### Administrative Law

1. *Crowell v. Benson* tries to provide a line of demarcation for agency and judicial roles
   1. Initial line of demarcation is deference to agency fact-finding but de novo review of law and constitutional/jurisdictional questions
      1. As with almost all other lines of demarcation developed, these eventually fall and courts grant agencies ever greater discretion
         1. Begins with *Skidmore* and *Hearst*, comes full bore with *Chevron*
      2. Deference to agency facts (under substantial evidence review) remains good law
      3. De novo review of jurisdictional questions is dead – *City of Arlington*
   2. Attempts to place boundaries around administrative state to take advantage of pragmatic benefits while respecting judiciary’s role
      1. Begins to erode as early as *Chenery II*, which explicitly approves of pragmatism
2. *Wong Yang Sung* exemplifies the impulse to elevate the APA to be administrative law’s governing charter
   1. This impulse also animates *Perez* and *Vermont Yankee*
   2. A cynical view of this impulse is that it only works one way – APA supremacy arguments succeed when granting agencies more discretion, but fail when cabining agency discretion
      1. This happens in *Sung* – court tries to limit agency authority, but is overruled by Congress

### Judicial Review

#### Statutory Standing

1. APA §702 provides judicial review for a person who suffers a “legal wrong” – under *Sanders Bros.*, this was defined as a statutory cause of action
2. *Data Processing* introduced a more liberal two-prong standing test:
   1. Has there been injury-in-fact?
   2. Is the interest sought to be protected arguably within the zone of interests (“ZoI”) to be protected by the statute? (Sometimes referred to as “prudential” standing)
      1. The purpose of this move was to open up the courts to individuals who wanted to challenge agency action – restricting the power of the administrative state
      2. Also designed to move away from old requirement of interest protected by common law in order to achieve standing, due to reality of post-New Deal government
3. Although ZoI test is *not* a difficult hurdle, it is not satisfied when plaintiff’s interest is *so* inconsistent with statute’s purposes that it can’t reasonably be assumed that Congress intended to permit the suit – *Clarke*
   1. *Air Courier* can be distinguished on this ground – although statute arguably provides incidental benefits of employment assurances to postal workers, such a benefit was antithetical to the statute’s true purpose of preserving revenues for the post office
      1. Congress need not have intended to benefit the plaintiff in this case
   2. *NCUA* rejects post-*Air Courier* tightening – even competitors of regulated entities have standing under broadly construed Congressional purposes
4. *Lexmark* finally returns to the rule of *Sanders Bros.* and kills prudential standing – a “legal wrong” means that there is a statutory cause of action *external* to the APA
   1. This is another failed arc of limiting agency discretion – results in heightened standing requirements (although obtaining standing is still not supposed to be a high hurdle)
   2. Existence of a cause of action is determined using traditional tools of statutory interpretation

#### Constitutional Standing

1. There are three elements to constitutional standing:
   1. Injury-in-fact (which contains two sub-requirements)
      1. Injury must be concrete and particularized – no “generalized grievances”
         1. Lack of information may be an exception to this general rule – *FEC v. Akins*
         2. Three potential rationales for the “generalized grievance” doctrine
            1. Constitution’s “case or controversy” requirement

Seems arbitrary if something as simple as buying a plane ticket can resolve a constitutional defect – see *Lujan*

* + - * 1. *Londoner*/*Bi-Metallic* due process distinction

Unconvincing because this is a *product* of legislative action

Resembles argument of *Arnett v. Kennedy* that legislature can define role of courts through statute

* + - * 1. Article II (separation of powers) – acts as a transfer of enforcement power from the executive to the courts
      1. States/sovereigns get special solicitude in finding injury-in-fact – *Mass v. EPA*
      2. AV endorses Richard Murphy’s approach – since none of the rationales are convincing, just eliminate standing entirely and increase deference to agencies
    1. Injury must also be “actual or imminent” – “certainly impending” – *Clapper*
       1. Rejects claim that “hypothetical or conjectural” harms can create injury-in-fact
          1. Steps taken by plaintiffs to reduce likelihood of harm were insufficient to grant standing in *Clapper*, but accepted in *Baur* (mad cow disease)
          2. Is there a “national security gloss” on injury-in-fact? We don’t want to encourage certain cases that infringe on military secrets (“negative solicitude”), but we want consumers to bring food safety lawsuits

Judges just shouldn’t force the CIA to reveal budgets? Does that bring *Richardson* into the “security gloss” cases?

* + 1. Abstract, stigmatic injuries do not create constitutional standing – *Allen v. Wright*
    2. Injury-in-fact initially served as a liberalizing move in *Data Processing*, but was eventually used as a block to court access in *Lujan*
       1. Even though Congress had explicitly created a cause of action (satisfying “prudential standing” pre-*Lexmark*), absence of cognizable injury-in-fact kept plaintiffs out of court – *Lujan*
          1. Same move is used in *Simon* – there is a cause of action, but no injury-in-fact due to lack of nexus between legal wrong and substantive harm
       2. Deprivation of procedural rights leads to looser requirements of redressability & causation – *see Mass v. EPA*
  1. Causation
     1. Third-party cases will usually consist of:
        1. Procedural injury (agency’s legal wrong); and
        2. Substantive injury (plaintiff’s actual harm being inflicted by the 3rd party)
     2. There must be a nexus between legal wrong and injury – *Simon v. E. Kentucky Welfare* (charity hospital does not provide services for poor). This can occur in two ways:
        1. An agency orders a 3rd party to take an action that inflicts harm on the plaintiff
        2. There is *no doubt* that agency action will force a 3rd party to change its behavior with respect to the plaintiff
  2. Redressability

