Legislation and the Regulatory State

I. Legislation and (Judicial) Statutory Interpretation
   a. method, rather than doctrine
   b. problems of drafting legislation:
      i. unintended consequences; can't anticipate all results of legislation (times change)
      ii. words are inherently vague, dependent on context
      iii. intentional ambiguity
         1. legislators can't agree on certain level of specificity
         2. left vague, hoping to prevail in the courts
      iv. multiple authors
   c. What to do if the language of a statute appears to lead to an absurd result?

II. ***Tennessee Valley Authority v. Hill*** **(1978)**
   a. Facts:
      i. Tellico Dam and snail darter; interpreting ESA 1973
      ii. Subsequent congressional appropriations for project
   b. Holding:
      i. Majority: ESA mandates enjoinder of dam construction
      ii. Dissent: ESA not intended to compel "absurd result"
   c. Rationale:
      i. Text
         1. language: "insure that any action authorized, funded, or carried out"
         2. dissent: language implies that ESA only applies to planned projects; where agency still has "reasonable decision-making alternatives"
            a. interpretive intent; language must be interpreted as avoiding an absurd result
            b. language of statute could have been written to anticipate such a problem
      ii. Legislative History
         1. previous legislation; previous versions of bill
         2. Representatives' statements in the Conference Committee
            a. assertion that Air Force activity would need to cease evidence that ESA applies to ongoing activities, rather than just planned actions
         3. further appropriations:
            a. but, individual members of Congress did not necessarily know what projects were being funded
            b. see canons of construction
      iii. Purpose of the statute as a whole
      iv. Avoiding absurdity
      v. Canons of construction
         1. In *TVA*:
            a. Subsequent bills do not impliedly repeal earlier leg.
            b. Congress does not alter substantive law through appropriations
            c. Congress does not impose new regulatory burdens retroactively
      vi. Notes:
         1. How absolutist did Congress intend the ESA to be?
         2. Subsequent amendments and TVA's role:

a. legislature creates a review board; but, TVA does not qualify for an exemption
b. TVA eventually able to acquire a specific exemption; later, snail darter found to not be an endangered species

III. Theories of statutory interpretation
- a. **Intentionalism**
  - i. Interpreting problem by reconstructing *specific* congressional intent
  - ii. suppose the lawmaker was present, reconstruct his likely answer; "imaginative reconstruction"
  - iii. problems of recreating specific legislative intent
- b. **Purposivism**
  - i. Statutory provisions interpreted to advance legislation's general aims
  - ii. problems with determining broad purpose of a statute:
    1. conflicting/compromise purposes = statute's "bounded" purpose
    2. see Legal Process school
- c. **Textualism**
  - i. Plain meaning of statute's language (to a reasonable person)
  - ii. Problems:
    1. lay v. expert understandings (in drafting legislation; industry-specific expertise; scientific)
    2. legislation is often drafted with understanding of how the court will interpret the language
    3. dictionary definitions and alternate meanings
- d. purpose of language in a statute:
  - i. certainty/predictability for those regulated, and for regulatory agencies
    1. agency's mandate to formulate policy requires certainty of legislative intent
  - ii. consistency between statutes
- e. Each theory assumes principle of **legislative supremacy**
  - i. Judges as legislature's "faithful agents"
  - ii. democratic/political legitimacy:
    1. as applied to a particular case
    2. as applied to the legal system

IV. Legislative Process
- a. Institutional introduction to Congressional lawmaking
  - i. Article I of the USC
- b. In problems of interpretation (where courts interpret statute contrary to legislative intent), Congress can amend a statute or pass another
  - i. but, statute's don't apply retroactively
  - ii. passing legislation is difficult
    1. difficult to secure passage applies to statute's intent as well as statute's language
    2. easier to block legislation (bicameralism and presentment); feature of the "cooling off" effect (legislation is supposed to be difficult to pass; checks and balances)
       a. when legislation is difficult to pass, common law baselines govern (no regulation)
  - iii. statutes are the products of compromises (critique of "sloppy" purposivism); often not principled

1. majoritarian principles are incorporated into the legislative process (filibuster)

iv. significance of parties and party discipline

v. individual legislators have equal votes, but not equal *power*

1. influences interpretation of legislative history; questions whether legislative purpose is *singular*
2. legislative history is incomplete (key players may never speak on the record); again, whose legislative history is indicative of statutory purpose?

V. Theoretical introduction to the legislative process

a. Pluralism

i. Interest groups in competition

1. Optimistic view: pluralist model enforces moderate policies
2. empirically, upper-class bias

b. Public choice theory

i. skeptical of benign pluralism

ii. based on collective action problem/free-riding

iii. "rent-seeking"

iv. rejects dissent in *TVA v. Hill*, asserting that legislation should accord with "common sense and the public weal"

1. one interpretation: social benefits of completing dam are diffuse, so no collective action mobilized to protest statute
2. skeptical of assumption of legislature/statutes to be reasonable products of reasonable actors
3. role of the court is to enforce winners' language (textualist approach); also, interpretation only enforces language to its limit (so as not to give winners more than they won)

v. problems with theory:

1. legislators in "safe" seats; ideology

VI. **Purposivism**

a. "strong" purposivism: where statute's purpose is used in interpretation even where text appears to provide an alternative mandate

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

i. Facts:

1. statute prohibiting pre-paying for immigration applied to contract to bring a rector to a church

ii. Holding:

1. statute does not apply to professional laborers (or, not in this case)

iii. Rationale:

1. relied upon by majority and dissent in *TVA v. Hill*
2. historical context:

a. wave of nationalist-based requirements legislation

i. Alien Contract Labor Act of 1885

1. debate revolved around immigration of southern European laborers
2. concern over immigrants' likelihood to assimilate (not a valuable "contribution to the body politic")

b. rise of organized labor

3. text:
    a. any corporation; any encouragement/transportation/immig.; any alien; to perform labor or service of ANY kind
    b. exceptions: actors, artists, singers, etc.
4. Church of the Holy Trinity: likely misread the statute; interpreted the statute in light of popular sentiment/assumption (undesirability of certain immigrants)
5. purpose:
    a. what is the "mischief" that the statute was designed to address?
        i. indentured servitude of manual laborers; degrading US labor market and body politic
    b. how to address misinterpretation?
        i. clarify manual labor
        ii. create industry-specific rules
        iii. create other remedies, such as minimum wages
    c. test case, carving exceptions
        i. To the DA, exceptions proved the rule that "any labor" also applied to labor outside of industrial/mechanical labor (excess of caution)
            1. as opposed to the general assumption of the statute's "spirit"; bases prosecutorial decision on the *letter* of the law, not the spirit
                a. issue of institutional competence?
        ii. in narrowing construction to exempt ministers, other professionals are still included in the statute
        iii. effect on fairness and coalition politics (is excepting ministers "too obvious"?)
            1. group that is likely excluded stands apart from the legislative process and expects that the court will protect its interests
                a. the exceptions enumerated in the statute were likely the result of interest groups exerting influence over drafting of the bill (actors, artists, singers, domestic servants)
            2. later passed statute exempting ministers
                a. subsequent legislative history: not necessarily indicative of the original legislature's intent
6. *Holy Trinity* is an extreme case of purposivist interpretation, not the ordinary case

c. <u>Legal Process approach</u> (Notes on the Rudiments of Statutory Interpretation)
    i. text:
        1. language should be interpreted to the extent of meanings that the words will bear;
            a. functions to prevent expansion of statute's reach, rather than compel expansion of statute
    ii. title of the act:
        1. summary of the purpose? shorthand?
        2. internal reference (use other aspects of statute or scheme to interpret particular text)
    iii. legislative history:
        1. background specifics about the mischief that Congress was trying to solve
            a. but, information about the problem is not always indicative of a particular statute's intent

i. data from churches indicated that dilution of labor market from foreign workers was also significant in religious industry

2. failure to include "manual" labor in bill, due to fears that legislation would not be passed
    a. but, evidence that amendment was not included even in the absence of time pressures (was not imposed in new session)
3. dependence of legislature on the courts' interpretation
4. start with legislative history, which results in the language of a statute; opposed to textualist approach, which begins interpretation by consulting the text

iv. canons of construction:
    1. evidence of meanings that the words MAY have, but not dispositive

v. purposes may be shaped with different degrees of specificity/generality
    1. purposes may exist in "hierarchies or constellations"; "do X, only insofar as you can using methodology Y"; or, "do X, only insofar as you can without doing Y"
        a. other purposes as a check
    2. purposivism does not provide an answer, but allows for an analysis of the above factors

vi. purposivism does not entail an examination of the political calculations surrounding the drafting of a statute (analysis should not be performed as a cynical political observer); assume legislative reasonableness

VII. <u>*Holy Trinity's* Modern Progeny</u>

VIII. Background to *Weber* (History of Title VII of the Civil Rights Act of 1964)
- a. role of the executive (Kennedy v. Johnson)
- b. difference between initial bill and compromise
    - i. bona-fide seniority systems preserved
    - ii. exception for professionally-developed tests (with non-discriminatory purpose)
    - iii. removal of AG's power (through EEOC) to file suit against employers for violations of Title VII
- c. What is the usefulness of knowing the legislative history of Title VII, for judicial statutory interpretation purposes?

IX. *United Steelworkers of America (USWA) v. Weber* (SC 1979)
- a. Facts:
    - i. QP: legality of USWA's racial quota for entry to training class (50% black)
- b. Holding (Brennan):
    - i. voluntary, private affirmative action plan does not violate Title VII's prohibition on discriminatory hiring practices
        1. legislative purpose for Title VII was to rectify unequal discriminatory employment practices, which disadvantaged blacks
        2. voluntary affirmative action system does not constitute discrimination under either definition (subordination or invidiousness- see below)
- c. Concurrence (Blackmun):
    - i. expresses discomfort with the Clark/Case memo; but, acknowledges that the memo was ignored in *Griggs*
- d. Dissent (Burger):
- e. Dissent (Renquist):
    - i. legislative history does not support majority's opinion;

1. many examples of legislators contending that Title VII could not result in unequal hiring (such would discriminate against whites)

ii. "voluntary" nature of affirmative action plan is a deceptive description
1. employer and union established plan in reaction to fear of being sued by the govt.

f. Notes:
i. aptitude tests that result in disproportionate passage rates between races, even if non-discriminatory, perpetuate the unequal employment opportunities resulting from the era of discrimination
ii. "bona-fide seniority systems" exempted in Title VII
iii. voluntary affirmative action (VAA)
1. unions and employers strategizing so that they would not be sued by federal agency for racial discrimination
2. three options:
a. VAA is OK under all circumstances
b. VAA is OK if it meets certain requirements (Brennan)
c. VAA is OK in response to an "arguable violation" (Blackmun's concern)
i. but, neither the employer nor the union wanted to establish a past violation (and civil liability)
d. No VAA ever
3. possible legislative purposes for Title VII:
a. good jobs for protected groups (outcome) (X)
i. X
b. do X via "non-discriminatory" (color-blind) methods (Y)
i. X via Y
c. do [X via Y] only insofar as it does not interfere with managerial discretion (Z)
i. X via Y without unduly prejudicing Z
4. temporal purpose of a statute
a. prospective, not retroactive
iv. private parties v. govt. entities
v. language:
1. Brennan concedes that the language of the statute (703(a), containing the word "discriminate") does not support USWA's VAA program
a. anti-subordination connotations
i. applies to discrimination against whites as well (Thurgood Marshall in *McDonald*)
b. intent to disadvantage based on hostility toward members of a race (invidious connotation); discrimination as not just to differentiate, differentiate with a malevolent purpose
i. but, court has already adopted a broader view of "discrimination" in *Griggs*
vi. Section 703(j):
1. absence of the word "permit"; implies that voluntary affirmative action systems ARE permissible
2. Brennan find support in House Report accompanying the Civil Rights Act

a. Renquist objects to rationale by pointing to subsequent language, qualifying House Report's support for voluntary AA with the phrase, "for the most serious types of discrimination", such as voting rights

vii. Brennan's opinion relies on <u>selective legislative history</u>; perhaps leading to rise of new textualism

X. <u>Dynamic statutory interpretation</u>

a. judges as "relational agents", tasked with implementing legislative purpose in unforeseen circumstances
   i. legislative purpose: specific intent (w/ respect to a particular issue); general intent (aims of the legislation); meta-intent (how to order specific and general intent in a purpose hierarchy; how to reconcile conflicts between specific and general intent)

b. criticism of dynamic statutory interpretation:
   i. difficulty in deciding which circumstances require deviation from specific intent
   ii. does not adequately respect constitutional safeguards in legislative process
   iii. undermines predictability/stability

XI. *WV University Hospital v. Casey* (SC 1991)

a. Facts:
   i. In 42 USC 1983, does provision permitting award of "reasonable attorney's fee" to P or D in a civil rights case include fees for expert testimony?

b. Holding (Scalia):
   i. statutory and judicial usage of "attorney's fees" have not included an embrace of fees for expert testimony
      1. language is coherent, purpose is not
         a. Congress did not authorize the shifting of expert fees

c. Dissent (Stevens):
   i. purpose of statute was to enact regime of "private attorney general" cases (pre-*Alyeska* regime); so, attorney's fees must include expert testimony
      1. purpose is coherent, language is not
         a. create atmosphere where private attorney general suits are affordable
         b. Congress likely overlooked the importance of expert testimony in such cases

d. Rationale:
   i. "private attorney general" cases
      1. certain class of statutes (civil rights, environmental) include a private right of action to encourage private citizens to enforce the statutes
      2. attorney fee shifting to permit suits that could not otherwise be pursued, due to cost
   ii. 42 USC 1983 was meant to overturn the Court's decision in *Alyeska Pipeline v. Wilderness Society*
      1. *Alyeska* restricted attorney fee shifting to a few exceptional cases
      2. legislature overruled decision with 42 USC 1983 in an attempt to reenact pre-*Alyeska* fee shifting structure
         a. but, Scalia argues that legislature's response was both broader and narrower than the pre-*Alyeska* regime
            i. for instance, 42 USC 1983 only applies to civil rights cases, and would not have overturned the actual decision in *Alyeska*, which pertained to an environmental statute
   iii. 42 USC 1983 does not explicitly allow for shifting of expert testimony fees

1. support for legislative forgetfulness argument?
    a. not forgetfulness but a product of legislative compromise, interest group influence

iv. Scalia: when a term is not ambiguous, use the "semantic meaning" of attorney's fees, as well as its usage in other statutes
1. but, the textualist argument that purpose is impossible to divine due to a disparate and changing legislature contradicts the assumption that the usage of a term is consistent across statutes
    a. choices of language are made by a variety of actors (legal staff, legislators, lobbyists, etc.)
    b. textualists find more support in previous judicial meanings, which are more cumulative

XII. *General Dynamics v. Cline* (SC 2004)

a. Facts:
    i. Does the Age Discrimination in Employment Act of 1967 prohibit discriminatory preference for favoring old over young (as well as young over old)?
        1. employer "grandfathers" oldest employees but changes benefit awards to retired employees
            a. employees between 40 and 50 years old protected by the statute but without benefits

b. Holding (Souter):
    i. ADEA does not prohibit discriminatory preference for old over young

c. Dissent (Thomas):
    i. "age" applies to discrimination against both old and young

d. Notes:
    i. textualist interpretation falls short for the majority, since purpose of statute clearly goes beyond dictionary definition of "age"
        1. but, language of statute is used by majority to constrict purposivist interpretations
    ii. statutory purpose (mischief addressed by statute):
        1. Congressional response to a report finding that employers favored younger workers (due to stereotypes, healthcare costs, tenure, etc.)
        2. also, vulnerability of older workers due to difficulty in being re-hired
    iii. purposivism "by the book"
        1. identify purpose, interpret text to comply with that purpose
        2. victory for legislative supremacy?
            a. but, majority consults extra-Congressional sources (Wirtz report) to identify legislative purpose
            b. degree of constraint on purposivism by textualism is debatable (perhaps pusposivists have just improved their rhetorical arguments)
        3. keep in mind, debate between purposivism and textualism is one of method, not doctrine; "legislative supremacy" is unhelpful sloganizing

XIII. **The Absurdity Doctrine**

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

a. Facts:
    i. statute prohibits interfering with delivery of mail; sheriff had homicide warrant for mail deliverer

1. public safety interest conflicting with inconvenience of mail disruption (balancing of hardships)
2. constitutional (federalism) implication:
    a. federal mail carrier; state interest in enforcing homicide law

b. Holding:
    i. Congress did not intend to protect murderers with statute; arrest warrant presents an exception (since otherwise would yield an absurd result, not intended by legislature)

c. Rationale:
    i. absurdity doctrine is not the sole domain of purposivism; accepted by textualists, but require a higher threshold (extreme cases; Easterbrook)
    ii. conflicts in absurdity doctrine lead to substantive canons of construction
        1. conflicts between statutes = repeals by implication are not recognized
        2. statutes in derogation of the common law should be narrowly construed
    iii. other conflicts:
        1. between statute and constitutional provisions; **constitutional avoidance doctrine**
            a. avoid the conclusion that Congress has passed an unconstitutional statute
        2. conflict between statute and common sense (of legality)
        3. conflict between statute and personal ideology
            a. not a legitimate source of judicial interpretation
            b. but, judges must find their own values somewhere in the legal system
    iv. Legal Process method for dealing with absurdity:
        1. consult language
        2. use purpose to come up with a narrowing construction for interpreting the language
    v. New Textualist method:
        1. no unique methodology
        2. identify conflict, construe language to account for conflict; in extreme cases, yield to legislative purpose
    vi. in *Kirby*, why prosecute?
        1. test case?
        2. post-Civil War context; Kentucky jurisdiction (border state)
            a. asserting authority of the federal government
            b. murder in question was the brother of the sheriff who boarded the steamboat; mail deliverer had been acting under authority of Union army
                i. sheriff and posse intended to murder mail deliverer
                ii. court was shielded from the background facts of the case
    vii. what is the breadth of the *Kirby* exception to the mail delivery statute?
        1. "The statute has no reference to acts lawful in themselves [execution of the arrest warrant], from the execution of which a temporary delay to the mails unavoidably follows"
    viii. how the court uses a perceived conflict:
        1. as the source of a discussion of absurdity
        2. explicitly trigger constitutional avoidance canon
        3. as a tool to strike down conflicting statute

XV. *Public Citizen v. US Dept. of Justice* (SC 1989)

a. Facts:

i. application of FACA (Fed. Advisory Committee Act) to President's consultation with ABA over judicial nominees
1. operative language: any committee…"utilized" by the President

b. Holding (Brennan):
i. FACA should not be construed to apply to ABA consultations, due to
1. acknowledges concern for transparency and expenditure of public funds
ii. degree to which language is convoluted to avoid conflict is greater in the case of a constitutional conflict than when resulting in absurdity

c. Dissent (Kennedy):

d. Rationale:
i. appellant (Washington Legal Foundation) is a conservative PAC, concerned with ABA's consultation process
ii. broad reading conflicting with "common sense"
1. broad reading implies that President's consultations with his own party would be subject to oversight
a. but, Congress (composed of political parties) would not pass a statute with such implications
iii. conflict with constitutional provisions (separation of powers):
1. Presidential authority to nominate judicial appointees should not be curtailed

XVI. *United States v. Marshall* (7th Cir., 1991)

a. Facts:
i. Controlled Substances Act, imposes mandatory minimum sentences for certain weight benchmarks of particular drugs
1. LSD is regulated by weight; does weight include the blotter paper?

b. Holding (Easterbrook):
i. blotter paper is analogous to lactose (in cocaine) or other drug mixtures; paper as mixture
1. points to consistency within LSD offenses (large-scale manufacturers tend to receive greater penalties)
2. inconsistency across penalties for other drugs?
a. PCP specifies the form that falls under the statute; so, Congress would have specified categories for LSD had it intended to do so (since the DEA and DOJ was consulted during drafting of statute)
3. administrability; difficulty in measuring pure LSD (limiting principle on absurdity concerns)
ii. structural argument:
1. consults other statutes, distinguishing between mixture and pure substance

c. Dissent (Posner):
i. blotter paper as a container, glass of orange juice, or an airplane, since it is used to transport the drug; paper as carrier
1. in response to administrability argument, Posner points to other cases, where amount of pure LSD is noted

d. Dissent (Cummings):
i. poses constitutional question (if majority's guidelines are correct)
1. two D's convicted of selling identical amounts of LSD would receive different sentences, depending on carrier used (the weight of the inert ingredient)
a. also, contrary to Congress' goal of addressing the drug problem

e. Rationale:
    i. assumption that criminal penalties should be proportionate to severity of the offense
    ii. both majority and dissent's arguments are evidence-based
    iii. Is Posner doing something unique, outside of the "faithful agent" concept of judge's role?
        1. Judicial role?
            a. Posner characterizes Easterbrook's approach as "positivist"
                i. criticizes approach as "buy[ing] political neutrality and objectivity at the price of substantial injustice"
                ii. acknowledges that his own "pragmatic" approach (referring to natural law) trades individual justice for uncertainty and degree of judicial willfulness
                    1. more akin to a "junior partner" than a "faithful agent"
                        a. Eskridge: junior partner approach finds support in original understanding of Article III; courts' power of equitable interpretation (English practice)
                        b. approach that assumes that legislature anticipates judicial interpretation
                            i. executor who interprets statutes with the ideal of Congress "at its best"
        2. further than conflict between textualism and purposivism?
            a. such as, if there was no conflict and Posner asserted his approach anyway, to advance pragmatic and moral ends
            b. less legislative purpose analysis than an acknowledgment that Congress may have acted irrationally
    iv. the Constitution does NOT protect judicial discretion in sentencing; only protects D's against unreasonable sentencing by a jury
        1. judges can feel like the mechanisms of imposing injustice through mandatory minimum sentences; powerlessness of a fed. judge in sentencing
        2. public choice theory
            a. competing special interests (law enforcement v. criminals) ensure that mandatory minimum sentences remain in effect

XVII. **The Statutory Interpretation Toolkit**

XVIII. <u>The Text (words standing alone):</u>

a. all interpretive regimes rely on text
    i. purposivism: text as best evidence of legislative purpose
b. but, no intrinsic meaning (only meaningful in context; reflects practices and conventions)
    i. see specialized linguistic communities (legal, doctors, etc.)
    ii. so, scientific or ordinary meaning? colloquial or dictionary meaning?

