**Legislation and Regulation Outline**

1. **LEGISLATION AND STATUTORY INTERPRETATION**

* [Three Theories Of Statutory Interpretation]
  + **Intentionalism** (most traditional, but has fallen out of favor) – specific/proximate ***intentions of the lawmakers*** (what picture they had in their head).
    - Where ordinary meaning is ambiguous 🡪
    - General Argument of Intentionalism (literary): no general fact of a matter of what a sentence means w/o asking what the speaker intended. “In 1789, the streets of Paris were full of canards.” Ducks or idiots?
    - **Problem:** limit of legislative foresight. Didn’t imagine everything. Over inclusion (would have provided exceptions if thought of it), or under inclusion (would have included more things). Also, Congress is a ***they*** NOT an ***it***. Different opinions, and they can change.
  + **Purposivism** – purpose of statute. General/ultimate aims; “evils” or “goods” the lawmakers concerned with.
    - What is difference between intentionalism and purposivism?
      * (1) Level of generality, or
      * (2) Proximate goals (intent) and ultimate goals (purpose)
        + Intent (proximate mental picture, content of the command) v purpose (ultimate goal that command is pursuing)? Ex. something healthy, like spinach pizza. “Healthy” = purpose. Spinach pizza = intent. Spinach might be unhealthy due to health warning.
    - Internal Debate within each of these.
    - **Problems:** interpreter should clarify the purpose by returning to principle; there might be multiple purposes that conflict with each other; purposes can cage as a result of new information; intent is more specific than purpose.
  + **Textualism** – ***ordinary meaning*** of the text, NOT legislative history.
    - *Nix v. Hedden*: presume “common” meaning unless term of art.
    - What are the sources for ordinary meaning?
      * Intuition (overwhelmingly the source of ordinary meaning)
      * Dictionaries
        + “Judicial notice”: Judges decide to take into consideration. Intuition and dictionaries.
      * Evidence (not judicial notice, must be proven, can be disputed by other side). Marginal at best. Dictionaries/intuition much more prevalent.
        + Expert Testimony
        + “Data” – surveys, internet searches
    - Why textualism? More democratic? Intuitively more fair? Eliminates subjective law making, constrains judges the most? Most ascertainable – multiple lawmakers, no one purpose/intent?
    - **Problems:** could lead to absurd results. Verges on irrational. Or, ordinary meaning is sometimes NOT determinate.
* [Ordinary Meaning As Default] *Nix v. Hedden* (tomatoes as vegetables, subject to tax; scientific or ordinary meaning?)
  + Method 1 (presumption structure): **Presumption that *ordinary, contemporary, common meaning* prevails unless otherwise indicated**. **Problem**: how to determine OM?
    - Argument for fruit: ***specialized meaning***. “Ripened ovary of a seed-bearing plant” 🡪 tomato is fruit.
    - Argument for vegetable (holding): ***ordinary meaning***. Tomato is vegetable in **common language** (grown in gardens, served at dinner unlike fruit?)
      * Why should we use ordinary meaning? Tax aimed at importers, sophisticated parties whose job is to navigate tariffs. Did they not have notice? Ordinary meaning for what community? Sociological question.
    - How does J. Gray know ordinary meaning? Uses dictionary, but falls back onto colloquial meaning. Could bring in data/experts. Last ten years, ppl more serious about establishing ordinary meaning through evidence. Or, who was the legislature addressing? Open question about what OM is.
  + Method 2: default rule. “Taxpayers win if statues are ambiguous.” (In 1893 described law).
  + Method 3: executive branch decides unless it is clear that they have misinterpreted it (collector decides). Way American law ultimately goes. Ex. *Chevron* (in non criminal matters where statutes ambiguous/silent 🡪 agencies get to decide).
* [Dictionary v. Colloquial] *Smith v. United States* (traded gun for drugs; did they “use” gun?)
  + **Majority (broad view):** “Use of a firearm during and in relation to a drug traffic offense.” Ordinary meaning of “use” (looked at dictionary) includes trading. Also, different section of statute had “use” with assumption of trading 🡪 read this interpretation into other part (**context**).
    - **Critical disagreement**: does “ordinary meaning” mean paradigm meaning and nothing more (dissent)? Or can it include more than intuitive meaning (majority)?
    - Problem: what if third party was brought in. Gun for cash, cash for drugs. Under majority, would be included. Very broad.
    - Or, use drugs to get gun. Not covered by *Smith* (under different case, *Watson*) because didn’t “use” gun. Just got gun.
  + **Dissent, Scalia (narrow view):** NOT ordinary, normally understood meaning. “use firearm” means “as a weapon.” Also, rule of lenity: “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”
    - Both sides using “ordinary meaning.”
    - What if use weapon as pistol whip?
* [#Absurd Results Doctrine] – Limits of legislative foresight.
  + **Two ways to misfire:**
    - Over inclusion: “No vehicles in the park”
    - Under inclusion: “Use a firearm” (like in *Watson*; didn’t cover using drugs to get gun).
    - Current law: **Absurdity must be *very clear***. VERY RARE. Be careful with using it (“clear to any reasonable person” or “undisputedly clear”). High threshold.
      * Problem for textualists w/ absurd results. How can you say ordinary meaning is absurd? Not consistent. Theoretically artificial graft onto textualism.
        + Or say, if application is absurd, that should affect the way we understanding the common ***meaning*** of the text.
        + Or say, absurd results doctrine with textualists can be solved with ***context*** 🡪 helps us bring in common sense. Don’t need absurdity doctrine, just understanding of context. “Drawing blood in the streets” means dueling. (1) Modern statutes provide more internal stuff to work with to determine context. (2) Also, modern statutes make judges nervous – 600-page document, legal technicalities.

Prof response: are these two really covert smuggling in of purpose??

* + - * + Do textualists need absurdity doctrine? Point is safety valve for common sense, but there are already many safety valves – prosecutorial discretion, pardons of defendants, jury discretion, etc. Many actors in the system that can bring common sense into picture.
  + [Textualism And Absurd Results] *Kirby v United States* (sheriff indicted for arresting person on mail boat, “knowingly and willfully obstructing mail”; court held that as a matter of public policy, not liable)
    - **All law should receive a *sensible construction***. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. Presumed that the leg intended exceptions to its language that would avoid absurd results. Reason should prevail over letter. ***Common sense sanctions this ruling***.
      * Case of over inclusion (language swept too broadly)?
* *Note: don’t think of ambiguity as “on or off,” but how hard you have to work to make wriggle room.*
* [Scrivener’s Error Doctrine] – Slip of the pen. Miswrote something.
  + *Cernauskas v. Fletcher* (“all laws and parts of laws are now repealed”)
    - Clearly an error on the legislature. Meant to add, “in conflict herewith.”
  + *United States v. Locke* (“prior to Dec. 31”; filed on Dec 31, lost mining land; court held guy liable)
    - Deference to legislature, as well as recognizing congressman typically vote on language of bill, generally requires court to assume the legislative purpose is expressed by the ***ordinary meaning*** of the words used. Going beyond plain language of a statue in search of possibly contrary congressional intent is a ‘step to be taken cautiously’ even under the best circumstances. **Filing deadline**. Always in some sense arbitrary. Don’t want to embark on aimless voyage.
    - **Dissent:** text does NOT reflect the ***intent*** of congress. “prior to Dec 31” is at least ambiguous and at best, a ***legislative accident*** (Scrivener’s error). Totally irrational, trap for unwary, to not include last day of year. Natural focal point for “end of calendar year.” Text is garbled in other areas, and other provisions allow for not plain meaning. Entirely consistent with ***purpose*** of statute.
    - Professor view: not aimless voyage (end of year is natural focal point), but also not irrational to say file on Dec 30 (ppl take off new years eve). Don’t really know why said “prior to Dec 31.” Makes him nervous about Scrivener’s error. Do judges too quickly assume SE?
* *Note: Absurd results about legislative foresight. In theory, SE is about flaw in creation of the text. Not that leg didn’t foresee, but text didn’t capture foresight of x.*

**#Legislative History**

* (1) [Classical – Exclusionary] *Aldridge v. Williams* (1845)
  + Rejected idea that internal legislative documents are admissible. Text is the law. **All we can use is “public history of the time”** (one type of context). *Aldridge* starts to gradually break down.
  + *Church of the Holy Trinity* (1892) (immigration contracts outlawed; English bishop hired for upper east side)
    - **Internal documents are ok, used senate report** (“didn’t have time to insert “manual labor or services; will be interpreted that way”). Not covered by statute, even though case clearly not outlawed by text. “Expressio unius est exclusio alterius.” (Exceptions listed mean all others included). Two absurd results arguments: (1) doesn’t cover brain toilers, (2) doesn’t cover ministers of the gospel.
      * Textualist argument: “labor or services” doesn’t include priest. But why then do you need exceptions?
      * When use absurdity doctrine, it’s not obvious how to read alternative statute. Brain toilers? Or ministers of the gospel? Emphasizes element of judicial discretion in absurdity doctrine.
    - Turns out that SCOTUS was completely oblivious that the senate report was completely misleading.
    - Ever-increasing use of LH after *Holy Trinity*.
* (2) [All In] – *American Trucking* (1940).
  + We may think the language is clear, but can’t know for sure until we look at LH 🡪 just evidence. Judges will ***weigh it as appropriate***.
  + By 1970’s, LH had become dominant source of statutory interpretation. “LH is ambiguous, so we’ll turn to statutory text.”
* (3) [Plain/Ordinary Meaning] – *Ceminetti* (1917)
  + Judges bound to adhere to plain/ordinary meaning of statute unless it is:
    - (1) clearly ambiguous or (2) absurd.
  + Preferred rule of the court today is ***ordinary*** meaning unless there is term of art at play. Reluctant to move off ordinary meaning. If legislators use ordinary meaning, they’re responsible for that meaning. Not entitled to private language. Response to American Trucking argument that you can’t determine ambiguity until we see everything.
* History now switches between approaches (2) and (3). Both allow LH in sometimes.
  + [Hierarchy Of LH Sources]
    - Committee reports – most visible. Most reliable.
    - Sponsor statements – special weight b/c sponsor most likely to know details of the bill, but doesn’t reflect consensus of CR.
    - Hearings
    - Post-enactment
      * Ratification – congress is acting
      * Acquiescence – congress is silent after judiciary interprets. Shows that congress liked it? Majority view is that acquiescence rests on a false premise.
      * Bulleted Nonsense: assertion into the record after vote.
* [Textualist Two Critiques Of LH]
  + ***Reliability*** (Scalia): LH may not be representative of the whole law-making body meant to say.
    - *Blanchard v. Bergeron* (Dist court awarded Blanchard $7500 in fees under 42 USC §1988 which provides a court “in it’s discretion, may allow a reasonable attorney’s fee” to the party that wins in federal civil rights action under USC §1983. App court reduces to $4k ruling, that 40% contingent-fee arrangement w/ lawyer puts cap on fees)
      * Justice White (majority): Look at LH, there is no cap. House & Committee reports refer to three district court cases (decided before bill) and said “applied directly.”
      * **J Scalia (concurring):** Congress is elected to ***enact statutes*** rather than point to cases. No one reads committee reports. Purpose was to **influence judicial construction**. LH is neither compatible with judicial responsibility nor conducive to a genuine effectuation of congressional intent. ***Committee reports are unreliable evidence***.
        + What’s Scalia’s problem? Why do congress need to read committee reports? Aren’t there incentives in place to keep staffer’s actions roughly in line with congressperson’s preferences? Well, incentives stronger for statute than incentives for reports.
        + Holds legislator accountable.
  + ***Formality*** (Easterbrook): LH is NOT the law. Constitution says what is law 🡪 text. LH has no formal standing. Legislators acting outside their office.
    - *Continental Can Co. v. Chicago Truck* (post-enactment LH; one senator wrote “substantially all” means 50.1%)
      * Text of the statute, and not the private intent of the legislators, is the law. Only the text survives complex process. Easy to announce intents, hard to enact law. **Constitution says only text is law**. Shouldn’t allow private legislators to substitute meaning.
        + LH might help, but in this case there is a perfectly conventional type meaning. One statement against is unreliable.
  + These two strands start in 80’s, gather force. Currently, minority is self-described textualists. But it has been extremely influential b/c now most ppl say “text is place to start,” and “LH is not the law,” etc. Most of the court will look at LH, but limited. Textualism (text is place to start) with two exceptions:
    - (1) Ambiguity that cannot be resolved any other way.
    - (2) Absurd results situation.
  + AV: Formal view is hard to make work. Needs to be more complicated than Easterbrook portrays b/c there are many things that are valid that do not go through legislative process, e.g. dictionaries, canons of interpretation, presidential signing statements.
    - Basic move: principle is that the only documents legislators are entitled to make are legal texts. Legislators have no constitutional authority to generate documents such as committee reports. **Problem:** why does person who creates dictionary have any more authority?
  + AV: Reliability is stronger critique. Hard to understand historical legislative process works and how document was generated. Best objections of LH are practical and pragmatic. Formalist critique doesn’t really get where it wants to go.

**#Canons of Interpretation**

* Canons naturally become more important w/ the rise of textualism. More you exclude LH, the more useful other sources become.
* Two types:
  + **#Semantic Canons** – built in normative defense. Can’t use language w/o semantic canons. Can’t help.
    - **“Expressio unius”** – expression of one is the exclusion of the other. “Except for…” implies no other exceptions.
    - **“Ejusdem generis”** – in a list, common characteristics applies to broader term at the end.
    - **“Noscitur a sociis”** – know it by its companions. List of words, you can figure out what one word means by looking at common properties of the list.
      * “exploration, discovery or prospecting.” Discovery of new drug qualify? SCOTUS: doesn’t qualify. All about land/getting stuff out of the ground. What about canon that says taxpayer benefits from ambiguity?
    - **Principle against surpluses:** construe statutes that every term/clause has ***independent work*** to do. Don’t want one term to be subsumed w/in another.
    - Are semantic canons really canons? Or are they just common sense way of understanding language.
  + **#Substantive Canons** – not language based. Extrinsic principles of the legal system. Much more normatively controversial. Not voted on.
    - *Nix v Hedden*: tax statutes should be construed in favor of the taxpayer (old canon; doesn’t really have force today)
    - **Rule of lenity**: where statutes are ambiguous 🡪 construe in favor of criminal defendant.
    - **Constitutional avoidance**: where statutes are ambiguous, construe them so as to avoid having to face and decide a constitutional question.
      * Do we start with substantive canons or semantic canons? ***Order*** in which they are applied may make a big difference.
  + Theoretical issues
    - Where do courts get authority to use canons?
      * Naturally used for semantic cases. Hard to escape their use. But much more of a problem for substantive canon 🡪 where do courts get authority to use canons? Most of them are NOT statutory enactment. Same with dictionaries and LH.
    - Canon’s pervasive indeterminacy
      * Both majority and minority uses rule of lenity in ­­*Smith v U.S*. Hard to know when the triggering conditions of canons are met (clear vs. not clear?).
    - Dueling canons
      * What to do when canon’s disagree? Which to apply first? How to decide weights or priorities to canons?
  + How to apply canons? Practiced based.
    - Generally give priority to semantic canons.
    - Llewellyn: for every canon there is a counter-canon 🡪 canons are useless.
      * Rejoinder: maxims of conduct often come in opposed pairs. Not useless, but dependent on context.
* *McBoyle v. United States* (motor-vehicle theft act apply to aircrafts?; Holmes reversed lower-court conviction, arguing fair warning should be giving when including something not in the common meaning, even if it falls into statute’s purpose)
  + (1) **Text and semantic canon arg.** – everyday speech, “vehicle” calls up the picture of a thing moving on land. And, ejusdem generis (read catch all narrowly to have characteristics of other members of list)
    - Rejoinder: categories not about land vehicles, but about free-ranging vehicles. Also, catch-all is specifically written broadly?
  + (2) **Legislative silence/inaction arg**. – congress knew about airplanes when law enacted. Could have put “airplane” in.
    - Rejoinder: so what? Maybe they didn’t say “airplane” b/c they assumed it was covered by the language.
  + (3) **Rule of Lenity arg.** – regardless of whether criminal reads statute or not prior to act, the legislature has duty to make clear to world. Should not construe beyond what is clear.
    - Fair warning justification for rule of lenity. What other justifications for RoL? Presumption in favor of liberty?
    - RoL much more honored in the breach (cases of tiebreaker), rather than the observance (great weight given initially).
* *People v. Smith* (M-1 rife found in truck; is it concealed weapon?)
  + Not covered by statute. Ejusdem generis 🡪 “dangerous weapon” refers to **stabbing weapons**. “Pistol” is not rifle (30 inches or less).
    - **Problem:** Isn’t stabbing weapons line artificial? Serious risk of absurd inclusion.
  + Two different ways to think about canons
    - (1) Help us make policy sense of statutes.
    - (2) Help us get at legislature said.
* Mini Overview of Current Statutory Interpretation of SCOTUS
  + Not one official view. Central tendency = **presumptive textualism**:
    - Every justice says, “We ***begin with the ordinary meaning*** of the statute in its textualist context.” Look at other statutes, whole codes, etc. Ordinary meaning = colloquial meaning. Use OM unless special reason to use term of art, trade, etc.
    - Looking at OM, freely use semantic canons.
    - If there is irreducible ambiguity 🡪 Thomas/Scalia (refuse to look other places; lean more heavily on substantive canons); majority of the court (look at LH, but only at that stage [presumptive textualism])
  + All court believes in absurd results and scrivener’s error. But ONLY use when it is clear.

