ADMIN LAW OUTLINE – KUMAR FALL 2010

**Background & Definitions**

* Administrative Law: law governing the forms, functions, and activities of government agencies (the APA is the governing law)
* Agency (defined by APA in **551**): each authority of the Government of the United States, but NOT: Congress, the federal courts, the District of Columbia, military authority, and territorial governments
  + Executive Agency: agencies whose heads are subject to unlimited presidential removal authority (generally, single-headed agencies; usually created by Congress with a goal of political accountability)
    - Located within or under the executive branch (directly accountable to the President)
  + Independent Agency: agency headed by person whom the President cannot remove at will, but rather for cause or egregious misconduct (generally, major multi-member boards are independent agencies; usually created by Congress with a goal of scientific governmental management.)
    - Not necessarily located within or under the executive branch
* Agency Functions (how agencies affect the rights and obligations of people)
  + Rulemaking: agencies engage in procedures that produce RULES, which function like statutes
  + Adjudication: agencies evaluate facts and produce an order, which functions like a court judgment – can be legally enforced, can enjoin, or order some kind of action
  + Dickinson – what distinguishes legislation from adjudication?
    - Legislation affects the rights of individuals **in the abstract** and must be applied in a **further proceeding** before the legal position of any particular individual will be definitely touched by it
    - Adjudication operates concretely on individuals in their individual capacity
    - Basically, groups v individuals
  + Fuchs – what distinguishes legislation from adjudication?
    - If a party is NAMED, more likely to be adjudicative; if no individual is named, and the decision has the capacity to affect a broad class of people, more likely to be rulemaking
* Rules: agency statements of general applicability and future effect, intended to have the force of law and designed to outline a law or policy.
* APA **551** provides definitions for administrative law, including – person, party, rule, rulemaking, order (final disposition of adjudication), adjudication (agency process for formulation of an order), sanction, relief, agency proceeding, and agency action

**Agencies & The Legislative Branch** (Separation of Powers)

Delegation of Power

* Congress can create offices and agencies, and can vest in them the authority to promulgate rules and regulations, to enforce those rules and to adjudicate cases that arise under those rules
* Congress delegates its power to executive branch agencies to interpret the organic statute, and to develop both policy and their own regulations
* Delegation Issues
  + Formalism – opines that any delegation of legislative power to an executive branch agency outright violates separation of powers.
    - (Kumar disagrees – says wholesale delegations have been going on since the late 1700s so there is no Framing argument that delegation was never intended.)
  + Functionalism – instead of immediately assuming there is a violation of SOP, ask whether a particular exercise of power by an agency would interfere with a core function of Congress (delegation is permissible, but Congress cannot delegate away its core functions)
  + Agency Advantages over Congress
    - Efficiency – agency rulemaking costs less (in terms of time and money) than Congressional; agencies can specialize internally to increase efficiency
    - Expertise – Agencies specialize in particular areas, so have more specialized knowledge than Congress.
  + Concerns (Disadvantages) about Congressional delegation of power:
    - Agencies are better served to deflect political accountability than Congress
    - Delegation enhances the influence of interest groups
    - Creates potential for shirking – agencies can get lazy and shirk responsibilities
* Nondelegation Doctrine – Idea that vesting legislative power in Congress, as an agent of the people, precludes the delegation of legislative power to any other body
  + This doctrine is specific to the delegation of legislative power, not executive power.
* Intelligible Principle Test – If Congress, via legislative act, provides an intelligible principle to which the person or body authorized to act is directed to conform, such legislative action by that person or body (such as an agency) is NOT a forbidden delegation of legislative power.
  + Congress CAN delegate, but must give the agency guidance and constraints as to how it may act/engage in rulemaking
  + Basically asking whether the delegation is of such a nature that any agency action would be usurping the role of the legislature (if so, would violate SOP)
  + Some types of delegation
    - Contingent Legislation – agency enacts a rule for a circumstance that will arise in the future (rule is enacted contingent on the future event happening)
    - Interstitial Rulemaking – agency engages in rulemaking to fill in a gap that exists under what Congress has legislated; agencies are given discretion to pass rules where there are gaps in the initial statute as long as the rules the pass are within the confines of the initial statute.
* Nondelegation/Intelligible Principle cases:
  + **Hampton** (SCOTUS, 1928) – legislation must contain an intelligible principle to guide agency; Congress must provide constraints to agency action.
  + **Schechter Poultry** (SCOTUS, 1935) – intelligible principle test case (highwater mark)
    - Statute here allowed the industry group to propose a code and then the President to modify and enact codes that would prescribe unfair methods of competition.
    - Court here applied the intelligible principle test and found the statute lacking sufficient intelligible principle (**This is the highwater mark for the intelligible principle test – the most strictly it has ever been applied**)
      * Congress must be SPECIFIC in its guidance
    - Keep in mind, congressional delegation to private parties is not permitted, because the agency will act in a self-interested way instead of acting to benefit the public.
  + **Mistretta** (SCOTUS, 1989) –
    - Issue: Did Congress’s delegation of power to the Sentencing Commission to enact sentencing guidelines constitute a delegation of excessive legislative power? (If so – if it violates the intelligible principle test – it would constitute a violation of the Separation of Powers)
    - SCOTUS: There is only a nondelegation violation if there is **such an absence of standards to guide the agency action that it would be impossible to ascertain whether the will of Congress has been obeyed.** 
      * Congress must delineate boundaries within which the agency may act
    - Scalia dissent – fears agencies are becoming essentially a powerful fourth branch of government that is not subject to oversight or checks and balanges
      * Fears this because President can only remove an agency head for cause
      * **Counterarguments** to this:
        + Agency power originates from the organic statute, not the Constitution, and therefore Congress can pass legislation to scale back or terminate agency power, so agencies are subject to Congressional oversight
        + Furthermore, agency rulemaking and adjudication are still subject to judicial review
  + **Whitman v American Trucking** (SCOTUS, 2001) **–** (slight revival of nondelegation doctrine)
    - “The degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” – implies a SLIDING SCALE analysis when applying intelligible principle test
      * There are different degrees of scrutiny for congressional delegations of power to agencies
      * If the delegation of power is very broad, like Schechter, that will require a VERY CLEAR guiding intelligible principle to be a permissible delegation
      * A delegation of power regarding a small or narrow area of rulemaking may have an intelligible principle that is somewhat vague and will still be upheld (agency action pursuant to the delegation will not be seen as usurping Congress’s power)
    - Takeaway: Courts will uphold legislation delegating power to an agency as long as the principle is remotely clear (severely cuts down nondelegation doctrine)
      * However, agencies cannot fix an overly broad delegation through rulemaking; it is the role of Congress to guide the agency, as opposed to the agency having the burden to fix an improper delegation
    - Thomas concurrence – worries that the intelligible principle test doesn’t sufficiently protect Congress from delegating too much power
    - Stevens concurrence – clarifies that Congress can constitutionally delegate some of its legislative power to an agency as long as it does so pursuant to its legislation (a statute) that adequately limits the power
    - Executive v legislative power:
      * Stevens: passing anything that looks like binding law is legislation
      * Scalia: executive power is any power besides passing legislation with no restriction on policymaking and not reserved for Art. III courts – when agency passes rules, this is rulemaking because they it is subject to restriction

Legislative Overrides

* Statutory Overrides
  + The most straightforward way for Congress to control agency discretion is for Congress to, when an agency makes a decision with which Congress disagrees, pass a statute overriding the agency decision
    - In extreme cases of an agency acting out, Congress can even amend the organic statute to eliminate agency discretion
* Legislative Vetoes
  + Definition: when Congress gives an agency discretion to make decisions, but such decisions are conditional on subsequent approval (or lack of disapproval) from Congress as a whole, the House or Senate alone, or even legislative committees.
    - Usually used when agency will be engaging in rulemaking
    - Expedient way for Cong to keep tabs on agency by quickly and on the front end vetoing an agency rule; generally would be used when agency exceeds authority or if Congress disagrees with how agency acts
  + **INS v Chadha** (SCOTUS, 1983) – imposes limitations on the legislative veto
    - The statute at issue permitted the AG to use discretion in making deportation decisions. Pursuant to the statute, AG decisions could be vetoed by only one house of Congress.
    - Issue – is this one-house legislative veto permissible under the Constitution?
    - Holding: NO, it is not – this VIOLATED Separation of Powers
      * The Constitution requires BICAMERAL (two house) legislative action
      * The Presentment Clause requires any legislative action to be presented to the President and subject to potential Presidential veto before being acted upon.
    - Effect of this case – legislative veto scaled WAY back (almost eliminated); cannot be exercised without bicameral approval and surviving presentation to the President
      * Case invalidated over 200 federal statutes that provided for a legislative veto that did not satisfy bicameralism and presentment; SCOTUS exhibiting Formalist tendencies – would rather preserve separation of powers at expense of efficiency
    - This case made the legislative veto process so cumbersome that Congress no longer bothers to use it.
    - White dissent – without a legislative veto, there is less accountability for agencies – thinks making the legislative veto more onerous for Congress creates a polarization, neither end of which is good – either Congress has to do everything itself, or must relinquish all control to the agency (Functionalist argument)
* Other methods of Congressional control over agencies:
  + Reduce funding for an agency it is displeased with
  + Decline to confirm presidential appointees to the agency

