# Legislation

## The Legislative Process and Theories of Interpretation

### I. Challenges of Statutory Interpretation and Tools of Construction

* ***Tennessee Valley Authority v. Hill* (SCOTUS 1978)**

Synopsis: Secretary of Interior sought an injunction of completing a federal dam that would eradicate an endangered species (snail darter), which violated § 7 of the Endangered Species Act. Court ruled in favor of Secretary of Interior. Tool: Tools of construction: (1) plain reading of text; (2) legislative history; (3) purpose of the statute as a whole; (4) Canons of construction (e.g. subsequent bills do not impliedly repeal earlier legislation unless the intent to do so is unmistakably clear, and Congress does not alter substantive law through appropriations measures.

* ***MA v. EPA* (SCOTUS 2007)**

Synopsis: MA petitioned EPA to regulate greenhouse gas emissions from cars. Court ruled for MA finding that the Clean Air Act did refer to carbon emissions.

Tool: Tools of construction: (1) plain reading of text; (2) legislative history; (3) purpose of the statute as a whole.

* ***West Virginia University Hospitals, Inc. v. Casey* (SCOTUS 1991)**

Synopsis: P appealed decision to limit recovery of expert fees. Court held that 42 USC 1988 does not allow for fee shifting of expert fees because it only says “attorney fees.”

Tool: The purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. To supply omissions transcends the judicial function.

* 1. Challenges of Statutory Interpretation
		1. Inevitable indeterminacy in language
		2. Anything can’t mean anything
		3. There is no legislative “intent” (535 members in Congress)
	2. Theories of Statutory Interpretation
		1. Intentionalism
			1. Traditional approach; Fallen out of favor in recent years
			2. When a statute is unclear, or seems to dictate a troublesome result, the judge should try to reconstruct the likely intent of the legislature that passed the statute respecting the problem at hand.
		2. Purposivism
			1. “Plain meaning” rule – where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise.
			2. Courts should read specific statutory provisions to advance the legislation’s purpose or general aim (not specific to issue at hand) as derived from a variety of sources – what is problem statute is trying to solve?
		3. Textualism
			1. Interpreters should strive to discern how reasonable people would understand the semantic import or usage of the precise statutory language that Congress adopted.
			2. Going beyond the text (to legislative history) to further some notion of congressional intent or purpose is both illegitimate in principle and unworkable in practice (but may looks for intent in the text).
			3. Separation of Powers – not judiciary’s responsibility to fix legislative mistake (note: line between interpreting and making law is blurry)
			4. Disaggregation of Purpose
				1. The “purpose” of a statute can be framed at different levels of generality.
				2. Should not just focus on a statute’s ends but also the means. E.g. of means – whether to rely on rules or standards to implement policies. Compromise can often be found in the means
			5. New Textualism
				1. Judges must adhere to the text precisely because the language chosen may be the product of a legislative compromise, however awkward.
				2. Rejection of legislative history
				3. Legislative supremacy

Respect for legislative supremacy requires enforcing the statute as written when its semantic meaning is clear in context

Mismatch between a statute’s text and its apparent purpose are a consequence of inevitable conflict, bargaining, and compromise among hundreds of elected federal officials and countless constituents and interest groups. Judges must respect the legislative compromise embedded in the statutory text. ***See West Virginia***.

* + 1. Commonalities between Approaches
			1. Look for legislative intent: Textualists look for objectified intent – the intent that a reasonable person would gather from the text of the law.
			2. Shrink from interpretations that would produce absurd results
			3. Statutory interpretation entails some reliance on canons of construction
			4. Legislative supremacy – acts of Congress enjoy primacy as long as they remain within Constitutional bounds and that judges must act as Congress’ “faithful agents”
				1. Purposivism – Argue that the principle of legislative supremacy not only permits, but actually requires the Court to deviate from the conventional meaning of the text. Conclude that a mismatch between a statute’s text and its apparent purpose reflects some sort of inadvertent legislative omission or failure of foresight.
				2. New Textualism – Conclude that a mismatch between a statute’s text and its apparent purpose are a consequence of inevitable conflict, bargaining, and compromise among hundreds of elected federal officials and countless constituents and interest groups.

### The Separation of Powers: The Roles Congress, the President, and the Judiciary play in lawmaking

* ***United States v. Marshall* (Ct. of App. 7th Cir. 1990)**

Synopsis: D’s convicted of LSD related charges. Court found that 21 USC 841b1Av and Bv, which set mandatory minimum terms of imprisonment based on weight of drugs include the weight of a carrier medium.

Tool: Majority (Easterbrook): “Junior partner” approach – stick with general intent of statute when interpreting it. (Positivist view). Dissent (Posner): Basing punishment of weight of carrier makes no sense so Congress must not have known how LSD sold. Practice of interpretation authorizes judges to enrich positive law with the moral values and practical concerns of civilized society (Pragmatist view).

* 1. U.S. Constitution
		1. Article I
			1. Section 1 – all legislative powers vested in Congress
			2. Section 7
				1. All bills raising revenue shall originate in House of Representatives.
				2. Before a bill can become law, it must pass both the House and the Senate (bicameralism) and, if it does, Congress must then send the bill to the President to sign or veto (presentment).
				3. If the President signs the bill, it becomes law. If the President vetoes the bill, it can still become law is each House of Congress can muster a two-thirds supermajority to override the veto.
			3. Section 8 – Powers of Congress
			4. Justifications for Article I lawmaking process
				1. Checks and balances – the House, the Senate, and the President may act as a check against the ill-motivated decisions of the other two (this can be abused).
				2. Deliberation and cooling off – tamp down the tendency of legislatures to adopt ill-considered legislation in hasty response to the passions of the moment.
		2. Article II – President
		3. Article III – Judicial power vested in Supreme Court and in inferior Courts that Congress may establish.
	2. The Judicial Role
		1. Faithful Agent
			1. “Imaginative Reconstruction” – process whereby a judge tries to think his or her way as best he or she can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.
			2. Positivism
				1. “Buys political neutrality and a type of objectivity at the price of substantive injustice.” ***Marshall*** (Posner dissenting).
		2. Junior Partner
			1. Definition – judges have more freedom to shape legislation through a process of interpretation that, while proceeding from the statute and from the instructions of Congress, is not strictly bound by those things. Treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning.
			2. “Dynamic statutory interpretation” – because statutes last for many years through many changes in legal and factual contexts, judges should act as a “relational agent”(v. adhere to specific statutory command) – an agent in an ongoing contractual relationship whose primary obligation is to use her best efforts to carry out the general goals and specific orders of her principal over time. Even if the principal has a specific intent with respect to a particular issue, she may also have a general intent and a rationally inferable meta-intent about how to reconcile conflicts between the specific and general intent.
			3. Can occur under textualist or purposivist approach.
			4. Pragmatism/Natural Law
				1. Judges have more freedom to depart from the text in order to “enrich positive law with the moral values and practical concerns of civilized society” ***Marshall*** (Posner dissenting).
				2. “Buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness.” ***Marshall*** (Posner dissenting).
			5. Criticisms
				1. Judges may not always be good at figuring out when new developments justify deviation from a clear, specific statutory directive.
				2. Does not adequately respect the constitutional and other safeguards built into the lawmaking process.
				3. Undermines the interest in legal stability and predictability as such.
				4. Does it reject Legislative Supremacy?

## Tools of Statutory Construction

### Text

* ***Nix v. Heden* (SCOTUS 1893)**

Synopsis: Nix (P) sued Hedden (D), a duty collector, for assessing his tomatoes as vegetables under the Tariff Act. Court found that although tomatoes are fruit under a dictionary definition, they are vegetables as used in common speech so they should be considered vegetables for purposes of the Act.

Tool: Should use ordinary meaning of words (how they are used in common speech) as opposed to their specialized meaning (dictionary definition of words) when interpreting statutes.

* ***Smith v. United States* (SCOTUS 1993)**

Synopsis: D proposed to exchange firearm with pawnshop dealer (undercover agent) for cocaine. Court found that exchange of a gun for narcotics does constitute “use” of a firearm during in relation to a drug trafficking crime within the meaning of 18 USC 924(c)(1).

Tool: Ordinary meaning does not exclude dictionary meaning.

* ***Corning Glass Works v. Brennan* (SCOTUS 1974)**

Synopsis: Corning paid night shift inspectors, mostly men, more than day shift inspectors, mostly women. Court found this violated Equal Pay Act because day and night shifts are “performed under similar working conditions” per industry’s own evaluation system.

Tool: (1) Legislative history, including statement on the floor by witnesses and industry representatives can provide insight into special meaning of statute text. (2) Specialized meaning can be derived from industry practice.

* 1. Plain/Ordinary Language Meaning – plain meaning of statutory language to an ordinary speaker of English
		1. General Rule
			1. Presumption that the ordinary meaning of the statutory language expresses the legislative purpose.
			2. In any interpretive exercise, judges must first look to the plain meaning of the text of the statute. ***Smith***; ***Babbitt***.
			3. Only the specific language reflected in the statute has been approved by Congress and signed by the President. It is the best indication of legislative intent. ***West Virginia***.
			4. ***See Nix***.
			5. ***See McBoyle*** (Holmes) (In every day speech, “vehicle” calls up picture of conveyance on land.).
		2. How to determine
			1. Primary Sources – statutory definitions, case law, administrative regulations/decisions
			2. Dictionary
				1. Webster’s Third dictionary
				2. Included in ordinary meaning. ***See*** ***Smith*** (O’Connor) (Dictionary definition of “use” – “to convert to one’s service” or “to employ” – along with how an average person on the street might this of “use” next to “firearm” should be included in ordinary use.).
				3. ***But Cf. Nix*** (definition of fruit and vegetable in dictionary doesn’t shed light on ordinary meaning).
				4. Congressional staffers responsible for drafting statutory language do not generally rely on dictionaries but dictionaries are good starting point.
			3. How word is ordinarily used
				1. ***See Smith*** (Scalia dissenting) (distinction between how a word can be used and how it ordinarily is used. Therefore “uses a firearm” has implied “as a weapon” after it. E.g. “Do you use a cane?” doesn’t mean whether it is on display in the hall but whether it is used to help with walking).
				2. ***Marshall*** (“You cannot pick a grain of LSD off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture.”)
			4. Potential consequences lead to strange or reasonable results?
				1. ***Marshall*** (“Mixture or substance” can’t include all carriers because then if carrier is glass bottle, then would be over threshold no matter what. Needs to be co-mingled more to be mixture.)
				2. ***But Cf. Marshall*** (even if statute compels off results, that is Congress prerogative as long as it satisfies a minimum standard of rationality).
			5. Not omissions. ***West Virginia*** (Scalia) (to supply omissions transcends the judicial function).
	2. Context – read words in their context rather than isolating them and reading them literally
		1. General Rule
			1. It is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” ***Smith*** (Scalia dissenting) (“use” means “use as a firearm” given context).
		2. How to determine
			1. See Semantic Canons of Construction and when to use them
	3. Structure
		1. ***West Virginia*** (Scalia) (looks at how attorney’s fees and expert witness fees are used in other statutes)
		2. ***See Babbitt*** (Stevens) (Congress separately authorized the Secretary to issue permits for takings that violated the Endangered Species Act suggests that includes indirect harm because otherwise the Secretary would not give out permits allowing direct harm to endangered species.)
		3. ***Marshall*** (Easterbrook) (nearby statutory provision that prescribed different penalties for a “mixture or substance containing a detectable amount of” PCP and for pure PCPC demonstrated that Congress was aware of the fact that some drugs were sold by the dose on carrier media with variable weight and thus Congress implicitly considered and rejected making an analogous distinction in the context of LSD).
	4. Special Meaning –a statutory phrase can be a “term of art.”
		1. Type
			1. Industrial context.
				1. ***Corning Glass; Nix***
			2. Science
				1. ***Marshall*** (Court seemed open to chemistry definition of “mixture” but since it was not provided, just used ordinary meaning).
		2. How to determine?
			1. Legislative history.
				1. ***Corning Glass***
				2. ***West Virginia –*** specialized or plain meaning?(court awarded attorney’s fees based on their equitable discretion. Alyeska held that could not shift in civil rights litigation. 42 USC 1988 response to Alyeska but did not overturn it).
			2. Dictionary definition. ***Nix***; ***But Cf. Smith***.
			3. Purpose/Context/Structure
				1. ***Yates*** (“tangible objects” would cover fish, but held that the term must be read in the financial context of the Sarbanes-Oxley Act of 2002 (SOX), which was enacted as a reaction to the Enron scandal and contained the specific provision Yates was charged with violating. In this context, the Court held that the term was ambiguous because the caption of the section in question, “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy,” and the title of the section in which it was originally placed, “Criminal penalties for altering documents,” indicated that Congress was referring only to financial records. Additionally, the section’s placement amongst other sections that prohibited specific actions cuts in favor of narrow construction. The Court argued that reading the section to apply to all physical objects would create significant overlap with another section.)