#### Reviewability

1. *Abbott Labs* creates a presumption of reviewability, based in the statutory text of §704, with two exceptions listed in §701:
   1. The presumption of reviewability stems from an acknowledgment of a shift from the clean dividing lines of *Crowell* to the modern, comprehensive administrative state
2. §701(a)(1) - Statutes preclude review, either explicitly or implicitly

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| --- | --- | --- |
|  | Explicit Preclusion | Implicit Preclusion |
| Constitutional | *Johnson v. Robinson, St. Cyr* | Never occurs |
| Statutory | No problem | *Block* (and maybe *Bowen*) |

* 1. Under implicit preclusion, the presumption is overcome if intention to preclude review is proven by clear and convincing evidence – *Bowen* 
     1. Represents a slight shift from *Block v. CNI* (consumers cannot get review because middlemen already get judicial review)
        1. The rationale makes *no* sense here – the availability of other potential plaintiffs is not used *anywhere* else as a reason to keep *this* plaintiff out of court
           1. True rationale is that the *object* of this statute is to raise consumer prices. Allowing consumers to challenge would be antithetical to the purposes of the statute, so we will find a way to exclude you
     2. Argument for preclusion is mushy – the presumption of reviewability is not as strong as it first appears in a statutory context
     3. The weakness of preclusion is *not at all* weak in constitutional cases, however
  2. Explicit preclusion provisions are generally construed much more narrowly, especially when constitutional concerns are implicated – *Johnson v. Robinson*
     1. The court is stretching here – the constitutional claim arises under a statute
     2. Congress’ failure to preclude reviewability of constitutional review is actually a convention. It’s unlikely that preclusion of review is constitutional, and the Court doesn’t want to come out and say it

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|  | Action | Inaction |
| Enforcement | Presumptively Reviewable – *Webster*, *Chenery II* | Presumptively Non-Reviewable – *Heckler* |
| Rulemaking | Presumptively Reviewable – *Abbott Labs* | WEAK Presumption Against Reviewability – *Mass v. EPA* |

1. §702(a)(2) – Agency action is committed to agency discretion by law
   1. This exception must be construed narrowly, otherwise every *Chevron* case becomes a non-reviewability case! (Interpretation has been “committed to agency discretion”)
   2. Early court decisions focused on indicia of inappropriateness for judicial review – technical complexity, separation of powers, subject matter (i.e., foreign policy)
   3. *Overton Park* formulates the “no law to apply” standard – agency has discretion of the statute provides no standards by which agency choice may be measured
      1. This *can’t* be the test – there is *always* law to apply (A&C, due process, Constitution)
      2. Court is caught between three competing impulses
         1. Presumption of availability of judicial review
         2. Hostility to common law as determinant of APA meaning
         3. Respect for Congressional instruction to defer to agencies
      3. *Heckler v. Chaney* creates an *additional* presumption *against* judicial review when agency’s refusal to act is being reviewed
         1. Presumption may be rebutted if:
            1. No enforcement because agency asserts lack of jurisdiction
            2. Adoption of *extreme* policy equal to abdication of statutory duties
         2. Agency inaction must be discrete to be reviewable – *SUWA*
            1. Agency actions are: rules, orders, licenses, sanctions, or relief
            2. *SUWA* also argues that action must be legally required to be reviewable – AV says this *can’t* be right; there must be a way to challenge non-enforcement based on unreasonable grounds
            3. Challenges to agency’s *management* policies (not rulemaking or enforcement) are not reviewable

Failing to set up a *system* isn’t reviewable – prevents private groups from conscripting agency enforcement to their favor

Court may require action, but may not tell agency *how* to act

* + - 1. Can’t presumption be made at merits stage? Do we *want* this as a gatekeeper?
    1. *Webster* mixes up 701(a)(1) and (a)(2) – there *is* law to apply, so the court has to go back to (a)(1) to find preclusion under the statute
       1. Scalia argues for a return to field-based non-reviewability – if review was unavailable under common law, it should be unavailable now. Acts as an effort to give independent content to (a)(2)
          1. Scalia’s test encourages courts to look to *both* “relevant traditions” and “costs & benefits of interfering with agency action”
  1. In reviewability analysis, use “no law to apply”, but *also* use Scalia’s pragmatic *Webster* fields

1. §553(e), in conjunction with §555(e), can *force* an agency to respond to a request for rulemaking. Parties may then take the agency’s denial of request to its court, challenging it for any number of reasons
   1. However, parties may *not* require an agency to embark on adjudication