XIX. <u>Ordinary v. Special Meanings</u>

a. *Nix v. Hedden* (SC 1893)
    i. Facts:
        1. tariff on tomatoes; dispute over whether tomatoes constituted "fruit" or "vegetable" in tariff statute
    ii. Holding (Gray):
        1. no special meaning of fruit or vegetable in the trade (that diverges from the dictionary definitions expounded at trial); so, ordinary meaning is used

a. tomato is a vegetable under ordinary meaning

2. In the case of a tariff statute, first consult specialized meaning; usually, the preference is to first consult the ordinary meaning (Scalia)
    a. *Robertson v. Salomon* (cited by Gray)
    b. It is only when technical meaning fails that ordinary meaning is consulted
        i. audience = would understand language to carry its technical meaning
            1. multiple audiences: importers and produce dealers (both part of the same trade); specialized meaning would not result in inequity, if dealing with merchants on both sides

iii. Rationale:
1. "ordinary" definition beyond the dictionary = context and community usage
    a. different methods of usage
        i. fruits: dessert; vegetables: dinner
    b. organization of production (growing methods)
2. Frankfurter: adapt meaning to intended audience (ordinary v. specialists)
3. canons of construction:
    a. default presumption that words have their "ordinary" meaning
        i. due to legislators' electoral accountability to "ordinary" constituents
    b. in case of doubt, construe tax statutes in favor of the citizen, against the govt.
        i. but, these two conventions point in opposite directions in *Nix*
        ii. Rule of lenity:
            1. courts should construe ambiguous criminal laws in favor of D's
4. can a purposivist argument overcome the presumption in favor of ordinary meaning?
    a. such as, if tariff was designed to address problem of produce "dumping", and tomatoes were amongst the produce being dumped?
5. purpose of a tariff statute?
    a. generate revenue
    b. protectionist economic policy
        i. so, implicates distinction between American growers and foreign competitors in vegetable trade v. fruit trade
    c. tariffs generally do not make comprehensive sense (the product of many interest groups)
        i. Tariff Act of 1883 was considered a "mongrel" act, since it was particularly garbled in its purpose
            1. concern for post-Civil War continuation of Civil War pattern of substituting West Indian vegetables for vegetables that could have been imported from the South

XX. <u>Legal Terms of Art</u>

a. *Moskal v. United States* (SC 1990)
    i. Facts:
        1. odometer fraud and "title washing" scheme
    ii. Holding (Marshall):
        1. ordinary meaning of "falsely made" renders D criminally liable under National Stolen Property Act of 1939
            a. finds support in legislative purpose

i. purpose of addressing criminal conduct that evades a single state's enforcement mechanisms (since activity is legal in each state)
b. dissent's legal meaning has not been uniformly established

iii. Dissent (Scalia; O'Connor; Kennedy)
1. legal meaning of "falsely made" relieves D of liability
a. also claim that their definition is the "ordinary" definition
b. difference between "false" and "falsely made"
c. legal definition of falsely made = forged
2. cites federal and state precedent holding that formulation ("falsely make, alter, counterfeit, alter, forge") does not include false information in a genuine doc.
a. falsity of content does not establish forgery
3. Marshall's imputed legislative purpose is overly broad (list of "falsely made, alter, counterfeit, etc." does not include all fraudulent activity)
a. Hart and Sacks' Legal Process theory
i. don't expand purpose of statute beyond permissible meanings of language
1. within purposivism, there are limits

iv. Rationale:
1. conflict between jargon of the legal profession and assumption that statutes are designed to be understood by the public; statutes as "legalese"?
2. D argues that "falsely made" means forged; argues that titles were legitimately produced by officials, even though they contained false information
a. asserts that his position is supported by canon of construction:
i. when a criminal statute contains a common law term, use common law meaning, if not otherwise defined (does this require complete agreement?)
1. under common law, "falsely made" = forged
ii. Scalia:
1. if possible, every word should be given some effect
2. when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs
a. Jackson: legal term of art is presumed to carry its cluster of ideas
3. also, look for the dominant common law meaning; direction in which the common law is trending

b. Joseph Raz:
i. Congressional intent should be ascertained by assuming that definition was intended to be "decoded" using prevailing interpretive conventions in the relevant legal culture

c. Rule of lenity
i. courts should construe ambiguous criminal laws in favor of D's

d. *Corning Glass Works v. Brennan* (SC 1974)
i. Facts:
1. suit for unequal pay under Equal Pay Act; different wages for night shift inspectors (male) and day shift (female)
ii. Holding (Marshall):

1. Congressional purpose indicates that "working conditions" were considered valid basis for difference in pay
    a. "working conditions" interpreted in reference to usage in the industry
    b. in the industry, working conditions = surroundings and hazards (technical meaning)
        i. expert notions of job evaluations
2. So, night/day work is equal, demands equal wages

iii. Dissent (Burger, Blackmun, Renquist):
1. agree with Court of Appeals, that time of day falls within "working conditions"
2. Both majority and dissent consult legislative history

iv. Rationale:
1. Legislative history consulted to determine that "working conditions" is a term of art with specialized meaning
    a. Legitimate?
2. the changing in the statute's wording reflects consultation with industry experts; evidence that technical meaning was intended
    a. "working conditions" did not include shift differentials, since shift differentials were already accounted for in collective bargaining process (global, not specific to particular job)

e. *Bruesewitz v. Wyeth* (SC 2011)

i. Defective design defense from statutory wording re: "unavoidable" side effects
1. Scalia: unavoidable means that the design of the vaccine is a given
2. Sotomayor: unavoidable is a term of art, referring to "unavoidably dangerous product", as commonly understood
    a. Still accounts for alternative designs
    b. Relied on legislative history of NCVIA (National Childhood Vaccine Injury Act)
3. Majority's response to Sotomayor:
    a. Unavoidable is a common word
    b. Statute adopted different wording from RST2
    c. Legislative history was unclear; objective was to avoid jury trials (not furthered by dissent's interpretation)
        i. Rejects legislative history as persuasive, consults text alone for interpretation of "unavoidably"
    d. Common law was unclear re: "unavoidably unsafe products"

XXI. <u>Colloquial meaning v. Dictionary Meaning</u>

a. How to determine ordinary meaning?

i. danger in using dictionaries; dictionaries as "historical catalogs"
1. dictionary as an aid to the judge's memory
2. worry that dictionaries will become too important
    a. "judicial notice of legislative facts"
        i. meaning is not an evidentiary matter

ii. but, "impersonal authority"

iii. However, Congressional staffers who draft statutes typically do not use dictionaries

iv. Dictionaries cannot capture colloquial meanings; semantic meanings ("use" a gun)

b. *Smith v. United States* (SC 1993)

i. Facts:
    1. does exchanging a gun for drugs constitute "use" of a firearm in narcotics statute?
ii. Holding (O'Connor):
    1. statute does not specify that firearm must be used as a weapon; "use" includes barter for narcotics
        a. D's action constituted "use" under Webster's and Black's dictionaries
        b. dissent's meaning excludes any other meanings of "use"
    2. context still restrict the definition ("during and in relation to a crime of violence or drug trafficking crime")
    3. cross-references other statutes involving guns, including the trade/commerce of guns
        a. "Whole Act Rule" – use of language presumed to be consistent across a statute or similar statutes
iii. Dissent (Scalia):
    1. ordinary meaning (that understood by ordinary person) assumes that "use" of a firearm entails its use as a weapon
        a. "use" implies use for its intended purpose
        b. ambiguity should allow court to invoke rule of lenity
    2. provision relating to "carrying" a firearm suggests different usage
        a. "uses or carries" – also an examination of context
        b. "crime of violence" – implies using gun as a weapon
    3. could have invoked 924(d), which specifies that a gun "used or involved" in a crime violates the statute
iv. Rationale:
    1. O'Connor's broad definition of "use" is restricted by second part of statute, requiring that the use play some part in the narcotics crime
        a. clarifies meaning by consulting other parts of statute
            i. also, comparable statutes re: export of guns contains "use"
    2. majority and dissent agree that words must be interpreted in context; but what level of generality should be used to define context? how much of the context?

XXII. **Semantic Canons of Construction**

a. semantic v. substantive canons (rule of lenity, etc.)
    i. semantic canons = making sense of context
        1. generalizations about common usages of language
        2. tension between broad (or narrow) dictionary definitions and divergent use in ordinary speech
b. Llewellyn's critique of semantic canons (for each canon there is an opposing canon)
    i. response: opposing canons are often mere exceptions
    ii. modern interpretation: canons in a hierarchy of interpretive tools (slipped below legislative history in purposivist era)
        1. movement to resuscitate canons, understood in context
            a. objective of allowing canons to act as constraining influence on judges
            b. now, some skepticism re: ability to discern legislative history
c. ***ejusdem generis*** (of the same type) = where a word is included in a list of common characteristics
d. ***expressio unius exclusio alterius*** (the expression of one thing implies the exclusion of others)
e. ***noscitur a sociis*** (a word is known by its associates)

XXIII. *McBoyle v. United States* (SC 1931)

a. Facts:
    i. National Motor Vehicle Theft Act, as applied to aircraft (federal criminal law)
b. Holding (Holmes):
    i. aircraft not included in statute; no fair warning that an aircraft would violate the statute
        1. use of **ejusdem generis** – of the same kind
    ii. different canons could have been used to reach the same result

XXIV. Expressio Unius

XXV. *Silvers v. Sony Pictures Entertainment, Inc.* (9th Cir., 2005)
a. Facts:
    i. QP: who has cause to sue for a copyright infringement? May an assignee (an exclusive license-holder), with no legal or beneficial interest in the copyright itself, institute an action against an infringer?
b. Holding (Graber):
    i. under 1976 Copyright Act, only legal owner of the copyright itself may sue for infringement
        1. Congress' listing of who MAY sue implies that all others are excluded
c. Dissent (Bea):
    i. consultation of legislative history
        1. 1909 Copyright Act
            a. restricted right to sue to copyright proprietor, including an assignee but not a licensee (at the time that they are holders of the right)
        2. 1976 Copyright Act
            a. predicated by recognition of principle of divisibility in copyright regime
            b. argument that Congress intended to enlarge the ability to bring suit to the owners of exclusive rights
                i. both original owner and assignees have standing to sue
d. Dissent (Berzon and Reinhardt); omitted:
    i. Congress intended to constrain infringement suits to parties who are actually interested (such as those who were involved in the creative process)
        1. so, assignee in this case should still have standing to sue
e. Notes:
    i. copyright: a bundle of rights
    ii. copyright as a statutory creation, so common law principles should not be inserted
        1. so, common law basis of assignment as standing to sue is not observed here
    iii. context establishes the conditions under which a canon might be used
    iv. canons can be used to eliminate ambiguity, so that legislative history need not be consulted
    v. in copyright, Congress "occupies the field"
        1. so, no room for judicial law creation of common law precedent (and prior precedent replaced)

XXVI. Presumption Favoring Consistent Meaning
a. "Whole Act Rule"
    i. Presumption against surplus language
        1. see criticism: legislators can be verbose and redundant, as in normal speech
    ii. Word presumed to have consistent meaning throughout a statute
    iii. Statutory provisions should not be interpreted in derogation of other provisions

XXVII. *Gustafson v. Alloyd Co., Inc.* (SC 1995)
a. Facts:

i. cause of action for rescission of contract, based on misrepresentations made "by means of a prospectus"
    1. definitional dispute over meaning of prospectus under Securities Act of 1933

b. Holding (Kennedy):
    i. "prospectus" as a solicitation to the general public
        1. canon: the term (prospectus) should be construed to give it a consistent meaning throughout the statute
    ii. starts analysis by examining other uses of prospectus in statute, other than definitional provision
        1. invokes *noscitur a sociis* ("it is known by its associates"), to show that the other items listed with "prospectus" include documents that are disseminated to the greater public
            a. but, also include documents used to *confirm* a sale; could not be disseminated to the greater public (concern raised by the dissent)
    iii. canon: presumption against surplussage
        1. if all of the listed documents constitute "communication," listing particular types of documents would be redundant
        2. so, particulars listed must be used to narrow the category
    iv. canon:
        1. Whole Act Rule
        2. majority starts with Section 10, since "prospectus" is used in a clear manner
            a. but, in specifying the definition of prospectus in Section 2, Congress may be creating distinctions in different parts of act; so, prospectus should be defined in context of each section (criticism of majority)

c. Dissent (Thomas):
    i. "prospectus" as more broadly defined
    ii. criticizes majority for looking beyond text in initial analysis (skips definitional provision, 2 (10))

d. Notes:
    i. problem was generated by SC decision in
    ii. Securities Act of 1933:
        1. general purpose: to improve the ability of the public to discern amongst companies in purchasing stock options
            a. increase transparency, etc.
        2. Section 2 (10):
            a. defines a prospectus as "any prospectus, communication, etc."
            b. prospectus as both a term of art (technical meaning) and possessing of an ordinary meaning (colloquial meaning)
                i. implications for prospectus as including a contract or limited to initial public offerings
        3. Section 10:
            a. information that must be contained in a prospectus
        4. Section 12:
            a. imposes liability based on misstatements in a prospectus
    iii. *noscitur a sociis* v. *ejusdem generis*
        1. *noscitur* - list of coequals
        2. *ejusdem* – list of particulars, followed by a more general term

a. not necessarily an intuitive usage of language; throws into question the canon's consistency with legislative intent

iv. source of definition of "prospectus" in Section 2

1. British Companies Act – worded almost identically, but with no explicit mention of "to the public"

a. legislative history- at what point should legislative history be consulted, if at all?

b. applicability of another jurisdiction's definition?

i. possibility that the wording was changed due to an appreciation of precedent in the American court system

ii. limitations and evidence offered by legislative history

XXVIII. *People v. Smith* (Mich. 1975)

a. Facts:

i. D charged with concealed weapon, in violation of Michigan state law

1. weapon in a vehicle considered to be "concealed"

ii. statute prohibits carrying concealed, "daggers, dirks, stilettos, etc."

1. also prohibits carrying a concealed pistol

a. *expressio unius*

i. inclusion of pistol implies exclusion of rifle

ii. but, no license for hunting rifles required in Michigan; so, *expressio unius* cannot be used

iii. another statute prohibits possession of a rifle with unlawful intent; prosecutors had no evidence of unlawful intent

b. Holding (Kavanagh):

i. conviction reversed

1. using canon of *ejusdem generis*, statute is interpreted to only prohibit stabbing weapons

c. Notes:

i. *ejusdem generis*: "of the same kind"

1. list of particulars, followed by a general term

2. characteristics of particulars define the general term

a. what characteristics should be dispositive?

b. what level of generality?

i. stabbing weapons?

ii. hand to hand combat weapons?

iii. short blades?

ii. hierarchical interpretive methods:

1. whether to use canons, legislative history, etc. if language is ambiguous/unambiguous

2. anti-hierarchical method:

a. turn to legislative history, canons to create context, to determine whether language is ambiguous

b. for instance, if debate over nun-chucks in legislature led to drafting of the law (legislative history), context of prohibited weapons may lead to different interpretation/holding

i. toward *Holy Trinity*, while avoiding *Holy Trinity*

XXIX. *Circuit City Stores v. Adams* (SC 2001)

a. Facts:
    i. case arising under the Federal Arbitration Act (FAA)
        1. states' hostility toward resolving employment disputes in federal arbitration addressed by Congress' passage of FAA
        2. Section 2 of FAA: rule for contracts subject to arbitration
        3. Section 1: carves out an exception for certain employment contracts
b. Holding (Kennedy):
        1. Exemption in FAA Section 1 limited to only contracts included in list (seaman, railroad employees, etc.)
            a. *ejusdem generis*; presumption against surplussage
                i. Congress would not have included particular exempt contracts if it meant to exempt all labor contracts
                ii. Common characteristic in list: transportation workers
                    1. but, perhaps an excess of caution? or perhaps the significance of the listed particulars were most salient at the time of the statute's passage
                        a. other types of employment contracts may not have been considered
c. Dissent (Stevens):
    i. Legislative history suggests a contrary purpose than in majority's interpretation of the statutory language
        1. In 2001, 5 member conservative majority of the court supports arbitration to resolve employment disputes; 4 member minority views extension of arbitration principles into the realm of employer/ee disputes as unfair
            a. decision influenced by each side's desired outcome
d. Notes:
    i. *Allied-Bruce Terminix Companies v. Dobson* (1995):
        1. held that, in enacting FAA, Congress intended to invoke its Commerce Power to the full extent of its constitutional ability
            a. term used as a "**shifter**" (without a fixed meaning); elastic
                i. meaning changes depending on the circumstance (time; controlling commerce power jurisprudence)
            b. but, the holding in *Allied-Bruce* could have used *noscitur a sociis* (it is known by its associates) or *ejusdem generis* to create a different meaning
                i. choose between canons based on whether the list of terms are specifics or general
                    1. "contract evidencing a transaction involving commerce"
                        a. court in *Allied-Bruce* did not restrict meaning of statute due to inclusion of transportation-related contracts in Section 1
                ii. but, can the list canons be used in lists of one? no precedent
    ii. usage of "commerce" throughout the statute
        1. which uses are "shifters"/have "evolutionary" definitions

XXX. **<u>Legislative history</u>**
a. Evolving permissibility
b. *United States v. American Trucking Ass'ns* (SC 1940)

i. Leg. History as an aid to construction of meaning of words, as used in the statute

XXXI. Forms of legislative history:

a. Committee reports
    i. Considered the most reliable form of leg. History
    ii. But, committee intention does not equal legislative intention; Max Radin
    iii. Problem of ascribing collective intent
    iv. Prof. Landis; L. Hand:
        1. Delegation structure demands that members look to committees to learn of statute's purpose
    v. Incentive to leave ambiguities in statute while inserting detail into committee reports
    vi. Prof. Wilmer Jones
        1. Probability that committee reports are best available evidence of legislative understanding
b. Statements of individual legislators
    i. Sponsors v. rank-and-file
    ii. floor statements
        1. not typically consulted
        2. but, can corroborate other evidence of meaning
        3. "bullet" rule: symbol in Congressional Records, indicating that statement was not actually read on the floor
        4. floor statements by swing voters can be revealing
    iii. Sponsors' statements
    iv. Statements made during hearings
        1. But, hearings are often "cooked" to support the bill
c. Successive versions of a statute
    i. Criticized by Max Radin
        1. Drafting changes often have little basis
d. Subsequent legislative action or inaction
    i. "post-enactment legislative history"
    ii. Legislative acquiescence to judicial holding
        1. Implicit legislative approval of judgment
            a. Skepticism of legitimacy of acquiescence argument

XXXII. **<u>Textualist Critique of Legislative History</u>**

a. Criticism focuses on utility of LH as tool to discern collective leg. intent and its violation of constitutional principles of bicameralism and presentment (Article I, Section 7)
    i. Scalia and Easterbrook
b. Formalism argument:
    i. Legislative history is not law; not subject to mandatory constitutional processes
        1. Risk of manipulation of legislative history to circumvent Article I, Section 7
        2. Argument that "leaving the details to the committees" is unconstitutional; drafting power is non-delegable (Scalia)
    ii. Breyer's response:
        1. Not law, but useful to understand the meaning of the words in the statute
c. Problem with establishing a collective legislative intent
    i. Marquis de Condorcet:

1. It CAN be impossible to aggregate individual preferences into a consistent collective choice
2. Social choice theory

ii. Decisions influence by agenda setting, order of decision (Easterbrook)

iii. But, decision makers are repeat players; incentive to restrain use of leg. history to alter legislation beyond members' common understanding of it

d. Utility of LH as an analytical tool:

i. Unreliable; possibly misleading; may supply misinformation

1. Committee members as "preference outliers"
2. Interest groups involved with certain committees
3. Rank-and-file members unlikely to read committee reports

ii. LH is usually produced by staff or lobbyists

iii. Legislators base votes on language of statute itself

e. LH contributes to an expansion of judicial discretion/willfulness

i. LH is vast and varied enough to supply justification for any policy outcome

1. But, relative elasticity of words' meaning also allows judicial manipulation
2. Does LH contain, rather than liberate, judges?

f. LH and Congressional expectations

i. Necessarily complementary relationship between legislature and courts (Eskridge and Ferejohn)

XXXIII. *Blanchard v. Bergeron* (SC 1989)

a. Facts:

i. interpretation of "reasonable attorney's fee" in 42 USC 1988

1. court of appeals capped attorney's fee by contingency fee arrangement of 40%

b. Holding (White):

i. Contingency fee arrangement does not impose an automatic ceiling on an award for reasonable attorney's fees

c. Concurrence (Scalia):

i. use of legislative history unnecessary, misleading; "dignitary" argument

d. Notes:

i. 42 USC 1988:

1. *Johnson v. Georgia Highway Express* (5th Cir., 1974)
   a. capping "reasonable attorney's fees"?
      i. fees based on 12 factors for assessing reasonableness
      ii. fees capped at the P's prior arrangement with the attorney?

ii. "reasonable" in legislative history:

1. references to 12 factor test in both House and Senate committee reports
2. reports are authoritative in establishing legislative history

iii. dignitary concern re: role of the court

1. suspicion that notes on judicial decisions were inserted into decisions to influence Supreme Court's deliberations
2. "beneath" the court to review District Court decisions?
   a. decisions can provide evidence of salient issues which may have influenced a statute's drafting

