Administrative Law Outline – Professor Wexler – Spring 2011

Introduction

Framework

I. Agencies and the Constitutional Framework
   a. What constitutional theory allows agencies to exist?
      i. Article I: Congress exercises legislative power
      ii. But there is so much policymaking power exercised by agencies that it could be considered legislative
   b. What can the Executive and Legislative Branches do to control agencies under the Constitution?

II. What Agencies Do – How Agencies Make Policy
   a. Rulemaking & Adjudication
   b. Must follow statutory requirements and constitutional requirements

III. How Agency Action is Challenged in Court
   a. Standards courts use to review agency action
   b. When challenges can be brought in court

Major Theme

I. Political Accountability – who should/can we hold accountable for governmental decisions?
   a. In the case of agencies: who do we hold accountable for agency decisions?
      i. President? Congress?
      ii. Need to know who controls the agency, who created it, who could have stopped it
   b. If you can't blame anyone, that goes against democratic principles
      i. How can agencies exist if they are not directly accountable?

What Makes a Rule in Administrative Law a Good One?

I. Fidelity to the text
   a. Framers' intent

II. Judicial administrability – easy or difficult to administer

III. Clarity to Congress – so Congress knows what it can and cannot do

IV. Costs – to the industry, for enforcement, e.g.

V. Fit with the real world
   a. Notion that we've got a system now that has evolved over time and exists, so if we were to change the rule, the administrative state might become unconstitutional
      i. Reliance interest
      ii. Stability
      iii. Practical consequences

VI. Usefulness of having a formulation at all
   a. Notion that it is wasteful to have a test when nothing fails the test (?)

VII. Accountability to the people (i.e., voters)

VIII. Expertise
   a. Notion that it allows the government to take advantage of expertise
   b. Will the result be better policies because it allows experts to develop the specifics

IX. Consistency with other rules/precedent/sources of law

X. Efficiency

XI. Flexibility/Amendability
   a. Notion that we may want a rule to be able to respond well to changing conditions

XII. Comprehensiveness (vs. incremental – dealing with smaller pieces of the problem at different times)
   a. Comprehensiveness could be a good or a bad thing

Overview

Agencies in the Constitutional Structure – Why Can They Exist & Who Can Control Them

I. Agencies are units of government with authority other than the courts and Congress
   a. Most agencies are created by an organic statute that lays out the duties, heads, etc.

b. Some agencies are:
    i. Independent Agencies = the heads of the agency/commission will serve for a term of years are enjoy some kind of protection – i.e., can be removed by the President only for cause … and this makes them "independent"
    ii. Executive Agencies = if the heads are removable by the President at all (for any reason at all basically)

II. Why Can Agencies Exist?
a. Article I gives legislative powers to Congress; Article II gives the executive power to the President; and Article III gives judicial power to the Court
    i. Agencies are not mentioned in this scheme
b. Agencies are delegated policymaking power from Congress by statute
    i. Does this violate Article I?
        1. There are good arguments that it indeed does
        2. SCOTUS has long held that Congress can delegate its power to agencies as long as it gives the agencies an **intelligible principle**
            a. This is a very permissible standard – just about anything can count as an intelligible principle
                i. Only twice has SCOTUS invalidated something because there was no intelligible principle: *Panama Refining* and *Schechter* – both from the 1930s
c. SCOTUS has allowed agencies to adjudicate disputes without violating Article III in most – but not all – situations
    i. Despite the fact that administrative law judges (ALJs), who decide cases for agencies, do not have tenure and salary protection – they are therefore not isolated from political pressures, e.g.
d. KEY IDEA: Agencies are bodies that make policy and decide disputes
    i. They are created and sort of controlled by Congress, but they are also sort of controlled by the President and the courts
e. KEY CONCEPT: What controls can each branch legally exercise over agencies?
f. KEY QUESTIONS: Are these controls – as they are created by statute and judicial doctrine – adequate to control agency discretion? Are they appropriately balanced between the branches?