#### Ripeness & Finality

1. Ripeness is a two-part inquiry: (*Abbott Labs*)
   1. Fitness of issue for judicial decision
      1. Issue must be purely legal, and decision is final under §704
   2. Hardship to parties of withholding court consideration
      1. Alternative to compliance subjects regulated entities to potential civil/criminal violations, and compliance engenders substantial costs
      2. Availability of “immediate” agency review will cut against a finding of pre-enforcement reviewability – *Toilet Goods*
   3. Although the *Texaco* two-step might apply to challengers of a rule’s validity at the agency level, judicial review will *still* be available
      1. This is made possible by *Abbott Labs*’ “parceling” of claims between pre-enforcement judicial challenges to agency rules and challenges before the agency for adjudications
   4. Ripeness exists to 1) protect the courts from being entangled in abstract policy discussions, and 2) protect agencies from unwarranted judicial interference before policies can be formalized, and before parties can feel concrete effects
2. Although *Abbott Labs* created a presumption in favor of pre-enforcement review, *Thunder Basin* and other cases have found implied preclusion if statute grants post-enforcement review. This seems *wrong!*
   1. *National Parks Hospitality Association* shifts ripeness to a much more stringent inquiry
      1. Legal uncertainty is insufficient to make a finding of “legal harm” – but isn’t this all that is being protected against in *Abbott Labs*?
3. Finality requires: (*Bennet v. Spear*)
   1. Completion of agency decision making (§704)
   2. Action determining rights with attendant legal consequences
      1. If there is no strictly legal harm, the issue is not yet ripe
         1. Under this logic, neither interpretive rules nor general statements of policy will *ever* be reviewable, because there is no binding legal effect! – *Lincoln v. Vigil*
            1. *National Parks* implies that the difference between IRs and GSPs is whether an agency is interpreting its own organic statute.
         2. The D.C. Circuit (and SCOTUS in *American Trucking*) have always stated that interpretive rules are reviewable – see *Hawkes* later this term!

### Procedure

1. Five sources of agency procedural requirements: 1) Agency’s organic statute, 2) Agency’s procedural regulation, 3) APA procedures, 4) Federal common law (i.e., *Chenery*) and 5) Constitutional due process
2. Grid for determining what processes are due under the APA:

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|  | “On the record after opportunity for hearing” (Formal) | Informal |
| Rulemaking | §§553, 556-57 | §553 (notice-and-comment) |
| Adjudication | §§554, 556-57 | Almost no APA procedures |

* 1. Exceptions are 1) interpretive rules, 2) policy statements, 3) rules of agency organization and 4) good cause rules
     1. Distinguishing factor between interpretive rules and other legislative rules is that legislative rules have the “force & effect of law” and interpretive rules do not
     2. Good cause exception can be invoked to: 1) comply with legislative deadlines, 2) correct technical errors, 3) if surprise is necessary (i.e., price-freezes), or 4) the unforeseen
        1. Agency’s reliance on good cause exception is reviewed de novo, and under an arbitrary & capricious standard for fact finding
     3. General statements of policy are *never* reviewable due to lack of finality – *Cohen v. U.S.*

1. The *Wyman-Gordon* arc starts with an assertion that agencies cannot hybridize rules and orders (issue an order with only prospective effect)
   1. The first question SCOTUS decided in *W-G* was whether an “order” announced in a previous adjudication was valid. Answer was “no” because it was actually a disguised rule
      1. Rule is defined as something that has “general applicability” and “future effect”
         1. *Everything* has future effect – that *can’t* be the defining feature of a rule
   2. Court quickly gives up in *Bell Aerospace* – both *Chenery II* and *W-G* argue that agencies may announce new principles in adjudications, subject to court review for arbitrariness as to whether rulemaking/adjudication is appropriate
      1. It can be very difficult to distinguish rules from adjudications, and in practice it never happens – *City of Arlington* (5th Cir.)
   3. An agency is bound by their own internal guidelines – *Morton v. Ruiz*
      1. AV argues this is empowering to agencies, since the power to bind is valuable (Ulysses)
2. Agencies can use rules to narrow the issues parties can challenge in adjudication – *Texaco*
   1. The “hearing” occurred during notice-and-comment rulemaking
      1. Alternate interpretation is that these are separate issues. We already decided the rule is permissible – only discussion surrounds application that prima facie violates the rule
         1. No hearing unless there is something to have a hearing about
   2. Somewhat Orwellian because the “rule” and “order” were promulgated by the same people, simply wearing different hats
   3. *Heckler v. Campbell* (Social Security grid system) similarly upholds agency’s right to make generalized statements about rules that may not be challenged in individual adjudications
   4. *Texaco* two-step only applies at the agency level – parties will *always* be able to challenge rule’s validity in court, absent some other barrier (i.e., issue preclusion)
3. Agencies are entitled to *Chevron* deference when interpreting their own statutes – *Dominion Energy*
   1. Agencies must show that they gave consideration to the relevant factors
      1. The relevant factors listed here are the *Matthews v. Eldridge* 3-part test for due process
      2. If they did, prior judicial decisions yield to agency’s reasonable interpretation – *Brand X*
         1. Are courts just not too worried about adjudication at issue here (informal)?
   2. No deference is given when agencies try to interpret the APA
      1. Doesn’t interpretation of CWA’s “public hearing” language trigger an “interpretation” of whether the APA intended to require formal procedures in cases like those presented?

#### Constitutionality

1. Administrative procedure’s constitutional problems are: 1) Due process, 2) Article III and 3) Retroactivity
   1. However, because all of these are fairly limited constraints, organic statutes and the APA will provide most of the procedural limits on agency decision-making
2. Due process only requires that you get “one good bite at the apple” somewhere – either before the agency or during judicial review, “some kind of hearing” is required
   1. In cases of legislative rulemaking, legislative process (i.e., voting) *is* due process – *Bi-Metallic*
      1. Limits to individual argument are needed, especially statutes with “general applicability”
      2. Unclear what facts (beyond widely known “legislative” facts) petitioners can provide
   2. In adjudication, oral hearing might be necessary, especially if judicial review is limited – *Londoner*
      1. *Southern Railway* elevates importance of judicial review, since the procedures afforded could not create a record under which courts could judge the decision’s arbitrariness
3. The grounds on which an order is adjudicated is identical to the one initially given – agencies are not permitted to engage in post-hoc rationalization – *Chenery I*
   1. Since agency’s reasoning is legally incorrect, SCOTUS can’t supply alternative rationale
   2. Adequate explanation (reason-giving) is the currency agencies use to buy deference
   3. Reflects *Crowell*’s division – court approves agency’s ability to set policy and give the order, but insists on a different legal rationale
4. *Chenery II* permits retroactivity in agency decisions as long as the costs are outweighed by the benefits

