**Administrative Law**

**Professor Michael Herz**

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**Introduction**

We started with the *NY Statewide Coalition* case, which reviewed the major ways to kill a regulation: Violates statute, violates Constitution, Arbitrary & Capricious, Procedurally invalid, Bad Facts. Lower court had held it A&C, but top court said it violated separation of powers. The rule was hurt by the high number of exceptions.

**Why Regulate?** Monopoly was once big, but not as relevant today, save for natural monopolies. We also target externalities, try to correct information asymmetry, and (as with the Soda Ban) foster non-economic paternalism. There are also collective action problems.

**What kinds of Agencies are there?** Executive Agencies: Single person at head, serves at pleasure of the president, Cabinet is archetypal, but includes EPA and others. Independent Agencies: Congressionaly created groups, not one person, usually staggered appointments, with tenure. Many variants. More independent from president and exempt from OIRA review. You go with the latter when you distrust the president. There’s also been a shift from the technocratic idea to a more democratic basis for agency action, which pushes for executive agencies.

C “vests” (unclear if grant, though more likely for Art I) legislative power in the Congress, judicial in SC and lower, Exec in the Prez. No mention of agencies, though they are implied:

Art II §2 c.2 -> appointment clause “all other officers” -> implies agencies.
 c.1 -> May Require opinion in writing of principal officer of head of exec dept.
 c.3 -> Take care that the laws be faithfully executed and commission officers of the U.S.
 Note that this is a Shall obligation, implying power. Also written in passive, implying
 control of a bureaucracy executing laws
Vesting Clause -> “vested with the executive power” in art II, unclear if this is an independent grant of power or a mere reference to powers described later. Former approach seems to be the one in Art I and Art III, but seems easier to assert here.
A Congressional role is implied the language saying offices “created by law”

Art I §8 -> sweeping clause, allows for necessary and proper and all laws needed to “carry into execution” the preceding §8 congressional powers.

**Non-Delegation – Party Like it’s 1935**

**Are there limits to the power Congress can give an Agency?** Yes. This is non-delegation. Rarely applied, there must be an “intelligible principle” as per shechter, which is a very low standard. We care because: Accountability (but prez also elected), Lockean argument [], fear that decisions will be arbitrary, Schoenbrod wants congress to make the tough decisions and not be able to duck responsibility for its choices. Bressman wants the self-constraint.

Note that Scalia and Dick Stewart believe that the real problem is that, not only are agency decisions often actually technical, with plenty of accountability, but also that the court couldn’t really enforce a stricter rule. Plus Congress knows what it’s doing (see coke oven rules).

**What are the theoretical underpinnings?** Three propositions, 1 is consistent with 2 or 3, 3 is most radical:

1. Agencies can’t act without statutory power (unlike the president’s “vested” powers); see Steel Seizure
2. There are limits on the power Congress can delegate, when to broad or unconstrained (**Hampton** gives us intelligible principle, which is close to here)
3. Once there’s a statute, there can’t be delegation no matter the breadth, just exercise of granted power. Inverse of Youngstown. (we are close to here in practice.)

In **Benzene Cases** Rehnquist said Congress has power to make laws, “not to make legislators.”

**Schechter** – proposition I complied with, but too broad. Power to a private group. There were some limits on what the president was allowed to approve, but the Court ultimately saw it as “delegation run riot.”

**American Trucking** – Scalia says that delegated power has to be executive. Stevens says that there is a proper delegation of a legislative power, and we should just admit it. Question was how they decided the number they picked was “requisite to protect public health w/adequate margins of safety.” Lower Court saw “choose big guys” as too broad, wanted agency to write its own constraint. Scalia killed that, despite being less arbitrary and facilitating review, partly because it didn’t help with the role that Congress should fill in the process.

**Mistretta** – This is where it mattered. Sentencing commission upheld 8-1 over Scalia, who saw it has a delegation of legislative authority, as no power to which their delegation was “attendant to executive authority” JV Congress.

**The Constitutional Boundaries of Adjudication**

Same basic problem as non-delegation, but as relates to Article III powers.

Art I. Adj is meant to be Faster, with more specialized judges (that Congress feels like it can trust). Practice moots a lot of this, and things like the Courts not wanting the 600k SSA claims a year. Crowell and Schor do most of the work.

**Public v. Private Rights** – What justifies this distinction? The hope for a better outcome, greater authority[], Congressional creation means not the judicial power, Congressional creation means no right otherwise, less need for independent judges (although why wouldn’t you need indep. more here than in private law, where govt. not a party?)

**Intersection with 7th amendment** – No agency jury right, rule is that if it can go to Art. I court, no jury need.

**So when is it Kosher?** Public and private party, statutorily created right, part of admin system, only an adjunct with facts.

**When is it no good?** When they enter binding judgment on common law cause independent of reg. regime.

**Crowell v. Benson** – Strict Liability regime established, goes against Common law and judges were hostile to this, so Congress made their own judges. Crowell wants new trial, Court ultimately validates Congress’s decision, and dicta on public rights plays a role in justifying this, allowing for **government v. private party**, which solves almost all these problems. Crowell itself is a private case though, and the decision rests on Congress’s authority to allow an agency court to determine factual questions, so long as reviewable. Notes say **Crowell means delegation allowed when there is judicial review to ensure reasonable fact finding and lawful decisions**.

**Northern Pipeline** – Bankruptcy Court, Judges are very involved. Brennan plurality says NO adjudication of private rights outside article III, but allows that some disputes among private parties, based on statutes, are in fact public rights

**Schor** – State common law claim for debt, but CFTC could adjudicate. Majority opinion, says that public v. private is not the only factor, instead balance Litigant interests in an art. III trial and Structural interests(including expertise, duty, review [pg. 18]). Decision is about turf. Here litigant interest was irrelevant because of consent (though this might just be a DP issue). O’connor sees no major structural interest, since there were few claims, bound up in statuory requirements, and expertise played a real role. There was also review here, though not de novo.

**Stern v. Marshall –** Estate battle. Five justices take hostile read of Crowell, say it is only about fact finding by an agency in adjunct mode, since de novo on all law and most facts. Scalia is even more against, wants only govt. cases. Specific rule is non-delegable judicial power includes **entry of a final, binding judgment by a court with broad, substantive Jx on a common law cause of action neither derived from nor dependant on any statutory schme**.

**Thomas v. Union Carbide** also, though not discussed, Brennan joined saying it was public. Echoes Schor.

**Procedural Requirements in Agency Decisionmaking**

Poles are Criminal (with tremendous procedure) and Legislative Action (with no procedure). Agencies are in the middle, and the key is to distinguish Rulemaking from adjudication. Note that sov. Immunity waived in §701

**When do you need procedures constitutionally?** DUE PROCESS DOES NOT APPLY TO LEGISLATION. *Londoner* and *bimetallic* combined suggest, as Davis argues, difference is between adjudicative facts (need a hearing) and legislative facts (decision process is the hearing). Quantity can matter, there might simply be too many people affected and other avenues to get your opinion heard, and, related, generality where breadth makes decision less arbitrary. So ask:

1. Is it rulemaking? DP does not apply to legislation/rulemaking
2. Is it essentially legislative or Essentially Adjudicative (does it target just one person? Is decision leg?)
3. What did the agency choose? Agencies can pick among these approaches

**Relevant parts of the APA?** §551 – DEFINTIONS – Rulemaking (5; is rulemaking “formulating, amending, or repealing a rule), Adjudication(7; formulating an order), Order(6; whole or part of a final disposition, whether aff or negative “other than a rule making, but including licensing”), Rule(4: general or particular[he doesn’t like particular here], future effect, implement interpret or prescribe law or policy)

§552 – public info including FOIA

§553 – Rule Making, (c) says that “when rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection”

§554 – adjudications

§556 – on the record proceedings before ALJ

§557 – More procedures.

**Bi-Metallic** – Town raising appraisals, owner wants hearing. Court says no hearing, though it notes that there’s a part of the statute that allows a hearing for an individual mistake.

**Londoner** – Guy gets a hearing after being denied one for the repaving of his street assessment. Had the right for written objections already, but Court said needed an in person hearing to argue and present evidence. Not a trial, though.

**Southern Railway** – Was it a taking to force them to eliminate the crossing? Court says yes. Dissent said delegation was enough so long as there was review, but court says that just because Congress could do it didn’t mean they could give it to one guy who had no presumption of special knowledge, meaning high chance of arbitrary application.

**Adjudication - FORMAL**

Can be formal or informal, though the latter is uncommon (includes things like which campsite you get.

**How do you get Formal Adjudication?** You look at the statute. §554 says that it applies “, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,” but lists 6 exceptions (subject to de novo court review, non-ALJ hiring/tenuring, decisions solely dependent on inspection/election, military/foreign aff, when agency is acting as a court agent, certification of worker reps). Also, *Dominion* relaxes the wording requirements a bit, admitting “opportunity for public hearing” could be enough, though siding with agency based on Chevron. Courts ultimately are **divided on how strict to be**, with formal hearings more likely when sanctions are imposed.

**What about the procedures?** Pre-Hearing, Hearing, and Record and Decision. Agencies can decide what procedures to employ, and vary widely on what they choose. Usually there’s much less discovery. Agency heads can preside, but usually don’t/ Evidentiary standards also different.

The **Legal Residium** Rule is dead, so now hearsay usually can be used, the idea being no jury means fewer protections needed, so hearsay can just go to weight. (Also, Pierce notes ALJs aren’t good at applying the rule.)

The proponent of an action has the burden of proof, meaning the burden of persuasion. However, **Gunderson v. DoL** ruled that an ALJ couldn’t just say “equipoise, proponent loses,” has to include some kind of explanation for why one side was picked (**True Doubt Rule**). Although APA is silent, standard of proof is preponderance, though, Constitutionally more can be required depending on issue (as with deportation.)

In deciding, look to **§**557, decionmaker has to rely on thing in the record “taking note of incontrovertible facts.” Decisions can be Recommended, which get auto-reviewed, or Initial Decisions, which get reviewed only on appeal or agency decision. SSA /EPA have a version of an intermediate appeals court, not all agencies do.

Decisions require REASONS, as per §557(c). The ruling is made part of the record, and must include statement of reasons, (language also appears in 553(c)(statement and basis of purpose) and §555(e)(requiring explanation of refusals unless “self-explanatory”)) actually stricter than federal court. Important since it clarifies the law and allows court review, since Courts MUST rely on the agency reasoning. Also improves rulings.

**INFORMAL Adjudication** – APA virtually silent. Con, org statute, and agency rules still apply though, as with the heavily procedure burdened, but non-APA Immigration courts. Note though that license revocations under §558(c) require notice to allow for compliance and §555 says statement for written denial (and “prefer not” not enough).

**Dominion Energy v. Johnson** – First Cir. gives Chevron deference to EPA interpretation that “opportunity for public hearing” meant no need for formal adjudication, despite older First Cir. ruling.

**Adjudication – Separation of Functions**

Like POM wonderful, note the commissioners are also the deciders. Usually DP and good practice require separating.