III. Legislative Control of Agencies
a. Congress creates agencies through an organic statute and delegates its power to the agency for the agency to make policy
b. Ways Congress Controls the Way Agencies Exercise this Power:
    i. Can rewrite the agency's statute
    ii. Can get rid of the agency
    iii. Can control the amount of money it gives the agency
        1. Most often used means
    iv. Can put informal pressure on agencies
        1. Ex: hold hearings, subpoena officials
    v. Congress <u>cannot</u> retain a veto power over what an agency does (*Chadha*)

IV. Executive Control of Agencies
a. Types of Presidential Control Over Agencies:
    i. Appointment Power
        1. President gets to appoint all *principal* officers of the U.S., subject to Senate confirmation
            a. Congress can vest appointment power to appoint *inferior* officers to the President or the courts or to the heads of certain departments
        2. KEY QUESTIONS: Can Congress limit by statute who the President can appoint? Can Congress assign new duties to an existing officer?
    ii. Removal Power
        1. Implicates the distinction between independent and executive agencies

2. There is no explicit removal power in the Constitution
    a. Different theories about who should have the removal power:
        i. One is that since agencies are an inherently executive function, the President should
        ii. SCOTUS takes the view that Congress can insulate some agency heads from presidential removal, so long as the restriction on presidential removal does not impede the President's ability to execute his constitutional duties (*Morrison v. Olson*)
            1. So we can have independent agencies
                a. But Congress cannot create an independent agency within an independent agency (*PCAOB*)
        iii. General Power as Superintendent of the Executive Branch
            1. President can issue commands to the Executive Branch to act in certain ways through things like executive orders or proclamations
                a. Ex: Executive Order 12866 requires agencies to do a cost benefit analysis for certain significant rules
                    i. Dicta: A part of some cost-benefit analyses is how much money human life is valued at . . . and this is an incredibly controversial thing

V. Summary
    a. Agencies can be described as quasi-legislative, executive, and judicial units of government
        i. They exercise policymaking power and adjudicatory power, but they are not legislatures (i.e., not elected) or courts (i.e., not tenured with salary protection)
    b. Some agencies are subject to a great deal of control by the President, and some not so much

How Do Agencies Make Policy

I. Agencies generally get to choose how to make policy, either by: rulemaking or adjudication
    a. There are certain costs and benefits of each and they each have different procedural requirements by virtue of the APA
        i. Possible Benefits:
            1. Rulemaking is arguably more fair and clear
            2. Arguably you get better policymaking decisions because rulemaking procedures require public input, e.g.
            3. Adjudication is more flexible and direct from the agency's perspective – can go after a specific individual
        ii. KEY QUESTION: Are the APA's procedural requirements for agencies adequate to protect the values that are lost when Congress delegates policymaking power to agencies? Most importantly – accountability to the public
    b. Main Difference:
        i. Rulemaking involves the creation of general and prospective guides for behavior
            1. Rulemaking results in regulations that we usually find in the CFR – generally, long and specific statutes
        ii. Adjudication involves resolving an active dispute between specific parties – one of which is usually the government
            1. Adjudication results in an individual decision or order – could come in all sorts of different forms: written decisions, letters granting a petition or license, e.g.

II. The choice of which policymaking mode to use is generally left to the discretion of the agency, but there are at least three situations when that is not true:
    a. When the statute tells the agency which way it is supposed to act
    b. Where acting by rulemaking will violate the Due Process rights of individuals
    c. Sometimes where the agency cannot act through adjudication (*Majestic Weaving*)