1. **REGULATION**

**Constitutionality**

**#Non-Delegation**

* [Non-Delegation Doctrine] – not been invoked since 1935 (*Clinton v. New York* was decided on different grounds)
  + **Time-honored constitutional rule:** a delegated power CANNOT be re-delegated.
    - Issue in non-delegation cases: in enacting statutes and giving power to agencies, do they get close enough to above rule? It’s NOT about whether gov can or cannot do something. But whether they can ***allocate*** power **within government**.
    - Congress to agency: “go forth and deal with x.” Is this limited instance of law making? Claim that congress has delegated legislative power to the agency.
      * **Fundamental non-delegation argument** 🡪 we want congress to do X instead of different agencies having the power to do X. Why? Agencies are not accountable in the same way. ***Accountability argument***. Not accountability per se, but a type of deliberative accountability (congress has unique structure/processes). Also, worry about collapse of separation of powers (can take a slippery slope form)
    - Cases first started to challenge in late 19th century. Only ruled on non-delegation grounds once (1935). Prior cases developed, via dictum, tests for non-delegation.
* Basic Tests
  + (1**) “Intelligible principle”** – *J.W. Hampton* (1928). Antithesis is *Panama Refining v. Ryan*.
    - If there is an IP 🡪 there has NOT been a delegation, only a ***statutory grant of power***.
  + (2) **Scope** – *Schecter* (1935) – look at ***sheer scope*** of delegation. Size of the domain. Broader it is, greater our concerns.
  + (3) **Private Parties** – *Schecter*; p. 49 cases. – might be especially objectionable.
    - P. 49 looks like court starts to uphold private party delegation. Delegation to private parties may not be uncontroversial.
    - Due process - *Carter Coal* (1936); *Amtrak*? Not in context of non-delegation, but in terms of due process (not what congress can give away, but who can pick it up).
  + [Relation Between IP And Scope] *Whitman* (2001)– sliding scale for (1) and (2). **Narrower the scope, less of an IP that you need. Broader scope, more of an IP is needed.** 
    - Above is black letter outline, but the practical case law says non-delegation doctrine is dead. No ruling down since 1935. Court has upheld delegations that by any common sense lack an IP at all (e.g. “in the public interest”; “to promote public health”). IP is almost now a legal fiction.
* [Invalidating Delegation] *Panama Refining Co. v Ryan* (1935: “ruinous competition” supposed to have led to depression. Answer: stabilized industries through cartelization. Minimum wages, maximum hours of hour. Quality standards of production 🡪 New Deal remedy. “The President is authorized to prohibit the transportation in interstate commerce” of oil produced in violation of state-imposed production quotas. SCOTUS cuts down.)
  + Unconstitutional. Bare grant of discretion. **No intelligible principle** 🡪 no indication of ***when*** the president was to exercise the authorized power. No guiding language.
    - Critique: is this really a delegation of power? Just b/c president can do something in no way prevents congress from stepping back in.
    - Answer: issue is NOT that congress has ***lost*** its power, but that **another law-maker is created**, one who is not subject to **democratic deliberation, transparency, accountability, and separation of powers** (President would now be making and executing laws). Way our system is set up to create laws through open, compromising/deliberating, democratic process 🡪 intelligible principle doctrine helps to further these goals (separates ends [set by congress] and means [left to agency/executive]).
* [Scope Of Delegation] *A.L.A. Schechter Poultry Corp. v. United States* (1935)(sick chicken regulation; invalidates whole National Recovery Act on non-delegation grounds)
  + Violates intelligible principle doctrine. “Fair competition” is an empty notion 🡪 doesn’t give **enough direction**. ***No limits or scope***. No standards for any trade, industry or activity.
    - Fair competition is blank check.
    - Poultry industry is coming up with what fair completion is (private deliberation)
    - Broad scope: ALL industries. Broader scope 🡪 more specific “intelligible principle” would have to be. “Fair competition” might make sense in ONE industry. But for ALL industries 🡪 basically saying “go forth and do justice/nice things” (central planning).
  + **Three strands after** *Schecter*:
    - Intelligible principle
    - Delegation to private parties
    - Sheer scope might make a difference.
      * AV: *Schecter* court seized with a sort of panic. Saw Hitler’s rule by decree. Overreaction to that possibility. Scope, by itself, should be a no concern. Only first two strands really make sense.
  + Constitutional rule-making: different than bad things happen. After *Schecter*, court went into drastically went in diff direction (bottom p. 49)
    - [Broader Scope = More Intelligible] *Whitman v. American Trucking Associations* (more ozone, more harm; EPA sets at .08. DC circuit invalidates on non-delegation grounds. Why .08? Not .07? Simply deciding how much public health. Should be legislative decision)
      * Scalia: no non-delegation problem b/c of precedent.
        + Dramatically underscores that the court is willing to sustain almost anything as an intelligible principle. Do NOT need criterion to say how much is too much.
        + **Doctrinal addition: broader scope = more specified intelligible principle**.

AV: court not taking intelligible principle seriously. No large social goal defined (how much harm to American people).

* *Amtrak* case: pending. Concerns of a ***private entity*** setting regulation. Amtrak and gov have to **mutually agree**. If don’t agree 🡪 mediation. DC circuit—two branches: for public officials 🡪 “intelligible principle” test (*Hampton*). Delegations to private parties are ***never*** ok. Amtrak is private party. Delegation not ok.
  + SCOTUS: Amtrak ***is*** a public entity. Issues to consider on remand: (1) appointments clause issue. First piece, President of Amtrak board is not appointed by President (problem). Second piece, if standard of Amtrak cannot be set, goes to arbiter (private or public).
  + J. Thomas: wants a more stringent account of non-delegation – unconstitutional delegation if agencies are generally applicable rules that bind private actors (all agency rulemaking would be unconstitutional, but what about adjudication? Not clear)
  + AV: can’t you just hold the legislature accountable for delegating power to private party? Private party strand of *Schecter* will be a new dimension, one not about non-delegation but about due process.
    - New dimension: of those who are delegated power by congress, should it be public or private party?
    - Some of the justices: you’ve got a good argument, but it doesn’t have anything to do w/ delegation. But ***due process clause*** argument: contains restrictions on private lawmaking if it is self-interested.
* **Summary of doctrine:** governing test in “intelligible principle.” Two other threads in *Schechter* that reinforce the test. And *Whitman* says the broader scope, the more intelligible the principle must be.

**The President and the Agencies: #Appointment**

* Appointment Of Officers – mini rules of appointment. Do need to apply in a mechanical way.
  + Not necessarily the case that President needs to appoint officer, if “inferior officer.” Can be appointment by courts or heads of department.
  + But if **principle officer**, need to be nominated by President, by and with the advice and consent of the senate. ***Default process for ALL officers of the U.S.*** Inferior officer process is optional. Not necessary to go to second option (inferior officer).
    - If **inferior officer**, President appoints only if delegated that power by congress. Does NOT need advice/counsel. In ***president alone***.
      * Congressional choice to vest power: Pres alone, courts, head of department.
  + **Employees v officers:** officer wields ***“significant power/authority”*** under laws of U.S. (*Buckley*)
    - How significant is significant? Who knows? Rough common sense
  + **Inferior vs. Principle officer**
    - After *Edmond* and PCAOB (peek-a-boo) case, trajectory is toward two principles:
      * (1) Hierarchical relationship of supervision is **necessary/sufficient** for inferiority. *Edmond*. Repudiates *Morrison*.
      * (2) “At will” removability is **powerful indicator** of supervisional authority 🡪 inferiority. *Free Enterprise Fund*
    - What about deputy AG? Historically thought of as principle officer. But applying the test, he could be an inferior officer. Colloquially a “principle officer.” But constitutionally an inferior officer.
  + Political checks on this problem: congress is not likely to give appointment power of president alone or to AG. Would lose senate consent. Not a live issue
* [Need to Follow the Constitutional Structure] *Buckley v. Valeo*  (Federal Election Commission, had 6 members. President appointed two, with confirmation by a majority of both House & Senate. House and senate appointed other 4)
  + Principal officers are selected ***by the President*** with the advice/consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the judiciary. President appoints judicial as well as executive officers. The mechanism here is**obviously unconstitutional**, and don’t need to decide officer/inferior officer.
    - If principal officer 🡪 unconstitutional b/c house participates. If inferior officer 🡪 unconstitutional b/c president is not appointing alone.
  + **No exception for congress to appoint inferior officers by themselves**. If don’t take one of three options, defaults to Present w/senate model. Why? Clause of distributing powers across executive and legislative so as to prevent **total aggrandizement of one branch**. Founders worried about powers of congress. Congress can’t both ***create and fill*** office. Filling power goes to someone else.
    - Appointments clause is **very mechanical**. Also, sometimes NOT relevant whether officer is principle/inferior.
  + **Officer v. non-officer** = someone who exercises ***“substantial authority of the U.S.”.*** Excludes employees who only do inter-agency stuff.
* [Principle v. Inferior Officer] **Big fighting issue:** when congress puts someone on inferior officer track, and someone argues it should be on default (principal officer) track.
  + *Morrison v. Olson* (appointed independent counsel [prosecutes corruption] by three-judge panel; authorized to exercise “full powers of the DOJ an AG” in conducting investigations and only removable for cause)
    - Counsel is ***inferior officer***. Cited four factors (multi-factor inquiry):
      * 1) Limited duties
      * 2) Limited jurisdiction
      * 3) Limited duration
      * 4) Also, subject to removal by a higher executive branch office (PRINCIPLE OFFICER) AV: if you’re not removable then that’s principal-officer-like; if you are removable that’s inferior-officer-like.
      * AV: *Morrison* is a soupy balancing test that says even **purely executive officers** may be removed without for cause.
    - **Scalia Dissent:** court’s understanding of inferior officer entirely un-rooted in constitutional text. Inferior has parallels in constitution. Inferior = hierarchical relation of inferiority. ***Whether they have superior or not***. Necessary condition 🡪 have to have boss.
      * AV: Not surprised if Morrison gets overruled soon—*Edmond* has repudiated Morrison’s appointments analysis; for removal is still the law but we are moving back to Myers and president’s power is expanding.
  + [Inferiority Dependent On Supervision] *Edmond v. United States* (Scalia) (Secretary of transportation appointed member of the Coast Guard of Criminal Appeals court)
    - Whether one is inferior depends on whether one has a superior. ***“Directed and supervised at some level by…” other officers*** (need NOT directly be principle officers, but could be chain of supervision leading up to principle officer). Inferior b/c of way they’re appointed 🡪 head of a department.
      * *Morrison* factors are NOT a definitive test. Are they consistent? Maybe. Both cases seen as given sufficient, but not necessary. Two ways to be inferior officers. But concern that it leaves very little group for non-inferior officers. If inferior officer path too expansive 🡪 erode the checking purposes of appointment clause?
      * Power to remove is evidence of superior/inferior.
    - *Freytag* (art. 1 judges appointed by Chief Judge of Tax court) – Art. 1 judges ***are*** officers. They perform more than administerial tasks—take testimony, conduct trials, rule on the admissibility of evidence, and have power to enforce compliance, and occasionally render final judgments. NOT “lesser functionaries” (*Buckley*), but exercised “significant discretion.”
  + [Removal “At Will” Indicates Inferiority] *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB)(members appointed by president)
    - Court decides that members are ok (NOT principal officers) b/c members will be required to be removed “at will.” 🡪 **powerful indicator of inferiority** and powerful tool for control.
      * Supports the ***necessary interpretation*** of *Edmond*? “Inferior officer’s are officers whose work is directed and supervised at some level.” Seems like *Edmond* test is **both necessary and sufficient for inferior officers**. But could read the opinion that maybe *Edmond* is not necessary.
      * AV: LAW HAS MOVED STRONGLY TOWARD *Edmond* 🡪 CURRENT TEST. NECESSARY AND SUFFICIENT.
    - Also, SEC ***is a department***. Rejected notion that “departments” are only old ones. Department = ***free standing self-contained entity in Executive branch***. NOT a department if nestled w/in another department