**What do we split up?** Enforcers and Adjudicators. Makes fairer since no “team” and makes sure that decision is “on the record” since the evidence has to actually be presented, rather than investigator deciding on impression. **Ultimately it’s a compromise, with those at the top still merged, but lw level people separate, ALJs especially.**

**What does the APA say?** §554(d) says “employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.” Excepting ex parte, (d)(1) says that person can’t consult person or party on fact in issue unless N&O for all to participate. (d)(2) says a person investigating or prosecuting for agency can’t supervise them.

For formal Adjudications, there’s also §557(d), which deals with Ex parte communications. [here?]

Note that some argue that since §552 defined a person as not an agency, but agency for these purposes usually means the head of the agency, and so you can’t just talk to anyone at the agency under 554(d).

**What about ALJs?** They are civil service, and many people have issues with their selection (vet preference, no trial preference). Agencies choose among three. **Nash** held that agencies could use management procedures for ALJs so long as they didn’t interfere with decisional independence. In the real world they are just left alone. Cities and states have them to, Some use federal model, others **Central Panels**, which treats ALJs as one entity, usually more efficient.

**Wong Yang Sung** - No Separation at all under the old deportation regime. **Court ruled this violated §554**, **rather than violating DP**. Basically, this meant DP said hearing had to be on the record, and so it got into formal ADJ. So the violation wasn’t the combining of the function, but not following the right part of the APA. Note that the Congress reversed this decision later for INS, but established a lot more procedure.

**Nash** – On ALJs and whether agency tracking was alright. Said that ALJs were subordinate to agency, and so could enforce conformity with its views, so long as no interference with live decisions, reasonable goal on decisions based on admin needs, even Quality assurance review alright, since it was just about statistical benchmarks.

**Rulemaking – INTRO / FORMAL**

**What is needed?** §553 requirements are modeled on legislative hearings (p.37):
Notice
Comment – note that strong reading of §553(c) would limit this to “interested” persons vice disinterested, but read as vice uninterested instead, allowing anyone to comment.
Consideration of Comments,
“Concise General statement of basis and purpose” – usually called preamble.
Publication in federal register, and—for substantive rules that aren’t exemptions, interpretations, or otherwise for good cause—at least 30 days after this before it takes effect.

**How is Formal Triggered**? §553(c) triggers formal rulemaking, using the same magic words and putting you in §556 and §557, though it’s a bit looser in that you can skip ALJ decision and take more evidence in writing, though rare. *Florida East Coast* restricted this much more than for ADJ, requiring the exact language (rule be made “on the record after opp. For agency hearing.”) People who hate regulations like this, since you get more regs under informal, N&C.

**Why wouldn’t we just adjudicate?** As explained in *Natl. Petroleum*, RM more efficient (in theory), is prospective rather than retroactive, has greater breadth and is clearer than “distinguishing precedent”, and has procedural safeguards that might actually be preferable since more people can participate in the decision process. [there’s also an availability advantage]. Bush tried to get people to consider formal RM, but few bit and Obama Admin withdrew the E.O.

**What differentiates FRM from FADJ?** 556(d) says RM can have all evidence in writing, and 557(b) allows them to skip the initial ALJ decision. Also, nothing in 554 applies, so it’s just the ex parte rules in 557, with none of the sepration of function stuff. Mostly though, it’s depth v. breadth.

**Cases on the interaction between RM and adjudication:**

**National Petroleum Refiners Assoc. v. FTC** – FTC switches from making law “the way man makes law for his dog” (Bentham) to a rule, for octane labeling. Opinion is endorsement of RM, & gives the standard account of why we like it. Question at issue was whether FTC had RM authority, court said they did, not just limited to non-adj specification.

**Heckler v. Campbell** – Campbell wants hearing on whether there is a job, but “Grid” limits evidence she can present. **Holding is even if individual [hearing] required, agencies can use rules for issues of general application.** Note, though, that there was a safety valve here, and doesn’t really resolve underlying issue. **Zerbly**, for the kids, is the contrasting case, saying that the safety valve there was too restrictive and there was no second stage inquiry on capacity as there was for the adults in *Campbell*.

**FPC v. Texaco** – sets the stage for *FTC*. Says standards can be particularized via rulemaking , upholding rule that said that they’d reject certain pricing structures without the hearing. Party had ignored chance to get waiver, rule efficient.

**AA v. CAB** – Rule effectively “amending” licenses for highly regulated cargo carriers = “rulemaking in form and effect”

**Rulemaking – INFORMAL [EPA?]**

In addition to Informal, there’s also **Hybrid** - organic statute, like Magmussan, requires more than APA minimum. But remember there is NO constitutional requirement for procedures in rule making. Increasingly online process, fears that e-commenting would become a referendum have gone unrealized. Regulation room at Cornell working on getting people to actually take advantage, but still mostly a Zipf’s law thing, like before.

**When informal?** When not formal. Many see formal as not necessarily better. But there are other exceptions:

§553(a) – doesn’t apply to military/FA OR management/personnel, grants, benefits, contracts, loans. However, These are narrowly construed, or the agency ties its own hands.
§553(b) – Requirement to publish notice in fed register (or via private actual notice); requires place/ time/nature of public proceedings (carefully described as meetings, not hearings), reference to legal auth, terms/substance of descrip has its own exceptions:
(A) interpretive rules, gen statements of policy, rules of org/procedure/practice OR (B) when agency finds good cause, and incorporates that argument into the rule that N&C impracticable, unnecessary not in Pub. Int.
Note, that hearing can still be required otherwise by statute.
§553(c) says after notice you have to give “interested a chance to engage, as above. 60 day standard, fear that too short would mean A&C, as *Nova Scotia* required effective comment “opp. to participate”
§553(d) is the 30 days. Key is it **creates a new obligation**, rather than eliminating an old one.
§553(e) is the right for the interested to petition for issuance, amendment, or repeal.

**What needs to be in a Notice?** “logical outgrowth test” is the standard, from *long island care at home*, usually NPRs are very detailed, all but final. ANPRs sometimes actually are just the issues. This means comments are really about talking the agency out of something, since the process is so far advanced. Big changes mean a new notice required. There is always outreach prior to NPR, to do otherwise would be malpractice. Also must disclose studies.

**Florida East Coast Railway** – Formal RM not required unless really, really close to the required language. Saying hearing is not enough. Partly this is because, in choice among RMs, procedure not that valuable.

**Vermont Yankee** – rebuked lower court, saying that although you can scrutinize the record and send back (not in the APA), can’t demand more procedures then in the law. Procedures should be left to the agency, no judge made best rule.

**Nova Scotia** – Breaking the whitefish regs (bastards!) to avoid bankruptcy. Court says the record is too sparse to allow for the A&C finding. Two parts: 1.) agency relied on undisclosed scientific studies, unavailable for N&C and 2.) Concise statement was two short, didn’t say enough about the issue or why the agency decided the way it did (wanted them to say why they thought it commercially feasible if an objection that it wasn’t was raised.) can’t be as vague as legislators.

**Long Island Care at Home** – Court adopts the “logical outgrowth test” language from lower court, with goal being fair notice. Agency must show all possible objections to the final rule received consideration.

**Rulemaking – EXCEPTIONS TO NOTICE AND COMMENT IN DEPTH [re-read p.56]**

As described above in §553(b)(A): interpretive rules, Gen. statements of Policy, and Agency org/pro/prac (we did not really go into this one). However “this stuff is a mess,” as **Funk** notes, it’s all the factors “plus a pinch of powdered bats ear.” Note that “interpret” is right there in 551 for rules. The big question is whether guidance fall in the “interpretive rules” exception. There’s also concern about making guidance too hard, leading to underproduction of guidance, which people want. Gen statements of policy v. interpretive rules, and applying comm nutrition and

A key is to think about what guidance is not, the approach in Am. hospitals. They’re *not* legislative rules that impose or change legal obligations.

**OMB guidance on Guidance** – reaction to the “guidance as backdoor” story. Empirical question: Yale study found fewer than expected, no trend across admins, still, there’s worries of secret law. OMB rule applies only to significant guidance (kind of a paradox since measured by impact), calls for best practices: consultation and clear non-binding.

**How easy is it to plead “good cause”?** Not too bad, most of the action is in the other exception. But, there are Three prongs here, asking if N&C is : 1.) Impractical 2.) unnecessary 3.) contrary to public interest. Being understaffed is not enough of a reason. The real reasons are if taking the time would invalidate the rule, or if the rule would be undone by advance notice.

**What Cases Deal with Defining the 553(b)(A) exceptions?**

**Appalachian Power v. EPA** – EPA went through N&C to say permits were needed along with periodic monitoring. Does not use N&C to define periodic. Court says it’s: Congress vague -> N&C reg, but Reg vague -> detailed guidance with no N&C. “law is made.” Court seems to decide that this is no good, since the law was actually clarified through the guidance, and parties saw as binding despite language. That reg wasn’t final or binding didn’t block judicial action, since obligations created for monitoring and restructure permitting.

**American Hospital Assoc. v. Bowen** – DCC. The hornbook of this topic. [pg. 55]. Guidance as a:

1. A non-binding statement of intention
2. It should also be an explanation/clarification of the law, not a change in the law
3. Examine procedure v. substance.

**Hoctor v. Dept. of Ag** – Big cat case. Reg says structure has to be in good repair. Inspector says 6 ft. no good, manual says has to be 8 ft. Agency says that is interpretive, with 8 ft. defining what contain means. Sort of like Heckler, in that the rule is about what the agency has to establish. Court says it’s not interpretive, since he has to follow it. As posner notes, it’s not really interpretation, but transforming a standard into a rule. Note this was interpreting agency’s own reg.

**American Mining Cong. V. DoL** – X-ray transparency issues. Sort of like Hoctor in that it’s a standard to a rule. But unlike Hoctor it’s not secret internal rule. Court notes that the interpretation could still be wrong, but upholds this here. lays out a four part test to see if there was a legal effect::

1. Would, in absence of a rule, there be legislative basis for enforcement action
2. Has agency published in C.F.R. (part two later eliminated)
3. Has agency invoked legal authority
4. Does the rule “effectively” amend a prior legislative rule.

**Community Nutrition Inst. v. Young –** Adulterated food. FDA with no N&C creates action levels, not enforcing below 20 ppb, though that could be adulterated. Says it was just about enforcing not defining or interpreting. Court says in operation this is an enforcement action. Official test was two parts: 1.) Is there a present effect AND 2.) Is it binding on the agency. Court stresses language like “will be deemed” and their offering exceptions to the guidance. Dissent, judge Star, takes a alternate approach, saying if it’s not a leg reg, don’t let them use it like one.

**Air Transport Association-** DCC. FAA creates procedural, highly protective rules, determining penalties under statute without N&C. Court says it “encodes a substantive value judgment, meaning that penalties are not procedures, but are substantive. **Functional analysis needed**, can’t just label them procedure and get away with it. The procedure exception is about internal operations, and therefore not rights or interests of affected parties.