### Legislative History

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

Synopsis: EPA Administrator decided not to regulate radioactive materials that he believed were subject to regulation by the Atomic Energy Commission. Court found that legislative history demonstrated that such “radioactive materials” had specialized meaning that did not fall under “pollutant” as provided by the Federal Water Pollution Control Act and therefore were not subject to regulation by the EPA.

Tool: Legislative history should be used in interpreting statutes. “Specialized meaning” can be derived from legislative intent determined by legislative history.

* ***Blanchard v. Bergeron* (SCOTUS 1989)**

Synopsis: Court held that a contingent-fee contract does not impose an automatic ceiling on an award of attorney’s fees under 42 USC 1988 based on legislative intent garnered from House and Senate Reports endorsing this interpretation in district court cases.

Tool: Legislative intent can be garnered from references/endorsements of judicial cases in Committee Reports.

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

Synopsis: A Representative said on the floor that “substantially all” as used in 29 USC 1383 (d)(2) means 85% and a Senator added to the record after debate that it meant “majority” and then clarified that “majority” meant 50.1% but after it was enacted as law. Court found it meant “85%” since comments made out loud and before enactment as part of legislative history have greater weight.

Tool: (1) Statements after enactment do not count. The legislative history of a bill is valuable only to the extent it shows genesis and evolution, making “subsequent legislative history” an oxymoron. (2) The text of the statute, and not the private intent of the legislators, is the law. The text is law and legislative intent a clue to the meaning of the text. (3) Statements spoken out loud have greater weight than remarks added to the record.

* 1. Sources
		1. Committee Reports
			1. Reports prepared by House and Senate Committees which accompany bills favorably reported to the chamber. ***See*** ***Blanchard*** (Used House report interpretation of judicial cases).
			2. Conference committee reports which accompany the reconciled version of the House and Senate bills.
		2. Sponsor Manager Statements- given special weight but not as much as committee reports
		3. Individual Legislator Statements During Debate – given little weight
		4. Hearing Testimony Statements
		5. Successive Versions of a Statute – record of changes to the proposal over the course of the drafting process
			1. ***See Babbitt Dissent*** (Scalia) (Although does not endorse legislative history as method of interpretation, majority ignores legislative history that Committee's removed from the definition of a provision stating that "take" includes "the destruction, modification or curtailment of [the] habitat or range" of fish and wildlife.)
		6. Failed Amendments
		7. Statements Placed in Record After the Fact. See ***Continental Can***.
		8. Acquiescence to Interpretation Over Time – If Congress refuses to overturn a judicial or administrative decision, this may amount to an implicit legislative judgment that the interpretation was correct
			1. Critiques: difficult to enact new legislation (there may be political opposition now) Congress may not be aware of lower courts decisions
		9. Ratification in Subsequent Bill – Congress reenacts a piece of legislation that has been authoritatively interpreted by a court or agency, or extensively amends such legislation without overturning the prior interpretation or enacts substantially identical language in a new statute.
		10. Later Statutes
			1. Although we must be cautious when relying on later-enacted statutes (because they may not illuminate an enacting majority’s intent, as our colleague Justice Scalia frequently reminds us), it can still be instructive in appropriate circumstances (see FDA v. Brown & Williamson, per O’Connor, J.).
		11. Change over time
			1. ***West Virginia*** (Stevens in Dissent) (common law, Alyeska, and then statute meant to return to common law).
	2. Textualist Critique
		1. Only the text of the statute, not the subjective intentions of individual legislators, is the law.
			1. Bicameralism-and-presentment (Art. I, Sec. 7) argument:
				1. Legislative history lacks legitimacy because it has not gone through bicameral passage and presentment to the President. Judicial use of legislative history facilitates legislative evasion of procedural safeguards.

Critique: no one is saying legislative history is a statute but that it is helpful in trying to understand a statute. Textualists still have to rely on outside sources for help in interpreting statutes. E.g. dictionaries case law, canons of construction, context…and these haven’t been subject to bicameralism/presentment.

* + - * 1. Legislators, lawyers and lobbyists manipulate legislative history; Scalia – “the more you use legislative history, the phonier it will become.”

If true, why does Congress tolerate it? As long as committee reports are published and available to Congress prior to the final vote on a piece of legislation, it makes sense to presume that the rank-and-file members implicitly endorsed those reports. Many distinguished judges embrace understanding that because Congress lacks the capacity to agree on all details of legislation, rank-and-file legislators tacitly agree to leave the details to be determined by committees and sponsors.

* + 1. Legislative history is not an accurate and useful reflection of legislative intent
			1. Doubts legislators read Committee Reports. ***See Blanchard Concurrence*** (Scalia) – Legislators don’t read committee reports. At best interpretation of judicial cases inserted by staff members on own initiative or at worst at suggestion of lawyer/lobbyist. Also, Court shouldn’t rely on district courts.
			2. Legislative history is easily cherry-picked
		2. Separation of Powers: Conception that judges impermissibly acquire added policymaking discretion by relying on legislative history

### Purpose

* ***Riggs v. Palmer* (Court of Appeals of NY 1889)**

Synopsis: D killed testator in order to make sure he did not change will. P brought suit so that D would not benefit from will. Court found for P because in spirit of the law, murderer of testator should not benefit from will.

Tool: (1) Should consider purpose of statute and look beyond plain text (which explicitly says “No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise.” (2) Common law principles (e.g. a person shall not profit from his or her own wrongdoing) can and should influence the interpretation of legislation. (3) Coherence – since a statute forms a part of a larger intellectual system, the law as a whole, it should be construed so as to make that larger system coherent in principle.

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

Synopsis: Church contracted with pastor in England and was charged for violating federal which prevented an employer from contracting with foreign laborers to come to the U.S. for employment. Court ruled in favor of Church finding that intent of Congress was to stay influx of cheap, unskilled labor.

Tool: (1) When the letter of the law and spirit of the law conflict, the former must yield to the latter. (2)In determining intent of legislature when language is not plain, court should consider: (a) title of the act and (b) evil which it is designed to remedy determined by circumstances of passage of statute.

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

Synopsis: Sheriff Kirby (D) stalled boat carrying mail by arresting mailman on the boat. Court found D not guilty of obstructing passage of mail because that would lead to absurd result.

Tool: Absurdity Doctrine – General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.

* ***Public Citizen v. United States Department of Justice* (SCOTUS 1989)**

Synopsis: Washington Legal Foundation (P) requests declaratory judgment to declare ABA Committee an advisory committee under FACA since President requests their advice on judicial nominations and an injunction until they comply. Court found that ABA Committee is not an advisory committee because a straight reading of “utilize” would lead to essentially every group falling under FACA and thus absurd results.

Tool: (1) Absurdity doctrine – statutes should not be construed to create absurd results, including absurd applications that are not before the court. (2) Concurrence: test is “patently absurd.” Used absurdity doctrine too loosely because could have just used constitutional avoidance – avoid reading laws so that they would have to be struck down as unconstitutional.

* ***United Steelworkers of America v. Weber* (SCOTUS 1979)**

Synopsis: P sued D for affirmative action training program which P claims discriminates against white employees. Court found for D reading beyond plain language of Title VII which prohibits discrimination on basis of race and looked at legislative history to determine Congress’s intent.

Tool:

* + Majority (Brennan): Legislative history gives insight into spirit of the law.
	+ Dissent (Rehnquist): Plain meaning prohibits affirmative training program. Believed Civil Rights Act was aimed at intentional discrimination as opposed to disparate impact in order to get it passed (textualism – trying to capture bargain?)
	1. Letter v. Spirit of the Law – Potential mismatch between the rules embedded in a statutory text (the “letter of the law”) and the general background purpose of the statute (the “spirit of the law”).
		1. Letter – literal meaning; believe legislative process is about bargaining
		2. Spirit – meaning consistent with purpose, justice, fairness, common sense; believe in limited capacity of legislature
	2. How to Determine Purpose
		1. “Plain meaning” rule – where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise. ***See MA v. EPA*** (statutory text forecloses EPA’s reading).
		2. The “mischief” rule – since the legislature passes legislation in order to solve a problem(s), if the court can identify the mischief the statute was trying to remedy, that fact will help the court to interpret the legislation in light of its purposes. ***See Holy Trinity***.
			1. ***See Babbitt*** (Stevens) (Court held that the intent of the Act to give broad protection to endangered species must include even actions that may have minimal or unforeseeable effects.)
		3. Context
			1. Statute’s title – interpreters may consult the title of a statute in order to help resolve ambiguity in its operational provisions. ***See*** ***Holy Trinity***.
		4. Structure – since a statute forms a part of a larger intellectual system, the law as a whole, it should be construed so as to make that larger system coherent in principle. ***See Riggs***.
		5. Legislative history – rely on statements by legislators, witnesses, or originating committees as well as evolution of a bill as it moves through the legislative process to determine the statute’s purpose.
			1. ***United Steelworkers***
				1. Majority (Brennan) – purpose was to integrate blacks
				2. Dissent (Rehnquist) - aimed at intentional discrimination as opposed to disparate impact in order to get it passed (textualism – trying to capture bargain)
		6. Substantive Canons
			1. Common Law Principles – “where a common law principle is well established…the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident. ***See Riggs***.
				1. E.g. A person shall not profit from his or her own wrongdoing. ***See Riggs***.
				2. Counter-argument: Isn’t purpose of passing statutes to depart from common law?
			2. Societal values – statutory purposes, and hence statutory meaning should be inferred in light of deeply held background values. ***See Holy Trinity***.(“Christian nation”)
			3. Absurdity Doctrine.
		7. Problem – purpose can be distilled into various levels of generality, which may cut against it as a tool of statutory interpretation. ***See United Steelworkers of America*** ***(Brennan v. Rehnquist***).
	3. Absurdity Doctrine
		1. Definition – statutes should not be construed to create absurd results. Don’t need to agree unanimously at an abstract level with what is absurd. Just need to deem absurd given purpose of the statute.
		2. Intentionalism and purposivism: statutory application which offends widely and deeply held social values must represent a failure of expression or foresight, which the legislators would surely have corrected had it come to their attention.
		3. Textualism: Result of Kirby case statute not likely predicated in process of legislative compromise as in Holy Trinity so textualists have accepted some form of absurdity doctrine.
		4. Application
			1. ***See TVA Dissent*** (Powell)
			2. ***See Kirby*** – best case
			3. Riggs – strong case
			4. Bologna statute
			5. Prison escape, hypo
			6. Holy Trinity
			7. Public Citizen – simply not what Congress wanted? Does the identification of absurd applications that are not before the Court empower the Court to conclude, more generally, that the language of the statute cannot be read in its ordinary sense? 🡪 record doesn’t support finding of absurdity.
			8. Public Citizen Kennedy Concurrence: “patently absurd” threshold not met – “where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obious to most anyone.” Instead, FACA should not apply because unconstitutional.

## Canons of Construction

* ***McBoyle v. United States* (SCOTUS 1931)**

Synopsis: McBoyle (D) was convicted of transporting an airplane across state lines that he knew was stolen. Court found D was not guilty under National Motor Vehicle Act because “motor vehicle” under the Act does not apply to air vehicles.

Tools: (1) Ejusdem generis – term “vehicle” appears at the end of a list of more specific terms, which provide guidance regarding the proper construction of the more general word “vehicle.” (2) Rule of lenity – the courts should not construe a statute to impose criminal penalties on a defendant if the statute could plausibly be read as not covering the defendant’s conduct.

* ***Silver v. Sony Pictures Entertainment, Inc.* (U.S. Ct. of App. 9th Cir. 2005) (en banc)**

Synopsis: P was not assigned underlying copyright but sued D for copyright infringement. Court held that an assignee who holds an accrued claim for copyright infringement, but who has no legal or beneficial interest in the copyright itself like P, cannot institute an action for infringement.

Tools: (1) Expressio unius est exclusion alterius applied twice: (a) statute does not expressly say that ONLY a “legal or beneficial owner of an exclusive right under a copyright” can sue but this is implicit by saying such a person is allowed to sue; (b) listing of “exclusive rights” implies that these are the ONLY exclusive rights. (2) Canon used to help determine whether text is ambiguous. (3) Dissent: Canons should only be used when Congressional intent cannot be discerned.

* ***Babbitt, Secretary of the Interior v. Sweet Home Chapter of Communities for a Great Oregon* (SCOTUS 1994)**

Synopsis: Forestry industry stakeholders (P) sued Secretary of the Interior (D) did not intend for Endangered Species Act regulation to apply to changes in habitat. Court found for D because “harm” includes direct and indirect consequences based on the text, broader purpose of Act, and other related statutes.

Tools:

* + Majority (Stevens): Rule Against Surplusage - Harm includes indirect and direct consequence or otherwise it would be duplicative of other words used to define “take” such as “harass,” “wound,” “pursue,” etc.
	+ Dissent (Scalia): Noscitur a sociis - Other words around harm are affirmative acts which are directed immediately and intentionally against an animal. Although they don’t all imply force, that is not the point.
* ***NLRB v. Catholic Bishop of Chicago* (SCOTUS 1979)**

Synopsis: Churches (D) challenged jurisdiction of National Labor Relations Board (P) over them. Court interpreted Act in D’s favor under constitutional avoidance canon to avoid determining whether statute violates First Amendment freedom of religion.