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

a. Facts:
    i. dispute over the meaning of "substantially all" as applied to the composition of contributions to a pension fund
b. Holding (Easterbrook):
    i. Statute as enacted by Congress used "substantially all" in the same sense as the IRS, to mean 85% or more
        1. legislative history is only useful when it reveals evolution; so, all of Durenberger's statements should be disregarded, since they came after passage of the statute
c. Notes:
    i. Legal Process method:
        1. questions of broader purpose
        2. Intentionalism
            a. discern broader purpose from legislative history
                i. criticized by Easterbrook
                    1. but, still uses legislative history to track compromise (but which is best represented in statutory language)
    ii. "substantially all"
        1. what numbers would colloquial definition imply? 85%? 90%?
            a. IRS interpretation; but, not a tax statute
                i. pensions have tax implications; but personnel implications do not
                    1. joint administration; labor and finance
                ii. so, which meaning of "substantially all"? labor or tax? term of art or colloquial meaning?
    iii. 50.1%
        1. Sen. Durenberger
        2. claims senatorial prerogative, since bill's language came from the Senate
            a. language was included due to special needs of Teamsters
                i. claims that his insider status re: special interest needs give him authority to interpret language
                    1. authority of legislative statement depends on role in legislative process
            b. problems with "bulleted statements"
                i. statements that were not made on the floor, after the fact of drafting/enactment
        3. Why did Sen. Durenberger and Teamsters fail to impute their meaning prior to enactment?
            a. Sen. Durenberger was in finance committee, not labor; language likely originated in labor committee
    iv. 85%
        1. Rep. Thompson
            a. supplied bulk of meaning for members of Congress
                i. naïve? floor statement, likely not read
                ii. but, members could have looked to statement before voting
        2. 85% interpretation supported by IRS statute

XXXV. **New Textualism's Disciplining Effect on the Use of Legislative History**

a. Justice Scalia: refuses to join any opinion relying on legislative history

XXXVI. *Exxon Mobil v. Allapattah Services, Inc.* (SC 2005)

a. Facts:
    i. Class action brought in fed. ct. under diversity jurisdiction (claim grounded in state law)
        1. Not all P's in class satisfied amount in controversy; can fed. ct. exercise supplemental jurisdiction?
    ii. Judicial Improvements Act (28 USC 1367)
        1. designed to reform supplemental jurisdiction, return to "pre-*Finley*" law
b. Holding (Kennedy):
    i. 28 USC 1367 overrules *Zahn*;
        1. statute is unambiguous, so no need to consult legislative history
        2. if leg. history was consulted, it is "murky"
            a. also, finds evidence that three drafters of Posner report (subcommittee of the Federal Courts Study Committee) attempted to manipulate legislative history, to avoid overruling *Zahn* (they acknowledge that, on its face, USC 1367 permits supplemental jurisdiction over claims that do not meet amount in controversy requirement)
            b. but, majority does not consult the Posner report, behind the House Report which accompanied the statute
                i. cherry-picking legislative history
                ii. Reports contradict each other
                iii. House report contains a disclaimer that it has not adopted Posner report as law (even though it is included)
                    1. *Zahn* included in a footnote to the Posner report (since it is not directly in the line of cases relating to pendant jurisdiction)
                        a. Not included in House Report (again, it does not deal directly with the issue, but is nonetheless affected by the statute)
                iv. both reports recommend gutting diversity jurisdiction
c. Dissent (Stevens and Breyer):
    i. deny that a statute must be declared "ambiguous" before legislative history is consulted
    ii. no need to prioritize House Report over Posner Report
        1. since the evolution of the statute from one report to the other is indicative of legislative intent
d. Dissent (Ginsburg):
    i. invokes substantive canon that jurisdictional statutes should be interpreted as interfering with the judicial status quo as little as possible
        1. increase difficulty for Congress to alter jurisprudence
        2. but, opinion ignores the fact the Congress was attempted to recreate the supplemental jurisdiction procedural rules
    ii. opinion characterized by "sympathetic textualism"
        1. uses textual interpretation to reach outcome that legislative history seemed to suggest
e. Notes:
    i. Supplemental jurisdiction
        1. evolution from ancillary and pendant jurisdiction
    ii. Posner report:

1. SC's preexisting pendant and ancillary jurisdiction jurisprudence is too complicated, encourages legislature to create supplemental jurisdiction "from scratch"
2. intention to return to pre-*Finley* law
    a. with the exception of *Zahn*

iii. *Finley v. United States* (SC 1989)

iv. *Zahn v. International Paper* (SC 1973)
1. Posner opinion

v. Modern use of legislative history in statutory interpretation
1. Legislative History and Statutory Ambiguity:
    a. both textual language and legislative history allow judges to be "willful", while both can further judicial restraint
2. traditional hierarchies (where committee reports are considered the most reliable indicia) have been rejected in *Exxon* (most recent example of legislative history doctrine)

XXXVII. <u>Should courts ever consult legislative history?</u>

a. Yes; and what for?:
    i. legislative purpose
        1. leg. history to discern collective legislative intent is now in disrepute
        2. textualists argue that by abandoning legislative history, they are refusing to identify background "purpose"; argue that they are practicing judicial constraint
            a. argument that history can be used to discern purpose if analysis is performed with understanding of filtering procedures in legislature
                i. such as with public choice theory
    ii. meaning of words in statute
        1. only when ambiguous?
            a. ambiguity v. vagueness
    iii. refusal to consult legislative history delegates legislative authority to judiciary
        1. textualism does not necessarily constrain courts
            a. but, courts are specially designed to interpret text (*Marbury*)

b. No:
    i. Not useful to discern Congressional understanding of a statute:
        1. members of congress do not read bills or committee reports (staff-driven process)
            a. legislators care about general purposes
            b. argues for broadly purposivist interpretative scheme
        2. but, still allows for possibility that leg. history could inform notion of general purposes
            a. more likely to be included in floor statements
        3. but, Congress SHOULD read bills
            a. Formalism:
                i. the law is only the words of the statute (cannot look outside the law itself)
                    1. subject to reducio al absurdum argument
            b. Constitutional argument
                i. legislation as a non-delegable responsibility
                ii. separation of powers rhetoric
                    1. "more respect for the legislature that it may have for itself"

4. but, Constitution frames outer limits and allows Congress to develop its own structure to further its responsibilities
    a. committees, agencies, etc.
ii. too easily manipulated
iii. implications of consulting legislative history:
    1. to compel more careful drafting of statutes
    2. definition of the judicial role

c. Some, in hierarchy

XXXVIII. **Substantive Canons of Construction**

a. divergent from semantic canons, which purport to be neutral with respect to substantive outcomes
b. assumes that, in the absence of the rule, the court would have reached a different conclusion
c. "clear statement rules"
    i. construe statutes to promote a favored value or avoid a disfavored one, unless statute demands the contrary
        1. Ex.: rule of lenity
            a. value of fair warning, etc.
        2. constitutional avoidance canon
d. implicit canons
    i. "nondelegation canon": constrain delegation of policymaking authority to executive agencies
    ii. Simplicity/"anti-messiness" canon
e. Implications:
    i. Judicial use of statute promotes values, regardless of purposes of Congress (determined by the court)

XXXIX. <u>Classic Approach: Statutes in derogation of the common law</u>

a. Spirit v. letter of the law

XL. *Riggs v. Palmer* (NY 1889)

a. Facts:
    i. Beneficiary son poisoned father, attempted to collect property
b. Holding:
    i. Although statute regulating effect of wills would give property to the murderer, spirit of law would not allow him to benefit
        1. "rational interpretation"
        2. The law did not comprehend such a case:
            a. Not within the mischief it seeks to address
            b. Absurd result
    ii. Substantive canon:
        1. No person should be allowed to profit by his own fraud, take advantage of own wrong
    iii. Appellant's argument:
        1. D unlawfully prevented revocation of the existing will
            a. But, even mere intention to revoke a will does not constitute revocation
c. Dissent:
    i. Courts bound to enforce statute (established by legislature)
        1. Testator may not have chosen the alternative recipients

XLI. <u>Rule of lenity</u>:

a. Ambiguities in criminal statutes are to be construed in favor of the D

i. Fair warning; clear line
ii. *Smith v. Unites States* (Scalia's dissent re: "using" a firearm)

XLII. *United States v. Bass* (SC 1971)
a. Facts:
i. Violation of Omnibus Crime Control Act; "receives, possesses, or transports in commerce or affecting commerce…any firearm"
1. Govt. argues that statute's commerce req. only applies to "transports"; need not establish an interstate connection in this case (for possession)
b. Holding (Marshall):
i. Statute is ambiguous; does not specify whether interstate requirement applies to all three factors or just "transports"
1. Construes statute in favor of D, since interstate commerce req. could be interpreted to apply to all three factors
ii. Invokes legislative history after refuting the below arguments
1. Conflict between sponsor's floor statement (Sen. Long) and another's (Rep. Pollock)
iii. Invokes ancillary principle of preserving the federal-state balance
c. Dissent (Blackmun):
i. Statute is not ambiguous, based on textual construction (literal grammatical reading)
ii. Legislative history (sponsor statement of Sen. Long) reveals that purpose was to prohibit possession
d. Notes:
i. Majority's interpretation of "in commerce" violates "rule of the last antecedent" canon
1. Refers solely to the last antecedent, in the absence of contrary intention
ii. Govt. argues that Title IV of the same act would be redundant under majority's interpretation
1. But, Title IV also reaches additional parties, not covered by the statute; punishes a broader class of behavior
iii. Rule of lenity:
1. Fair warning, clear lines of criminality
a. But, unlikely that criminals consult text of statutes (Holmes, *McBoyle*)
2. Rule of lenity as a version of the nondelegation canon (Congress must decide the elements of an offense)
a. But, legislature presumably is aware of rule of lenity when crafting legislation

XLIII. <u>Avoiding Serious Constitutional Questions</u>
a. Construe statute to avoid serious constitutional problems
i. Rooted in counter-majoritarian difficulty inherent in judicial review (*Marbury*)
b. Avoidance canon (modern version)
i. *Ashwander v. Tennessee Valley Authority* (SC 1936); Brandeis concurrence
ii. Seven rules (see 4 and 7)
1. (4): constitutional question avoided if case can be disposed on another ground
2. (7): construe a statute as constitutional if such is "fairly possible"; even in the presence of a "serious doubt" of constitutionality
a. or, "grave constitutional doubt"
iii. differs from "classic" avoidance canon
1. interpret statutes to avoid constructions that would be *actually* unconstitutional

XLIV. *National Labor Relations Board v. Catholic Bishop of Chicago* (SC 1979)
a. Facts:

i. applicability of prohibition on "unfair labor practices" in section 8 of National Labor Relations Act (NLRA) to religiously affiliated schools employing lay teachers, teaching secular subjects
    1. unfair labor practices re: organizing as a union

b. Holding (Burger):
    i. did Congress intend the NLRA to apply to church-operated schools?
    ii. no need to decide constitutional question (where entanglement at issue is excessive)
        1. analyze text of statute to determine whether constitutional decision is REQUIRED
        2. invoke legislative history to support meaning
            a. no affirmative intention to include religious schools found in history
                i. if Congress intends to reach into a Constitutionally problematic area, it must provide a clear expression of its affirmative intention to do so
            b. so, read statute to avoid placing religious school teachers under NLRA jurisdiction
                i. so, is it possible to construe the statute to avoid excessive entanglement between govt. and religion?
        3. no response to dissent's textualist argument
            a. look to legislative history for the "clear statement of affirmative intention" that constitutional avoidance canon demands
                i. connection between legislative history and use of constitutional avoidance canon means that legislative history will be consulted to find intent; contrary to textualist perspective

c. Dissent (Brennan):
    i. majority exercising legislative functions to avoid constitutional conflict
        1. court must determine whether alternative constructions are "fairly possible"; no "affirmative expression" rule in precedent
    ii. legislative history indicated that Congress intentionally left out an exception for religion/education
        1. statute was intended to cover all employers, except those specifically excluded
            a. implicit *expressio unius* argument
        2. avoidance is "disingenuous evasion", since statute is not ambiguous

d. Notes:
    i. constitutional question presented: Free exercise clause of 1st Am.
        1. *Lemon v. Kurtzman*
            a. state aid to religious schools constitutes excessive "entanglement"
                i. to decide whether state aid constitutes excessive entanglement, court would have to decide whether religious doctrine influenced "conditions of employment"; i.e., religious objections to unionization
        2. how serious must the constitutional problem be?
            a. evolutionary view:
                i. constitutional question as it presents itself in modern context
            b. fixed confines:
                i. constitutional question in original meaning
    ii. competing theories of constitutional avoidance:
        1. Burger: clear statement
        2. Brennan: ambiguity resolving

iii. justification for canon in empirical claims about likely Congressional intent (likely did not intend to impose unconstitutional statute)
    1. Congress prefers narrow interpretation of statute to avoid constitutional invalidation
    2. legal fiction designed to show respect for Congress?
    3. Constitutional decisions are significantly harder to undo
iv. arguments that canon enlarges v. restricts judicial discretion:
    1. policy against head to head conflict with Congress
        a. striking down statutes as unconstitutional is costly to the relationship
        b. but, little conflicts result instead
    2. but, hierarchy of constitutional purposes allows for judicial discretion
v. protecting constitutional values:
    1. process-oriented approach:
        a. modern "clear statement" approach incentivizes Congress to legislate more carefully
            i. contrary to faithful agent assumption
    2. substantive approach:
        a. "soft" enforcement; "resistance norms"
            i. values that are more or less yielding to government action
vi. background on legislative history
    1. general consensus that NLRA (Wagner Act) was only passed because legislators were convinced that it would be struck down under *Schecter* repudiation of Congressional commerce power
    2. Burger's use of LH:
        a. notes that example of college professor was invoked as an example of relations NOT covered by the Act
            i. but, professors have tenure, different governance procedures than teachers
        b. post-enactment legislative history:
            i. statues NOT enacted v. amendments and statutes actually enacted (the latter has more credibility)
            ii. exclusion of non-profit hospitals (alternative to statute that would have excluded religious institutions)
                1. majority argues that religious exemption was unnecessary (proposed statute, not enacted)
                    a. even without the proposed statute, religious institutions would not be covered
                        i. if statute WAS passed, it would have only been as an excess of caution
vii. how to show an affirmative/clear intent to include religious institutions?
viii. effect of avoidance doctrine on eventual constitutional decisions
    1. accretion of avoidance decisions influences the eventual deliberation on constitutional issue
    2. note also that the court always has the option to strike down an application as applied to a specific circumstances, without wholesale invalidation
        a. issue of severability

XLV. **Administrative Agency Regulation**

a. agency regulation of the public
b. regulation of agencies by Congress, President, and Judiciary

XLVI. Introduction to the role and function of administrative agencies
a. nominally located in executive branch
    i. although, complicated relationship (see Bressman)
b. responsible for promulgation and application of regulations that translate general statutory directives into concrete requirements or prohibitions
    i. rules passed in the absence of bicameralism/presentment requirements of Article I, section 7

XLVII. <u>Separation of powers and the (uncomfortable) place of agencies in relation to it</u>
a. nothing in the Constitution explicitly mandates separation of powers (no "shall never exercise" provisions, as in Mass. constitution)
    i. implied by affirmative grant of powers (assumed to exclude others)
        1. Vesting Clauses
    ii. inferences from structure:
        1. structural evidence of separated powers:
            a. Con. minimizes each branch's role in selection of the others
            b. ability of branches to remove officials from other branches is limited and difficult
            c. limitations on Congressional control of compensation of other branches
            d. Incompatibility clause (preventing legislators from serving as judges or executive officers)
            e. Bill of Attainder clause (prohibits legislative imposition of penalties)
        2. structural evidence of blending:
            a. President participates in legislation via veto power
            b. Senate's responsibility for impeachment
            c. confirmation process for executive appointees
            d. President's treaty power requires Senate's approval
    iii. historical understandings and practice:
        1. response to perceived failure of state governments, in which legislature dominated
        2. purposes:
            a. create greater govt. efficiency
                i. division of labor
            b. assure that statutes serve the common interest
            c. assure impartial admin. of the law
            d. hold executive officials accountable
            e. establish balance of powers
b. Formalist perspective:
    i. Con. draws sharp lines of demarcations between branches' powers
        1. non-delegation of powers argument
c. Functionalist perspective:
    i. Con. is defined at a high level of generality
    ii. seeks to implement the purposes behind the separation of powers
d. Definitions:
    i. Legislature:
        1. make and alter the general rules of society
    ii. Executive:

1. execution of those general rules

iii. Judicial

1. interpretation and application of rules to controverted cases

XLVIII. Delegation of Legislative Power

a. virtues and vices:
   i. laws do not include all necessary details applicable to a specific case
   ii. admin. agencies have specialized expertise
b. rationale for housing agencies in the executive branch:
   i. crowded legislative agenda
   ii. legislative process is slow (by design)
   iii. partisanship and politics (pork, grandstanding, influence of interest groups)
c. anti-democratic complaints:
   i. agencies' insulation from electoral process
      1. also may allow legislators to avoid democratic accountability through delegation
   ii. but, Congress can contract or eliminate agencies by statute
      1. also, both legislature and President have power to select agency personnel
d. modern imperative
e. delegation to the judiciary?
   i. open-ended statutes allow judiciary to develop the law in a common law fashion
      1. as in antitrust, employment discrimination
   ii. implicit delegation through statutory vagueness
f. judicial review of agency action
   i. circumscribing agency power

XLIX. Interpretive approaches in determining appropriate agency authority:

a. Formalism
   i. consult the text of the constitution to determine substance of separation of powers doctrine
   ii. role of the formal structure is to constrain the power of the central government and protect liberty
      1. emphasize constraining and liberty-protecting aspects of the text
b. Functionalism
   i. text is open-ended, answers fewer questions; constitution as providing an initial allocation of powers, which is subject to reallocation (through statutes, through executive accrual of authority)
   ii. endorse New Deal project of growth of the regulatory state
      1. support the govt. acting with energy to solve problems, so read that constitution to allow govt. to act in modern times
         a. dynamic/evolutionary interpreters of the constitution
c. choice of interpretative regime is often dependent on the subject matter

L. Types of agencies:

a. Executive branch agencies
b. "independent agencies"
   i. defined by restrictions on President's ability to remove the agency head
      1. limited by Congress
   ii. presumed to limit the agency from direct control by the President in other aspects as well

LI. How to characterize the nature of the power exercised by the agencies ("modalities of action")?

a. quasi-legislative

b. quasi-adjudicative
c. advocates of delegation may characterize agencies as exercising executive power in quasi-legislative or quasi-adjudicative modalities

LII. Justifications for agency delegation
a. subject matter expertise

LIII. **Non-delegation doctrine**
a. rarely (successfully) invoked
b. "intelligible principle" doctrine
    i. so long as the court, using whatever tools of statutory interpretation it deems appropriate, can discern an intelligible principle in a statute delegating power to promulgate rules to an agency, that agency may act in whatever modality (quasi-legislative/quasi-adjudicative)

LIV. *Whitman v. American Trucking* (SC 2001)
a. Facts:
    i. EPA tasked with setting air quality standards "requisite to protect public health"
        1. "requisite" challenged as too broad
b. Holding (Scalia):
    i. EPA's exercise of authority was valid, as it's enabling statute contained an "intelligible principle" on which the EPA could base its decision
        1. Judiciary should defer to legislature in such a policy judgment
c. Concurrence (Thomas):
    i. Suggests that the constitutionality of such delegation of "legislative" powers is still an open question
d. Rationale:
    i. agency constitutional avoidance
        1. if there is a lack of an intelligible principle in the statute itself, the agency can restrict itself with an intelligible principle, to avoid the statute being struck down as unconstitutional
    ii. line between agency implementing Congressional mandate and in using discretion to legislate

LV. **Separation of powers and the relationship between agencies and Congress**
a. Congressional control of delegated power
    i. Legislative veto

LVI. *Immigration and Naturalization Service v. Chadha* (SC 1983)
a. Facts:
    i. AG given authority to suspend deportations in individual cases
        1. statute granting authority retained veto power for one chamber of Congress
            a. compliant with bicameralism and presentment?
                i. only applies to **legislative veto** that violates bicam. and present. (one chamber)
b. Holding (Burger):
    i. one chamber legislative veto is unconstitutional
c. Concurrence (Powell):
    i. Case could be decided narrowly; Congressional determination of individual immigration status is an improper exercise of judicial power
d. Dissent (White):

i. Article I only requires that the tools of legislation be formulated via presentment and bicameralism
    1. "realist"/"evolutionary"/"functionalist" perspective; acknowledges agency-heavy governance structure
        a. best approach to enact Framer's general goals of separation of powers
    2. formalist readings cannot provide the tools capable of governing modern society
ii. legislative veto as legislature's reservation of ultimate authority, used to enact its grant of plenary legislative power (preserve values of separation of powers)
iii. underlying principles of separation of powers are satisfied in individual cases of deportation suspension

e. Notes:
    i. Article I → presentment and bicameralism
    ii. decision does not stand in the way of the Congressional Review Act

LVII. <u>Congressional control via appropriations and oversight</u>

a. statute + appropriations = policy
b. other forms of congressional control:
    i. Senate *advice and consent* to appointments
        1. formerly allowed for the use of the filibuster (req. a 2/3 supermajority)
            a. while *Noel Canning* pending before the SC
            b. eliminated in Nov. '13 during "nuclear option" debate for judicial nominees
        2. Senate can go further and refuse to appoint anyone to an agency
            a. National Labor Relations Board
                i. must have at least 3 members to perform any legislative activity
            b. Presidential response: use recess appointment power
                i. Senate response- refuse to recess
    ii. Congressional control of framework legislation
        1. agency's enabling statute + framework legislation
        2. Administrative Procedure Act (APA)
            a. also, freedom of information act, reduction in paper act

LVIII. <u>The Relationship between agencies and the President</u>

a. Presidential control of agencies and their legislative power
    i. Appointment power
    ii. recess appointment power

LIX. *Buckley v. Valeo* (SC 1976)

a. Facts:
    i. Internal Revenue Code of 1954 + Federal Election Campaign Act of 1971
    ii. 4 out of 8 members of the Federal Election Commission appointed by Congress
        1. Congress may only appoint "inferior officers", President may appoint "officers of the United States"
b. Holding:
    i. Appointment process violated Article II of USC, as Congress vested in itself executive and adjudicatory powers
        1. Commission's administrative functions can only be served by "officers of the US"
c. Notes:
    i. appointments clause:
        1. inferior officers

a. Congress can vest appointment in President, courts, or heads of departments
i. but nothing says that Congress may retain appointment power for itself
ii. only has power to assign the power, not to exercise it
iii. court interprets "heads of departments" as heads of executive departments (so, not the speaker of the house, etc.)
2. officers who are not inferior ("principal officers")
a. must be appointed by President
3. employees of the United States (rather than officers)
a. subordinate to officers

ii. money is speech under 1st Am.