**The President and the Agencies: #Removal**

* [Overview] Constitution is largely silent about removal. 1789, removal is not a central issue. Trying to get the thing set up in the first place. What does constitution say? Impeachment provision. Substantive legal standard 🡪 intended to prevent impeachment for ***maladministration***. NOT about doing a bad job. So NOT sole mechanism of removal (no expressio unis). What then are the other means of removal? **Four theories**—removal should track appointments (Alexander Hamilton); President must be left free to fire officials at will (implicit in “executive power”); power to remove should be by impeachment; and who can fire, and for what reasons, is up to Congress. **Two big questions in case law:** Can congress give itself role in removal? Can congress narrow president’s role of removal?
  + **Two models in case law (neither is purely instantiated):** 
    - **Unitary executive model:** top-down, hierarchal control by president. Emphasis on presidential accountability 🡪 needs control of executive if he is going to be accountable.
    - **Civil service model:** emphasizes that congress should have power to create independent agencies 🡪 top officers are only removable for cause.
      * Case law oscillates b/t two models.
  + *Myers*: at least stands for that **congress cannot participate in removal**. Question is whether *Myers* goes beyond that. The actual opinion was ***unitary executive theory w/ exceptions*** (executive power to remove ***at will***). **Three exceptions laid out** (arbitrary flinches?):
    - Quasi-judicial character, involved in formal adjudication – should be insulated decision maker, prevent “telephone justice.” Can’t reach into case, but can look at series of decisions.
    - Inferior officers can be removed only for cause. But why? Opinion has some garble about appointments clause.
    - “Duties that are specifically delegated…” (don’t worry about this one)
  + *Humphrey’s Executor*: about-face of *Myers*, in accord with ***civil service model***. At-will removal is only for ***purely executive officers***. FTC is quasi-legislative and so cannot be removed at will.
    - Unsatisfying b/c no one knows what “quasi-whatever” means. Non-delegation problem.
    - Case that licenses ***independent agencies*** 🡪 “headless fourth branch”. FTC, SEC, FCC, etc.
  + *Morrison v. Olson* (1988): context for Roberts court today. Two holdings:
    - (1) Independent officer is inferior officer. (probably bad law due to 1997 case)
    - (2) Upholds for-cause removal of independent officer. Change test of *Humphreys*. **New test: whether for-cause removal “unduly interferes” w/ president’s ability to execute the laws**. Extremely vague. What does this mean? Principles to help flesh out: if President has express grant of constitutional power, then can remove at will. Ex. sec. of defense; principle of tradition. Historical core of presidential power involving original great departments.
      * Hard case: EPA.
    - Is *Morrison* good law? Probably for now. *Free Enterprise*. But two levels of removability case. Broad reading: lots of broad language about unitary executive. But would suggest too broad, that *Humphrey’s* is wrong to begin with? Narrow: not trying to overrule *Humphreys*, but trying to prevent expansion of civil service model. Kept in check.
  + After *Free Enterprise Fund* big problem 🡪 what to do w/ administrative judges? (mini art. III judges). Court will likely not declare invalid. But what reasoning? Two outs: (1) admin judges are not officers, but just employees of U.S. (outside *Myers* rational altogether). AV: “Nah! I’m convinced they’re officers.” (2) Adjudication is different. Not w/in the ambit of unitary executive theory. Prevents telephone justice.
* [Executive Power To Remove Executive Officers] *Myers v. United States* (Oregon postmaster; removed by President w/o consent of senate [against statute]; suit brought for back pay)
  + President must have power to remove ***at will*** any **executive officer**.
    - Concerns: President needs ability to control his own officers. Senate shouldn’t be involved in removal. Two theories split when congress is not involved in removal, but President’s power in restricted 🡪 “for cause” removal.
    - ***Unitary executive***: strong reading of *Myers*. Direct chain from president on downward to shape executive. Opposed to civil service model (exception 2 below & *HE*).
  + **Exception 1** [Quasi Judicial]: duties quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. Ex. article I courts. Agency courts, internally decides cases (SEC).
    - Great problem: how do you draw the line between executive and judicial power? Cannot run an executive branch w/o applying law to facts. Taft is trying to draw the following lines:
      * If executive officers exercising quasi-judicial power, president CANNOT reaching into process and decide case. Off limits.
      * President CAN look at a ***series of decisions*** and decide if person is doing job well/not well and can remove.
  + **Exception 2** [Civil Service]: Can limit the power of the president to remove ***inferior officers***, e.g. removal only **for cause**.
    - Top layers of executive branch are ***political appointments***. Don’t want day-to-day employees being swept out every time president changes (career officers).
      * Isn’t this directly opposed to reasoning in *Myers*. Won’t this lead to “yes minister” organizations?
* [Constraining The Executive Power Of Removal] *Humphrey’s Executor v. United States* (FTC head nominated by Hoover to regulate monopolies; Roosevelt came in and had different ideas about unfair competition; statute said can only remove for inefficiency, neglect, or malfeasance)
  + Statute is constitutionally valid. FTC has ***quasi-judicial*** (adjudication) ***and quasi-legislative*** (rule-making) officer so executive doesn’t need full at will removal authority.
    - Doesn’t Roosevelt have argument that “for cause” remove – neglect of duty? But whose conception of duty? Begging the question. If duty is allowed to be whatever the President thinks 🡪 then “for cause” becomes meaningless. Also, since malfeasance (wrongdoing) suggests that for cause removal needs to reach a clear violation between political differences (policy disagreement). SCOTUS has historically taken a ***narrow*** view of for cause qualifications, for above reasons.
    - *Myers* was about a **purely executive officer**.
  + By characterizing the FTC as quasi-legislative, don’t we run into non-delegation issues? Intelligible principle – whole point is to say NO grant of legislative power. Only executive power. Issue goes away if you know what court means by “legislative power” 🡪 not rulemaking. Court means power to do that which **congressional committees** would otherwise do. Not creating statutes.
    - But today, legislative power means “rule-making.” Huge problem. Makes *Humphrey’s Executor* test look really dubious. Bumps up against non-delegation doctrine.
    - Ppl say *Humphrey’s Executor* stands for congress’ power to set up independent officer (independent = for cause protection). Headless, fourth branch of government. After *HE* 🡪 congress sets up bunch of agencies (*HE* licenses their existence), with key features:
      * Headed by ***principle officers w/ for cause tenure protections***. Exercise adjudicative power and later legislative powers. ***“Independent agencies”*** – FTC, SEC, FEC, etc. 🡪 have **for cause tenure protection**.
        + Independent of congress b/c congress doesn’t participate in their removal.
        + Independent from President b/c President doesn’t have power to remove them w/o cause.
      * Multi-member agencies.
  + Hallmark view of conservative legal movement: independent agencies are constitutionally suspect. Two visions: unitary executive model (*Myers*) and civil service model (*HE*).
* [Independent Unless Central To Presidential Power] *Morrison v. Olson* (independent counsel appointed to prosecute criminal activity by senior executive branch officials) (as to appointments side, no longer good law. Repudiated by *Edmond*)
  + Both sides agree he is ***purely executive officer***, but President’s need to control the exercise of that discretion is NOT so ***central*** to function of executive branch that it needs to be at will removal. Ditches *HE*. Court is NOT drawing line between inferior/principle officers for a for cause removal.
  + After *Morrison*, the law is agency cannot be made independent if it ***unduly*** impedes on president’s power to execute laws. But **two guidelines:** 
    - (1) If President has **express power in substance** of power. E.g. department of defense.
    - (2) **History and tradition**. Group of cabinet departments that have been around forever and clearly seen as executive.
    - But modern agencies 🡪 very fuzzy. Not very many cases after *Morrison*.
* [Odd Case After *Morrison*] *Free Enterprise Fund v. Public Company Accounting Oversight Board* (5 board members who are appointed by SEC and removable for cause; court held them to be inferior officers)
  + **Two layers of for cause removal is unconstitutional**. Can’t have officer protected by for cause tenure who itself can only remove a subordinate officer if there is cause. “Result is a Board that is not accountable to the President, and a President who is not responsible for the Board.” Subverts President’s ability to ensure the laws are faithfully executed.
    - Small and forgettable decision? Court goes out of way to say unprecedented arrangement. Funny, novel set up. Won’t restructure federal government.
    - Major decision? Funny mismatch b/c reasoning says President must have power to executive laws. Unitary executive view from *Myers*.
      * Holding is narrow. Reasoning is very broad 🡪 Constitution requires President chosen by entire Nation ***oversee*** the execution of the law. Constitution adopted to enable the people to govern themselves, through elected leaders. The growth of Executive Branch heightens concern that it may ***slip from the Executive’s control***, and thus from that of the people.
  + **Breyer Dissent:** Court is wrong that there are no other examples of multi-layered removal. Administrative law judges (for cause) under two layers of for cause divisions. Roberts says don’t worry b/c ALJ’s are adjudicative power.

**Agency Adjudication—and Prosecution**

* [Overview] More constraints when agency acts like mini-court than mini-legislature. Critical issue: can agencies combine all three powers of government into same office?
  + Art. III – *Crowell*. Important not merely for doctrine (some now bad), but **for its attempt to find lines of accommodation between administrative state and the law**.
    - **Basic idea:** (1) NOT all adjudication has to happen in art III courts (blessing in part of the administrative courts). Reasons of efficiency—sheer volume of cases. (2) But there ***will be*** judicial review. Think about both law (de novo) and fact (substantial evidence test w/ exception 🡪 facts on which the constitutional jurisdiction of the agency depends, if not true, agency wouldn’t have jurisdiction [de novo]). *Crowell*.
      * Both de novo reviews are substantially relaxed in the aftermath.
      * Line between jurisdiction and non-jurisdictional distinction has been declared nonsensical by SCOTUS.
      * BUT fundamental deal remains. Agencies can adjudicate and courts review.
  + **Due Process/SoP issue** – problem is the combination of powers w/in agencies.
    - No general constitutional prohibition for combination of powers at the ***top level*** of agency.
    - Need separation of functions at the ***initial level***. *Wong Yang Sung.* Administrative law judge enjoys for-cause tenure (insulated judge).
    - **Three further prohibitions:** ALJ can’t engage in communications with party w/o other present. ALJ cannot be under supervision of prosecutors. ALJ can’t wear two hats (ALJ can’t do prosecution and investigation).
* [Art Iii Question—Agencies Decide, But Judicial Review] *Crowell v. Benson* (harbors workers comp; question about who decides liability 🡪 executive branch agency or art III court?)
  + Basic move: ***Agencies can decide cases, but subject to judicial review***. Simple division of labor. Judicial needs to review \*\***laws (de novo) and facts 🡪*ordinary facts*** (standard is deferential; need substantial evidence), but ***jurisdictional facts***, facts that determine whether court gets decision or not (de novo review b/c check on constitutional power to delegate case in first instance). Ex. whether it was on water or not (jurisdictional) and whether injury occurred (ordinary? Why would you separate out facts as more important than others?).
    - Attempt to try to lay out the boundary line b/t administrative state and traditional court system. Need charter, set of principles, that gives us boundaries between executive adjudication and courts.
    - Line laid down in *Crowell* has shifted 🡪 **much more cases to agencies**. *Crowell* succeeded in legitimizing agencies through judicial review. But details are all bad.
* [Due Process And Separation Of Powers] – Put the question in either terms: DP 🡪 fundamental requirement of DP is that before life, liberty, and property can be deprived, there must be a hearing before an impartial decision maker. Claim about agencies combining functions is that decision maker is NOT impartial. Keeps on switching its hat. SoP 🡪 the very definition of tyranny is legislative, executive, and judicial functions in one hand. Just what agencies are doing.
  + **Responses:** combination of functions does ***not have to be total***. Can have formal separations w/in an agency (partial separation of functions). Or, legislature takes away life, liberty, and property all the time, e.g. taxes. Why can’t it delegate that responsibility to an agency? Or, *Crowell* arg. that you can take agency decision and get an art. III review (how comfortable we are with this depends on standard of review). Or, practical concerns that have to be balanced against impartiality and separation of powers. If had judicial review was everything, we’d be bankrupt and everything would grind to halt. Yes, we are compromising SoP but we’re doing it in a way that makes sense overall. Or, specialized expertise. Or, a ***statute*** enacted was a combination of powers, reflection of all three branches. Combination wasn’t a departure of separation of power, but a **product** of the separation of powers.
    - Law takes no one view. Doesn’t take one camp or another.
  + [APA And Combination Of Functions At Initial Level] *Wong Yang Sung v. McGrath* (non-citizen who is subject to deportation proceeding; inspector system that inspector would inspect, adjudicate, and prosecute)
    - **Basic rule of DP:** some sort of hearing has to occur, but does NOT follow that combination can’t occur. Funny compromise. For adjudication there is separation of functions in ***initial hearing*** (554d), but NO separation of functions when that hearing is appealed to ***top level***.
      * Constitution requires a hearing before you can be deported from United States. Once requirement is in place, we read it into the APA, then we say APA’s provision apply. NOT the same thing as saying DP forbids the combination of functions. APA contains giant exception to separation of function 🡪 does NOT apply to agency (bottom 750). At top level, combinations can be combined. Later cases have confirmed that DP does not prevent combination at ***top level***.
    - Problem with 554(d)(2) & (3) of APA (p.751). Gov. rejoinder 🡪 554 doesn’t apply. We don’t have give hearing by statute. Court: adds a little bit to 554 “or by the constitution.” Under compulsion of constitution, the proceeding requires a hearing.

**Procedural Vitality**

**#Due Process Outline**

* STEP 1:**Rulemaking Or Adjudication?** (whether an agency is engaged in…; often obvious)
  + Two factors (*Bi-Metallic*):
    - (1) Numbers affected (cost) – if a lot are effected 🡪 **rulemaking**. Just a few 🡪 **adjudication**. How many ppl are participating? (bi-product)
    - (2) General vs. Specific grounds (legislative vs. adjudicative facts)
      * General: “all taxpayers in city…”
      * Specific: “Here is the property assessment on Smith’s property”
      * Legislative: policy-type facts.
      * Adjudicative: facts about specific persons, often regarding facts not publicly available.
    - E.g., *Anacondor* (EPA rule that affected only one firm in county) – dealt with general and legislative facts 🡪 rulemaking.
  + **If rulemaking 🡪** legislative process ***is*** due process. Floor, NOT ceiling. APA will go above floor.
    - Legislative-type procedures used to make rules themselves satisfy due process
    - Statutes (in particular the APA) may, of course, require more of agencies than the Constitution does, so this is a floor, not a ceiling.
  + **If adjudication 🡪** go to Step 2
* STEP 2: **Protected Entitlement?**
  + Two Sources:
    - Liberty: Due Process Clause creates “liberty interests.”
    - Property***: “independent source” required*** (DP clause does not create a federal property interest)
      * i.e. an extra-constitutional one
      * Possible sources include:
        + State Law (*Roth*; *Sindermann*? [Vermeule is not 100% convinced there are no federally protected DP property rights; if a state’s law gets too far out of line with the others, the Court might find a protected property interest anyway])
        + Federal law (*Ridgley*)
        + University common-law? 🡪 “Legitimate expectation of entitlement.” (*Sindermann*)
    - Must “cabin agency discretion” (*Ridgley*)
      * Artful drafting can help the government avoid DP concerns
  + If no entitlement: FAIL
  + If yes: go to Step 3
* STEP 3: **What Process Is Due?** 
  + ***Matthews three factor test:*** (1) the private interest that will be affected; (2) risk of an erroneous deprivation and probable value, if any, of additional/substitute procedural safeguards; (3) burden on the gov of adding additional procedures.
    - Marginal cost-benefit calculus. The Hand formula in a slightly different guise (B < PL).
      * Start with Friendly factors: [FRIENDLY FACTORS] **Judge Friendly’s Ten Elements of Judicial Due Process:** (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) the opportunity to present reasons why the proposed action should not be taken; (4) the right to present evidence, including calling witnesses; (5) right to know opposing evidence; (6) right to cross-examine adverse witnesses; (7) a decision based exclusively on the evidence presented; (8) the right to counsel; (9) a requirement that the tribunal prepare a record of the evidence presented; and (10) requirement that tribunal prepare written findings of fact and reasons for its decision.
      * Agency will provide some number of procedural elements. Person will say, “I want more!” Question isn’t in abstract what they should provide, but should they provide more than what they’re already providing. **Matthews test captures this question** 🡪 if burden on government (B) is less than expected harm to claimant for not doing so (PL) = need more due process.
      * P: probability that erroneous outcome will occur w/o certain components of procedure. L: harm to claimant if error occurs.
      * We want to add components just up to the point when burden is equal to the benefit to the claimant B (third factor) = PL (second factor x first factor).
    - Separate question: who calculates B = PL, court or agency?
      * *Loudermill* strand: process is for the ***courts***. Wouldn’t defer to congress or agency in assessing BPL.
      * *Walters* strand: **“substantial weight”** should be given to government’s definition of claimant’s interest. As long as congress/agencies give **plausible reasons** for balancing procedures, that’s enough. Court will NOT do itself BPL test, but ask whether plausible reasons have been given for the congresses/agencies BPL test.
      * AV: *Walters* is right. Wrong to approach with systematic distrust of agency. Court isn’t familiar with systematic trade-offs involved. Shouldn’t question unless there is evidence that agency is acting in bad way (why reasons are asked for).

**Due Process: Background**

* Five Basic Sources Of Agency Procedure
  + (1) Organic statute creating an agency or vesting it with powers **often specifies applicable procedures**.
    - Often the main source of procedural requirements.
  + (2) Own adopted procedural regulations (beyond what statute, APA, and constitution requires). **Binding** (agency must conform to its own rules).
    - Why do they do this? Think current procedures aren’t good enough (e.g. make more accurate decision). Can undo them by valid procedure.
  + (3) APA establishes **procedural requirements of general applicability**.
    - Often applies on how organic statute sets up agency. APA cross-references organic statute to see how it applies. Interaction between the two.
  + (4) “Federal common law” that are designed to facilitate judicial review. (E.g., the requirement, developed in *Chenery* and subsequent cases, that agencies articulate a sustainable justification for discretionary decisions)
    - Put this one in brackets. Not grounded in constitution or statutes. SCOTUS has been very hostile to federal common law obligations. Nervous to allow DC circuit free reign.
  + (5) **Constitutional due process** requirements may apply.
    - DP places ***no constraints*** on statute and agency **rule making**. For **adjudication**, DP ***does*** place constraints 🡪 basic presumption of hearing ***before*** deprivation occurs, but ill-defined exception to this where costs of waiting is too high. *North American Cold Storage.*
* [More Required If Adjudicative] #*Londoner v. Denver* (1908) (costs of building street in proportion based on amount of property owned; statute required notice, written objections allowed, but no hearing)
  + When decisions are made by **administrative body** that are ***adjudicative in nature*** 🡪 more than written objections is required by due process. Need ***oral argument and presentation***.
    - Court doesn’t say why. Maybe in-person objections are more effective? Makes agency more directly accountable (court suggests that if it was legislature, it would be a different case)? If legislature 🡪 no right to oral proof. You can vote for legislature (substitute oral hearing; check on accountability), but you can’t vote for agency? Why is voting a substitute for oral hearing? Both a public accountability check? Or hearing is a mechanism for deliberation (already found in legislature)?
      * **Two theories:** (1) accountability, (2) inducing deliberation.
    - Does NOT provide for judicial review.
* [More Not Required If Rule Making] *Bi-Metallic Investment Co. v. State Board of Equalization* (1915) (all property values in Denver increased by 40%; party can show up and be in audience, but no chance to speak/file objections)
  + ***Valid political*** response and distinguishable from *Londoner*. ***Generalized rule making, NOT adjudication***.
    - Considerations: number of people affected is large; can vote out of office; sheer cost of allowing all these people due process. Questions: how many people are affected? And what sort of facts are going into the governmental decision?
      * **Policy/legislative facts** (e.g. if we raise minimum wage, will unemployment go up?) and **individuated/adjudicative facts** (about specific ppl). *Londoner* was ***individuated facts*** 🡪 affected on **individual grounds**.
    - Another way to understand diff. between facts: How much private information does the party that wants to participate have?
  + Recap of distinctions
    - (1) Number of people affected.
      * Greater costs argument
      * Legislative v. adjudicative fact argument
    - (2) Provides for a judicial review – want hearings for adjudicative facts but not legislative facts.
* [Adjudication Requires Hearing Within An Agency] *Southern Railway v. Virginia* (1933) (highway commissioner w/o notice or hearing to command railway to take tracks out and build overpass; standard: if arbitrary 🡪 get relief)
  + Violates DP and requires hearing. “Thing authorized is no mere police regulation.”
    - Seems to fall on *Londoner* side of the line (adjudicative facts). But like *Bi-Metallic* there is judicial review. But maybe not ***sufficient*** judicial review (not subject to “general review”). Only about whether commissioner’s decision is “arbitrary.” “There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing.” What does this mean? (1) Arbitrariness standard is inadequate, but if there were full judicial review it would be adequate, or (2) If no hearing before agency, you don’t have access to what you need to show agency is wrong (AV thinks it is this one). And not system that *Crowell* envisioned (IMPRACTICAL).
    - Judicial review is NOT **crucial**. But *Cold Storage* indicates that it goes into balancing.
  + 509 Note 3 – AV things this is wrong. Absent a hearing before the agency, a review could only rubber-stamp agency decision.
  + SCOTUS: in adjudication, the **presumptive requirement of DP** is to have a hearing ***within*** an agency. Need to get ammo to launch effective attack on judicial review. Also, hearing must occur before agency does something bad to you.
* [Exception To Presumption Of Due Process Hearing] *North American Cold Storage Co. v. Chicago* (putrid frozen chicken destroyed; what kind hearing do you get before it occurs?)
  + With respect to some sorts of problems, costs of having hearing before we take property is too great ***in the aggregate***. An exception to presumption of due process where costs of pre-action hearing is too high. **Implicit cost-benefit analysis**.
    - Rules in favor of city of Chicago. They can get hearing ex post. **Problem:** how can you show that destroyed chicken is not unfit? Ex post judicial check is total nonsense. Maybe court didn’t want to be in business of deciding what is a public emergency or not. Court wants no part of determining emergencies.