Tool:

* Majority (Burger): Constitutional Avoidance Clear Statement Rule – Could not find clear affirmative intention of Congress to have NLRA apply to teachers employed by religious schools.
	+ Congressional debate focused on private sector.
* Dissent (Brennan): Constitutional Avoidance Ambiguity Resolving Rule – Majority is asking Congress to write statutes in opposite way in which they do so. Clear statement threshold will never be met.
	+ Expressio unius canon: Majority interpretation is not “fairly possible” because church-operated schools are not within eight exceptions that statute lists.
	+ Legislative history - Hartley exception draft included exception for religious or educational organizations but these exceptions were taken out and only nonprofit hospital exception was kept in. This exception was later reversed which confirms Congress’s intent to cover all employers.
	+ This statutory interpretation would lead to having to deal with Constitutional issue which is okay.
* ***Gregory v. Ashcroft* (SCOTUS 1991)**

 Synopsis: Missouri state judges (P) sued the Missouri Governor, (D) challenging the validity of the mandatory retirement provision under the federal Age Discrimination in Employment Act of 1967 (ADEA). Court found that the provision did not violate ADEA because ADEA exempts judges as persons appointed at the “policymaking level” given the Federalism Canon.

Tool:

* + Majority (O’Connor): Federalism Canon Clear Statement Rule- Federal courts should be certain of Congress’ intent before finding that federal law overrides the constitutional balance of federal and state powers. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute. Congress did not do so, so will not read ADEA to cover state judges.
	+ Concurrence (White and Stevens): (1) Judges are policymakers so they are not “employees” under ADEA’s definition; therefore, ADEA exempts judges; (2) In *Garcia*, SCOTUS decided that Supremacy Clause always trumps 10th Amendment, so Federalism canon directly conflicts with this decision.
* ***Cipollone v. Liggett Group, Inc.* (SCOTUS 1992)**

Synopsis: P sued D alleging that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by D under failure to warn, breach of warranties, and fraud. Court found that some of the state common law claims were preempted while others weren’t.

Tool:

* Majority (Stevens): Presumption against preemption - Presumption that police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress.
* Concurrence/Dissent (Blackmun): Presumption against Preemption canon applies but intent of Congress to preempt common law not clear.
* Concurrence/Dissent (Scalia): Does not subscribe to Presumption against Preemption canon. Under Supremacy Clause, court must interpret Congress’s decrees of pre-emption in accordance with their apparent meaning.

### General

* 1. Canons of Construction – interpretive principles or presumptions that judges use to discern – or, at times, to construct – statutory meaning.
	2. Semantic Canons – rules of grammar or syntax; Congress presumed to accept
	3. Substantive Canons – normative or policy commitments; Congress presumed to accept but can overcome them (issue is what is the standard for Congress overcoming them?)
	4. When to Use Canons
		1. Only where text ambiguous after using other tools of construction
			1. ***See Smith*** (O’Connor) (Rule of lenity should only be used when after using all tools of construction there is still ambiguity).
			2. ***See Silver Dissent*** (Bea) (Statute is ambiguous but first look at statute’s intent before using expressio unius.).
		2. To help determine whether text is ambiguous
			1. ***See Silver*** (Graber) (Expressio unius used first to clarify text)
			2. ***See McBoyle*** (Holmes) (uses ejusdem generis to show there is ambiguity in order to then use rule of lenity)
			3. Textualists – semantic canons should be used before legislative history.
		3. More important than other indicia of intent?

### **Semantic Canons**

* 1. Expressio unius – the expression of one thing implies the exclusion of others
		1. Strong case: when Congress has thought of examples, especially multiple examples 🡪 evidence of focus
			1. ***But cf. Holy Trinity*** (statute makes specific exceptions, pastor is not one of them but court still finds pastors are an exception under spirit of the law).
		2. ***See Silver*** (Graber).
	2. Ejusdem generis – general language in a statute that comes after more specific language is limited by previous language
		1. ***See MA v. EPA Dissent*** (Scalia) (p. 10-11)
		2. ***See McBoyle*** (Holmes) (term “any other self-propelled vehicle not designed for running on rails” appears at the end of a list of more specific terms – “automobile, automobile truck, automobile wagon, motorcycle…” – which indicate a vehicle running on land).
		3. E.g.A law bars “dogs, cats and other animals in the public park.” Does this apply to police on mounted horses, who are patrolling the park? Answer: No, because, applying Ejusdem Generis, dogs and cats suggest domestic animals (that is the characteristic these specific terms share, which constrains the catch-all category that comes after).
		4. E.g. A law says that a tenant may withhold rent if her building is inhabited by “mice, rats, and other pests.” Does this apply to annoying neighbors? Answer: No, because applying Ejusdem Generis, mice and rats suggest vermin or other critters that can cause infestation, but not people.
		5. Tip: you must decide which of the common characteristics of the specified list is relevant to interpreting the meaning of what follows.
			1. Law makes it a crime to conceal a “dagger, dirk, stiletto and other dangerous weapon but not a hunting knife.” Does “any other dangerous weapon” include a scythe? A scissors? An M1 rifle? If the specified terms refer to “stabbing weapons” then perhaps the scythe and the scissors but not the rifle would be covered. If the specified terms refer to “short bladed weapons” then perhaps a scythe and a rifle would not be covered but a scissors would be covered. If the terms refer to “bladed weapons that may be used for stabbing and which have no other legitimate daily use,” then perhaps none of the three would be covered. We might, on the other hand, argue that “any dangerous weapon” conceivably covers things without blades (because of course literally, it certainly could). This view might be most plausible if, perhaps, when this law was passed, blades were the primary weapon of choice and that since then, guns have come along, and there is no other criminal provision available to address them. In that case, perhaps we have a good argument that the legislature meant the catch-all category to provide flexibility for law enforcement over time. To bolster this argument further, we might apply Expressio Unius and say that by excluding “hunting knife” Congress specified the only weapon that should be excluded, which suggests that other things, like the M1 rifle, should be included.
	3. Rule against surplusage – don’t be redundant
		1. ***See Babbitt*** (Stevens).
	4. Noscitur a sociis – words take meaning from company they keep (usually when words can mean more than one thing)
		1. ***Babbitt*** (Scalia dissenting) (The interpretive canon noscitur a sociis instructs that words derive their meaning from surrounding words; thus plain meaning of harm does not include act or omission that remotely kills or injures a population through habitat modification.)
		2. ***Babbitt*** (Stevens majority) the lower court had used Noscitur to determine whether the word “harm” should be given the same narrow meaning as surrounding words like “kill,” “hunt” and “shoot,” which suggest injury or attempted injury to a particular animal. Stevens thinks the application of noscitur here is inappropriate. It is not being used to help resolve a question about two plausible different meanings (like the word bank, which could be a river bank or a commercial institution). Instead, Noscitur is being used to narrow or broaden the meaning of a term, which is a different and more questionable application of the canon.
		3. ***Yates*** (The words immediately surrounding “tangible object” — “falsifies, or makes a false entry in any record [or] document” —indicated that Congress intended to restrict the term to related objects.)
		4. E.g. A law forbids noise within fifty yards of a “shore, beach, bank or levy.” Noscitur suggests that “bank” here refers to the edge of a waterway, not a commercial financial institution

### Substantive Canons

* 1. Where do they come from?
		1. Values embedded in Constitution
			1. Separation of Powers
				1. Striking down statutes would seem like judicial activism. E.g. Constitutional Avoidance
				2. Federalism
			2. State Sovereignty
				1. Presumption against pre-emption
		2. Values/commitments/presumptions embedded in common law
			1. Rule of Lenity
		3. Common values of civilized
	2. Rule of Lenity – Presumption that in the case of doubt, statutes are construed most strongly in favor of the accused.
		1. ***But Cf. Nix***.
		2. ***See Smith Dissent*** (Scalia)
		3. ***See McBoyle*** (Holmes)
	3. Constitutional Avoidance – avoid reading laws so that they would have to be struck down as unconstitutional
		1. Clear statement rule - If Congress wants a general statute to reach constitutionally problematic cases, Congress must provide a “clear expression” of its “affirmative intent” to do so. ***See*** ***NLRB*** (Burger)
		2. Ambiguity resolving rule - Court can only avoid a constitutional problem if that interpretation is “reasonable” or “fairly possible.” If the text of the statute is not ambiguous, then the avoidance canon has no place. See ***NLRB Dissent*** (Brenna).
		3. ***See Public Citizen Concurrence***.
		4. Justifications
			1. Reflects a reasonable presumption about what Congress actually intended
				1. Strength: grounds canon in the policy preferences of Congress rather than those of the judiciary
				2. Weakness: Although Congress typically prefers to have its statutes upheld, there is not much evidence that Congress is otherwise averse to enacting legislation that raises difficult constitutional issues.
			2. Tool of judicial restraint. If Congress is unhappy with how the Supreme Court interpreted a federal statute, Congress can amend the statute, but a constitutional ruling can be altered only by a subsequent judicial decision to overturn the earlier constitutional holding (unlikely) or by a constitutional amendment (even more unlikely). Also, constitutional rulings are generally more likely than statutory rulings to affect other areas of the law.
				1. Weakness:

Canon enlarges the ability of judges to rely on constitutional considerations to nullify congressional enactments.

A court invoking the avoidance canon need not analyze the constitutional issues or apply the extant constitutional doctrine with as much rigor, as would be expected in a case where the court was actually ruling on the constitutional issue. The judicial obligation to give reasons is one of the most important constraints on judicial willfulness, so it is troubling that the avoidance canon apparently allows courts to make quasi-constitutional decisions on the cheap.

Presumption that courts should err on the side of avoiding constitutional invalidation of statutes is distinct from the presumption that courts should avoid reaching and deciding questions of constitutional law.

* + - * 1. Strength: Congress can always amend statute to force Constitutional question
			1. Enables courts to take constitutional considerations into account in ways that would not be possible if the court were limited to a simple yes-or-no decision on whether the statute at issue is constitutional. (legitimate tool of judicial empowerment which some see as bad but this says it’s good)
				1. Process-oriented: when Congress considers legislation in a constitutional danger zone, it is important that Congress deliberate more carefully than it ordinarily would about the constitutional issue before acting. Therefore, by insisting that Congress address constitutionally problematic issues explicitly, the avoidance canon may improve the legislative process by encouraging more candid and searching analysis of constitutional questions regarding a statute’s reach.

Weakness: As faithful agents, it is problematic for a court to refuse to enforce a statute as written because it concludes Congress should have been more careful in its deliberations.

* + - * 1. Substantive: Constitution enshrines certain public values, and courts can properly enforce and promote those values not only by striking down legislative enactments that clearly contravene the Constitution’s text, but also by reading statutes narrowly to avoid trenching on constitutional values unless Congress has clearly forced the issue.

Weakness: it is not legitimate for a court to adopt a strained reading of statutes in order to protect constitutional values if the court has not identified any actual violation of the Constitution. The Constitution does not adopt freestanding values but rather prescribes particular mean to implement those values and to balance them against other considerations.

* 1. Federalism (State Sovereignty) – Federal courts should be certain of Congress’ intent before finding that federal law overrides the constitutional balance of federal and state powers. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute. Represents a preference to avoid infringing on state sovereignty even if there is no potential constitutional issue (“these [federalism] canons are distinct from the avoidance canon in that they may apply even in the absence of any plausible concern that the statute might actually be unconstitutional.”)
		1. ***See Gregory*** (O’Connor) (presumption against interfering with fundamental aspects of state sovereignty, as when a federal law (like the ADEA) purports to interfere with core state functions or state officials. The presumption is motivated by a respect for state sovereignty and autonomy, which is embodied in the structure of the Constitution and expressed most explicitly in the 10th Amendment. The Court requires a clear statement from Congress before it will read the ADEA as applying to state judges.)
		2. ***But cf. Gregory Dissent*** (White and Stevens)
		3. ***See Kirby***.
		4. Critique
			1. If a straightforward reading of a statute does not offend any express constitutional provisions, Congress should not have to go back and re-enact it with additional clarity.
			2. Not clear that Constitution embodies a freestanding commitment to federalism.
	2. Presumption Against Preemption – presumption against federal preemption of state law
		1. Presumption that police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress. ***Cipollone*** (Stevens)
		2. This is another “pro-federalism” canon in the sense that it is also solicitous of state sovereignty. But the canon is not about preserving core state functions from federal interference per se. It is rather about the extent to which a federal regulatory regime (like federal rules for cigarette labeling) will be found to displace a potentially competing state regulatory regime (state labeling rules, or state common law claims that allow plaintiffs to sue cigarette manufacturers for failure to warn, fraud, etc). The Supremacy Clause makes clear that where federal law conflicts with state law, federal law governs. Yet the challenge for courts in preemption cases is to figure out when and to what extent Congress has exercised its preemptive power. In Cipollone, Stevens and Blackmun agree that there is a presumption against preemption, but Stevens thinks that Congress has spoken clearly to overcome that presumption, and Blackmun does not. Where there is ambiguity, Blackmun says, he will read the preemptive provision narrowly to allow common law claims to go forward.
		3. ***But cf. Cipollone Dissent*** (Scalia)
	3. Others
		1. Subsequent bills do not impliedly repeal earlier legislation unless the intent to do so is unmistakably clear.
		2. Congress does not alter substantive law through appropriations measures. ***See TVA Majority*** (Burger).
		3. Congress does not impose new regulatory burdens retroactively without clearly saying so. ***See TVA Dissent*** (Powell).
		4. Absurdity Doctrine– statutes should not be construed to create absurd results given purpose of statute. *See supra*
		5. Major Questions / Democracy Forcing Canon - statutes should not be construed to give agencies authority over questions of great “economic and political” significance unless Congress has spoken clearly. Often referred to as “democracy-forcing” because it sends the matter back to democratically elected officials for a clear statement.
		6. A person shall not profit from his or her own wrongdoing. ***See Riggs***.