LX. *Noel Canning v. NLRB* (2013)

a. Facts:
i. contested definition of "the" and "happen" in Presidential recess appointment power
1. held to only apply to recess in between sessions
2. only vacancies that may be filled are those that occur during that recess
3. Senate can avoid recesses altogether by holding "pro forma" sessions, where it conducts no business at all
ii. Government argument:
1. partisan gridlock was not anticipated by Framers; Presidential recess appointments bolster appointments power to recreate balance of power envisaged by original understanding of USC

b. Holding:
i. Presidential recess appointment power must be exercised between sessions, for vacancies that occurred during the recess

c. Rationale:
i. Article II, Section 2
1. President shall have power to fill up all vacancies that may happen during the recess of the Senate…
ii. National Labor Relations Act of 1947
1. creates a right of collective organization
2. enabling statute does not allow agency to enact its functions unless it has at least 3 members
a. Congress refuses to fill appointments to paralyze NLRB
i. Obama used recess appointments to fill vacancies, contested in court

LXI. **Removal**

a. no mention of removal in constitution

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

a. Facts:
i. statute requires Senatorial consent for both appointment and removal of postmasters
1. counteracting system of political favors through appointments

b. Holding (Taft):
i. postmaster understood to perform only executive functions, in purely executive modalities (no bleed-overs in functions or modes of activity into the legislative or judicial)
ii. did not restrict Presidential removal authority (such as only allowing "for cause"); rather, aggrandized the Congress in its power

1. functionalist approach: focus not on express clauses, or on absolute sense of separation of powers, but rather on balancing test
    a. undo interference with the President?
        i. mere encroachment v. aggrandizement
        ii. Taft: encroachment, but not aggrandizement
iii. once in the domain of the appointments power, removal power is the President's alone
    1. holding lasts nine years, until *Humphrey's Executor*

c. Notes:
    i. postmasters were more important at the time; postmasters involved in censorship, moral determinations, etc.
        1. "spoils system" – appointments for party which won election
    ii. federal civil service did not apply to political appointees
        1. progressive impulse to give some measure of security in tenure in office by removing plenary Presidential removal power
    iii. Wilson refuses to comply with removal restriction; congressional involvement
    iv. Taft: only former president to serve as SC justice
        1. always complied with advice and consent requirements
    v. decision of 1798
        1. mentioned in *Humphrey's Executor*
        2. First Congress – important for originalists
        3. fear that removal power was subject to legislative regulation; but, decided that removal power is vested in President alone
            a. not for Congress to grant or take away by express provision
            b. executive removal power implied by appointments power
                i. otherwise would be to "unduly embarrass the President in the exercise of his powers"

LXIII. <u>Re-crafting the general rule of Presidential removal power to accommodate independent agencies in a formalist approach</u>

a. Efficacy of removal power or its absence; scope of agency "independence"

LXIV. *Humphrey's Executor v. United States* (SC 1935)

a. Facts:
    i. FDR attempted to remove FTC commissioner, confirmed by US Senate
        1. FTC Act restricted Presidential removal power to "for cause" situations
            a. Is such a restriction constitutional?

b. Holding (Sutherland):
    i. Presidential removal power is not plenary for officers exercising powers that are not solely executive
        1. Overturns *Myers*
            a. Distinguishes postmaster (exercising strictly executive powers) from FTC commissioner (quasi-legislative and quasi-judicial)
        2. Extends to members of independent agencies

c. Dissent (Jackson):
    i. resort to "quasi" exposes that categorization has broken down

d. Notes:
    i. although FTC was not a New Deal agency, decision has implications for independent agencies

ii. decision came down on the same day as *Schecter* (unanimous repudiation of FDR's economic agenda)
    1. FDR said to be madder about *Humphrey's Executor* than *Schecter*
    2. opponents of the New Deal feared that those agencies were too independent
        a. later, *Humphrey's Executor* ironically seen to support New Deal program
iii. independent agencies has officers "occupying no place in the executive department" and who "exercises no part of the executive power vested in the President"
    1. in contrast to *Myers*
    2. power exercised by FTC is quasi-legislative or quasi-judicial
        a. exercising executive power using quasi-leg. or quasi-jud. modalities?
            i. but, repudiated in *Humphrey's*; powers are leg./jud., rather than just functions of power
            ii. modality determines location and location determines control
iv. Jackson: becomes leading proponent of functionalism
    1. experience with Nuremburg trials exposed danger of excesses of executive power
v. separation of powers issues keep arising, as judiciary resists legislative schemes that have been passed with presidential approval (not over veto)
    1. constitution's vesting/separation of powers not drafted with level of specificity necessary to account for every exigent situation
vi. <u>formalistic approach v. functionalist approach</u>
    1. formalist:
        a. purpose of separation of powers is not just to enhance govt. efficiency, but to protect individual liberty
    2. functionalist:
        a. consult context of specific subject matter to determine whether power of executive branch is unduly compromised
            i. encroachment v. aggrandizement

LXV. *Morrison v. Olsen* (SC 1988)
a. Facts:
    i. independent counsel process, appointed for specific investigations and prosecutions
        1. statute give AG and DC Circuit the power to appoint indep. counsels
            a. gives AG the power to remove independent counsels, but only for cause
b. Holding ():
    i. independent counsel is an inferior officer
    ii. four factors for determining whether an officer is inferior
        1. subordination
        2. limited scope of duties
        3. limited tenure
        4. limited jurisdiction
    iii. test for encroachment:
        1. do removal restrictions impede President's ability to exercise his constitutional duties
            a. centrality to the functioning of the executive branch
                i. control over prosecution by executive officials is not central to the functioning of the exec. branch
            b. sufficiency

i. does statutory scheme leave the executive enough control the scope of executive activity?

c. both categories are relevant to "control" factor (see below)

i. control by removal: President can remove the AG (control AG's monitoring of independent counsel); indirect control

ii. AG determines need for independent counsel; indep. counsel abides by DOJ procedures

iv. even if encroachment, no aggrandizement

1. no attempt by Congress to gain a role in removals

c. Dissent (Scalia):

i. inferior officer defined by dictionary ("subordinate") and using whole act rule (consulting meaning of "inferior" in provision for inferior courts)

1. finds fault with other factors established by majority (subjective)

ii. "he who lives by ipse dixit dies by ipse dixit"

1. comparing holdings in *Humphrey's Executor* and *Morrison*

iii. disputes centrality/sufficiency test

1. too much room for judicial discretion

a. constitution leaves construction of governmental to political/democratic mechanisms

2. Court failing to appreciate impact of President losing control over prosecution by executive officials

a. analogy to legislative legal immunity in legislative affairs

b. Court removes implied immunity (since President has control over removal) of executive officers

iv. disputes indirect control mechanism of President removing AG

1. very narrow categories for President to remove AG for cause

2. ineffective method of controlling independent counsel

a. like saying "shackles are an effective means of transportation"

3. also, AG's discretion to dictate jurisdiction of independent counsel is circumscribed, and he has very little control over the counsel once appointed

d. Notes:

i. independent counsel: inferior officer? or principal (non-inferior) officer

1. see *Buckley* for impact on removal powers

ii. removal power:

1. prosecution is indisputably executive

a. easy case for formalism (no need to result to "quasi")

b. court holds that classification of modalities of action as "quasi" is unnecessary

i. but, leaves question of analysis of functions open for later cases

iii. two years prior to *Morrison* (Burger Court): *Bowsher v. Synar* (1986) (formalist opinion with functionalist dissent by White)

1. re: statute designed to reduce the national deficit

2. GAO: governmental accountability office (with Comptroller General)

a. removable only by impeachment or ordinary legislation for narrow range of reasons

b. Comp. General is in the legislative branch; evidence from legislation's definition -> but, actual work is classified as executive (by modality, or method)
    i. categorization of agencies/officers/actors
        1. location
        2. control
            a. such as removal power
        3. modality/method
        4. task/function

iv. SC interpretive approaches:
    1. formalist
        a. "pure"
        b. with fictions ("quasi")
    2. functional
        a. "realism" about control
        b. actual encroachment
            i. versus Congressional self-aggrandizement (capturing executive power for itself)

v. for *Myers* and *Humphrey's Executor* to co-exist, President must have ability to remove any officer exercising executive power
    1. holding in *Bowsher*: Presidential removal power is NOT the only method of controlling executive officers
        a. distinguishes between encroachment and self-aggrandizement
        b. holding recasts *Myers*, rather than overruling (holding consistent with *Myers*)
            i. *Myers* – aggrandizement
            ii. *Humphrey's* – encroachment
                1. functionalist justification

LXVI. **The Return of Formalism**

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

a. Facts:
    i. Sarbanes-Oxley Act
        1. creates independent body to police the accounting industry and to enforce the accounting provisions enforced by the SEC
            a. the PCAOB
                i. located within the SEC

    ii. removal and Appointments issues
        1. members of the PCAOB are inferior officers
            a. appointed by a "head of a department"
                i. Congress can vest the appointment power of inferior officers in the heads of departments
                    1. are SEC commissioners heads of department?
                        a. for present purposes, SEC, an independent agency, is considered a "department" within the executive branch
                            i. legal fiction: the entire dept. is considered a "head of a department"
        2. removal power:

a. SEC – considered an independent agency, even though enabling statute does not provide for removal
    i. but, other indicia of independence interpreted to mean that President does not have power to remove commissioners at will
b. PCAOB – two degrees of removal protection away from the President
    i. board members can only be removed for "cause plus"
    ii. SEC members can only be removed for cause by the President
        1. *Humphrey's Executor* – one level of removal protection is permissible, as long as Congress does not take power for itself

b. Holding (Roberts):
    i. formalist approach:
        1. quotes *Chadha* (separation of powers is about protection of individual liberty, not efficiency)
    ii. democratic accountability deficit
        1. analogy to "commandeering" in federalism cases – people should know "who to blame"
            a. political branch policies that "fuzz" the lines of accountability lead to democratic failure
        2. but, "for cause" removal provisions do not allow President to remove officials for policy disagreements
            a. not typically conceived of as a method of accountability
    iii. control:
        1. centrality argument:
c. Dissent (Breyer):
    i. functional approach
        1. examine context and alternatives as they function in the real world
        2. courts possess an inferior understanding of the realities of administration and politics
            a. deference to political branches; contrary to basic tenet of the formalist approach (judiciary must police the boundaries and protect interests)
d. Notes:
    i. Importance of Senate advice and consent power for Presidential appointments
        1. "no" votes are rare, more likely that candidate withdraws or President appoints someone other than his ideal selection
    ii. functional methods of Presidential control
        1. OMB regulatory review process
        2. progressive/"good government" administration requires Presidential control
            a. Court's efforts to patrol the administrative state, and the failure of judicial review of agencies, requires Presidential control

LXVIII. **Judicial review of the regulatory process under the Administrative Procedure Act (APA) of 1946**

LXIX. Pre-APA precedent:

a. court-made administrative common law
    i. esp. significant in New Deal/WWII era, where FDR created new agencies
        1. in the early years, agencies were subjected to significant congressional review, due to perceived inequities (ex parte communications; legislative/judicial modalities)→ driven by MC's disagreement with ideology of agencies' missions

a. but, rapid expansion of administrative state led to desire to impose control
i. judicial/legislative functions
ii. due process concerns (5th Am. procedural due process, as applied to fed. govt.)
2. led to Congressional (scholarly) review that generated the APA in 1946

b. APA: statutory trans-substantive framework (applies to all agencies, regardless of SM or status as executive/independent)
i. House/Senate disagreed, APA represents a legislative compromise
ii. establishes default rules for agency procedure, but not the sole source
1. Constitution (due process clause); although floor of APA is *generally* thought to be higher than min. req. of DP clause
2. agencies' enabling statutes; w/ enabling statutes, APA does not act as a floor, or a ceiling (default rule that Congress can work around)
a. if silent on a procedure, the APA applies by default
3. agencies' own procedural rules; APA acts as a floor
4. court-created procedure (in excess of what the APA requires)
a. how do courts interpret the APA?
i. eliminating all room for common law-like creativity? hard and fast codification that cut off pre-APA precedent?
ii. or a continued role for judicial review of procedure
b. courts' judicial review of APA is distinct from statutory interpretation
i. "against codification"; codification reifies the state of the common law at the moment of codification (see *Vermont Yankee*, below)

LXX. <u>Introduction to the APA (See Appendix B):</u>
a. defines the agencies that are subject to its terms
i. executive/independent distinction is not noted (broadly-applicable)
ii. exceptions for military in time of war, etc.
b. provides sets of procedure for different modes of agency action
c. provides for judicial review of final agency actions (judicial review provisions)
i. different standards of review for different problems
1. an area where courts have had significant contributions

LXXI. APA's distinction between rule and orders
a. **Rule**:
i. whole or part of agency statement of general or particular application and *future effect*
ii. replaced earlier concept of "quasi-legislative" effect (as applied to a particular application)
b. **Rulemaking**:
i. agency procedure for creating/amending rules (if it's a rule, it has to be accomplished through rule-making)
c. **Order**:
i. final disposition (of whatever form) of an agency, in a matter other than rule-making, but other than licensing
1. everything that is a final disposition that is not a rule
d. **Adjudication**:
i. agency process for formulation of an order
e. <u>Formal</u>:
i. Rulemaking

1. very few agencies engage in formal rulemaking

ii. **Adjudication**

1. adjudication using court-like processes (with exceptions) resulting in final orders
2. generally performed by a hearing officer (ALJ)
    i. "rule of 3" – pool of possible appointees; agencies often seek waiver of rule so that ALJ's with greater expertise in a given field can be appointed
        1. see distinction between officers, inferior officers, and employees
    b. witnesses, cross-examination (but not governed by Fed. R. Ev.)
    c. conclusion as a recommended outcome
        i. appealable, resulting in a final order at last level of appeal
        ii. order is assumed to be "self-enforcing"
            1. or, in other cases, order is not self-enforcing (agency would have to go to Ct. of Appeals to enforce order)
3. Court of appeals: DC Cir. as default (but can invoke another Ct. of Appeals with a close enough relationship to the parties)
    a. same appeals process for notice and comment (informal) rulemaking

f. <u>Informal</u>:
    i. Rulemaking
        1. **Notice and Comment rulemaking**
    ii. Adjudication
        1. Residual category (anything that isn't formal adjudication or informal rulemaking); "informal agency action"
        2. most prevalent category

g. under-emphasizing role of licensing and rate-making (which are hugely prevalent in reality), in favor of exposition on rules/orders of general effect

h. 1969 – court struggles with whether agency can use adjudication to enact law, or whether notice and comment rulemaking should be dominate procedure; *Weiman Gordon*
    i. indicating a switch to notice and comment as dominant creative mechanism
    ii. in the below cases, the agencies have the power to use formal adjudication AND informal, notice-and-comment, rulemaking

LXXII. *SEC v. Chenery* (SC 1947)

a. Facts:
    i. Public Utility Holding Company Act (PUHCA) → SEC has power to review, approve, or substitute corporate governance plans for public utilities
        1. response to collapse of public utilities during Great Depression
        2. statute requires that SEC only approve reorganization plans that are "fair and equitable"
    ii. *Chenery I:*
        1. Chenery group (owners of controlling stock in Federal Water Service Corp.) bought additional stock after SEC planned to convert outstanding shares of non-voting stocks to "preferred" stock with voting power
        2. SEC held that Chenery group could not trade stock during negotiation of reorganization plan, under "duties of fair dealing"

a. common law of trusts, re: fiduciary duties (conflict of interest for fiduciaries to trade stock during reorganization)

3. appealed to SC (Frankfurter opinion):
    a. SEC's decision, which was based on existing common law, must be evaluated by that standard
        i. SC held that SEC had misinterpreted common law re: "fair and equitable dealing", reversed holding
        ii. SC standard:
            1. only review agency's action by its proffered rationale; eliminates opportunity to provide *post hoc* justifications

iii. *Chenery II:*

1. SEC rejected Federal's reorganization plan, offered plan where Chenery group would surrender preferred stock for cash → Chenery group challenged the order, leading to *Chenery II*

b. Holding (Murphy):
    i. new standards established through adjudication do not present a problem for the rule of law
        1. legal fiction: orders via rulemaking are not "new" laws
        2. if an agency has both rule-making and adjudicative authority through enabling statute, agency can use its discretion to choose which method it will use
            a. rule v. order (not a rule)
                i. distinction turns on prospectivity (only) – rule does not apply retroactively
                    1. order also applies prospectively, but only through precedent/stare decisis
                ii. general norm: rules have future-only affect; results of an adjudication can apply retroactively to the case before it
            b. rule v. standard
                i. turns on specificity v. open-endedness
            c. rule-making v. adjudication as different methods
        3. but, preferable to use quasi-legislative rule-making to develop new standards, with prospective effect
            a. agencies with discretion re: method can promulgate rules or standards, but this requires post hoc case-by-case adjudications
    ii. agency must explain its decision and court will interpret decision in light of agency's explanation, made at the time of the decision
        1. agency must articulate explanation at the time of decision, not a justification after the fact

c. Dissent (Jackson):
    i. new rules should not be established through adjudication
        1. concerned with how the administrative state interacts with existing legal (common law) principles

d. Notes:
    i. agency justification (adopted by majority) for proceeding through adjudication, rather than rulemaking
        1. had the agency had to use rulemaking, it would have had to establish a new definition of "fair and equitable"

2. so, should agency be allowed to use adjudication for this type of order?
    a. use expertise to develop new standard through adjudication
        i. so, why not establish a rule? not enough expertise; need to retain flexibility
            1. but, what about the rule of law? predictability of legal standards?
                a. but, same argument for common law

ii. retroactivity problem:
    1. when agency announces a new "rule" and applies the rule to the instant case
        a. retroactive, since behavior in case took place before the rule was announced
    2. "balancing test" – hardships of retroactive application v. agency's interest in applying rule retroactively

iii. pre-APA
    1. passed in between *Chenery I and II* but not applied to either

LXXIII. *NLRB v. Wyman-Gordon* (SC 1969)

a. Facts:
    i. *Excelsior Underwear* – NLRB announces new rule governing representation, applied prospectively only
    ii. NLRB – since rule was unprecedented, announced *Excelsior* rule but did not apply in pending cases
        1. in subsequent case, applied rule to *Wyman-Gordon* and overturned the results of an election
    iii. Wyman-Gordon argued that the *Excelsior* rule could only be valid if promulgated through rulemaking, since it had a prospective-only effect (defining it as a "rule")
b. Holding (plurality):
    i. even though *Excelsior* pre-dated *Wyman-Gordon*, the rule could be said to have been generated in the current case, since it was the first case where it had effect
        1. but, 6 vote block held that *Excelsior* rule was invalid as first developed (in adjudication)
            a. seemingly in conflict with *Chenery* (resolved in *Bell Aerospace*)
c. Notes:
    i. Five factors limit legality of retroactive administrative actions such as that in *Chenery* (DC Circuit, *Wholesale & Dept. Store Union v. NLRB*)
        1. Whether case is one of first impression
        2. Whether new rule represents an abrupt departure from well-established practice or fills a void
        3. Party's reliance on the former rule
        4. Degree of the burden posed by new regulation
        5. Statutory interest in applying the new rule

LXXIV. *NLRB v. Bell Aerospace* (SC 1974)

a. Facts:
    i. NLRB's regulation of union board elections (no penalties imposed); classification of buyers as "managers"
        1. rule developed via adjudication
b. Holding (2nd Cir., Friendly):
    i. NLRB could not reverse earlier adjudicative precedents through adjudication

c. Holding (SC, Powell):
    i. Rejects Friendly's holding; agencies have broad discretion to use either adjudication or informal rule-making
        1. Unless use of one or the other method is an abuse of discretion or contrary to enabling statute
d. Notes:
    i. sustains *Chenery II*, represents the court relaxing its hesitancy to embrace use of Notice and Comment rulemaking
    ii. if rule-making process is made difficult through additional requirements (see below), agencies will "work around" the process by using adjudication
    iii. formalization -> informalization (*Florida East Coast*) -> re-formalization via court-made rules (*Nova Scotia*) -> re-informalization via subsequent judicial interpretation (*Vermont Yankee*)

LXXV. **Informal Rulemaking (Notice-and-comment rulemaking) under APA 553**

a. APA 553 requires:
    i. Notice
    ii. Opportunity for comment
    iii. Concise statement of basis and purpose accompanying the final rule
b. "paper hearing requirement"