#### Rulemaking

1. Agencies are presumed to have rulemaking authority – *National Petroleum Refiners* (octane ratings)
   1. Embraces the fairness of rules’ prospectivity over adjudications
      1. This was the dissent in *Chenery II*! Failed when it attempted to limit agency’s discretion, but succeeded when it allowed agencies to engage in rulemaking if they so desire
   2. Could be interpreted narrowly (agency can make rules regarding its own adjudicative processes) or broadly (substantive rulemaking authority). Broader interpretation ultimately wins out
   3. Introduces a judicial check as to whether agencies evaluated pros and cons of a proposed rule
      1. Moves toward examining agency rationales and away from policing line between administrative state and judicial function
2. There are four sources of rulemaking anxiety, attempts to limit agency discretion, and judicial responses
   1. *National Petroleum Refiners* (broad, substantive rulemaking authority)
      1. Lower courts respond with attempts to proceduralize agency actions
         1. Notice-and-comment must be *meaningful* to meet APA requirements
         2. Without development of record, judicial review is impossible, and regulation is therefore arbitrary
      2. SCOTUS responds with *Vermont Yankee*, killing hybrid rulemaking
         1. §553 is a *ceiling* on procedural requirements that courts can impose on agencies – there is *no* common law of administrative procedures
      3. *Perez v. MBA* is *Vermont Yankee* 2.0, killing the “definitive interpretation doctrine”
         1. “Definitive interpretation” was a D.C. Circuit innovation requiring notice-and-comment after an agency changes a previously issued interpretive rule
   2. *Chenery II* (choice between rulemaking and adjudication)
      1. *W-G* attempts to limit agency discretion, but ultimately fails
   3. *Texaco* two-step (Rules at time 1, limit issues for hearing at time 2)
      1. *Nova Scotia* adds paper hearing requirements to informal rulemaking – informal rulemaking must still produce enough of a record to allow for judicial review
         1. Paper hearings have three requirements:
            1. Disclosure of material information agency relied on (*Portland Cement*)
            2. Response to material, relevant comments (overlaps with A&C review)
            3. Logical outgrowth rule

Comments could not be meaningful because they were not addressed to the subject at issue

Applied in *Long Island Care at Home* – did potential commenters recognize that their interests were at stake?

* + 1. AV is skeptical that these procedures would be upheld if presented to SCOTUS today
    2. Agencies can either 1) Give reasons, or 2) Run risk of arbitrariness review
  1. *Florida East Coast* (emphasizes importance of “magic words” to trigger formal procedures
     1. Serves to encourage informal rulemaking
     2. Also reads generality distinction of *Londoner/Bi-Metallic* into an organic statute

1. The only remaining way to ease rulemaking anxiety is A&C review – the only remedy rooted in APA’s text
   1. However, A&C review is not as strong as usually made out to be – *Baltimore Gas*
2. Who gets to decide if a rule is interpretive?
   1. Starr (dissent in *CNI*) argues that the agencies should get to choose, while *Hoctor* and *AMC* argue that courts have final determination. Ultimately rejected
      1. *Hoctor* takes a hard line in defining interpretation, arguing that “gap-fillers” that create specific guidelines out of broadly worded statues are not interpretive (8-foot fence)
      2. Isn’t certainty better than being unsure as to when enforcement action will be brought?
   2. *CNI*’s argument is similar to *Hoctor*, emphasizing regulation’s “binding” nature on regulated entities. They must submit to agency’s demands or risk being hauled to court. Also rejected
   3. Law settles on “boundedly arbitrary specification” – *Lincoln v. Vigil* (general statement of policy) and *AMC* (interpretive rule) apply the “binding statement” test
      1. *AMC* actually formulates four inquiries to determine if rule is interpretive – only survivor is “Whether in the absence of the rule there would not be an adequate legislative basis for enforcement action?” If yes, then legislative

#### Adjudication

1. Agencies are presumed to have the power to interpret statutes via adjudication – *Chenery II*
2. Facts are appropriate for judicial notice include 1) legislative facts, 2) official documents, or 3) facts within the agency’s special expertise
   1. Agency *should* give parties an opportunity to rebut, but might not have to if they can argue no prejudicial error (if error was harmless) – *Market Street* (citing §§556(e), 706)
3. §557(d) bans ex parte communications that are “relevant to the merits of the proceeding” and applies to “interested persons” (formal proceedings only)
   1. “Interested person” is interpreted broadly to cover any individual with an interest in the proceeding greater than the general interest the public as a whole may have
   2. Lack of prejudice might sterilize otherwise improper contacts - *PATCO*
4. Ex parte communication bans in the informal rulemaking sphere create a failed arc
   1. *Sangamon Valley TV* introduces idea that informal rulemaking, when involving “resolution of conflicting private claims to a valuable privilege” can require a ban on ex parte communications
   2. *HBO* extends by prohibiting *any* ex parte communications in informal rulemaking
      1. Argues that lack of revelation of ex parte contacts might *require* a finding of arbitrariness – rationale is “a fictional account of the actual decision-making process”
         1. AV thinks this is misguided due to possibility of lack of prejudice – agency’s *actual* knowledge is irrelevant if public justification is based on record evidence
      2. Implicitly overruled by *Vermont Yankee*’s ban on proceduralization?
   3. *ACT* returns to rule of *Sangamon Valley* – ex parte is only categorically impermissible if “conflicting claims to a valuable privilege” by private parties is at issue
      1. Animated by practical concerns and desire to encourage cooperation between regulators and regulated entities
5. Generally, executive officers may participate in ex parte communication with agency officials – *Costle*
   1. This exemption does *not* extend to formal adjudication (or rulemaking?) – *Portland Audobon*
      1. However, *Franklin* strongly implies that the President is not included within the APA’s restrictions on ex parte communications, out of respect for the separation of powers