# Regulation

## The Constitutional Position of Administrative Agencies

### Constitutional Background

* 1. Separation of Powers
		1. Article I – Congress – Legislative Power
		2. Article II – President – Executive Power
		3. Article III – Judiciary – Judicial Power
	2. Agencies
		1. Promulgate regulations (note: legislative rules are not legislation but they are still law) – Legislative power
		2. Enforce, Implement – Executive power
		3. Adjudicate disputes – Judicial power
	3. Formalism v. Functionalism
		1. Formalism
			1. Constitution draws sharp lines of demarcation between the powers and responsibilities assigned to the respective branches.
			2. Unconstitutional for Congress to reassign a power from the branch to which it is assigned by the relevant constitutional vesting clause.
			3. Constitution’s meaning is fixed by some historical understanding that prevailed at the time of its adopting in 1789 and interpreters must abide by that clearly established meaning.
		2. Functionalism
			1. Constitution leaves a lot undecided.
			2. Congress has broad authority to determine the shape of government pursuant to the Necessary and Proper Clause.
			3. Administrative scheme just needs to leave the “core” functions of each branch and preserve an appropriate balance of power and tension among the branches.
			4. Strict and unyielding separation of powers risks compromising the functionality and adaptability of modern government without necessarily furthering the underlying aims of the separation of powers.
			5. Formalism would undesirably disrupt and unravel much of the post-New Deal administrative state.
		3. Cases
			1. Formalism
				1. ***Buckley*** – if you perform executive function, can only be appointed under Appointments Clause.
				2. ***Myers*** – (1) makes structural inferences of constitution (vesting clauses) and (2) separation of powers - if you perform executive function, you can only be removed by President with no constraint from Congress because removal power is essential to faithfully executing the law.

Functionalism counterargument – is exclusive removal power necessary to further Separation of Powers. Doesn’t constraining removal power allow for checks and balances.

* + - * 1. ***Bowsher*** – If Congress can remove official by process other than impeachment, then official is legislative and not executive, and thus cannot perform executive functions.

White dissent – functionalism

* + - 1. Functionalism
				1. ***Humphrey***
				2. ***Morrison***

### Nondelegation Doctrine

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

Synopsis: J.W. Hampton, Jr., & Co (P) imported barium dioxide which was assessed at a rate higher than fixed by statute due to Presidential proclamation issued under the flexible tariff provision (Sect. 315 of Title III of the Tariff Act). Court found that Congress can delegate legislative power as long as it lays down a legislative intelligible principle to which the agency must conform.

Tool: (1) Non-delegation doctrine. (2) Intelligible Principle Test passed – President was empowered to increase or decrease the rate of duty as was necessary to “equalize” costs of production. Statute also provided four factors for the President to take into account: (a) differences in conditions of production (wages, costs, etc.); (b) differences in wholesale selling prices; (c) advantages granted to foreign producer by a foreign government; and (d) any other advantages and disadvantages.

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

Synopsis: A.L.A. Schechter Poultry Corp. (D) was convicted for violating the Live Poultry Code, promulgated under Section 3 of NIRA, which authorized the President to approve “codes of fair competition” – essentially production and price controls – that were to be submitted by trade or industrial groups. Court found for D because code-making authority conferred to President was an unconstitutional delegation of legislative power.

Tool: (1) Non-delegation doctrine. (2) Intelligible Principle Test – NIRA did not pass Intelligible Principle Test. NIRA supplied no meaningful statutory criteria to channel the President’s discretion to approve or disapprove a code of fair competition. “Fair competition” has no common law antecedents and thus is an essentially empty phrase. NIRA included a broad “Declaration of Policy,” and the President’s approval of a code was simply conditioned on his finding that it would “tend to effectuate the policy of this title.” In other words, the Act does not prescribe rules of conduct, but instead authorizes the President to make codes to prescribe them.

* ***Whitman v. American Trucking Association, Inc.* (US 2001)**

Synopsis: American Trucking Association (P) challenged Section 109 of the Clean Air Act, which requires the EPA Administrator to revise NAAQS every 5 years as necessary, as violating the non-delegation principle. Court found that Section 109 included intelligible principle and thus did not violate the non-delegation doctrine.

Tool: Intelligible Principle Test - Congress does not need to provide a determinate criterion.

* ***Industrial Union Department, AFL-CIO v. American Petroleum Institute* (US 1980) (“Benzene case”)**

Synopsis: OSHA promulgated standard to regulate occupational exposure to benzene. Court found for D reading in a “significant risk” of harm to employee health before adopting a safety standard requirement that OSHA had not met in promulgating its benzene regulation.

Tool: Non-delegation doctrine canon – judiciary has responsibility to read statutes, where possible, to avoid sweeping and potentially unconstitutional delegations of legislative power.

* 1. Definition: cannot violate Constitution Article I so Court imposes some limits on Congress’s authority to delegate legislative power to administrative agencies while acknowledging the reality that all administrative statutes inevitably transfer some policymaking discretion to the agencies that implement them.
	2. Current State
		1. Non-delegation doctrine: No longer used - Although the Court has embraced the non-delegation principle throughout much of the nation’s history, the Court has only twice relied (both times in 1935) on it to invalidate a statute as unconstitutional.
		2. Non-delegation doctrine canon: Court uses.
		3. Legislative Veto?
	3. Competing Conceptions of Power that the Agency is Exercising – ***Whitman***
		1. Scalia (majority): The power that the EPA exercises pursuant to its authority under the CAA is not really legislative power, but rather a form of policymaking discretion that is inherent in the executive power.
		2. Stevens (concurring): agency rulemaking authority is “legislative power” but nevertheless the delegation is constitutional when adequately limited by the terms of the authorizing statute. Vesting Clauses of Articles I and II do not purport to limit the authority of either recipient of power to delegate authority to others.
		3. Thomas (concurring): CAA’s delegation to EPA might be unconstitutional not because it lacked an intelligible principle, but because the power delegated was too broad. “I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than legislative.”
	4. Delegation to Judiciary? – When Congress drafts an ambiguous statute, one could say this is an implicit delegation to the judiciary to make key decisions that could be considered “legislative.”
	5. Pros and Cons of Delegation
		1. Pros
			1. Administrative agencies have specialized expertise that makes them more effective policymakers, especially in complex technical fields.
			2. Crowded legislative agenda means that Congress does not have time to study, let alone address, the many issues and questions that would arise with respect to even a moderately complex statute.
				1. If Congress cannot delegate broad authority to administrative agencies, it cannot exercise its Commerce Power to the full extent contemplated by the Constitution. ***JW Hampton***.
				2. Congress must have the capacity to delegate lawmaking authority to agencies if the federal government is to be able to function in a complex modern society. ***JW Hampton***.
			3. Legislative process, is by design, slow and cumbersome, and this makes it difficult for Congress to react quickly to new information or changed circumstances.
			4. Pressures of partisan and distributive politics may inhibit, sensible, pragmatic application of the best available information to the problems at hand.
		2. Cons
			1. Pro arguments reject or question our system’s commitment to democratic accountability and the separation of powers.
			2. The point of the institutional structure is for it to be difficult for the federal government to make law in order to protect individual liberty from government overreaching and preserve the position of state governments as the principal lawmakers in our federal system.
				1. Counterargument: (1) Changed circumstances justify delegation to agencies because the threat to public welfare is no longer just about war, boundaries and international trade but now with a larger population, public welfare threats include social externalities associated with industrialization which require quicker, more complex responses. (2) Alternative to agency delegation might be more detailed congressional statutes that are not as well thought out.
			3. Regulatory policy decisions shouldn’t be insulated from politics, because democratic accountability allows people to select the leaders they want and to check legislative abuses through the threat of electoral retaliation.
				1. Counter-argument: agencies are headed by President which is accountable to a national electorate and voters can hold their legislators accountable for the scope of their delegation.
			4. Most significant regulatory policy decisions involve value judgments, AKA political decisions
			5. “Capture theory” – regulatory agencies are often captured by the interest groups that they are supposed to regulate because such groups can lobby well and agencies depend on them for information and political support and many agency officials often come from or seek to subsequent employment from interest group.
	6. Rationales for a Constitutionally Grounded Non-delegation Doctrine
		1. Separation of Powers – non-delegation doctrine is an inherent consequence of the Constitution’s general commitment to a separation of legislative and executive powers.
		2. The Article I Vesting Clause – Vesting Clause provides that “all legislative Powers herein granted shall be vested in Congress of the United States.” In contrast, the other Vesting Clauses for the executive and judiciary don’t say “all” powers.
			1. Critiques: (1) Necessary and Proper Clause might be read to give Congress the authority to delegate lawmaking authority when necessary to implement its other Article I powers. (2) Vesting Clause does not imply that Congress cannot transfer that power. (3) Not clear that agencies technically exercise “legislative power” when they implement a statute by promulgating rules and regulations.
		3. Bicameralism and presentment – the framers of the Constitution would not have taken the trouble to spell out elaborate procedures for the exercise of a newly granted power if those procedures were not integral to the governmental scheme. Non-delegation doctrine protects interests served by the bicameral and presentment process by preventing Congress from circumventing Article I Section 7 process through the faster and easier alternative of agency lawmaking.
	7. Intelligible Principle Test – When Congress confers decision-making authority upon agencies, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.” ***J.W. Hampton***
		1. Passes Test
			1. ***J.W. Hampton*** – The President was empowered to make such “changes in classifications or increases or decreases in any rate of duty” as were necessary “to equalize” those “costs of production.” In making this determination, the President was to take into account: “(1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.” The Act also stated that all investigations into differences in production costs were to be made by the United States Tariff Commission, which was required to “give reasonable public notice of its hearings and …reasonable opportunity to parties interested to be present, to produce evidence, and to be heard.”
				1. Law gives specific factors, very mechanic.
			2. ***Whitman*** – Section 109 requires that “for a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, the EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.”
				1. Court has never demanded that statutes provide a determinate criterion. E.g., “requisite” could be interpreted to mean cost-benefit analysis. Court has “found an intelligible principle in various statutes authorizing regulation in the ‘public interest’…In short, we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”
				2. What’s really going on? Court moving away from Non-delegation doctrine because don’t want to disrupt entire regulatory system.
				3. Instead of saying there is no NDD problem, court could have utilized a NDD canon to interpret statute so that there would be no NDD.
		2. Fails Test
			1. ***A.L.A. Schechter Poultry Corp.*** – Section 3 of NIRA authorizes the President to approve “codes of fair competition.” Such code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups “impose no inequitable restrictions on admission to membership therein and are truly representative,” and (2) that such codes are not designed “to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy” of Title I of the act.
				1. NIRA supplied no meaningful statutory criteria to channel the President’s discretion to approve or disapprove a code of fair competition. “Fair competition” has no common law antecedents and thus is an essentially empty phrase. Under Title 1, Section 1 of the NIRA there was a broad “Declaration of Policy,” and the President’s approval of a code was simply conditioned on his finding that it would “tend to effectuate the policy of this title.” In other words, the Act does not prescribe rules of conduct, but instead authorizes the President to make codes to prescribe them.
	8. Non-delegation Doctrine Substantive Canon
		1. Definition: construe statutory delegations narrowly in order to avoid a serious non-delegation problem.
		2. Specific Constitutional Avoidance Canon
		3. Benzene Case (***Industrial Union***)
			1. The Occupational Safety and Health Act (OSH Act) instructed OSHA to prescribe a standard that “most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.”
			2. Reasoning that the OSH Act would “give the Secretary unprecedented power over American industry” if “limited only by the constraint of feasibility,” the plurality read in a “significant risk” of harm to employee health before adopting a safety standard – a requirement that OSHA had not followed in promulgating its benzene regulation. No provision of OSH explicitly required such a finding, but the plurality justified its reading in part by emphasizing the judiciary’s responsibility to read statutes, where possible, to avoid sweeping and potentially unconstitutional delegations of legislative power.
			3. Feasible could mean many things. E.g. technologically feasible or cost-benefit analysis

### Congressional Control of Agencies

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

Synopsis: Chadha remained unlawfully in the United States past the expiration of his nonimmigrant student visa. The AG ordered that his deportation be suspended, pursuant to Section 244(a)(1) of the Immigration and Nationality Act. The House of Representatives unilaterally vetoed the suspension. Court found that this unicameral legislative veto is unconstitutional.