**Agencies & The Executive Branch**

Appointment of Agency Officials

* Appointments Clause: President shall nominate, and with consent of Senate, shall appoint ambassadors, public ministers, and SCOTUS justices, and all of the officers of the US, and Cong may vest the appointment of inferior officers in the Pres alone, or courts of law, or in Heads of Departments
  + Congress has more flexibility when it comes to “inferior officers” (but cannot appoint these officers itself) – can choose to:
    - Delegate the appointment to the President
    - Delegate the appointment to an Article III (judicial) court
    - Delegate power to a department head
      * Does this mean the 15 departments in the APA, or something more broad?
* Appointments Issues:
  + Who is an “officer of the US”?
    - An appointee who exercises “significant authority”
    - MUST be appointed by Pres
  + How to distinguish between a principal and an inferior officer? (see cases below)
  + How to distinguish between an inferior officer and a mere employee?
    - Mere employee: lesser functionaries who are subordinate to principal and inferior officers, and generally are limited to performing ministerial tasks
      * Have no final say/binding control
      * There are no restrictions as to how employees may be appointed – Congress can appoint anyone in an employee capacity.
* Categories of Officers:
  + Principal
  + Inferior
  + Employees (not even considered officers)
* Principal v Inferior Officers – how to tell?
  + **Morrison v Olson** (SCOTUS, 1988) – provides test to tell if officer is “inferior” or “officer of the US”
    - How to tell if an official is an “inferior officer” or “Officer of US”? Four-part balancing test:
      * Is the officer subject to removal by the President or another executive branch official? If yes, this indicates an inferior officer.
      * Scope of duties – do duties include formulating government/executive policy, or are they restricted to more administrative duties?
        + Administrative duties indicates inferior officer
        + Restricted duties (limited to investigation, or prosecution) indicates inferior officer)
      * How broad is the jurisdiction of the office? The more limited, the more likely an inferior officer.
        + Ex) If the officer’s investigation is restricted to certain things, or they have no jurisdiction until granted by a superior officer, this indicates inferior officer
      * Is the officer’s duty limited in tenure? If yes, this indicates inferior officer
        + Whether there is a date set for when the office will end or whether there is a specific task, at the conclusion of which the office will end, these both indicate inferior officer
    - Also – court holds it is permissible for officers in one branch to appoint officers in another branch (here, Article 3 court appointed someone to a position in the executive branch)
  + **Edmond v US** – Scratches Morrison test
    - Asks: if all 4 factors of the Morrison test point to an officer being a principal officer, but they are also subordinate to a higher superior, what prevails? Principal or inferior? (Case points out the Morrison test is dicta)
    - Holding: If they are supervised by someone else in the executive branch that is not the President, they are an inferior officer.
      * Souter concurrence – look to totality of circumstances; look at powers and duties and subordination together
        + Real confusion comes when regarding officers who do have all factors of the Morrison test but are also subordinate. There is no bright line rule.
      * FYI – heads of independent agencies and departments (has department in name) are “Officers of the US”
  + Analysis:
    - First apply Edmond – if they work under someone else other than the President, they are an inferior officer – end of story.
    - However, if they do NOT work directly under someone else (they are a department head, they are one of agency commissioners at top of agency hierarchy) then apply Morrison to see if they are an inferior officer or not.
* Employees – how to tell? What are the criteria? (fuzzy line)
  + **Freytag v Commissioner**
    - Chief Judge of Tax Court appoints ALJs
    - First ask: are ALJs “Officers of the US” “inferior officers” or “mere employees”?
      * Because they can rule on evidence and are appointed for a number of years and can render final decisions, they are more than mere employees.
      * However, they work under all 19 tax court judges, and so are not “Officers of the US”
      * Therefore they are inferior officers
    - Next: Is there an Appointments Clause problem?
      * Under Appts Clause, inferior officers may by appointed by courts of law
      * Holding: Tax Court is a court of law and therefore can appoint inferior officers, therefore the appointment of the ALJs is proper
    - Scalia dissent – says court of law can only be an Article III court (tax courts are Article I courts) but the appointment is still proper because the Tax Court is a Department and the Chief Judge is a Department Head
      * Kumar agrees with Scalia’s view
  + **Buckley v Valeo** (SCOTUS, 1976) – Congress is LIMITED in its appointment power
    - Federal Election Campaign Act created an 8 member Commission to administer/enforce the Act
      * 4 of the members are appointed only by Congress
    - Cong can create offices and provide for method of appointment for those officers under Necessary & Proper Clause – but still bound and trumped by Appointments Clause
      * If the method provided does not comport with Appts Clause, holders of those offices will NOT be “Officers of the United States” and are limited to performing duties only in aid of the functions that Cong could carry out itself.
    - “Employees” are lesser functionaries who are subordinate to principal and inferior officers
    - Holdings:
      * The power granted to the Commission “represents the performance of a significant governmental duty” and exceeds those scope of things that Congress could carry out itself, and so could only be properly exercised by “Officers of the US”
      * Because the Commission members were not appointed in a way that would permit them to be “Officers of the US”, they cannot perform their assigned administrative functions without violating separation of powers.
    - Ultimately – Congress does not have the power to appoint either “officers of the US” or “inferior officers”
  + **Landry v FDIC** (DC Circuit, 2000) 🡪 NOT BINDING!!! (conflicts with Freytag)
    - Finds that ALJs are “mere employees”
    - Distinguishes from Freytag in that the ALJs hearing FDIC cases can only recommend a decision, as opposed to being able to issue binding decisions
    - Concurrence – there is no distinguishing Landry from Freytag – ALJ status as inferior officer or mere employee shouldn’t turn on level of deference given to ALJ nor whether binding power is determinative, should turn on the fact that an ALJ can be removed by an agency (but even that is not determinative, because the Solicitor General is clearly an Officer of the US, and yet is still subject to review by the AG)
  + Employees in a nutshell – no constitutional restriction on who appoints employee
    - Buckley – employees are lesser functionaries subordinate to officers
    - Freytag – employees perform ministerial tasks
    - Landry – FDIC ALJs are all employees because they can only make recommendations, but have no final say
* Court of Law or Department Head?
  + **Free Enterprise Fund** – asks “What is a Department Head?”
    - Independent agencies can in and of themselves be “department heads” (that is to say, each of their board members can constitute a “department head” – an independent agency could have 100 department heads) 🡪 Here, SEC was considered department
    - An agency/body doesn’t require the word “department” to be in its title to be considered a Department/Department Head under the Appointments Clause
  + Pursuant to Freytag, both Article III AND Article I courts constitute “courts of law”

Removal of Agency Officials

* Unlike Appointments, the Constitution is silent as to the extent of Presidential removal power and how removal works – this leads to some confusion in the case law on the matter
* Article 2 Section 1: “Executive power shall be vested in the President”
* Article 2 Section 3: “President shall take care that the laws be faithfully executed”
* If the officer is a PRINCIPAL officer of US and performs PURELY EXECUTIVE FUNCTION(S):
  + **Myers** (SCOTUS, 1926) – the Pres must have unlimited removal power over these officers (current status of holding – original was that Pres removal power applies to all officers appointed by Pres, but Humphrey pared it down)
    - There is no for-cause requirement, the removal must be able to happen at-will (emphasizes unitary executive theory)
    - Ex) All Secretaries who head the different departments (members of Pres cabinet)
* If the officer is a PRINCIPAL officer of US and performs QUASI-LEGISLATIVE/JUDICIAL FUNCTION(S):
  + **Humphrey’s Executor** (SCOTUS, 1935) – a for-cause restriction on removal of these officers who perform these kinds of tasks is permissible (NOT MANDATORY)
    - Note: Cong can always give the President MORE power (could have permitted at-will removal), Cong just cannot impose unconstitutional limitations
    - Implication: independent agencies can be run by principal officers of the US who can be removed only for cause
  + **Bowsher** (SCOTUS, 1986) – Congress cannot reserve for itself power to remove executive officers (violates separation of powers, because Congress is legislative and executive officers are, by definition, executive)
    - Not clear if this also applies to inferior officers.
* If the officer is an INFERIOR officer and performs PURELY EXECUTIVE FUNCTIONS:
  + **Morrison v Olson** (SCOTUS, 1988) – Pres must have unfettered ability (at-will) to remove these kinds of officers ONLY WHEN: removal restrictions would impede the President’s ability to faithfully execute the law
    - Otherwise, Congress imposing a “good cause” requirement for removal does not impermissibly impede on executive power
    - Ask: 1) Is the power purely executive? If so, 2) Does the “for cause” removal requirement (or any removal restriction) impede the President’s ability to faithfully execute the laws?
      * If yes – the limit is unconstitutional
      * If no, the limit is probably okay
    - Kumar: who would this apply to? Solicitor General
      * If inferior officer, safe to assume, even if exercising purely executive power, removal for cause is okay.
    - Scalia dissent – proposes his own test: Statute can be invalidated under SOP if:
      * Agency is engaged in exercise of purely executive power, AND
      * Statute deprives Pres of exclusive control over exercise of that power
      * Leaves important question unanswered: How to tell if an executive function is important enough that the Pres must have the right to remove the person at will?
* If the officer is an INFERIOR officer and performs QUASI-LEGISLATIVE/JUDICIAL FUNCTIONS(S):
  + **Free Enterprise** – for-cause removal is permissible AS LONG AS there are not TWO layers of for-cause removal
    - Here, the fact that the Board members were removable for cause by SEC Commissioners (who were inferior officers), who were in turn removable for cause by the Pres, rendered Presidential control too attenuated and was therefore impermissible
      * Essentially, Pres wouldn’t be able to hold the SEC accountable for supervising the Board because the Commissioners are also limited to for-cause removal – hinders Pres ability to oversee the officers who execute the laws

