factors it is not considering because the comments cannot respond to that data, almost as if comments are being rejected.
* More than a minimal response to major comments
  + 553(c) – concise general statement of basis and purpose requires consideration of relevant factors - Also, “after consideration of the relevant statements,” there is a requirement that an agency meaningfully respond to objections in its “concise statement.” It doesn’t have to agree with objections, but it does have to respond to them with facts, when facts are appropriate, and policy considerations when those are appropriate.
  + 706(2) – authorizes judicial review – some explanation of agency’s action
  + Respond to “vital question of cogent materiality” but not a fleshed-out standard, so lots of litigation is about the fact that agency didn’t respond to comments – in practice, if they don’t respond to major organizations (NRDC, American Petroleum Institute) there is a problem – and the threat of litigation probably drives who they respond to – also responding to major governmental organizations (in this case, the Bureau of Fisheries)
  + Also a “thoroughness” requirement
    - **Automotive Parts & Accessories Ass’n v. Boyd (D.C. Cir. 1968)** – agencies must enable a court to see what major issues of policy were ventilated by the proceedings and why the agency reacted to them as it did”
    - **Rodway v United States Department of Agriculture (D.C. Cir. 1975)** – agencies must respond in a reasoned manner
* Relevant Caselaw
  + **Citizens to Preserve Overton Park, Inc. v. Volpe (1971)** held that although reviewing courts should be deferential to agency’s finding of facts, it should find a decision “arbitrary” if it doesn’t consider “all the relevant factors.”
  + **Portland Cement Ass’n v. Ruckelshaus (D.C. Cir. 1973)** held that “failure to disclose the basic data relied upon” would “suppress meaningful comment,” “akin to rejecting comment altogether.”
  + **Chamber of Commerce v. SEC (D.C. Cir. 2006)** held that if some information was publicly available and “obviously relevant” then it need not be included. But the information cannot just be publicly available, it must be “so reliable or ubiquitous” that the procedural requirements should be relaxed because it did not unfairly prejudice affected parties from comment.
* Caselaw about Data Used After Initial Notice
  + **Community Nutrition Institute v. Block (D.C. Cir. 1984)** – if an agency gets new information but it underscores the same conclusion, it does not need to share it anew. Here, the studies that were the basis for labeling requirements for certain meat products were challenged; new studies that addressed this problem were included in the final rule statement.
  + **Chamber of Commerce v. SEC (D.C. Cir. 2006)** / **BASF Wyandotte Corp v. Costle (1st Cir. 1979)** – an agency may generate additional data using a “methodology disclosed in the rulemaking record” even if the actual data is not made available until after the close of the comment period. In BASF, court found that parties had opportunity to conduct their own research and critique the methodology in advance for pollution limits.
  + **Rybachek v. EPA (9th Cir. 1990):** Court held that even if agency added new information and new conclusions in final rule that responded to comments (in this case, the impact of water regulations on small mines), it was not required to engage in never-ending back-and-forth.
  + **Ober v. EPA (9th Cir. 1996):** Court held that interested parties had been denied due process to notice and comment when EPA had asked Arizona for information about why it was not including a number of specific pollution control measures and included this information in the final report. Court distinguished Rybachek because in Rybachek, the new data was the agency’s internal reflections instead of new information solicited from outside party. It also said that Rybachek’s data was merely new information to continue on its current regulation rather than, as in this case, something critical to the EPA’s decision.
* **Some qualifications to disclosure rules**
  + Agency did not have to disclose trade secrets or sensitive national security information.
  + Agency must disclose when **scientific study** is the source of policy consideration rather than the agency’s own experience and analysis (which suggests if it were the latter, there might not need to be data cited).
  + Petitioners must show actual prejudice – i.e. they could have advanced a relevant counterargument based on this data.
  + Question about whether it is “readily available”

**Vermont Yankee Nuclear Power Corp. v. NRDC (1978)**

AEC promulgates a rule that waste disposal issue shouldn’t preclude the licensing of new plants. There is a hearing with oral testimony. NRDC wants discovery and cross-examination – justification in forcing institution to respond to meaningful comments and meaningful judicial review (always the two arguments made for more process).

* SCOTUS objects to procedural common law because this makes it too burdensome and makes it too much like formal rulemaking; also, it is fetishizing procedure and incorporating it into an agency when the whole point is that administrative agencies are meant to be more nimble and efficient; also, no such thing as administrative common law and that APA sets out the procedure
  + How do you square with Nova Scotia? Nova Scotia had statutory hooks in 553 and 706; perhaps they couldn’t find a statutory requirement in cross-examination
  + Court is driven by distinction by requirement to produce evidence that feels different and less onerous with cross-examination
* Two possible holdings: Narrow: Cross-examination requirement is inappropriate; Broad: Courts can’t require anything more than what the APA says is required of rulemaking – courts can’t require procedures beyond what is required in APA (beyond what was required in Nova Scotia)
* Agencies can always impose their own procedural requirements at their discretion
* Rehnquist believes informal rulemaking and its efficiency would be lost if proceedings needed to full adjudicatory procedures. Notes that informal rulemaking need not be based only on the transcript of an oral hearing and that an agency, when engaged in informal rulemaking, doesn’t even need to hold an oral hearing. Adequacy is not based on the type of procedural devices but whether 553 of the APA has been complied with.

**APA Section 553**

Notice-and-Comment Rulemaking

553 Informal Rulemaking

1) Notice

2) Opportunity for Comment

3) Concise statement of basis and purpose accompanying the final rule

Paper Hearing Requirement

553(b) requires agency provide advanced notice of rule change

553(c) after the process, the agency requires a concise general statement of the rule’s basis and purpose

**APA section 553 requires notice-and-comment**

Exceptions

* 553(a)(1) – any rules required for military and foreign affairs
* 553(a)(2) – related to agency management or personnel, grants (Medicaid), benefits (Social Security), contracts, and public property
* **553(b)(a) – interpretive rules and general statements of policy**
* Good cause exception – where impracticable, unnecessary, contrary to public interest (totally uncontroversial or in an emergency)
* Several agencies do it even when not required, but once you start notice-and-comment, you waive right to exception

Why have these procedural requirements?

* Most efficient way to produce the best result
* Gives legitimacy to the process (the less democratic the entity, the more we add process to make it seem legitimate)
* Separation of powers concern to force them to stay within delegation
* Makes the process transparent to avoid running afoul (although query whether that produces the best process)
* Limiting function to force deliberation / cynically to wait until the next administration
* Guards against agency capture because the process is transparent
* If you’re anti-regulation, then you like that regulation is really cumbersome to produce
* Facilitate judicial review – can review process that is on the record with reasons (anxiety about courts that do not have the judicial independence of article III courts)
* APA is a response to try to add some democratic legitimacy to an institution that is, at its core, on shaky democratic ground to protect it for minority rights
* **Drawback**: never-ending back and forth of notice-and-comment or battle of studies

Implications of **Nova Scotia**

* Is it better to have a world of regulation rather than statute because it is so proceduralized? Or is the Congress more democratically accountable and so it’s okay that it doesn’t give reasons?
* Does more procedure drive agencies underground to make law more secretly? Should less be required so that the process is more open?
* Full documentary record and relatively elaborate opinion on how you reached decision and response to major objections
* Much more public input
* Allows private parties to inflict significant costs on agencies and slow down regulation

**Guidance and Interpretive Rules**

General Statements of Policy and Interpretive Rules

553(b)(A) exception doesn’t apply to general statements of policy or interpretive rule such that that pronouncement not be issued through n-and-c.

Legislative/substantive rules – categories of rules that come out of notice-and-comment – have the force of law

Non-legislative rules - Interpretive rules/general statements of policy (guidance)

* 553(c) with magic words triggers formal rulemaking (556 & 557) – legislative rule
* 553 – notice-and-comment rulemaking – meaningful opportunity to comment (Nova Scotia) – legislative rule
* Guidance/General Statements of policy – triggered by 553(b)(a) exception to notice-and-comment requirement; no procedure in the APA
* Interpretive Rules – triggered by 553(b)(a) exception to notice-and-comment; no procedure in the APA

What is the stake of drawing distinction between legislative and non-legislative rules?

* Procedural hurdles are different in legislative vs. non-legislative rules
* Judicial review will look different depending on the type of rule at issue
* Non-legislative rules lack procedure to give it binding force of law; informal rulemaking does have force of law

Why do guidance instead of notice-and-comment?

* Cumbersome to do n-and-c for everything
* Immediate need for action
* Agency could be tentative and not sure about its policy
* Agency might need temporary fix but wants notice and comment to flesh it out more later on
* They could have gone through adjudication – (Chenery II)
  + In theory, guidance in adjudication requires its own justification
  + In practice, agencies will usually follow their own guidance
  + Guidance can be turned into policy through adjudication – but it can still be collaterally attacked going forward

Reasons to be Suspicious of Guidance

* Agencies do not have to provide reasoning – end-run around public participation
* Agencies could be avoiding meaningful judicial review b/c standard for guidance is much lower than legislative rule and an end-run around Chenery I
* Ad hoc compliance (maybe more consistent compliance through rules)
* Impacted parties can’t participate

But enforcement actions based on guidance have greater burden and have to prove the rationale of their guidance

**PG&E v. FPC (D.C. Circuit 1974)**

* Natural Gas Shortages in the 1970s and companies had to provide curtailment plans to FPC to show they were in compliance with 717(c) and were not granting “any undue preference or advantage” to ay party or maintain any “unreasonable difference” in service or facilities for different consumers – this from a FPC Directive issued without notice and comment
* But different curtailments plans had different priorities so FPC issue guidance under Order No. 467 for how to prioritize, saying that variable service contracts should be limited first and then those using gas for large volume boiler usage, deeming these two constituencies best able to find alternative fuels; this was put forth as a general statement of policy without notice-and-comment

Holding:

Difference between rule and general statement of policy

* A substantive rule establishes a standard of conduct which has the force of law
* A general statement of policy does not establish a binding norm; an agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general policy statement
* Because a general statement of policy is adopted without public participation, the scope of review may be broader than for a substantive rule
* Judicial review is the first public review and may analyze the underlying wisdom and does not need to affirm a test that merely satisfies the test of reasonableness

Why not a legislative rule?