Tool:

* Majority (Burger): Legislative veto under the Immigration and Nationality Act is unconstitutional because:
	+ It is exercised unicamerally and is not one of the Constitutional provisions in which one House may act alone and not subject to the President’s veto. Expressio unius – when a legal document such as the Constitution carefully delimits the manner in which a given power is to be exercised, interpreters should presume that the specified manner is exclusive.
	+ Attorney General’s suspension of deportation is an executive act, and the legislative veto is a legislative act which should only be exercised bicamerally.
* Concurrence (Powell): Plurality’s decision should be narrower or else it will invalidate every use of the legislative veto which is used widely. The House’s act was unconstitutional because it took on a judiciary role because it made a determination with certain statutory criteria. But, did not follow due process and decision based on political reasons.
* Dissent (White): If the effective functioning of a complex modern government requires the delegation of legislative/quasi-legislative authority, Article I (the source of the nondelegation doctrine) cannot forbid Congress from qualifying that grant with a legislative veto. Legislative veto restores fidelity to some of the purposes underlying bicameralism and presentment since the legislative veto maintains congressional involvement in the exercise of administrative discretion under broadly-worded statutes. Note: Assumes status quo is deportation.
	1. Legislative Veto
		1. ***Chadha***
		2. Cons of Legislative Veto
			1. Separation of lawmaking from law implementation makes it harder for lawmakers to write oppressive laws and then spare their supporters.
			2. Giving lawmakers control over law implementation would diminish legislators’ incentives to pass clear, transparent, and discretion-constraining statutes, because lawmakers would want to give themselves more discretion.
	2. Other Oversight Mechanisms
		1. Hearings on agency conduct
		2. Budget – “power of the purse”
			1. Congress may attach substantive “riders” to appropriations bills that restrict an agency’s authority to make certain decisions.
			2. Gives individual members of Congress with influence over the agency’s budget considerable leverage over the agency.
			3. Congress can control how aggressively or expansively an agency pursues its delegated tasks by controlling the resources at the agency’s disposal.
		3. Revise Statutes
		4. Dissolve Agency
		5. Communicate/Work with Agencies
		6. Investigations on agency activities
		7. Issuing press releases criticizing agencies
		8. Sending sharply worded letters to agency officials

### Presidential Control of Agencies

* **Buckley v. Valeo (US 1976)**

Synopsis: FEC Act Amendment created a commission in which eight members of the commission were to be chosen as follows: the Secretary of the Senate and the Clerk of the House of Representatives were ex officio members of the Commission without a right to vote, two members would be appointed by the President pro tempore of the Senate upon recommendations of the majority and minority leaders of the Senate, two would be appointed by the Speaker of the House of Representatives upon recommendations of the majority and minority leaders of the House, and two would be appointed by the President (subject to confirmation by House and Senate). The six voting members would then need to be confirmed by the majority of both Houses of Congress. In addition there was a requirement that each of the three appointing authorities was forbidden to choose both of their appointees from the same political party. Selection process for members directly appointed by Congress and appointed by President with House/Senate approval challenged as violating the Appointment Clause. Court agreed.

Tool:

* “Significant Authority” Test – the “fair import” of the Appointments Clause “is that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”
	+ Commission members are thus officers, specifically inferior officers (like the postmaster)
* Congress may vest “in the President alone, in the Courts of Law, or in the Heads of Departments,” the appointment of “Inferior Officers” but neither the speaker of the House nor President pro tempore of the Senate are included in this language. The Court struck down the system by which members of Congress directly appointed Federal Election Commission commissioners and members of Congress had to approve Presidential appointees (see CB 432).
* The Appointments Clause takes priority over the Necessary and Proper Clause.
* Officers not appointed as provided for in Appointments Clause cannot perform executive functions
	+ Commissions members can perform investigative and informative responsibilities that Congress might delegate to one of its own committees. However, current Commissioners cannot exercise enforcement power via discretionary power to seek judicial relief. It is the President’s and not Congress’ responsibility to “take Care that the Laws be faithfully executed.” Art. II, Sec. 3. Therefore, provisions vesting in the Commission primary responsibility for conducting civil litigation for vindicating public rights, violate Art. II, section 2, Cl. 2.
* **Myers v. United States (US 1926)**

Synopsis: Federal law provided that President with advice and consent of the Senate could remove Postmasters. Court struck down this provision because this was not intent of First Congress and violated Separation of Powers. Tool: The President has the exclusive power to remove executive branch officials, principal and inferior officers, and does not need the approval of the Senate or any other legislative body.

Holding (Taft): Separation of Powers: The statute violated the separation of powers between the executive and legislative branches. To deny the President the removal power would not allow him to “discharge his own constitutional duty of seeing that the laws be faithfully executed.” Power of removal is different from power of appointment: (1) Much more cumbersome on president to not be able to remove someone than to not be able to appoint someone. (2) Senate can familiarize itself with potential appointees but doesn’t know everything going on as to why President would want to remove someone.

Dissent (Holmes): Congress can create offices so they should be allowed to constrain them.

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

Synopsis: President appointed Humphrey to FTC and later removed for political reasons. However, the FTC Act only allowed a president to remove a commissioner for "inefficiency, neglect of duty, or malfeasance in office." Court found for Humphrey because he was not executive officer.

Tool: The President has sole removal power of executive officers but not quasi-legislative or quasi-judicial officers.

* **Bowsher v. Synar (SCOTUS 1986)**

Synopsis: Balanced Budget and Emergency Deficit Control Act of 1985 bound the President to sequester cuts per the Comptroller General’s report. Court held that Comptroller was legislative because he could be removed by process other than impeachment – a joint resolution (requires bicameralism and presentment) of Congress. Court found Act violated Separation of Powers since Comptroller exercised executive powers but was legislative official.

Tool:

* + Majority (Burger- formalist opinion): If Congress can remove official by process other than impeachment, then official is legislative and not executive, and thus cannot perform executive functions.
	+ Dissent (White – functionalist opinion): Determining the level of spending by the federal government is a legislative function, not an executive one, he argued. Even if the power were executive, there is nothing wrong with delegating that power to an agent as long as Congress could influence him only by a means that is subject to the Presentment and Bicameralism Clause requirements, which the act satisfied, since the Comptroller General could be influenced by Congress only through a joint resolution.
* **Morrison v. Olson (US 1988)**

Synopsis: Independent Counsel can be removed by the Attorney General for “good cause.” Court finds that this does not violate separation of powers because it is an inferior officer and removal provision does not unduly trammel the President’s executive authority.

Tool: Removal restrictions allowed for inferior officers if meet certain criteria.

* + Inferior officer test - In determining whether an officer is inferior, the court should consider the following factors: (1) subject to removal by a higher Executive Branch official; (2) limited duties; (3) limited jurisdiction; and (4) limited tenure.
	+ Removal restrictions are not allowed when they “unduly tramme[l]” the President’s Executive Authority. In determining whether removal restriction do so, the following factors should be considered: (1) type of function of office (executive, quasi-judicial, quasi-legislative  no longer sufficient as in Humphrey); (2) degree of authority of office; (3) does removal restriction impermissibly burden the President’s power to control and supervise the office.

* 1. Pros/Cons
		1. Presidential control of agencies may increase democratic accountability by virtue of the President’s electoral accountability to the people.
		2. On the other hand, presidential control over senior agency personnel with which Congress may not interfere outside of the context of Senate confirmation of presidential nominees, may dilute checks and balances by shifting the implementation of legislative policy to far away from Congress.
	2. Appointment/Removal Power
		1. Appointments Clause: Art. II, § 2, cl. 2 - …”[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”
			1. “Officers” – assume executive; “any appointee exercising significant authority.” ***Buckley***.
				1. “Principal Officers” - No question that only the President can appointment them with advice and consent of the Senate.
				2. “Inferior Officers” – Congress may authorize them to be appointed by President, Courts, Heads of Departments
			2. Nothing about Congress having power to appoint
				1. Does Necessary and Proper Clause – Art. I, Section 8, Cl. 18 – permit Congress to play another role?
			3. Nothing about removal power
		2. Encroaching v. Aggrandizing Power
			1. Court willing to acquiesce more when Congress just encroaches on presidential power (***Humphrey***) rather than when it also tries to aggrandize its own power (***Myers***).
		3. Appointment Power
			1. Congress cannot appoint “officers,” either principal or inferior
				1. Appointments Clause allows Congress to vest appointment of officers in “the Courts of Law, or in the Heads of Departments, but neither the speaker of the House nor President pro tempore of the Senate are included in this language. ***Buckley***.
			2. Limitations on pool of candidates President can pick from – no case on this but consider encroachment v. aggrandizement; removal restrictions factors infra; purpose of agency – independent?; and functionalism v. formalism.
		4. Removal Power
			1. History:
				1. President has exclusive authority to remove executive “officers” and does not need approval from the Senate. ***Myers (US 1926)***.
				2. The President has sole removal power of executive officers but not quasi-legislative or quasi-judicial officers. ***Humphrey*** (distinguish from Myers, because postmaster is pure executive officer while FTC commissioners have quasi- legislative and judicial power)

Congress can restrain President’s removal power when not pure executive officer. E.g. “for cause” provision

E.g. The FTC Act in ***Humphrey*** only allowed a president to remove a commissioner for “inefficiency, neglect of duty, or malfeasance in office.”

* + - 1. If Congress can remove official by process other than impeachment, then official is legislative and not executive, and thus cannot perform executive functions. ***Bowsher***.
			2. Removal restrictions allowed for inferior officers if meet certain criteria. ***Morrison***.
				1. Inferior officer test - In determining whether an officer is inferior, the court should consider the following factors: (1) subject to removal by a higher Executive Branch official; (2) limited duties; (3) limited jurisdiction; and (4) limited tenure.
				2. Removal restrictions are not allowed when they “unduly tramme[l]” the President’s Executive Authority. In determining whether removal restriction do so, the following factors should be considered: (1) type of function of office (executive, quasi-judicial, quasi-legislative 🡪 no longer sufficient as in Humphrey); (2) degree of authority of office; (3) does removal restriction impermissibly burden the President’s power to control and supervise the office.
			3. “Double insulation” – President can only remove SEC commissioner “for cause” and SEC commissioner can only remove Public Accounting Oversight board member “for cause” – is not allowed because deprives president of capacity to enforce the law. *Free Enterprise* (Roberts Majority).
	1. Centralized Regulatory Review
		1. EO 12866 (note: if conflicts with statute, statute governs. Sect. 1(b))
			1. Sec. 6 – all executive branch agencies (but not independent commissions) required to submit proposals for “major” regulations ($100M+) to the Office of Information and Regulatory Affairs (OIRA), a division within OMB. Submissions have to include a regulatory impact analysis that includes a formal cost-benefit analysis (CBA).
			2. Sec. 4 – established an annual regulatory planning process in which executive branch agencies and independent commissions are required to submit to OMB a draft regulatory program describing all significant regulatory actions that the agency planned to undertake in the coming year.
			3. Sec. 7 – disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President.
			4. Pros/Cons

|  |  |
| --- | --- |
| **Proponents** | **Opponents** |
| Effective government – president has holistic perspective, which facilitates coordination, coherence and rational priority setting.  | Neither the President nor OMB has the requisite expertise in the substantive policy areas to second-guess the programmatic agencies.  |
| Democratic accountability* President is electorally accountable
* Shift away from Congressional oversight committees which tend to be dominated by interest groups as opposed to the President’ s broader, national view
 | Less Democratic accountability* Congress is more directly responsive to public opinion.
* Administrative rulemaking process allows agencies to gather much public input
* Shift away from Congressional oversight committees.
* Not transparent process
* Increases influence of one set of unelected bureaucrats (OMB) vis-a-vis another set of unelected bureaucrats (agency officials)
 |
| Deterrent effect – agencies, if left to their own devices, will regulate too much due to agency officials’ tendency to focus on narrow missions or be captured by special interest groups.  | Claim that agencies tend to overregulate is implausible.  |
| OIRA has not chilled agency regulation substantially per quantitative research (doesn’t speak to quality of regulation – watering down effect).  | OMB review introduces a powerful and undesirable anti-regulatory bias for two main reasons: (1) CBA has an anti-regulatory cast and is usually deploy and is usually deployed for blocking environmental, health, or safety regulations that have difficult-to-quantify benefits. (2) Structure of OMB review contains a status quo bias because delays of review entail significant costs and may cause agencies to play it safe by adopting more modest regulations.  |
| Cost-Benefit Analysis* Science-based approach
* Obama added human dignity, and fairness to list of hard-to-quantify factors
 | Cost-Benefit Analysis* Many factors are difficult to quantify
* Some opponents of regulatory review process think that CBA can be neutral instrument if used properly.
 |

### Judiciary Control of Agencies Overview

* 1. Enforcing procedural requirements (APA)
	2. APA calls for agency policy decisions to be subject to Hard Look “arbitrary” or “capricious” Review
	3. Interpretation of statutory provisions subject to Mead-Chevron review.