LXXVI. Judicial "Formalization"

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

a. Facts:
    i. time-temperature-salinity rule and effect on botulism in processed whitefish
b. Holding:
    i. unfair rule-making process (procedural inadequacy)
        1. no explanation for failure to account for species-specific regulations
        2. no explanation for commercial unfeasibility
            a. but, should agency be permitted/required to consider commercial feasibility?
            b. agency's enabling statute does not require cost-benefit analysis or analysis of commercial feasibility of its decisions
                i. Court holds that agency improperly exercises its discretion in NOT considering costs to industry
                    1. bases its holding on interpretation of the agency's interpretation of its own power
                        a. since agency thinks it ought to consider commercial feasibility, but does not, court faults the decision
                    2. had agency declared that it did not have the authority under its enabling statute to consider commercial impact, court would be on shaky footing in invalidating its decision
    ii. inadequate notice-and-comment (turns on requirements of 553):
        1. agency failed to disclose to interested parties the scientific data that it based its decision on
        2. failed to address the question of commercial feasibility
    iii. "paper hearing" requirement
        1. "concise general statement"

a. but, ambiguous statutory requirements in 553 argued to give agency discretion to adopt suitable rule-making policies
2. disclosure of evidence relied upon

c. Notes:
i. decisions must be explained and articulated in detailed findings of fact and conclusions of law
1. what triggers the obligation to engage in formal rule-making?
a. enabling/organic statutes
i. if enabling statute says, "rule-making after hearing," not sufficient to compel formal rule-making
1. must say "hearing on the record"; actually used in very few enabling statutes
2. concern that rule-making was too formal, too time-consuming
2. informal rule-making (APA § 553)
a. informal rule-making divided between 553 and exceptions
i. certain kinds require notice-and-comment, others do not
3. precedent and legislative history
ii. notice-and-comment requirements
1. give interested parties the opportunity to participate
iii. judicial "over-proceduralization"
1. interpreting text of 553 to require additional procedures
2. interpreting text of § 706(2)(a), "Scope of (judicial) review"
a. "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"
i. difficult to enforce 706(2)(a) without "over-proceduralizing" the rule-making process
1. judicial authority to make rule-making more demanding?
b. "arbitrary and capricious review"
i. does this review entail an analysis of adequacy of procedures or an analysis of whether evidence supports a given policy?
ii. holding in *Chenery*:
1. Ct. should sustain an agency decision on the basis of the grounds that the agency actually relied on, rather than factors articulated after the fact
a. requires a published record of agency's explanation
b. distrust of post hoc rationalization
iv. ossification of over-proceduralization
1. creation of a notice-and-comment regime more cumbersome than that required by APA 553

LXXVIII. <u>The Court puts a stop to extra-statutory procedural requirements for notice-and-comment rulemaking?</u>

LXXIX. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (SC 1978)
a. Facts:
i. Atomic Energy Commission and licensing for nuclear power plants
1. licensing req. environmental impact statements
a. two alternatives for impact statements based on Environmental Survey report

i. no quantitative evaluation of environmental impact
ii. cost-benefit analysis (adopted by agency)

ii. adequacy of Environmental Survey?
1. agency declined to use formal adjudication in Environmental Survey

b. Holding (Rehnquist):
i. agency procedures were adequate
ii. agency used minimum procedures established in APA and in its enabling statute, not subject to judicial review
1. if court decides appropriate procedures after the agency has selected appropriate procedures at its discretion, an agency will use formal rulemaking procedures for every decision to avoid invalidation by judicial review

c. Notes:
i. Bazelon (DC Circuit):
1. judicial review should focus on procedure, not substantive decisions
ii. Leventhal:
1. judicial review should not abandon inquire into sufficiency of an agency's reasoning process
iii. remaining options available for judicial review:
1. 706 arbitrary and capricious review
a. substantive review, as advocated by Leventhal
b. 706 review has evolved into the "hard look" doctrine (see *State Farm* below)
2. APA 559:
a. additional procedural requirements may be "otherwise recognized by law" (administrative common law)
i. textualist effort to ground administrative common law in statute
iv. notice-and-comment online (e-rulemaking)

LXXX. **Exceptions to 553: "Rules" without notice-and-comment**

a. See *Mead* below
b. In the context of the informal rulemaking process (553)
c. exceptions in 553(a)
i. military, agency management, public property loans, governmental benefit programs, etc.
ii. 553(b) exceptions below:

LXXXI. <u>Good Cause – INSERT READING NOTES ON EXCEPTIONS BELOW</u>

a. APA 553(b)
i. when notice and comment would be unnecessary, impracticable, etc.
1. extremely common exception
b. impracticability
i. used for emergencies
ii. requires that rule promulgated under this exception be temporary, and followed by full notice-and-comment procedure to develop a permanent rule
iii. still worries re: agency's ossification of temporary rule
1. agency already devoted resources to development of temporary rule
c. unnecessary
i. where agency anticipates no opposition
ii. procedure has developed in agencies for using unnecessary exception (another example of proceduralization of informal processes) -> "direct final rulemaking"

1. simultaneous solicitation of comments; interim rule becomes permanent if no adverse comments received

iii. courts could still review agency action under unnecessary exception but there is a less-complete record to review

1. courts can still use "hard look" review

d. contrary to public interest

i. commonly used for price control and other issues where advance notice will result in anticipatory behavior

LXXXII. General Statements of Policy

LXXXIII. *Pacific Gas & Electric (PG&E) v. FPC*

a. Facts:

i.

b. Holding (McKinnon):

i. rule in question is a general statement of policy, not subject to 553 notice-and-comment rulemaking requirements

c. Notes:

i. is an agency required to promulgate statements of general policy?

1. addresses problem of agency secrecy
2. APA 552 (also FOIA)
    a. requires each agency to make available to the public statements of policy that are not included in the Federal Register
3. "outward" effects of disclosure of policy
    a. notice to regulated industries
    b. does not bind the public
4. "inward" effects:
    a. monitor lower-level agency staff
    b. does not bind the agency's future discretion (flexibility of the policy statement)
        i. is agency open to adjustments of the policy in certain circumstances?
        ii. seems to express the preference that general statements of policy be framed as standards, rather than rules
            1. but, *Chenery* preserves agencies' discretion to use either rules or standards

ii. factors used to distinguish policy statements from rules (often as characterized by agency in statement itself, but can also be inferred elsewhere):

1. binding:
    a. rules have the "force of law"
        i. court examines agency's representation of statement (if agency claims that it has the force of law, it is a rule)
        ii. does not bind regulated parties in specific cases (articulated as such in statement of policy)
            1. distinct from the agency claiming that it may rely on the policy in future adjudications
            2. not (unduly) coercive
                a. are costs of non-compliance with policy so high that, as a practical matter, policy is de facto binding (the

extraordinary case, based on structure of regulated industry)

b. agency reduces its own future discretion

2. definition of a rule under APA definition
    a. "whole or part of an agency statement of general or particular applicability…with future effect"
    b. if general statements of policy were not "rules," there would not need to be an exception for statements of policy under 553, dictating "rulemaking"
        i. so, something can be a rule under the APA but still fall under an exception, where notice-and-comment is not required
            1. deceptive to distinguish between rules and statements of policy; classification of the former as a "substantive rule" might clarify the distinction
3. general statements of policy:
    a. if language/effect is too coercive (demonstrated by agency's statement or agency's use of policy), can't be classified as a rule (for instance, if statement of policy has an immediate economic impact on an industry)
    b. See *Columbia Broadcasting* case (pre-APA)
        i. chain broadcasting regulations (between radio stations and networks); FCC states that it will deny licenses to companies with impermissible licensing agreements
            1. agency stated that order would not be immediately reviewable, since it did not have the force of law
            2. reasoning rejected by court:
                a. immediate effect of regulation was to compel companies to immediately nullify agreements with broadcasters, to avoid agency action

iii. continuum:
1. Notice and comment rules
    a. substantive/legislative
2. interpretive rules (see below)
3. general statements of policy
    a. with interpretive rules, "non-legislative rules"
    b. compared to interpretive rules, precursor to law v. policy distinction
4. pure *Chenery* discretion
    a. agencies are free to formulate rules in adjudications, without prior notice

iv. ossification problem:
1. if agency is allowed to generate policy statements, regulated industry will have high level of compliance to avoid future adjudications (but, without opportunity to comment on policy)
    a. is this allowing agency to subvert the APA's minimum procedural requirements?
        i. "compliance pressure on the cheap"
    b. but, courts have held that judicial review in future adjudications is more expansive when adjudications are based on policy statements, rather than rules (less deference to agency discretion)

i. but, Supreme Court has never embraced this view
1. *Chevron* (see below)
2. *Mead* – distinction between law (statutory interpretation) and policy
a. the level of deference given to an agency's decision of law turns on whether formal procedure (notice and comment v. adjudication) was used
b. policy decisions – "hard look doctrine"
i. judicial review – make sure agency has taken a "hard look" at the salient problems surrounding a decision
ii. also, difficult to conduct expansive judicial review in the absence of a detailed record, such as that compiled in notice-and-comment process

LXXXIV. Interpretive Rules

LXXXV. *American Mine Safety Congress v. Mine Safety and Health Administration*

a. Facts:
i. Federal Mine Safety and Health Act and Mine Safety and Health Administration requires that mine operators report accidents to the Administration
1. reporting must occur whenever occupational illnesses are diagnosed
2. MSHA issues a policy letter defining that a chest x-ray constitutes a "diagnosis"
a. promulgated without notice and comment (through PPL's)
i. three PPL's – second revokes first; third reinstates first
ii. uses opacity scale for chest x-rays, where 4/12 is generally regarded as positive for the effects of black lung -> "diagnosis" constitutes 0/12 or 1/12 opacity
1. PPL = use opacity for diagnosis of black lung
3. mine operator did not disclose illness, despite having a miner with opacity of 0/12 or 1/12 (only indication of black lung)

b. Holding (Williams):
i. consults prior cases that purportedly involved interpretive rules, but were held to not to constitute interpretive rules
1. gap-filling rules
2. how interpretation of a statute can still fall outside exception for interpretive rules/notice-and-comment
a. agency's interpretation depends on initial authority promulgated in initial rule (which did go through notice and comment)
b. agency's interpretation should not turn on how much discretion the interpretation gives to the agency
i. "interpretation is a chameleon that takes its color from its context"
ii. criteria for interpretive rules:
1. subjective (how agency characterizes its own actions)
a. whether rule is published in Code of Federal Regulations (since a rule may only be published if it has the force of law)
i. subjective, since agency decides whether to publish in CFR (indicating whether it considers the rule to carry the force of law)

b. whether agency specifically invoked its legislative authority (signaling that it means to be acting in a legislative manner, enacting new law, etc.)

2. objective
    a. whether, absent the rule, there would be a basis for the enforcement action (prior statute or rule)
        i. cites SEC's proxy language (prohibits using a proxy in contravention of rules and regulations)
            1. entire content of enforcement turns on rules and regulations, statute itself forbids nothing
                a. clear example of an interpretive rule
            2. compares with reporting requirement in present case
                a. reporting requirement allows a method for enforcing existing rules
                b. but, still doesn't meet requirement, since ad hoc requirements could be used (not as clear as in SEC proxy rule)
    b. whether the rule effectively *amends* a prior legislative rule
        i. "a rule does not become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted"
            1. specifying that x-ray can constitute diagnosis simply makes definition in PPL "crisper" (moving from "standard" – multiple methods of diagnoses, to a "rule" – x-ray constitutes diagnosis)
                a. not enough of a substantive change to constitute an "amendment"

c. Notes:
    i. Attorney General Manual
        1. interpretative rules:
            a. agency's construction of statutes and rules (law)
        2. general statements of policy:
            a. advise public prospectively on how agency plans to exercise discretionary power
    ii. interpretive rules used instead of creating ad hoc requirements, which would also be permissible under MSHA statute
    iii. *Hochter*:
        1. wild animal in captivity statute, requiring containment structures for animals
        2. regulation promulgated without NAC, "for particularly dangerous animals," an eight-foot containment fence is required
            a. agency = valid interpretive rule, defining what "safe" requires
        3. Posner holding:
            a. rejects agency's interpretation
            b. can't go from qualitative to quantitative in an interpretive rule (but allows for exception in *American Mine Safety Congress*, since diagnoses always implicate quantitative values)
    iv. policy implications re: agency choosing not to use notice-and-comment in interpreting statutes/rules

1. agency requires input to promulgate rules, need additional input to guide interpretation?
    a. still allows for challenges in an ad hoc manner
2. democratic accountability problem presented by avoiding notice-and-comment
    a. statutory interpretation is the domain of the judiciary
        i. statutory interpretation does not require a quasi-legislative process, so courts are less worried about interpretation going through notice-and-comment than promulgation of new rules
3. agency's decision can always be subject to judicial review under APA 706

v. pending issue in DC Circuit:
1. when an agency promulgates an interpretive rule, not using NAC, if agency amends THAT rule, can agency still treat amendment as an interpretive rule?
    a. no, agency will have to use NAC

LXXXVI. "Informal Adjudication" – the residual category

a. term of art
    i. most common form of agency action (90% of all adjudications)
        1. *See Overton Park*
            a. decision of where to place a highway (enabling statute did not require formal adjudication for such decisions)
b. Constitution can also provide source of requirements for adjudication through procedural due process
c. APA 551
    i. adjudication: agency process for formulating an order
    ii. order: generated outside rulemaking
d. APA 554 – requirements for formal adjudications:
    i. every case of adjudication required by enabling statute (obligation and power to engage in formal adjudication)
e. under separation of powers, Congress exercises control over actions of agencies through framework statutes, such as APA
    i. shares power to some degree with judiciary, although judicial control over agency (executive) action is largely exercised through judicial review
    ii. issues of control are political

LXXXVII. **Judicial Review of Agency Action**

LXXXVIII. constitutional justiciability

a. constitutional limits on judicial review of agency action
    i. Article III power of a court to act
        1. a constitutional objection cannot be waived by the parties (issues are raised by court *sua sponte*)
            a. constitutional issues of standing/ripeness/mootness
b. judicial review of "law"/statutory interpretation is governed by *Chevron/Mead*
c. judicial review of agency exercises of discretionary authority governed by hard look doctrine; *State Farm*
d. general practice:
    i. courts avoid disputes between agencies and private regulatory parties unless constitutional or APA guidelines mandate review
e. reviewability under APA 706

LXXXIX. Constitutional issues of reviewability (Rubin/Malamud memo):

i. jurisdiction
    1. authorized by an agency's enabling statute
    2. can also be invoked under federal question jurisdiction (28 USC 1331)
    3. writs of certiorari or mandamus
        a. mandamus: court order compelling govt. official to act or refrain from acting

ii. standing (constitutional requirements and "prudential"/judge-made requirements)
    1. political landscape affecting interpretation of standing
    2. injury in fact
        a. distinct from general injuries experienced by public as a whole
        b. *Lujan v. Defenders of Wildlife*
            i. harm to P's must be imminent (loss of enjoyment in visiting endangered species' habitats)
        c. *Allen v. Wright*
            i. general interest in enforcement of law held not to be concrete enough to satisfy standing req. (black schoolchildren suing IRS for granting tax exemptions to schools that discriminate, although they did not attend such schools)
        d. *Baur v. Veneman*
            i. increased risk of harm sufficient to satisfy standing req. (rule making meat more disease-prone)
    3. prudential standing requirement:
        a. not constitutionally-required (so enabling statutes can subvert)
        b. "zone of interest test"
            i. does party's interests fall within the zone of protected interests?
                1. example: statute expanding regulations on credit unions
                    a. commercial bank may challenge regulations – credit unions compete with banks
                        i. even though the commercial banks were not the regulated parties, they were within the zone of interests
            ii. not a question of specific intent (not necessary that the enabling statute explicitly authorized review by certain parties)

iii. causation/redressability ("nexus" between agency's action and P's injury)
    1. judicial review must be capable of providing a remedy for the injury (problem of speculativeness)
    2. *Allen* also fails on causation inquiry (see above)
        a. refusing to grant tax benefits to discriminating schools might cause remedy to occur (integration of such schools) BUT this result is entirely speculative
    3. actions of third parties can intervene to sever causal connection and defeat standing
        a. *Simon v. Eastern Kentucky*
            i. patients sued IRS for reducing tax benefit for a hospital that turned them away
                1. independent decision by the hospital defeated causation
                2. financially incentivizing an action is not the same as causing it
    4. procedural injuries
        a. such as inability to comment (not technically "causing" the injury, since rule may have been adopted regardless)
        b. courts have held that procedural injuries are not subject to stringent causation inquiry

i. causation is satisfied if the procedural step in question was connected to the substantive result

iv. ripeness
1. objectives:
a. avoidance of premature adjudication
b. protect agencies from judicial interference
2. balance between fitness of issue + hardship to the parties of withholding judicial review
3. APA: judicial review only for FINAL agency action
a. ripeness and exhaustion
4. more likely "ripe" if involving legal questions, rather than factual (time can develop facts)
5. availability of "pre-enforcement review"
a. some statutes explicitly allow for pre-enforcement review, so that parties do not have to violate regulation to challenge an agency's decision

v. exhaustion
1. a party must exhaust any administrative procedures proscribed by Congress before judicial review
a. *Woodford v. Ngo*
i. statute contained exhaustion requirement, but SOL on administrative complaint procedure had passed
1. no judicial review, since admin. remedies were not exhausted

b. <u>APA Limits on Judicial Review</u>
i. statutory limitations added to judicial review (which is also constrained by outer limits proscribed by Constitution)
ii. pre-APA law:
1. judicial review through prerogative writs (mandamus, etc.)
2. court would not review decisions based on agency discretion
iii. APA:
1. see memo re: compromise between New Deal Democrats (favor independent regulatory state, free from judicial review) and conservatives (suspicion re: extensive executive structure, favor judicial review to check agencies) – traditional view
a. but, opposing parties more complex, other factors at play
i. ABA's proposals and Walter-Logan bill
ii. highly visible agency blunders, Congress shifting more conservative, Roosevelt filling judiciary with liberals (threat of invalidation perceived as less)
1. also, role of non-partisan factors:
a. self-interested lawyers
b. judicial review often implicates agency *inaction*
c. expanded definition of property
b. results in McCarran-Sumners bill
i. provides for extensive judicial review and broad standing
ii. less exemptions for certain agencies as in prior bill
2. **Section 702:**
a. injured party is entitled to review providing that such review would not affect other provisions or statutes on review (such as explicit preclusion in enabling statute or constitutional limitations)

i. APA does not trump explicit or implicit preclusion but creates a presumption of reviewability

b. reviewable actions:

i. those that are expressly reviewable under statute (enabling statute)

1. not necessarily final actions

ii. final agency actions that are not reviewable under another process

1. even if enabling statute does not expressly provide for review
2. APA expands reviewability (review by virtue of the APA alone)

c. Presumption of Review under the APA and its Exceptions

i. broad language of review (any injured party is entitled to judicial review) – see section 702

ii. *Gutierrez de Martinez v. Lamagno*

1. US Atty.'s decision that a D was "acting in scope of employment" was subject to judicial review

iii. exceptions to presumption:

1. where statutes preclude judicial review
2. when agency action is "committed to agency discretion by law"

iv. Preclusion (see APA 701(a)(1))

1. explicit (statutory) preclusion

a. removes certain decisions from review

i. leaves open the question of the scope of the preclusion

1. presumption of review causes courts to read explicit preclusion statutory language narrowly

a. for instance, limits preclusion to findings of fact, while permitting review of legal conclusions, procedures, etc.

2. implicit preclusion

a. *Block v. Community Nutrition Institute*

i. Sec. of Ag. determined price of milk, consumers sued, claiming price was set too high

ii. statute allowed a procedure for review for producers and handlers but silent on consumers

1. under *expressio unius*, consumers implicitly precluded

v. Committed to Agency Discretion (see APA 701(a)(2))

1. see *Overton Park* below

XC. Exceptions to APA reviewability

a. preclusion (see above) – 701(a)(1)

b. "no law to apply" – 701(a)(2)

i. includes finding law to apply in very vague delegations, thereby solving both constitutional non-delegation and APA reviewability problems

c. when is agency inaction unreviewable?

i. for instance, when is there ever "no law to apply"?

1. no law to apply = "futility doctrine"
2. even if a statue is silent, what about other sources of law?

a. *Webster v. Doe*

i. National Security Act authorizes CIA Dir. to terminate employees at his discretion (at will)

1. employee alleged that he was fired because he was gay

ii. Constitution provided "law to apply"
iii. Scalia concurrence:
1. scrap "no law to apply test" in favor of common law test (is decision traditionally reviewable)

d. potential tension with the non-delegation doctrine
i. a lawful delegation of power must provide agency with an "intelligible principle" for enforcing the law (so that they are not asserting legislative power)
1. See *Whitman v. American Trucking* above
2. no law to apply test implies that there is no intelligible principle
a. this justifies court's relaxed review of delegation of power (since agency decisions can be reviewed)
3. but, unreviewable decisions are typically those that do not involve the exercise of quasi-legislative power (such as ability of CIA Dir. to fire employees at will)
a. non-delegation doctrine operates in the domain in which the power given to an agency is enormous, legislative in character
i. Compare *Schechter Poultry, Webster v. Doe, Overton Park*
b. very few cases under either doctrine (both no law to apply and non-delegation are disfavored)
i. canon in favor of finding law to apply
ii. in *Overton Park*, intelligible principle dictates that Secretary exercise prudence in light of parkland protection statutes

ii. Prof. Merrill: distinguish between private rights (vested in individuals; money, property, liberty) and public rights (vested in society; management of tax revenue, enforcement of laws)
1. traditional non-delegation doctrine applies to private rights (where they are threatened by broad discretionary authority)
2. un-reviewability doctrine applies to public rights (where Congress has given executive discretionary power)

XCI. *Citizens to Preserve Overton Park v. Volpe* (SC 1971)
a. Facts:
i. Department of Transportation Act of 1966 and Federal-Aid Highway Act of 1968 prohibit federal funding of highways through public parks if "feasible and prudent" alternative route is available
ii. highway proposed through public park in Memphis

b. Procedural posture:
i. Dist. Ct. rejected claim (granted Sec's motion for summary judgment), affirmed by 6th Cir.

c. Holding (Marshall):
i. reversed judgment of 6th Cir.
ii. no legislative intent to restrict judicial review (subject to presumption of review in APA 701)
1. citing *Abbott Laboratories v. Gardner* (SC 1967)
2. does not fit into "committed to agency discretion" exception (read very narrowly)
a. supports narrow reading with legislative history
i. Marshall, 1971 (era where legislative history is consulted)
b. discretion argument: "prudent" alternative requires evaluation of competing interests
i. rejects argument, due to paramount importance of parks in statutes

1. acknowledges that legislative history on this point is ambiguous, so consults statutory language as primary source of legislative intent

ii. also supports the assertion that there IS "law to apply"

1. discretion exception is only valid when there is no law to apply (no meaningful standard against which to judge agency's decision)
2. distinct from APA 706 (arbitrary, capricious, abuse of discretion), only applies to "lawful" exercise of discretion (Raoul Burger)
    a. or, read 706 narrowly, so that even abuses of discretion can be unreviewable (Kenneth Culp Davis)

d. Notes:

i. Dept. of Transp. Act passed during construction of highway, so Sec. had to determine whether highway complied with Act (federal funding was available for the rest of the highway)

1. Sec. decided that no feasible alternatives existed but did not provide an explanation

ii. agency's decision was "committed to agency discretion by law"?