**Agencies & The Judicial Branch – Judicial Review**

* Judicial Review of Agency Decisions
  + Canons of construction – rules of guidance that courts employ when interpreting statutory language (often used in admin law to determine whether legislation is ambiguous)
    - Schechter shows a nondelegation canon of construction – if an unambiguous statute can be interpreted in a way to avoid granting unrestricted power to an agency, that’s how the statute should be interpreted.
    - Ex) If there are two competing ways a statute can be read, and one interpretation would save the statute while the other would render it void for some reason, use the interpretation that is deferential to or would save the statute)
  + **FCC v Fox TV** – asks “What is an independent agency & to what sort of judicial review should an independent agency be subjected?”
    - Statute said cussing on the radio is criminally actionable; FCC (Federal Communications Commission) has interpreted this to mean only deliberate cussing was actionable, then they changed their view and found fleeting expletives were also actionable. SCOTUS upheld the FCC’s new interpretation.
      * Scalia said no difference between judicial review for executive and independent agencies.
    - Several concurrences/dissents addressed the significance of the FCC as an independent agency:
      * Breyer dissent – With independent agencies, courts should be more vigilant in ensuring major policy decisions are based on articulable reasons (Thinks independent should be treated differently from executive)
      * Stevens dissent – During judicial review, it is the job of the court to make sure independent agencies are acting in accordance with their congressional mandate and are not taking on the role of Congress (Separation of powers issues still arise)
        + Kumar says here, FCC is merely executing and enforcing the law, so it is NOT stepping into Congress’s territory

**Rulemaking under the APA**

Formal Rulemaking under the APA

* Formal rulemaking – an incredibly cumbersome and time consuming process that is very rarely used
* Section **553**c spells out the initial rulemaking process and also when FORMAL rulemaking is triggered
  + Like informal rulemaking, formal rulemaking begins with a notice and comment period
    - Notice – agency notifies public of proposed rule (online and publish in federal register)
    - Comment – there is a period during which the public can comment on the proposed rule
  + However, when rules are:
    - **Required by statute** (if the organic statute that the rulemaking proceeding requires the rules to be made as follows)
    - **To be made ON THE RECORD**
    - **AFTER opportunity for an agency HEARING**
    - Then FORMAL ADJUDICATION is required.
  + Section **556** and **557** govern formal rulemaking (instead of **553**, which governs informal)
    - Have extremely numerous and onerous requirements
    - **556**d – An agency must accept oral and documentary evidence and allow for CX
      * A rule or order promulgated via formal rulemaking or adjudication must be based on the WHOLE RECORD
    - **557**c – The record must contain a statement of findings, conclusions, the bases for the findings, for each material issue of fact and law.
* **US v FL East Coast Ry** (SCOTUS 1973)
  + Emphasizes the magic words – whenever you have a requirement of a hearing on the record in an agency’s organic statute, FORMAL rulemaking is required
    - The order of the words is not important, as long as they are all there
    - If the organic statute does not have the magic words, then informal rulemaking procedures will apply
      * UNLESS the organic statute states EXPLICITLY to proceed under **556** and **557**

Informal Rulemaking under the APA

* Governed by **553**, which requires:
  + Agency publishes notice of proposed rule in Federal Register (**553**b)
  + Agency includes time, place, and nature of public rulemaking proceedings (**553**b)
  + Agency references legal authority under which rule is proposed (**553**b)
  + Agency gives terms/substance of proposed rule and describes issues involved (**553**b)
    - The more substantive this portion is, the better – in CT Light & Power, the agency was faulted for having a thinly supported notice of proposed rulemaking
  + Agency gives the public the opportunity to comment – submit written data, rules, or arguments (**553**c)
    - This period lasts 60 days
  + After all this, agency creates rule and incorporates into the rule a concise general statement of basis and purpose (**553**c)
  + There exists a general right to petition for repeal of agency rule (**553**e)
* Exceptions to informal rulemaking: (**553**b)
  + Interpretive statements and general policy statements (can be even less formal than informal rulemaking)
  + Emergency rulemaking – can suspend time requirements to pass rule in case of emergency (ex – Coast Guard & EPA passed rules after oil spill)
  + Hybrid rulemaking – adds a little more formality than informal rulemaking under **553** – usually done voluntarily by agency
    - Ex) VT Yankee – rulemaking made a record but had no CX or discovery
  + Non-binding agency rules (Non-legislative rul**e**s & management/procedural rules)
* What happens when an agency makes a rule?
  + When an agency issues binding rules (rules other than those interpreting an existing statute or providing guidance on how to run an agency) those rules will also bind the agency itself
    - Although the agency can later change a binding rule by engaging in further valid rulemaking
    - Binding rule: any rule passed through notice and comment rulemaking or through formal rulemaking (usually looks like legislation)
* **VT Yankee** (SCOTUS 1978) – courts can’t require an agency to use more procedure than **553**
  + Agencies can CHOOSE to engage in more procedure than required (hybrid rulemaking) but COURTS can’t force them to do this
  + Unless due process or longstanding agency procedure requires greater procedure than **553**, agencies need not engage in greater procedure and courts cannot compel them to do so
  + Policy: absent constitutional constraints or extremely compelling circumstances, agencies should be free to fashion their own procedural rules and to pursue methods of inquiry that they deem will best permit them to discharge their duties.
* **Connecticut Light & Power** (DC Circuit 1982) – ignores VT Yankee
  + Agency rule is challenged because the proposed rule didn’t give its technical bases, and the final rule was different from the proposed rule.
  + Court says agency must act transparently in early stages of rulemaking and disclose underlying data and studies relied on by the agency to the public; this is so the public can have a meaningful role in the notice and comment process
    - Does DC Circuit hold agency to higher standard than **553**c in forcing agency to justify why it proposed the rule it did? DC Circuit says no, they are merely requiring agency to comply with **553**c. Kumar thinks maybe yes.
  + If the final rule is different from the agency’s proposed rule, this is fine AS LONG AS the final rule is a LOGICAL OUTGROWTH from the proposed rule
    - Test to see if final rule is logical outgrowth: IF change from proposed rule to final rule is SO SUBSTANTIAL THAT THE ORIGINAL NOTICE DID NOT ADEQUATELY FRAME THE SUBJECTS FOR DISCUSSION
      * Important factor of LO test: if the practical impact of the final rule is similar to what the impact of the proposed rule would have been, had it gone into effect
    - If a rule fails the logical outgrowth test, the agency must re-notice
    - Reason for this test – we want the agency to take into account and, if necessary, make changes pursuant to the public comments during the comment period.
* **American Radio** – another DC Circuit departure from VT Yankee
  + Agency failed to disclose studies it relied on when it engaged in rulemaking
  + An agency is required to give the public sufficient notice, which includes revealing the studies on which the agency relied.
  + Held: If an agency relies on a document for its final decision, the agency must disclose that document to the public – it should be part of their statement required by **553**c of the basis and purpose of the rule

Exemptions from the Rulemaking Process (Non-Legislative Rules)