**Due Process: Protected Interests**

* [Entitlements And “New Property”] *Goldberg v. Kelly* (welfare benefits; allowed to submit written protests and oral hearing afterward, but wanted oral hearing before benefit is deprived)
  + The extent to which procedural DP must be afforded the recipient is influenced by the extent to which he may be ***“condemned to suffer grievous loss”*** and depends on whether recipient’s interest in avoiding that loss **outweighs the gov interest in summary adjudication**. Needs hearing rights ***prior to*** termination.
  + Like *Londoner*, but different b/c not taxing current property, but declining to provide future benefits. Or, harms we are inflicting are much greater? Or maybe distinction is b/c it’s rulemaking (see DP outline). Two most promising distinctions: (1) idea that it is a subsidy rather than a penalty (gov. refusal to grant privilege rather than taking a right); and (2) *Londoner* taking away something you already have, and *Goldberg* is gov refusing to give something. Fight in *Goldberg*: are these distinctions valid?
    - Court repudiates distinction between right and privilege. “Extent to which procedural DP must be afforded to…grievous loss.” 🡪 repudiates second distinction. What ***isn’t*** *Londoner*?
    - Benefits are a matter of ***statutory entitlement*** for those who qualify to receive it. Different than person just walking in and demanding money.
    - What is the role of brutal need or grievous loss? What triggers due process ***is statutory entitlemen***t. Creates ***legitimate expectation***. BUT, *Arnett v. Kennedy* (“bitter with the sweet”). Cannot have an expectation when statute lays out procedure. And people’s expectations may be way out of line with what the law affords. **Rehnquist goal: all due process is cut off by statutory provisions**.
    - *Loudermill* (current law): **entitlement substance** comes from statutes, but **DP procedure** comes from constitution. Statute CANNOT override due process requirements of constitution.
  + Two entirely distinct models of DP going on:
    - **Rehnquist:** DP requires statutory entitlements have to be respected by agencies/executive. If they are, then DP requires nothing more. DP is historically connected with magna carta 🡪 law of land clause (fundamental obligation of executive was to comply with parliamentary statute). No grounds for DP beyond statute are required. *Arnett* is NOT the law.
    - **Powell/*Loudermill*:** Constitution itself ***speaks to process***. If substance is provided by legislature, then up to judiciary to decide how much process is required. There must be ***substantive*** entitlement to trigger due process. Just like *Londoner*.
* [Look At “Nature” Of Interest At Stake] *Board of Regents of State Colleges v. Roth* (Roth hired as one-year assistant professor; end up term was not hired and not given a reason; brought suit arguing failure to rehire violated constitutional rights because failure to give reasons or opportunity for hearing violated DP)
  + Property, unlike liberty (some privilege, not a right), is NOT created by constitution. Rather, they are ***created and their dimensions*** are defined by **existing rules or understandings** that stem form an **independent source** such as state law (*Goldberg*). Nothing in this employment contract or Wisconsin law that gives him any entitlement.
    - Why is property (life, liberty, and property) rights coming outside the distinction? Maybe we have rights/privilege distinction for property as well? Recreated rights/privilege distinction through statutory entitlement.
    - Old/new property distinction. At common law, new property classified as privilege, not right. *Londoner* is classic, old property interest. *Goldberg* 🡪 we want new property treated as old property (no privilege/right distinction). Court gets nervous that rational has no outer bounds, sweeps in everything. **Cabins it by saying there must be *positive source of law* that gives entitlement.** “Property” in constitution is NOT a source of entitlement. Irony 🡪 in attempt to cabin *Goldberg*, they **destroy it** by recreating rights/privilege distinction. Ended up going in a circle.
* [Entitlement Created By Legitimate Expectations – University Common Law] *Perry v. Sindermann* (teacher employed in Texas state college system for 10 years, series of one-year contracts; after involved in public controversy, board decline to offer him another contract—no hearing or statement of reasons was provided; Sindermann brought suit arguing it was retaliation for free speech exercise)
  + Like *Roth*, but court said “common-law” of university might have **given legitimate expectation of entitlement**. Remand to see if he had substantive entitlement.
    - *Sindermann* displays impulse that if state law is defeating ***legitimate expectation***, then there is property. ***Presumptively*** state law defines entitlements, but there is judicial review to **impose entitlement based on legitimate expectation**. If state law tried to define something as clearly property, then there would be some federal judicial oversight of that.
  + [From Book] *Goldberg* Two-Step:
    - (1) Determining whether the interest that has been deprived is protected liberty or property—turns on a “categorization” rather than a “balancing test”; an interest **must be of a certain type** (rather than weight) to qualify for due process protection.
    - (2) Determining what process is due—***requires balancing***.
  + Cases since *Roth* and *Sindermann*: confirm the so-called ***“entitlements doctrine.”*** For constitutional purposes, “property” is created and defined by nonconstitutional law. Absent an entitlement—some legal constraint on the reasons that the state can take something (job, benefit, license)—there is NO protected property interest. Thus, DP does NOT apply to ***discretionary deprivations***.
* [Not Entitlement] *Ridgely v. Fema* (Stafford Act authorized executive to provide housing for Katrina disaster victims; recipients of rental assistance whose payments had been terminated sued)
  + Statute says President ***may*** provide housing, but doesn’t have to. No entitlement. No property interest. Statute written entirely in ***permissive terms***.
    - Is it really supposed to be this easy? After *Goldberg* and all the other cases? Why does the court just recreate *Arnett*? This case is super Arnett, folds the process into the entitlement “language.” Under current law, courts say substantive entitlement means that there is no entitlement unless relevant statutes ***“cabin the discretion”*** of officials. If not, no due process entitlement. But *Sindermann* is hard to explain on this theory. Sense of entitlement does NOT often track what law technically provides. Implies that (1) “cabining of discretion” test cannot be the only test; and (2) there will be backstop, minimal judicial review to see if ***legitimate sense of entitlement was created***. Black letter law that statute creates property entitlements is only 90% correct.
* *Arnett* Doctrine Of “Bitter With The Sweet” Firmly Rejected In *Cleveland Board Of Education V. Loudermill*
  + “Property” is NOT conditioned by the statutes procedures. Misconceives the constitutional guarantee. DP clause provides that certain substantive rights—life, liberty, and property—**cannot be deprived** except pursuant to constitutionally adequate procedures. The categories of ***substance and procedure are distinct***. If not, clause would be a mere tautology. DP is conferred, NOT by legislative grace, but by ***constitutional guarantee***. Legislature may not deprive such an interest, once conferred, w/o appropriate procedural safe-guards. Once DP applies 🡪 ***answer is NOT in the statute***.

**Due Process: What Process is Due?**

* [Balancing Test] #*Mathews v. Eldridge* (1976) (issue: whether DP requires that prior to termination of social security disability benefit payments the recipient be afford an evidentiary [oral] hearing? P allowed to present medical evidence, third party physician evaluated him also)
  + A full trial-like hearing is NOT required before every deprivation. Necessary for some instances (like welfare as in *Goldberg*).
    - Here, the primary thing that will be relied on is medical records and assessments, which do **not benefit very much** from an in-person hearing.
    - And the hearings are likely to **add significant expense and delay** in the system
    - We should give at least ***some deference*** to agency decisions about what procedures to use, since agency officials are the people chosen by congress to create these procedures—especially as here where the procedure they designed ***does*** give many rights to appeal.
      * How much deference do we give agencies in setting procedures? *Mathews*: “**substantial weight** must be given to the good-faith welfare programs”
  + ***Matthews* test (balancing three factors to determine what DP requires):** 
    - (1) “First, ***the private interest that will be affected*** by the official action;”
    - (2) “Second, the ***risk of an erroneous deprivation*** of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and”
      * **Marginal analysis:** how much more accurate will processes be if we add one more safeguard?
      * In *Mathews*, written medical evidence was sufficient to establish the plaintiff’s medical state, whereas the determination of wealth in *Goldberg* is far less clear
    - (3) “Finally, the ***government’s interest***, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”
      * Is the government’s interest only accuracy?
      * What interests, besides cost? *Goldberg* says we don’t want the “social malaise” of unjustified termination, but that doesn’t show up in this case
      * Interest in providing as much benefit as possible, which is only possible with fewer hearings
      * Balancing accuracy against cost across the array of cases in the system, not the rare cases.
  + **Brennan dissents** b/c terminating the disability payments can create a large hardship (emphasizing factor 1).
  + **Why are judges making these decisions?**
    - “Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, *not the rare exceptions*.” (Emphasis added)
  + **Vermeule: what it ought to be (and largely as it is)**
    - What the justices should ask: Has the agency given cogent reasons (rational, reasonable explanation) for its processes? Has the agency balanced the interest and given some sort of reasonable justification? If it has, then that should be the end of the case. Very different than justices saying, “well, what *should* the procedures be here?”
    - Actual law is probably a mix of this and judicially prescribed procedures
* [*Matthews* Applied] *Scweiker v. McClure* (1982) (and other cases on p. 690-91)
  + You can get a hearing to decide your insurance claim over $100, but the hearing officer works for the insurance company
    - This ok because the added value of having a gov official do it is **not very great**
    - After all, the hearing official has to be “qualified” and “have a thorough knowledge,” so that should be enough.
* [*Matthews* Applied] *Walters v. National Association of Radiation Survivors* (1985) (Congress’s idea from the post-Revolutionary honor: Veterans’ benefits should not be “lawyered-up;” keep it as honorable and non-adversarial process as possible. After the Civil War, Congress limits attorneys’ fees in Veterans’ Benefits cases to $10. Worried that veterans will be exploited by attorneys.
  + Court (Rehnquist) upholds $10 limit (basically rejecting a veterans’ ability to hire a lawyer *with his own money*). Government has ***legitimate interest*** (protecting veterans’ interests) in the informal, non-adversarial process. “It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies DP. Not about conserving money.
  + Why does the government get to say lawyers would ruin the process? AV (echoing Stevens’ dissent): sounds Orwellian. Only possible answer seems to be that veterans’ benefits are different.
    - All of these cases are based on assumptions about the agency’s motivations
      * *Goldberg* was very suspicious
      * *Mathews* was more charitable
      * *Walters* was even more charitable than *Mathews*
      * AV: *Mathews* and *Walters* have the better approach, reflect a high degree of deferring to agency.
        + In all of these cases, the government is trying to give away money, not come tax you; there is some serious political support for these benefits which means the agencies have a large pool of believers from which to hire. Mistake to see agency’s motive as trying to deny benefits and would be throwing away good info if you ignore what agencies think should be the design of their procedures should be.
        + **How it ought to work:** for benefits programs, agencies should get the benefit of the doubt unless there is evidence to the contrary; they should be presumed to be fairly balancing the agencies institutional interests and those of the recipients.
        + The way to check this is to ask the agency for a statement of reasons. If it has cogent reasons 🡪 that is enough. ONLY IF the agency cannot explain why it designed the process the way it did should we question them and be suspicious.
  + Attorneys make little statistical impact on outcomes
    - RED FLAGS: selection bias (people who get lawyers had a harder case; appellate statistics may be a bias)
    - AV: junk statistics
  + AV: Congress is paternalistic with veterans; assumes they know better what is in veterans’ best interests than veterans do.
* **Current State Of The Law**
  + After *Loudermill*, ***substance* is for agencies/legislatures** and ***procedure* is for the courts**; but *Matthews* and *Walters* show a more nuanced story that courts are pretty deferential to the agencies, in effect asking if the government has a good reason for affording the level of process it sets.
    - So NOT true that courts just look at Friendly’s list of hearing elements and decide which are required. They defer.
  + **Three Takeaways**
    - (1) Trial-type hearing is NOT always needed before benefits are terminated
    - (2) Process that is required is a program-specific balancing of the *Mathews* to determine which Friendly factors are required
    - (3) Previous is done with substantial deference to the agency b/c we believe (somewhat covertly) they know what is best

**The Chenery Principle**

* [No Post Ad-Hoc Rationalization] *SEC v. Chenery Corp. (I)* (Chenery’s company is forced to reorganize, wants to retain control of company so went out on open market and bought a bunch of shares during reorganization [no insider trading or funny business]; SEC said conflict of interest and couldn’t transfer share into new company by using equity common law)
  + **No post hoc rationalization by agencies**. Only holds for ***discretionary decisions***. Doesn’t apply for required actions (reasons don’t matter there). Overturns SEC b/c they relied on ***judicial decisions*** that were wrong. Court will use the **reasoning employed** by the agency.
    - In appeals, court often affirms while disregarding the reasoning. Why is it different here? Why does it matter if test we used was technically wrong if the outcome would be the same?
    - **Issues:** did Chenery’s have an adequate opportunity to present their case if the reasoning used in court is different than in original decision? Maybe there’s an ex ante deterrent effect after Chenery I. **No bait and switch allowed. Need to provide general rules up front**. Will this lead to excessive rationales up front? And, like jury findings, the court maybe doesn’t have authority to decide grounds of original decision. Legislature wants the SEC to decide grounds (and maybe not when they’re in court trying to win).
  + AV: way to understand *Chenery I*. Point is really about ***legally authority*** 🡪 “The grounds upon which an administrative order must be judged are those **upon which the record discloses that its action was based**.” Allocates power between **lawyers and policy professionals**. NOT about courts v agency.The determination is NOT in the authority of the court, but in the SEC. But why is this relevant when SEC is standing right in front of them? Response: not really the SEC, but now a lawyer is trying to win case. Post hoc rationalization developed in litigation is NOT what congress wants from agencies. NOT real decision-making. **Court wants agency professions to decide independent rationale w/o distraction of litigation or conflict or from separate authority.**
    - Frankfurter than says that there needs to be some ***legal rule*** of SEC to find against Chenerys. Strongly implies SEC has to engage in **rulemaking** (mini statute that governs going forward). Would great news for Chenerys b/c the new rule wouldn’t be retroactive.
  + Remedy: vacates decision and remands issue back to SEC for a new round of adjudication.
* SEC Decision On Remand
  + Ignores Frankfurter and do NOT engage in rulemaking, but ***adjudication***. Use original Public Utility Holding Company Act. Frankfurter said you can’t use common law, but can use own rulemaking, but Frankfurter forgot about original act.
* [Adjudication And Retroactivity Ok] *SEC v. Chenery Corp. (II)* (new members of the court)
  + Murphy: ***Two possible paths forward for agency*** – decide by case by case (like common law) OR make general rule (Frankfurter suggestion). The ***choice itself*** of which path to take is **within the special expertise/insight of SEC.**
  + [TAKEAWAY 1] **Rule of Chenery II:** the choice made between proceeding by general rule or by individual, ad hoc litigation is one that ***lies primarily in the informed discretion*** of the administrative agency. Agencies have power to precede EITHER by ad hoc (adjudication) or by general rule (rulemaking) subject to ***very deferential treatment*** of the court.
    - Agency knows better than it’s a one-off case or general pattern. Only ppl that will know enough to make that decision.
    - **Two concerns:** (1) might be a lot of homogeneity in the environment that will make a rule appropriate; (2) or the agency might need time to develop experience to know (1) [agency might make a mistake prematurely].
  + [TAKEWAY 2] Agency can engage in adjudication as ***long as benefits outweigh costs***. What to do about the Chenerys? PP: SEC decision is **retroactive**. Court: (1) ALL matters of first impression have a ***retroactive effect***, whether the new principle is announced by court or by an administrative agency 🡪 common law courts **do this all the time**. In Chenery case, there ***is*** a statute in place (so not as bad as pure common law). (2) Yes, there is harm to the Chenerys, but this is ***overbalanced*** by benefits.
* *Chenery* Review
  + T1 – PUITCA Sec 7 & 11 “fair and equitable” vs. “harm to investors” (very broad statutory powers for SEC)
  + T2 – Chenerys go out on open market and buy enough stock to keep control of reorganized market.
  + T3 – SEC order 1 (adjudicative determination) upon equity principles. Say it is inherently conflict of interest. Order leads to disgorgement of stocks (costs + interest). Chenerys lose controlling interest.
  + T4 – *Chenery I* (1943). No post hoc rationalization by agencies. Only holds for ***discretionary decisions***. Doesn’t apply for required actions (reasons don’t matter there).
  + T5 – SEC order 2. Directly applies PUITCA Sec 7 & 11.
  + T6 – *Chenery II* (1947). Two important holdings: (1) Sustained SEC decision to proceed by order, NOT by rule; (2) “retroactively” is ok so long as balance of harms justifies it. Not true retroactivity b/c SEC used PUITCA that was enacted ***prior*** to its decision. It is retroactive in the sense that the act was a sort of blank check. Contentless. Doesn’t seem fair to Chenerys. AV: Real villain is congress who passed an act that lacked specificity (delegation is so open ended).