Functional Effects Test – line between leg. rule and guidance hinges on

1) how tentative the language in the order is

2) how binding it is

a) for the parties and

b) for the agencies itself (does it reserve discretion to depart from guidance)

* The more binding the language, the more likely the court will find that it is a rule and should have been issued through notice and comment
* Chenery I still applies to guidance
  + But it is easy to give a rationale for guidance so that it has sufficient reasons to pass Chenery I, but if an agency offers guidance and provides a faulty reason, that guidance can be rejected in judicial review
* No deference from reviewing court – the less deference it gets, the less likely it is to qualify as a legislative rule (not a factor)

Analysis of Order No. 467

* Announces itself as a general statement of policy and says that individual circumstances will be adjusted
* Interested parties can challenge or support policy in individual proceedings
* It is not finally determinative of the rights and duties of a given pipeline
* FPC could have just done this ad-hoc, it didn’t need to make a general statement of policy
* But it’s not a binding rule – does not have force of law - rights at issue could be resolved at particular adjudication of a curtailment plan

Columbia Broadcasting System, Inc. v. United States (1942)

* Contrasts this with the FCC rule that licenses would be refused – this was an immediate and binding effect that would cause immediate damage to the business
* This will be settled in individual adjudication, with opportunity to present and be heard, and that will disenfranchise potentially at some future time, so the harm is much lower

Practical Effect of No Longer Justifying Plans

* Petitioners note that since plans will be accepted that conform to Order No. 467, companies will no longer have to justify their plans; but the Court notes that the provisions of Order No. 467 allow anyone **adversely affected to present evidence in a section 4 hearing**

Functional Impact of Deciding It is Guidance

* Guidance document can be challenged in a way a rule cannot
* Guidance is usually followed and lawyers tell clients to follow it
* Guidance cannot be challenged easily in practice – public pressure to follow guidance because norms/costs around challenging the rule would be too costly – finances and reputation could be at stake
* Functionally has the same power as rule without procedural protections
* Agencies need to submit regulations to OIRA for cost/benefit analysis but really big guidance tends to be submitted to OIRA

Real Difference?

* Couldn’t agencies just copy and paste rationale behind general statement of policy in an informal rulemaking?
* Couldn’t adversely affected parties just challenge rule as arbitrary or capricious in court?
* Can’t agencies announce rule in adjudicative decision, copying and pasting rationale?

Potential Differences

* Some agencies cannot act without a legal basis in a formal rule
* It is not always possible to attack substantive validity of underlying rule, especially if statute of limitations has expired

**Hoctor v. United States Department of Agriculture (7th Cir. 1996)**

Question: Is the interpretive rule for the secure containment of animals, where an 8 foot limit was read as an interpretation of the regulation that dealers must have an adequate structure that shall be “structurally sound” and maintained in good repair, which was promulgated by the Department under the Animal Welfare Act without compliance with the notice and comment requirements of the APA, nevertheless valid because it is an interpretive rule?

Holding: This is not an interpretive rule because choosing an arbitrary bright line rule not meaningfully derived from the semantic meaning of an ambiguous regulation requires notice and comment.

1) Legislative rule if bright line rule is formed out of ambiguous regulation

2) Legislative rule if enforcement actions cohere towards bright line rule of ambiguous regulation

* Agency could have gone through notice-and-comment / adjudication and announced interpretation a la Chenery II
* Guidance gets no deference and agencies’ interpretations get Auer Deference
* An interpretive rule only if it can be derived from the regulation by a process reasonably described as interpretation – bright line standard from ambiguous statute with no semantic connection is a legislative choice. If standard is derived from semantic meaning of ambiguous term, might qualify as interpretive rule.
* If an agency acts like a legislature and makes an **inherently arbitrary choice**, then this must be a legislative rule
* If in all agency enforcement actions, the agency coheres towards the same arbitrary standard, then this is a red flag and then this looks like a legislative rule that requires notice-and-comment
* Also, the greater the public interest in a rule, the greater reason to allow the public to participate in its formation.
* Posner notes the relationship between generality and interpretation and specificity and legislation: It may also depend on how general or specific the underlying statute/regulation is. The more open-ended, the more notice-and-comment rulemaking is required.

Judicial review

* Guidance and interpretive rules are considered tentative actions
* Only final agency actions are subject to review

Guidance / Interpretive Rules

* If unclear which it is, courts usually defer to agencies’ interpretation of whether it is guidance or an interpretive rule

**Deference Regimes**

APA 704

All final agency action is subject to judicial review (with exceptions)

APA 706

Lays out procedure by which courts can set aside agency action as unlawful

* When do courts give agencies deference when they have interpreted a statute?
* What’s the proper relationship between courts and administrative agencies?
* Should they be treating them like lower courts or like experts or other generic state actors (who get no deference)?
* How do we balance judicial supremacy with democratic accountability?

Why might deference be inappropriate?

* Constitutional: judicial supremacy means courts interpret the law
* APA 706 says reviewing court should decide all questions of law (counterargument is that deference could be encompassed by that)
* Courts are equal to if not more expert at statutory interpretation
* Both OLC and actors in Executive Branch interpret the law all the time and when courts interpret those legal views, the Court’s view of the law prevails; so deference is at odds with the Executive-Judicial relationship

Why might deference be appropriate?

* The agency sees these cases all the time and has expertise in what a definition means (thinking about it way more than a one-off time in a court) (query whether the administrator knows more than the lawyers bringing the case)
* Circuit cases could reach different results – so making administrator point person will keep law consistent and uniform across time

**Skidmore v. Swift & Co. (1944)**

* Office of Wagers and Hours Administrator has issued guidance on Fair Labor Standards Act
  + Sometimes administrators bring enforcement actions or write amicus briefs
* Lower court didn’t give Administrator any special weight – SCOTUS maintains that some deference is due to the Administrator’s Views

Holding: The weight of such a judgment in a particular case will depend upon the thoroughness evident in the consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

* If it is persuasive, it gets deference; if it’s not persuasive, it does not give deference
* Seems similar to how sister circuits treat each other
* Applies to all agency actions (informal/formal, guidance)

After Skidmore, you defer to administrator to questions of law and fact, and you have these Skidmore factors; some courts would not defer if there was plain meaning in the text; some courts latched on to how long-standing the interpretation was; other courts looked to how technical the question is and would defer the more technical it is; some courts would look at consistency of interpretation with congressional intent.

* Skidmore “Respect” – slightly less than Hearst deference – it might reject an interpretation that is reasonable but is wrong
* Skidmore has more of a sliding scale approach to deference
* Some argue that this is the same respect due any brief – some argue that it is a little more respect than an ordinary brief

**Chevron v. USA, Inc. v. Natural Resources Defense Council, Inc. (1984)**

1970 Clean Air Act sets up a two-stage process for curtailing pollution. First, EPA establishes “nationwide ambient air quality standards” (NAAQS). Each state was supposed to come up with an implementation plan to meet NAAQS. Lots of states are going to fail these standards, so the amendment in 1977 require that states who are not going to meet this standard, they have to start issuing permits to a company that wants to build a new polluting source (stationary source). You could only get a permit if you comply with the lowest achievable admissions rate, and new pollution will be offset by other polluting sources going down within the state. Under Carter, the interpretation of stationary source was any source where 100 tons of pollution was emitted – this could include one smokestack. Reagan switches to the single bubble concept.

Doctrine:

Step 1: Has Congress directly spoken to the precise issue using traditional tools of statutory construction? If so, Congressional intent decides. If ambiguous, move to Step 2.

Step 2: Has the agency adopted a “permissible construction of the statute” or is “reasonable?” If so, agency is accorded deference. (only to their own organic and substantive statutes)

Stevens Opinion

If Court finds clear Congressional intent in the statute on an agency construction, that is the controlling interpretation. If the statute is silent or ambiguous with respect to the specific issue, the question is whether the agency’s answer is based on a permissible construction of the statute. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation is implicit rather than explicit but in that case, the Court may not substitute its own construction for a reasonable interpretation made by an administrator.

Stevens agrees that there is no clear statutory intent regarding the “bubble concept.” But notes that House Committee Report had two main purposes: 1) to allow reasonable economic growth to continue and 2) to allow states greater flexibility for the former purpose than the EPA’s present interpretation regulations afford.

Prior to 1981, EPA had a point source understanding of stationary source such that each smokestack was considered its own stationary source. Post-1981, it re-evaluated guidelines and argued that the point source method actually discouraged retiring older, dirtier valves since they had to be replaced with valves that met the newer specifications.

Statutory Language

* Section 302(j) of the Act defined a “major stationary source” as “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant’ – inconclusive

Legislative History

* Notes that the history is generally silent except for desire to give EPA broad discretion and to allow reasonable economic growth. Notes that it is a reasonable construction and is supported by the public record developing the rulemaking process and well as private studies
* Notes that EPA’s varying interpretations show that it has interpreted it flexibly in the context of implementing policy decisions and Congress has never responded to its reinterpretations

Policy

* Notes that policy arguments more fit for Congressional landscape than judicial landscape
* Notes that Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference
* Notes that several things could have happened – Congress intended to accommodate both interests but didn’t do so with a level of specificity; Congress could have been unable to reach a bargain on those interests and took their changes with agency administration; Congress could have wanted the Administrator to strike the balance with his/her/their expertise; perhaps Congress did not consider the question

Legal Analysis

* When there is **Congressional silence** in a statute – this is an **implied delegation of statutory authority** to the agency
* **Silence is implied delegation** – Court prefers democratic accountability of agencies as opposed to courts; it could also be viewed as when law runs out (b/c it is ambiguous), it becomes a question of policy and so courts should defer to agency on policy choice

Step 1:

* How could you interpret “stationary source?” The text doesn’t do a lot. You could appeal to the purpose of the Clean Air Act to reduce pollution.
* The statute is ambiguous because there is a recognition of both the environmental and economic concerns and chose to stay silent on the trade-off between environmental and economic concerns.

**Implied Delegation Theory**

* Is ambiguity actually a delegation?
* Maybe Congress just rushed the legislation?
* Maybe Congress has delegated it to agencies because it can’t figure it out and so wants agency on the ground to make the decisions?

1. Chevron rejected many of the factors used before, such as whether the interpretation was longstanding or whether it was issued contemporaneously with the statute.