#### Adjudication Due Process

1. Is a protected interest at issue?
   1. Liberty
      1. Might be implicated if personal/professional reputation is at stake – *Roth*
   2. Property
      1. Property is an extra-constitutional legal entitlement that cabins agency discretion – is there a legal constraint on the actions that the state can take? – *Roth*
      2. Property right exists if “policies and practices” indicate a legitimate claim of entitlement – relies on contractual doctrines of reliance, promissory estoppel, etc. – *Sindermann*
      3. There are three potential traps in the “entitlement as property doctrine”
         1. Bitter with the sweet – *Arnett v. Kennedy*
            1. A truly positivist reading that denies the ability to divorce substantive right from the procedure given

How to square this with concept of constitutional superiority?

Should be rejected on institutional competency or separation of powers grounds?

* + - * 1. Rejected in *Loudermill* – DPC prevents property from being taken except subject to constitutionally guaranteed procedures

Judiciary has final, independent authority on the adequacy of statutorily defined procedures to meet requirements of DPC

AV argues that agencies are constantly calibrating procedure and substance, combining inquiries of Steps 1 and 3

* + - * 1. *Walters* and *Ingraham* deemphasize *Matthews* factors and focus on justifications for the chosen policy (desire to keep veteran benefits process non-adversarial, need to maintain classroom discipline without exacerbating fear)

Reflects *Arnett* in that agency discretion is maximized, but conceptually distinct in that reason-giving is the focus

* + - 1. States can avoid due process concerns by defining away a property “right”
         1. By simply creating a discretionary grant, no entitlement is created
      2. Importance of interest has no bearing on its status as “property” – cf. *Goldberg*
         1. Problems of both overinclusion (prisoner hobby kit) and under-inclusion (*Ridgely v. FEMA* – President *may* provide rental aid)

1. Has there been an actual deprivation?
   1. A protected interest cannot be deprived unless it is done intentionally (recklessness/gross negligence might also be sufficient) – *Daniels v. Williams*
2. What process is due?
   1. Is the proceeding a rulemaking or an adjudication?
      1. Decided under *Londoner*/*Bi-Metallic*’s generality principle
      2. If rulemaking, legislative process is all that is due
      3. If adjudication:
         1. Determine which elements are required from Friendly’s 10 factors under a marginal cost-benefit analysis (arranged so 1 is more important than 10)
            1. An unbiased tribunal
            2. Notice of the proposed action and asserted grounds
            3. Opportunity to argue reasons why proposed action shouldn’t be taken
            4. Right to present evidence/call witnesses
            5. Right to know of opposing evidence
            6. Right to cross-examine adverse witnesses
            7. Decision based exclusively on evidence presented
            8. Right to counsel
            9. Requirement that tribunal prepare a record of the evidence
            10. Requirement that tribunal prepare written findings of fact and reasons for its decision
         2. Determine if a hearing is required pre- or post-deprivation?
            1. There is a free-floating presumption towards pre-deprivation process, but if adequate reasons are given, post-deprivation process might be sufficient –(*North American Cold Storage* – emergency circumstances, coupled with ability for post-deprivation judicial review and compensation, justified lack of pre-deprivation hearing)
   2. *Matthews* introduces a three-factor balancing test that looks similar to Hand’s B<PL torts formula
      1. Private interest to be affected
         1. Multiple parties’ interests must be taken into account, including those who do not have constitutionally protected rights – *Brock v. Roadway Express* (employee’s interest in not being fired must be considered)
         2. Interests exist independent of statutory grants, but claims to due process do not – *O’Bannon* (no right under step 1 to stay in chosen nursing home)
      2. Risk of erroneous deprivation/incremental value of additional procedures
      3. Government’s interest in avoiding costs of additional procedures
         1. *Matthews* defers to agency choice on how much procedure to give because it assumes that agencies *want* to help the individuals they were created to serve
            1. Similar to arbitrariness review – essential question is if agencies have *reasons* for its good-faith judgments?
            2. Starkly opposes *Arnett*’s insistence on independent judicial review
         2. Should be applied generally, not on the specific basis of single cases, since the constitutionality of an entire program is at issue
3. *Goldberg* conflates steps 1 and 3 – existence of an entitlement might turn on how much loss a deprivation would cause. In this case, “brutal need” triggers the inquiry into how much process is due, and whether pre- or post-proceedings are required
   1. Also invokes the government’s interest in not erroneously depriving benefits
   2. *Matthews* departs from *Goldberg* because government’s interest only appears on *one* side
      1. Implies a good-faith effort on the agency’s part *not* to harm individuals
4. A lack of meaningful choice but to comply *does not* violate due process if “adequate protections” also exist – compare CERCLA with *CNI*