**RM & Adj errata: Ossification, Information Access**

**Is Rulemaking Ossified?**

Most say yes, but not all. Arguments are that judicial review makes pre-ambles too long, executive oversight takes to long, and the agencies OWN procedures are too onerous. To solve this, some want **Direct Final Rulemaking**, where you issue a notice and a rule simultaneously, saying rule stays if no significant comments. Legality would come from the Good Cause exception, since if no one objects, you didn’t need N&C. Use so far limited to easy cases, so no court endorsements yet. Others want **Interim Final Rule**, where you keep N&C, but keep the rule in place during, also depending on Good Cause (since can’t say unnecessary). Creates powerful presumption in favor of the rule. Note agencies often forget to issue the final rule after comment period anyway.

A last alternative is **negotiated rulemaking** where you get stakeholders to agree in advance, meaning better compliance and reduced litigation. Popular in the 90’s but unclear if it actually works. The General understanding is that the committee that convenes would be representative, there is N&C and agency need not agree with the outcome of the negotiation, and judicial review is still in place, as Congress wants (avoiding private delegation concerns as in Shecter.)

**What Gets Published?**

§552 applies, but it applies beyond rulemaking. 3 kinds of materials involved here: (a)(1) must be published in the Federal Register, with (B) and (C) covering rules of procedure, (D) covering interpretation, policy, rules, meaning even things exempt from N&C come in here. **If you don’t publish, you can’t enforce unless you give actual notice**.

(a)(2) must be available for inspection and copying. (B) here doesn’t have to be general, so can include things like tax rulings. These days this is all online. Includes stuff requested under (a)(3) that you expect at least two more requests for.

(a)(3) anything not in the other categories. This is FOIA. Available on request.

**RM & Adj errata: Ex Parte Contacts**

As Patco notes, goal is to prevent appearance of impropriety and promote fair decision making.

**Ex Parte Contact Issues** **in formal proceedings** – Forbidden in court, all but assumed for agencies, if not encouraged. Several sources:
556(e) record needs to be exclusive source of decision;
554(d)(1) says isolate ALJs; 557(d) added in mid 70s for sunshine act.
554(d) is the separation of functions stuff, and it’s only ALJs and all about agency action, not outsiders. Remember agency head exempted. It also has the fact at issue requirements, and applies to formal adjs only.

557 is also only for formal actions, but now the rest of the world comes in. Goes in both directions, not limited to facts. When parties initiate, they can just lose. Question arises of who counts as an “interested person.” Key parts are (d)(1)(D) allowing sanctions, (d)(1)(C) requires written record of these kinds of convos when oral; (d)(1)(E) says prohibitions start when agency decides, but no later than when notice of hearing foes out, unless communicator already has knowledge. Also, (d)(2) says you can’t use this rule to withhold info from Congress.

Key case here is **Patco v. FLRA** – Court embraces broad definition of interested person, consistent with 553(c), though the court suggests SOME stake is necessary. Court ultimately stresses harmless error here. Court lets clearly “interested person” of sec trans. Off the hook since he avoided discussing merits, focusing on procedure, but note such questions COULD be designed to influence. For the union head “a judge must have neighbors” but the attempt to discuss the merits was shocking. He was clearly interested person and talked on the merits. That his opinion was publicly known was also irrelevant.

**What about in informal proceedings?** The model matters. For RM seems like we’d expect someone on a “legislative” model to speak to those outside of people. Call it “asynchronous Regulatory Negotiation” that might reduce chance for litgation after the rule comes out, and eliminates the need for public posturing (maybe). No statute bars such contacts, but think Nova Scotia and need for record. Some agencies are really worried about this, going beyond APA.

There are some cases: **Sagamon** held that the guy sending turkeys to the FCC members was unacceptable on basic fairness grounds (though ultimately same result. **HBO v. FCC** see court accept that there might be pre-comunications, but says that if it is going to be the basis of decision it must be in the record, or risk becomes that the public part of RM becomes kabuki. Also say once notice issues, officials involved or expecting involvement should refuse to discuss with interested persons.(Skelly wright’s call likely fails VY) Last is **ACT** Doesn’t official overrule HBO, allowing for some limit near “competing claims to valuable privilege”, but said that the decision was explained on the record, is enough for review, and so private meeting with involved companies didn’t invalidate rule.

[do we need to do 637-642? **Costle** – ex parte doesn’t matter for rule making.]

**Due Process – Protected Interest**

Procedural Due Process is the lease controversial. Cases tend to involve state agencies and informal adjudication, because formal adjudication gets APA, and rulemaking, by Londoner and Bi-Mettalic don’t come under the ambit. You might want hearings to reduce the risk of error, which is the official line since statutory issues are relevant to the entitlement, hearings also allow for rebuttal, which separates discretionary decision from whim. Though this can tax resources and lead to “double or nothing” where you get procedure and benefit or neither.

**First question: What is the Protected Interest**

**How does it work when it’s property?** *Goldberg* originated the idea that denial of a benefit could be a property interest under DP, rather than just an unprotected privilege. This is the “New Property” idea, which includes SSB and professional license, among other things. Basically, the idea is that if the government MUST give it to you, it takes on the aspects of property, though morals come in here too. Works at state level too, as in *Sinderman* where specific language in faculty manual and “common law” practice allowed court to conclude he had a “promise” of a job. **Whether you have an entitlement is the threshold question, then what procedure is due.** Courts accept there’s an interest in ineffective payouts (but courts note govt. rarely gets money back). **Entitlement Doctrine –** no property without legal constraint on state deprivation, which is extra constitutional. And no property means no DP.

**But why have a threshold question?** There’s a fear that if you require prophylactic hearings for everything, as lower court in *Roth* wanted, there’d be too much judicial interference, and PDP would become SDP, as people got a hearing for any perceived harm traced to the government. Note also the dissent in Roth, where Marshall tries to argue that there should always be a hearing to make sure govt. didn’t break other Con reqts (like EPC), but Court rejects this, since any decision would then be enough.

**But Beware the Positivist Trap**. In Roth and Sinderman, law outside the Constitution actually creates the property. Three manifestations:

1. Bitter w/ Sweet – rejected now. Language from *Arnett*. Idea was that when the right came attached to bad process, you had to accept the process provided. It’s killed in **Cleveland BoE v. Laudermilk**, which says state can’t qualify Substantive protections, as this guts PDP.
2. State Controls Property Interest – Requires Opt-in to PDP, though constraints, limits in takings clause.[]
3. Trigger not linked to importance – [only relevant in step 2, but recall moralizing in Goldberg]

**Goldberg v. Kelly –** the key property case. Brennan talks about statute saying you must get the benefit, but also talks about “grievous loss” and “brutal need” suggesting less legalistic standard. Note that this is an adjudication, not a rule, and there’s been a deprivation in the form of terminated benefits.

**Roth and Sinderman** – the two competing professor cases. Latter gets a hearing, since he had a better claim on the merits that the job had explicitly and implicitly been “promised” to him, meaning that it’s really a property interest, unlike Roth, who had a mere abstract expectation, not an entitlement.

**Ridley v. FEMA** – Katrina housing benefits did not proc DP concern, statute was discretionary, saying “may”.

**What about the Liberty Interest?** Different analysis. *Sandon* abandoned the entitlement doctrine approach. Three kinds of liberty interests: 1.) Protected Rights: can be DP when you want procedure, but tied to outcome 2.) Reputational harm: deprives liberty, but courts require injury to rep AND additional tangible deprivation of status [] 3.) physical restraint: civil or criminal, plus corporal punishment.

Prison cases: *Wolf* and *Meachem* create a sort of positive law liberty interest that tracked property, but *Sandin* discarded this as hard to apply, requiring too much court intervention, and the disincentive to create rules. Ultimate rule from Sandin is has to be “serious and atypical,” saying that there is no entitlement doctrine for liberty interests in prison.

**How do you know when there is a deprivation?** *Paratt* (tort claim post hoc enough to cover lost mail in the prison) tells us there is no such thing as a negligent deprivation. *Daniels* court went further, saying even post hoc not required under DPC, requiring an abuse of power, and a state action. Some cases have to show interest and if person still has it (fired and still paid, might have to rephrase as reputational)

**Brock v. Roadway Express** is a good example of finding an deprivation. Identifies the interest in the employer’s ability to hire and fire at will. Court also recognizes a right in not wanting to be fired. Once that’s identified, then it’s standard Mathews v. Eldridge analysis. (this case is really just about which interests you look at when determining.)

**Special Problem under Superfund** – There’s a thing called a UAO which commands compliance with clean up, but there’s no hearing and no review, only way to get into court is to refuse to comply, but that risks a big fine. Can also seek reimbursement and comply. DCC is fine with this process, saying that there is a property interest, but say “refuse and defend” is enough. Though DCC came to opposite conclusion in Sacket, which said pre-enforcement review possible.

**Due Process – What Process is Due?**

Judge Friendly on 82 lists 10 elements that make up due process, could say it’s those 10 plus before deprivation. But Goldberg had lots of DP, at least on paper, which ultimately became everything on friendly’s list suggests need a driver. Remember, though, what really matters to the individual is the result, not the process. However, we might want procedure not just for accuracy, but for its subset, consistency, or for dignitary value (suggesting despite Walters an interest in procedure itself), or for greater flexibility.

In C you can make up an interest, for an agency they have to identify.[]

**What is the key framework?** *Mathews* of course, rooted in Goldberg. Balance is 1.) Private interest that will be affected 2.) risk of erroneous deprivation through procedures in place and value of new safeguards (judge by general cases *Walters*, procedures value is in correcting errors not getting one side money) 3.) government interest, including function involved and the fiscal/admin burden of new or different procedures.

**Mathews v. Eldridge -** Disability benefits regime sort of like Goldberg, but all in writing before. Court says that’s enough, distinguishing Goldberg in that this involved no means testing, credibility less important since medical issues. There was also retroactive pay, meaning less need for pre-hearing. Saw govt interest in not paying an erroneous benefit, avoiding mistaken termination (not just in saving money or avoiding higher procedural burdens), though the case focuses mostly on costs/burden.

**What does Mathews look like in practice?** It looks like:

**Laudermill** – Bitter with sweet case about fired, tenured ex-con security guard, court goes through Mathews to find small pre-hearing right (court says context worth it, but just mercy plea, pure discretion not enough). Ties in with flexibility argument, though doesn’t upset the entitlement doctrine.[why would it? Link to interest.]

**Goss v. Lopez** – School suspension, liberty and property, requires pre, but only informal oral hearing and notice

**Ingraham v. White** – You can sue to get process after corporal punishment. Strong govt. interest not just in avoiding burden, but in making sure the punishment is effective.

**Walters v. Nat. Association of Radiation survivors** – the $10 max for lawyers case, idea was to make it non-adversarial by defacto bar on counsel (but remember §555 says you have a right a lawyer when you deal with an agency). Limited private interest here, since you can’t call process itself the interest. Burdens private party, but for govt. interest prong can see paternalistic desire to protect vet, increased burden on system of lawyers, (not here is not paying, since can’t have an interest in denying rightful payments). Informality tone an interest too. Court also sees limited benefit in the stats, but doesn’t really parse them. Stevens Dissents, saying you need us “independent guardians of liberty”

**Gray Panthers** – Part B claim, led to toll free number for brief oral case, builds on dignitary, non-arbitrary arguments

**FOIA (**The fed version**)**

**Where’s the law?** §552. (a)(1) Publish in Fed Register all the 553 stuff and all the exempt stuff. (a)(2) available for public inspection and copying now meaning on line, especially after e-gov act. Includes even unpublished materials and admin manuals. Also frequently requested (1+2 times) 1 and 2 are now basically the same. Many want more affirmative disclosure, Obama pushed for some, but reality doesn’t live up to the memo. Reverse FOIA (95) blocking also possible.