* Mayo Foundation for Medical Education and Research v. United States (2011) – **consistency of interpretation is irrelevant** and neither is how long the interpretation was promulgated after the statute
* It appeared also to make the deference independent of any concerns about the agency’s expertise or the technical complexity of the issue
* Entergy Corp. v. Riverkeeper (2009) – SCOTUS sometimes has viewed Step 1 as folded into Step 2
* Some view Step 2 as that the agency must adequately explain its choice, **respond to reasonable objections and proposed alternatives** a la Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. (1983)
* **Chevron does not require that agencies demonstrate a valid interpretive method** (e.g. if a textualist rejects arriving at that interpretation through legislative history) – this is different than in a State Farm case where the courts will reject an agency’s policy if the explanation is unreasonable – perhaps because this is not a statutory interpretation issue at all but a policy choice delegated by Congress
  + However, others have disagreed, citing that agencies might be better at discerning legislative intent because of executive branch’s greater responsiveness, that they are more purposivist in furthering the statute’s goals, and that they are a particularly capable reader to know what the statute refers to given their expertise

Why does **delegation to agencies make sense (**even if implied delegation is a legal fiction)?

* Consistency – if Courts get final say – you would get many circuit splits instead of the consistency (for at least the four years of the administration)
* Expertise
* Democratic accountability – more opportunity in Executive Branch to correct agency action that court action
* Should there be more/less deference to independent agencies (depends upon whether you value expertise or democratic accountability more)? Should there be more deference to technical issues than rights issues?

2. Is Chevron deference normatively a good idea?

In Favor

* Policy choice, not judicial interpretation
  + Agency has more expertise than courts to make decision – it might allow technical experts within agency to have more influence than lawyers
  + Agency is more politically responsive practically and in terms of the Constitution
  + Agency allows for more consistency in federal law given limited dockets of SCOTUS and inconsistency across Courts of Appeals; interpretive issues might also be interrelated and so makes sense to have one interpreter

Against

* Concentrates too much power in executive branch
  + Constitutional argument of separation between law-interpreting and law-enforcing power – erodes checks and balances – transfers lawmaking power from Congress to the agencies (executive)
* Might undermine democratic accountability in the long-run by giving policymaking authority to agencies rather than courts because Congress will choose delegation more often; if courts were in charge, Congress might be more hesitant to do this since they an exert less influence over judicial interpretation; without Chevron, Congress might be incentivized to write cleaner statutes
  + Counterpoint: Congress might not trust agencies, especially in divided governments; also, are less democratically accountable courts a better option than agencies since there will always be ambiguously worded statutes
* Should independent agencies be subject to Chevron deference since they are more insulated from presidential control? Or are they more accountable to Congress than even courts are?

**Skidmore vs. Chevron**

* Is Chevron really different from Skidmore? It does replace a multi-factor standard to a rule. Empirically, it has created more difference.

3. **Legal Justifications for Chevron**

* Congress can delegate according to intelligible principle rule; courts determine whether agency stays within bounds of its delegated authority
* Chevron equates statutory silence or ambiguity to an explicit delegation
  + But couldn’t it be possible that Congress left that to the courts?
* Another basis is pragmatic arguments about deference and the Legal Process School’s reasonable person argument that a reasonable legislator would have wanted this deference for its benefits
  + But perhaps legislative framework was not clear when APA was passed, so argument that it overturned Congressional understanding of deference is moot
  + Is this just a pragmatic legal fiction?
* Chevron may also just be a substantive canon of interpretation – because our constitutional system of democracy favors accountable agencies to unaccountable courts, ambiguity in an organic act is presumed to reflect a delegation of primary decision-making authority to an agency unless it specifically says otherwise
  + But is there a constitutional concern about separation of powers?
* **Bumpers Amendment tried to pass de novo judicial review of agency decisions**, but never got passed
* **House tried recently to pass Separation of Powers Restoration Act** to dispense with Chevron deference
* 1999 Financial Modernization Act instructed that when there is a dispute between the federal Office of the Comptroller of the Currency and a state insurance commission about whether a particular financial product is “banking” or “insurance,” federal courts review w/o de novo - called the “jump ball” provision
* In Dodd-Frank Act, standards of review for OCC decisions regarding presumption of state consumer-protection laws to be according to Skidmore deference while at the same time saying it wants Chevron review for all other OCC interpretations of federal laws

4. Chevron’s Practical Impact

* Difficult to measure empirically since agency’s aggressiveness is correlated with increased judicial deference
* Chevron did render agency consistency less relevant
* Substantially higher win rates for adjudications as opposed to rulemaking
* Chevron tends to win depending on whether the judge comes from the same political party as the agency making the decision
* It’s possible Chevron reduced impact of political disposition; it’s also hard to tell since only the hard cases come to Appeals Courts / SCOTUS, where policy views are likely to make a difference
* Is the problem too little deference from critical judges or too much deference from sympathetic judges?

5. Chevron and the Hard Look Doctrine

* Court embraced hard look doctrine for judicial review of agency policy determinations – “an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”
* Breyer notes the irony that there is more deference for matters of law but less deference for matters of policy

**Doctrinal Escape Valves from Chevron**

Chevron render agencies the primary interpreter of statutes

* Formal Argument: Silence/Ambiguity is an implied delegation
* Functional Argument: Agencies will be more faithful to what Congress intended / Democratic accountability; Agencies are experts since they are dealing with these statutes all the time

**United States v. Mead Corp. (2001)**

* Chevron Step Zero: Does Chevron deference apply?

**Question**: Does a tariff classification ruling by the United States Customs Service deserve judicial deference?

**Holding**:

**Narrow: A tariff classification has no claim to judicial deference under *Chevron* there being no indication that Congress intended such a ruling, but under *Skidmore*, the ruling is eligible to claim respect according to its persuasiveness.**

**Broader: Administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. If Chevron Step Zero fails, Skidmore deference applies.**

**Mead Factors** (only applies when an agency is interpreting its own statute / organic or substantive; no deference when interpreting APA)

* Most Important Factor: Formality of procedure used – full adjudication or notice-and-comment
* How participatory was the process – more outside participation, the more deference
* The quantity of decisions
* Precedential status of the agency’s actions (binding 3rd parties in future decisions get more deference, but binding on the individual also gets some deference)
* More likely agency can overturn the decision easily, review de novo, the less deference
* The more decentralized the decision making, the more likely it will not get Chevron decisions (field offices vs. central head office)
* **National Cable & Telecom. Ass’n v. Brand X Internet Svcs. (2005)** – agencies can continue to interpret statutes notwithstanding judicial precedence as long as their new interpretation is reasonable

**Chevron deference for n-and-c rulemaking and adjudication. Yellow Transp., Inc. v. Michigan (2002).**

**Procedural formality is not a necessary condition. Edelman v. Lynchburg Coll. (2002); Barnhart v. Walton (2002), but Breyer has suggested this procedural formality is not a sufficient condition in National Cable & Telecom Ass’n v. Brand X Internet Svcs. (2005) though it is unclear whether the other justices agree.**

**Is procedural formality a good Congressional proxy for agency authority to interpret ambiguity? Does a reasonable legislature believe that procedural formality confers authority?**

Scalia was also concerned about ambiguous regulations that are governed by interpretive rules that receive deference. **Courts have pushed back on deference to such interpretive rules when the regulation is very ambiguous.**

* **Gonzales v. Oregon (2006)**
* **Paralyzed Veterans of America v. D.C. Arena L.P. (D.C. Cir. 1997)**

**Might also such ambiguous regulations run into nondelegation problems such that the interpretation cannot be meaningfully attributed to the rulemaking process.**

Breyer views deference as a matter of technical expertise, so cares less about participatory concerns; with other liberals (Souter, Stevens, Sotomayor, Kagan), they have less technocratic justification and more emphasis on democratic accountability

Rationale

* Cites Skidmore that “the weight accorded to an administrative judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”
* Recognition of express and implicit delegation of authority from Congress that are due Chevron deference
* Chevron deference accorded where statute authorizes rulemaking or adjudication power
* **Just because there is no formal adjudication or notice and comment does not mean that it lacks Chevron deference** – Court found in NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co. that lack of these were not fatal

Chevron Deference Analysis in Meade

* Congress never thought of classification rulings as deserving of Chevron deference
* Customs has some general rulemaking power that has the force of law
* Congress also had classification rulings in mind when it said that “regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned”
* But the binding classifications are not binding beyond the parties to the ruling; they are thought to have some precedential value in future rulings to secure uniformity
* But precedential value does not add up to Chevron deference (as interpretive rules do not get Chevron deference)
* Provision for independent review of Customs classifications by the CIT
* Within the agency practice, Customs never treated classifications as if they had the force of law – Customs do not usually engage in notice and comment and the agency makes it clear that its binding character does not cover 3rd parties – it is only conclusive between itself and the importer and even then only until Customs has given advance notice of intended change
* Notes how many different classifications are issued from how many different places could not possibly have the force of law; no particular statutory force given to headquarters rulings
* Equates classification rulings to “interpretations contained in policy statements, agency manuals, and enforcement guidelines” and so do not get Chevron deference

Skidmore Deference

* Chevron doesn’t disrupt Skidmore’s holding that an agency’s interpretation merits some deference given the “specialized experience and broader investigations and information.”
* Believes that Customs can provide specialized experience about whether a daily planner is a diary, whether diaries are grouped with “notebooks and address books” and when a ring binding should qualify as bound

Choosing a Middle Ground

* Notes that given the breadth of administrative actions from rulemaking down to actions in enforcement officers, there should be more than just two forms of deference – the Court has chosen to tailor deference to variety
* Rejects Scalia’s idea that Chevron deference is due to any agency that is “authoritative”

Scalia’s Dissent

* Scalia does not like the **ambiguity of this rule**, but Souter argues that there should be many deference regimes b/c Congress has delegated multiple ways for agencies to do things
* Scalia is **skeptical of independent agencies** because he wants more democratic accountability and between the executive and the courts, he prefers the executive having the interpretation over judicial power
* Scalia also recalls that in the past, there was no judicial review of agency decisions unless they went too far – originalist conception of executive power and the strong unitary executive
* Scalia worries that **this will drive more unnecessary notice-and-comment and more vague notice-and-comment rules** so that they can interpret the rules using interpretive rules, which are less transparent

**Scalia Dissent** – Scalia believes the majority’s idea of Chevron deference doesn’t make sense because it equates procedure with authority and points out that this is tension with other deference regimes. Argues that Chevron deference should be accorded to agency perspective that its authoritative.