III. Types of Rulemaking

a. Formal: rare (and relatively unimportant)
    i. Trigger: on the record + after a hearing
b. Informal: most important mode of policymaking that agencies engage in
    i. Notice and Comment Rulemaking (§ 553): agencies must set out the proposed rule in the Federal Register with an explanation and important data (to give notice); then the agency opens up a 60-90 day comment period where anyone can comment on the proposed rule; then the agency is supposed to consider the comments before it issues its final rule – it must explain any changes in the final rule and why it rejected certain comments
        1. KEY QUESTION: Does the agency have to consider every comment? How does it decide which comments to look at? What if the final rule looks *very* different from the proposed rule?
c. Super Informal: exceptions to the notice and comment procedure
    i. If a rule falls into a certain category – military and formal affairs, agency procedure or management, rules about public property, e.g. – they can issue the rule without going through notice and comment
    ii. Foggy Exception: agencies do not have to use notice and comment procedures for interpretive rules or policy statements (as opposed to substantive and legislative rules)
        1. Courts have trouble interpreting this distinction

IV. Types of Adjudication
a. Formal: trial-like proceeding with procedures specified by the APA
    i. There are certain triggers in organic statutes that determine if and when formal adjudication is required
    ii. Usually conducted by an ALJ
    iii. Happens often
b. Informal: all other individualized decisions
    i. Ex: letters, documents denying or approving a petition
    ii. Any procedures or requirements are determined by the organic statute, not the APA
        1. APA has very little to say about informal adjudication

Judicial Review of Agency Action – Standards

I. Courts are generally pretty deferential with respect to what agencies do
a. Agencies are required to:
    i. Follow required procedures
    ii. Act rationally (i.e., agency's reasoning process)
    iii. Reach reasonably outcomes (i.e., agency's bottom line)
    iv. Note: It is possible to reach a reasonable outcome through irrational means
b. Courts can overturn agency action if the agency fails to do any of the above requirements
    i. KEY CONCEPT: What do courts look for when determining whether the agency has acted rationally – generally, arbitrary and capricious review – and whether the agency has reached reasonable outcomes – arbitrary and capricious review, *Chevron*, *Skidmore*, e.g.
    ii. KEY QUESTION: Are these standards of review strong enough to control agency discretion, given the other controls that exist? Or, are courts to deferential to agencies?
    iii. KEY IDEA: Agencies make two kinds of decisions, broadly speaking: (1) how to interpret legal terms that appear in a statute or regulation; and (2) everything else – deciding what policies to adopt, what the facts are, how to apply the facts to the law, etc.
        1. The judicial analysis differs depending on whether the agency has made a legal interpretation or a factual/policy decision

II. Standards:
a. Arbitrary and Capricious: applies to all agency actions of all types – agencies cannot act in an arbitrary and capricious fashion
    i. Deferential standard, but not super deferential – 1 out of 3 or 4 wins
    ii. An agency must (*State Farm*):
        1. Examine the relevant data

2. Explain its decision in a satisfactory way
    a. Ex: rational decision between the facts and the choice it made; relied on all the factors Congress instructed, etc.
3. Consider all important aspects of the problem

b. Substantial Evidence: applies when the agency has acted through formal proceedings (APA)
    i. Slightly stricter standard
c. KEY ISSUE: What does the court review when it is deciding whether an agency has met the arbitrary and capricious or substantial evidence standard?
    i. The court is supposed to look at the whole record that was in front of the agency during the agency's decision making process

III. *Chevron* Doctrine
a. KEY QUESTION: Is the *Chevron* Doctrine a good one? Should it be changed? Has the Court supported it in plausible ways?
b. SCOTUS: Courts have to defer to reasonable agency interpretations of ambiguous statutes
    i. *Chevron* Two-Step: (1) Does the statute clearly preclude the agency's interpretation? (2) Is the agency's interpretation reasonable?
        1. Only applies if the agency is interpreting a statute which it has been trusted to administer
c. *United States v. Mead*: only agency legal interpretation that came out of certain kinds of formal processes are eligible for *Chevron* deference
    i. There is a lot of uncertainty about what gets you through the *Mead* threshold and to the *Chevron* two-step
        1. Notice and comment rulemaking will get you through both stages
        2. Informal adjudication – depends
        3. Notice and comment exceptions – depends, unclear
d. Why *Chevron* deference?
    i. Agencies are experts in whatever subject they are dealing with
    ii. Agencies, unlike courts, are accountable to the public through the President