**#APA Procedure**

* Hinge Points Of APA Procedure:
  + (1) **Rulemaking and Adjudication** – presumption that ***agencies can do either*** (*Chenery II)* (and agencies are presumed to have power to rule make under *National Petroleum*).
  + (2) **Informal and Formal** –553 and 554 say ***formal rulemaking is triggered only where organic statue says so*** (says “record” and “hearing” or substantial equivalent). Under *Seacoast*, even though “record” was absent, the court said formal is required (for adjudication, formal is default). Flash forward to *Dominion Energy* and we get very different world. Language in the organic statute is subject to *Chevron* 🡪 **unless statutes are clear, agencies are free to interpret them in any reasonable way**. “Hearing” can have a range of meaning. Therefore, we defer to agency to what “hearing” means and whether formal is required. Outraged Breyer generation b/c seen as deferring to agencies on APA. Response is no, just deferring to organic statute. AV: both are half right; about the ***interaction*** between APA and organic statute.
    - Now, most courts follow *Dominion*. On the record vs. off the record (what legislature does – open ended information inputs then unstructured decision). Courts say if they want a record they should say “record.” Institutional thought behind *Dominion* interpreting substance of organic statute and interpreting the procedural requirements of organic statute are practically intertwined.
    - Can streamline formal rulemaking (paper rulemaking instead of oral cross-examination) as long as ***no party is “prejudiced thereby.”*** But won’t know if court will find that no party was prejudiced.
* [Trend To Encourage Informal Rulemaking] *Chenery II* (1947) (up to agency, and not court, to determine whether to use rulemaking or adjudication)*; Texaco* (1964)*; FIC v. Petroleum Refiners* (1973) (octane ratings are bad; applies rule in subsequent adjudication; have authority to rule make unless clearly forbidden)*; Florida East Coast* (need both “record” and “hearing” or substantial equivalents to trigger formal rulemaking under 553)(1973)🡪 all part of trend to encourage agencies to engage in rulemaking. Old cases, the center of the action is formal adjudication. After APA, and in 60’s and 70’s, process in which courts interpret APA to allow/incentivize informal rulemaking.
  + **Four limits for agencies:**
    - (1) If statutes are clear, then agency has to follow
    - (2) Under DP (*Matthews*), court retains authority to strike down procedure
    - (3) Courts get no deference in interpreting the APA (*Dominion*). APA is not organic statute.
    - (4) Substantive constitutional limitations.
* [Counter Reaction] – counter move to above trend. Mostly coming from lower courts, especially DC circuit.
  + (1) [Interpretation of 553, *Nova Scotia*]**553 “paper hearings”** – But it is a contradiction to say there is “record” in informal rulemaking. Court use idea that to give substance to explicit requirements of 553 **requires implicit comment**. “Meaningful comment” requires including documents. W/o it, all you’d have is speculation. AND, besides *Nova Scotia*, there is the **“logical outgrowth” rule** 🡪 supposed to say that if the final rule is too different than proposed rule, it’s not valid under 553 (need “fair notice” for comment to be meaningful). E.g., *CSX Transportation* (p. 567)(1 year period changed to 4 in final rule). Would be burdensome to have companies comment on every possible dimension. Good to have agency flag the issues that are on the table? Two points about LO (less like legislative procedure or more like paper formal hearing):
    - 1 – Touchstone for “logical outcome” is more about ***reasonably foreseeable***. Rough rule of thumb: agency can change the answer, but it cannot change question/subject.
    - 2 – what is the rule about level of generality? What is “subject”? Specific factors, or general topic? Problem from the agencies point of view is that it is unclear on what judge considers the same subject. Incentive for agency to **flag everything**.
  + (2) **706 “hard look”** – 706(2)(a) says court shall said aside agency decisions that are “arbitrary and capricious.” Interpret that language to say that court will take “hard look” at agency’s reasoning (has it considered relevant alternative? Etc.). Different than saying agency has to use certain procedures. Judges hoped that indirect effect would be for agencies to add more procedure. 706 is ***textualist statutory hook***. Question as to if it violates *Vermont Yankee* b/c of how much is read into “hard look.” But SCOTUS has supported hard look in at least one case. Probably isn’t going anywhere.
  + (3) **Hybrid rulemaking** – DC circuit especially pioneered body of law in 60s and 70s called HR 🡪 **NOT the law today!** Struck down by *Vermont Yankee* (announces principles that are critical today). HR was a series of cases that said the procedures in 553 are a ***floor but not ceiling***. In particular cases, agency might have to provide more than 553 requires. When “especially important interests” affected 🡪 need more procedure. Interests = health, safety, or environmental.
* APA Procedure

|  |  |  |
| --- | --- | --- |
|  | **Rulemaking** | **Adjudication** |
| **Formal** | 556/7 | 554, 556/7 |
| **Informal** | 553 (esp. 553(c)). N&C. | 555/8 (everywhere) |
| **Excepted** | 553(b)(3) |  |

* + APA says via *Chenery*, you can choose column, there is another dimension governed by the APA (formal, informal, excepted)
  + **#Rulemaking**
    - 553 – massive exceptions. But might be bound by own rules or by their own organic statutes.
      * (b) & (c) – Notice and Comment rulemaking. Written or oral comments up to agency to decide. Need to provide final basis and statement of the rule. Courts have held that implicit in (c) is the obligation to ***respond to comments***.
      * (c) says trigger that decides whether informal or formal is whether organic statute says rules are ***“made on the record after opportunity for an agency hearing.”*** Trial-type procedure. Formal rulemaking is elaborate. Rarely occurs nowadays.
      * (b)(3)(A)&(B) 🡪 **“Excepted” rulemaking**. Allows them to issue rules w/o notice and comment. Very very little applies.
        + “Interpretative rule” – don’t have to go through notice and comment. E.g. “we interpret FTC to forbid X.” Doesn’t have same force as notice and comment rule. But if posted, engine of compliance kicks in. Agency might get a lot of what they want w/o any process headache.
      * 556(d) Can streamline formal rulemaking (paper rulemaking instead of oral cross-examination) as long as ***no party is “prejudiced thereby.”*** But won’t know if court will find that no party was prejudiced.
  + **#Adjudication**
    - 554 – trigger for formal adjudication is exactly the same as trigger for formal rulemaking. If organic statute says what 544(a) says ***“determined on the record after opportunity for an agency hearing”*** 🡪 **formal adjudication** of 556/7. Two big differences between formal adjudication and rulemaking: (1) no option to streamline adjudication (cross-examination, full trial type, etc.); (2) separation of functions (554(d)).
    - 555/8 – **Informal adjudication**. Adjudication = anything that is NOT rulemaking. Might include deciding cease and desist as well as paper vs. email decision. Location of camping, etc.
      * 555(e) – prompt notice shall be given…with brief statement for ANY agency proceeding. 🡪 can’t ignore petition. Have to, at minimum, give brief statement for denying petition. Then you can take that to court.
      * 555/8 applies everywhere, not just in informal adjudication. But most are only relevant to adjudication.
  + **#Rules** – saw that APA defines rules as “an agency statement of general or particular applicability of future effect…”. Generally prospective (sort of). Hallmark is NOT prospective effect, but ***general applicability***. Courts have sort of ignored “future effect” bit of definition. Rather, they’ve imported the *Londoner*/*Bi-Metallic* distinction.
    - **Rules w/ force & effect of law** – rule with statutory force. Binding. **Four ways to make:** 
      * Formal rulemaking
      * Informal rulemaking (N&C procedure)
      * Subject matter exemptions – military/foreign affairs and benefits/management affairs.
      * Good Cause exemption
    - **Rules w/o force & effect of law** – interpretive rule (not binding; stands on whether it is a good interpretation), or rule of agency organization, procedure, or practice (binds agency, but not third actors).
      * Policy statement/binding document is neither rule nor binding.
    - Two visions: Pound 🡪 provides clarity for modern economy. (other one)
    - **Force & effect of law v. not force & effect of law**?
      * Trade off: for **F&E**, you need appropriate procedures or good exemption, but on the backhand, you have advantage of binding rule and Texaco two-step (narrows issues for licensing and adjudication). For **no F&E**, you don’t have to jump through initial hoops, but your guidance document or whatever doesn’t have effect of law and it can always be challenged later (more work on back end).
        + **Starr/Funk Approach:** let agency choose what route to go down 🡪 pay up front or pay later. Courts do not have to decide whether something really is an interpretive or legislative rule. AV: This approach is hard to square with the APA 🡪 it is question for the court to classify interpretive and legislative rules. Courts consistently reject Starr approach. Courts allow arguments that say rule X ***really is*** a legislative rule.
        + **Test:** whether the rule has a legally binding effect. Idea is that an agency’s label should NOT be dispositive. Q: is rule ***behaving*** like rule? **“Legal effects” test**. Factors? Look at how agency describes rule; purports to bind regulated parties (“this is the law, follow it”); whether it binds agency official discretion in enforcement.
  + AV Jurisprudential note: *Hoctor* raises question of distinction between agency interpretation and lawmaking. Posner’s answer is that if agency rulemaking involves an element of arbitrariness, then it is rulemaking, not interpretation. AV: this is deeply misguided. There exists a category of arbitrary interpretation. Arbitrary interpretation is a critical element of interpretation. Nailing something down to particular interpretation. Within range of reasonableness, it is necessarily arbitrary.
    - Concern about agency guideline/document is that they pop out of nowhere as pseudo-law. No formulized process or procedure.
* [Presumed Power To Rule Make] *National Petroleum Refiners Association v. FTC*
  + Agencies are ***presumed to have power to make rules*** UNLESS statute **explicitly forbids it**. FTC ***may*** make “substantive” rules (rulemaking power). Earlier FTC commissioners had said they did NOT have power to make rules, only adjudicate.
    - But *Humphries Executor* already said they had quasi-legislative power? Court draws distinction between legislative and substantive rules. Argument: FTC’s rulemaking power only extends to ***adjudication processes***. Not setting new substantive rules. Legislative powers did NOT mean substantive sense, only the power to do what a legislative committee would do 🡪 hold hearings, investigate, etc. No one thought they had power to make substantive rules.
    - Why does the agency want rulemaking power so badly? If it’s just a precedent, you can always argue for distinction (that precedent doesn’t apply). It is ALWAYS legally available to argue **rule doesn’t apply** OR precedent was **wrongly** decided. If rule 🡪 argument of inapplicability is NOT available. And **cannot challenge rule**. Period for challenge and comment has past. ***Rules bind the agency no less than anyone else until the rule is changed***.And **adjudication can prolong enforcement**. Party not violating any law UNTIL cease and desist order comes. Allows delay. If rule is on books 🡪 immediate and current infringement.
    - Rules are both fair and efficient; binding effect; promote information; provide notice, etc.
    - Put together with *Chenery II* 🡪 agencies have power to use either tool and are presumed to have power to use either tool.
* [*Chevron* Deference For Formal Versus Informal] #*Dominion Energy v. Johnson* (permit expires under CWA; EPA reviews it and Dominion asked for variant and wanted hearing, not just written statement)
  + Even for adjudication, agencies will get *Chevron* deference **whether formality statute in APA has been triggered**.
    - Involved in adjudication (particular case, *Londoner* and *Bi-Metallic*), but 551 says “rule” is general AND ***particular***… Courts have **collectively ignored definition of rule**. Define it same way *Londoner & Bi-Metallic* define “rule.” Tracks general and particular applicability.
  + Statute says “opportunity for public hearing” but does not define “public hearing” and does not contain magic APA words. 1st circuit had earlier looked at statute and said did require formal adjudication. Pre-*Chevron*, looked at history b/c of ambiguous statute. But post-*Chevron*, when statute is ambiguous, the ***agency gets to decide*** whether it means formal or informal. Furthermore, *Brand X* says **if ambiguous and court says one thing, the agency can come along later and say another thing and prevail**.
    - Why this case bothers ppl: first circuit ***already said*** what statute means. Serious threat to rule of law values? Also, unless statute says magic words, it is up to agency where to afford formal hearings? Also*, Chevron* says agencies get deference on own ***organic statutes*** but NOT the APA 🡪 interpretation is **for the courts**. Seems like court is giving deference to EPA on APA. AV: agency is interpreting the ***interaction*** between the CWA and the APA.
      * **Fundamental objection:** *Loudermill* instinct. Agencies shouldn’t have power to decide what procedures apply to them. Can’t allow them to interpret the very thing that is gives them legitimacy.
  + Every circuit except 9th circuit follows *Dominion Energy*
* [Texaco Two-Step] *FPC v. Texaco, Inc.* (gas companies had escalator clauses for increases in oil prices; FPC adopts rule saying they can’t have these clauses, and then dismisses applications w/o hearing)
  + Gas companies under the Natural Gas Act afforded ***hearing that is adequate***. What is “hearing?” Licensing is adjudication. Court said that b/c policy outlawed indefinite price-changing provisions, don’t need to repeat application case by case.
  + **#Texaco two-step** (controls what happens in licensing): (1) making substantive rule of law through notice and comment procedures that outlaws escalator clauses; (2) rule is generally applied and no case-by-case adjudication is needed. ***Precludes hearing on whether rule is inconsistent with statute***. Precludes a category of claims.
    - Only get a hearing if there is substantive legal claim. Texaco two-step ***restricts the scope of hearing***. Splits DP into two steps. Rule challenge, then factual challenge in adjudication. Leaves no room to dispute in hearing if escalator clause is for public good. ***Era of encouraging rulemaking*** – starts in *Chenery I*.
    - There would have been serious argument for company prior to *Dominion* (via *Secose*).
* [Upholds Texaco] *Heckler v. Campbell* (individual with benefits entitlement [disabled social security] that wants individualized procedure)
  + **Three determinations:** (1) if you have disability, (2) what your qualifications, (3) if there are jobs for you in national economy. Grids were solution to variability in oral proceedings of (3). Issue: does Texaco two-step apply to grids? **YES.** 
    - Two-step cuts across the divide between licensing all the way to benefits.
    - **Consistent with due process?** Two answers: (1) substantive rules define your entitlement, OR (2) you did have a full hearing; gov. just divided it up.
  + Both *Heckler* and *Texaco* give agencies **powerful incentive for rulemaking**.
  + Costs of rulemaking? Prior to *Florida*, there was a perception among judges that rulemaking had become out of control. Dysfunctional rulemaking, e.g., peanut butter making.
* [Watershed Moment Of Encouraging Informal Rulemaking] *U.S. v. Florida East Coast Railway* (boxcars accumulated at railway ends; ICC says every day railroad holds onto someone else’s boxcars is small fine; affects railways at end of system more than middle railroad companies; ICC had streamlined formal proceeding w/ paper hearings. Issue: was 553c formal rulemaking trigger ever set off? No.)
  + Two claims (both about organic statute): (1) [Indirect Significance] “Hearing” sets off 553 of APA; (2) [Direct Significance] even if it doesn’t, the word “hearing” requires more process than the ICC afforded 🡪 requires oral participation, cross-examination, etc.
    - For (1) 🡪 textualism. **Doesn’t say “record,” so no APA trigger**.
      * Response: it’s rare for statute to say “on the record.” Hard to believe APA only reserved formal hearing for only a few areas. Counter: ***that’s the point!*** *Florida* is decision **that really licenses current landscape** 🡪 informal rulemaking is prevailing engine of lawmaking in U.S.
    - For (2) 🡪 whether it requires full hearing is determined by whether rate making is rulemaking or adjudication. Ratemaking is rulemaking (*Londoner/Bi-Metallic* 🡪 general rule, applicable to all). Not about monetary liability, but ***generality*** (rests on legislative-type facts, not facts specific to actor). This rule is general rule. Doesn’t matter if affects some parties more than others.
      * **Douglas dissent:** ratemaking is adjudicative, not legislative. Cannot saddle with new rate w/o hearing. Violates due process (traditional pre-*Florida* thinking).
  + *Florida* could be understood as watershed moment where court decides to classify rate making as rulemaking, not adjudication. **Both (1) and (2) pushes agencies towards rulemaking.** (1) says RARELY will you be obliged to do rulemaking formally. (2) says even for imposition of liability on regulated firms, paper hearing is sufficient if done through general rules. Paper hearings are going to be sufficient on basically on all fronts. Series of decisions overturning lower court rulings in favor of rulemaking. Counter attack from lower courts: *Nova Scotia*
  + Organic statue may work ***indirectly or directly***. For direct, look at DP to interpret “hearing” in organic statute. For rulemaking, paper hearing is fine. Controversial part is classification of agency action as rulemaking in *Florida*. Traditionally, ratemaking = adjudication. More important part of *Florida*: 553 and 554 read in **textualist way** 🡪 maximum conditions in which APA triggers formality.
* [Reaction To Shift To Informal Rulemaking] *U.S. v. Nova Scotia Food Products Corp.* (white fish manufacturing arguing against smoking regulation to prevent disease; white fish are different)
  + Comment means ***meaningful comment***. Concise and general statement actually has to be long and reflective of alternatives, disclose the evidentiary and analytical documents relied upon to permit informed and effective comment.
  + PP is like *Florida*: rule is not ***sufficiently tailored***. Notice and comment rulemaking is inadequate. Agency didn’t disclose scientific data they used to make decision. Should have been placed in record. No record was made. Response: but “record” is ***formal***. Notice and comment should be like legislative rulemaking where no formal record is produced. Like making a statute.
    - Attempt to nudge informal rulemaking towards formal rulemaking. Basic argument: is NOT that APA directly requires record in informal rulemaking, but **record is required** ***indirectly*** by things APA does require, such as (1) agency must allow ppl to comment, and (2) agency must **give general and concise statement** for the rule. From (1) and (2), court concludes that record is required for commenting purposes and to make statement and purpose (record provides life and content).
      * Response to SCOTUS pushes rulemaking to informal side.