1. this would prohibit judicial review under 701(a)(2)
    a. committed to discretion by enabling statute? also by implicit sources?
2. argument that "prudence" implies that decision was committed to agency discretion
    a. prudence: careful good judgment; use of reason; provident or frugal (always cheapest to condemn parkland)
3. but, Marshall finds that "prudence" renders statute re: protection of parkland meaningless (parkland protection statute must temper the meaning of the Secretary's exercise of prudence)
    a. very existence of statute indicates that scope of discretion was reduced
    b. also, Secretary did not indicate the basis on which he made the decision (no record to consult)

iii. reviewability as a preliminary question:

1. after court determines that it may review a decision, then it can determine whether or not decision fell outside discretion

iv. is it possible for a law to "pass" the "no law to apply" test?

1. is there ever no law to apply?

XCII. When is agency *inaction* unreviewable?

a. judicial review of an agency's rescission of an existing rule

i. in *State Farm* (see below), petitioner argued that 706 arbitrary and capricious standard only applied to review of an agency's decision to adopt a rule

1. argued that standard did not apply to an agency's rescission of an existing regulation

b. judicial review of an agency's decision not to adopt a rule

i. review authorized by 706(1)

1. allows courts to compel rulemaking procedures when explicitly mandated by an agency's enabling statute (mandatory or limiting language)
    a. reviewable when agency action is "unlawfully withheld"
2. agency's decision not to bring a specific enforcement action is presumptively not reviewable

ii. judicial review of an agency's decision not to initiate rulemaking proceedings is deferential (only for compelling cause) -> deference so broad as to constitute non-reviewability
1. plain error of law
2. change in factual circumstances
iii. deference is somewhat less broad for agency decision to terminate rulemaking proceedings
1. since judicial review can focus on what changed (see below for court's reluctance to review inaction)

c. explanation for deference (*NRDC v. SEC*)
i. judicial reluctance to interfere with agency resource allocation decisions (including personnel, budget, own competence)
ii. agency's decision not to regulate an activity is based on factors that are not suited to judicial resolution
1. judicial review will take on an abstract/hypothetical quality

XCIII. **Judicial Review of Agency Decisions of "Law": Statutory Interpretation in the Administrative Agency Context**

a. once reviewability is established, what is the scope of judicial review?
i. Law, fact, policy?
1. distinctions are not drawn into the APA (scope for each is not defined)

b. APA sections:
1. 706(a):
a. agency actions, finding, conclusions are to be reviewed and set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"
2. 706(c):
a. in excess of statutory jurisdiction, authority, or limitations
3. 706(e):
a. unsupported by formal evidence (applies to formal adjudications and formal rule-making)
4. 706(f):
a. unwarranted to the facts, if such facts are reviewable de novo

XCIV. *Chevron USA v. NRDC* (SC 1984):

a. Facts:
i. EPA regulation (Clean Air Act of 1977) re: non-attainment states (states which were non-compliant with air pollution standards)
1. in non-attainment states, permits required for new or modified "stationary sources"
2. Clean Air Act 302(j) definition of stationary sources:
a. source emitting over 100 tons of any air pollutant per year
3. EPA interpretation of "stationary source"
a. "bubble concept"
i. stationary source = all of the pollutant-emitting sources on a property, under the control of the same person
ii. contrary to the former model, a "point source" approach
b. bubble concept allows a factory to "tradeoff" – no need to get a permit if installing a new "source," if total emissions are reduced
i. industry argument:

1. pre-existing plants are not subject to permitting process, so incentive to keep old, polluting technology
2. innovators are punished for reducing pollution with new technology
    a. statute creates a competitive disadvantage for innovating businesses

b. Holding (Stevens):
    i. two-step approach:
        1. Has Congress unambiguously (directly) spoken to the precise issue in question (expressed its intent)?
            a. To determine, use traditional tools of statutory interpretation
                i. "traditional" tools different for different justices
                    1. see applicability of legislative history, etc.
                ii. how ambiguous does legislative intent have to be?
                    1. same analysis as used in rule of lenity (is threshold for lenity the same as the threshold for constitutional avoidance?)
            b. Applicability of the bubble concept to the permit program
            c. If so, contrary agency decisions must be rejected
            d. Stevens (purposivist) did not mean plain meaning
        2. If Congress has not directly spoken/if the statute is silent or ambiguous as to the precise question, ask whether the agency's interpretation is based on a permissible construction of the statute (defer to agency's reasonable interpretive discretion)
            a. interpretation need not be the only permissible interpretation
            b. interpretation need not comport with that which the court would have reached de novo
            c. also entails statutory interpretation
                i. identify a "policy space", rather than determining a "point estimate" of legislative intent
                ii. but, criticism that Step Two entails statutory interpretation identifying congressional intent to create a range of alternative interpretations
            d. is an agency required to provide evidence for why it chose one possible interpretation over another permissible interpretation?
                i. distinction between *Chevron* Step Two and 706 arbitrary and capricious review for abuse of discretion?
                ii. Is *Chevron* Step Two leaving the realm of law and requiring an analysis of policy?
                    1. Stevens: judges have a duty to respect agency's policy choices (democratic accountability)
                        a. but, 706 allows judges to examine agencies' policy decisions
        3. Step One, attempt to pinpoint Congress' interpretation; Step Two, identify the range of permissible interpretations; then, use 706 to review policy choice (*State Farm*, see below)

c. Notes:
    i. pre-Chevron/pre-APA scope of review:
        1. "murky" practice, based on multi-factor analysis:

a. whether agency's interpretation was longstanding
b. distinction between law and "mixed question of law and fact"
c. whether agency's interpretation was issued contemporaneously with the enactment of the statute
d. whether Congress had acquiesced to agency's interpretation
e. standards, not rules; factors were not applied consistently

2. influenced by extent that the court was convinced of wisdom of agency's policy (ideology)
3. use of legislative history and intentional ambiguity

ii. the APA has not been read to mandate de novo review (as if nobody has decided the question before; as if an agency has not come up with its own interpretation)

iii. parallel with *Weber* (consider purposes of statute, before consulting agency's interpretation)

1. not a case where there is a single statutory purpose
2. in *Weber*, countervailing interests
    a. countervailing interests in CAA statute:
        i. reduce air pollution
        ii. reasonably accommodate economic growth
    b. Legal Process theory:
        i. statutes contain multiple purposes, as a result of the political compromise that produced the statute
3. CAA purpose:
    a. not *only* to reduce air pollution, as concluded by the Ct. of Appeals
        i. creation of ambiguity satisfies *Chevron* Step One
        ii. Stevens: when I'm confused, I go with the agency

iv. Stevens' implicit delegation

1. level of deference afforded to agencies reflects recognition that Congress has delegated its quasi-legislative power to agencies
    a. but, same level of deference as with an express delegation?
        i. standard under *Chevron* is to defer to "reasonable" interpretations
            1. general reading: this is the same standard as arbitrary and capricious (manifestly in violation of statute), just different language
    b. why would Congress delegate?
        i. Congress was unable to form a coalition on the topic (Legal Process approach)
        ii. Congress did not consider the exact question
        iii. Congress intended to accommodate competing interests
        iv. but, Stevens claims that the reasons for Congress' delegation do not matter to the analysis
            1. but, does not necessarily act this way
            2. cites various pre-*Chevron* factors, even though *Chevron* "rule" does not entail consideration of these factors
2. Does *Chevron* present a new rule, or a new verbal formula that represents existing understandings?
    a. Stevens maintains the latter; also, *Chevron* was little noticed immediately following the decision

i. language in decision maintains that holding is based on "well-settled principles," even though these principles are not incorporated into the rule
1. see pre-*Chevron* factors
2. refers to tradition of deferring to agency in question (room to treat different agencies differently in respecting agency discretion)

b. test question with empirical studies:
i. debatable effect
ii. agency general counsels stated that they considered *Chevron* to make a difference
iii. greater deference to agency discretion?
1. immediately after *Chevron* v. long-term effects
2. more deference? or agency's adopting more aggressive interpretations?

v. agency expertise:
1. technical expertise (scientific understanding)
2. consequentialist – expertise as to the likely consequences of one statutory interpretation as opposed to another
3. multiple cases arise under the same statutes, allows for agencies to adopt uniform interpretations
4. agencies expertise in determining legislative purpose:
a. repository of legislative purposes
b. better position to determine whether a statutory term is a term of art; or where common meaning might be unrealistic in the context of an agency's field

vi. democratic accountability
1. also accountability to interest groups
a. problem of agency **capture**
i. all interested parties are not equally represented in rulemaking process (see Public Choice Theory)
2. executive v. independent agencies
a. accountability re: executive = agencies under the executive branch, but attenuated connection with the President (challenges notion that agencies are accountable via the President)
b. so, make Congress accountable for actions of agencies
i. create rules to require that Congress make statutes more specific
3. barrier presented by standing
a. determined not by Congress but by judiciary's constitutional, statutory interpretation doctrine

vii. effect of Scalia joining the court in 1986:
1. effect of using more or less tools of statutory interpretation at *Chevron* Step One
2. general question: is legislative history more likely to create statutory ambiguity or resolve ambiguity?
a. certain tools might be impermissible at Step One that are used at Step Two to determine range of permissible interpretations

b. but, Stevens holds that "traditional tools" of statutory interpretation are used at Step One
    i. in practice, a tacit hierarchy of interpretive tools:
        1. statute
        2. agency expertise
            a. might itself be defined using tools of statutory interpretation
        3. legislative history
        4. canons
        5. subsequent interpretations

viii. **Normative/legal evaluations of *Chevron***
    1. empirical evaluation

XCV. Statutory interpretation under *Chevron*

a. *Chevron* and textual interpretation
    i. "traditional tools of statutory construction" in Step One
        1. But, can always yield a possible unambiguous answer re: Congressional intent
            a. So, "sufficiently clear" answer is needed before moving on to Step Two
    ii. Methods:
        1. Overall statutory scheme (for instance, contextual evidence that a term is a term of art)
        2. Semantic canons of construction

XCVI. *MCI Telecommunications v. AT&T* (SC 1994)

a. Facts:
    i. Communications Act of 1934
        1. response to AT&T monopoly- purposivist interpretation of statute (Stevens)
    ii. 1970's: technological changes make competition with the Bell system possible
        1. perverse consequences: for the non-dominant players in the industry, Communications Act imposed excessive costs
            a. in changing circumstances, 1934 regulatory regime results in perverse consequences `
    iii. is modification of Communications Act tariff requirement permissible?
        1. Can modification be big/fundamental?
        2. Is the current modification fundamental?
b. Holding (Scalia):
    i. Agency exceeded its authority; "modify" was not meant to encompass fundamental change to provisions of statute
        1. Scalia seems to suggest that, where agency's interpretation entails a substantially broader delegation of power to the agency, ordinary *Chevron* deference should not apply
            a. Persistence of the non-delegation canon
c. Dissent (Stevens):
    i. exemption for rate filing falls within agency's power to "modify" provisions
d. Notes:
    i. Stevens and *Chevron* Step Two:
        1. when Stevens uses *Chevron*, it doesn't seem like he is using a rule
            a. cites *Chevron* dicta (pre-existing, pre-*Chevron* standards)

ii. *Chevron* questions:
1. Is there an agency? Is the agency engaging in statutory interpretation?
a. Does *Chevron* apply?
i. See *Mead* (below) for determination
iii. deference to agency discretion:
1. implicit delegation (of Congress to agency to fill a gap)
2. agency expertise
3. democratic accountability (more accountable than courts, although not as accountable as Congress)
4. coordination and efficiency (consistency, uniformity)
iv. Textualism and *Chevron* deference
1. Texualists less likely to defer to agency interpretations because they are more likely to find a "clear meaning" in the statute
2. Use of legislative history
a. Criticized by textualists as creating "agency liberating ambiguity"
i. But, inclusion of policy details in legislative history can actually make some statutes less flexible
3. Implications for each approach to *Chevron* on separation of powers (non-delegation doctrine)
a. Expansive *Chevron* (defer to agencies) – shifts power from Congress to executive
b. Restrictive *Chevron* (find Congressional intent) – shifts power from executive to judiciary

XCVII. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* (SC 1995)

a. Facts:
i. Endangered Species Act of 1973: unlawful to "take" any endangered species
ii. Interior Dept. promulgated a regulation further defining "harm" within the definition of "take"
1. harm defined to include significant habitat modification or degradation
b. Holding (Stevens):
i. agency's interpretation that "harm" includes habitat degradation is entitled to deference
1. incidental takings exemptions would be meaningless is indirect harm was not meant to be included in "harm"
2. Ct. of Appeals decision reversed
ii. *Chevron* analysis:
1. Even if agency's interpretation is incorrect, it is reasonable and entitled to deference
c. Concurrence (O'Connor):
i. "harm" encompasses foreseeability and issues of proximate causation; harm to habitat may result in direct harm to species
d. Dissent (Scalia):
i. "take" can only apply to individual animals, not a population
1. noscitur a sociis: "harm" is the only word included that does not consist of a direct action to injure an animal
ii. *Chevron* analysis:
e. Notes:
i. methods of statutory interpretation:

1. consult other statutory provisions
    a. later exception allowing agency to give permits for "incidental" injuries
    b. provision imposing harsher penalties on "knowing" violations
    c. latitude given the agency in other provisions
2. Stevens in *Chevron*: apply all traditional tools of statutory interpretation in Step One

ii. evidence supporting "take" as a term of art:
1. "take" is explicitly defined by Congress in statute
2. but, special meaning in hunting context (Scalia)
    a. Scalia defines "take" to hold an ordinary meaning within the domain of permissible evidence

iii. semantic canons of statutory construction
1. but, always countervailing reasons NOT to apply a given canon (Scalia's "lawyer's list")

iv. legislative history
1. Stevens: leg. history lacking
    a. but, proposal to include a specific provision on habitat destruction was dropped

v. When does *Chevron* Step Two come into play?
1. when there is an ambiguity in the statutory text
2. in the absence of an agency, or *Chevron*, courts attempt to read statute to resolve ambiguity
    a. so, what is the best reading of the statute?
        i. Scalia: in this case, the best answer is also an unambiguous reading of the statute (not always the case- if not, would apply *Chevron* Step Two)
            1. this is assuming that *Chevron* applies to the instant case

vi. operative provisions ("take") v. statutory definitions ("harm")
1. definitional sections should be read as consistent with the operative provisions; limited by the nature of the term they define (Scalia)
2. the statutory definition alone controls the operative term's meaning (Stevens)

vii. semantic canons:
1. see tension between *noscitur a sociis* and presumption against statutory redundancy canons

XCVIII. *General Dynamics Land Systems v. Cline* (SC 2004)

a. Facts:
    i. Age Discrimination in Employment Act of 1967 forbids discriminatory preference of young over old -> does it also prohibit favoring old over young?
b. Holding (Souter):
    i. ADEA does not prohibit favoring old over young (contrary to legislative purpose, evidenced by inclusion of word "discrimination")
    ii. deference owed to agency's interpretation of "age"?
        1. limited by *Skidmore v. Swift*
        2. or deserving of greater deference under *Chevron*?
c. Dissent (Scalia):
    i. would defer to the agency's interpretation, which is reasonable
        1. cites *Mead*

d. Dissent (Thomas and Kennedy):
    i. "social meaning" of age discrimination
e. Notes:
    i. no *Chevron* analysis necessary, since agency's interpretation is clearly wrong
        1. if *Chevron* applies, agency would flunk at Step One
        2. devices of statutory interpretation contradict agency's interpretation
    ii. *Skidmore v. Swift & Co.* (SC 1944)

XCIX. *FDA v. Brown & Williamson* (SC 2000)

a. Facts:
    i. FDA promulgated 1996 regulation authorizing itself to regulate nicotine as a "drug" within the meaning of FDCA
b. Holding (O'Connor):
    i. Congress has not authorized the FDA to regulate tobacco products
        1. using *Chevron* analysis
    ii. "drugs" originally conceived of as including substances intended to have a therapeutic effect on the structure or function of the body
        1. once FDA has evidence of harmful effects of nicotine, they may either ban tobacco products or not
            a. Congress clearly could not have intended the FDCA to have such a sweeping effect
                i. an issue too big to defer to discretion?
c. Dissent (Breyer, Stevens, Souter, Ginsburg):
    i. FDCA does not limit the FDA's remedies (ban on tobacco products)
        1. statute does not imply that a harmful product must be banned (other remedies available)
            a. also, countervailing interests (withdrawal and other effects would inundate the medical system)
d. Notes:
    i. intervening statutes:
        1. a floor?
        2. but, if determining legislative intent of FDCA, look to circumstances of 1938 statute, rather than intervening statutes
        3. FDCA itself as a limit on remedies?
    ii. methods of statutory interpretation:
        1. neither majority nor dissent consults plain meaning of statute until after making arguments re: legislative intent
            a. agency's interpretation rejected solely on the basis of inferences of legislative intent from structure, purpose, and history
    iii. "all or nothing" problem
        1. a combination of drug/delivery device may be regulated under device statutes
            a. cigarette as a nicotine delivery device
    iv. <u>"too big for deference"</u>
        1. "major," "extraordinary," "jurisdictional" questions
        2. unlikely that Congress would delegate such sweeping power in such a cryptic manner (as in *MCI* – "modify")

a. use common sense if the issue is of such economic/political magnitude (need another indication- ambiguity is not enough)
i. another way of saying, not applying *Chevron* to cases of certain magnitude
ii. deference is predicated on ambiguity = implicit delegation
3. "too big for deference" = a "*Chevron* canon"
v. application of *Chevron* to "jurisdictional" questions (see below)

C. *Arlington v. FCC* (SC 2013)
a. Facts:
i. agency made a declaratory judgment that "reasonable time" regulation for approving siting of communications towers and antennas was presumptively 90/150 days
ii. relevant statutory provisions:
1. 332(c)(7)(b)(2) – "reasonable time" provision
2. judicial review provision
a. private right of action
b. savings clause (except for 332(c)(7)(b), nothing limits state and local siting decisions)
iii. QP: does agency lack the authority to interpret "reasonable time"? Does *Chevron* deference still apply when an agency determines its own jurisdiction (statutory authority)?
1. objection to agency's authority under savings clause and judicial review clause:
a. JR provision read as if private right of action is exclusive mechanism for contesting a siting decision
i. declaratory action subverted the process for objecting to FCC giving state and local governments unreasonable amounts of time in tower siting
1. usually, private right of action would protect private interests of citizens but here, protecting state and local entities from federal oversight (federalism concern, respect for state/local allocations, processes)
b. Holding (Scalia):
i. Both jurisdiction and subject matter of agency authority is delegated by Congress (distinct from jurisdiction question in courts)
1. *Chevron* deference applies to "jurisdictional" interpretations by an agency
2. *Mead* dictates that Congress must have authorized agency to determine a particular issue, in a particular manner
a. In *Mead*, *Chevron* deference NOT given to an action by an agency with rulemaking power that was NOT rulemaking
c. Concurrence (Breyer):
i. *Chevron* deference applies where Congress has given the agency authority to promulgate interpretations or rules that "carry the force of law" (*Mead*)
ii. Even if Congress did not intend for the agency to resolve the ambiguity, there are reasons to defer (agency expertise) (*Skidmore*)
d. Dissent (Roberts):
i. *Chevron* applies by its terms only when dealing with a statute that an agency actually administers
1. definition of *Chevron's* domain, in *Chevron*

ii. "an agency cannot exercise interpretive authority until it has it"
1. Question of whether agency has interpretive authority is left to the courts, without deference to the agency (*Mead*)

e. Notes:
i. what does it mean for an agency to administer a statute?
1. an agency's enabling statute gives it differing degrees of authority for what it can do with a statute
a. easy *Chevron* cases: the agency clearly has the authority to regulate with the force of law (can use NAC or adjudication) and has actually done so in the case at issue
2. question of whether *Chevron* does not apply (rather, de novo review applies) to questions of an agency's jurisdiction (authority to regulate)