* Notes in the past, agencies were due deference when resolving ambiguity has been given is no longer due and requires affirmative legislative intent; likewise, when agencies did not have authority to resolve ambiguity, they are now due some kind of deference
* Believes Court collapses Chevron doctrine, announcing a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so without offering a hard and fast rule
* Notes that purpose of Chevron was that it was congressional intent to allow agencies rather than courts fill in ambiguous statutes

Critiques Court’s reliance on procedure as a proxy for authority

* New background rule is that ambiguity is resolved by judges but if Congress signals intent through provisions for rulemaking or adjudication, then agency can resolve it; believes this background rule is contradicted by origins of judicial review of agency action
* **Believes there is no connection between the formality of a procedure and the power of the entity administering the procedure to resolve authoritatively questions of law (or the amount of deference it is due)**
  + Notes that most formal procedure, adjudication, is based on trial courts where usually accorded no deference on questions of law
* Notes that informal rulemaking is often authorized but not required
* Finds it a contradiction that agencies can pass policy through rulemaking and change it as they’d like and are accorded deference, but if they pass policy through informal adjudication, a court can give a definitive ruling on the ambiguity that is binding going forward
* Also notes that grant and benefit programs are exempt from requirement of informal rulemaking, but if they take advantage of that exemption, then the rules will be deprived of Chevron deference
* Finds it difficult to find coherence for when Congress signals its intent to allow the agency to decide matters of ambiguity

Worries about incentives for agencies

* Worries about incentives of this interpretation of Chevron – believes there will be more informal rulemaking than necessary (so that agencies get Chevron deference) and more confusion in lower courts
* Also thinks agencies shouldn’t have to use rulemaking authority – that Congressional intent is signaled enough by the option to use it
* Believes that agencies will have high incentive to rush out ambiguous rules that construe statutory ambiguities, which they then will clarify through informal rulings entitled to judicial respect **(because courts must defer to reasonable agency interpretations of their own regulations)**
* **Worries that agencies will keep statutory ambiguities ambiguous so that agencies can change meanings at their discretion and then pass it through rulemaking so that they are accorded Chevron deference**
* But statutes whose meanings are solved through less than rulemaking will then ultimately have their meanings decided by the courts as a final matter so that courts will have taken the authority as opposed to the agencies to whom the matter was delegated
* Agencies could also have their own interpretation rejected even with Skidmore deference, repromulgate it so that it gets Chevron deference and then effectively overrule a court – Scalia believes this is different from his interpretation of Chevron where the court didn’t give a judicial interpretation, but defined the scope of acceptable outcomes that left agencies the range in which it could decide the proper interpretation

Skidmore

* Believes that Skidmore standard is too confusing and uncertain and will invite lots of mixed litigation

Precedent

* Believes there is no clear rule coming out of this and the only case where Chevron deference wasn’t given was in a case where that deference was dicta because the interpretation wasn’t reasonable to begin with
* Scalia wants clarity: ambiguity means Congress intended agency discretion – any resolution of the ambiguity that it is authoritative – that represents the official position of the agency – must be accepted by the courts if reasonable

**Critiques of Mead**

* **Why are we assuming that more procedure should lend itself to greater substance deference**?
* Does the Mead/Chevron/Skidmore deference schemes really influence judicial behavior about deference?
* Kagan wanted deference to be based on who makes the decision
* Or does Mead rebalance the distribution of power between courts and agencies?

Notes

1. Scalia prefers Chevron’s categorical approach than Mead’s case-by-case approach; Souter prefers a more flexible standard that tailors the deference to the variety

Breyer and Scalia argued back and forth about this debate in Barnhart v. Walton (2002) and National Cable & Telecom. Ass’n v. Brand X Internet Svcs.

What values should be favored in rules vs. standards debate?

* Greater fidelity to Congressional intent
* Which gives greater power to judges or agencies?
* Which creates more predictability?
* Which is more sensitive to context?
* Which is more likely to track prevailing political preferences?

Does it matter whether the basis for Chevron deference is an assumption or prediction about real congressional intent or rather a legal fiction designed to further certain underlying values? Could there be different types of statutory ambiguities, such that sometimes it is preferable for an agency to decide and sometimes it is preferable for a court to decide?

**2. Procedural Formality**

**Chevron deference for n-and-c rulemaking and adjudication. Yellow Transp., Inc. v. Michigan (2002).**

**Procedural formality is not a necessary condition. Edelman v. Lynchburg Coll. (2002); Barnhart v. Walton (2002), but Breyer has suggested this procedural formality is not a sufficient condition in National Cable & Telecom Ass’n v. Brand X Internet Svcs. (2005) though it is unclear whether the other justices agree.**

**Is procedural formality a good Congressional proxy for agency authority to interpret ambiguity? Does a reasonable legislature believe that procedural formality confers authority?**

If interpretive rules were given Chevron deference, wouldn’t that be the equivalent of giving them the force of law?

Kagan had argued previously that it should turn on whether the senior agency official to whom authority is granted endorses it.

Anne O’Connell would focus on the type of agency, the agency’s track record, the agency’s expertise, the level of presidential and congressional control over the agency, and the timing of the agency’s action.

3. Was Mead wrong because the ruling letter did have binding effect on the Mead Corporation whereas in Christensen, it was only an interpretive rule?

But Mead didn’t seem to be using “force of law” in a formal sense, but rather as a form of balancing test to infer Congressional intent.

Are there other factors that one could look for to find the “force of law?”

* sanctions for violations

4. Is Scalia’s desire for agency endorsement in conflict with the idea that agency interpretations cannot be added post-hoc?

5. The Practical Effects of Mead – Scalia’s Concerns

a. Unpredictability

b. Increase in Notice-and-Comment Rulemaking

Is it a bad thing to have more n-and-c rulemaking? Will it divert resources to processes that are unnecessary?

Scalia was also concerned about ambiguous regulations that are governed by interpretive rules that receive deference. **Courts have pushed back on deference to such interpretive rules when the regulation is very ambiguous.**

* **Gonzales v. Oregon (2006)**
* **Paralyzed Veterans of America v. D.C. Arena L.P. (D.C. Cir. 1997)**

**Might also such ambiguous regulations run into nondelegation problems such that the interpretation cannot be meaningfully attributed to the rulemaking process.**

c. Ossification through premature judicial construction

* National Cable & Telecom Ass’n v. Brand X Internet Svcs. (2005) – judicial construction of an ambiguous statute is provisional – as long as the statute is ambiguous, the court should uphold an agency’s alternative interpretation notwithstanding prior judicial construction – Thomas argued that this wasn’t overruling a judicial opinion as Scalia feared since it is not saying that the Court’s interpretation is legally wrong but rather a different possible interpretation – likens it to SCOTUS interpretation of a state law being “reversed” by a state court adopting a conflicting yet authoritative interpretation of a state law

**Auer Deference**

**Kisor v. Wilkie (2019)**

Seminole Rock (1945) – “plainly erroneous” is a super-deference standard when agencies are interpreting their own regulations

Auer v. Robbins (1997) – adopted Seminole Rock language and held when agencies are interpreting their own regulations, they get super-deference (above Chevron)

Critique

* No difference between Auer and Chevron
* There should be less deference to agency interpretation
* Some wonder the reason that agencies should get so much deference

Kisor requested benefits in 1982 for PTSD was rejected. He then reapplied in 2006 and was accepted. The Dep’t of Veterans Affairs only granted benefits from the re-opening motion. The Board of Veterans’ Appeals ALJ affirmed this decision. Under the VA regulation, the agency could grant Kisor retroactive benefits if it found there were “relevant official service department records” that it had not considered in its initial denial. 38 CFR §3.156(c)(1)(2013).

SCOTUS took cert. on whether Auer should be overruled

Kisor Factors:

Auer / Seminole Rock deference is the deferral to an agency’s reasonable interpretation of an ambiguous regulation. Courts generally favor the agency making the determination about the meaning of an ambiguous regulation based on Congressional intent that an agency should make the determination. Agency is in better position to reconstruct original meaning and that making these decisions is usually grounded in policy concerns. Thomas Jefferson Univ. v. Shalala (1994). Agencies can also conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. Agencies also have political accountability.

But the regulation **must be genuinely ambiguous** even after the Court has resorted to all the tools of interpretation. But when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency’s reading, except to the extent it has the “power to persuade.”

**Court will reject Auer deference when a court does not reflect an agency’s authoritative, expertise-based, “fair, or considered judgment.” The first two might be requirements whereas the others are factors.**

* **Regulation must be genuinely ambiguous using all tools of interpretation**
* **Interpretation must still be reasonable**
* **Interpretation must be “authoritative” or “official position”**
* **Sliding scale based on how close the subject matter is to agency’s ordinary duties or whether it falls within the scope of another agency’s authority, must implicate its extensive expertise**
* **Must be a fair and considered judgment (not an ad hoc judgment adopted during litigation)**
* **And no deference to interpretation that creates “unfair surprise” to regulated parties, thus rare Auer deference to an agency construction conflicting with a prior one**

**Auer deference is no greater than Chevron deference. Note that the factors are new, so test isn’t fully fleshed-out.**

Gorsuch is concerned about agency power and prefers judiciary control whereas Scalia is concerned about agencies but prefers executive control and trust agencies more than the judiciary even though both are skeptical of the administrative state

* Argues that Auer deference was invented without consultation to the APA or the Constitution. Also argues it creates systematic bias in favor of the federal government.
* Argues legal process is compromised by deference to executive agency’s interpretation of rules given that ALJs are allowed to let their agency’s interests predominate and so are not wholly impartial.
* Argues with Auer, there is no fair hearing and no need for the agency to amend regulation through notice and comment – affirms Scalia’s fear that the agency’s failure to write a clear regulation winds up increasing its power, allowing it to both write and interpret rules that bear the force of law without substantial judicial review. Believes it ultimately denies people a neutral forum.