* **553**b says interpretive rules, policy statements, and agency practices are exempt from informal rulemaking. How do we tell if a rule falls into this category?
  + Legal effects test – if a rule has a legally binding effect, it is a substantive rule, will be regarded as such by all courts, and is not exempt from rulemaking procedures (must go through notice and comment) .
* Management/Procedural rules – generally, internal agency instructions (how to run an agency)
  + Rules of procedure can affect the outcome of cases, so generally look at whether a procedural rule can affect the substantive right
* Interpretive Rules & Policy Statements
  + Interpretive rule – statement agency releases to the public explaining what the agency takes its own rules to mean (statement of clarification) – doesn’t add anything new
  + Policy statement – tells public how the agency plans on exercising a discretionary power; it is a statement by an agency announcing motivating factors that an agency will consider, or tentative goals toward which it will aim in determining the resolution of a substantive question of regulation
  + **US Telephone** (DC Circuit)
    - If an agency treats a policy statement as a binding rule in enough cases, then it will be considered a binding rule, regardless of what the agency says about it or what they intended it to be when it was originally issued
      * Look to the IMPACT the rule has had on agency practice
    - Basically, actions speak louder than words here.
    - Decision limited to policy statements
  + **Professionals & Patients for Customized Care (PPCC)** (Fifth Circuit)
    - FDA policy statement regulates pharmacies manufacturing drugs and prevents them from selling as generics
    - Test to see if rule is substantive and thus must go through rulemaking procedures (legal effects test):
      * Does the rule have a binding effect? (Unlike in US Telephone, here courts give deference to what agency SAYS – if they treat the rule as binding/nonbinding)
      * Does the rule leave agency free to exercise discretion, or does it tie agency’s hands? (If ties agency’s hands, more likely binding rule)
    - Doesn’t distinguish between policy statements and interpretive rules but rather treats them holistically (both as non-legislative rules that are exempt from rulemaking)
    - Problematic – to see if the rule has a binding effect, you would have to wait and see how the rule plays out before you can accurately determine if it is legislative.
  + **American Mining** (DC Circuit) – Provides 4-factor test to see if agency rule is exempt from rulemaking or not
    - Does an “interpretive rule” repudiate, or is it irreconcilable with, a previous rule? (If so, then is subject to rulemaking under APA) Look to 4 things: (if answer to any one of these is yes, then new rule is not exempt from rulemaking)
      * Does the new rule add anything substantive to the previous rule?
      * Is the new rule published in the Code of Federal Regulations?
      * Did the agency explicitly invoke its legislative authority in creating the new rule?
      * Did the rule amend a prior legislative rule (take away a prior right or duty)?
    - Decision limited to interpretive rules
    - Pro: Can tell whether will be legislative or non-legislative faster than PPCC
    - Con: splitting hairs between 2 different legislative rules instead of non-legislative v. legislative rules
  + **Syncor** (DC Circuit) – Kumar says this is the most confusing nonsense DC Circuit ever said
    - Case attempts to distinguish between interpretive rule and policy statement
    - Policy statement: doesn’t impose, elaborate on, or interpret a legal norm – just describes how to enforce existing law
    - Interpretive rule: fills in gaps in a statute or in agency regulations; fleshes out prior ambiguities. Court said these are more binding on agencies than policy statements
    - NO EXAM QUESTION will turn on whether a statement is interpretive or policy
  + Analysis:
    - Since substantial impact test is dead and legal effects test is still alive, first step: legal effects test – Does this rule create a binding norm on the regulated parties? Yes if one of 2 things:
      * Rule contains mandatory language: “Agency must engage in X process” “Agency shall do X” (doesn’t provide for much agency discretion) or
      * Agency treats rule as binding in subsequent adjudication
    - If after legal effects test is applied, it doesn’t look like a legislative rule? APPLY THE TEST FOR YOUR CIRCUIT
      * Outside DC Circuit – PPCC case – only one test regardless of whether interpretive rule or policy statement:
        + Has agency treated policy at issue as binding?
        + Are agency’s hands tied by language in the statute?
      * DC Circuit – two different rules (Syncor case)
        + If policy statement – look at impact on agency test from US Telephone
        + If interpretive rule, apply force of law test from American Mining

Does agency have power to engage in NC rulemaking?

If yes, did agency intend to exercise that substantive rulemaking authority? (4 factor test)

**Adjudication under the APA**

Formal Adjudication under the APA

* Unlike formal rulemaking, SCOTUS has no bright line rule on what language in an **organic statute** triggers formal adjudication (once triggered, you go to **556** & **557** for governing the process)
* Formal adjudication is triggered by **554**
* IF pursuant to **554**:
  + A formal hearing is required to determine the issue
  + Conducted on the record
  + After opportunity for agency hearing
  + Then formal adjudication IS triggered, go to **556** and **557** (these sections govern both formal rulemaking and formal adjudication)
  + A statute requiring a “hearing” does not necessarily mean formal adjudication
* Formal Adjudication Procedure
  + First 🡪 ALJs make “initial determination” or “initial opinion”
    - ALJs make credibility determinations about witnesses
    - Big deal about formal adjudication – creates a/holds hearing on the record
    - Rules of Civil Procedure and FRE do NOT apply in federal agencies
  + Second 🡪 The initial ALJ decision is subject to review within the agency (usually a group of commissioners)
  + Third 🡪 Agency heads make a final decision on the matter
  + Fourth 🡪 It is only AFTER this final decision that someone can appeal in the federal court system
    - Typically you will start with either your circuit’s or the DC Circuit’s CoA
* Since there is no specific language that triggers formal adjudication, if an organic statute is ambiguous (if doesn’t have magic words, then presumed ambiguous) as to what type of adjudication applies, how do we know when an agency is required to engage in formal adjudication? IT DEPENDS (on which Circuit you follow)
  + **City of West Chicago** (Seventh Circuit) – There is a presumption in favor of INFORMAL ADJUDICATION unless legislative history indicates a CLEAR INTENT for formal adjudication
  + **Seacoast** (Ninth Circuit) – FORMAL adjudication is presumed unless the organic statute specifies that formal adjudication is NOT required
  + **Chemical Waste Mgmt** (First & DC Circuits) – use Chevron analysis
    - Is the statute ambiguous with regard to what type of adjudication must occur (whether a public hearing is required)?
    - IF YES, and the agency interprets the ambiguity to mean either that formal adjudication IS or IS NOT triggered (usually would probably decide it was not triggered), then
    - Agency decision regarding type of adjudication will be upheld so long as it is REASONABLE (a very lax standard)
  + Chemical Waste is the prevailing approach right now, but it’s unclear how other Circuits would address this issue.

Informal Adjudication

* APA is largely silent on procedure required for informal adjudication (little to no required procedure under APA – adjudication proceeding can pretty much happen however – same person can act as investigator, prosecutor, and judge, etc)
* **Overton Park** – agency didn’t substantiate findings of fact. Problem? YES
  + APA says nothing about formal factfinding being required for informal adjudication
  + Court held that agency had to provide a record/explanation as to why the agency held what it did (court wants agencies to be held accountable)
    - Court decided not to give self-serving agency statements weight in court
  + Implies a new procedural requirement that doesn’t show up in APA – agency must provide enough of a record that upon review you can tell if agency was acting properly
  + Tension with VT Yankee that says courts can’t require agency to use more procedure than APA requires
* **Pension Benefit** – Reconciles tension between VT Yankee & Overton Park
  + Here, the agency was acting like the agency in OP; Court said OP and Vt Yankee are not in tension – focuses on the specific/general distinction
    - If a court tries to invent a new procedural requirement (impose extra steps – here, create a requirement of “fundamental fairness”) that is a specific requirement and CANNOT STAND
  + VT Yankee says courts are not free to impose **specific** procedural requirements that are not in APA
  + Overton Park says **706** imposes **general** procedural requirements on an agency to explain its decision to avoid the decision being unlawfully arbitrary and capricious under the APA
    - Rationale of OP: court has to be able to review agency decision on appeal
  + Applies VT Yankee to informal adjudication as well as rulemaking

**The Choice Between Rulemaking & Adjudication**

* **Chenery I** (SCOTUS 1943)
  + Chenery is submitting reorganization plans to the SEC. SEC approves a reorganization plan
    - This is adjudication because it is against one party, no general rule is being issued
    - The order singled Chenery out and excluded him from the general proposed new structure. Chenery sues.
  + **A court can only affirm or overturn the agency decision on the basis that the agency gives in its findings; the grounds on which administrative action must be judged are those upon which the record discloses that its action was based**
  + If a determination of policy or judgment is one that the agency alone is authorized to make, a judicial judgment cannot be made to do service for an administrative judgment
  + Court can do one of three things:
    - Affirm agency decision for reason agency gave
    - Remand decision to agency
    - Reverse agency decision as wrong
  + Court CANNOT substitute its own authority (to do so would be to take from the agency something Congress intended the agency to have)
  + Likewise, the AGENCY cannot make something up later and claim that as the basis for their decision – must have already been incorporated into agency order.
  + Dissent – should have allowed ad hoc adjudication here
  + Modern application of Chenery I with regard to modification of rules – if it is absolutely clear what the agency action would be on remand to the agency, courts may bypass strict procedure and just affirm the case (for efficiency’s sake)
* **In re Federal Water Svc Corp**
  + Remand of Chenery I to SEC. Pursuant to Chenery I, SEC is supposed to come up with law/authority on which to base its decision against Chenery.
  + SEC refuses to do this, invokes its own policymaking authority and made the same decision as before without citing legal authority. Chenery appeals again.
* **Chenery v SEC** (DC Circuit, 1946)
  + DC Circuit condemns SEC decision
  + SEC violated SCOTUS ruling by applying to Chenery a standard that had never been promulgated by either an agency regulation or a legislative problem
  + Basically, doesn’t like that SEC is adjudicating on the basis of a rule that doesn’t exist – hasn’t been made either by Congress or by the SEC itself.
* **Chenery II** (SCOTUS, 1947)
  + Although SCOTUS affirms its holding in Chenery I – courts can only overturn agency action via the basis it cites for its action – SCOTUS reaches a different result.
  + Says agencies have a statutory right to do case-by-case adjudication, if the agency deems that is the best way to proceed
    - Support ad hoc adjudication – adjudication for a special purpose or issue presently under consideration
  + SCOTUS wants agencies to be able to create policy through adjudication as well as through rulemaking, instead of just through rulemaking
    - If a situation is too new for an agency to pass a rule, the agency still has to deal with the case, so we want to allow the agency to deal with these situations on a case-by-case (adjudicative) basis
  + The AGENCY (not a court) gets to choose whether to engage in rulemaking or ad hoc adjudication.
  + How will the agency make this decision?
    - The organic statute may tell an agency how to proceed on a certain issue
    - If not, there are procedural factors agencies will consider in making this decision:
      * Informal adjudication is less formal than either type of rulemaking (faster)
      * Scope: rulemaking has broad application, adjudication is limited to particular case at issue
      * Control over issues: rulemaking allows agency to proactively shape its agenda whereas adjudication is reactionary
      * Visibility: adjudication more likely to fly under the radar than rulemaking
      * Deliberation: if agencies want feedback from the public, rulemaking is the better way to get this
      * Efficiency – rulemaking is ultimately more efficient than adjudication
* Modern Implications of Chenery II
  + If an agency is empowered by a statute to proceed either by rulemaking or adjudication, that choice is at the discretion of the agency
  + Retroactivity concerns:
    - Chenery II says retroactivity is permitted if the agency deems it appropriate and if it is consistent with carrying out an agency’s statutory duties
    - Modern modification – if a new rule is a substitution for a well0defined earlier rule, in that case the new rule has to be given PROSPECTIVE effect (not retroactive)
      * But if a new rule is an application, clarification to existing law, retroactivity is presumed to be okay but the presumption can be overcome if it would cause manifest injustice.