## The Administrative Rulemaking Process

### The Administrative Procedure Act and the Forms of Agency Action

* ***United States v. Florida East Coast Railway Company (SCOTUS 1973)***

Synopsis: Two railroad companies brought action to set aside incentive per diem rates established by the Interstate Commerce Commission in a rulemaking proceeding alleging that that the Commission violated APA 553 and 556 by not granting their requests for a hearing.

Tool:

* + When agency is doing something legislative as opposed to judicial, formal rulemaking procedures are not triggered unless language from APA 553 of “on the record after opportunity for an agency hearing” is used more exactly.
		- ICC was doing something legislative because per diem incentives were applicable to all railroads going forward. Thus, the Court found “after hearing” language in 1(14)(a) of the interstate Commerce Act was not sufficient to trigger the formal rulemaking provisions of APA since ICC
	+ APA does not limit additional requirements imposed by law.
		- Thus, ICC still had to comply with “after hearing” provision although it was not bound by formal rulemaking procedures. Court found that since this language was not defined by APA, it doesn’t necessarily mean the right to present evidence orally and cross-examine witnesses, or the right to present oral argument.
* ***SEC v. Chenery Corporation (SCOTUS 1957)***

Synopsis: SEC confronted with case of management trading during reorganization. SEC announces that managers and board can’t buy shares during restructuring and thus rejected public utility’s reorganization plan by retroactively applying the rule it established. Court found in favor of SEC holding that administrative agencies can rely on ad hoc adjudication to formulate new standards of conduct.

Tool: Administrative agencies have the discretion to establish new standards of conduct by exercising its rule-making powers or by ad hoc adjudication.

* 1. APA Rules for Major Categories of Agency Actions

|  |  |  |
| --- | --- | --- |
|  | **Rulemaking** | **Adjudication** |
| **Informal** | APA 553* “notice-and-comment” rulemaking
* Agency must give public notice.
* Agency must provide an opportunity to comment on the agency’s proposal – submission of written data, views, or arguments with or without opportunity for oral presentation.
* If the agency decides to finalize a rule, it must publish an explanation of the rule.
 | ?* Day-to-day decision-making
* E.g. Whether to fund a project, application of a tax credit, etc.
 |
| **Formal** | APA 556, 557* Adversarial hearing
* Presiding officer is an ALJ.
* Interested parties are entitled to present oral testimony and conduct cross-examination
* Agency’s final rule must be based on the official record
 | APA 554, 556, 557* Trial-like adversarial hearings that typically involve an agency seeking to impose some sort of penalty on a regulated party, or attempting to resolve a dispute between two or more parties under a regulatory scheme administered by the agency.
* Require an opportunity for oral presentation except in cases involving claims for money or benefits or applications for initial licenses, where the agency may forgo those procedures if the parties “will not be prejudiced thereby.”
 |

* 1. Rulemaking v. Adjudication
		1. Rulemaking
			1. Prospective policies
			2. Typically impacts a lot of people but can impact few
		2. Adjudication
			1. Resolves particular disputes
			2. Backward looking
			3. Affects one or few people
	2. Formal v. Informal Agency Action
		1. APA Sect. 553 – rulemaking is governed by formal procedures if the agency rule in question “[is] required by statute to be made on the record after opportunity for an agency hearing.”
			1. If the agency is doing something “legislative” (something that applies broadly), then the exact above language needs to be in the statute to trigger formal procedures.
				1. ***Florida East Coast*** (ICC was doing something legislative because per diem incentives were applicable to all railroads going forward. Thus, the Court found “after hearing” language in 1(14)(a) of the interstate Commerce Act was not sufficient to trigger the formal rulemaking provisions of APA since ICC.)
			2. If the agency is doing something “judicial,” than the above language does not need to be exact in the statute to trigger formal procedures.
		2. APA does not limit additional requirements imposed by law.
			1. ***Florida East Coast*** (agency still had to comply with “after hearing” provision although it was not bound by formal rulemaking procedures. Court found that since this language was not defined by APA, it doesn’t necessarily mean the right to present evidence orally and cross-examine witnesses, or the right to present oral argument.)
	3. Policymaking
		1. Agency can make policy either through rulemaking or adjudication. ***SEC v. Chenery***.
			1. Unless otherwise constrained by statute.
		2. Justifications for allowing policymaking through adjudication
			1. Procedural protection – formal hearing
			2. Common law process – courts make policy this way all the time
			3. Functional – better for agency to do its job through adjudication then let people get away with unfair practice (***Chenery***).

### Notice & Comment Rulemaking

* **United States v. Nova Scotia Food Products Corp. (CA2 1977)**

Synopsis: FDA inspection found that Nova Scotia (D) plant violated regulations for smoking whitefish. Court found that regulations were invalid because the FDA failed to disclose to interested parties the scientific data and the methodology upon which it relied so that comments could be addressed to the data and the “concise general statement” was less than adequate.

Tool: (1) Agencies should disclose the data or studies on which their proposals are based to allow for meaningful comment. (2) Meaningful comment required so that court can conclude whether or not the agency had considered all relevant factors to determine whether agency action was arbitrary under APA 706(2)(A). (3) In concise general statement, agency must address “vital questions, raised by comments which are of cogent materiality.”

* **Chocolate Manufacturers Association v. Block (CA4 1985)**

Synopsis: USDA published for comment a proposed rule for what constituted “supplemental foods” for WIC and acknowledged the congressional directive that the USDA design food packages containing the requisite nutritional value and appropriate levels of fat, sugar, and salt. USDA responded to public comments by deleting flavored milk. CMA petitioned the USDA to reopen the rulemaking to allow it to comment. Court found in favor of CMA and held that USDA didn’t abide by 553(b) because ultimate changes in the proposed rule were not in character with the original scheme or a logical outgrowth of the notice since USDA never suggested that flavored milk would be removed while it discussed other foods containing high sugar levels.

Tool: Test for determining adequacy of notice of change in a proposed rule occurring after comments appears – if the changes in the original plan are in character with the original scheme, then the final rule is a logical outgrowth of the notice and comments already given.

* 1. APA 553 – Three main procedural requirements (p. 896)
		1. Notice
			1. (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
			2. (1) a statement of the time, place, and nature of public rule making proceedings;
			3. (2) reference to the legal authority under which the rule is proposed; and
			4. (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
		2. Opportunity for comment – the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.
		3. Concise general statement – After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.
	2. Judicial Expansion of 553
		1. The courts’ expansive reading of 553’s procedural requirements has transformed “informal” rulemaking into a much more elaborate and formal process – a “paper hearing” that includes extensive and often repeated notice to affected groups of a proposed rule, provision to them of the factual and analytical material supporting it, and detailed responses to any group’s adverse comment to alternative proposal.
		2. Possible explanation – judges are uncomfortable with the idea that agencies can make important policy decisions without adequate procedural safeguards. This is likely exacerbated by ***Florida East Coast Railway***, which shifted more cases from the heavily proceduralized formal rulemaking category to the less formal notice-and-comment category.
	3. Pros
		1. Intrinsic Value – allowing people to participate in process has procedural value because democratic/fair
		2. Instrumental Value – Process allows for better policy outcomes
		3. Judicial Value – allows judges to properly review agency decisions
			1. Meaningful comment required so that court can conclude whether or not the agency had considered all relevant factors to determine whether agency action was arbitrary under APA 706(2)(A).
				1. Though a reviewing court will not match submission against counter submission to decide whether the agency was correct in its conclusion on scientific matters, it will consider whether the agency has taken account of all relevant factors, and whether there has been a clear error of judgment. ***Nova Scotia***.
			2. Concise general statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency’s action.
				1. Under APA 706, court must review “whole record” but can’t do this without the agency producing a record. ***Nova Scotia***.
	4. Cons
		1. Judges’ procedural rulings are outcome-driven
		2. Expanded proceduralization associated with a “paper hearing” may favor those affected interests with greater ability to mobilize resources to provide more or better information to a rulemaking agency
		3. Leads to overproceduralization of notice-and-comment rulemaking, rendering it too cumbersome, costly, and lawyer-driven, which in turn undermines that benefits associated with this more flexible form of agency rulemaking.
	5. Notice
		1. 5 USC 553 (b)(3) – notice of a proposed rulemaking must contain “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”
		2. Supplemental Notice
			1. Test for determining adequacy of notice of change in a proposed rule occurring after comments appear – if the changes in the original plan are in character with the original scheme, then the final rule is a logical outgrowth of the notice and comments already given. ***Chocolate Manufacturers***.
			2. In ***Chocolate Manufacturers***, USDA published for comment a proposed rule for what constituted “supplemental foods” for WIC and acknowledged the congressional directive that the USDA design food packages containing the requisite nutritional value and appropriate levels of fat, sugar, and salt. USDA responded to public comments by deleting flavored milk. CMA petitioned the USDA to reopen the rulemaking to allow it to comment. Court found in favor of CMA and held that ultimate changes in the proposed rule were not in character with the original scheme or a logical outgrowth of the notice because USDA never suggested that flavored milk would be removed while it discussed other foods containing high sugar levels.
			3. Problem: Provides incentive for agencies to be more general so that you are not trapped in your details.
			4. Comments do not act as notice
	6. Opportunity for Comment
		1. Meaningful comment: Agencies should disclose the data or studies on which their proposals are based. Failure to disclose basic data relied upon would suppress meaningful comment, such nondisclosure would be akin to rejecting comment altogether. Does not apply to trade secrets or sensitive national security information. ***Nova Scotia*** (FDA did not provide scientific data and did not keep contemporaneous record.)
		2. What about data or studies generated during or after the comment period?
			1. SCOTUS has not addressed the issue and courts of appeals have not developed a consistent or transparent doctrine on this issue.
			2. General themes have emerged:
				1. If commentators criticize the studies on which the agency initially relied, and the agency responds by conducting new studies that do not lead to any fundamental changes in the agency’s proposal, then the agency usually does not have to provide an opportunity to comment on these new studies as well.
				2. An agency may generate additional data using a methodology disclosed in the rulemaking record even if the actual data is not made available until after the close of the comment period.
				3. When the new material generated in response to commends adds new information, the case law is much sparser and outcome more difficult to predict.
	7. Concise General Statement
		1. Test of adequacy – Agency does not need to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking but the “concise general statement” should enable the court “to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” ***Nova Scotia***.
			1. Agency must address “vital questions, raised by comments which are of cogent materiality.” ***Nova Scotia***.
				1. In ***Nova Scotia***, FDA did not address vital questions – (1) whether proposed regulation is commercially feasible or whether other considerations prevail even if commercial infeasibility is acknowledged; (2) whether the rule should be established on a species by species basis, particularly whether lower temperatures but with the addition of nitrite and salt would be sufficient; and (3) whether the proposed T-T-S requirements would destroy whitefish.
		2. Under APA 706, court must review “whole record” but can’t do this without the agency producing a record. ***Nova Scotia***.

### Exceptions to 553: Good Cause, Policy Statements, and Interpretive Rules

* **Pacific Gas & Electrical Co. v. Federal Power Commission (DC Cir. 1974)**

Synopsis: Petitioners, mostly customers of pipeline companies (P) sought review of FPC (D) Order No. 467 which stated D’s curtailment of natural gas priorities due to national natural gas shortage claiming that it was a substantive rule as opposed to a policy statement which D should have promulgated after a rulemaking proceeding under the APA. Court found that Order NO. 467 was a general statement of policy and thus not subject to 533 procedural requirements.

Tool: Force of law test to distinguish between substantive rules and policy statements.

* **American Mining Congress v. Mine Safety & Health Administration (DC Circuit 1993)**

Synopsis: Statute required that mine operators provide information to Secretary. Regulation required operators to report accidents, injuries and “diagnosed illness.” Policy letter stated that x-ray showing condition constitutes a “diagnosis.” American Mining Congress challenged policy letter for not following 553 procedural requirements. MHSA relied on interpretive rule exemption. Court found that PPLs were interpretive rules because it was not required as a predicate to enforcement since Part 50 regulations required the reporting of diagnoses of the specified diseases. Nor did the agency propose to act legislatively either by including the letter in the Code of Federal Regulations, or by invoking its general legislative authority under the statute. Finally, it is not an amendment to Part 50.

Tool: Four part test for determining whether legislative rule or interpretive rule.

* **Hoctor v. United States Department of Agriculture (CA7 1996)**

 Synopsis: Dept. of Agriculture issued an internal memorandum requiring an 8ft. fence to enclose dangerous animals without following 533 requirements. Hoctor was cited and sought review. Court found that the internal memorandum was not an interpretive rule because it was arbitrary and thus legislative and therefore need to follow 533 requirements.

Tool: When agencies base rules on arbitrary choices they are legislating and so these rules are legislative/substantive and thus require notice and comment rulemaking.