**Policy Escape Valves – Major Question Doctrine**

Extraordinary Cases Jurisprudence

Question of whether Chevron deference should apply to “extraordinary” cases where Congress is unlikely to have delegated decision to an agency. Cites many cases where Court has found that Congress could not have intended such a delegation – rejects Breyer’s argument in Brown & Williams Tobacco Corp. that Executive Branch is equally politically accountable. Should major questions consist, as in MCI, of major questions for a regulatory scheme or major political issue (even if its effect on regulatory scheme is minimal) as in Brown & Williams Tobacco Corp.?

* Whitman v. American Trucking Associations (2001) – “Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes”
* Barnhart v. Walton (2002) (interstitial issue made Chevron deference appropriate)
* Gonzales v. Oregon (2006)
* National Cable & Telecommunications Ass’n v. Brand X Internet Services (2005) (Breyer, J. concurring)
* Negusie v. Holder (2009) (Stevens, J. concurring in part and dissenting in part)
* Utility Air Regulatory Group v. EPA (2014) (Court “expects Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance.”)
* King v. Burwell (2015)

What are the situations where the court will not apply Chevron deference because the case is too extraordinary to defer?

**FDA v. Brown & Williamson Tobacco Corp. (2000)**

Kessler wants to regulate tobacco and tries to force Congress to respond to tobacco; Congress then holds a hearing. Legislators threaten to cut off funding to the FDA. FDA asserts its authority to regulate tobacco to reduce tobacco consumption amongst young people.

Court finds at Step 1 that drugs unambiguously does not include nicotine.

* Agency will argue at Step 1, that it is not ambiguous because nicotine qualifies as a drug (textualism); agency will also argue that purpose of statute is to prevent dangerous things so purpose of statute aligns with purpose; it doesn’t matter that FDA has changed its mind given Chevron
* Agency will argue that nicotine as a drug is a reasonable interpretation (for all the reasons from Step 1)
* Tobacco company will argue at Step 1, that Congress spoken directly to the issue because it has passed different legislation governing tobacco; attempts to give power to FDA to regulate tobacco have failed (though agency can argue that this is only in response to FDA’s position)
* Tobacco will make static textualist argument that FDCA was passed in 1938; at the time of the legislation, Congress did not mean tobacco to be considered a drug at this time
* Court finds that if nicotine is a dangerous drug, then FDA has to ban it; that is contrary to Congressional intent and so tobacco can’t be considered a dangerous drag
* Should there be more deference to an agency in matters of scientific expertise? Should it be more deferential to agencies that require more technical experience?
* Court might be working hard to keep interpretation at Step 1, so that it feels like the business of the courts; saying it is unreasonable on the merits, which is more of a policy consideration is less the court’s business as the less democratically accountable branch (though one could argue both are policy implications); so courts might fight over Step 1 more when it is really a Step 2 issue
* **Applies Chevron test but notes that acts must be read in whole context, including other acts passed by Congress.**

Finer Points of O’Connor Opinion

* Notes that under FDA provisions for ensuring the safety of a drug, tobacco should be banned, but Congress has passed legislation protecting tobacco use and instead asks that the public be adequately informed while the economy is protected “to the maximum extent.” Finds that FDA can regulate many “dangerous” products without banning them (as long as the benefits outweigh the harms), but it may not conclude that a drug cannot be used safely and still allow that product to be on the market. Thus, Congress has made clear that the FDA cannot regulate tobacco since it cannot be used safely.
* Notes that subsequent statutes can alter earlier statutes without expressly amending them. United States v. Estate of Romani (1998); United States v. Fausto (1988).
* Notes that Congress has legislated restrictions on tobacco against the backdrop of the FDA arguing that it could not regulate tobacco under the FDCA. Congress has also rejected bills that would grant FDA authority five times. Thus, Congress has ratified FDA’s interpretation of FDCA. Congress instead chose to regulate tobacco under the FCLAA (Federal Cigarette Labeling and Advertising Act) and thus precluded any other agency.
* Also, no evidence that when Congress passed FDCA that they intended FDA to regulate tobacco since they do not even discuss the matter, which would be strange given the importance of the tobacco industry.
* Cites MCI Telecommunications Corp. v. American Telephone & Telegraph Co. (1994), where it rejected FCC’s claim that the term “modify any requirement” under 203(b) of the Communications Act of 1934 meant that it could relax a mandatory requirement that long distance carriers file their rates.

Breyer Dissent

* Breyer Dissent contextualizes 1938 as a time when Congress was giving agencies broad power under the New Deal; Dissent also argues that later statutes cannot be used to interpret statute at the time
* Majority argues that Congress is trying to reconcile and make law congruent and so need to factor in later statutes
* **Can Congress do its own dynamic statutory interpretation**? Is it more legitimate for Congress to update a statute than the judiciary? Court here looks more comfortable with Congress doing dynamic statutory interpretation work.
* **Major Questions Doctrine: Tobacco industry is too important for Congress to have delegated such a major question to the FDA; reverses the assumption about Congressional silence – ambiguity here does not mean delegation, but implies a nondelegation issue – Congress must be explicit if it is making that delegation.**
* **Whitman Trucking Ass’n: Scalia says you can’t use small provisions to make huge changes (elephants in mouseholes).**
* Gundy was framed as a constitutional nondelegation case but could have been briefed as a Chevron case where the attorney general’s interpretation of SORNA could govern
* Major Question is when there the case contains “political and economic implications”; perhaps individual rights (this whole idea is dicta, however) (but boundaries are difficult)

Breyer Dissent

* Notes that literal language and general purpose of FDCA seem to encompass tobacco products.
* Argues that FDCA does not significantly limit the FDA’s remedial alternatives and the later statutes do not tell the FDA it cannot exercise jurisdiction, but simply leave FDA jurisdictional law where Congress found it.
* Argues that FDA can impose the “safest remedy” even among an inherently dangerous product.
* Rejects that FDA can only focus on safety of product itself rather than the aggregate risks (e.g. finding a black market alternative) – finds that there is nothing in the statute that insists the FDA must ignore those realities even if they would cause more harm
* Believes that FDCA can be interpreted flexibly base on the purpose of Congress’s overall desire to protect health
* Argues that subsequent views of a statute are not controlling, so subsequent statutes do not have to modify understanding of FDCA. Haynes v. United States (1968)
* Notes that Congress never gave the FDA authority but also failed to take that authority away when the FDA asserted authority
* Noted that FDA’s change of opinion is legally irrelevant under Chevron – noted that FDA finally had evidence of chemical interaction which allowed it to regulate nicotine under the statute

**Defense of Major Questions Doctrine**

* Congress is more democratically accountable than an agency, so it makes more sense for Congress to make the decision
* Faithful agent doctrine – courts are trying to effect Congressional intent
* Congress must sign off on really big decisions notwithstanding executive accountability

**Critique**

* Breyer believes if executive adopts this interpretation, court should stay out of it and let executive be accountable to the electorate
* Least concerned for major questions about democratic accountability because executive will be held accountable for agencies’ interpretations of major questions

**Massachusetts v. EPA (2007)**

* Refinement of major questions idea: the rule isn’t in the absence of a clear delegation, there is no authority to regulate; in the absence of an explicit delegation, there is no Chevron deference

553(e) gives parties right to petition for a rule and every agency has to give authority to petition; agency can then deny.

Agency makes reference to major questions doctrine and that climate change is a major questions case that needs to be legislated by Congress

Court finds that statutory definition is sweeping authority and the definition of air pollution is really broad (including weather and climate); Court argues that policy determinations of agencies have to relate to the reasons the statute gives you for making those policy determinations

Stevens Opinion

Ordinarily, an agency’s refusal to initiate enforcement proceedings is not subject to review. **But there is a difference between non-enforcement and denial of a petition for rulemaking**. So refusals to promulgate rules are susceptible to judicial review, **though such review is “extremely limited” and “highly deferential.”**

**Finds that statute is unambiguous that carbon dioxide qualifies as an air pollutant under 202(a)(1) of CAA.**  Rejects postenactment congressional actions because if they do provide meaning, none of them suggest that Congress meant to curtail the EPA’s power to treat carbon dioxide as a pollutant.

**Distinguishes from Brown & Williamson – EPA does have authority**

* In B&W, Congress thought that FDCA would have required a “banning” of tobacco, whereas regulation of CO2 would require no such thing.
* B&W also showed Congressional enactments that only would make sense if FDA lacked authority; **no enactments made by Congress to suggest that EPA lacked authority**

EPA’s Decision not to regulate

* The “judgment” under 42 U.S.C. § 7521(a)(1) must relate to whether an air pollutant “causes, or contributes, to air pollution which may reasonably be anticipated to endanger public health or welfare.” If EPA finds endangerment, it must regulate. It can only avoid taking action if it provides some reasonable explanation as to why it cannot or will not exercise its discretion. To the extent that this limits priorities of Administrator or President, this is the congressional design.
* **EPA has offered no reasoned explanation for its refusal, arguing that the policy reasons provided by EPA have nothing to do with whether greenhouse gases contribute to climate change. It must first go through the process of an endangerment proceeding. Thus, their decision is arbitrary and capricious.**

Ruling refuses to decide if EPA must reach an endangerment finding or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.

How can this case be squared with Brown & Williamson?