**Scope of Judicial Review of Agency Action**

* Standards of review
  + When a court reviews action of a lower court, the typical standards of review used are jury standard, abuse of discretion, clearly erroneous, and de novo
  + When a court reviews agency action, standards of review used are:
    - Arbitrary and capricious (most deferential )(Courts affirm agency decisions 75% of the time under this standard)
    - Substantial evidence (mid-deferential – a little MORE deferential to agency than “clearly erroneous” would be) – courts affirm agency decisions 70% of the time
      * Requires a court to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion
    - De novo review – least deferential standard – courts affirm agency decision 67% of the time
      * Note: the default review for questions of law is de novo; however, there is a series of exceptions to this, 2 of which are:
        + Chevron: if Chevron applies, do not review de novo, give Chevron deference (if passes each step)
        + Mead: if Mead applies (agency is interpreting its organic statute in context of informal adjudication or something less than NC) do not review de novo; Skidmore applies
  + **APA 701** – APA judicial review applies except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law (provides definitions for applicable terms)
  + **Dickinson v Zurko** (SCOTUS, 1999) – court/court standards of review are not interchangeable with court/agency standards of review
    - Fed Circuit (consistently refuses to believe APA applies to it) used clearly erroneous standard of review to hold that Patent Board erred in decision; agency says we are an agency, that is not a proper standard to use
    - Had substantial evidence been applied, Patent Board decision would have been upheld.
    - SCOTUS: when a court reviews an agency decision, more deference should be given (agency has expertise and Congress charged agency to make such decisions)
    - Under **559**, there is a presumption of uniformity for judicial review of agency decisions (the three standards listed above) that can only be overcome by very clear language in the statute
      * **559** addresses the effect of a subsequent statute on other laws and there is a presumption of equal application (uniformity) of the law
    - Distinction between clearly erroneous and substantial evidence standards – whether the specific presiding judge could find v whether any reasonable mind could find (hence substantial evidence more deferential to agency)
* Judicial Review of Findings of Fact in Formal Proceedings (QUESTIONS OF FACT)
  + Formal proceeding: adjudication OR rulemaking
  + The substantial evidence standard is the one typically used for findings of fact in FORMAL proceedings, and the substantial evidence standard must be met based on the closed agency record (the record formed under **556**/**557** from the proceeding)
  + APA **706**(2e) – A reviewing court shall set aside agency action/findings found to be unsupported by substantial evidence in a case subject to **556** and **557** (formal rulemaking or adjudication) or otherwise reviewed on the record of an agency hearing provided by statute
    - What kind of evidence will be reviewed? All documentary and oral (FRE don’t apply)
  + **Universal Camera** (SCOTUS 1951) – When courts review agency decisions, they must evaluate the record AS A WHOLE, not just the part of the record favorable to the agency decision, to see if in light of everything the agency’s decision is supported by substantial evidence.
    - In this case, the ALJ found one way and the agency reversed, but the ALJ findings are still important because the ALJ engaged in factfinding, so ALJ findings are part of the whole record that will be reviewed on appeal.
  + **Allentown** – what actually counts as being included in the record, and thus must be reviewed by courts?
    - Testimony, attached documentary evidence, etc
    - The agency cannot evaluate evidence on the basis of unarticulated presumptions and practices, even if those presumptions and practices COULD survive judicial scrutiny if the agency had explicitly adopted them into the record
      * “Agency wisdom” will not be on the record and will not factor into the substantial evidence analysis of the court.
      * Kumar disagrees – says courts shouldn’t discount agency’s knowledge
  + **Kimm** – courts should not look only at the final agency decision, also at the lower ALJ opinion (constitutes part of entire record) – especially because ALJs actually decide based on credibility whereas the agency just decided based on the record
* Judicial Review of Findings of Fact in Informal Proceedings Review of Agency Conclusions
  + **706**2a – courts shall set aside informal factfinding IF agency findings are:
    - Arbitrary & capricious
    - Constitute an abuse of discretion, or
    - Not in accordance with the law
    - (All three of these things are referred to in shorthand as “arbitrary and capricious review”
    - Note: as a caveat to Allentown, agencies can structure facts on agency policies, including evidentiary presumptions so long as agencies announce their presumptions before relying on them.
  + **ADAPSO v Board of Governors for Fed Reserve** (DC Circuit, 1984) – Interplay between substantial evidence and arbitrary and capricious standards of review
    - If there is specific language in an organic statute that requires more than the APA’s a/c review, the organic statute trumps APA’s a/c review
    - This case involves review of agency rulemaking.
    - DC Circuit treats the s/e and a/c standards of review as the same standard, just one to use for formal proceedings and one to use for informal proceedings
      * There is no such thing as a finding by an agency that isn’t somewhat arbitrary but somewhat supported by evidence – therefore, there is no standard that would fail a/c but pass under s/e
      * Important difference:
        + S/E MUST BE FOUND WITHIN THE RECORD OF CLOSED-RECORD PROCEEDINGS – cannot look beyond the record (why s/e is generally used to review formal rulemaking/factfinding)
        + When doing a/c review, a court can review based on material that was not known at by parties at the time of the initial proceeding (it can arise later and be known only to the reviewing court) and therefore would not be in the record (no closed-record requirement for a/c) – why mostly applied to informal rulemaking/factfinding.

**Judicial Review of Agency Legal Conclusions** (central admin law topic – agencies interpreting their own organic statute)

* Review of legal questions can come in a number of forms:
  + Whether an agency action or policy is in violation of the Constitution (due process)
  + Whether an agency action or policy is contrary to the organic statute
  + Whether an agency action or policy is in violation of the agency’s own regulations
* These forms create a spectrum for the types of deference an agency can get:
  + Constitutional challenges – agencies get no deference and are reviewed de novo
  + Challenges to agency interpretation of its own regulations – get most deference
  + Challenges to agency interpretation of the organic statute – mid-deference, fuzziest area for review, and most common area that comes up

Deference Historically

* Pre-Chevron cases where agency interprets a statute; these cases attempt to pin down when/why/how much deference to give an agency (NO CONSISTENT RULE BEFORE CHEVRON but a TREND toward deference)
  + **NLRB v Hearst Publications** (SCOTUS, 1944)
    - Case deals with NLRB interpretation of statute
    - Court asks if Congress intended that the agency be accorded deference 🡪 decides yes, Congress did so intend, which is shown in that Congress gave the agency the authority to decide matters under the statute through formal adjudication.
    - Factors to weigh Congressional intent and agency decision:
      * Whether the agency interpretation has precedent
      * Contemporaneous construction – the sooner after the organic statute was passed the agency made the rule, the more deference
      * Original intent of Congress
      * Expertise of agency
      * Fairness – if agency seems biased
  + **O’Leary** (SCOTUS, 1951)
    - SCOTUS uses de novo review for question of law: looks to agency record to see if substantial evidence supports agency conclusion of law (gives deference)
    - Uses substantial evidence review for question of law, and on that basis upholds agency findings (gives deference)
    - Basically, court applies substantial evidence to everything (more deferential than de novo)
  + **Packard Motor Car** (SCOTUS, 1947)
    - Court says no reason to look through legislative history if the statute is clear on its face and lacks ambiguity
    - Indicates that if the agency decisions involve the types of things properly left within the agency decision, agency decision is entitled to deference