* 1. 5 USC 553 (b) Except when notice or hearing is required by statute, this subsection does not apply— (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
	2. Notes: Substantive/Legislative Rules v. Non-substantive Rules (Interpretive rules and policy statements)
	3. Good Cause Exemption
		1. “impracticable” if there is some kind of emergency situation that makes the delay associated with the ordinary notice-and-comment process intolerable. E.g. new regulations allowing speedier revocations of pilot licenses if deemed a security threat after 9/11.
		2. “unnecessary” if the rule in question is “a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.” Courts construe this exception narrowly limiting it to cases in which there is no controversy whatsoever about the rule.
		3. “contrary to the public interest” if advance notice of the proposed rule would prompt undesirable anticipatory behavior by affected parties. E.g. announcement of a price increase at a future date could have resulted in producers withholding crude oils from the market until such time as they could take advantage of the price increase.
	4. General Statement of Policy
		1. An agency “policy statement” is an agency memorandum, letter, speech, press release, manual, other official declaration by the agency of its agenda, its policy priorities, or how it plans to exercise its discretionary authority in some future case given a relatively open-ended grant of legal authority.
		2. Compared to substantive rule
			1. Timing – Force of law test
				1. “Critical distinction” between substantive rules and policy statements is that they have a different legal status in those subsequent proceedings. A valid substantive rule has the “force of law” meaning that the only question in the subsequent proceedings is whether the regulated parties conformed their conduct to the rule. The validity of the “underlying policy embodied in the rule” is not subject to challenge at that point. In contrast, a policy statement merely declares in advance how the agency intends to exercise its discretion in the future; the agency cannot rely on the policy statement in subsequent proceedings. When “the agency applies the policy [announced in the statement] in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.” ***Pacific Gas.***
				2. Is the agency using this as binding law (enforceable at Time 1 of passage), or does it come into force at Time 2(during adjudication)? I.e., the agency is not bound to follow it but could do the opposite of the policy statement if a company gave a good defense of their distribution schedule.

Factors: Tentative intention not finally determinative; No final, inflexible impact immediately upon petitioner

* + - 1. Deference: Policy statement easier to pass but not given as much judicial deference as rule.
	1. Interpretive Rules
		1. Definition: Declaration of how the agency interprets an ambiguous statute or regulation.
		2. Legal Effect Test – determines whether rule is substantive/legislative or an interpretive rule (an affirmative answer to any one means the rule is legislative). ***American Mining Congress***:
			1. Whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;
			2. Whether the agency has published the rule in the code of federal regulations (not very important factor because completely controllable by agency);
			3. Whether the rule effectively amends a prior legislative rule. Subsequent case law has minimized the importance of the second factor;
				1. “A rules does not become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rules could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another…” ***American Mining Congress***
			4. Whether the agency has explicitly invoked its general legislative authority.
		3. Effect: Like policy statement, lacks the binding legal force of a legislative rule in the sense that one cannot incur legal liability simply for “violating” an interpretive rule. In contrast to policy statements, an interpretive rule can be inflexible, mandatory and coercive since it is a declaration of what it thinks some statutory or regulatory command actually means without the court rejecting it as not being a 553 exception. (CB 656).
		4. Arbitrary = Legislative/Substantive Rule
			1. When agencies base rules on arbitrary choices they are legislating and so these rules are legislative or substantive and require notice and comment rulemaking. ***Hoctor***.
				1. E.g. Internal memorandum requiring eight foot fence to secure “dangerous animals” is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose. ***Hoctor***.

We are not saying that an interpretive rule can never have a numerical component. Especially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation. ***Hoctor***.

* + - * 1. Hoctor compared to American Mining Congress (AMC)

X-ray = fence

? = 8 feet

## Judicial Review of Agency Action

### Standard of Judicial Review

* ***Ethyl corp. v. EPA (CA DC Circuit 1976)***

Synopsis: The Clean Air Act authorizes the Administrator of EPA to regulate gasoline additives whose emission products “will endanger the public health or welfare…” The EPA Administrator (D) determined that the automotive emissions caused by leaded gasoline present “a significant risk of harm” to the public health so he promulgated regulations that reduce the lead content of leaded gasoline. Ethyl corp. (P) requested review of agency rule. Court ruled in favor of D finding a rational basis for the rule.

Tool: Spectrum of opinions.

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

Synopsis: DOT decision to rescind passive restraint requirements for motor vehicles was arbitrary and capricious because (1) it did not consider requiring airbags and/or automatic seatbelts and (2) dismissed requiring automatic seatbelts saying that they wouldn’t increase usage but evidence seemed contrary to this because didn’t take into account inertia (people have to want to detach).

Tool: Hard Look Review – Modern Standard

* 1. Arbitrary and Capricious Standard
		1. APA “Scope of Review” provision: 5 USC 706
			1. (2)(A) – instructs a reviewing court to hold unlawful and set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...”
		2. Another statute trumps 5 USC 706
		3. Spectrum of Deference
			1. More Deference – if any facts support action
				1. Courts should focus on procedure – Court should not immerse itself in the data, especially in highly technical cases. Ensuring that agencies follow procedural safeguards will help prevent erroneous decisions on the merits from occurring. ***Ethyl*** (Bazelon in Concurrence).
			2. Okay, unless patently wrong
			3. Less deference – okay if plausible even if reasonable people could disagree
				1. Rational Basis – “The standard of review is a highly deferential one. It presumes agency action to be valid… it forbids the court’s substituting its judgment for that of the agency…and requires affirmance if a rational basis exists for the agency’s decision…The reviewing court must assure itself that the agency decision was “based on a consideration of the relevant factors…”…it must engage in a “substantial inquiry” into the facts, one that is “searching and careful.” ***Ethyl*** (Wright in Majority).

***State Farm*** (Rehnquist in Dissent) – A change in administration is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.

* + - 1. Only if based on sound, thorough reasons supported by data, evidence, and expertise
				1. No Logic Gap - “The thought process by which an agency reaches its conclusion on informal rulemaking resembles a chain. If there is a link missing, then the agency, to reach the conclusion that it did, was required to take an arbitrary jump in its logic to reach that conclusion…[I]f no such scientifically proved chain exists, the Administrator’s decision can only be arbitrary and capricious…” ***Ethyl*** (Wilkey in Dissent).
				2. Hard Look Review. ***State Farm***.
			2. Everything said previously plus cost justified
			3. Only if judges agree
			4. No deference
		1. Hard Look Review – Current Standard. ***State Farm***.
			1. “The scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.” “In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”
			2. An agency rule is likely arbitrary and capricious under 706(2)(A) if the agency:
				1. (1) has relied on factors which Congress has not intended it to consider;
				2. (2) entirely failed to consider an important aspect of the problem; or

Important aspect of the problem – some alternatives are sufficiently obvious that the agency must address them.

In ***State Farm***, court found that agency rule was arbitrary and capricious because DOT should have considered requiring the airbag technology to be utilized since the passive seatbelts were detachable but provided no reasons for not doing so. Petitioners invoked *Vermont Yankee* alleging that to require an agency to consider an airbags-only alternative is to dictate to the agency the procedures it has to follow. However, in *Vermont Yankee*, court held that a court may not impose additional procedural requirements upon an agency but here, the airbag was a technological alternative within the ambit of the existing standard.

* + - * 1. (3) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: ‘We may not supply a reasoned basis for the agency’s action that the agency itself has not given.’”

In ***State Farm***, court found that agency rule was arbitrary and capricious because agency was too quick to dismiss the safety benefits of automatic seatbelts. The agency must explain the evidence which is available and must offer a “rational connection between the facts found and the choice made.” DOT only said that there was substantial certainty that automatic seatbelts would not increase usage but provided no direct evidence. Existing evidence seemed strong that requiring passive belts would increase usage.

* 1. Cons of Hard Look Review
		1. Agencies following APA procedures
		2. Agency is expert
		3. Paperwork exercise – can always come up with rational basis
	2. Pros of Hard Look Review
		1. APA calls for arbitrary and capricious standard
		2. Agency’s influenced by interest groups
		3. Having to give account will improve quality of thinking
		4. Achieve buy-in/support

### Should Courts Review Agency Procedures or Policy Choices?

* ***Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. (SCOTUS 1978)***

Synopsis: Atomic Energy Commission (AEC) promulgated rules following APA informal rulemaking procedures. Natural Resource Defense Council (NRDC) appealed arguing that court should require AEC to utilize more formal procedures (formal adjudication) since the rule covers a more complex and technical issue. SCOTUS ruled in favor of AEC because courts cannot require agencies to follow procedures beyond the minimum required by statute.

Tools: A court cannot require an agency to follow procedures beyond what is required by the APA.

* 1. APA 553 is statutory minimum and maximum. ***Vermont Yankee***.
		1. Absent constitutional constraints or compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge many duties.
		2. A court cannot require an agency to follow procedures beyond what is required by the APA.
		3. Rehnquist in ***Vermont*** Justifications
			1. Overproceduralization of informal rulemaking – agencies would eventually adopt full adjudicatory procedures due to:
				1. Agencies can’t predict what courts will deem appropriate
				2. Courts review with full hearing record while agencies don’t have foresight when structuring proceedings.
				3. Courts will typically assume that additional procedures will produce a better record for review.
			2. Judicial review would be unpredictable if courts were ruling based on what they thought was “correct” result and “best” procedure.
			3. Misconceives the nature of the standard for judicial review of an agency rule.

# Legal Interpretation in the Administrative State

### Judicial Review of Agency Statutory Interpretation

* ***National Labor Relations Board v. Hearst Publications (SCOTUS 1944)***

Synopsis: Hearst Publications, Inc. refused to collectively bargain with a city union representing newsboys, claiming the it was not required to because the newsboys were not their “employees” within the meaning of the National Labor Relations Act (Act). Court found that they were “employees” finding that NLRB’s determination has a reasonable basis in the law given that publishers dictated prices, hours, locations, etc. and newsboys relied on wages to support families.

Tool: Judicial review of agency statutory interpretation – de novo review for pure questions of law and extremely deferential review for mixed questions of law and fact.

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

Synopsis: Employees (P) sued employer (D) for overtime for night shifts worked. Court found that Administrator of Wage and Hour Division’s policy that waiting time may not constitute work was based on erroneous law, so the court reversed and remanded in favor of D.

Tool: Test for determining the deference to be given to an administrative agency's rules examines four factors: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.

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

Synopsis: EPA promulgated a regulation permitting States to adopt a plant-wide definition of the term “stationary source.” NRDC challenged regulation in favor of previous regulation calling for point source approach. Court found in favor of EPA utilizing Chevron two-step test.

Stationary source 🡪 Plantwide bubble

Tool: Chevron Two-Step Test

* ***MCI Telecommunications Corp. v. American Telephone and Telegraph Co. (SCOTUS 1994)***

Synopsis: FCC issued rule to make tariff filing optional for non-dominant long distance carriers under 203(b) which authorized FCC to “modify any requirement” under 203. Court found this was not valid exercise of FCC’s modification authority because elimination of a crucial provision of the statute for 40% of a major sector of the industry is too extensive to be considered a “modification.”

Modify 🡪 Eliminate

Tool: Per Chevron, an agency’s interpretation is not entitled to deference “when it goes beyond the meaning that the statute can bear.”

* 1. Early Cases
		1. Pure Questions of Law – de novo review
			1. “[Q]uestions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute…”
				1. In ***Hearst*** – definition of employee
				2. In ***Skidmore*** – definition of working time 🡪 law has not determined this definition
		2. Mixed Questions of Law and Fact - extremely deferential review
			1. “…But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.” The agency’s application must “be accepted if it has warrant in the record and a reasonable basis in the law.”
				1. In ***Hearst*** – whether newsboys counted as employees under the meaning of the term in the NLRA.
			2. Test for determining the deference to be given to an administrative agency's rules examines four factors: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.
				1. In ***Skidmore*** – looked at record, but no record because it was just a bulleting so came up with this four part test. Less deferential than ***Hearst*** because looking at agency process.
	2. Chevron
		1. ***Chevron*** Two Step Test
			1. Step 1: “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”
				1. Courts should use traditional tools of statutory construction in order to decide whether “Congress had an intention on the precise question at issue.” ***Chevron*** Footnote 9.
				2. In ***Chevron***, Stevens found that Congress did not address issue in either statutory language or legislative history.
				3. In ***MCI***, Scalia found that definition of “modify” is not ambiguous looking at dictionary definition and structure of statute.
				4. In ***MCI***, Stevens (in dissent), found that “modify” is ambiguous.
			2. Step 2: “If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”
				1. In ***Chevron***, Stevens found that EPA advanced a reasonable explanation for its conclusion that the regulations serve the statute’s economic and environmental (reducing air pollution) objectives.
				2. In ***MCI***, Stevens (in dissent), found that FCC interpretation of “modify” was reasonable looking at structure, purpose, text, and dictionary.
		2. Rationale – Congress intended to give agency delegation (Congressional silence if implicit delegation)
		3. Is it legal? Is court doing its job under 706(a)?
		4. What is impact of Chevron? Is this normatively desirable?
			1. Decline of use of non-delegation doctrine + Chevron (deferential) review can lead to following concerns
				1. Agencies and their unelected officials having too much power.