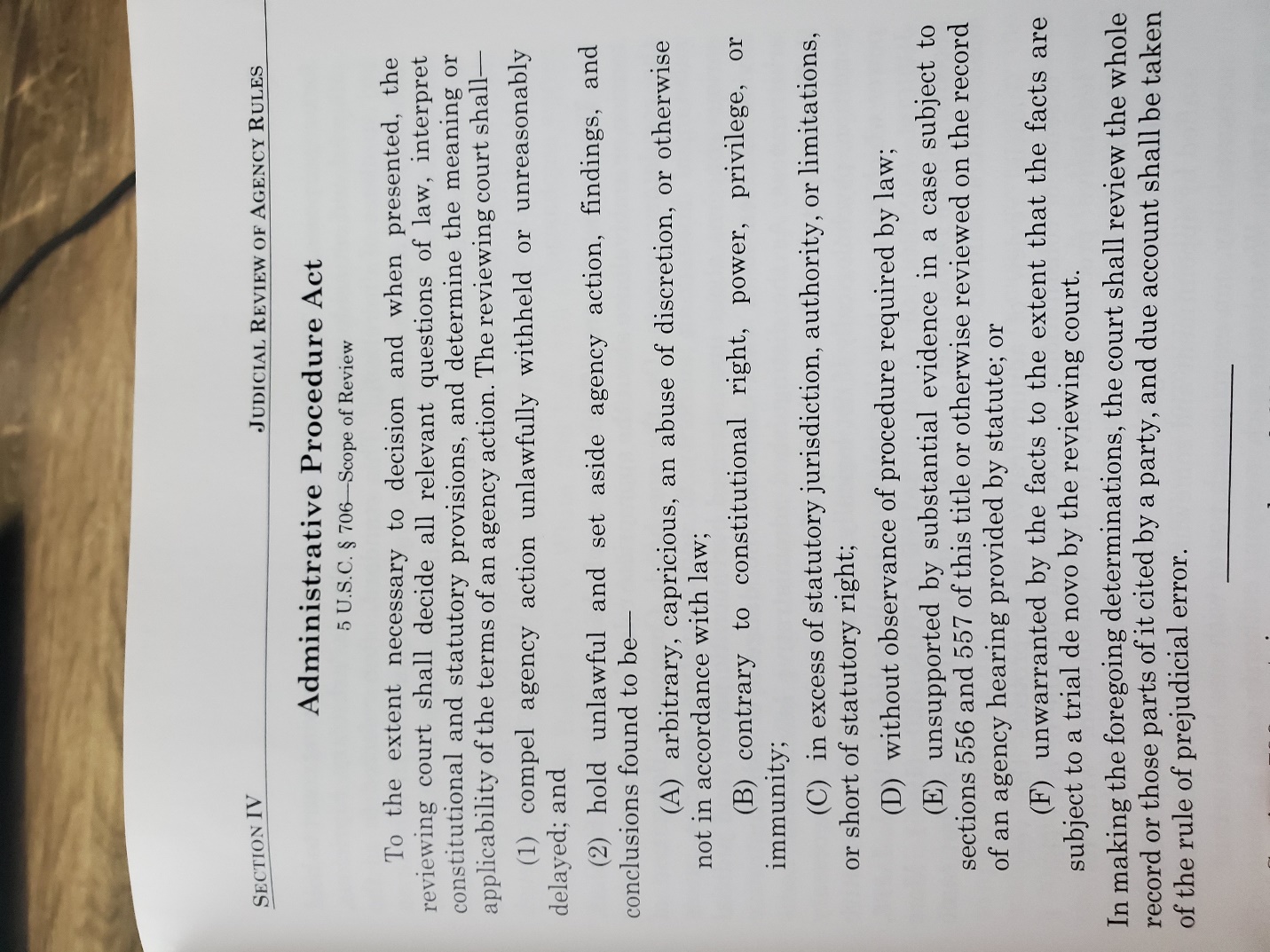
* Congress hasn’t spoken as clearly on the question and the agency changed its mind on regulating greenhouse gases
* Maybe both cases are trying to prevent politically motivated **changes in course**
* Refinement of major questions idea: the rule isn’t in the absence of a clear delegation, there is no authority to regulate; in the absence of an explicit delegation, there is no Chevron deference
* King v. Burwell makes it seem like major question doctrine still exists – Court does not give Chevron deference to IRS’s interpretation

Will there be different reviews when an agency takes an action, declines to enforce a statute, or refuse to make a rule?

Scalia Dissent

* Notes that when the administrator makes a judgment, it must be based in “endangering public health or welfare,” but the statute is silent about the reasons for deferring judgment
* Believes reasons EPA provides (executive branch coordination and foreign policy) are strong reasons for refraining from action and thus should be accorded Chevron deference
* Believes that Stevens opinion asks EPA to make conclusions about the scientific uncertainty and Scalia believes they already have done that
* Scalia believes that carbon dioxide is not “an air pollution agent or combination of agent” and that this specific term limits the more general examples
* Scalia believes “air pollution” is different from “global climate change” b/c previous NAAQS have generally regulated air closer to the surface
* Believes Court should defer to EPA’s interpretation of these statutes under Chevron deference

**Rationality Review**



1. Is judicial review available – does the court have jurisdiction?

Marshall reads these exceptions very narrowly – this really broadens set of circumstances for judicial review.

701(a)(1) is where the court has explicitly precluded judicial review; **‘showing of “clear and convincing evidence” of a . . . legislative intent’ to restrict access to judicial review.**

702 (a)(2) is where the law is so broad that there is no **“judicially manageable standard”** to judge it against and it was left to agency’s complete discretion. Then, it doesn’t conflict with 706 because there is no discretion to judge. (The decision not to enforce therefore provides no judicially manageable standard unlike the decision to enforce where statutory overreach is possible. *Heckler.*)

1. What is the standard of review?

Court interpreted 706(2)(A) to mean that a reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”

Presumption of regularity when an agency is fulfilling its statutory mandate

APA 701 & 704 lay out conditions under which an agency action can be reviewed under two circumstances

1. Organic statute subjects actions to judicial review
2. 704 – all final agency action for which there is no other adequate remedy in a court

* Sometimes, appellate bodies within agencies can review claims sua sponte (e.g. BIA) even though district court can only review upon appeal
* Federal court will decide if it makes sense to let agency proceed and then review, or stay the agency’s proceedings and decide the question first itself – going to depend if the party will be irreparably harmed by proceeding through the agency first

APA 706 describes when a court can invalidate an agency decision

* 706(2)(A) – arbitrary and capricious standard
* 706(2)(B) – unconstitutional
* 706(2)(C) – beyond statutory authority
* 706(2)(D) – procedural defects
* 706(2)(F) – needs better fact-finding (usually in a formal adjudication)

Bazelon and Levanthal debated the proper way to evaluate agencies. Bazelon thought courts should review and building common-law around agency procedures – courts were better equipped to evaluate those issues since courts are experts in procedure, but not the substance of agency decision. Vermont Yankee invalidates this.

Levanthal wanted to engage in “hard look” review of substance of agency decisions. In the 70s/80s, courts have adopted an approach in which courts can police the substance of agency decision-making.

**Pacific States Box & Basket Co. v. White (1935)** – arbitrary and capricious is extraordinarily deferential, with essentially no independent judicial scrutiny into the evidence offered in support of agency’s decision – as long as “any state of facts reasonably can be conceived that would sustain the agency action, there is a presumption of the existence of that state of facts [even if they haven’t been found] and the party challenging the agency action must carry the burden of showing that the action is arbitrary.” **No longer the law.**

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

1. Is judicial review available – does the court have jurisdiction?

Marshall reads these exceptions very narrowly – this really broadens set of circumstances for judicial review.

701(a)(1) is where the court has explicitly precluded judicial review; **‘showing of “clear and convincing evidence” of a . . . legislative intent’ to restrict access to judicial review.**

702 (a)(2) is where the law is so broad that there is no **“judicially manageable standard”** to judge it against and it was left to agency’s complete discretion. Then, it doesn’t conflict with 706 because there is no discretion to judge. (The decision not to enforce therefore provides no judicially manageable standard unlike the decision to enforce where statutory overreach is possible. *Heckler.*)

1. What is the standard of review?

Court interpreted 706(2)(A) to mean that a reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”

Court show take a hard look at what the agency did – but you’re not supposed to second-guess agency decision and put in your policy preferences.

Procedure/Substance – procedure would be if you actually responded to the comments and factors; substance would be whether you actually considered the most important elements and drew a reasonable conclusion based on that information (but there is some slippage between the two).

Case is sent back because there is not enough evidence of the Secretary’s decision-making; they remand to the lower court for development of administrative record.

**Courts will look to the following to see if the record is developed enough (not doctrine)**

**1) Internal documents**

**2) Data to reach decisions**

**4) Any internal memo**

**4) External justifications (propose rule, final rule, public statements)**

**If there is no justification in the record – a court can remand back for fuller explanation or discovery; discovery is rare and reserved for showing of bad faith**

Effects

Agencies are going to provide written justifications for their actions.

**Arbitrary and Capricious Cases generally has three forms (not doctrine)**

1) No reasons given – vision of administrative government: transparent, reason-giving government

2) Insufficient factual/evidentiary bases to support a decision – vision of administrative government: data-driven, expert-driven government

3) Impermissible reasons/goals that are within the proper business of what the agency is supposed to be engaged in – vision of administrative government: APA serves as check on executive power – insulating agencies to stay in their proper lane – agencies shouldn’t become too powerful

**Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. (1983)**

* Was rescission of Standard 208 arbitrary and capricious?

“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider [either adding factors or not using all factors], entirely failed to consider an important aspect of the problem [or alternative solution that is really obvious], offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The review court should not attempt itself to make up for such deficiencies.”

**Both making rules and rescinding rules have to have explanation**

**Softening arbitrary and capricious review**

* **If a court can remand without vacatur – but keep the rule in place and remand back for justification (how likely agency can justify the rule and how disruptive the invalidation will be)**
* **Court can sever the rest of the rule and leave it in place**
* **Court can soften Chenery I reasoning – briefs can clarify and expand original reasons**

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 et. seq. (1976 and Supp. IV 1980) directs the Secretary of Transportation to issue motor vehicle safety standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.” 15 U.S.C. 1392(a). In issuing these standards, the Secretary is directed to consider “relevant available motor vehicle safety data,” whether the proposed standard is “reasonable, practicable and appropriate” for the particular type of motor vehicle, and the “extent to which such standards will contribute to carrying out the purposes” of the Act. 15 U.S.C. 1392(f)(1),(3),(4).

1975 – Standard 208 mandates you need a passive restraint – automatic seatbelts or airbags. Agency went back and forth about issuing passive restraint requirement several times, finally rescinding in 1981. NHTSA maintained that it no longer could find significant safety benefits. It had assumed in 1977 that 60% would use airbags and 40% would use automatic seatbelts. By 1981, it became clear that automatic seatbelts would be installed in most, and so the life-saving potential of airbags would not be realized. Standard 208 would require $1 billion to be implemented and would provide limited benefit and make people more suspicious towards safety regulation.

District Court found three reasons this decision was arbitrary and capricious.