Modern Deference

* Emergence of a Deference Rule: Skidmore & Chevron
  + **Skidmore** (SCOTUS, 1944) – Results of informal agency proceedings (here, interpretive statement) are entitled to deference to the extent that the courts will regard them as persuasive (but not binding)
    - This is “expertise-based” deference – agency knows best/most about a particular matter
  + **Chevron** (SCOTUS, 1984) – is agency interpretation entitled to deference?
    - Two-step test:
      * Has Congress spoken directly to the question at issue? (Is the statute ambiguous?)
        + Can look to legislative history on this point
        + If NO, Congress has not spoken directly, then YES, the statute is ambiguous, next:
      * Is the agency’s interpretation of the statute based on a permissible construction of the statute? (Did the agency act reasonably?)
        + Is it arbitrary and capricious?
        + Is it contrary to the statute?
    - FOUR REASONS Court imposes such a deferential approach:
      * Congress delegated rulemaking authority to agencies based on expertise
      * Agencies are held politically accountable both to Congress and Pres
      * In policymaking, agencies have the freedom to consider information that judges can’t
      * In regard to factfinding, the agency process of going through formal adjudication or rulemaking is superior to having a court try to make a decision by reviewing the cold record
    - Once you go through the Chevron test, if the statute is ambiguous but the agency acted reasonably, courts MUST defer to the agency
      * Different from Skidmore, where courts merely regard agency statements as persuasive; also, Skidmore only applies to non-legislative (exempt from APA procedure) rulemaking.
  + Notes on Chevron
    - Meaning of ambiguity: If Congress explicitly left a gap for an agency to fill, that is an express delegation of authority to the agency to fill the gap 🡪 If Congress uses an ambiguous term and doesn’t define it, Congress didn’t just forget to define it; instead that is an explicit delegation to the agency to define the term
      * Different from when a statute is just unclear and we look to legislative history to find out what it means
    - **706** – originally, deference was only given to agency for questions of fact; Chevron flips this
    - How to get Chevron deference in adjudication:
      * Apply ambiguous term case by case, or
      * Create a definition for the ambiguous term to be applied to all
  + **Cardoza-Fonseca** (SCOTUS, 1987)
    - SCOTUS overturns interpretation of statute agency used in adjudication based on a statutory construction argument – looks at canon of construction for Chevron step 1 (takes a more searching approach)
    - Practical effect of this case: LIMITS amount of deference agencies get under Chevron
    - However – if an agency is dealing with a term that is ambiguous, but such a broad concept that the agency can’t concisely define it (they would be trying to define a term in the abstract, instead of for a specific context), the agency should instead evaluate on a case by case basis – and the agency decision to evaluate on a case by case basis, and the interpretation in each case, is entitled to Chevron deference
    - Scalia concurrence – Scalia thinks the Court is improperly substituting its own interpretation of a statute for that of an agency (doesn’t think tools of statutory construction exist for court to trump agency) – Kumar agrees with Scalia
* When does Chevron apply?
  + Chevron Step Zero – before applying Chevron, ask if this is the type of case where Chevron applies
    - Agencies can only receive deference for a statute they are charged with administering (usually, a statute that empowers the agency🡪 the organic statute)
      * Ex) FDA interpreting APA is not entitled to deference, because FDA isn’t charged with administering APA
    - Agency interpretations of their own regulations are not eligible for Chevron deference (too informal)
    - Agency interpretation of something outside the statute (say the Constitution or a court decision) is not eligible for Chevron deference
    - If an agency is acting as a prosecutor, its interpretations relating to the proceeding are not entitled to deference
  + **Rapaport** (DC Circuit, 1995) – To get Chevron deference, there must be only one agency administering a statute
    - Don’t want conflict of multiple agencies interpreting the same provision differently, so no agency gets deference
    - Concurrence – If all agencies that administer a statute agree on an interpretation, deference could be proper.
  + **Christenson** (SCOTUS, 2000) – Agency opinion letters are not entitled to Chevron deference (they are too informal) – it is unclear where the line is for what is formal enough to receive Chevron deference
    - Opinion letters and the like (**non-legislative rules**) receive Skidmore deference – surprise! Skidmore isn’t dead!
    - Scalia concurrence – Skidmore deference should never be used, it is Chevron or none
      * Counterarg to this – Even if included in a very informal statement, the agency can still have relevant expertise we want the court to pay attention to
    - Breyer dissent – agrees that Skidmore is still good law, but says that it would be proper to apply Chevron here as well
    - Open question after Christenson: Which issues/agency decisions are entitled to Chevron deference and which are entitled to Skidmore?
  + **Mead** (SCOTUS, 2001) – Trying to fill in the Christenson gap – what decisions are eligible for Chevron deference (addresses Chevron Step 0)
    - Congress must have intended to delegate for agency to be entitled to deference
    - **If an agency is engaging in formal rulemaking, formal adjudication, or informal rulemaking, agency is eligible for Chevron deference 🡪 proceed to Step 1**
    - Other ways to find congressional intent to delegate? If agency interpretation has a legislative effect (binds third parties)
    - Limits scope of Chevron – tailors level of deference depending on level of formality agency uses in rulemaking/adjudication
  + **Negusie –** (SCOTUS, 2009)Different Justices approach the Chevron question differently:
    - Kennedy – plurality opinion writer – if agency interpretation is based on a legal error, no Chevron deference; remand to correct the mistake
    - Scalia (along with Alito) – concurrence – emphasizing importance of maintaining agency discretion where Congress has so delegated; afraid this case might cut into that discretion
    - Stevens (along with Breyer) – concur in part and dissent in part - distinguish between cases where the agency is trying to define an ambiguous term in the abstract (like Cardoza-Fonseca) versus where the agency is trying to define an ambiguous term in a specific context (like Chevron)
      * Stevens – If the agency states during adjudication that “we define (ambiguous term) to mean X”, shouldn’t find that to be eligible for Chevron deference; whereas If agency says “we think this specific case is covered by (ambiguous term) because of X” that gets Chevron deference because it is an application of law to fact.
    - Thomas – dissent – statute is not ambiguous about what courses of inquiry are proper and which are not, therefore agency is not entitled to Chevron deference
      * Contextually, statute clarifies issue (looks at legislative history) so there is no ambiguity
      * Since statute hasn’t changed since enactment, Congress intends (looks to Congress intent) for it to stay the same – just because a statute fails to mention a term does not mean the statute is ambiguous
      * Kumar loves the Thomas opinion