(a)(3) is FOIA. It requires the agency to produce things upon request, and covers everything not in 1 and 2 that is:

1. A record
2. Possessed by an agency (president is not an agency, but it can reach parts of the EOP other parts of APA don’t
3. Reasonably described
4. Following agency request rules
5. With fees paid AND
6. Is not exempt.
7. NOT ON THIS LIST –requester ID, need/justification/indication of information’s use or why desired.

(a)(4)(A), allows for fees but often waived for press/media. Also establishes judicial review of decisions, which is de novo, with fees/costs available, but less hospitable in practice than on paper (oft corporate motivated). Note that time limits in (A)(6) are basically a fiction. (20 days, 10 day extensions on paper)

**What matters?** It matters which agency has the document, not who made them. Format doesn’t matter. Your death can matter to privacy, but **Favish** says that family can assert privacy right of a dead person (Vince Foster).

**What are the big exemptions?** They are under §552(b), and fall into three categories

|  |  |  |
| --- | --- | --- |
| **To Protect the Gov** | **To Protect Business** | **To Protect Individual(s)\*** |
| 1. Nat’l security. No requester challenge ever wins here. Court determines if materials are authorized to be kept secret and are “properly classified”

| | 1. Internal Personnel rules and practices: used to be high and low, but ***Milner*** in SC now says all low, meaning only truly trivial stuff, like parking rules, is protected, goes against lower court practice, which protected things like enforcement manuals (secret law? Yikes)
 | (4) Trade Secrets/private or confidential comm/fin info: Lots of lit, even though sort of not what FOIA about. Exemptions requires:1 – substantial competitive harm2 – Release would impede future info gathering3 – (maybe) subject of record would not want court to reveal (and, some add, tangible harm on release.) | (6) Personal Privacy: covers things like medical records and names. Protection is for **“clearly unwarranted”** invasions. In **Dept. of Air Force v. Rose**, court allowed for redaction of otherwise releasable student records. Not that this interacts with privacy act, barring release of “retrievable” ID info w/o consent. |
| (3) Other statutes: bends to other decisions to keep secret, can include classified material under “sources and methods” statute.  | (8) Financial institutions: no releases about banks. Lots of overlap w/4 | (7) Law Enforcement Records: 6 sub parts here\*\* – most important is (c) create unwarranted invasions of privacy. Note that this is **could reasonably be expected to cause** **Unwarranted Invasion** of privacy, a lower bar than . (f) also matters, 2d Cir. has said that it needs to be a particular person, not just “persons” live circuit issue. |
| (5) Privileged Mat. – matches litigation privileges, like work product, A-C, Delib Process | (9) The mystery well/geology exception: 4 likely enough |

\*Note that, for 6 and 7, Courts have said that there doesn’t appear to be privacy interest for Courts “we trust that AT&T will not take it personally” FTC v. AT&T. Un warranted in 6&7 means balancing privacy v. public interest in knowing about govt. action, not private interests. Hence **Reporter’s committee**, where they didn’t make them give otherwise publically available “rap sheet” summary for mobster, partly because public had the data.
**\*\*** interfere with proceding, deprive person of fair trial, create unwarranted invasion of privacy, disclose confidential source, disclose techniques or procedures, endanger life or safety.

**Agency’s Own Rules**

Agencies are bound by their own rules under **Arizona Grocery/Acardi**. In **Nader v. Bork**, rules for special prosecutor. Note this also blocks changing rules through ADJ, at least somewhat. But, agencies are not bound through estoppel. “**Agency says something in rule, binding, but never (w/ 2 exceptions[]) stuck with incorrect advice”**

**But what is a rule?** Legislative or substantive rules, the kind that need N&C, sometimes you can get procedure/interpretation to count to on a balancing or reliance argument.

**Why hold them to it?** Rules have own force, ignoring would be de facto amendment (which requires procedure), Ignoring own rule is A&C, can raise DP concerns. There’s theory issues though, remember all the discussion on adj v. rule was about enforcement.

**And what does bound mean?** Note that lots of things, like 12,866 say that they don’t bind or provide grounds for suit. In ***Caceras***, the guy wanted the recording excluded that the IRS made counter to its staff manual, which required approval for recording. Court allowed the evidence though. Partly to incentivize creation of standards. Partly to avoid interfering with executive. Rules this isn’t DP[], which would have required excluding.

**What about non-rule statements?** That’s where Estoppel comes in. The basic rule is that **there is no estoppel against the government**. ***Merrill*** is the basal case, statement about reseeded wheat didn’t force them to pay out later.

**Why does the government get off so light?** Rules and law are in the public interest, and it’s the public that suffers here. There’s actually a preferred outcome for society, unlike with private parties. The other interest here is how bad would it be to hold the government to its word. This is why filing deadlines are sometimes treated differently, since they’re not about the general benefit, but just about the administrative goal. [echoes reasoning in Richmond]

**Can you ever get them?** There’s an idea, though not yet in the SC, that misconduct might be enough, as in the dicta of **OPM v. Richmond**, which said that some claim might be possible, not in a claim for money from the treasury. The idea is not that misconduct changes the burden or the reliance, but rather that it would help equity. Note that the reasoning in Richmond can make it hard for agencies to stand by their word when money is involved, though they often do just choose to live up to the mistake. Tax rulings have a safe harbor (inf. Adj revenue rulings) and §552(e) allows you to ask an agency for a declaratory order, which is as binding as a normal adjudication. In reality there’s a need to check, better chance of getting something if you have it in writing, and if you hear from a senior person.

**Is there any alternative to Estoppel**? There’s the **Winstar** approach. There, the court said that it was a contract that could be enforced, rather than calling it estoppel. Bolstering this was/is the Tucker act’s allowance of contract claims.

**Consistency & (non)Retroactivity & Res Judicata**

Adjudications are retroactive by definition. But there’s no per se bar on all retroactive legislation. C has ex post facto doctrine, but that’s limited to criminal law, applies to Statutes of limitations and procedure, always line drawing problem.

**How does this differ from rules?** Not bound by old adjudications, since you can change through the same method, like with rules. But, you have to explain. **Brennan v. Gilles & Cotting Inc.** was OSHA fine for contractor, OSHA Appealed a ruling of no fine, and court set aside because change was not explained (though not just because there was a change). There is a threshold question though, were they actually inconsistent adjudications? See: **Comcast v. FCC** where “unchallenged staff decisions” weren’t enough for court to throw out decision on the cable boxes inconsistent with past adjs. (not commission v. commission, which would have counted) Said Comcast should petition for revocation of other waivers, forcing explanation that way. Consistency doctrine goal is not to get everyone to rule the same []

**NLRB is the biggest offender here**. They flip positions A LOT. Take **NLRB v. Guy F. Atkinson**, where the agency flipped, invalidating an agreement because of changes in NLRB policy adopted after the guy was fired, one related to JX one to substance. Court invalidated, since the changes in policy where a hardship disproportionate to the advance in public good and since retroactive the company could not have known at the time. Usually these issues are less problematic for JX, but not always.

**So how approach Retroactivity in Adjudications?** You can ask if there was reliance, whether that reliance was reasonable, and if we want to encourage it. There is also a 6 factor approach[]:

1. Is it a first impression/hazy? More hazy means more likely
2. Was there reliance/did it shape primary conduct? Or did you just think you could get away with it? – note this also means, or can mean, you look to whether their conduct would have been different if the rules had been different—related to harm—and can set aside as in *Miriam* when though it retroactivity doesn’t make sense for a good faith actor, even if it might for a bad faith actor.
3. How great is public interest?
4. Administrative convenience?
5. What is the relief from? Imposing a fine is dicier than some prospective requirement or an injunction.

**What about Retroactive Rulemaking?** The Key case here is **Bowen v. Gtown Hospital**, A rule is set aside for no N&C, but then they passed a rule and made it retroactive to the date of the original rule. Court decides this on statuory grounds, saying **that retroactive rulemaking** **is available only with an explicit statement of authority to make the rules retroactive** (the retroactivity language related to agency adjudication was not enough.) The Court worries that this would promote sloppiness. Scalia concurs, but with a different argument. He says that **by definition, and rule must be of future effect, and so it CAN’T be retroactive.** However, following that logic would take you out of the APA, and might be countered by arguing that this just means a rule can’t be exclusively retroactive (S says that would be order) Scalia also notes that excess “secondary retroactivity” meaning taking past actions into account, can be A&C.

**Res Judicata and me**. Administrative decisions have the same kind of preclusive effect as judicial decisions, even w/regard to judicial decisions. However, there are some limits on the preclusive effect of administrative adjudications:

1. **Locurto v. Giuliani** – emphasized that claims are not precluded w/o full and fair opportunity to litigate, which is always the case if there’s a trial, but not in an agency adj, as with the fireman free speech admin procedure, which court said lacked a neutral arbiter in one instance, lacked discovery in the other.
2. **Statutes**: can always require De Novo Review
3. **Public Policy**: also an exception.

**What about the other way, can judicial decisions preclude admin rulings?** The key case for this question is **U.S. v. Mendoza**, Govt. has lost, Mendoza wants to bar them on Off. Non. Mut. Estoppel. But court creates an RJ exception for govt. as litigant, fearing that to do otherwise would kill circuit splits/legal development AND force government to appeal every decision.

**Does that mean agencies can just ignore judicial rulings?** No. Although *Mendoza* seems to say that the agency can ignore rulings against it outside the specific parties, which is called **non-acquiescence**. However, this raises fairness concerns, since not everyone can bring suit (expensive), and its law breaking. Plus, aren’t courts a la *Marburry*  supposed to decide what the law is? This leads to inter-circuit non-acq, but not intra-circuit. Revesz and Estricher argue that inter is fine, and intra can be to, so long as the issue is live and the goal is to get it to the SC. Dillen and Martinez are counter, saying that you have to follow the law, which is not a surprise since the two make a business of fighting agencies.

**SCOPE OF JUDICIAL REVIEW**

**What does the APA say about when you can go to Court?** This is the 700’s. §702 waives sovereign immunity, but also says no money damages. §703 says the nature of the case depends on the statute, and creates residual authority to review in the courts. §704 limits review of actions made reviewable by statute or FINAL agency action for which there is no other remedy in court. §705 Agency can stay an agency act when it finds “justice so requires” pending review. Court too, when needed to prevent irreparable injury. Then there §706.