**Informal Rulemaking and “Common Law”**

* [Overview] *Vermont Yankee*
  + **Narrow holding** (demise of hybrid rulemaking): 553 is a ceiling, NOT a floor.
  + **Other versions**
    - There is no common law of administrative procedure. Not like England.
    - Even broader principle – like *Wong Yang Sung*. APA is like mini constitution for administrative state. It sort of occupies the deal. Congress could instruct agency to do hybrid rulemaking, but Congress must speak clearly when it wants to do so (courts will default to APA).
  + Supreme Court very serious about this; DC circuit less so 🡪 reoccurring cycle of expansion and then SCOTUS slap down 🡪 APA is ***exclusive code***.
* Other judicial modes of proceduralizing informal rulemaking
  + **553 paper hearing requirements** (catch all label to include judicial interpretation of 553). Argument is that these are required to make “notice and comment” meaningful. But legislature model ***is*** meaningful to legislature, and is what the APA intended 🡪 result is an undercurrent against paper hearing requirements (J. Cavanaugh).
    - Disclosure of **studies/relevant info** on which agencies rules rest.
    - **“Rulemaking record”** – all relevant documents
    - **“Logical outgrowth rule”** – final rule has to be a logical outgrowth of posted rule for comment. **Changing the answer = ok. Changing the question = NOT ok**. Also can think about this is terms of foreseeability. If final rule is too surprising, comment procedure isn’t meaningful.
  + **“Hard Look” review** – under 706. Requires that agencies articulate their reasoning and respond to comments. Indirectly it proceduralizes informal rulemaking.
* [553 Is Ceiling, Not Floor] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council* (licensing is formal adjudication on the record, basically cost/benefit analysis; environment groups want one of risks to be taken into account is nuclear waste; agency did Texaco two-step 🡪 made “zero release” assumption for risk. For zero release assumption, assumed “normal circumstances.” Procedurally, had paper hearing plus hearing panel (oral hearing with commissioners). Did NOT allow cross-examination on key document. Environmental groups wanted to examine Dr. who wrote document, formal oral argument, and access to underlying data. DC Circuit said agency had to create a “genuine dialogue.” Didn’t specify what procedures, but gave possibilities. Very unspecific).
  + SCOTUS: Holding is two things: (1) APA 553 is ***ceiling, not floor***. Agencies free to do more, but judges cannot require more. (2) Remand for lower court to take “hard look.”
    - **Concerns Underlying Holding** – (1) incentives of lower court decision to make agencies “procedure up.” Would make it impossible to predict judicial review. **Force agencies to adopt full administrative procedure**. (2) Court gets close to say DC circuit is bad faith judging. Lower court doesn’t like nuclear power, and it is NOT their place to second-guess legislature. AV: not fair to accuse lower court of hiding the ball. Like *Matthews* and *Goldberg* in that there are significant interests at stake. Serious affect interests at stake. Due-process-ish, but not DP b/c rulemaking not adjudication and no entitlement. *Goldberg* is about how serious are the harms. We want more procedures. Rehnquist response: no ish! Either it violates APA or Constitution or it does not. No additional stuff. APA supposed to occupy whole field of administrative procedure. **Textualist opinion**. No free-wheeling purpovist approach.
    - *Vermont Yankee* (1) overturned ***whole body of hybrid rulemaking*** [narrow holding] and (2) there is ***no common law administrative law*** [broader holding]. Explains APA from square one. APA is kind of ***constitution for administrative state***. NOT to be seen as starting point or default rule. Does not authorize common law approach. Remand for the court of appeals to take “hard look.”
  + *Yankee* seems **inconsistent with “paper hearing” requirements**. Judge Cavanaugh of DC circuit – none of paper hearing stuff is in the APA! Counter: but it is **interpretation**, not common law, of the APA. Without interpretation, it is NOT meaningful. Counter (AV): but it ***is*** meaningful in the sense that it is exactly what legislature does and it IS meaningful for them. NOT about meaningful.

**#Exceptions to Notice-and-Comment** (hydraulics of Admin law)

* [Legal Development Note] (1) General trend to incentivize rulemaking 🡪 (2) courts get anxious about informal rulemaking, and therefore embark on proceduralizing informal rulemaking 🡪 (3) raising stakes for informal rulemaking. More costly informal rulemaking becomes, the more beneficial it is for agencies to get within exceptions.
* [APA Exceptions] Huge subject-matter exemptions in 553 (1) & (2). But benefits agencies often bind themselves to rulemaking, however. Procedure exemptions (b)(3)(A)&(B)
  + **§553(a) Subject Matter Exemptions:** doesn’t apply to ***military or foreign affairs functions; matters relating to agency management or personnel or public property, loans, grants, benefits, or contracts***.
    - Ex: management of public lands, the award of gov’t contracts, administration of welfare, disability, education and other grants/loans.
  + **§553(b)(3) Procedure Exemptions:** Except when notice or hearing is required by statute, this subsection doesn’t apply to
    - (A) ***Interpretive rules, general statements of policy, or rules of agency organization, procedure or practice***.
      * **Interpretive:** ask whether a rule has substantive legal effect. **“Legal Effects Test”**
      * **Procedural:** examples of rules governing conduct of agency, allocating authority/assigning duties within agency
      * **Not excluded:** legislative/substantive rule
        + Legislative rule: establishes a standard of public conduct that carries the force of law because it has binding effect
    - (B) But when agency for ***good cause*** finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that the notice and public procedure is **impracticable, unnecessary or contrary to public interest**.
      * Ex of contrary to public interest: announcing consideration of a rule on price freezes would lead to everyone raising their prices before the rule goes into effect.
      * Ex of impractical: time is too short
    - (A) and (B) are doing very different things. (A) stuff doesn’t have force/effect of law. (B) ***does*** have legally binding force (good cause rules).
      * Exemptions to notice and comment are big deal (see 599 bottom – almost half not going through notice and comment).
  + If not exempted under above, it is a ***legislative rule*** 🡪 goes through notice and comment and has force/effect of law. Must be consistent with organic statute.
  + **Force/effect of law rules that are not legislative rule?** Subject-matter exempted rules. “Good cause” exempted rule.
  + **Don’t have force/effect of law?** Interpretive rules (interpret binding law); rules of agency organization, procedure, or practice; policy statement.
* [#Good Cause Exemption] – by its nature, it is shifting.
  + [Contrary To Public Interest] E.g. FAA rule that allows to ban foreign national pilots. Contrary to public interest? Emergency exception. DC Circuit: of course this is good cause. Emergency/time sensitivity exception.
  + [Surprise Is Necessary] Disclosure that agency is even thinking about rule would cause problem. E.g. price controls. Immediate incentive for private firms to jack up base-line prices 🡪 agencies will try to surprise regulated firms. Destroys purpose if announce in advance.
  + [Trivial/Obviously Necessary] Agency places bet that nobody cares.
* [#Policy Statements] *Community Nutrition Institute v. Young* (FDA document issued w/o notice and comment that lays out levels for adulterated products)
  + Rule has the **practical effect of law w/o formal status as law**. If rule has “binding legal effect” and even if agency ***says*** rule is not binding—if it ***acts like it is***, it requires N&C.
    - If want force/effect of law 🡪 must have (1) notice and comment; or (2) good cause. The same document could be BOTH a general statement of policy and an interpretive rule. AV: this rule does NOT (technically) have the force/effect of law. Company can get exception.
  + **J. Starr dissent:** toughen up firms. System guarantees you have challenge now or later. If N&C, you can challenge it then. If no N&C, agency can’t use Texaco two-step. You can always go to court later and argue that you are in compliance with underlying statute (rule can’t bind this argument). Starr approach is NOT law. DC circuit/SCOTUS says the court needs to decide if the rule is ***really*** law. Leads to agency boilerplate that says, “this does not have any legal effect, etc.”
    - AV: difference between Starr and majority? 🡪 Do we access legal effect formally or pragmatically?
  + **Two visions:** (1) unclear statutes make companies bet, and this no way to run an economy. Advantage of admin agencies is that they can put out documents that provide clarity/guidelines. Admin state is pre-requisite to capitalism. Admin state provides rules. (2) FDA wants to make law w/o notice/comment. They know they can’t make rule with force/effect of law, but they have next best thing 🡪 issue document that rests on implicit threat that says, “If you shift above levels, you will be subject to three years of litigation.” This is, in practical terms, law. Provides every incentive to apply. “Formal law.”
  + DC Circuit Test **🡪 “legal effects” test**. Can be satisfied by something that doesn’t have formal effect of law, but requires ***de-facto compliance from regulated agencies w/o notice and comment*** (attempt to circumvent notice and comment).
* [Interpretive Rule] *Hoctor v. U.S. Department of Agriculture* (within acts domain, a pretty blank check for secretary; guidance document [internal memo for inspectors] that says “structurally sound” is 8 ft fence; guy had 6 ft fence. Hoctor’s argument: “memo” is legislature rule that is invalid b/c no N&C)
  + Hoctor’s right. **Procedurally invalid rule**. NOT interpretative rule b/c 8 ft is ***“essentially arbitrary in relation to the general objective.”*** 8 ft, as opposed to 7 or 9 ft, “could not be derived from regulation by a process reasonably described as interpretation.” AV: what does arbitrariness have to do whether it is an interpretation or not? It seems picky to complain about arbitrariness w/in certain range. W/in range, the height will always be arbitrary.
    - There is also a separate question of whether there is a valid interpretation. But NOT what case is about. The objection is about procedure of interpretation.
    - This type of case gives Starr dissent above a lot of appeal. Agency has two options, and we should let them choose which sticker to put on top of documents: (1) legislative rule w/ N&C (do Texaco two-step); or (2) interpretative rule that actors can get exempted from. SCOTUS/DC rejects this though b/c APA textualism clearly says it is not up to the agency to decide where something is legislative or interpretive rule. If walks/talks like legislative rule, it is.

Statutory Authority – *Chevron* Analysis

**#Chevron**

* [Summary]
  + Key question about exceeding statutory authority is ***who decides*** question? Answer right now (simplified form): where there are **gaps/ambiguities** 🡪 agencies have power to fill them in under *Chevron* test.
  + Old distinction of law/fact and was probably embodied in APA 🡪 courts shall make all questions of law. In line with *Crowell v. Benson* approach. But *Hearst* and *Skidmore* introduced different ways of thinking about agency authority and law (before APA). *Hearst* seemed to say just like there are good reasons to give agencies deference on fact questions, there are good reasons to give deference on mixed questions. (1) ***expertise in substance of regulated field***, and (2) ***national uniformity***, better than bunch of courts. AV: suppose all that is true, what has it to do with mixed questions in particular? Couldn’t it spill over to purely law questions? Expertise/uniformity would be relevant to purely legal questions. Rational broader than category it identified. *Skidmore* says we defer to an administrator where there seems to be ***good/persuasive*** reasons to do so. **Skidmore = persuasive deference**. J. Jackson’s factors relevant to persuasion. AV: left courts with confused doctrine for 40 years – no deference, mixed deference, persuasive deference.
  + *Chevron* gives two-step test: (1) did congress **speak clearly on the precise question** at issue? If so, end of case. (2) Is the **agency’s interpretation reasonable**?
    - How does this differ from *Hearst/Skidmore*? Different from *Hearst* b/c it is a **straight legal question**. Goes beyond. Different from *Skidmore* b/c not talking about power to persuade but ***power to control*. Epistemic deference v. authority deference**. Being persuaded by authority (power to persuade) v. letting authority decide, and upholding decision as long as it’s reasonable (power to control).
    - Why would we want to depart from *Hearst*/*Skidmore*? *Chevron* gives three rationales, and fourth from *Hearst*:
      * (1) **Delegation** – thought that law itself has power to give agency authority to fill in gaps. Allows court to magically square *Chevron* with APA. Court exercises function APA provides to decide that the law says agency should fill gaps. Makes *Chevron* ***powerfully attractive 🡪 now official rationale for Chevron***.
        + Scalia response: one searches the U.S. code in vain for delegation. Instead, it is just a default rule, a global presumption. Pragmatic factors—expertise and accountability—that Chevron mentions are why judges indulge this fiction (really driving the train).
      * (2) **Expertise**
      * (3) **Presidential Accountability**
      * (4) **National Uniformity**
* [Pre-*Chevron* History] Has the agency substantively acted within its authority? Where agency can do x, y, and z, how do we know agency is within x, y, and z?
  + [Bench Line] *Crowell v. Benson* – agency gets **deference to fact unless it is constitutional fact**. As to **questions of law, courts will decide de novo**.
  + Change in 1944: [Categories Destroyed] *NLRB v. Hearst Publications* (can national labor review board decide whether newsboys are employees?)
    - Decision of the board is to be accepted if it has ***“warranted in the record” and a reasonable basis in law***. Reviewing court’s function is **limited** when an agency administering a statute must determine it initially.
      * Is this consistent with *Crowell*? Is the question of whether a newsboy an employee a question of fact or law? Seems to be both. Have to define “employee” (question of law) before you decide if newsboy fits that definition (question of fact). *Hearst* is assuming these are intra-jurisdiction questions (so exception of *Crowell* doesn’t apply). AV: Can we understand *Hearst* as saying that the expertise that *Crowell* appeals to ALSO applies to these mixed questions of law and fact? Expertise rationale sweeps more broadly than *Crowell* realized. But couldn’t this also be true for just law? That labor board understands better what an employee is better than judge? *Hearst* sort of destabilized notion of pure law is reserved for the court.
    - Rationales
      * **Expertise** – AV: isn’t this impossible to prevent it to applying to questions of law? Cuts across *Crowell* categories.
      * **Consistency/uniformity** – if agency handles it, won’t have varying legal answers if different jurisdictions. Also cuts across *Crowell* categories. But why not have SCOTUS resolve splits?
      * **Congressional instruction** – congress wanted labor board to decide rather than court? Also disregards *Crowell* distinctions.
        + Above three 🡪 ***destroys Crowell***. Unsettles categories.
  + Two years after *Hearst*, APA is enacted and seems consistent with *Crowell* 🡪 courts shall decide all questions of law.
  + [Not Binding, But Power To Persuade] #*Skidmore v. Swift & Co.* (whether fireman hours count for overtime; agency is not a party of case)
    - Rulings, interpretations and opinions of Administrator are NOT controlling, but do constitute a body of experience and informed judgment that **courts can resort to** (power to persuade). The weight on case will depend upon:
      * ***Thoroughness evident*** in its consideration
      * The ***validity of its reasoning***
      * Its ***consistency*** with earlier and later pronouncements
      * Whether interpretation is ***long standing***
      * Whether congress has ***reenacted the same language*** in the presence of the interpretation
      * The nature of the agency’s ***specialized experience*** regarding the legal question and practice implication
    - *Skidmore* was used to try to cover difference between two case law lines of *Hearst* and *Crowell*. *Skidmore* factors employed to decide which line to apply.
      * Lead to broad consensus that this approach is a mess. Leads to *Chevron*.
* [*Chevron* Deference] *Chevron v. Natural Resources Defense Counsel* (EPA definition of “stationary source” as bubble concept; bubble argued is more efficient b/c foregoes forced reduction from all sources; argument against is statue said every “stationary source” had to comply and would force investment in cleaner technology)
  + Fails under the last two *Skidmore* factors (consistency and length of time). AV: court looked at *Skidmore* factors and found them mushy and cutting opposite directions and decided they needed **new test:** 
    - (1) Decide whether Congress had ***directly spoken to the precise question at issue***. If intent is clear, then inquiry ends. If not clear (statute is silent/ambiguous), then
    - (2) The question for the court is whether agency’s interpretation is ***permissible/reasonable construction***.
  + AV: very different than what had come before. New age. No messing around with persuasive/authoritative or fact/law. For **pure legal questions**, if the statute is NOT clear, then the agency wins. How do we square this with APA and separation of powers?
    - Deciding legal questions ***includes*** delegation to the agency. Solves separation of powers. Is this satisfying? *Crowell*’s thought was unless court decides question of law, we end up with huge bureaucratic system. Cross red line where courts are ousted from public law questions and executive decides law. *Chevron* seems to blithely cross line w/ idea that delegation is a legal question. BUT there ***is*** still a legal stop 🡪 the first party of test (deciding if statute is clear). There is a ***residual judicial check***.
    - But non-delegation problem? Purpose of statute is to clean air and economic efficiency. Congress gave to agency power to strike balance. AV: seems like congress has gestured super broadly, but left all real decision to agency.
  + Justification
    - (1) **Delegation** (see discussion above)
    - (2) **Expertise**
    - (3) **Accountability** – president gets to pick w/in range of acceptable options. And president is democratically accountable. But is this persuasive given the range of issues that are at play in each vote? Is accountability a valid consideration? Don’t we want objective, immune legal arbiters? Does *Chevron* create more congressional responsibility because it puts them on clear notice what happens when gaps are left in legislation?
      * AV: Can all these justifications fit together? Particularly expertise and accountability (seems like two different pictures – PHD’s v. politicians)? Maybe we want both. We try to pick best person (expertise), and then hold then accountable (accountability). And its all relative – compared to what? Judges have no idea what’s going on. Relative to them, agency looks pretty good.
    - **Simple version:** statutes are so complicated, that judges lost confidence in their ability to analyze them