1) Insufficient evidence in the record to justify NHTSA not seeking more evidence about whether the standard would increase belt usage

2) Inadequately considered the possibility of requiring manufacturers to install nondetachable rather than detachable passive belts

3) Failing to give any consideration to requiring compliance with Standard 208 by the installation of airbags

**Holding: The agency failed to present an adequate basis and explanation for rescinding passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.**

“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The review court should not attempt itself to make up for such deficiencies.”

It will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp. Inc. v. Arkansas-Best Freight System*.

Court holds that rescinding rule is covered by APA arbitrary and capricious standard and that it does not matter whether an agency is adding new burden or deregulating.

Court finds that NHTSA should have considered airbag technology as fulfilling Standard 208 requirement. The fact that detachable passive restraints made the passive restraint option less effective wouldn’t justify any change except disallowing compliance by means of that technology which did prove less effective (as opposed to the others, which had found to be safe). Agency didn’t even consider airbag option as fulfilling Standard 208. Agency shouldn’t revoke standard just because industry tried less effective option and failed. Rejects other post-hoc rationalizations for why it wasn’t included because it offered no reasons (re: Chenery I). Court also says it doesn’t require agency to consider every single alternative possible, but the agency should have considered an option that was within the ambit of the existing standard.

Court also finds that agency cannot just say that the effect of something (in this case, the safety benefits of automatic seatbelts) is uncertain; it **must explain evidence available** and make a rational connection between the choice made and the available information (even if it is uncertain). Court finds that agency expertise can come to bear on evaluating field studies but that agency failed to consider the inertia of automatic safety belts.

Court found that agency was correct to look at costs and benefits but must consider actual safety benefits with adequate evidence and take into account that the Motor Vehicle Safety Act intended for safety to be preeminent factor.

Court also found that agency failed to articulate a basis for not requiring nondetachable belts under Standard 208. Agency was concerned about such “use-compelling features” given public backlash to ignition-locking mechanism and that people would reject based on irrational fear of getting trapped in car. Agency also didn’t consider that spooling mechanism for nondetachable belts is just as safe as detachable features. Agency can decide that nondetachable belts should not be allowed, it must articulate reasons, not just rely on previous reasons for rejecting ignition-locking mechanism, because this is a different mechanism and is fundamentally different from ignition-locking mechanism because it doesn’t interfere with use of vehicle.

Rehnquist Dissent

Agreed that Agency needed to explain why it did not continue to leave automatic seatbelt and airbag requirement of Standard 208 intact.

Disagrees that agency’s view of detachable automatic seatbelts was arbitrary and capricious. Believes agency put its expertise to bear on rejecting studies that showed its increased effectiveness. Believes agency did cost-benefit analysis of minimal benefit at higher cost. Also believes agency’s consideration of public backlash makes sense given the turnover from the previous administration which was less responsive to public backlash.

**Criticisms of Hard Look Doctrine**

1) Generalist judges are likely to misunderstand the issues involved and to make mistakes, thus leading to bad decisions on the merits. Judges might also not be able to identify the salient issues, especially in regulations. It might have the perverse affect of incentivizing agencies to make policy through case-by-case adjudication.

2) Judges might improperly substitute their own judgments for that of agency by finding ostensible failures to adequately address important issues in those cases where the judges disagree with the agency’s policy choice on substantive or ideological grounds.

3) Reasons required for agencies to justify action have little to do with agency decision-making – they are usually concocted after the fact by agency lawyers, obscuring the true basis for an administrative decision instead of putting it out in the open. It might also give more power and authority to lawyers rather than agency experts.

4) High cost to producing all these records because adversaries will nitpick every detail to delay its passing. It may also incentivize reluctance to make rules for fear of judicial reversal. The gains made in higher quality regulation may be offset by fewer rules promulgated that need to be to address evolving situations.

Judge Bazelon argued that this would **limit the effectiveness of judicial review since judges aren’t experts in the field.**

**Critiques of Hard Look Review**

* One concern about hard look review is whether it is inconsistent (since court can only review some rules)
* A formal critique is whether this is a separation of powers issue since executive is charged with enforcing the laws
* A functionalist critique is whether courts have the expertise to evaluate the substance
* Incentivizes administrative costs – leaves more power to lawyers – expensive – puts too much efforts into every rule when agencies are supposed to be nimble and flexible
* Does this drive real decision-making underground because agency has to provide technical reasons to justify itself (even if the real reason is political)
* Discourages experimentation – ossification – freezes rules in place
* Keeps old rules and distorts them because of cumbersome nature of passing new rules

**Defense of Hard Look Review**

* Imposes reason-giving requirement on administrative state; disciplines them
* Leads to better decision-making because requirements are needed
* Courts are concerned about agency caption and so courts need to review
* Force consistency/transparency across administrations
* Forces scientific studies to the forefront (though doesn’t answer whether scientists or politicians are making the final decisions)
* Creates a check on agency that Congress can’t provide
* Preventing bad faith

**Benefits of Hard Look Doctrine**

William Pederson saw arbitrary and capricious review as creating an ex ante disciplining effect.

It creates incentive to 1) ensure broader participation by a more diverse group of agency staff 2) reduce cognitive biases, such as overconfidence and tunnel vision 3) mitigate the ability of special interest to exert undue policy influence 4) facilitate meaningful citizen participation by forcing agencies an incentive to take public comments seriously and by forcing agencies to present their analyses and conclusions in a form that courts and the general public can understand well enough to assess its reasonableness.

1) Incentive for agencies to develop more rigorous and transparent systems for evaluating scientific issues, which the court can use to evaluate decisions

2) Despite procedural costs, agencies still put out a number of rules, which are rarely reversed, and even when reversed do not usually stop agencies from achieving their goals

3) Higher costs can force policymakers to seek broad coalition to seek legislative reform and disincentivize overregulation

4) Might force agencies to prioritize rules that are really important over those that are less so – the willingness to bear additional cost signals the net benefits of the proposed rule – since courts cannot, with the same expertise, evaluate whether a rule is really worth passing, the added tax suggests that if the agency still plans to pass the rule, it is worth the cost of judicial review

**Questions after State Farm**

Should agencies be allowed to make decisions for political reasons?

**Policy Change and Agency Inaction**

Hard Look Review and Congressional Intent

* Did the APA intend Hard Look Review or did the enacting Congress have the deferential standard of *Pacific States Box & Basket* in mind?
* Have all three branches implicitly endorsed hard look review at this point?
* Should courts take a hard look at agency flip-flop or will that limit agency flexibility?

**Background of Judicial Review**

After Overton Park, all agency action is presumed available to judicial review under APA except for certain exceptions

After State Farm, all agency action, including the choice to deregulate, was subject to arbitrary and capricious review

**-All action is presumptively subject to judicial review, including changing a policy, under arbitrary and capricious review**

Judicial Review of an Agency’s Rescission of an Existing rule

* Agency’s **decision not to initiate a rulemaking proceeding** is judicially reviewable under APA 706 and 553(e) (people have the right to petition)
  + 706(1) requires a reviewing court to “compel agency action lawfully withheld.”
  + Courts compel initiating of rulemaking when a statute unambiguously requires agency to do so or agency’s reasons for refusal are expressly precluded by statute. Massachusetts v. EPA (2007); Atlantic States Legal Fond. V. EPA (10th Cir. 1997)
    - **Judicial review of an agency’s decision not to initiate rulemaking proceedings is more deferential than review of an agency’s decision to adopt a new rule.** WWHT, Inc. v. FCC (D.C. Cir. 1981) – it will “overturn an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency. National Customs Brokers & Forwarders Ass’n of America, Inc. v. United States (D.C. Cir. 1989); Failure to initiate rulemaking is “evaluated with a deference so broad as to make the process akin to non-reviewability.” Cellnet Communication, Inc. v. FCC (D.C. Cir. 1992)
    - **Policy Reasons** for not compelling agency action
      * Requires investment of resources after agency has already decided in its expert judgment that is not worth that cost
      * Threat of litigation might compel agency to pay more attention than is merited to the issue
      * Judicial competence to determine is lacking (issues of budget, personnel; evaluation’s of agency’s competence; competing interests within broad statutory framework; time for action has not arrived; rapid technological development might make regulations outdated quickly; scientific data might not be precise enough yet; industry may be evolving such that regulation is not required; agency might still be developing expertise)
      * Judicial review will only be hypothetical since records and reasons are tailored to rule eventually adopted, and the agency might pick from a plethora of possible rules
    - Judicial review of a decision to **terminate a rulemaking proceeding that has already started**, the standard of review is less deferential than that applied not to initiate in the first place, but more deferential than the standard for review of an enacted rule. Williams Natural Gas Co. v. Federal Energy Regulatory Comm’n (D.C. Cir. 1989); Natural Res. Def. Council, Inc. v. SEC (D.C. Cir. 1979)
  + 706(2)(A) requires review courts to set aside arbitrary and capricious “agency action” and 551(13) **explicitly defines “agency action” as “failure to act.”** Massachusetts v. EPA (2007); American Lung Ass’n v. EPA (D.C. Cir. 1998)
* An agency’s **decision not to bring an enforcement action against a particular party** is presumptively unreviewable unless it fits within exceptions. Heckler v. Chaney (1985)
* In *State Farm*, Court found that **there is no special deference for agency rescission of a regulation within the arbitrary and capricious standard** – Court found that 706(2)(A) creates a status-quo bias, not an anti-regulatory bias – once an agency has determined that a set of policies carries out Congressional mandate, “settled presumption that those policies will be carried out best if the settled rule is adhered to.” Atchison, Topeka, & Santa Fe Railway Co. v. Wichita Board of Trade (1973). Couldn’t agency expertise about how to best tackle the problem still require deference?

**Changing Rules**

Agency wants to rescind rule because policy preference changes

* New information changes perspective of agency
* New political administration and agencies are under executive branch

Debate emerges after State Farm whether an agency changing its mind is subject to stricter scrutiny

**FCC v. Fox Television Stations, Inc. (2009)**

Communications Act of 1934 prohibits broadcast license from “uttering any obscene, indecent, or profane language by means of radio communication.” 18 U.S.C. 1464. In Pacifica Foundation, FCC announced definition of indecent speech that prohibits “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience.” In subsequent cases, commission made a distinction between literal and nonliteral uses and found that “deliberate and repetitive use…is a requisite to finding indecency” when a complaint focuses solely on nonliteral uses. Agency also found that “full context” is important but that there a few principal factors: 1) “explicitness or graphic nature” 2) “dwells or repeats” explicit material 3) the extent to which language was meant to “pander,” “titillate,” or “shock.” “No single basis” for an indecency finding but one “passing or fleeting” references has tended not to be found indecent. In 2004, FCC said that one, nonliteral reference to the F-word could be actionably indecent. The case concerns two utterances before the FCC’s 2004 Golden Globes order. Both were during primetime awards shows and were designed to pander and shock. The order argues that both would have been actionable before the 2004 Golden Globes order based on staff ruling and dicta because one involved an actual description of excrement and the other involved a reference to a sexual act.