**Review of Agency Discretion & Policymaking**

* Hard look review
  + Early version: developed in 60s – courts required agencies to demonstrate they had taken a hard look at underlying questions of policy and fact when making policy; they had to give extremely detailed explanations for their conclusions and why they did not choose alternatives
  + Modern version: no longer a procedural requirement of agency, but rather courts taking a hard look when reviewing agency policymaking
    - Incorporated by DC Circuit in Step 2 of Chevron (not just for policy but for questions of law too)
    - While hard look is not a procedural “requirement”, indirectly it does require agencies to make findings with regard to informal agency actions if they want the action to be sustained on appeal
    - Hard look review aims for balance between policing the agency for genuine arbitrariness and allowing judges to impose their own policy preferences/judgments
* **Industrial Union** (DC Circuit, 1974)
  + How to tell if an agency is deciding a question of policy (and thus is subject to hard look review?)
    - If the facts do not unilaterally give an optimal or right answer (if there is no fact issue) and there is also no legal issue (no statutory interpretation issue, everything is unambiguous) and the court just has to choose one course of action from the innumerable possible courses of action = policymaking
  + If an agency is handling a policy issue, then the agency needs to state what considerations it found to be persuasive and explain what it was doing so the court can review
    - Agency must articulate decisionmaking process that shows it took a hard look at problem presented and the considerations that went into making that decision
      * Basically, agency must explain its whys and hows
  + Why make agencies explain reasons for policy decisions?
    - Pros: it holds agencies accountable for their policy decisions
    - Cons: Places a higher burden on agency; slows down agency’s rulemaking/adjudication process
* **Motor Vehicle Mfrs v State Farm** (SCOTUS, 1983)
  + First SCOTUS decision to adopt hard look review
  + Agency in this case passed a regulation requiring car mfrs to install seatbelts instead of airbags
    - Claims a basis of cost-benefit analysis, but really was a political move to help newly elected Reagan fulfill his campaign promises
  + Court uses arbitrary and capricious review, but uses HARD LOOK arbitrary and capricious review. Meaning:
    - Agency has to provide relevant data and give a satisfactory explanation and a rational decision
    - RATIFIES DC Circuit approach to hard look review
  + Criteria for hard look review – agency must:
    - Articulate satisfactory rationale for agency’s action at the time of the action (not something post hoc)
    - Supply a reasoned analysis justifying any reversal of course
    - Consider alternative ways of achieving objectives (not every alternative, but at the very least those Congress advised you consider)
    - Examine relevant data and consider relevant factors
    - Provide explanation for each of the above four criteria showing that the agency actually did it
  + Rehnquist dissent – just because policy is motivated politically doesn’t mean it’s improper (Kumar agrees with this) because if don’t comply with current Pres administration you may be fired!
  + Distinguishing between State Farm & VT Yankee
    - State Farm involves substantive review of agency decisions as opposed to imposing new procedures on agencies; SF asks – did agency actually do what it was supposed to and consider proposed alternatives.
  + State Farm & Chevron
    - State Farm is in tension with Chevron (legal question)
    - Chevron says that agency interpretation of a statute will be given strong deference
    - State Farm says that agency administration of a statute (policymaking – which is supposed to be an agency strength) will NOT be given strong deference, will be strictly reviewed
* **PR Sun Oil** (First Circuit, 1993)
  + If an agency follows all necessary procedures to the letter, but the outcome doesn’t logically follow from the procedures.
    - If an agency decision doesn’t make sense, it is arbitrary and capricious and will not survive hard look review
  + Court says hard look review requires the following:
    - Discussion of relevant issues (including any reason for suddenly changing approach or rejecting proposed alternatives)
    - Consistency with past practice
    - Avoidance of unexplained discrimination
* Hard Look Summary
  + Apply hard look review whenever you have a question of policy, whether for formal or informal content
    - When a statute directly authorizes an agency to create broad standards, limits, etc 🡪 potential policy question
  + Difference between AC review for informal findings of fact v Hard Look AC
    - Original AC is highly deferential to findings of fact – court will probably uphold unless there is something glaringly wrong with it
      * Chevron bubble rule was a drastic shift, but because it was a question of law (statutory interpretation) it receives strong deference
    - Hard look AC is a much more searching standard – courts require the agency to provide a reasoned analysis for ANY change/new implementation of policy
      * Agency must consider all relevant factors
      * Agency must explore alternate ways of achieving objective (everything in purview of rulemaking)
      * Agency must show action is result of reasoned decisionmaking
  + Downside of hard look – ossification; makes the NC rulemaking process much more time intensive
  + Legal basis for hard look (not explicitly in APA)
    - **553**c – requires agency to incorporate into its rules a concise general statement of their basis and purpose
    - **706**2a AC standard – says courts need sufficient information from agency to conduct judicial review on an issue
  + If policy fails hard look, court will vacate rule and remand back to agency for reconsideration (there will be no rule in place until agency comes up with new rule)
    - State law exception – in TX, default practice is to just remand without vacating the rule

**Agency Discretion & Policymaking: Substantive Review v Procedural Adequacy**

* Cases:
  + **Nova Scotia Food Products** (Second Cir, 1977) – another example of hard look review
    - FDA passed regulations for production of whitefish. (NC rulemaking)
      * Didn’t make scientific data on which it relied available to public
      * Didn’t consider (or at least failed to show it considered) viable alternatives
      * Therefore, it didn’t meet the **553**c concise general statement requirement – agency cannot leave vital questions, raised by material comments during the comment period, completely unanswered
      * Hard look is not dissimilar from American Radio – agency HAS to explain why it chose one option over another
  + **US Telecom v FCC** (DC Cir, 2000) – hard look applied to step 2 of Chevron – that is, to a question of law rather than a question of policy BUT not ever DC Circuit panel has applied hard look to Chevron step 2
    - FCC interprets ambiguous term in statute and is sued; entitled to Chevron deference?
    - Court says no, because:
      * FCC failed to explain how its interpretation of statutory terms actually reconciled with the relevant statute – failed to meet State Farm criterion – therefore interpretation was not regarded as product of reasonable decisionmaking.
    - SCOTUS has not endorsed using hard look for Step 2 of Chevron

**Due Process**

* Overview
  + Law cannot deprive people of due process pursuant to Fifth and Fourteenth Amendment
  + Specifically, the government cannot deprive people of life, liberty, or property without due process of law
  + Two types of Due Process
    - Substantive – limits what the government can regulate
    - Procedural – procedures by which government may affect rights of individuals (TYPE OF DP IMPLICATED IN ADMIN LAW – we focus on procedures agencies use)
      * \*\*\*\*\*\*ONLY APPLIES TO ADJUDICATION\*\*\*\*\*\*
      * **Bi-Metallic** (SCOTUS) – why due process only applied to adjudication
        + DP is required only when a relative small number of people are concerned and who are exceptional on individual grounds in each case (essentially describing agency adjudication)
      * Ex) If agency engages in adjudication (NOT rulemaking) and takes away welfare benefits, raises DP concern
      * Whereas if Congress passed legislation abolishing welfare, no DP claim
* Analysis
  + Is the agency engaging in adjudication?
  + Is there a constitutionally protected interest? (Life, liberty, property)
    - Property – 2 categories
      * Common law rights – “old property” – distinguishes between rights and privileges
        + If something is a right, government can’t seize without due process, otherwise you have been deprived of DP
        + However, if something is a privilege, government can seize without any kind of employment (such as employment)
      * Statutory rights – “new property” – extends requirement of due process to government taking of some things that were traditionally privileges
  + What process is due from the agency?
    - DP issues for “life” – better served in criminal procedure, not usually implicated in administrative law
  + Is the agency decision one that would implicate DP? Yes, if it involves -
    - Benefit decisions (terminating welfare, disability payments, government assistance)
    - Access to services (state agency expels student for violating school policy)
    - Licenses – (state agency revokes medical license or driver’s license)
    - State employment/State contracts/Federal employment/Federal contracts
* Cases – Property Interests
  + **Bailey v Richardson** (DC Cir 1950) (Old Property case)
    - Alleged property: employment
    - Court says employment does not constitute property, and no process is required here to take it (to fire the employee)
      * Balance cook’s interest (right to work at that location) with government interest (military being able to choose its work force)
    - Dissent – first sympathetic view that employment could be constitutionally protected
  + **Cafeteria Workers v McElroy** (SCOTUS 1961) (Old Property case)
    - Alleged property: ID security badge to enter workplace
    - Court: No due process is required here because the plaintiff wasn’t deprived of the right to work, only of her very narrow right to work at this specific facility, which does not trigger a need for due process
  + **Goldberg v Kelly** (SCOTUS 1970) (New Property case)
    - Alleged property: welfare benefits
    - Process requested: pretermination hearing
    - Court: (extends DP protection to “new” property) welfare (benefit received from the state) is property and requires due process before being taken
      * Hence, to deprive of pretermination hearing violated right to due process
      * Although a FULL pretermination hearing is no longer required, just some pretermination process)
  + **WI v Constantineau** (SCOTUS 1971) (New Property case)
    - Alleged property: good name/reputation
    - Requested process: opportunity to challenge “badge of infamy”
    - Court: When a person’s good name/reputation is at stake because of government action (here, labeling “excessive drinker” and prohibited from buying alcohol) has due process rights to notice and opportunity to be heard
      * People do have property interests in their reputations
  + **Bell v Burson** (SCOTUS 1971) (New Property case)
    - People have property rights to their driver’s licenses (they can become essential to a person’s livelihood), and the government cannot take away driver’s license without according due process.
    - Case broadens idea of protected rights which must have process before being taken
* How to tell if a particular benefit is a liberty or a property interest?
  + Liberty interest: any type of criticism made to your good name; reputational damage
  + Property interest: a benefit for which someone has MORE THAN an abstract need/desire; a benefit on which someone relies in everyday life
    - Can be created formally or informally, can be granted by statute, regulation, school policy, etc.
    - Whatever grants the property right must confine the government’s discretion to remove that benefit from the private person to a range so narrow that a person would believe he could keep the benefit absent unusual circumstances (why entitled to DP before benefit is taken)
      * Ex) In Goldberg – state created welfare so state created the property interest
  + Cases:
    - **Board of Regents v Roth** (SCOTUS 1972)
      * Benefit: renewed employment contract (original contract was for one year)
      * Requested process: a reason for the University decision not to renew
      * SCOTUS: This interest is not encompassed by the constitutional protection of liberty or property
        + Why not liberty? His name/reputation was not being damaged; State did nothing to limit future employment opportunities.
        + Why not property? For a property interest to be protected by due process, you must have a legitimate claim of entitlement to it.
      * Dissent – Marshall – wants to establish a property right in government employment (requiring for-cause termination instead of permitting at-will); wants a greater scope of property rights
    - **Perry v Sindermann** (SCOTUS 1972)
      * Benefit: University employment
      * Requested process: hearing as to why he is being fired
      * Court: Since he was employed for 7+ years, he had de facto tenure (entitlement), he does have a DP right to a hearing (court focuses on property interest)
    - **Castle Rock v Gonzales** (SCOTUS 2005) (essentially creates a step 0 for DP)
      * Benefit: restraining order
      * Requested process: enforcement of restraining order
      * Court: approach DP analysis like this:
        + **Is there an entitlement? IF YES 🡪**
        + **Does the entitlement constitute a liberty or property interest?**
      * SCOTUS says here, not clear whether entitlement and even if there is, too vague to constitute a property interest because the restraining order arose incidentally, not out of specific government benefit (it wasn’t solely created by the government)
      * Concurrence – Souter/Breyer – No one took away the restraining order; she still has it. Instead of asking for process before being deprived of restraining order, she wants to use due process to compel the government to act (do more) on the basis of the existence of the restraining order. She has had nothing taken away from her. The restraining order itself provided process; it just didn’t provide substantive entitlement, which is what she is claiming.
      * Dissent – Stevens/Ginsburg – There was an entitlement to police protection and that protection does constitute a property interest. She was deprived of her property right when the police ignored her pleas to arrest her husband pursuant to the restraining order, and ignored these pleas without providing her a hearing or process.
* If a liberty or property interest is at stake, what process is due?
  + **Mathews v Eldridge** (SCOTUS 1976)
    - Benefit: disability; Benefit rescinded with process both pre and post-termination, and Eldridge is told he can seek reconsideration within 6 months but it may take up to a year to get a decision.
    - Court creates 3 part balancing test to determine if process given is sufficient: (Kumar hates this test)
      * Private interest affected by agency action (individual interest)
        + Look at what determines eligibility for the benefit (is it a static condition or something that could change?)
        + Look at duration of deprivation (here, up to one year before ALJ can review suit)
      * Risk of error inherent in current agency procedure (How fair and reliable is the agency’s process? )
      * Public (government) interest in maintaining the status quo (burden on government if status quo is disrupted)
  + **Loudermill** (SCOTUS 1985)
    - Defamation of life, liberty, or property must be PRECEDED by notice and opportunity for hearing appropriate to the nature of the case (under due process)
      * Therefore, a pretermination hearing of some kind (not necessarily a full hearing) is necessary (here, Loudermill being fired)
        + Level of formality can be very low, based on importance of the interests involved
      * Court takes into account nature or pretermination v posttermination – if pretermination process is Spartan but posttermination is elaborate, that can be all right.
    - Apply Eldridge to see how much pretermination process is required
    - Marshall concurrence – agrees that pretermination process is necessary, but thinks it should be greater – before a full termination, a full hearing should be required
    - Rehnquist dissent – Thinks SCOTUS is inconsistent with this decision because when a statute creates a property interest, that statute should also be able to limit the process required for that interest.
  + **Gilbert v Homar** (SCOTUS 1997)
    - What process is due an employee who gets suspended but not terminated?
    - An employee is not entitled to process in the form of a presuspension hearing.
    - Why not? Eldridge test –
      * Employee doesn’t have huge private interest because is just a suspension
      * Strong state interest to hold people in positions of trust accountable
      * No pretermination hearing is required here
      * Loudermill IS still good law for termination, but it doesn’t apply to suspension.
        + Although the employee here may still be entitled to some post-termination process
  + Analysis:
    - Castle Rock:
      * Is there an entitlement? If yes
      * Does that entitlement constitute a liberty or property interest? If yes
        + (A benefit is not a protected entitlement if the government may grant or deny at its discretion – look for limiting language!)
      * What process is due?
        + Eldridge – do balancing test.