***Chevron* Step #Zero – When does *Chevron* apply?**

* [Overview] Court gives an answer as to when *Chevron* applies: “When a court reviews an agency’s construction of the statute which it administers.” What does this exclude? *Mead*.
  + Settled principles:
    - (1) **Agency “litigating positions”** and positions **articulated for the first time in briefs** are NOT entitled to deference.
    - (2) Agency is NOT entitled to deference insofar as it’s **acting like a prosecutor**.
    - (3) Agency does NOT receive deference if it is interpreting a statute that is **enforced by many agencies** – the APA, for example. (APA not considered to be administered by any agency).
  + Two key things to think about: (a) whether agency is **interpreting own organic statute**, and (b) whether it is **contemporaneous**. If either of those fail, we’re outside *Chevron* typically. \*But congress can create statutory scheme where more than one agency gets *Chevron* deference, but this is not the default presumption.
    - If NOT Chevron (authority deference), we do *Skidmore* (epistemic/knowledge based deference) (judges decide, but allow agency to be persuasive given certain factors).
  + **Decision Procedure – *Chevron* Zero**
    - (A) Am I looking at ***contemporaneous construction*** of ***organic statute***?
      * If yes (to both parts) 🡪 (B)
      * If no 🡪 *Skidmore*
        + Post-hoc rationalization
        + Interpreting APA/criminal statutes
        + Multiple agencies? No general answer; need to look at specific statutory scheme.
    - (B) Was there a delegation to the agency of power to make rules with “force of law”? *Mead*
      * If yes 🡪 go to *Chevron*
        + If agency used **formal, notice & comment, or excepted legislative rules** (good cause and 553 subject matter exceptions—international/military) 🡪 delegation 🡪 *Chevron*
      * If no 🡪 go to (basically) *Skidmore*
        + If agency used **informal adjudication, interpretive rules, or guidances/policy statements** 🡪 TOTC. What circumstances? ***Thoroughness, consistency, expertise, technical/complicated issue***.
* [Contemporaneous Construction And Organic Statute] *United States v. Mead Corporation* (whether day-planners were diaries or not for tariff purposes; agency said yes in letter ruling at port of entry)
  + ***No deference***, even though it *was* contemporaneous and of organic statute. There exist conditions under which agencies don’t get *Chevron* deference even within this core area. Agency gets deference when it ***appears that Congress delegated authority to the agency generally to make rules carrying the force of law*** (legislative rules). Authority can be implicit or explicit.
    - Straight off the bat, *Mead* says *Chevron* is about **delegation** (not expertise or accountability). Makes delegation doctrine official.
  + How do we know when Congress has delegated authority to make legislative rules? ***Tied to APA procedure*** (box below). Fair to assume delegation to legislate if requires formal administrative procedure. X = very good indicator that congress intended delegation and agency gets *Chevron* deference.

|  |  |  |
| --- | --- | --- |
|  | Rulemaking | Adjudication |
| Formal | X | X |
| Informal | X | **TOTC** |
| Excepted | 1. ***Good cause*** (legislative rules that are issued w/o N&C) – lower courts have said they do get *Chevron* deference b/c Congress carved out exemption for procedure. 2. ***Interpretive rules*** – not supposed to be legally binding. Clarify rules that give more specificity. *Mead* says ***no deference*** **as a class**. *Long Island Care at Home v. Coke* 🡪 **TOTC** |  |

* + - AV: What does the procedure have anything to do with deference to legal questions? (class ideas) Provides some process? More deliberative? Maintains relevance of accountability and expertise? AV: all these probably work in tandem. But consider delegation doctrine, if congress is giving authority to agency to make binding rules, let us encourage/incentivize process within the agency that has virtues that legislative process in congress has 🡪 deliberative process, listening to outside parties, etc. X = substitute for world in which congress makes policy choices. *Mead* approach gives Texaco-type now or later choice: more procedure now, more deference later. Less procedure now, less deference later 🡪 fundamental impulse. Adds to *Chevron* a sort of **process-based rationale**.
  + **Grave open questions:**
    - What if it is informal adjudication (everything the agency does except rulemaking, about 80-90% of what agency does)? Does it get deference? *Mead* does NOT say that informal adjudication does not get deference, but you have to do multi-factor balancing test to decide if get *Chevron* deference. Do TOTC (totality of the circumstances). Considerations? *Mead* says: doesn’t purport to have force of law beyond particular party. 10,000 letters issued every year from random officials; doesn’t look like deliberate procedure. Seems implausible, on TOTC, that custom services officials were intended to speak with force of law.
    - What about excepted rules – good cause rule and interpretive/guidance documents?
* [Deference For Interpretation] *Long Island Care at Home v. Coke* (interpretive rule that went through N&C; said “companionship workers” excluded from FLSA)
  + Is it legislative rule b/c of N&C? Doesn’t matter, gets *Chevron* deference either way. (1) It went through N&C 🡪 gets deference. (2) Even if it didn’t, the TOTC suggests that congress wanted it to have force of law. **What are the circumstances/factors?** Thoroughness of agencies reasoning; consistency of prior/later decisions, expertise…. Very much like *Skidmore*.
    - AV: fallen into black hole. Circumstances to see if Chevron applies for interpretive rules are *Skidmore* factors…
  + [Skidmore Factors Applied Twice] *Gonzales v. Oregon* (state AG issues interpretive rule addressing the Controlled Substances Act as it relates to Oregon state assisted-suicide law. Said using drugs for assisted suicide was NOT legitimate medical practice and that dispensing/prescribing drugs for this purpose is unlawful under CSA. Issue: is this valid?)
    - TOTC says no *Chevron* deference. AG has no expertise (law officer). Then basically says, “for the reasons just given, *Skidmore* doesn’t apply either.”
  + P.315 note 5 – Scalia thinks Chevron always applies but the statute is always clear and denies agency.

**Chevron Step #One – Has Congress spoken to the *precise issue in question*?**

* [Overview] Two big picture points:
  + (1) About **rules of statutory interpretation** 🡪 CAN be used in *Chevron* step 1. ***All*** the tools are used. Purpose, cannons, other areas of statute, etc.
    - AV: Court has done a terrible job in explaining how *Chevron* cases are different than ordinary statutory interpretation cases. Lack of distinction between “best” vs. “possible” interpretation. Two solutions:
      * **Best practices version:** if 5/4, then statute is NOT clear. Should engage in a round an updating after first vote.
      * **Hard rule version:** if get 3 or 2 votes, then get *Chevron* deference.
  + (1) #**Major questions cannon:** seed in *MCI*. Wouldn’t congress have said something more clear if they wanted major refashioning of statute? *Brown & Williams* – if it is of major economic/political significance (cuts across whole industry) 🡪 we will **presume agency does NOT have authority** unless congress has ***spoken clearly***.
    - Absent in *EPA*, but is back in supplement case. AV: very much the law.
    - Is this consistent with *Chevron*?
      * Inconsistent: *Chevron* is presumption that gaps/ambiguities = delegation. To presume against delegation in face of ambiguity is to take back chevron.
      * Consistent: *Chevron* is about allocation of interpretive authority. Cannon says as to certain types of questions, we want congress rather than the agency. Not from agency to the court, but agency to congress. *Chevron* and cannon are addressing two different subjects.
* Themes/Problems
  + (1) Problem of **traditional tools of statutory interpretation**. P.284 fn1 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions that are contrary to clear congressional intent.”) 🡪 how is *Chevron* Step One different, if at all, than what we did during class in the first two weeks? AV: a fair critique to say that they’re not at all difference. There is a conceptual difference, but justices look at all possible tools of statutory interpretation and pronounce the statue clear according to those they favor. In lower courts, *Chevron* looks much more real.
  + (2) Problem/theme – **old statues and new problems.** We are dealing with a bunch of old statutes. Congress is more gridlocked and does less now. Less updating by congress of statutes. Leads to problems when agency updates, fit less well with old statute.
* [Interpreting Statutory Language And Statutory Context] *Babbitt v. Sweet Home* (issue of what “take” means of endangered species; “take” = harass, harm, pursue, hunt, shout, wound, kill, trap, capture; agency interprets it to include significant habit modification or degradation)
  + “Harm” **includes indirect harm**. If you read “harm” as direct harm, then it doesn’t do any independent work from other words. And provision for exception permit would not make sense if indirect harm was not included. And the statute says “knowing,” and all the other words are obviously knowing. Additionally, court cites “ESA’s broad purpose to protect endangered and threatened wildlife” 🡪 definition of “harm” is reasonable.
    - **Scalia dissent:** harm, modified by its fellow words, suggests ***direct*** harm. Cannon against surplus. Trap, capture is surplus. “Take” is *Pierson v. Post*. Reducing to control. And there is difference between “knowing” and purpose. And the permit could just be safety check for accidently hurting of endangered. Strange that “harm” is the only word out of ten to address huge impact of law. **“Congress does not hid elephants in mouse holes.”** AND provided for habitat modification elsewhere in the statute and provided two mechanisms for dealing with. Congress then wouldn’t hide the prohibition the word “harm.”
    - Dissent v. Majority: **dueling cannons** between ***noscitur a sociis*** and ***canon against surplus meaning***.
  + AV note: If Scalia and Stevens (or any of the Supreme Court) can forcibly disagree 🡪 ***doesn’t this mean it is not clear???*** Tiebreaker should be *Chevron*. If disagreement, obviously reasonable interpretation. The fact of reasonable disagreement means agency should win (means they always will win hard cases). Problem?
* [Seed Of Major Questions Canon] *MCI Telecommunications Corp. v. AT&T* (agency, under FCC clause that allowed them to “modify any requirement” of the act, gave different rules for dominant vs. non-dominant phone carriers)
  + Modify does NOT mean big change. Cites a bunch of dictionaries. Thus, the statute is clear. And agency has created a fundamentally different type of statute than was originally created—eliminates critical provision for 40% of the industry. It is a fundamental revision of the statute. Sort of ***non-delegation canon***—where agency is deciding something of great importance, court decides against agency unless congress was explicit about agency authority.
    - AV: but can’t reasonable minds disagree about this? Look at votes, 5-4. Implicit benchmark for Scalia decision is “that is the sort of the decision congress should be taking. Above they’re pay-grade.” Gut instinct of Scalia is agency should implement, not write, statute. Is this inconsistent with Chevron zero? Are we really arguing about delegation?
* [Major Questions Canon] *FDA v. Brown & Williamson Tobacco Corp.* (prior to Clinton era, FDA said tobacco wasn’t within its authority, but changed mind under Clinton and began regulating; tobacco is a “drug” in terms of statute)
  + Macro argument- either it is a drug and must be banned, or not a drug: (1) question if drug is “safe for intended use,” and if not, then must ban; and tobacco is not safe, so FDA must ban, but we’re not going to ban entirely; (2) Congress has said via other statutes that tobacco should remain part of the market as an important aspect of American economy, and is regulated through state funding, and addressed in tobacco labeling.
    - Seed of *MCI* blossoms: **“we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”** Too big for agency to handle. Same impulse as non-delegation doctrine 🡪 dead as constitutional matter, but lives on as statutory matter. **Two lenses:**
      * (1) Major questions doctrine tries to allocate some issues from **agencies back to congress**. Not inconsistent with *Chevron*, b/c *Chevron* is about courts v. agencies.
      * (2) When court uses major questions canon, it ***is*** a decision allocating power from agency to the court! Outright tension with *Chevron* b/c it says that when there’s a gap, agency should decide.
    - **Breyer Dissent:** this is why we have *Chevron*! So that a politically accountable actor (president) will appoint people to make big decisions. AV: is majority stressing legislative accountability, and dissent stressing presidential accountability? Pay grade question is different than *Chevron* question (judges v. agencies)?
* [Major Questions Doctrine Reversed] *Massachusetts v. EPA* (parties petitioned EPA to rule-make and assert jurisdiction over greenhouse gases; EPA said they lacked legal authority to regulate greenhouse gases [cited *Brown & Williamson* major questions canon] and greenhouse gases are ubiquitous, don’t want to get into area unless clearly directed to by congress and have same fit problem as *MCI* [localized air pollutants]; even if we had authority, we would decline to use it b/c of scientific uncertainty and president’s foreign objectives)
  + The statutory text is **clear and forecloses any other conclusion**. Distinguishes *Brown* by saying (1) they’re only ***regulating*** emissions, not banning drugs; (2) no congressional action that conflicts in any way with regulation of greenhouse gases (unlike *Brown* where Congress had regulated tobacco a bunch). And EPA’s argument that it would be unwise to regulate right now ***is divorced from the statutory text***. EPA is refusing to comply with a clear statutory command.
    - AV: on the text, it’s a hard case. Implied term limits the definition. Also, could this be viewed as a sever problem of **“old statutes, new problems**” problem? Not envisioned by the actors, but now needs to be addressed. Statute created a broad principle? What’s weird about this case is that it flips around major questions doctrine, saying the agency must deal with this problem unless congress clearly excludes it.
    - Odd outcome, in that both major questions canon AND *Chevron* were in their favor (makes it easier case than *Brown & Williams*).
  + **Scalia Dissent:** air pollution in text means localized air pollution, most natural reading of the text. Reasoning p.343-344. And benchmark has to be only reasonable.
  + What happened: EPA said they’d regulate it, but created tailoring rule to raise internal threshold of what they regulate. SCOTUS response: you don’t have authority to re-write thresholds. Had to then appeal to absurdity doctrine to resolve issue. Basically re-wrote statute. AV: *Mass v. EPA* was wrongly decided.
* [Agency Determining The Scope Of Their Authority] *City of Arlington v. FCC* (FCC authorized to “prescribe such rules and regulations as may be necessary in the PI to carry out the act’s provisions.” Issue: *Chevron* exception for agencies that determine their own jurisdiction?)
  + NO *Chevron* exception for jurisdiction. There is **no distinction between “jurisdictional” questions and non-jurisdictional question**, but just a series of powers/duties for agencies (“distinction…is a mirage”). The ONLY question: ***has agency exercised its statutory duties*** (question simply is whether the statutory text forecloses the agency’s assertion of authority, or not)?
    - AV: how to make sense of that? For Scalia, stakes could not be lower. Within *Chevron*, Scalia is comfortable saying agency violated its duty. He wants *Chevron* to maximum extent, and then within *Chevron*, constraints occur. All prior three cases lost at step one.