Court of Appeals found arbitrary and capricious on three grounds. 1) Agency did not explain why it had not previously banned passing or fleeting expletives. Scalia rejects because there is no empirical evidence available to test effect on children. 2) It would require a ban on all expletives, so its rational was incoherent. Scalia rejects this because there are ways in which there is less notice for a passing expletive than when the content clearly won’t be viewed by children. 3) Agency provided no evidence for why passing and fleeting references would lead to more use by broadcasts. Scalia sees their logic and says it is entitled to deference. Scalia also believes the agency justified its shift from a categorical approach to a more general approach in indecency.

* Some courts wanted to hold agencies to a more rigorous standard of review when rescinding a decision. Office of Communication of United Church of Christ v. FCC (D.C. Cir. 1983), NAACP v. FCC (D.C. Cir. 1982)
* Court rejected this view in FCC v. Fox Television Stations, Inc. (2009) Scalia wrote
  + Providing a reasoned explanation ordinarily demands acknowledging a change of position and justification of that change
  + But it does not need to demonstrate that these reasons are better; it only needs to prove
    - that the reasons are permissible under the statute
    - that there are good reasons for it,
    - and that the agency believes it to be better;
  + no more detailed justification than required for a new rule except
    - new policy rests on factual findings that contradict those which underlay previous policy
    - prior policy has generated serious reliance interests that must be taken into account
* Stevens Dissent
  + Believes in stronger standard for changing previous rules
  + Favors stability
  + Wanted strong presumption that initial views of agency were correctly carrying out Congressional intent in statute
* **Breyer Dissent**
* Finds that agency did not reason its new ruling through First Amendment jurisprudence
* FCC also failed to consider effect on local broadcasters; notes that had they failed to respond to these objections in notice-and-comment proceedings, the court would have invalidated it as arbitrary and capricious – does arbitrary and capricious mean something different in adjudication as opposed to notice-and-comment? (because it’s procedurally defective)
* Believes agency didn’t explain change through any reference to empirical studies
  + Law doesn’t grant independent agencies power to adopt policies for political reasons
  + Same standard of review as adopting rule, but standard of review to explicitly changed circumstances
  + Requirement for explaining a change in policy
  + Acknowledges sometimes that balance should be weighed differently
  + Where the policy rested on the following, special need to explain why earlier views are no longer controlling
    - Particular factual findings
    - View of governing law
    - Special needs to coordinate with another agency

In Verizon Communications, Inc. v. FCC (2002), Court found that *State Farm* as applied to agency flip-flop rather than when an agency implements the statute for the first time.

Why is this not a Chevron case about the meaning of “indecent?” Agency presumption as a matter of policy rather than interpretation?

**Important Notes**

* Not found arbitrary and capricious to change policy in adjudication

Reconciling with State Farm

* Small change vs. dramatic change
* This feels more like **a pure policy preference change** whereas in State Farm, there was a conflict with scientific evidence
* Less concerned about influence of politics in FCC than in State Farm

**Scalia clarifies that arbitrary and capricious review doesn’t require a policy reversal to be subject to stricter scrutiny**

Why not make it harder for an agency to change its mind?

* ossification – perversion of legal standards (to fit within existing rules) – but also stifles innovation
* An APA doesn’t require more for policy reversals; Agencies are still acting within their organic statutes
* Democratic accountability – agencies are adapting their policy to electoral preferences

Arbitrary and Capricious Criteria (**in dicta**)

* + Providing a reasoned explanation ordinarily demands acknowledging a change of position and justification of that change
  + But it does not need to demonstrate that these reasons are better; it only needs to prove
    - that the reasons are permissible under the statute
    - that there are good reasons for it,
    - and that the agency believes it to be better;
  + no more detailed justification than required for a new rule except
    - new policy rests on factual findings that contradict those which underlay previous policy
    - if prior policy generated reliance interests, need to explain why new policy outweighs harm of reliance interests (**but note, you can say your policy outweighs them just based on values**)
  + politics can be a justification, but it cannot just be bare politics – there still need to be neutral reasons for the politics

Should we demand neutral reasons for political decisions?

* Disciplines and makes rulemaking better
* Is it just giving pretextual decisions?
* Do we want to evaluate the rationale or the outcomes?
* Is it just a façade so that courts seem like they are evaluating law as opposed to political judgments?

**Role of Politics in Administrative Decision-Making**

* Rehnquist argued that an agency change in position as a result of politics should be welcome and it should not be arbitrary and capricious for an agency to change its policy based on regulatory philosophy rather than technocratic explanation
* Or should these changes for political reasons receive more deference b/c of presidential political accountability – or would that create sloppy reasoning?
* Should the court have permitted the rescission if its reason was based on different regulatory priorities (and only rejected it in State Farm because it based it on empirical grounds)?
* Is it better to have this political influence more transparent and not have people skewing the numbers?
* Does the APA preclude political considerations as legal justifications?
* Should non-political factors still be mentioned in purely political decisions so that policy trade-offs are more clear?
* Should Courts be allowed to obstruct the Presidential imperative in structuring agency decision-making given that the President is more democratically accountable than the courts?
* Or should agencies be protected from political reach by the president? Should political justifications not be allowed then? Do political considerations interfere with the idea that this power is delegated from Congress and create nondelegation issues?

**Hard Look Review of Decisions by Independent Agencies**

* Should an even more stringent hard look be required for independent agencies?
* Lack of Political Accountability
  + Breyer Dissent in FCC v. Fox Television Stations, Inc. (2009) argued their lack of political accountability meant that they should be subject to even more stringent review
  + **Scalia argued in FCC v. Fox Televisions Stations, Inc. (2009) that APA makes no distinction between independent and non-independent agencies in 701(b)(1) nor 706;** they’re protected from President and bend more towards Congress – it creates separation of powers issue if judiciary starts to intrude on that
* Major Decisions by executive agencies must be reviewed by OIRA (Office of Information and Regulatory Affairs) within OMB – considers alternatives and cost-benefit analysis
* Major decisions by independent agencies review by courts have not gone through OIRA process – should that lead to more stringent review?
* Does EOIR review more for technical reasons or political reasons?

**Heckler v. Chaney (1985)**

Holding: The general exception to reviewability provided by §701(a)(2) for action “committed to agency discretion” remains a narrow one, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency’s refusal to institute proceedings should be judicially reviewable.

701 (a)(2) is where the law is so broad that there is no “judicially manageable standard” to judge it against and it was left to agency’s complete discretion. Then, it doesn’t conflict with 706 because there is no discretion to judge. The decision not to enforce therefore provides no judicially manageable standard unlike the decision to enforce where statutory overreach is possible.

Certain circumstances where presumption can be overcome:

* Statute creates judicially manageable standards to review enforcement
* Inaction violates constitutional rights
* If the agency’s non-enforcement policy is so extreme that it amounts to an abdication of the agency’s responsibility

**Reasons for Making Presumption against Judicial Review of Enforcement Decisions:**

1) complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. Agency has better expertise about how to deploy its resources.

2) In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.

3) Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers.

4) Finally, we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.” U.S. CONST., ART. II, § 3.

* Difference from Mass. v. EPA – 553(e) – **gives interested parties the right to petition to make a rule as opposed to bringing enforcement**

Marshall Dissent

Because this “presumption of unreviewability” is fundamentally **at odds with rule-of-law principles** firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority **subjecting enforcement discretion to rational and principled constraint**, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a 5 particular factual setting in which the full implications of such a presumption were neither confronted nor understood.

I write separately to argue for a different basis of decision: that refusals to enforce, like other agency actions, are reviewable in the absence of a “clear and convincing” congressional intent to the contrary, but that such refusals warrant deference when, as in this case, there is nothing to suggest that an agency with enforcement discretion has abused that discretion.

**Distinction between prosecutorial discretion in Criminal settings and in Administrative settings**

* Arguments about prosecutorial discretion do not necessarily translate into the context of agency refusals to act. Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is **society’s general interest** in assuring that the guilty are punished. In contrast, requests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable—injuries that result, for example, from misbranded drugs, such as alleged in this case, or unsafe nuclear power plants—or to obtain palpable benefits that Congress has intended to bestow—such as labor union elections free of corruption, see Dunlop v. Bachowski, 421 U.S. 560 (1975). **Entitlements to receive these benefits or to be free of these injuries often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries.** The interests at stake in review of administrative enforcement decisions are thus more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions. (rejects majority’s rationale that it is not singling out people for harm by non-enforcement)

**Purpose of APA was to rationalize and discipline administrative use of power**

* Perhaps most important, the sine qua non of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion. Since passage of the APA, the sustained effort of administrative law has been to “continuously narrow the category of actions considered to be so discretionary as to be exempted from review.”

**Impossible distinction between failure to enforce and affirmative exercises of agency power**

* This case law recognizes that attempting to draw a line for purposes of judicial review between affirmative exercises of coercive agency power and negative agency refusals to act is simply untenable; one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.

**Lower Court solutions to failure to enforce**

* a demand that an agency explain its refusal to act,
* a demand that explanations given be further elaborated,
* and injunctions that action “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706, be taken.

**Meaningful Standard**

* Traditional principles of rationality and fair process do offer “meaningful standards” and “law to apply” to an agency’s decision not to act, and no presumption of unreviewability should be allowed to trump these principles.
* Moreover, the agency may well narrow its own enforcement discretion through historical practice, from which it should arguably not depart in the absence of explanation, or through regulations and informal action.

Should there be review of non-enforcement?

* No – separation of powers concern – executive is given discretion
* Yes – non-enforcement creates life and death decisions
* Yes – it is too extreme to deny review at all to this decision (checks and balances)