**What’s special about §706?** allows court, reviewing the whole record to set aside or compel illegally withheld/unreasonably delayed agency actions, if:
**(A)** A&C, abuse of discretion, or not in accordance with law
**(B)** Contrary to Constitutional right, power, privilege immunity
**(C)** in excess of statutory JX, auth, limits, or short of statutory right
**(D)** without observance of procedure required by law
**(E)** Unsupported by substantial evidence in a §556 or §557 case or otherwise otherwise on the record case
**(F)** Unwarranted by the facts to the extent facts get de novo review in reviewing court. Read as a deadletter since there’s always remand, though may originally have been intended to cover review of informal proceedings.
The easy ones are (B) & (D), which are de novo save for dominion energy where procedural question got Chevron[] and (F), which seems to anticipate a trial, but this virtually never happens outside of places like FOIA, that allow such review.

Harder are (A), (C), and (E). What makes them trickier is that there is some idea of deference involved. Each applies to a different kind of proceeding. Substantial evidence is “factual findings after formal proceedings”; A&C is after judgment calls. Because humans are limited in making distinctions, facts in informal proceedings just end up with A&C review.

**Review under §706(E) – Substantial evidence** **QUESTIONS OF FACT** (A&C can actually be an easier bar to clear than this one. )

**So what is substantial evidence?** “More than a scintilla” “Evidence on which a reasonable person would base a conclusion” not really a preponderance. The standard is usually enough to defeat motion for directed verdict. It is a MORE deferential standard than clearly erroneous, which is what appeals court gets. [**Zurko** says they’re the same standard, book says SE narrower than clearly erroneous.] Note that it is NOT the standard of proof, and it is not just relitigating the issue, it’s whether there is evidence in the record to support the finding.

The trick is how you balance deferring to the agency on facts, leaving only questions of law for the court, v. the risk that this would leave the agencies totally unbound.

The leading case here is **NLRB v.** **Universal Camera** – the complex firing sequence case, where Chairman challenges as being about retaliation, but the other side says it’s about insubordination. That factual question is the key legal question of the formal adjudication. This is the case where they reversed Judge Hand.

The full board reversed the ALJ, who had said that the firing was alright. Note two statutes involved, APA and NLRB, NLRB also has record as a whole requirement, which is read the same. The court reversed because there was no consideration on the record as a whole. The LH was congress trying to “express a mood” and get courts to **consider the evidence in favor and the evidence against**. Not just pick out one supporting piece.

There’s also a question of what to do with the ALJ, you’re reviewing the Board decision, but **alj-board disagreement** gets some weight, since, as §557 says, the opinion is part of the record. Board might have agenda, ALJ might be less biased, and the ALJ might be better able to determine credibility (bias or intangible?)

**Allentown Mack** – the case that deals head on with the fear of unbound agencies. Here the ALJ and board agreed in applying the standard, but the SC reverses saying that the board is disguising rules as fact finding. And, he adds, you have to hold the agency to the announced standard, not the standard as applied. The major story is that there was enough evidence in the record to show reasonable, meaning not enough in the record to show otherwise. They upheld the test, but they killed the ruling since the fact finding itself was not supported by substantial evidence.

Dissent here gives a method for Substantial evidence opinion: 1. ID conclusion, 2. examine evidence, 3. determine if evidence obviously inadequate to the point that the Court must have misunderstood duty. They think Scalia, though he says he’s deferring to valid choices on types of evidence, isn’t really deferring.

Note this isn’t about Burden of Proof/production. In APA, production is just the prima facia requirement. burden of proof is on movant/proponent, though **Greenwhich** created “**True Doubt Rule**” meaning benefit applicant couldn’t win just on equipoise. Suggests Burden of Proof as Burden of persuasion not quite the same as preponderance. []

**What about questions of Law?** 706 does say courts review all questions of law, and we have the Marburry principle. **Hearst** was an attempt to answer this, contemporary with Skidmore in 1944. Question was whether “news boys” were employees or contractors. Seems factual, but really it’s legal, since it’s about the background common law, there’s no hint of deference in the decision, but later they seem to decide relying on the agency, because Congress wanted it done that way. **This is a formal way out of the deference question, saying Congress wanted it to go a certain way**. Once contrasted with the Foreman case, similar facts no deference as Court, Breyer-like thought Cong wouldn’t want defer.

**Skidmore** is also worth mentioning here, since it’s the same kind of question, here the Court says that though the agency isn’t a party, their opinions from things like briefs can come in, but only to the extent they are persuasive.

Lower courts have added in standards, like long-standingness (reliance, congressional acquiescence), and whether law and interpretation are contemporaneous.

There’s also **Chevron**, itself about the CAA. Court can’t find an answer in the statute. The logic is that the question is a policy decision, and accountability and expertise mean the agency, not court, should decide it. The case itself uses those ideas more than the delegation argument in Skidmore and Hearst.[] This is true even though the case itself is a flip-flop, it wasn’t until **Brand-X**, that this became explicit, showing Chevron is about what’s a good policy

**And then there’s . . .**

**The Chevron Test**

Step 0 – Really two parts: First: **Has Congress has given the agency the power to state proposition w/ the force and effect of law**? Second: **Has the agency actually done so**? Based on **Mead**, and note that process can matter significantly here. *Mead*’s rules of thumb, not always true, are that it’s all about procedure, with formal getting more deference, and the exemptions in §533 (Guidance, Policy, Internal rules) don’t get deference. **It’s not causal, though, it’s that full procedures indicate delegation.** **Barnhart** complicates, applying a sort of a totality test, saying that issue is interstitial, the agency has expertise, the issue was important to administer, is complex, and, the agency has long considered it meant chevron because deference depends in part on interpretive method used and nature of question asked. (in Barnhart, like Mead, there was no N&C.)

If you fail in Step 0, then you go to **Skidmore**: Agency rulings/interpretations/opinions are not controlling, but can provide guidance with their weight dependent on: Thoroughness, Validity of Reasoning, Consistency with earlier and later pronouncements (including lack of flip flops), and “all factors that allow it to persuade. (Scalia thinks this step is unneeded, as Chevron replaced Skidmore)

Some Per se Rules: Briefs/litigation positions don’t get Chevron deference. If many agencies interpret, none get deference. No Chevron Deference for agency acting as a prosecutor.

Step 1 - Court asks: did Congress address “the precise question” at issue (court enforcing what it sees as Congress’s decision.) Issues are “how clear is clear” and what tools do we use to determine that?

In a footnote, Stevens says you use “traditional tools of statutory interpretation” but do you? The traditional view is that you look at the text, then other tools if the text gives no answer. The minority view is that you look at the text, and if that is ambiguous you go to the agency without the other tools.

There’s also a question of how uncertain you have to be to get a yes or a no in step 1.

Nominally, **MCI** and **Brown & Williamson** are resolved in this step. But the steps really aren’t as distinct as they seem.

Step 2 - If not, go with the agency, given greater expertise and accountability, if their decision is based on a permissible construction of the statute.

The language here is in Chevron, and is basically so long as it is not arbitrary, capricious, or manifestly opposed to the statute, but one way to read that is to ask whether it is a reasonable policy choice, which isn’t really about being contrary to statute. IF it’s about interpretation, then the steps conflate, if not than it has become policy, not interpretation. (the desert example, which must still be bout policy if you’re still talking statute in step 2. Anything but A&C here would just make it step 1.

The **strong** reading of Chevron is that ANY ambiguity leads to deferral, which means that it happens in almost all cases. The **Narrow** reading is that you linger longer in step 1, using things like LH, which is more like Chevron itself. The **Weakest** reading is that if there is a “better” reading in step 1, then you go with that, and you can bolster that by really going after the agency in step 2. Most often just treated like a normal case.

If they win under Chevron, they can change the interpretation. If they win under skidmore, it would need to persuade the court that the new interpretation is actually better, since the court still technically has authority on the interpretation.

**Case Details**

**Step 1 Cases**

**MCI v. AT&T** – Statute said long distance carriers had to file rates, but also allowed the FCC to modify, and as competition rose they eliminated the filing requirement for non-dominant carriers. Question was did modify allow that interpretation. They go back and forth on the dictionaries between the dissent and the majority, with Scalia weighing only contemporary dictionaries. There’s also a limitation on Modify in the statute, the 120 maximum for delay, which can also go both ways. You could read all of this into step 2 though, saying that it is ambiguous, but that this particular interpretation is wrong. Stevens is much more purposive, saying that things have changed and that this is what Congress wanted, but unclear if in step 1 or step 2. Calls this paradigmatic on judicial deference.

**Brown & Williamson** – 5-4. Straight forward reading of the text seems to support the dissent. Majority argument is built on two pillars. First, that the fit is wrong, since if they had the authority they’d have to ban it, which clearly was not the intent of Congress. Second, that there was effective ratification, thanks to the 6 later laws passed while FDA believed the other way, creating a regulatory scheme that can’t otherwise function, something that went beyond mere acquiescence. It’s hard to tell what step the dissent is in, they mostly talked statute.

Some argue there should be different approach for cases like this one that deal with Jx, something the court is deciding right now (answer: no). B&W didn’t have to decide this, since it was resolved in step 1. If it’s about Jx, it’s a tougher argument that their expertise should apply, over the courts, and there might be abuse from agencies, but both arguments also play the other way. **Note court went way past text to stay in step 1**.

**Mass v. EPA** – Big picture is similar here, and court reversing in step 1. Flip of B&W, since it also involves a position switch, and are 5-4. Counter to type, Breyer says in Dissent “legislative atmosphere is not a law.” Part [II-C] gives us the question going back to *Hearst* and *Packard* about importance and prominence of an issue suggesting that Congress didn’t punt. Raises the recurring issue of **whether ambiguity itself is a delegation.**

**City of Arlington** – This is the Chevron in Jx case. Court says that Chevron applies to Jx. But what is a Q of Jx? Intuition is fox should not guard the hen house. But the power grab fear goes against the idea of Chevron, as well as being difficult in practice. This is where Scalia’s hypothetical law comes in, he’s defending against what he sees as a way to make Chevron irrelevant by turning everything into Jx. Dissent disagrees on what Jx means, saying that these should be defined as questions about whether Congress delegated authority to them or not.

**Env. Def. v. Duke** – Ends up in step I, despite an apparently clear rule. Q was definition of increase. Agency had used different definitions in different areas. **Allows “inconsistency” over space (here meaning different purposes in the statute, but same language. So “space” in the statute) the way Chevron allowed over time**.

**Step 2 Cases** – the big question is if you still use the statute. The most popular is to say that it’s A&C. Rare to lose here

**Entergy v. Riverkeeper** – the Anti-*TVA v. Hill*, based on statute saying “best technology available,” Riverkeeper said choice of almost as efficient, but much, much cheaper standard was no good, since “best” is a term of art, but scalia thinks that view just has to be reasonable, not only or best, and that just because there was silence in statute on C-B, as well as ANY other factors, doesn’t mean that Congress couldn’t have allowed for such considerations at step II level. because they were silent on C-B (and everything else). Breyer concurs with Scalia here, using LH & mergin the steps. In a sense, this is an extension of the absurd results doctrine into the Chevron framework.

**Brand X** – Page 727 – Odd case, no details, but affirms that if the court says that an statute passes step 1, then the construction of the statute does not preclude other, later constructions. This can happen even if the agency was not a party to the initial ruling, and the court reverse engineers the position. Also brings in Stare decisis. Question was whether ISPs were common carriers, 9th Cir. had previously ruled, but FCC was not a party. Court reconstructs what it would have done.