CI. <u>*Chevron*, inter-statutory conflict, and the limits of agency authority</u>

CII. *NLRB v. Hoffman Plastics* (SC 2002)

a. Facts:
i. employees terminated for attempting to organize a union (violation of labor law)
1. one employee later found to be undocumented immigrant (violation of immigration law)
ii. award back pay to Castro, or foreclosed by immigration policy (never was legally authorized to work in the US)
1. NLRB defense of decision to award back pay:
a. not inconsistent with immigration law (IRCA), since back pay period capped when company learned of Castro's illegal status
i. response: if Castro complied with immigration laws, he would have lost his right to back pay
ii. Castro could not mitigate damages without committing additional violations of IRCA

b. Holding (Rehnquist):
i. NLRB decision to award back pay was incorrect and court is not bound to defer to its interpretation under *Chevron*
1. cites *Sure-Tan*: NLRA can apply to illegal aliens but NLRB's remedies to address violations are limited (must take into account other "equally important Congressional objectives"
a. as opposed to employees in *Sure-Tan*, Castro in *Hoffman* was "not lawfully entitled to be present" in US
ii. NLRB has no authority to administer policies re: immigration (which underlie IRCA)
1. cites prior holdings refusing to defer to agencies when their interpretations conflict with other statutes re: maritime law; bankruptcy code

c. Dissent (Breyer):
i. court should defer to broad scope of agency's remedial authority
1. agency considered competing objectives of NLRA and IRCA in issuing determination
ii. holding supports both labor and immigration policy objectives
1. consults text of IRCA- does not specifically address conflicts with other laws
2. general purposes of IRCA:
a. denial of back pay reduces costs of labor violations for employers, if employees are illegal (wink and a nod)

i. cites statistics re: higher rates of labor violations in areas with large populations of undocumented aliens

CIII. <u>*Chevron* and Constitutional Avoidance</u>

a. when an agency's otherwise reasonable interpretation of a statute (which would be accorded deference under *Chevron*) raises a serious constitutional issue
    i. constitutional avoidance canon
        1. *NLRB v. Catholic Bishop of Chicago* (1979): court will "save a statute from unconstitutionality"

CIV. *DeBartolo v. Florida Gulf Coast Bldg. and Const. Trades Council* (SC 1988)

a. Facts:
    i. NLRA provisions re: strikes and boycotts, as opposed to leafleting a third-party by parties other than those affected
        1. primary dispute v. "secondary boycott"
            a. pressure on secondary employer or group of consumers, aiming to compel secondary employer or group of consumers to pressure the primary employer
    ii. NLRB interprets secondary boycott to constitute unlawful coercion, despite First Amendment concern with such an interpretation
        1. Ct. of Appeals denied enforcement of order on constitutional grounds
b. Holding (White):
    i. court should conduct its own interpretation to find a constitutional interpretation, rather than deferring to agency's unconstitutional interpretation under *Chevron*
        1. consults legislative history, finds no indication that Congress intended NLRA to reach handbilling
c. Notes:
    i. constitutional avoidance canon
        1. two responses to ambiguity under *Chevron*
            a. agency deference
            b. constitutional avoidance
                i. constitutional avoidance leads a court to conclude that a statute is not ambiguous (since it can only be interpreted as constitutional)
                    1. essentially prioritizing substantive canons over *Chevron* deference
                    2. Sunstein: approach promotes leaving serious constitutional questions to the legislature
                        a. as opposed to contrary value of allowing executive to enforce the law
        2. two approaches under *DeBartolo* and *Rust* re: *Chevron* and constitutional avoidance
            a. when there is a constitutional issue, don't use *Chevron* at all; use constitutional avoidance canon instead
                i. even though this means that there MUST be ambiguity (un/constitutional interpretations available)
            b. even when there is a constitutional issue, *Chevron* still applies, but the avoidance canon plays a role:
                i. Step One
                    1. avoidance canon dictates an answer at Step One
                        a. "traditional tool of statutory interpretation"

2. the constitutional interpretation is the unambiguous meaning of the statute
    a. *St. Cyr*- canon of presumption against retroactivity

ii. Step Two
1. defer under *Chevron* only if agency's interpretation is within the range of permissible meanings (meaning only constitutional interpretations)
2. likely the meaning of *DeBartolo*, although holding is not clear on the question

CV. *Rust v. Sullivan* (1991)

a. Facts:
i. HHS interpretation of Title X to limit funding for abortion-related activities
1. recipients denied funding argued violations of the First and Fifth Am.'s
    a. Ct. of Appeals applied *Chevron* in rejecting petitioners' arg.

b. Holding (Rehnquist):
i. first engages in *Chevron* analysis:
1. finds that the statutory wording re: abortions is ambiguous
2. agency's interpretation is not impermissible in possible reasonable range of interpretations

ii. petitioners cite *Catholic Bishop* and *DeBartolo* in invoking constitutional avoidance canon as alternate argument; courts should save statutes from unconstitutionality but also from "grave doubts" of unconstitutionality
1. majority finds such doubts not to be present (not serious enough)
    a. doubts are not grave enough to AVOID the interpretation
2. also argues that any federal restriction re: abortion will be challenged on constitutional grounds (impossible to avoid the constitutional issue)

iii. constitutional doubts must be serious enough to reject *Chevron* deference

c. Dissent (Blackmun):
i. ambiguous statutes should be interpreted to avoid constitutional doubts, even after *Chevron*
1. a plainly constitutional interpretation would be reasonable

d. Dissent (O'Connor):
i. provides additional rationale for applying constitutional avoidance canon:
1. constitutional questions will not be reached unnecessarily
2. preserves "delicacy" of prohibiting actions of a coordinate branch:
    a. by focusing on agency's interpretation, rather than Congress' power to pass legislation
        i. Congress retains power to raise constitutional issue by legislating more clearly

e. Notes:
i. distinguishing *Rust* from *DeBartolo*
1. consistent decisions, according to Rehnquist
2. seriousness of the constitutional doubts

ii. does *Chevron* create a heightened standard for constitutional avoidance?
1. must doubts be more serious than otherwise?

iii. why not confront constitutional questions when doubts are presented by interpretations of statutes, since the court will have to address the issues at some point anyway

CVI. The Rare Case: Flunking Step Two

CVII. *Ohio v. Dept. of the Interior* (DC Cir. 1989)

a. Facts:
    i. DOI promulgated regulation pursuant to CERCLA re: Superfund compensation, calculating damages focusing solely on the market value for each resource lost

b. Holding:
    i. DOI interpretation is not a reasonable interpretation of the statute (passes *Chevron* Step One, fails under Step Two)
        1. distinct from the court applying which interpretation it thinks is best; consults sources of Congressional intent to determine range of permissible meanings
            a. consults record on which DOI relied; past precedent
            b. egregiousness of interpretation? "obviously and totally fallacious"
            c. does intent NOT to limit to MP = intent to disallow sole use of MP?

c. Notes:
    i. no examples of flunking step two at SCOTUS level
    ii. is this really Step Two?
        1. lack of authority for using only MP for calculating lost-use value might also indicate that Congress did speak unambiguously on the issue – Step One
            a. but, if case was flunking at Step One, court would say, "Congress intended X"
        2. Step Two issue would entail analysis of permissible interpretations re: weighing of various pricing measures but would necessitate using factors other than MP
    iii. does *Chevron* really have two steps?
        1. one step: how much do we know about what Congress intended?
        2. two steps are most clearly illustrated where court is 50/50 split on Congress' intent after using tools of statutory interpretation, so agree on ambiguity
            a. but again, very difficult for an agency to flunk in such a situation
            b. so, did Congress speak unambiguously to the issue? and, is agency's interpretation within the range of permissible interpretations? is essentially the same question

CVIII. "*Chevron* Only has One Step" (Stephenson & Vermule)

a. Two steps are both an inquiry into whether the agency's interpretation of a statute is permissible (reasonable) as a matter of statutory interpretation
    i. Step One is a "special" case of Step Two (one permissible interpretation would be adopting Congress' unambiguous meaning)
        1.
    ii. *Brown & Williamson* (FDCA as applied to tobacco products)
        1. Found to flunk Step One (Congress had spoken directly to the issue; unambiguous)
        2. But, court could have held that legislative intent was ambiguous (lower courts had decided the case differently) and that agency's interpretation was not permissible at Step Two – same result

b. All Step Two decisions could be rewritten in the language of Step One
    i. See diagram re: permissible interpretations and the "zone of ambiguity"; "policy space," not "point estimate"

CIX. Does an agency get *Chevron* deference if a court has spoken first?

CX. *National Cable & Telecommunications Ass'n v. Brand X* (SC 2005)

a. Facts:

i. FCC defined "telecommunications service" to exclude broadband, despite contrary ruling in *ATT&T v. Portland*
    1. Was FCC definition precluded by Ct. of Appeals (9th Cir.) ruling? From same jurisdiction (with binding authority)
    2. jurisdictional question: FCC's power to regulate depends on whether a new technology is a "telecommunications service"
        a. Scalia held that "jurisdictional" questions are entitled to the same deference under *Chevron*
ii. *AT&T's* argument in *Portland*:
    1. City of Portland's attempt to regulate broadband is preempted by FCA
iii. FCC issues interpretation 2 years later, then applies to a 9th Cir. case

b. Holding (Thomas):
    i. agency's interpretation is entitled to deference under *Chevron*, regardless of previous court holding
        1. court's decision only trumps agency if it determines that the statute was unambiguous, and that the agency's interpretation was unreasonable (not filling a gap in an unambiguous statute)
            a. *Chevron*: agencies, not courts, should fill gaps
            b. court may overrule only if there is no gap to fill (at Step One)
            c. this requirement also entails that the court state that its construction follows from an unambiguous term in the statute
    ii. alternate holding would lead to "anomalous" results:
        1. determination of whether agency is entitled to deference would turn on order of decisions
            a. "race to the courthouse" – delegation for interpretation is to agencies, and if not delegated to an agency, to courts
        2. rule would lead to "ossification" of statutory law by precluding agencies from revising judicial constructions
    iii. criticism of holding:
        1. rote, mechanical application of *Chevron*, which was actually meant to operate as a standard

c. Concurrence (Stevens):
    i. holding might not apply where the SCOTUS resolves a pre-existing ambiguity (creates non-ambiguity)
        1. promotes uniformity – agencies should follow SC precedent but non-acquiescence to circuits is different

d. Dissent (Scalia):
    i. judicial holdings cannot be reversed or ignored by the executive branch
        1. majority's rule requires courts to specify whether there is statutory ambiguity in dicta
        2. use the same standard for "unambiguousness" as in *Chevron*? or new standard
    ii. past court decisions are meaningless? subject to reversal by an agency issuing a new interpretation?
        1. Thomas' solution – past decisions would have come out the same way under *Chevron* Step One
    iii. every case that reaches *Chevron* Step Two is "agency-reversible"? since standard of unambiguity has not been reached

1. but, agency is not reversing if it is not required to adopt a certain interpretation
    a. one of a range of possible interpretations

e. Notes:
    i. What if FCC HAD issued an amicus brief in *Portland*, and court had chosen not to give *Skidmore* deference to the agency's interpretation?
        1. likely the same outcome (FCC's non-participation still resulted in eventual agency deference)
    ii. the "Brand X" issue – actually emerged in *Leachmear* (White, dissenting):
        1. refers to pre-*Chevron* SC rulings – policy decisions masquerading as statutory interpretation
            a. contra. Stevens' concurrence, same issue as in *Brand X* was present as regarding SC precedent (where *Brand X* implicated circuit precedent)

CXI. <u>*Chevron* and the agency's interpretation of its own regulations</u>

CXII. *Auer v. Robbins* (SC 1997)

a. Facts:
    i. FLSA (1938) exempts salaried employees (1940 regulation) from receiving overtime (white collar exemptions)
        1. salaried employees= those who receive compensation that are NOT subject to adjustment due to variations in quality or quantity of work
        2. unique import in the public sector, due to importance of applying uniform standards (for public accountability)
    ii. petitioners: sergeants in police dept.
        1. patrol guide = pay may be reduced for disciplinary violations
    iii. Ct. of Appeals rejected petitioners' argument: one-time reduction does not defeat salaried status
    iv. Secretary's interpretation in an amicus curie brief (at court's request):
        1. salaried status depends on whether compensation may "as a practical matter" be adjusted
        2. standard is met if there is a "significant likelihood" that an employment policy results in deductions

b. Holding (Scalia):
    i. Secretary's interpretation is due deference, unless it is plainly erroneous or inconsistent with the regulation (even though it was promulgated in the form of a legal brief)
        1. not a post-hoc rationalization; rather, no reason to believe that it is not a fair and considered judgment
        2. interpretation is subject only to the limits imposed by statute
    ii. *Skidmore* factors that persuade court revolve around agency's "seriousness", evidence thereof
        1. Was *Skidmore* dead letter after *Chevron*, pre-*Christensen*?
            a. several cases sustained agency interpretations under *Skidmore*, without deciding whether *Chevron* applies
                i. courts will "take the easy way out", answer the easy question re: which case supports their decision re: the agency's interpretaton

c. Notes:
    i. background of the FLSA:
        1. designed to "spread work out" in Depression era

a. exemptions for "white collar" workers (types of work that do not lend itself to shared labor)

ii. DOL – power to promulgate regulations in some areas, but not others

iii. *General Electric v. Gilbert*:

1. pre-*Chevron*
2. discrimination based on pregnancy is not gender-based discrimination
    a. EEOC guidelines not considered to constitute legislative rules, no automatic deference

iv. *EEOC v. Arabian Oil*

1. post-*Chevron*
2. majority opinion relies on *Gilbert* but does not cite *Chevron*
    a. Scalia dissent:
        i. *Gilbert* should no longer be followed, due to *Chevron*
3. *Chevron* deference was not immediately standardized in the courts
4. precursor to *Christensen*, which was the precursor to *Mead*

CXIII. Limiting *Chevron*'s domain: *Mead* and the re-emergence of *Skidmore* deference

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

a. Facts:

i. employees sought back pay for "working time" under FLSA

1. Ct. of Appeals affirmed Dist. Ct's denial of claim
    a. held that time which can also be used for pleasurable or personal purposes is not 'working time'

b. Holding (Jackson):

i. holding of the lower court reversed

1. working time can include "waiting time"

ii. Congress delegated interpretive authority to Administrator

1. promulgated occupation-specific interpretations of whether waiting time = working time
2. Administrator's policies are not binding on a district court
    a. but, agency expertise means that Administrator's interpretations are "entitled to respect"
        i. "power to persuade"
        ii. Dist. Ct.'s holding was based on erroneous interpretation of the law

c. Notes:

i. pre-*Chevron* case

ii. nature of the "respect" to which agencies are entitled:

1. analogous to an expert witness, but with unique position and expertise inherent in agencies

iii. after *Chevron*, if court determines that agency is not entitled to *Chevron* deference (for the reasons noted in *Mead*, such as agency was authorized to use NAC or formal adjudication and did not), *Skidmore* is consulted to determine whether agency's interpretation is persuasive

1. under *Skidmore* review, the court may decide not to defer to the agency's interpretation for the same reasons that it denied it *Chevron* deference

CXV. *US v. Mead Corp.* (2001)

a. Facts:

i. Tariff classification ruling by US Customs Service
    1. Tariff rulings promulgated in "ruling letters"
    2. Ruling letters: apply to particular transactions
        a. Subject to modification
        b. Not to be relied upon by any person other than addressee
        c. Not subject to notice and comment (either in issuance or modification)
        d. Consists of "advice and guidance" re: interpretation of customs laws
        e. Can be retrospective, prospective, or apply to a current transaction
        f. No requirement of a record or explanation

b. Holding (Souter):
    i. Tariff classification not entitled to *Chevron* deference, since it does not carry the force of law (interpretive rule)
    ii. BUT, classification decision is entitled to "respect" under *Skidmore*
        1. Jackson in *Skidmore*: degree of "respect" depends on agency's thoroughness, validity of its reasoning, consistency with past rules
    iii. Congressional intent re: whether agency decisions "carry the rule of law"
        1. Explicit authorization to engage in rulemaking and adjudication one piece of evidence that Congress intended for agency to enjoy primary interpretive authority
            a. But, want of such procedure does not decide the case
                i. formality of process is evidence
            b. "binding rulings" are not legislative in character, since they do not bind anyone but the parties to the ruling
            c. how do informal adjudications carry the force of law?
                i. *Chenery I* – agency's ability to make new rules in adjudications
                    1. rules based on adjudications' precedential value
                        a. but see *Mead* – precedential value does not, in itself, lead to *Chevron* entitlement
                        b. distinct from customs letters, since customs letters are appealable to the CIT (Court of Int'l Trade)
                            i. even though customs letters are binding on the parties
        2. Congress intending agency's action to carry the force of law = Congressional intent for agency to be afforded *Chevron* deference (circular logic)
    iv. *Chevron* left *Skidmore* intact and just represents that circumstances pointing to an implicit delegation "present a particularly insistent call for deference"
    v. Response to Scalia ("authoritative" or "official" agency actions are due *Chevron* deference; no deference owed under *Skidmore*):
        1. Breadth of rules promulgated by Customs
        2. Central management at the highest level did not defend Custom ruling until after litigation began (at which point *Chevron* deference would apply under Scalia's model)

c. Dissent (Scalia):
    i. Majority contradicts *Chevron*'s presumption that statutory ambiguities = congressional delegation of authority to the agency
    ii. Formal procedures are not necessarily indicative of Congressional intent to delegate interpretive authority to an agency

1. *Chevron* as a rule (Scalia) v. a standard (Souter/Breyer)

iii. Any interpretation that is "official" or "authoritative" should be given deference under *Chevron*
   1. For instance, when agency's leadership (general counsel) adopts the interpretation at the trial court level or where DOJ defends the interpretation in court
      a. But see *Chenery I* – court should not consider post hoc litigation
      b. level of deference different at each level of litigation?
   2. Majority: agency decision is "authoritative" when it carries the force of law; formal procedures indicative of Congressional intent

iv. Practical effects of *Mead* (Scalia):
   1. Unpredictability
   2. Increase in NAC rulemaking
   3. Incentive for agencies to rush ambiguous rules to get *Chevron* deference, then interpret those rules later
      a. Courts may limit deference to overly ambiguous rules
   4. Ossification through premature judicial construction
      a. Alleviated by *Brand X* (court may uphold an agency interpretation that is contrary to a judicial holding); prior judicial construction is considered "provisional"
         i. See Scalia's dissent in *Brand X*
            1. Judicial decisions subject to reversal by executive officers is "probably unconstitutional"
         ii. Majority's response:
            1. Agency's decision to interpret the statute differently from a court is not a reversal (not saying that the judicial construction was legally wrong)

d. Notes:

i. Implications re: interpretive rules
   1. Not subject to NAC or adjudication, in the expectation that they will be subject to heightened judicial scrutiny

ii. Interpretive rule in *Mead* different from that in *Christensen* (opinion letter), since it bound the parties to the particular case
   1. *Christensen*:
      a. DOL issued "opinion letter" that forced use of comp time violated FLSA
         i. opinion letter not entitled to *Chevron* deference, although court should accord it *Skidmore* persuasive authority (not binding on any parties)
            1. as in policy statements, agency manuals, enforcement guidelines, etc.
      b. category based on process: interpretations NOT arrived at after NAC or formal adjudication
         i. see exceptions to NAC for interpretive rules, etc. – APA exception, since these rules do not carry the force of law (which is also why they are not accorded *Chevron* deference)
         ii. "good cause" exception – does this prevent agency from being entitled to *Chevron* deference?