***Chevron* Step #Two – Is the agency’s interpretation *reasonable or permissible*?**

* [Big Points] – very rare for a court to set aside an agency interpretation on Step Two. Very similar to either Step One or A&C?
  + **Puzzle:** *Entergy* doesn’t even recite the steps—only asks 🡪 ***is the interpretation reasonable?*** **Stevens dissent:** why are you not doing steps? **Scalia:** it’s a fusion of step one and step two (“If Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”)
    - **Current law:** steps of *Chevron* are still there.
  + *Brand-X,* Changing interpretations over time: under *Chevron*, yes. Totally ok. Under *Skidmore*, it looks a little different b/c one of the factors is **consistency over time**. Inconsistency reduces persuasiveness.
    - Also, Thomas distinction between best v. only interpretation.
    - Final little puzzle: what if you look at judicial opinion and its unclear whether the court is saying “best” or “only possible”? **Thomas gives default rule:** if not sure 🡪 we read it as saying the “best” (which would allow agency to go in a different direction)
* **How is this different than step one?** 
  + *MCI*: written as step one case, but couldn’t it be written as a step two opinion?
  + *Brown & Williamson*: same. “Not spoken to precise issue,” but not reasonable interpretation.
* [Reasonable Interpretation, And No Mention Of Chevron] #*Entergy Corp. v. Riverkeeper* (Clean Water act; issue is whether “best technology available” language allowed cost/benefit analysis; EPA does not say it’s unfeasible, but just not worth it)
  + EPA wins if offers ***reasonable interpretation*** of the statute. NOT necessarily the ***only*** possible interpretation, NOR even the interpretation deemed ***most reasonable*** by the courts. **Cost-benefit analysis is appropriate**.
    - Silly to spend $$$ just to save one more fish. At some level, everyone is sensitive to marginal benefit. **Sort of an absurd results doctrine**. But how could have congress been more clear?
  + AV: is this step one? Is this step two? Are they saying you ***must*** consider cost/benefits? Or just that you ***may***? If may, then what about absurd results? Clearly this is a mess. Scalia does not even mention *Chevron* steps. Just one question: **is agency interpretation reasonable?** There is ***no coherent distinction*** between step one and step two. Any step one can be written as step two, and any step two can be written as step one. There is **no reason to care** whether a statute has one meaning or not. We only care if statutory interpretation is reasonable or not. It is ***irrelevant*** whether zone of ambiguity has one point or multiple points in it. We don’t need to decide that. And court wants to decide the least amount possible. Three ideas floating around—step one, step two, and arbitrary and capricious—and we should eliminate the first idea. Book mentions another way of knocking out one of ideas—step two is same as arbitrary and capricious.
  + **Stevens Dissent:** Statue is clear. Unless costs are so high that the best technology is “unavailable,” Congress has decided that they are outweighed by benefits of minimizing adverse environmental impact. Statute neither expressly nor implicitly authorizes cost/benefit analysis.
* [Changing Interpretation Over Time] *National Cable and Telecommunications Association v. #Brand X Internet Services*
  + (Uncontroversial part) Changing position—agency flip-flopping—does NOT change deference in *Chevron*. (Controversial part) And it ***doesn’t matter*** if a court had already interpreted case. Prior court decision trumps agency construction ONLY if decisions said construction follows from ***unambiguous terms*** of statute and thus ***leaves no room*** for agency discretion, no gap to fill (**only reading v. best reading**). NOT overruling judiciary, only choosing different construction. Construing it differently does not say prior decision was legally wrong.
    - AV: this is exactly right. In *Chevron* world, it is confused to say that judicial opinion trumps agency determination. Question is NOT what statute means, but what statute could reasonably mean. Does not matter if 9th circuit previously said “the best reading” of the statute.
    - But in ***arbitrariness*** issues 🡪 flipping back and forth does matter.
    - *Brand X* is agnostic about the **range of agency discretion**. “Give me some range, whatever it is, and there’s no problem switching back and forth within the range.” It says nothing about how big the range should be (major canon’s doctrine).
  + **Scalia Dissent:** you’re allowing agency to ***overrule court***. Unconstitutional for executive officers to reverse judicial courts. AV: Thomas’ response is analytically crushing 🡪 judgment of federal court says ***best reading***, but that does NOT mean it is the **only** reading. It would only constrain the agency if the 9th circuit has said, “the only permissible reading is X.” Thomas is giving us a rule for interpreting judicial opinions: unless the court is clear that it is giving the ***only*** possible interpretation, then we take it to mean it is giving us the ***best*** interpretation.
* [Social Science] – Has *Chevron* made a difference?
  + No- Studies found that courts accepted 73% of administrative interpretations they review and the amount of deference is the same under *Skidmore* and *Chevron*
    - Problem with studies: they don’t account for the aggregate effect of when judges defer more to certain agencies over others
  + Yes— it’s possible that the formal doctrine is making differences even though we observe no change in the win rate—agencies could be changing the mix of projects that they undertake
    - The result could be unobserved because of settlement effect 🡪 no challenging agencies now when they would have in the past because you have to get past Chevron.

Rationality

**#Arbitrary and Capricious Review**

* [Statute] **APA §706(2)(A)** – Court shall hold unlawful and set aside agency action, findings, and conclusions found to b***e arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law***.
  + AV: **most useful arrow** in your quiver if trying to overrule agency. Why? It attacks agency ***reasoning***, NOT its legal conclusion. Not just picking A or B, but the reasoning for A or B. Because of *Chenery I* (no post ad-hoc reason), you can pin down agency in the ***administrative proceedings***. And this is where the games begin, because it is not clear when new reasoning begins—is it a new and different explanation or just an explanation of prior reasoning?
* After *Overton Park* and *State Farm*, Four Components of A&C (“Hard Look”):
  + (1) Did the agency consider the ***relevant statutory factors*** (those that congress instructed agency to consider/NOT consider)? In *Chevron* analysis, agency interpretation is deferential 🡪 if organic statute is silent/ambiguous about a factor, up to the agency (NOT a de novo question). (*Overton*)
  + (2) Agency needs to consider ***reasonable policy alternatives***. (*State Farm*—airbags w/in “existing ambit of standards.” Lower courts expand to include those factors that ***should have*** been on the table, not just those that were put on the table by agency). **\*\***But *FCC v. Fox* might have taken this prong back.
    - This must be at least in the comments section. Challenger to the agency can’t do post ad-hoc rationalization either.
    - Can lead to ossification. There is ***always*** some factor that the agency ***could have*** considered.
    - ***Fox* complicates:** makes us distinguish between reasonable policy alternatives at a ***given time*** (A v B – two new alternatives) v. ***over time*** (A 🡪 B—changing from one to another). No obligation to compare A with B in **over times cases** UNLESS (1) ***reliance interests*** (AV: not really about costs of transition) or (2) ***factual contradiction***.
      * AV: rational decision-making doesn’t ***require*** comparison. Strange though to say you have to choose the best at a given time, but not over time. Only makes sense as an **anti-ossification measure**.
  + (3) Substantiate the factual predicates behind your reasoning. ***Factual underpinnings***. (*State Farm*—haven’t sufficiently shown non-detachable seatbelts won’t be effective).
    - 706 – arbitrariness review applies to findings as well. Uncontroversial. But an outlier.
    - Courts factual review seems to be high water mark. Controversial.
    - ***Fox* complicates:** alters to existence of policy questions that are uncertain in a well-defined sense 🡪 agency CANNOT prove something is the case or is not the case. So has to do something that, in some sense, is unjustifiable. *Fox* distinguishes between **factual findings** and **predictions** (uncertain category). ***If factual findings 🡪 have to change. If changing prediction 🡪 don’t have to change***.
  + (4) Make no ***“clear errors of judgment.”*** Simple judicial review. (*State Farm*)
    - AV: how clear is clear and how arbitrary is arbitrary is NOT self-defining. A&C review becomes very objectionable on this point. Judges apply these factors to a different degree of intensity. And no clear examples of SCOTUS doing this.
    - First two factors are used the most.
  + Some ppl say 1-3 are procedural, and 4 is substantive. AV: more confusing than helpful

**Arbitrariness Review: The Classics**

* [Remedy In Arbitrariness Cases] *Overton Park v. Volpe* (secretary of transportation authorizing Memphis to build highway through public park [informal adjudication—not a general rule and no formal proceeding]; law says cannot do it if “feasible and prudent” alternative and only if there was been “all possible planning to minimize harm”)
  + [Arbitrariness Test] (1) ***Consideration of all factors***; and (2) whether there has been a ***clear error of judgment***. Inquiry into facts is to be **searching and careful**, but ultimate standard of review is a narrow. Court is NOT empowered to substitute its judgment for that of the agency.
    - **“Relevant factors”** 🡪 those made relevant by the ***substantive law***. Look to statute for relevant factors. “Feasible and prudent.” Prudent does not mean pure cost/benefit analysis, or statute would be meaningless. Betrays purpose of statute. Green side of scale weighed more heavily.
  + AV: probably wouldn’t come out the same way today b/c of *Chevron*. Court seems to be doing a “best reading.” What “relevant factors” should be considered is a ***statutory interpretation*** question, which means *Chevron*. So only has to be “reasonable,” not best. Except the reasoning was post ad hoc rationalization. And we **have no record**. Court, by brute force, says, “let’s make them have a record.” Makes textualists worry. There is **no record requirement in APA for informal adjudication**. Court has tried to make it ok in later cases by two different strategies: (1) 706 requires a record for us to do our function, (2) bottom of 706 says “review should be of whole record.”
    - Takeaway: even in informal adjudication, agencies can be required to compile record to survive arbitrary and capricious review. What if there is no record? Court will ***send it back*** to agency to compile a record.
  + *Overton Park*, on remedy side, comes up with third way = **send back to compile record**. Now the **most often outcome** in A&C cases. Fundamental A&C remedy: ***go and explain it again***.
    - Post ad-hoc rationalization = NOT agency proceedings. Does not mean coming up with reasoning after the fact. Worry in *Chenery* is about balance between lawyers and agency. We want agency making decision, not litigator.
    - **Fundamental impulse:** not that you can’t do it, but you have to give public reasons for it.
    - *Vermont Yankee* squelches hybrid rulemaking but allows A&C review.
* [The “Hard Look” Doctrine] – arbitrariness review is serious. We’re going to emphasis *Overton*’s “searching and careful.” DC judges engaging in hard scrutiny of agency’s reasoning.
  + [Approved Hard Look] *MVMA v. State Farm* (series of different presidents; “passive restraint” system requirements—air bags or auto seatbelt; companies were only going to do auto seatbelts, so agency said bag it b/c ppl will just detach it. Did not then consider airbags only.)
    - Need to consider ***reasonably available alternatives*** 🡪 airbag only option.
      * **Agency response:** we don’t have to exhaustively consider every feasible response!
      * **Court counter-response:** you don’t have to consider ***every possibility***, but you do have to consider the ***prior alternatives brought up***. AV: this is not relevant factors. Seems to be something doctrinally made up. “Have to consider reasonable alternatives, and it was a reasonable alternative b/c you brought it up.” Some judges will scrutinize agencies more than others, and politics gets involved. And high quality agencies get more leeway than low-quality agencies
      * We can also ***review the facts that underlie*** the reason you put forth. AV: could think about the factual part of *State Farm* as “clear error of judgment” from *Overton*.
    - AV: is this more like *Vermont Yankee* than we let on? If we force the agency to jump through hoops, why isn’t this requiring procedure of agency? And where does court get off saying to agency, “you have to do more”?
    - *State Farm* use shorthand as technocratic approach to A&C 🡪 you CANNOT offer different political justification for change. Rehnquist seen as saying you CAN.

**Arbitrariness Review: Current Problems**

* [Topics] – (1) when you change, can you say I work for X administration and we have Y policy? White House told me to do it? (2) Ossification. Does it exist? Is it bad?
* [Agency Policy Positions Changing Over Time] *FCC v. Fox Television Stations, Inc.* (Paris Hilton/Nicole Richtie say f word; FCC charged with policing tv. At time 1, “fleeting expletives” were not actionable. At time 2, under Bush, FCC changes policy in adjudication [“Golden Globes” order] 🡪 “fleeting expletives” is no safe harbor and might be fined for it. FCC challenges: (1) Admin law claim—has not adequately explained its new policy [lost in this case], and (2) new policy infringes on 1st Amendment b/c its too vague [win on later case])
  + Agency has to give ***reasoned analysis*** for new policy, but does NOT have to explain why new policy is **better** than old policy. It suffices that new policy ***is permissible*** under the statute, that there are ***good reasons***for it, and that agency ***believes it*** to be better, which the conscious change of course adequately indicates. However, you do have to explain when there is (1) ***reliance interest***—not applicable in this case b/c did not punish, only a prospective order; and (2) if old policy rests on ***factual findings*** that are opposite than findings of new policy, then you have to explain. Scalia says empirical findings in this case are **impossible**. “Some propositions that scant empirical evidence can be marshaled.” Different than situation where failure to adduce empirical data that can be readily be obtained (*State Farm*). AV: notion is that there is a category of what economist called ***“uncertainty”*** 🡪 **cannot prove or disprove**. When agencies are in a situation like that🡪 entitled to pick their poison. Can say yes or no w/o showing one is better. Only way to make sense of this is distinction between **facts** (like adjudicative facts) **and predictions** (like legislative facts). Agencies ***do*** make policy in adjudication.
    - AV: if agency doesn’t have to explain why new policy is better than old, why do you have to explain why A is better than B when making initial decision? **Anti-ossification measure**.
    - [CURRENT LAW] If you’re choosing ***at a given time*** 🡪 need to compare (*State Farm*). But when you are choosing ***over time*** 🡪 DON’T need to compare (*Fox*). AV: why is change at a given time different than change over time? Strange puzzle.
    - And maybe there is a worry that there will always be an alternative policy consideration that should be explained?
  + **Breyer Dissent:** even if there is no reliance or change in factual findings, agency still needs to explain why ***change is justified***. In the **first time** 🡪 ok to flip coin. But when you **switch** 🡪 have to give reason for change.
    - AV: Breyer has to be conceptually right. Irrational not to compare all alternatives. E.g., choose sushi or pizza. Chose sushi. Why did you choose sushi over pizza? Sushi is good. What? How is this not arbitrary?
  + [Political Justifications] – The change in *Fox* is no surprise. There was a change from Clinton to Bush. Could FCC have said, “White House told us so?”
    - FCC is independent agency, so ***should*** be insulated from presidential control? So above is not a good legal justification? AV: if FCC is insulated from White House, why is it tracking what it wants? Staggered appointments by President. By second term, independent agencies are in line by appointments mechanism. **And no legal relevance between independent v. executive agencies**.
    - What about EPA—pure executive agency? After *Chevron*, unless congress specifically says agency must decide on technocratic grounds, **agency is free to decide the considerations**. And maybe there is distinction between uncertainty categories and knowable facts. Maybe political justifications are response to uncertainty.
      * AV: Rehnquist approach – do *Chevron*,consider relevant factors, and then allow agency to go with its gut.
      * How much do we want to invest in fact-finding?
    - *Fox* allows political flex and prevents ossification. Don’t have to explain why you’re changing.
  + [Switching Back And Forth] – *Fox*: for agency decisions, you can switch back and forth. *Skidmore*: have to be consistent or it’ll count against you. *Brand-X*: can switch back and forth. AV: are we being consistent? Ossification approach: let agencies switch back and forth to their hearts content.
  + After *State Farm* and *Fox*:
    - (1) For *Chevron* and A&C 🡪 agencies can switch back and forth. For *Skidmore* 🡪 cannot switch.
    - (2) Case 1: A v B. Case 2: A 🡪 B. For case 1, must be a ***comparison*** between A and B. For case 2, *Fox* says you DON’T have to compare (why B is better than A), with **two exceptions**: (1) reliance and (2) change in factual findings.
    - AV: above might not make rational sense, but it is an **anti-ossification matter**. How much should this be a consideration? Consistent trend in court to allow agencies to change. Premises of current law: switching back and forth is fine, increasingly, and agencies should be responsive to administrations