**Step 0 Cases**

**U.S. v. Mead** – Figuring out if tariffs apply. Court said ruling letters, which were informal adjudications, did not bespeak an intent to bind. Reasons were that Congress gave another agency review authority, the agency didn’t behave like they were binding, and so many were made. No explicit or implicit statutory indication agency can make a rule with force of law. **Procedural requirements are a signal that Chevron applies, but are not the reason that it applies.** When there is no Chevron, than skidmore applies.

**Barnhart v. Walton** the SSA case. Breyer’s broad test described above. SSA interpretation of disability, N&C post-lit.

**Gonzales v. Oregon** – Euthanasia. Mead like. could have used **Christiansen** to get out of it, [] which says interpretive rules don’t get Chevron [scalia concurred saying Chevron inapp if statute unambig, interp. not authoritative, or, as here, responsible agency personnel not involved]. The rule was “interpretive” with no N&C. **Court says that statute suggests split authority with SEC HHS, so this oversteps.** N&C not that important, & not req’d since interpretive. **Also creates rule: can’t just transpose statute’s language into reg and then interpret reg for bonus deference.**

**Skidmore v. Swift and Company**: About whether they are waiting to work, or working to wait. Notaly means that some interpretations get more weight than others. Note that this was private parties involved, the agency was on the sidelines. It is **Categorically** different from Chevron, not just weaker, based on the idea that here there is a belief that there is a correct answer that the court can uncover. Thus, flipping suggests wrong because it shows that one of the two selected must be wrong.

**Long Island Care at Home** – Breyer case, gets past step 0 to chevron, but muddled, skidmore like analysis. Says that the keys are rule involves individual rights and duties, agency uses full N&C, where resulting rule is within statutory grant, and where rule is reasonable, court assumes deference. In the decision, he also talks expertise, and focuses on importance of Congressional intent to allow agency to fill gaps. **This is barnhart like.**

**What about interpreting its own regs?** Comes down to **Seminole deference** versus **Auer Deference**. The manning critique is that if you let this go too far you end up with non-public process and then no judicial review. But the counter is this preserves efficiency.That doesn’t get us past the fear of **disingenuous** regulations, with a new admin interpreting regs in a way clearly not intended, in *long Island*, Breyer convinces himself this isn’t going on. **Auer**, which says even an interpretation in an amicus brief is enough. Rules are:

1. **Anti-Parroting Canon** – *Gonzales* can’t just put statute language in a reg and jump Chevron
2. **Chistopher v. SmithKline** – No auer deference, but decision more on it sharp break from past practice
3. **Decker v. Northwest** – 7-1 SC defers under auer, but the 1 is Scalia attacking Auer. Sees it as separation of powers issue, since it lets the same branch interpret and be interpreted.

**Arbitrary & Capricious Review**

Discretionary policy choices, not interpretation, covered by §706(2)(A). Admin L. Rev Id’s 10 common reasons to reject:
1) Relevant Factors: Ignoring req’s factors, or took into account those that are barred
2) No Tie to the Statute’s purposes or requirements: Sort of a species of the above.
3) Clear error unified by lack of explanation: The other 7, include, factual premises don’t meet the relevant standards, no explanation or bad reasoning, failed to consider important aspect without justifying, inconsistent with past practice w/o explanation or legit reason, agency didn’t adopt or explain why they didn’t adopt alternative solution, didn’t consider substantial argument or respond to key comments, imposed disproportionate sanction, or catch-all reasoning failure.

**Can you consider things not mentioned explicitly in the Statute?** Majority in *Mass* suggests not, but *Pension Benefit* says other statutes can, but don’t have to be, and DCC allows cost to be considered when not barred. But *Mass* seems to overrule those cases. [what was the category language in our Mass v. EPA discussion?]

**What is the hard look?** Originally meant the agency gave hard look to procedure, but now it refers to court review. Begins with **State Farm**. Court does not substitute own judgment, but looks to see if they run afoul of factors above. Court looks only at the record, agency can’t rely on arguments made during the litigation or after the decision. They also called them out for inadequate reasoning, which has made agencies very defensive. Note that this last one is about prediction, (which is also seen in *Fox*)*.* Dissent raises the admin change, sort of. Big debate on Hard Look is whether cost to agencies in extra work up front is worth the gain.

*Fox* goes into the rigour of state farm, with Scalia saying that predictions must be logical “not clairvoyance.” They basically replay the second part of State farm, though the logic standard for the “safe harbor” prediction is more deferential. The tape delay decision, not to require a “treatise” is also less demanding.

See also *Mayo*, which links Step II analysis to Hard look A&C analysis. Kagan in *Judulung* [sp] was even more explicit, footnote said could be Chevron, but that it was more “apt” to call it A&C since not about meaning.

**What about when the agency changes?** This is **FCC v. Fox**, Scalia says the agency doesn’t have to prove to the court that a change is better, gives blackletter as 1.) **recognize that there is a change**, 2.) **explain the new policy**, but 3.) **no need to prove new policy is better**.

**State Farm** – Passive Restraints. Court saw two big problems. First was the failure to require airbags, which was 9-0. The only justifications were made during the litigation. More controversial was the stuff about whether it would be worth it to do, which was all 5-4. Accepted the idea that there was a needed threshold percent and that many wouldn’t use, but wanted explanation of why inertia wouldn’t work, basically calling them out for inadequate reasoning.

**FCC v. Fox** – Scalia on fleeting expletives. Gives the blackletter on changed policies. Breyer dissents, saying that you should need more for some decisions than that. Rule on safe harbor, tape delay to, as above. Note that FCC is not a chevron case because the meaning of fleeting expletive doesn’t change and is not at issue. There’s also the argument here about whether independent agencies should be treated differently, more protected and less able to rely on political justification. Scalia says no such distinction in the APA, and rejects Stevens extra-textual arguments about congressional intent to have more control over independent agencies, saying can’t be Cong agents and wouldn’t change analysis.

**Overton Park v. Volpe** – presumption of regularity not a shield from searching review. Look for relevant factors or clear errors of judgment, bud don’t just sub in court’s view.

**Mass v. EPA** – Agency said wouldn’t regulate even if they could, based on “reasonable positions” but steven’s relying on the statute, which nowhere says they can’t rely on this, but also doesn’t say they can. In *Pension Benefit*, the court said you don’t have to consider related statute, but you can. Strong reading is that anything not specifically mentioned is out, weak reading puts all the weight on the “shall” language in the statute, however, the question is without an official finding how was Shall triggered?. In the end, they seem to say the statute is what puts things off limits.

**Availability of Review**p. 147 in the notes has a discussion of how 1331 and organic statutes can allow for review, dependence on statute. Waiver of Sovereign immunity claims for non-money damages claims under §702 in the APA. State agencies suable.

**Are there exceptions to review?** §701(A) gives two: (1) review precluded by statute (2) Committed to discretion by law.

**(A)(1)**

Usually pretty easy, presumption of reviewability, statutes rarely block review. However, can be blocked implicitly:

In **Block v. Community Nutrition**, the milk case, statute did not expressly prevent suit, but O’Connor said that silence trumped. This didn’t kill the presumption of reviewability though, because her reasoning was based on the Court being sure, via expresio unius, that Congress did intend to block suit from this party, especially given the administrative exhaustion requirement. She said you didn’t need a clear and convincing arugment, just enough for the Court to be sure. The alignment of interests also mattered here.

**Bowen v. MI Academy** – Statutory provision permitted some review, but Stevens, who did not participate in Block walks that case back a bit. **This is the more standard approach, and Stevens allows suits regarding the method used, even though some other types of review were restricted**. [] pg 150.

**What about when there is explicit preclusion?** The key case limiting preclusion is **Johnson v. Robinson**, where the VBA’s denials of benefits for the conscientious objector got review since it was an EPC claim, and thus he wasn’t challenging the administrative scheme, which was barred, but instead Congress’s original choices. **Traynor v. Turnage**, built on that, allowing a challenge to how the VA interpreted a later statute in making its decisions. (Congress reacted). There’s an ongoing question about whether Congress even can preclude Constitutional review.

**(A)(2)**

Much more conceptually challenging. Lots of statutes leave things to the discretion of the agency, so even if you could challenge what would it be for? Abuse is by definition out, though [missing something in written notes]. **Overton Park** is the first big case here, where court said that the standard allowing review of the highway placement decision was that there was **“law to apply” (**although that goes back to whether it’s review for consistency or abuse). Note that the EXACT argument can matter, as in *Heckler*, which might have been reviewable had they argued it was about Jx.

But this is A) a stupid standard, as the agency would just win on a motion to dismiss and B) there’s always law to apply, since you can always challenge as A&C, which Scalia notes in *Webster*, arguing “law to apply” means OTHER legal tools, like political question, allowing courts to avoid being pulled into places they’d be in the way. Narrower alternative is that there are spots where Congress at least implicitly says you can’t review for A&C/Abuse, though uncommon[].

The first big case is **Heckler v. Chaney** – Says that the law is out if statute gives unlimited, unbounded choice. Execution drugs case. They want FDA to enforce their policies, **but there is a presumption of NON-reviewability for decisions not to enforce**, since there’s no coercive power in not inforcing, there’s no record to review inaction, and the analogy to prosecutors is easy and suggests discretion.

DCC had similar case, but statute required the FDA to take certain steps, so suit was allowed under violation of statute theory, not failure to act theory. Makes clear that there are two ideas: review of discretion and Inaction.

APA in 551 equates action and inaction and in 701 allows courts to accelerate. By day X, do Y is clearly reviewable, but other instances harder, usually no record. But 553 allows petition for action, rejection of which must be explained under 555(e) (which is how Mass v. EPA got out of this one, and noted that A&C applies to such a question. )

**Webster** – the CIA case, Gay = fired. Court says unreviewable. Key was the “deems” language, also looked at the overall structure of the law. Said Con claims probably were cognizable. Scalia lays out his theory here, noting that the “law to apply theory” even law here allows review for vindictiveness, & court looks to sensitivity of decision, practical disruption of court entering question, and whether there traditionally is review.