But, Court sometimes says no. ***See MCI; Brown & Williamson***.

But, Agencies accountable to President who is accountable to people.

But, Congress is sometimes responsive. E.g. Congress gave power to FDA to regulate tobacco 10 years after ***Brown & Williamson***.

* + - * 1. Congress writing statutes too vague

But, Congress has incentive not to do this when in congressmen from different party than president.

### Deference and Structural/Purposive Interpretation

* ***Food and Drug Administration v. Brown & Williamson Tobacco Corp. (SCOTUS 2000)***

Synopsis: FDA asserted authority over tobacco products in 1996, after having previously disavowed such authority, and issued regulations concerning promotion, labeling and marketing to children and adolescents. A group of tobacco manufacturers, retailers and advertisers filed suit, challenging the FDA’s authority under the FDCA. Court found that FDA had jurisdiction over tobacco products.

Drug 🡪 Intended to Effect Body 🡪 Not Nicotine

Tool: Major questions canon should be applied in step 1. As Chevron is applied in this case, don’t need to look at text in step 1.

* 1. Step One includes looking at text along with statutory structure, context (other acts/history), and major questions canon. ***Brown & Williamson***.
	2. Major Questions Canon
		1. Definition – “In determining whether Congress has specifically addressed the question at issue, a reviewing court should” consider “common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” ***Brown & Williamson***.
		2. Rationale – “Deference under Chevron to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” ***Brown & Williamson***.
		3. Limit on Chevron’s deference to agencies because systematically anti-regulatory
	3. Questions of Agency Jurisdiction - Whether Chevron applies when an agency is interpreting statutory limits on its own jurisdiction has long been the subject of dispute.
		1. No: Brennan – Agencies do no administer statutes confining the scope of their jurisdiction and such statutes are not “entrusted” to agencies for the following reasons: (1) statutes confining an agency’s jurisdiction do not reflect conflicts between policies that have been committed to the agency’s care but reflect policies in favor of limiting the agency’s jurisdiction that by definition have not been entrusted to the agency and may conflict with the statutory policies the agency has been charged with advancing but also with the agency’s institutional interests in expanding its own power; (2) agencies can claim no special expertise in interpreting a statute confining its jurisdiction; (3) cannot presume that Congress implicitly intended an agency to fill gaps in a statute confining the agency’s jurisdiction since by its nature such a statute manifests an unwillingness to give the agency the freedom to define scope of its own power.
		2. Yes: Scalia – Distinction between jurisdictional and non-jurisdictional questions in this context has no basis in court precedent and its incoherent because: (1) deference is necessary because there is no discernable line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority. (2) deference is appropriate because it is consistent with the general rational for deference – congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction. Congress does not desire that every ambiguity in statutory authority be addressed de novo by the courts.

### Deference and Semantic Canons

* 1. ***Babbitt***
		1. Take 🡪 Harm 🡪 Significant Habitat Modification
		2. Stevens – rule against surplusage used to determine that the ordinary meaning of harm would in fact include changes in habitat that hurt the endangered animals. Harm includes indirect (entire species) and direct (specific species) consequence or otherwise it would be duplicative of other words used to define “take.”
		3. Scalia in dissent– noscitur a sociis used to show meaning of “harm” is clear.

### Deference and Substantive Canons

* ***Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council (SCOTUS 1988)***

Synopsis: “Coercion” is unfair labor practice in NLRA. Court finds that NLRB’s interpretation of “coercion” as including leafletting is reasonable but it raises serious constitutional question (potential violation of First Amendment). Court found that it should not give deference to agency because constitutional avoidance canon should be utilized over Chevron canon.

Unfair labor 🡪 Coercion 🡪 not peaceful leafletting

Tool: Constitutional Avoidance Canon trumps Chevron canon.

* ***Rust v. Sullivan (SCOTUS 1991)***

Synopsis: Title X of the Public Health Service Act says no money in programs “where abortion is a method” of family planning. HHS regulation prohibits money in programs where they talk about abortion (gag order). SCOTUS found agency interpretation was permissible under Chevron and then went on to determine that constitutional questions were not serious enough to trigger the constitutional avoidance canon.

Where abortion method of family planning 🡪 includes discussion of abortion

Tool: In order to require use of constitutional avoidance canon, regulations must raise “grave and doubtful constitutional questions.”

* ***Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SCOTUS 2001)***

Synopsis: Army Corps denied Waste Agency permit to use previous pond site for migratory birds as a solid waste disposal site. SCOTUS read Clean Water Act to avoid significant constitutional and federalism questions raised by agency’s interpretation and therefore rejects administrative deference for definition of “navigable waters” under the Clean Water Act and finds that Army Corps does not have jurisdiction over isolated, abandoned sand and gravel pits with seasonal ponds, which provide migratory bird habitats.

Navigable Waters 🡪 Waters of US 🡪 Not instrastate ponds

Tool: Even if a statute does not raise serious constitutional doubts to trigger DeBartolo, an ambiguous statute should not be interpreted to authorize agency regulations that “alter the federal-state framework by permitting federal encroachment upon a traditional state power.

* 1. Constitutional Avoidance
		1. Trumps Step 2 of Chevron
			1. When an otherwise reasonable agency interpretation would raise a serious constitutional question, the court should reject the agency’s interpretation in favor of a reasonable alternative construction that does not raise the constitutional question. ***DeBartolo***.
			2. In ***DeBartolo***, “coercion” is unfair labor practice in NLRA. Court finds that NLRB’s interpretation of “coercion” as including leafletting is reasonable but it raises serious constitutional question (potential violation of First Amendment). Court found that constitutional avoidance canon should be utilized over Chevron canon.
		2. Serious Risk of Constitutional Problems(high standard)
			1. In ***Rust***, Rehnquist held that “gag order” did not raise serious constitutional question (violation of 1st and 5th Amendments) partly because any federal restriction to abortion, which Title X requires agency to do, would likely be challenged on constitutional grounds. Rehnquist goes as far to say that interpretation is actually constitutional.
			2. In ***Rust***, Blackmun dissenting says “gag” order raises serious constitutional question and goes as far to say that it is unconstitutional.
			3. In ***Rust***, O’Connor dissenting says it raises serious constitutional question, but court should not go as far as to determine whether it is constitutional or not.
		3. Why should court assume Congress doesn’t intend to violate Constitution?
			1. Separation of Powers – Court doesn’t want to validate interpretation that Congress wrote something in a way that would force them to strike it down.
			2. Prudent (O’Connor) – Court would have to strike down a lot more statutes.
	2. State Autonomy
		1. Federalism canon – the Court will not read a federal statute to intrude into core aspects of state sovereignty, or to displace traditional state authority, unless the statute clearly mandates such a result. ***Solid Waste***.
		2. ***Solid Waste*** – Court rejects the Army Corps’ interpretation of its jurisdiction under the CWA (to reach non-navigable intermittently wet isolated ponds) because that interpretation, if adopted, would raise a serious risk that Congress has gone beyond its Commerce Clause power under the Constitution (which limits Congress to regulating matters that substantially affect interstate commerce). This is classic constitutional avoidance. But then the Court says that another reason why it rejects the agency's interpretation is because the agency's expansive interpretation of its jurisdiction under the CWA might violate federalism principles (respect for traditional state regulatory prerogatives over land use). You could describe this as invoking the federalism canon plain and simple even if there is no serious risk of violating the 10th Amendment. (Indeed, it is actually quite hard to violate the 10th Amendment--under court precedent, you would need to "commandeer" state institutions), or you could describe this as a species of constitutional avoidance, because perhaps the court thinks that adopting the interpretation goes so far that it actually does raise a serious risk of violating the 10th Amendment. The court is not perfectly clear about which it is doing.
		3. Trumps Chevron

### Limits on Chevron’s Domain

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

Synopsis: Customs Service issued ruling letter saying that day planner = bound diary  4% tariff. Letter is not result of notice and comment or formal adjudication (like policy statement/interpretive rule). Customs service looked at dictionary and did research.

Tool: Chevron Step 0

* 1. Step “0” – Agencies only get Chevron deference when:
		1. Congress gave agency authority to make rules carrying the “force of law,” and
		2. Agency used those methods to speak with the “force of law.” ***Mead (Souter)***.
	2. Congress gave authority to may rules carrying the “Force of Law”
		1. Delegation of such authority may be shown…by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.” ***Mead (Souter)***.
		2. Notice-and-comment rulemaking often falls under Chevron but is not necessary for Chevron deference. ***Mead (Souter)*** (“The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of Chevron.)
		3. “want of procedure does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.” ***Mead (Souter)*** – Mead analysis requires further probing to whether there is any other indication that Congress delegated authority to make rules carrying the force of law:
			1. “precedential value” (but does not always amount to Chevron deference - ***Mead (Souter)***)
			2. Amount of rules issued (***Mead (Souter)***)
			3. Whether the interpretation represented the authoritative position of the agency (Mead Scalia dissenting saying from Chevron)
		4. The Customs Ruling Letter at issue in Mead had legal force and effect with respect to the Mead corporation. So was Mead’s application wrong? Should an agency get Chevron deference as long as its interpretation has independent legal effect, even if it is issued with minimal procedural formality? Or is the degree of procedural formality more significant than whether the interpretation has formal legal force? So Mead did not seem to be using the phrase “force of law” in the traditional, formal sense. However, maybe meant force of law exists when ruling applies generally as opposed to one party…?
	3. If Fail Step 0
		1. Get Skidmore deference –
			1. “degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”
			2. “The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” ***Mead (Souter)*** *(quoting Skidmore).*
			3. Note: court rejected consistency factor of Skidmore in Chevron. So likely would not emphasize it as much. Or maybe look at consistency of rulings within short period of time as opposed to changing mind over time.
		2. Persuasiveness factor
			1. Odd factor because the persuasiveness of a legal interpretation can be collapsed into the de novo legal inquiry itself.
			2. Agency expertise? Mead p. 860
		3. How is Skidmore test different from Step two of Chevron?
			1. More subjective – what is actually correct as opposed to reasonable
				1. Note: Scalia takes issue with this because court could say interpretation wrong, then agency can come back after notice and comment to get Chevron deference and have court say it is reasonable.
			2. Skidmore more about process than substance?
	4. Chevron and Congressional Intent
		1. Souter – presumption applies only when “the agency’s generally conferred authority and other statutory circumstances” make it apparent that “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.” ***Mead (Souter)***.
		2. Scalia – across-the-board presumption that ambiguities in agency-administered statutes are legally equivalent to congressional delegations of authority to the agency.
	5. Pros
		1. “Interpretive rule” exception – Mead could be necessary to prevent agencies from exploiting the “interpretive rule” exception to 553 notice-and-comment procedures. A key distinction between interpretive rules and legislative rules is that the former lack the “force and effect of law.” If courts were to give Chevron deference to agency statutory constructions contained in interpretive rules, on the logic that Congress had implicitly delegated these policy choices to the agency, wouldn’t that be the equivalent to treating interpretive rules as if they did have the “force of law”? Furthermore, one of the reasons that courts often give agencies great latitude in invoking the interpretive rule exception to notice-and-comment rulemaking is the expectation of more aggressive judicial review of agency interpretations issued in such contexts – “pay me now or pay me later” idea that the agency can avoid procedural formality only at the cost of subjecting its decision to more rigorous judicial scrutiny on the merits.
	6. Criticism -  ***Mead (Scalia in dissent)***.
		1. Chevron doctrine “that all authoritative agency interpretations of statutes they are charged with administering deserve deference was rooted in a legal presumption of congressional intent” important to Separation of Powers.
		2. “No necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.” Formal adjudication is like trial courts, which are not typically “accorded deference on question of law.” Informal rulemaking is authorized but not required.
		3. “Ossification of large portions of our statutory law” – Causes agencies to lose discretion and flexibility of interpreting ambiguous statutes differently over time by “having that same ambiguity resolved authoritatively (And forever) by the courts.”
		4. One might argue that agency could simply readopt its interpretation by using one of the Chevron-eligible procedural formats approved by the Court today. But never before has an agency interpretation set aside a judicial interpretation.
		5. Lead to artificially induced increase in informal rulemaking and formal rulemaking.
		6. Lead to confusion – notice-and-comment rulemaking is not necessary but unclear whether it is even sufficient.
		7. Creates a “sliding scale of deference” by breathing new life into Skidmore – Scalia believed that Chevron deference should be applied to all agency decisions that are "authoritative," and thus took issue with the Court's reaffirmation of Skidmore, which Scalia called an “anachronism.”
		8. Sliding scale ill create uncertainty, unpredictability, and endless litigation. Skidmore deference was okay back in the day but not today where “federal statutory law administered by federal agencies is pervasive, and when the ambiguities…that those statutes contain are innumberable.”
		9. Many cases contradict ***Mead*** interpretation of Chevron except for *Christensen* in which it was just dictum.
		10. In ***Chevron***, court rejected consistency factor in ***Skidmore***.