#### Bias & Separation of Functions

1. The presence of an unbiased decision-maker is integral to the concept of due process
   1. Concern is that a judge will be biased towards himself if he has also acted as a prosecutor
      1. Combination of investigative and adjudicative functions, without more, does not create a due process violation – *Withrow* (medical board)
         1. Similar to *Vermont Yankee* – rejects attempt to add extra procedures
   2. Three sources of bias law: 1) Judicial bias statutes, 2) Due process & 3) ABA ethics guidelines
   3. Recognized sources of impermissible bias are:
      1. Personal interest (pecuniary, nepotism, etc.)
         1. Personal bias is a matter of degree – *Monroeville* (50% of a city’s funds that come from traffic violations is too far over the line)
         2. Self-regulatory groups are biased, but so are the parties they regulate! This is the expertise-bias tradeoff – *Berryhill* (other than licensed optometrists, who else has expertise to regulate state’s optometry practices?)
         3. Gratitude might be a cognizable source of bias – *Massey Coal* (donor to judge’s election fund has landmark case heard by court on which the judge sits)
            1. AV thinks some limiting principle is needed, such as pecuniary interest
      2. Personal animus (as in contempt proceedings)
      3. Prejudgment of facts in adjudication
   4. Three limits on bias doctrine include:
      1. Rule of necessity (a biased forum to have case heard is better than none at all)
         1. AV thinks this is not necessarily the case
      2. Separation of functions is not constitutionally required
      3. Bias must arise from an extrajudicial source
2. The *Morgan* series of cases is another example of eventual deferral to agency discretion
   1. *Morgan I* leads with the proposition that “the one who decides must hear”. By *Morgan IV* this has moved to “personal familiarity” with the facts of the case
   2. *Morgan II* adds the critical injunction that courts “may not probe a decision-maker’s mental processes” to see if he actually “made the decision” or not
      1. It is effectively impossible to determine if a decision-maker had “personal familiarity”!
3. Officers are presumed, absent a showing of bad faith, to wield their power according to law (“presumption of regularity”) – *National Nutritional Foods Association*
   1. If bad faith is shown, reasons might be required
4. Separation of judicial and advocacy functions under §554(d) does not apply in rulemaking, informal adjudication, listed exceptions of §554(d) or top-level agency review
   1. Agency heads cannot be disqualified from adjudications by completing studies and filing reports. Otherwise, no order on the subject of the research could ever be made, since agency is the only body with the relevant expertise (not to mention Congressional authority)
5. §554(d) imposes three basic requirements for formal adjudications:
   1. Presiding employee may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate
      1. Staff contacts by administrative decision-makers (even in formal rulemaking) are not proscribed by §554(d) – *Hercules*
         1. Courts are queasy at the concept of unmonitored interaction between rule makers and advocates, and plead for congressional interference
         2. *Hercules* is a compressed cycle that ends with unfettered agency discretion – petitioners try to get *HBO* 2.0, courts express angst, but reject
   2. Presiding employee cannot be subject to the direction of an agency employee involved in investigative or prosecuting functions
   3. No agency employee who investigates/prosecutes a case may, in that case or a factually related case, participate or advise in the decision
6. Agencies have substantial leeway in structuring ALJ performance/evaluation schemes – *Nash v. Bowen*
   1. Courts appear to be uncomfortable with reviewing schemes that ask what kind of decisions ALJs make (favorable to government or claimant), but ultimately approves
   2. Agencies may *not* punish ALJs for their decision in any particular case or series of cases

### Fact

1. Under §706 (only applies to formal proceedings), courts must make decisions “on the whole record” and cannot examine just one side (“substantial evidence”)
   1. Facts in every other setting are reviewed for arbitrariness
      1. Consists of two parts: Plausible conclusions and adequate reason-giving
   2. ALJ determinations can get weight, especially if the agency reaches a different conclusion and credibility determinations were valuable to the ALJ’s conclusion – *Universal Camera*
   3. Agency must give good *reasons* for rejecting the ALJ’s conclusion – this is A&C review!
   4. The norm under substantial evidence is that agencies win – it’s a very deferential standard
2. Substantial evidence is similar to JNOV – can a reasonable jury reach this conclusion? – *Allentown Mack*
   1. AV thinks the jury rationale is unhelpful since it ignores the importance of an agency’s reasoning
   2. *Allentown* isn’t *really* about substantial evidence – its more about transparency and arbitrary & capricious review – the NLRB didn’t give good reasons
      1. Scalia thinks the NLRB wants to kill an administrative remedy without owning up to it
3. How can courts enforce substantial evidence, since they can’t probe administrator’s mental processes?
   1. Remand to agency (without vacating) for development of a factual record – *Pension Benefit*
      1. Is this in tension with *Chenery I*’s prohibition on post hoc rationalization?
4. Courts may question agency’s institutional competence, giving ALJ decisions less weight – *Zhen Li Iao*
   1. Posner goes a little bit nuts in this opinion, which has no basis in current law
   2. Seems to invoke due process issues – does *Matthews’* balancing test (prong two) allow institutional baselines?