Judicial Review of Agency Action – Availability (When Can You Bring a Claim)

I. Reviewability
a. KEY ISSUE: Does the APA bar review of P's claim against the agency?
    i. Two ways the APA could bar review of agency decisions [§ 701(a)]:
        1. Statutory Preclusion
            a. Courts, though, are reluctant to read statutes to preclude judicial review (especially when it appears that Congress is attempting to bar a constitutional claim/challenge)
        2. Agency decisions are unreviewable to the extent they are committed to agency discretion by law
            a. Main Area: Enforcement (*Heckler v. Cheney*)
                i. Enforcement decisions are typically left to the agency's discretion and courts will not get involved/review
                ii. That is, the statute does not discuss when an agency can decide *not* to go against someone – this is a decision given by Congress to the agency to exercise in its full discretion (i.e., whether or not to prosecute) – and courts will generally not review this

II. Standing
a. Constitutional Requirements (Article III – limits the judicial power to resolve cases and controversies, so we need a live case or controversy)
    i. Actual Injury = in fact, concrete, particularized, imminent (as opposed to a general complaint or hypothetical injury)
    ii. Causation = injury has to be fairly traceable to the agency action at issue

1. Sometimes this is hard to meet because usually P is arguing harm from the agency's failure to regulate some third party
    a. Why is the agency at fault here, as opposed to the third party?

iii. Redressability = injury must be likely to be redressed by a favorable judicial decision (i.e., that the court can issue an order that will give relief)
1. Typically if there is causation, there will be redressability (but not always)
2. Sometimes there is a question as to whether the right person is in front of the court (i.e., is there someone in front of the court who the court can actually order to do something?)
    a. Ex: if P is suing the President for something, despite the fact that P can show harm and causation, the court might not be willing to order the President to do something to redress the harm

b. Prudential Requirements (we're only concerned with one)
i. Zone of Interest Test = the interests sought to be protected by P have to be arguably within the zone of interest to be protected by the statute

III. KEY IDEA: There are substantial limits on when courts can hear challenges to agency action and who can bring those challenges
a. Limits:
i. Reviewability – when does the APA bar review of agency action
ii. Standing – what are the standing requirements that P must meet before bringing an action

IV. KEY QUESTION: Are these limits on when a challenge can be brought overly strict? Do they allow agencies to have more discretion than they should have, given other controls over agencies (executive, legislative, standards of review, e.g.)? Are these limits justifiable? If so, why?

Agencies and the Constitutional Framework

Introduction

I. Background:
a. 1887: creation of the first modern agency – Interstate Commerce Commission (ICC) – to regulate the railroads
b. 1933-1937: New Deal, which was largely about Administrative Law
c. 1946: Administrative Procedure Act (APA)
i. The "constitution" of federal administrative law – the bedrock on which its doctrinal structure still stands
d. 1970s: Second expansion of the administrative state, as Congress started passing laws to protect health, the environment, e.g.
e. 1980s-1990s: Deregulatory phrase

II. A Case Study: The Occupational Safety and Health Act (1970)
a. What kind of power does this statute delegate?
i. Seems legislative because it gives OSHA the ability to create safety standards through rules and regulations
ii. Seems executive because OSHA has the power to investigate and enforce the rules
iii. Seems judicial because of the OSHRC that can adjudicate claims
b. This agency is different than most because it has a split structure: legislative and executive powers under the Dept. of Labor (executive agency) – and – judicial power is given to OSHRC (a separate, independent agency)
i. Most agencies will have everything together in the same agency (i.e., the same body issuing rules, enforcing the laws, and adjudicating disputes)
c. What were Congress' other options here?
i. Do nothing – left regulation to the states
ii. Informational approach – inform the employers about workplace hazards, e.g.