1. but, not a flaw in the Congressional delegation of interpretive authority
2. Sunstein: *Mead* could not be meant to apply to exceptions to NAC

c. category based on impact:
   i. rules that "lack the force of law", left undefined
   ii. informal adjudications are not usually considered to NOT carry the force of law: see *Mead, Overton Park*
      1. but, informal adjudications are an agency's last statement on an issue, that are meant to create rules that bind future parties as precedent
         a. impact category might only apply to "quasi-legislative" rules, regardless of process

d. Scalia concurrence in *Christensen*:
   i. *Skidmore* is an "anachronism" that was replaced by *Chevron*
   ii. concurs in judgment, since Administrator's interpretation of FLSA was unreasonable

iii. *Chevron* deference does not apply where agency's statutory interpretation does not "carry the force of law"
   1. formality + possibility of other indicators
      a. is the interpretation a "legislative-type" activity?
         i. Congressional intention + privileged group of processes that presumptively trigger *Chevron* deference
            1. but, agency's are supposed to have a choice in which processes they use
               a. *Mead* "burdens" the choice – see Scalia criticism
            2. also ignores *Chevron* Step One, where ambiguity is considered to be intentional (ambiguity = delegation)
   2. But, Congress rarely states that agency interpretations should carry the force of law
      a. *Mead* points to a variety of factors – sanctions, etc.

iv. SC may be influenced by the fact the customs decisions are appealable to "expert" courts, rather than courts of general jurisdiction

v. continuing vitality of *Skidmore*

CXVI. Applying *Mead*

CXVII. *Long Island Care at Home v. Coke* (2007)

a. Facts:
   i. Exemption for domestic care workers in FLSA
      1. First definition ("regulation"): workers employed by household or individual
      2. Second "interpretation": can also be employed by a third party
         a. inconsistent with "regulation" section
   ii. Respondent argument:
      1. Overall purpose of 1974 amendment was to extend coverage
      2. Definitions in two regulations (General Regulation and third-party regulation) conflict; which governs?
         a. Majority: the specific (third-party reg.) governs the general

3. Third-party regulation is not "legally-binding"; consists of an interpretive regulation, not entitled to deference (only entitled to persuasive authority) (*Skidmore*)
    a. *Mead* – interpretive rules enjoy no *Chevron* deference "as a class"
    b. But, majority holds that NAC procedures indicate that DOL intended third-party regulation (the "interpretation") to be binding (carry the force of law)
        i. Use of formal procedures; past agency practice, treating interpretive rule like the others (legally binding)

b. Holding (Breyer):
    i. Agency's interpretation of FLSA to exclude companionship workers, even though employed by third parties, is due deference under *Mead* and *Chevron*
        1. Congress authorized DOL to "fill a gap" in the statute; formal procedures = evidence of binding effect; matter of agency expertise; interstitial matter

c. Notes:
    i. FLSA excluded domestic and agricultural workers, for blatantly racist reasons (FDR needed votes from Southern Democrats)

CXVIII. <u>The *Mead/Chevron* Framework</u>

a. What is the first question re: interpretation of a question of law?
    i. There is an administrative agency that has made a reviewable decision
        1. *Mead* – agency empowered to act with the force of law
        2. If no, go straight to *Skidmore*
    ii. The agency's action raises a question of law
        1. *Mead* analysis – hard, bordering on indeterminate
            a. such as applied to good cause exception
        2. Courts decide whether a statute is ambiguous with intention of *Chevron* deference in mind
            a. decision is inflected by whether they want to defer to the agency
    iii. Ask: Has the agency manifested its intent to act with the force of law as to this particular decision?
        1. If yes, go to *Chevron* Step One
        2. If no, go to *Skidmore*

b. Is the issue ambiguous, and is this an issue Congress would delegate via ambiguity (*Chevron* Step One + *FDA v. Brown & Williamson*)
    i. So, if the statute is ambiguous, what does ambiguity *mean*? Some situations where it does not constitute implicit delegation (such as when the issue is "too big for deference")

c. After (or during) *Chevron* Step Two, arbitrary and capricious analysis (permissible interpretation?)
    i. Where does law run out and policy begin?
    ii. *Mead* analysis -> leads to *Chevron* v. *Skidmore* analysis
        1. see flowchart, analyze on exam (do not skip the *Mead* analysis, even if the court would avoid the *Mead* analysis due to ambiguity)

CXIX. <u>Judicial review of agency policy decisions (and of fact-finding, except for fact-finding in formal adjudication) under the **arbitrary and capricious standard**.</u>

a. Judicial review of agency "rules"
    i. questions of **policy** (as opposed to questions of fact; questions of law)
        1. questions of fact:
            a. formal procedures – standard of "substantial evidence"
                i. see 706(2)(E)

b. everything else – arbitrary and capricious standard
i. 706(2)(A)
2. questions of law
a. *Mead/Chevron*
3. questions of policy:
a. also arbitrary and capricious standard under 706(2)(A)
i. when court is examining questions of fact and questions of policy, no need to define which question, since both use same standard of review
b. policy: agency's exercise of its discretion
i. to determine range of permissible discretion, analyze question of *law* first (questions of law are implicit)
ii. "policy" may not be used the same way in "general statements of policy" (which refers to statutory interpretation) -> here, policy applies to any exercise of discretion

b. Competing approaches to the arbitrary and capricious standard:
i. Substantive review
1. Leventhal
ii. Procedural review
1. Bazelon
iii. Emergence of the "hard look doctrine" and its tension with *Vermont Yankee*

c. APA section 706 (Scope of review):
i. 706(2)(a): arbitrary, capricious; abuse of discretion
ii. 706(2)(b): contrary to constitutional right
iii. 706(2)(c): in excess of statutory jurisdiction/authority
iv. 706(2)(d): without observance of procedure req. by law
v. 706(2)(e): unsupported by substantial evidence
vi. 706(2)(f): unwarranted by the facts (to the extent that the facts are reviewable de novo)

d. Judicial review in the regulatory process
i. Non-delegation canon concerns
1. Contrast w/ subject-matter expertise of agencies
ii. Reviewability easier than congressional oversight

e. Judicial review under 706(2)(a):
i. Pre-APA practice: extraordinarily deferential to agencies (presumption of facts supporting an agency interpretation w/ burden of proof on challenging party to refute presumption)
1. *Pacific States Box & Basket* – "any set of facts that can reasonably be conceived"
ii. Concern re: agency capture led courts to increase aggressiveness of arbitrary and capricious review
1. Also caused agencies to engage in more NAC rulemaking, rather than adjudication
2. Leventhal: proponent of robust JR
a. "hard look review"
i. Ensure that agency has considered all relevant aspects of an issue (not merely that agency had complied with procedural req.'s)
ii. Contrasted with *Pacific States Box* approach (the agency's path must be "reasonably discerned")
3. Bazelon: JR re: whether an agency employed procedures conducive to reasoned decision-making

iii. *Overton Park*:
1. Arbitrary and capricious review must not substitute court's interpretation for the agency's, only must ensure that all relevant factors were considered
a. But, prioritize review of process or of substance in 706(2)(a)?
2. What is required of reviewing courts in applying the 706(2)(A) standard?

CXX. Modern "Hard look" review

CXXI. *Overton Park* (see above)

a. re: reviewability, court determined that there was law to apply
b. re: law v. policy question:
i. whether agency acted within the scope of its authority?
1. Is the statute a bar to making the choice in question? Reasonably within the range of possible choices?
a. reminiscent of *Chevron* Step Two
ii. Then, move to 706(2)(A) -> Was the choice arbitrary or capricious, under specific circumstances (focusing on decision-making process)?
1. Presumption of regularity + careful and searching review of "the facts"
a. Facts: how the agency reached its decision; not a review of the record
i. not limited to whether agency made formal findings or followed the prescribed formal procedures
2. Whether the decision was based on the relevant factors and whether there has been a clear error of judgment?
a. see critique in *Ethyl* re: language (arbitrary and capricious review is actually more deferential than traditional "clearly erroneous" standard; pre-*Overton Park* standard used in reviewing judge's decisions in appellate cases)
b. an error so clear as to deprive the agency's decision of a rational basis
c. plaintiff's argument that the agency's decision was arbitrary/capricious
i. agency relied on the judgment of the Memphis City Council alone (did not perform its own inquiry)
ii. review must be based on contemporaneous record, rather than post facto justifications
1. but the only record available: affidavits after the fact
a. court leaves decision whether to examine post facto testimony to lower court upon remand (if it cannot compile a formal record)
d. Black: case should be remanded to agency, since it did not compile a formal record
i. majority does not agree (embrace an artificial process of producing formal documentation)
1. since even after the agency compiles a record, a reviewing court might still overturn the agency's decision
ii. courts hinting that formal records should always be prepared, even though not required by the APA

CXXII. *Ethyl Corp. v. EPA* (DC 1976)

a. Facts:
i. CAA authorizes EPA to regulate gasoline additives where emissions "will endanger public health"
1. Administrator promulgated rule, after NAC, that leaded gasoline presented "significant risk of harm"
ii. QP: Did evidence adduced in NAC support Administrator's finding?
b. Holding (Wright):

i. Administrator's finding affirmed as supported by a rational basis (although studies are inconclusive, they are cumulatively suggestive)
    1. interpretation of "will endanger" = significant risk of harm, rather than actual harm
        a. this is a reasonable interpretation of the statute (although analysis is being peformed at *Chevron* Step One, the agency would also pass Step Two)
    2. interpretation generates policy decision (policy has elements of law and fact)
        a. agency adopts a "precautionary" policy as a result

c. Concurrence (Bazelon):
    i. judges should not be expected to engage in de novo factual review, esp. in highly technical cases, but should ensure proper procedures
        1. interpretation by Administrator is an exercise of legislative policy judgment

d. Concurrence (Leventhal):
    i. JR should include substantive review (judges are capable of forming a working understanding of technical issues)
        1. Congressional delegation of authority to the agency is done with awareness that JR will ensure that agency exercises its authority within statutory limits

e. Dissent (Wilkey):
    i. little or no evidence to support Administrator's finding
        1. essential point or element missing in agency's reasoning = "clear error of judgment" (wrong statutory standard?)
    ii. statute requires agency to base its rules on evidence that emissions cause actual harm -> require a causal connection
        1. bases arbitrary and capricious analysis on statutory interpretation (law)
            a. disagreement with the majority is based on an alternative interpretation of the statute, rather than on agency's abuse of discretion

f. Notes:
    i. the more a statute constrains agency the action, the stricter arbitrary and capricious review will be
    ii. substantive v. procedural arguments:
        1. even Wilkey's dissent has procedural elements (agency did not flag evidence that it would end up relying on for NAC)
            a. to support his assertion that agency could not have a rational basis for its determination (suspicion that proffered evidence is a post hoc justification, in violation of *Chenery I*)
    iii. *Massachusetts v. EPA* (2007):
        1. court invalidated EPA's decision not to regulate emissions of greenhouse gases under CAA
            a. EPA's explanation of factors that it relied upon did not include whether greenhouse gases contribute to climate change
                i. CAA required that EPA regulate greenhouse gases if they contributed to climate change
            b. *Chevron* analysis, rather than arbitrary and capricious
                i. agency's decision was not in accordance with law
                    1. separate from the hard look doctrine, even though 706(2)(A) is used (third provision = not in accordance with law)

iv. pre-*Chevron* decision, which lays out the framework for statutory interpretation argument that would be adopted in *Chevron* (questions of law in the middle of an opinion that purports to decide questions of policy)

CXXIII. *Vermont Yankee* (see above)

a. reviewing court did not specify what substantive provisions were required, just stated which procedures needed to be used
    i. but, argument that it is impermissible for court to require substantive evidence that could only be obtained through over-proceduralization
        1. arbitrary and capricious review can cause agencies to adopt more stringent procedures than otherwise required under APA (see *Overton Park*)

CXXIV. Hard look review and rescission/inaction

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

a. Facts:
    i. NHTSA directed to promulgate safety standards for motor vehicles
        1. Was NHTSA's rescission of the passive restraint requirement (after determining that airbags were not feasible) arbitrary and capricious?
b. Holding (White):
    i. agency's decision to rescind prior passive restraint requirement was arbitrary and capricious abuse of discretion
        1. standard under A/C:
            a. same as applies to non-regulation/non-action
            b. same as decision to regulate/promulgate a new rule
            c. same as decision to change existing rules
                i. or higher standard for decision to *deregulate*
c. Concurrence/Dissent (Rehnquist):
    i. agency adequately explained its decision
    ii. agency's changed view of the standard seems to be related to the election of a new President (Reagan), who is entitled to evaluate administrative priorities
        1. regulatory policy under Ford, Carter, Reagan (not necessarily partisan, but differing regulatory ideologies)
        2. different for an executive agency, as opposed to an independent agency?
        3. deregulation under Reagan:
            a. backward-looking: assessing administrative records and evaluating administrative priorities (looking back toward New Deal regulatory apparatus and dismantling it piecemeal- interpretation that regulations are doing more harm than good)
                i. different analysis of regulatory costs as compared to benefits (status quo of regulatory state must be reconsidered; removing the status quo presumption, in favor of a presumption against regulation)
        4. the increased level of hard look review in *State Farm* may be attributed to the fact that the case dealt with a rescission and the politics of regulation; but now has been extended to cover other situations, such as promulgation of new rules
    iii. constitution tolerates executive agencies because of their democratic accountability, via the President
        1. criticism: agency expertise outweighs benefits of democratic accountability (*Chevron* factors)

a. incentive for every agency to entrench extreme policies, in light of realization that next administration will attempt to remove past regulations

d. Notes:
   i. law (statutory interpretation)/policy
      1. *Mead/Chevron* v. *State Farm*/arbitrary and capricious review
      2. interpretation (553) v. exercise of discretion (706)
      3. but, bright lines between the two do not always exist (such as when a choice between permissible interpretations – law – is promulgated in a general statement of policy)
   ii. agency enabled to consider practicability, whether proposed standard is reasonable and whether it will contribute to purposes of statute
      1. Does statute limit agency to the stated factors (expressio unius argument), or is agency enabled to consider other factors?
         a. statutory interpretation argument
            i. as with argument that agency (enacting regulations under a "technology-forcing" statute) should not defer to manufacturers' preferred designs
            ii. as with argument that statute ranks safety higher than practicality
               1. statutory interpretation arguments shape the outcome of the arbitrary and capricious review
            iii. Congressional intent = statute + appropriations
   iii. under *Chevron* Step Two, the agency is not required to provide a record explaining why it made its decision
      1. arbitrary and capricious analysis – whether agency's implementation of permissible interpretation is reasonable
      2. arbitrary and capricious Step One – whether agency's exercise of authority is within scope of statutory authority
         a. Step Two – focuses on the agency's policy choice of how to implement the statute
      3. are there "facts left on the ground" after a *Chevron* Step Two analysis? indication that arbitrary and capricious review might examine whether agency has used its discretion in a way not authorized by the statute
   iv. Stephensen/Vermuele:
      1. *Chevron* only has one Step (identifying the range), then go to *State Farm*
         a. but, this is a different analysis than *Chevron*, where court would not be permitted to review reasons for agency's policy choice after Step Two
   v. status quo presumption –
      1. but, agencies should be able to change their mind
   vi. *FCC v. Fox*
      1. FCC change in indecent speech policy (stricter)
         a. *Chevron* step two – new policy is permissible
         b. A/C – that new policy is supported by "good reasons"
         c. rejected notion that agency rescission of a previous policy is held to an even more rigorous standard of review
            i. Stevens' dissent: heightened review should be administered to agency rescission, since it also represents a departure from Congressional intent

vii. costs/benefits of hard look
    1. parallel to discussion re: costs/benefits of heightened review of procedures (*Nova Scotia*)
    2. is *State Farm* overturning *Vermont Yankee*?
        a. by forcing agencies to engage in certain procedures to avoid A/C invalidation
        b. but, just necessitates that the agency point to evidence, not that it engage in specific procedures
            i. agency's response: inferences may be drawn from expertise; cost concerns preclude examination of all relevant evidence

viii. When is agency *inaction* unreviewable? (duplicated from above)
    1. judicial review of an agency's rescission of an existing rule
        a. in *State Farm* (see below), petitioner argued that 706 arbitrary and capricious standard only applied to review of an agency's decision to adopt a rule
            i. argued that standard did not apply to an agency's rescission of an existing regulation
    2. judicial review of an agency's decision not to adopt a rule
        a. review authorized by 706(1)
            i. allows courts to compel rulemaking procedures when explicitly mandated by an agency's enabling statute (mandatory or limiting language)
            ii. reviewable when agency action is "unlawfully withheld"
            iii. agency's decision not to bring a specific enforcement action is presumptively not reviewable
        b. judicial review of an agency's decision not to initiate rulemaking proceedings is deferential (only for compelling cause) -> deference so broad as to constitute non-reviewability
            i. plain error of law
            ii. change in factual circumstances
        c. deference is somewhat less broad for agency decision to terminate rulemaking proceedings
            i. since judicial review can focus on what changed (see below for court's reluctance to review inaction)
    3. explanation for deference (*NRDC v. SEC*)
        a. judicial reluctance to interfere with agency resource allocation decisions (including personnel, budget, own competence)
        b. agency's decision not to regulate an activity is based on factors that are not suited to judicial resolution
            i. judicial review will take on an abstract/hypothetical quality

CXXVI. <u>Hard look review and changes in agency policy</u>
- a. Policy = arbitrary and capricious
- b. Fact = substantial evidence
- c. Law = *Chevron/Mead*

CXXVII. <u>Domain of hard look versus the domain of *Chevron*: Is *Chevron* Step Two really just *State Farm*?</u>
- a. See memo

CXXVIII. Judicial review of factfinding in agency formal adjudication (and still more questions of boundaries among fact, law, and policy)

CXXIX. *Allentown Mack v. NLRB* (SC 1998)

a. Facts:
    i. NLRB has rulemaking power but does not use it (promulgates almost all rules via adjudication)
        1. unfair labor practice – refuse to bargain with union OR take a poll of support for the union
            a. statute preamble: statutory interest in "labor peace" aided by continuity (although there is also a countervailing interest in employee free choice, addressed in Rehnquist dissent – not assigned)
    ii. When can an employer presume a union to NOT have majority support?
    iii. sale of a unionized plant, to a group of managers from the plant – new company: Allentown Mack
        1. presumption of union support if the majority of the workers at the new company are from the old company (triggering condition)
        2. modalities by which an employer may question union support:
            a. hold a board election (requires 30% showing of non-support)
            b. withdraw recognition of the union
            c. conduct a poll
                i. "unitary standard" for both withdrawal of recognition and establishment of a poll
                    1. good faith reasonable doubt
                    2. reasonable doubt based on objective considerations
                    3. objective reasonable doubt
                ii. language emerged in formal adjudication (*Chenery* standard, elaborating the standard in future formal adjudications)
                    1. QP: One standard stated differently? Are alternate phrasings permissible?

b. Holding (Scalia):
    i. polling standard is the same as standard for a board election -> reasonable standard for NLRB to adopt (not so irrational to be A/C)
        1. there is no statutorily-dictated standard
    ii. review of fact under substantial evidence standard
        1. "whether it would have been possible for a reasonable jury to reach the Board's conclusion"
            a. but, dissent responds that agency expertise renders it dissimilar to a jury
                i. but, ALJ is the fact-finder, more similar to a jury than an agency
        2. standard is "good faith reasonable doubt"; doubt = uncertainty (as opposed to agency's interpretation, where doubt = disbelief)
            a. no ambiguity, based on dictionary meaning
                i. so, agency's alternate standard is not an interpretation, it's a **change** in policy
                    1. agencies are allowed to change their policy (*FCC v. Fox*), but they have to explicitly recognize that it is changing its policy

c. Dissent (Breyer):

i. "reasonable doubt based on objective considerations" -> "objective" indicates that NLRB wants ALJ's to consider their own expertise in the sphere of labor law

d. Notes:
   i. policy question, subject to A/C review
   ii. substantial evidence standard
      1. agency discounts several employee statements as probative re: majority union support
         a. how certain must an expression of lack of union support be?
            i. under preponderance of the evidence standard (e.g. 51%)
            ii. under "clear and convincing evidence" standard (60%)
               1. agency indicates that it has adopted a clear and convincing evidence standard without admitting it (Scalia)
               2. quantitative standards applied to the totality of all the evidence (such as "beyond a reasonable doubt")
      2. substantial evidence standard applies to factual judgments (Scalia)
         a. or, use of policies to appropriately determine whether a particular employee's statement ought to be relied upon by an employer, as a matter of policy (and would therefore be subject to A/C review)
            i. most significant in informal adjudication (fact allows no room for agency expertise, as opposed to policy)

CXXX. **"Presidential administration": Presidential interventions in the agency rulemaking process**

a. three way struggle for control over the administrative state
   i. President
      1. "Presidential administration" (Kagan)
      2. executive agencies v. independent agencies (limited removal power)
   ii. Courts
      1. judicial review
   iii. Congress
      1. limits of congressional oversight?
         a. in context of burgeoning Presidential control

b. Presidential control

CXXXI. <u>OIRA: centralized regulatory review</u>

a. created by Reagan as a tool to shift administrative state to deregulate
   i. cost benefit analysis
   ii. cumbersome procedural requirements

b. adopted by Clinton, tweaked to allow for greater public accountability; cost benefit analysis modified to include non-quantitative benefits/costs (health, life, environmental)

c. OIRA
   i. does not include results of informal adjudications (also, leaving independent agencies question aside)
      1. no impact on "rogue" agencies (NLRB) which promulgate all their rules through adjudications (additional incentive to continue the practice)
      2. also, agencies may engage in "OIRA avoidance" (such as if a regulation will comprise a "significant regulation" – over $100 million impact – the agency will split the regulation in two)
   ii. Sunstein:

1. OIRA review makes it more likely that an agency will survive hard-look review (comprises an initial stage of "hard look")
2. with Revescz, argues that CBA can be used to account for liberal priorities as well as comprising an anti-regulatory justification

iii. OIRA receives the ACTUAL RULE the agency would promulgate (not the evidence that would be presented in NAC)
1. accounts for agency that might not be aware of how its regulations impact other agencies' regulatory policy, administration's policy agenda as a whole
2. interest groups do not have input in OIRA review, and rule does not go back out for NAC after OIRA review

iv. democratic deficit argument:
1. but Congress created OIRA and its acquiescence (by not dismantling OIRA by statute) is implicit approval

v. expertise argument
1. decision-making placed in the hands of non-experts in OIRA

vi. OIRA review - presumption against preemption (anti-regulatory mechanism)

CXXXII. <u>Presidential directives</u>

a. most direct mechanism of Presidential control over agency regulations
b. distinct from executive orders (specifically, orders that are issued unilaterally by the President, without Congressional authorization); see Obama 2014 State of the Union
i. executive orders used to govern the activities of the executive branch
1. may not contradict constitutional or other statutory provisions
2. may be superseded by statute
3. do not sunset at the end of an administration

ii. by executive order, President may:
1. create policies for the federal government as an employer
a. set substantive employment policies for federal contractors through procurement power
i. Obama: non-retaliation for disclosure of compensation information
ii. affirmative action – origins in executive orders in federal contracting

c. Presidential directives:
i. directed at administrative agencies, guiding their regulatory policy and planning
1. See Memo on Clean Water Protection (Clinton)
a. "not intended to create any right...substantive or procedural..."
i. do not carry any legal rights (no cause of action for parties harmed by directives)
ii. remains within boundaries of agency's legal authority
b. do directives bind the agency?
i. no case law on the question
2. Obama directive to Secretary of DOL to modernize "changing nature of the workplace" in white collar exemptions (March 2014)
a. does not lay out details re: policy prescriptions, reasons behind directive, or timeline

ii. when would Presidential directive be plainly unlawful?
1. when requiring an agency to do something not authorized by statute (no Congressional delegation)

            a. for instance, directive to agency NOT to consider a factor that it is required to consider by statute
    iii. rationale for centralized control of agencies and Congressional delegation to agencies:
        1. expertise
        2. democratic accountability
    iv. *Sierra Club* –
        1. difference between executive and independent agencies for purposes of Presidential directives
            a. see distinction between inclusion of independent agencies in planning provision of Clinton Executive Order, exclusion in other provisions
d. Executive orders -> presidential directives -> appointment/removal
    i. once appointed, agency staff are subject to capture
        1. by special interests and by administrative staff (career staff have agendas of their own)