### Law

1. *Hearst* and *Skidmore* begin eroding the *Crowell* distinction between factual and legal deference to agencies – *Hearst* defers on mixed questions of fact and law and transports “substantial evidence” standard over to legal questions, and *Skidmore* introduces the idea that agency reasoning might be persuasive and should be taken into account
   1. AV thinks *Skidmore* deference is little more than common sense – if an agency has a good point, courts will take notice
2. *Chevron*’s official justification for agency deference is an implicit delegation of decision-making authority
   1. The *actual* justifications given are concepts of agency expertise and political accountability
3. Ambiguities or statutory gaps are implicit delegations to interpret laws – this the rationale used to get around APA §706’s command that courts shall determine all questions of law
4. Courts review agency decisions for two requirements: interpretive validity and rationality (good reasons)
   1. This gets tricky since there are officially two steps of *Chevron* and arbitrariness review (three tools) trying to fit into two steps
      1. This leads to one of two results: either *Chevron* step two collapses into step one (see *Entergy*), or step two collapses into arbitrariness review (see *Judulang*)
5. There are several potential fixes for *Chevron*
   1. It could be overruled, either by SCOTUS or by Congress
      1. Would overruling *Chevron* have a practical impact, since judges could still defer to agency “expertise” given docket pressure & discomfort with making technical decisions?
      2. Would Congress be able to overrule *Chevron* without crossing constitutional lines?
   2. A voting rule (requirement of a supermajority to overrule an agency decision?
      1. Relatedly, accounting for the votes of other judges (i.e., if there is a split on whether the statute is ambiguous, a default determination that the statute *is* ambiguous)
   3. Collapse the *Chevron* inquiry into one of simple “reasonableness”
      1. Isn’t that what we already do, in effect? This is *definitely* the conclusion of the argument that *Chevron* is already just one step
6. Similar to *Chevron*, *Auer* deference is a court’s deference to agency’s interpretation of its own regulation
   1. Bears similar theoretical justifications to *Chevron* – namely, agency expertise
   2. Scalia argues against *Auer* deference in *Decker*
      1. Agency has “special insight into rule’s intent” is irrelevant, since judges are required to say what the law *is*, not what the legislator’s intent *was*
      2. The argument for agency expertise is not indicative of who should interpret
      3. Deference to agency interpretations in this context raise separation of powers issues that *Chevron* deference does not
         1. Indicates a larger problem with the separation of functions, which means that the entire administrative state is in jeopardy!
         2. Also encompasses the idea that *Auer* deference incentivizes agencies to write intentionally vague regulations to provide itself with maximum flexibility
            1. Isn’t this overridden by a concern that a subsequent administration will “reinterpret” vague statutes?
      4. All of Scalia’s arguments are *very* similar, if not identical to, arguments against *Chevron*!
         1. AV thinks it is logically inconsistent to reject *Auer* but accept *Chevron*
   3. There are three constraints on *Auer* deference
      1. The existence of judicial review (similar to *Chevron* step 1)
      2. Additional content from statute to regulation being interpreted (anti-parroting canon)
      3. A&C review (*Christopher* – Court injects a “notice” requirement into *Auer* deference)
7. *City of Arlington* eliminates the historical *Crowell* distinction between “jurisdictional” and “non-jurisdictional” questions, since they can frequently be recast in an effort to remove the issue from *Chevron* entirely (similar to blending of *Chevron*’s Steps 1 and 2)
   1. Roberts argues for a narrowing interpretation that Scalia alleges is aimed at restricting the applicability of *Chevron* itself – is he right (see *King v. Burwell*)?

#### Chevron Step 0

1. *Mead* requires a court to find a *reason* to infer that a Congressional delegation of authority has occurred. However, this delegation may be implicit, and is not required as a matter of positive law
   1. Most obvious way is to examine the amount of procedure Congress required – formal and informal rulemaking, and formal adjudication, allow an inference of delegation. In short, whether the delegation includes the power to make rules/decisions with the “force of law”
   2. Also available is “some other indication of a comparable congressional intent”
      1. This *flips* the rationale for deference away from those “actually” recognized in *Chevron*
   3. Informal adjudications & interpretive rules are governed by totality of the circumstances test for congressional delegation
      1. *Mead* does *not* require that informal adjudications never get *Chevron* deference. Likewise, interpretive rules will probably get *Skidmore* deference under *Mead*
      2. Important consideration might be reason-giving – required in all processes except informal adjudication
   4. Scalia argues *Mead* creates a presumption of no authority, flying in the face of *Chevron*
   5. *Mead* is a nominal reconciliation with *Crowell*-like boundaries, but AV thinks this is cold comfort
2. If *Chevron* doesn’t apply under step 0, *Skidmore* deference might (but not necessarily *will*) be appropriate
   1. Creates a broad spectrum of deference – *Chevron* to *Skidmore* to no deference at all
3. *Barnhart* tries to shift step 0 away from *Mead*’s formality grid and towards *Skidmore* factors – the test for if *Chevron* deference is warranted *is* the *Barnhart* factors. If no *Chevron* deference, then use *Skidmore* to determine “how much” deference is due
   1. *Barnhart* factors are essentially the same as *Skidmore* factors, but slightly different: importance of legal question, related agency expertise, complexity of the administration, and agency’s consideration over a long period of time
   2. This is AV’s black hole of deference, and is seen in *Gonzales v. Oregon*
      1. No deference in *Gonzales* because the agency was not an expert in the relevant field and the agency attempted to encroach on traditional provinces of the state