iii. Federal intervention in workers' comp systems – creating a federal program or fund to help improve state worker's comp programs
iv. Imposed injury tax – notion that if you may companies pay for their harms (internalize the cost) then they will take steps to decrease injurious conditions
v. Could have put all powers in one agency
vi. Made the detail regulations itself (rather than delegating to OSHA to do so)

III. Public Interest vs. Public Choice Theory
a. **Public Interest** focuses on an underlying social problem or need to which the administrative apparatus is viewed as the response
i. According to this view, administrative agencies are created to serve some kind of public interest or promote some public value
b. **Public Choice** views the creation of an administrative agency as the outcome of a struggle among self-serving legislators and the factions, interest groups, and powerful individuals who compete for legislative prizes
i. Public choice applies economic insight to legislation
ii. In its strongest version, it suggests that legislators are not interested in serving the public, rather they want to promote their own private interests (money, re-election, good committee assignments, power, e.g.)
1. So legislation is self-interested people coming together and trying to get the most they can for themselves
iii. If public choice theory is right, we might have less respect for the legislative process
1. Ramification for judicial deference → there is no reason for the courts to defer to Congress
2. Ramification for statutory interpretation → is there a congressional intent we actually care about?

IV. In terms of Public Interest vs. Public Choice, why did Congress choose to delegate power to OSHA?
a. Public Interest:
i. Congress did not trust the states to sufficiently handle the problem – it is so pervasive that federal government regulation is necessary
1. Notion that if we trusted the states, Congress would have left it to them
ii. Race to the Bottom – if we trusted some states, but not others, then if one state acted in a way to protect safety and health in the workplace, then some companies may leave the state for one that does not regulate
iii. Federal government more competent to regulate
iv. Uniformity – even if we trust the states, the varying standards state-to-state might not be ideal
b. Public Choice:
i. Legislators want to be re-elected and that is what is driving them – not whether the workplace is actually safe (i.e., through lobbyist pressures, legislators knew what the voters wanted)
1. It could be that the legislator himself thought that an injury tax was best, but if the people want a command and control law, to get re-elected he supports the command and control law

V. In terms of Public Interest vs. Public Choice, why does Congress delegate to an agency (rather than writing the regulations itself)?
a. Public Choice :
i. Frees up their time to do other deals (money-making, e.g.)
ii. Displaces the blame, if any arises, to unelected agency administrators
1. Punt the issue for someone else to take the political heat when specific decisions are made that are unpopular
a. Easier to take credit for the big picture, broad, general idea (i.e., we have worked so hard for workplace safety regulations)

b. Harder to take credit for imposing specific details – that might be politically unpopular

b. Public Interest:
   i. Frees up their time to solve other real problems
   ii. Agency has more expertise to write regulations
      1. Counter: problem of agency capture – that experts are not disinterested, they have a uniquely industry colored view
   iii. De-politicize key decisions – decisions made by agencies might seem fairer, rather than those driven by politics
      1. Note: this might also be a reason that Congress chooses to create an independent (rather than executive) agency

VI. A Case Study: The Consumer Financial Protection Bureau
   a. This is the newest *independent* agency
      i. It will have one independent director
         1. President may refuse director only for cause → "for inefficiency, neglect of duty, or malfeasance"
         2. Critique: Agency is run by one director – as opposed to a commission
      ii. Congress granted rulemaking authority – including the prohibition of unfair, deceptive, and abusive practices in financial services
         1. There is some concern about what constitutes "abusive practices"

What Legal Limits Does the Constitution Place on Power to Delegate to Agencies

I. Congress creates and empowers administrative agencies through legislative authorization
   i. A statute that provides for the creation of a particular agency or confers upon it a particular set of powers and responsibilities is usually called an "authorizing act" or "enabling act"
      1. Does this delegation of policymaking authority violate Article I – "All legislative powers herein granted shall be in a Congress of the United States" – which says nothing about delegation (either yay or nay)?