**Standing –** also a mess.

Broadly, as in *Flast* Art III = adversarial and context historically viewed as Judge resolvable. 6 components:

1. **Art. III** **Reqs** – These cannot be waived and are Jx. They must be PROVEN.
	1. Plaintiff suffered, or is likely to suffer, a judicially cognizable injury (concrete, particular, legally protected), actual/imminent that is. This is **injury in fact** as asserted most things count, not ideology.
		1. Increased competition (Data Processing(both future and 2 specific contracts), Clarke, Nat’l Cred. U)
		2. Fewer postal jobs (Air Courier)
		3. Aesthetic injuries (Lujan)
		4. Loss of Land (Mass v. EPA, but M & D differ on scientific question of how much & when)
		5. Future injury to crops and defenses taken against them (Monsanto) [might be prudential]
		6. Lack of fair chance to get a contract/admission (Jacksonville)
		7. Being in a Segregated school (Dignitary injury in Allen v. Wright)
		8. Can’t use the river, despite no measurable pollution (Laidlaw, **reasonable belief + response**)
		9. NOT Ideological injuries (Sierra club (no harm to the org.) and **Allen v. Wright** the case on the tax break for schools that were segregated, says Politics is where you deal with ideological injury.
		10. NOT Animal nexus or Env. Nexus (Lujan)
		11. NOT congressional Standing – Raynes v. Bird, no injury + SoP, can sue on miscount though
		12. Lujan rejections often based on EVERYONE having standing on the argued logic
		13. **What about Risk**? The logic follows from regulations, which are prospective and designed to reduce chance of future injury, but Courts are reluctant to view harm this way. They did once, in **Truckdrivers v. Pena**, based on argument of increased risk of harm from Mexican drivers (clearly a way lower standard than in clapper.)
	2. Fairly traceable to D’s unlawful conduct (caused by defendant) (NEXUS, CAUSE) AND
	3. Likely redressed by the relief requested by P. (can be cured) (NEXUS ,REDRESSABILITY)
		1. *Mass* dissent was arguing here, saying that it was unclear if harm to coasts caused by defendant or cured by anything the court could order.
		2. The Katrina cases same conclusion, flipped reasoning, there was clearly redressability, since asking for damages, but failed on causation (CoA decision vacated)
		3. **Independent Actor Problem** - Third party beneficiaries always face this problem. (Wright, Simon v. E. Kentucky Hospital, Allen v. Wright, Dissent in Mass v. EPA)
		4. **Procedural Errors** – Truly harmless errors are exempt, but the rest come in. You can justify it as an increased risk argument, but blackletter is that **you have a harm in the act (like the building of the dam) and procedure is linked, since designed to protect.** Similar to the reasoning in the AA cases. (Scalia’s FNs in Lujan)
		5. **Relief** – You have to evaluate related to relief. (**Lions**(chokehold case), Steel Co., Laidlaw)
2. **Prudential –** these Congress can override/waive (citizen suit), as they are just for convenience of the courts
	1. No generalized grievances – can still be widely shared though. Bleeds into Con issues.
		1. Recall Lujan above. We don’t allow for fear of opening floodgates, and stepping on the president’s toes as being the one charged with enforcing the law.
		2. As in **Allen v. Wright**, mere fact govt. violates the law not enough to give you a particularized injury, since everyone has that.
	2. Within legal “zone of interest” – This is written into §702, which says “within the meaning of the relevant statute” so agencies regulated by it or maybe benefitting.
		1. Competitors have been found within the scope (Data Processing, Clark, Nat’l Cred. U) standard is arguably within scope, with specific congressional intent irrelevant
		2. Employees didn’t make it in under revenue protection law though (Air Courier)
	3. Usually no 3rd party standing allowed, though with some exceptions, must assert one’s own rights or interests – no Jus Tersii. **Straightforward, has to be your own legal right** and can be overridden by Congress or courts when there’s a “special relationship” or harmed party can’t vindicate own rights.

**Constitutional Concerns** – Injury in fact. Note that the bar on general grievances bleeds in here.

**Sierra Club** – Court said no standing because no injury to the organization, since no ideological harms. And govt. action if anything helps them since it raises their funding.

**Lujan** – Want the reg set aside, standard case, but the endangered species are not the plaintiffs, DoW is. **Can bring suits on behalf of their members, so long as members have standing, the lawsuit is relevant to the organization’s purpose, AND there’s no reason for individual participation (like damages)**. Court says that the problem here is that we can’t be sure that the harm will actually befall these plaintiffs, since they may not take another trip, **has to be likely and reasonably imminent** (Kennedy, in dissent, says ridiculous since then plane tickets enough). In rejecting ecosystem nexus, *Mass v. EPA* comes in as a counter, since the reasoning there seems to suggest anyone can sue for GW, but here court says ecosystem nexus is too open, since continguty covers too much. Dissent would have accepted vocational and animal nexus, but majority found those too attenuated as well. Idea is if you’d pay a lot to avoid, than it’s an injury, but than everyone would have standing.

**Clapper v. ACLU** – FISA standing. Court says unclear if comms will be monitored, standard was **certainly impending**, dissent wanted lower standing. The issue with the CURRENT harm was the *Laidlaw* argument about nexus, which is reasonable belief + response standard, here it was too uncertain and the reaction unreasonable.

**Constitutional Concerns -** Nexus

**Simon v. E. Kentucky** – Classic example, plaintiff can’t show that hospital tax exemption being taken away wouldn’t necessarily get the hospitals to accept the homeless. Lack of medical care is clearly an injury, but no nexus. **Note that, if this were risk as harm, it would work, since increased chance of acceptance would make the harm redressable.** Would have needed to should that the Hospital WOULD have provided the desired care if tax exemption were removed without it.

**Jacksonville –** Contractor case. Argument is that affirmative action harm was fair chance, not odds of getting the job. Makes it a procedural issue.

**Allen v. Wright** – No suit allowed for discrimination, even though discrimination was an injury. Court said the connection was too attenuated, leading some to argue that there should even just be a blanket rule that you can’t sue for someone else’s tax liability.

**Mass v. EPA** – shows the possibility of a disconnect between cause and redressability. Relatedly, as Scalia noted in *Lujan*, third parties will always have more trouble securing standing than directly regulated industries, a function of the private law model being applied here. This problem culminates in the independent actor problem.

**Constitutional Concerns -** Relief

**Steel Co. v. Citizens for a Better Env.** – Weren’t filing the reports, but came into compliance within the 60 window after notice of suit. **SC says that this denies standing.** Declaratory relief is pointless, there’s no claim of future threatened injury, and the fine that would be paid to the govt. doesn’t redress anything for the plaintiff (who is a private AG bringing a public suit.)

**Friends of the Earth v. Laidlaw –** Similar set up, but here the SC allows standing. Polluter is in compliance and they are seeking the fine for the government. But here the Court says that’s enough, because you want the deterrent effect, **distinguishes Steel Co. since there the violations were all in the past at the time of filing[].**

**Prudential Concerns** – Zone of Interest

**Association of Data Processing Service Orgs. v. Camp** – Statute says banks can’t do other things, but comptroller lets them anyway. Court says that there is harm from future losses due to increased competition. Banks and customers were clearly in by the terms of the statute. But that still leaves competitors open, court says they are in because it **doesn’t matter if Congress actually intended them to benefit, so long as they are actually protected. The standard is “Arguably within the scope”** which means it doesn’t have to enough to win on merits, but it must actually protect.

**Clarke v. Sec. Ind. Assoc.** – Modern *Data Processing*, about discount brokerages. Court again says increased competition is an injury. The standard the court gives is highly undemanding: **interest must be so unrelated or inconsistent with purpose of statutes that Congress can’t reasonably have acted to permit suit**.

**Nat’l Credit Union v. First National** – A broad case, O’Connor dissents saying it’s too broad (putting every injury in fact into the ZoI, making the interest enforcing the statute, since it is about internal organization, not regulating competition), but court ultimately allows standing for the change in membership. They differentiate from *Air Courier* on the grounds that there the purpose had nothing to do with employment, but here, the interest asserted by the banks, the one that helps them, is limiting the markets of the credit unions, which was the statute’s purpose too.

The only counter case is **Air Courier**, where court said that postal employees are too far removed from postal monopoly provision to challenge it. Relaxation of monopoly could reduce jobs, but no ZoI as statute about revenue protection.

**Availability of Judicial Review - Timing**

Three overlapping doctrines based on idea that it’s too early for suit.

1. **Ripeness** – Milder version of the issues in Steel Co./Laidlaw. Concept exists outside of Adlaw. There used to be a question of pre-enforcement review, though many statutes allow it, or even require it, now it is practice. **Abbot Labs** allowed for pre-enforcement in a two part test: 1.) Fitness (manageable scope, factually fleshed out) and 2.) Hardship to challenger (via concrete action applying the regulation that threatens or harms. Also allowed when rule is substantive and requires immediate adjustment of conduct)

There’s also **National Park Hospitality Assoc. v. Dept. of Interior** – Court here said it was too early. Case opens with strong statement of hardship inquiry for pre-enforcement, but this doesn’t meet that, although it is a “fit”. Guidance documents may not be ripe for review, since no N&C, no record, can easily change, might not be binding. There is sometimes review, but not always.

1. **Finality** – As in §704, finality is 1.) Consummation of Agency decisionmaking AND 2.) has legal consequences and determines parties’ rights. The basic idea is to ask whether there is more to come.

1. **Exhaustion** of Admin. Remedies – You can only go to Court after you go to the agency. 3 components:
	1. Classic Exhaustion Req’t: Overlaps with ripeness and finality, has to be a final action, inaction usually not enough since the agency “gets the first crack.” Also you have to wait until the process is done, interlocutory style appeals are rare. (though *Mathews* was one.) This creates facts judges can works with and solves some things before they get to courts. Also allows for deference.
	2. Waiver: A line of cases here about whether you’ve abandoned your right to raise a claim. (note that there can be DP claims working in the background here.)
		1. **McKart v. US** – he was exempt from the draft as a widow’s son, but mother dies and they say he’s in. Legal issue is clear, but he doesn’t go to the draft board. Argues he should be exempt as a defense at the criminal trial. Here is a purely legal question (interpreting the statute) and a significant hardship, plus stakes for the guy are high. Court notes all the dangers, but statute isn’t explicit, and given the above they let him slide.
			1. **McGee** – is the comparison case, where the court said the guy who dodged on being judged a conscientious objector was out of luck, needed to exhaust as there was a factual element to that determination, meaning a role for agency expertise.
		2. **Woodford v Ngo** – Explicit statute this time, related to grievance system in prison. Question was whether exhaustion meant “**proper exhaustion**” They read the statute to say exhaustion doesn’t mean unavailable, but rather “used up,” which is the McGee reading and the common approach. Stevens in dissent just doesn’t think the text is there
		3. **Darby v Cisneros** - §704 says **when agency action “otherwise final” it is final even if there is another discretionary review that could follow**. Here the decision was final unless the SEC or the private parties wanted an appeal, so they allowed you to go to a court. Note that this is restricted to the APA, but general rule is no further review of final decision.

**Tools of Congressional Control**

Congress creates and limits agency authority via statute. It also tries to shape agency behavior.

**How involved Can Congress be after that?** They’re fairly restricted. They don’t have, for instance, the legislative veto. **INS v. Chadha**, saw Burger kill the one house veto (alternatives killed in perfunctory follow on cases). Killed more statutes than any single SC decision. Particulars here were Congress could suspend the suspension of deportation, as they did for 6 of 340 people.

**Wait, why kill the legislative veto?** People liked it as a way to keep Congress’s hand in decisions, further democratic accountability, and [avoid over delegation.] But the facts of Chadha make democratic accountability tough to argue here, easier on a regulation. There’s also a fear that this will allow even vaguer delegations.

**So what did the Court kill it?** Burger’s argument is that legislative decisions require, under the Constitution’s presentment clause, bicameralism and presentment, and the one house veto has neither. Burger says there’s a presumption this is “**legislative in purpose and effect”**, and it altered legal rights. But this is a weak argument, as subpoenas also alter right, as do executive and judicial actions, plus what right did Chadha lose out on, given that statute created the system. However, everyone does agree that amendment is a legislative action. White is livid in dissent, especially given that the SoP arguments in the majority seem weak to him given “quasi-legislative” nature of executive action under broad delegation doctrine. Scalia argues this is an executive action.