#### Chevron Step 1

1. *MCI* gives birth to the major question doctrine – uncertainty that Congress intended to delegate a decision of great economic and political significance to an agency in a cryptic fashion
   1. Primary justifications for the major question doctrine:
      1. Congress should make decisions, not agencies (excuse for courts *not* to decide)
      2. Some questions should not be politicized (excuse for courts *to* decide)
      3. Canon of interpretation (allows it to be used in *Chevron* step 1)
      4. Check on agency overreach (killed by *Mass v. EPA,* but brought back in force by UARG)
   2. Is a judge’s duty to interpret the *statute as a whole*, or define individual words in the abstract?
   3. Is MQ doctrine a return to the non-delegation doctrine?
2. *Brown & Williamson* further refines MQ doctrine, noting that if the proposed regulatory scheme does not *fit* with the statutory command, a court can take it away from the agency
   1. Ignored in *Mass v. EPA* – one of many reasons why these two cases are inconsistent
      1. This inconsistency is cause for despair – there is no way to argue with a court’s determination that a statute is unambiguous. Based on decisions in *Mass v. EPA* and *Brown & Williamson*, a court can make that determination very easily, whenever it wants, to achieve a given policy goal
3. *UARG* uses MQ to keep the Court in Step 1 – Roberts uses MQ in *King v. Burwell* to keep the Court in Step 0 – which is the better way to look at it?
   1. One possible interpretation is that Roberts is trying to create a robust Step 0 inquiry to keep more cases out of *Chevron*, ultimately leading to a reduction in its importance

#### Chevron Step 2

1. *Entergy* embraces idea that an agency can disagree with courts within a range of reasonableness – this is *antithetical* to *Crowell*
   1. Stevens vehemently argues that the majority has skipped step 1 (Is the statute unambiguous? YES!) and went straight to step 2
      1. This is fundamentally a case about how silence should be interpreted: does silence as to whether a factor may be considered permit or preclude the agency from considering it?
         1. Does the analysis change given that other areas of the statute explicitly allow the disputed factor to be used?
2. *Brand X* establishes a default rule that pre-*Brand X* cases indicated only a court’s judgment of the “best” interpretation, not foreclosing later agency interpretations under *Chevron* step 2
   1. Essentially creates a threshold inquiry – if prior judicial opinion does *not* control, agency might still lose in *Chevron*
   2. Scalia channels a *Crowell*-like concern by noting that this leads to a result where an agency can reverse *every* judicial decision under *Chevron* step 2
      1. Rejoinder – courts still have ultimate control – they can simply decide whether agencies must follow a “point estimate” of the law, or stay within a range of reasonableness
      2. AV thinks it is inconsistent to reject *Brand X* but accept *Chevron*

### Discretion

1. Arbitrariness review is an acceptable solution to rulemaking anxiety because it flows from APA §706
   1. As validated in *State Farm*, A&C review seems to embrace *only* technocratic reasons as acceptable – political considerations may not be cited as reasons for a policy
      1. Dissent argues political accountability (a rationale for *Chevron*) should be an acceptable reason for agency policy
      2. *Mass v. EPA* doubles down on impropriety of political rationales
   2. However, A&C review is not as strong as it is usually made out to be – *Baltimore Gas & Electric*
      1. Agencies have a 92% win rate at SCOTUS – lower courts are too intrusive in A&C review
2. There are three traditional elements to arbitrary & capricious review:
   1. Did the agency consider relevant statutory factors?
      1. If the statute it silent as to which factors are relevant, the agency’s decision to use certain factors in its analysis is given *Chevron* deference – *Pension Benefit*
         1. *Pension Benefit* does not require agencies to consider relevant factors from related statutes
         2. *Mass v. EPA* tries to argue that agency’s reasoning must be consistent with statutory text – if not, the decision is prima facie arbitrary and capricious
            1. Everyone knows this isn’t true, and agencies can provide whatever reasons they want for taking a given action – *WildEarth Guardians* (EPA may decide not to regulate due to lack of resources)
      2. Cost can (must?) be included as *qualitative* (NOT quantitative) factor – *Michigan v. EPA*
         1. Doesn’trequire formal cost-benefit analysis to avoid war with *Vermont Yankee*
         2. Departs from overarching narrative of the weakness of A&C review
         3. Shouldn’t *Mobil Oil*’s permissive stance towards “parceling” allow EPA to consider different factors and different times?
   2. Did the error commit any clear errors of judgment?
      1. Rarely used as a rationale for overturning an agency decision
   3. Did the agency consider all reasonable policy alternatives?
      1. Agency has to consider all “obvious” policy alternatives – not every alternative device conceivable by the mind of man – *State Farm*
         1. This is virtually identical to the requirement to respond to meaningful comments under *Nova Scotia*
         2. How can agency know which comments they must respond to for A&C review?
            1. Does this lead to agency ossification? No empirical evidence, but…
      2. Agency need not explain why a new policy is *better* than an old one, as long as the agency acknowledges the policy change and gives good reasons for the shift – *FCC v. Fox*
         1. Three exceptions to general rule of *FCC v. Fox*:
            1. Agency must acknowledge change has occurred – cf. *Allentown Mack*
            2. Factual contradictions must be addressed
            3. Agency must address any existing reliance interests – *Chenery II*
         2. *State Farm* requires assessment of reasonable policy alternatives, but *FCC v. Fox* doesn’t
            1. Cases can be reconciled using an information accessibility spectrum – in domain of factual uncertainty, agencies may rely on their best guess
3. The birth of A&C review in *Overton Park* suffers from several conceptual problems
   1. Conflicts with *Morgan IV*’s ban on probing mental processes of decision maker
   2. Allows agency to create a list of post hoc rationalizations for its decision
      1. No APA requirement for a record in informal adjudication – can production of a record to facilitate judicial review under §706 be ordered? AV says no, law says yes!