II. Nondelegation Doctrine
   a. Congress often writes statutes that authorize or direct another party to do something, and Congress can use these statutes to give varying levels of discretion to agencies (= contingent legislation, placing a condition on when someone can act)
      i. Many statutes use this form → "If the President/Agency finds X, then President/Agency shall/may do Y"
         1. Points of discretion:
            a. How much discretion does the President/Agency have to find X
               i. X could be something specific – when the temperature goes over 90 degrees
               ii. X could be something vague – if the President finds certain tariff rates are unreasonable
            b. Whether the statute uses "shall" or "may"
            c. Y – it could tell the President/Agency exactly what to do or give discretion in the action taken
   b. Range of Discretion Examples:
      i. "On January 30th, the President shall lift the trade embargo"
         1. This is a delegation statute, but it does not give the President any discretion
      ii. "If the President finds that the relevant country has violated the neutral commerce of the U.S., then the President shall lift the embargo" (*Brig Aurora*)
         1. Slightly more discretion, but not by much
         2. SCOTUS: It is fine to give the President this power
            a. Court barely discussed the issue – accepted the delegation of power as contingent solely on a finding of facts, since the statute specified both the act to be performed and the condition for its performance

iii. "If the President finds that the relevant country has imposed unequal or unreasonable rates, then the President shall impose a set amount of tax" (*Field v. Clark*)
    1. SCOTUS: The power Congress delegated was not "legislative" because it was rooted in finding facts to effectuate the congressional will – the President is acting as Congress' agent – simply deciding whether a contingency exists is <u>not</u> legislative power
        a. Nondelegation Doctrine → "That Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution"
            i. But what are the contours that define "legislative" power?
iv. "If the President finds it necessary to equalize costs of production, he shall increase the rates to the correct amount" (*J.W. Hampton v. U.S.*)
    1. So the President is supposed to find that X is necessary, and he also has discretion re: how much to increase Y
    2. <u>SCOTUS: Congress needs to provide the agency with an intelligible principle to guide the delegate's discretion</u>
        a. It is OK for the delegate to have discretion re: Y, so long as there is an intelligible principle which the delegate can conform to
v. "If the President or Secretary of Agriculture 'feels like it,' they can make regulations to protect forests from depredation" (case not in textbook)
    1. This statute gives the most discretion – there is not even a contingency
    2. SCOTUS: rejects the challenge on the grounds that the statute does not give legislative power (but it is not clear why – no real sophisticated explanation given)

c. Only two cases in which SCOTUS has struck down statutes based on the nondelegation doctrine – both during the New Deal
    i. Ex: *Panama Refining* (U.S. 1935) (8-1): "If the President feels like it, he may ban interstate transportation of so-called 'hot oil'"
        1. SCOTUS struck down the statute because Congress had delegated the essential legislative power because there was nothing to guide the President's discretion
            a. "The Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition or circumstances and conditions in which the transportation is to be allowed or prohibited"
            b. This delegation gave complete discretion (completely standardless) to a narrow issue (i.e., narrow scope of discretion)
        2. Dicta: Might argue that the President did not have *complete* discretion because the policy statement of the Act was to promote industrial recovery . . . but SCOTUS did not consider this relevant
    ii. Ex: *Schechter Poultry* (U.S. 1935) (unanimous): "If the President feels like it, he may approve a code of competition for an entire industry" – so industries would come up with codes themselves about how the industry should be run, and then the President would approve it and make it law
        1. SCOTUS struck down the statute because it determined that the essential legislative power had been delegated
            a. "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks advisable for the expansion of the industry"
            b. This delegation was a lot of discretion and a relatively broad scope
    iii. These two cases were the high-water mark for the nondelegation doctrine – the point at which it appeared to have some bite to it