**Do they have any power left?** Well, they passed the **Congressional Review Act** (pg 1029/181) but it’s been used only once. There’s also the **REINs Act**, which is currently dead in the Senate, but would give Congress a lot more power than the CRA, flipping it’s language to require approval for major regs, not allow disapproval. Note that it by language says that it is not a law and does not provide a basis to challenge as such or protect it as one. Policy argument could harm de-regulation as well as regulations, and tracks Non-Delegation on who should make the choice in big regs. There’s also a question about Congress’s capacity to handle all the regs. Two views on possible illegality of REINS:

1. It is functionally the same as Chadha, it amounts to a veto [analogize to Fed. R. Civ. P.]
2. Or is it separation of powers, w/Congress getting in the way of Agency. (Scalia v. Stevens on Delegation comes back in here, Scalia position from Mistretta would suggest this argument means no reins)

**What about Indirect Power?** Here’s where Congress shines. The biggest power they have here is **Appropriations**. They can use riders on these bills, barring certain types of spending. Can be extreme or targeted. Problematic because there’s too much log rolling, avoids rel debates over the law, immune to veto, and an even more invisible process than usual. Also doesn’t go to the subject matter committee. Gives a second bite at the apple.

**Presidential Control** – **HIRING**

Three components: Hiring, Firing, and General Supervision. Start with hiring and Firing

**Hiring?** Getting the right person can be key. There are about 1500 political appointees, about as many schedule C guys who are not directly appointed by the prez, but who can be sort of distributed among the agencies. Most agencies have a civil service deputy and a political deputy under the political appointee head.

**What kinds of people are hired?** Well, there are employees (like ALJs, or me) and then there are officers of the US, who come in regular and “inferior” varieties. This derives from the appointments clause, II§2, which says that the Senate has to advise and consent on the appointments clause (Strong reading is that the Senate would only act in Extreme cases. Stephenson argues that there can be deemed consent if there’s no action). Allows, but does not require, that Congress vest appointment of inferior officers in dept. heads, president, or the courts.

**Text:** [The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

**So how do we know who’s what?**

First we ask: who is an officer? The major case here is **Buckley v. Valejo**, the elections law case where the commission’s appointment process involved house and senate leader selections. The key in the case, as in the OLC memo, was that officers have “real power,” meaning **the ability to do things that bind private parties and involve the government’s exercise of sovereign power.** Often this comes down to making final decisions, which is why ALJs are not (even if decisions are final in practice, they are employees), but **Freytag’s** tax judges are officers. The final decisions thing comes from Landry. In the case itself, the court talks about the need to restrain congressional appointees to congressional powers (furthering the legislative function) not prosecutorial or administrative powers of the kind that the commission had, thus Congress couldn’t appoint rule makers or enforcers.

Note that, for *Buckley* couldn’t use inferior officers, since was in Cong. And couldn’t argue they were employees, which are **mere functionaries** subordinate to officers.

Then we ask: are they or are they not inferior officers: There are a few cases here. The bottom line is that having a boss is sufficient, but not necessary, to be an inferior officer. Other factors include limited duties (meaning both not formulating policy or [running an agency administratively]), narrow focus (under another’s control), executive officer can remove (even if for cause), and short tenure though Scalia wants the boss rule to be it and others want it to be anyone that is not the head of a department/agency. Cases are:

**Morrison v. Olsen** – Independent counsel case. Comes down to whether inferior officer, court uses squishy analysis above, removal, limited duties, limited in time, and this is where Scalia argued for the boss rule, otherwise not subordinate as at founding.

**Edmond v. US** – Doesn’t explicitly overrule Olsen, but Scalia writes and uses boss thing. Is Coast Guard judges case. **Shows significant authority not alone enough**. Also clarifies that having a superior means someone who directs their work, can remove, and block them from final decisions (in context of being their boss). Says the court is inferior on the above, though not all Olsen factors there

**Free Enterprise Fund** – PEEKABOO. cites Edmond. SARBOX board No double for cause. Weird because wasn’t clear SEC was really independent.

 **Presidential Control** – **Recess Appointments clause**

All Noel-Canning, all the time.

**What about qualifications?** Congress has power here to set who can go in a position, and the limits are surprisingly unexplored. Strong Constitutional unitary executive position is to say if they want to enforce they should just vote them down. Toughest in the real world is the bicameralism requirement for independent boards. Goes back to the question of what is the proper role for the Senate, and whether political will is enough, or if law must be added, too.

**What about the clause itself?** The big case is Noel Canning. Isn’t inherently politicized, party in power matters, position on Congressional v. Presidential power matters. (Tribe, Lederman, Kennedy on DCC side, not 11th Cir side.) Text II§2c3 reads:

“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session” limited LH about this, but purpose clear. Can use for judges, despite wrinkle.

**Noel Canning** – Case involves the NLRB and the CFPB. Congress had left and was going to come back 12 days later, but did not adjourn sine die. There were also pro forma sessions from the unanimous consent agreement.

Before this case, as 11th Cir. said, recess was intersession, as everyone agrees on, and intrasession, which were any significant time away. The exact line was fuzzy, but in practice 10 days was the shortest. Unclear exactly when they started. Court here says **only the intersession recess counts now** (other circuits agree). A lot of this turns on “the recess,” with the definite article suggesting the single recess at issue. There are also no “the adjournments” in the Constitution, suggesting there are many of those. (not airtight. There’s “the session” in I§5, but there are many sessions. 11th Cir’s analogy was “the dog is a quadraped.” Also, the definite article argument may prove too much, since there are two sessions in a Congress.) Bolstering this is the contrast with adjournment being used elsewhere for short breaks. Also, there’s the “next session” language, which makes sense symmetrically with the recess as inter-session. However, this reading renders the clause useless, since Senate is always in session now. (could imagine it other ways, like lots of short sessions) **today the problem is senate inaction, not absence.**

The next issue is arise v. exist. Practice has been that it doesn’t matter when the vacncy arises, but plain reading says that it has to be DURING the recess, and that’s what the DCC goes with. The purpose argument though, strongly suggests that it should be about need to fill, and in the past, when deaths happened well before they were reported, the “strict reading” may actually be anachronistic. Could say “during recess” modified when the president can do it.

There was no formal decision on pro-forma session, but it’s implicitly decided when they said that the one NLRB appointment didn’t end until the “end of the session”, and counted the Pro-Formas. They did at least some work during these, but they were there in part because house wouldn’t let them go. This interp-brings the house into the appointment process.

**Book Notes**

Four major Conclusions: recess appointments can’t be made during a session, an intersession recess only exists when the Senate adjourns Sine Die, the vacancy must arise during a recess, and the appointment must take place in that recess. There was also an implied ruling that pro forma sessions are enough to avoid recess.

Inaction is much more troubling than rejection. The president has no options really, other than political pressure.

**Presidential Control** – **Removal/Presidential Direction**

**What’s the value?** Not much day to day, but lots of deterrent value. Law and politics matter, sometimes the latter matters much more (think J. Edgar, who had dirt, or people who are too popular or hard to replace to fire).

**So how do you remove?** There’s no removal clause, though some argue impeachment should be the only way to remove. Unclear who does the firing. Some want symmetry with appointments, meaning Senate involvement, but the democracy gains and prevention of cronyism arguments don’t make sense when forcing the Prez to work with someone.

However, **Meyers** said that it was unconstitutional for there to be an advise and consent requirement for firing of a post-master. The original decision was a paean to executive power, written by Taft and resting on the take care clause to argue that structure meant the president alone had the power to fire, with Congress limited only to impeachment.

**So did Meyers settle it?** Ha ha. No. Then came **Humphrey’s Executor**. Upholds a for cause requirement for FTC commissioners, meaning that FDR couldn’t just remove the guy for standing in his way.

**Can they be squared?** There are a couple of options:

1. Nature of the Office: popular right after. Notes that Meyers was a purely executive position, whereas FTC was quasi-legislative and quasi-judicial, so the firing did less to impugn the powers of the president. The reality didn’t fit this though, after all, even Post masters investigate, and FTC job was investigative.
2. Participation of the other branch: Meyer’s statute required participation of Congress, but Humphrey’s just constrained the authority to fire or not fire.
3. Nature of the Constraint: [I think this is the same as two]. More important in later cases.

**What’s the modern doctrine?** **Morrison v. Olsen** basically kills the nature of the office/“purely executive” test. There the prosecutor was clearly executive. There’s no explicit overruling of Humphrey’s, but what mattered was whether the law interfered with the president’s ability to do the job of president. This is a very vague test, in the sort of Breyer-style before he was on the Court. The standards are similar to the test for inferior officer: **narrow job, limited tenure, etc…** The case mentions the purely executive thing, but it doesn’t do any work.

Scalia HATES this though, thinks that allowing the special prosecutor to be removable only for cause is unconstitutionally bad idea, as it removes all controls on prosecutors. Ultimately, policy bends to his side and office dies

The Court returned to this in **Bowsher v. Synar,** The GAO comptroller case. The reasoning mirrors Chadha: He is executing, and so he can’t be an agent of Congress, which he would be if they could fire him with the joint resolution. However, whereas Chadha was weak about why legislative, this is weak on why executive. **The key is you can flip the language and say that he’s an executive officer, but the president can’t fire him**, and the constraint on the firing is unconstitutional. (this is where n. 9 comes in, saying that this is different from the for cause cases because Congress was involved in the decision after delegating the power).

**Is there a maximum amount of Independence Congress can Give?** Well, the prior question is what are independent agencies. It’s not a constitutional term, certainly, and there’s no magic combination of staggered terms, tenure, partisanship reqs, that decides them, though tenure is most important. (Exec agencies are dept. can be free standing, though). **Free Enterprise** dicta is pro-exec, but holding limited, says that **two layers of for cause is too much**.Breyer very persuasive though, saying that there really isn’t a problem here, but he exaggerates how common. (the SEC not being really independent adds a weird wrinkle)

**What about ALJs?** **Weiner** tells us to read in for cause protection for adjudicative positions. Can argue that they are employees, [there’s an older case constraining on inferior offiers, dire ALJs, don’t make final decision as per Bukckley and Landry made that explicit in the DCC], but many think that Landry is wrong. Many ALJ decisions are final

**What about Direct Presidential Control?** Some argue it would be legally invalid. Constitution does not give the president directive authority. However, often Congress gives power to the president and the president is allowed to delegate that authority according to 3 U.S.C. §301. But most often statute gives task to agency. This is read as an implicit constraint on executive authority. **That would mean that he can fire, but he can’t pre-empt or invalidate something that an appointee legally does**. However, you can read the vesting power as implicitly allowing others to decide, because of passive voice OR as putting the power in the presidents hand and making the delegation away invalid.

The Kagan position is more modest, says that unless Congress explicitly says otherwise, there should be a default to president being allowed to direct.

As a practical matter, this is largely immaterial, since the president wields tremendous informal and indirect power.

**But the president does have some direct powers**: He can request, and he has the Constitutional authority to ask for the opinion of the department head in writing.