**Standing**

* Basics
  + Sometimes, agency action will affect third parties; the doctrine of standing is designed to take into account these people and, in certain circumstances, give them an opportunity to challenge agency actions
    - There are two types of standing: constitutional and statutory
* Constitutional Standing (comes from Art. III case and controversy requirement)
  + **Lujan v Defenders of Wildlife** (SCOTUS 1992) –sets requirements for constitutional standing
    - Three requirements for constitutional standing: A 3P must show:
      * Injury in fact: an invasion of a legally protected interest which is both:
        + Concrete & particularized, and
        + Actual or imminent
      * Causation: must be traceable (but for legal defect of X, injury would not have happened – cannot be too attenuated)
      * Redressability – can the injury be redressed?
    - Kennedy concurrence – Congress has the power to define injuries and articulate chains of causation that can lead to 3Ps having standing, the same as Congress can pass statutes that give rise to these causes of action
    - Problems with the Lujan decision:
      * The three part test is neither referred to nor implied in the constitution
  + **Friends of Earth v Laidlaw** (SCOTUS 2000)
    - If plaintiffs sue and have statutory standing pursuant to an environmental statute, it doesn’t matter that the environment wasn’t injured; the injury in fact the courts look at is to the plaintiffs.
    - Was there an effect on individuals? Were they harmed? Court says yes – they were no longer able to enjoy the river, there was economic harm in that property values went down, and there was a perceived threat. This is sufficient to find injury in fact.
      * Even though we don’t know that the defendant dumping of mercury caused harm to the environment!
      * How does this reconcile with Lujan? Court says in Lujan, all plaintiffs brought were conclusory allegations; what plaintiffs bring here is less abstract, therefore, injury in fact.
    - Causation – but for the mercury dumping, there would be no injury to plaintiffs. Court says it’s not improbable that mercury dumping is linked to these problems.
    - Redressability – Court says civil penalties requested by plaintiff are sufficient redress because although they are not requesting an injunction to stop the mercury dumping, civil penalties will serve as a sanction to prevent future misconduct.
      * SCOTUS distinguishes this case from Steel Company case (which doesn’t permit suit on the basis of wholly past violations) because the dumping of mercury was a continuing, not wholly past, violation.
    - Scalia dissent – thinks there should be a requirement of proving harm to the environment before granting standing; also thinks that civil penalty is not appropriate redress.
* Statutory Standing
  + APA **702** – a person suffering legal wrong because of agency action within meaning of relevant statute is entitled to judicial review thereof. Congress can explicitly give parties a right to bring lawsuits
    - (Scant guidance on when Congress intends people to bring lawsuits or not.)
  + **Chicago Junction** – shift from protecting common law rights to protecting rights Congress intended to protect. Even if a party meets all constitutional standing requirements, Congress may statutorily restrict who can sue – so have to establish statutory standing as well before determining a party actually does have standing to sue.
  + **ADAPSO v Camp** (SCOTUS 1970) – provides test for statutory standing
    - Zone of Interests test:
      * Whether P alleges that challenges action has caused him injury in fact, economic or otherwise
      * Whether interest complainant is seeking to protect is arguably within the zone of interests that the statute/constitutional guarantee in question protects or regulates.
        + Zone of interests encompasses aesthetic, conservational, recreational, and economic values.
      * Court is taking relevant language from **702** and interpreting it very broadly: asking whether Congress intended to protect the interest P is claiming
        + To do this, look at the statute AS A WHOLE, not just an explicit provision of the statute
        + Court made up the zone of interests test itself
  + **Clarke v Securities Industry Assn** (SCOTUS 1987)
    - SCOTUS wants to stop lower courts from narrowing the ZoI test (even though White wrote majority and he hates ZoI and wants it narrowed)
    - Holds that you don’t need explicit language from Congress in the statute that they intended to give plaintiffs standing, but you have to figure out the Congressional intent and make sure standing/the interest plaintiff is claiming is more than just marginally related to the purpose of the statute
      * Essentially affirms Camp – read whole statute and legislative history and from it presume congressional intent in enacting the statute; no clarity on how to do this
    - Stevens concurrence – he would have used narrower grounds.
  + **Air Couriers v American Postal Workers**
    - How to establish standing to sue under APA?
      * First establish constitutional standing (legal wrong, injury in fact)
      * Second look at zone of interests under statute (is the interest they are claiming was violated within the zone of interest that the statute sought to protect?)
    - SCOTUS here says no standing (first SCOTUS decision where statutory standing not found)
      * The statute was silent with regard to the interests plaintiffs were alleging had been violated; therefore their interest was not within the zone of interests that the statute sought to protect
        + You can establish Cong intent by looking at their stated purpose for passing a statute
      * The courts will not consider whether analogous statutes seek to protect these interests; will only consider the statute that plaintiffs are suing under.
  + **National Credit Union v First National Bank**
    - Broadens ZoI test again (Air Couriers had narrowed it some)
    - Court says unless 3P interest is completely contrary to arguable congressional intent, 3Ps have standing
    - Dissent – O’Connor – ZoI test has become too broad, to the extent where it doesn’t exist because it grants standing to anyone who has a colorable argument that their interest is within the zone of interests a statute sought to protect
  + Keep in mind that almost always, with the exception of Air Courier, SCOTUS finds people to be within the zone of interest (Air Courier was a strange case anyway where the interest wasn’t at all related to what the statute was protecting)
* Analysis:
  + There are 2 tests that must be met for a 3P (person not direct target of agency regulation) to have standing:
    - Constitutional standing (comes from case and controversy requirement of Article III)
      * Lujan test – Injury in fact? Causation? Redressability?
    - Statutory standing (prudential requirements – comes from APA **702**: a person suffering legal wrong because of agency action or adversely affected within the meaning of relevant statute entitled to judicial review thereof)
      * Camp test – Zone of interests? (This test was made up)
      * Also, if a statute broadly gives parties the right to sue, the statutory standing test is met. (Ex – many environmental statutes)
  + BOTH Constitutional AND Statutory standing tests must be passed for a party to have standing to sue.