1. But, see *Yakus v. United States* (U.S. 1944), which makes it clear that these two cases were not the main thrust of the law
    a. "If the President feels like it, he may fix minimum commodity prices that are fair and equitable"
        i. Statute guidelines: prices had to be fair; promote the purposes of the Act; and determined after considering the prevailing prices of the time
    b. SCOTUS upheld the statute finding that there was an intelligible principle – Congress had laid down sufficient standards to guide discretion

d. Ex: *American Trucking v. EPA* (U.S. 2001): Clean Air Act § 901(b)(1) requires the EPA to set air quality standards at the level where the attainment and maintenance are requisite to protect the public health with an adequate margin of safety – it does appear to control the agency's discretion by telling them to set the level where public health will be protected; EPA chose .08
    i. D.C. Cir. (1999): this was an unconstitutional delegation of legislative power
        1. D.C. Cir. thought that the EPA basically picked .08 out of a hat – it was not clear that .08 was some threshold level
        2. What the D.C. Cir. did though was very strange: (1) the statute had no intelligible principle to guide the EPA's discretion, but nonetheless, EPA could save the statute by developing their own intelligible principle and following it; (2) they found that the EPA had not done that though
        3. According to the D.C. Cir., their rule – that an agency can cure an unconstitutional delegation by creating an intelligible principle for itself – serves the latter two of the three purposes of the nondelegation doctrine
            a. <u>Purposes of the NDD</u> (*Benzene* case, SCOTUS):
                i. To ensure that Congress makes the key choices of social policy
                ii. To give the agency a principle for it to follow
                iii. To ensure that courts can determine whether in fact the agency has followed the principle
    ii. SCOTUS (2001) (unanimous): "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute"
        1. If the nondelegation doctrine is about anything, it is about ensuring that Congress makes the key choices of social policy – and this is not satisfied by the D.C. Cir.'s rule
        2. "We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law"
            a. Therefore, relying on precedent, the Court determines that this is <u>not</u> a delegation of legislative power and upholds the statute
        3. "It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"
            a. If *Panama Refining* and *Schechter Poultry* carry any weight today, it might be because of this sentence
    iii. Justice Stevens vs. Scalia
        1. Stevens (concurrence): Congress can delegate legislative power – it is a fiction to say that even when Congress gives an intelligible principle that that is not a delegation of legislative power
            a. If we are going to characterize governmental power as legislative or judicial or executive, we should look at the actual nature of the power that is being exercise

i. When an agency determines how much ozone can be in the air that is a legislative decision
b. It is more honest to admit that this is a delegation of legislative power
i. And so long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it
c. Q: Under this theory, are there any limits on who can be delegated to?
2. Scalia (majority): Congress cannot delegate legislative power
a. When the Constitution "vests" a power in someone it is giving it only to that branch and they alone must exercise it
b. Q: If Scalia is right, then why can the President delegate power to subordinates, since Article II "vests" power as well?
i. Scalia's response would speak to the unified Executive notion

e. Ex: *Mistretta v. United States* (U.S. 1989): SCOTUS upheld the Sentencing Commission, which was a delegation of authority to fix criminal punishments
i. The Court looked to several places to find an intelligible principle
1. Unlike *Panama Refining* and *Schechter Poultry* where the Court was stingy in where it would look to find an intelligible principle and *only* considered the statutory language itself
ii. This suggests that courts should be more generous in trying to figure out where an intelligible principle might be coming from
1. Courts should not feel confined to only the specific statutory language
a. Ex: Congress' statements of the goals and purposes of the legislation, the specific statutory requirements, other instructions, etc.

f. How Does the Nondelegation Doctrine/Intelligible Principle Rule Fare? (applying criteria in Intro)
i. Comprehensive – it applies no matter what the delegation is, so quite comprehensive
1. *Cf.* there is not a rule for X situation, Y situation, Z situation …
ii. Judicial Administrability – very easy to apply because it is such a loose standard
1. So one could argue this is a very good rule under this criteria because everything passes
iii. Accountability – fares poorly under accountability because it allows Congress to delegate vast amounts of policymaking power to unelected agency heads
1. Cutting slightly against this idea is the notion that some agencies are accountable to the President
iv. Expertise – rule fares well because one major reason Congress delegates to agencies is because they are better equipped to make these key decisions
1. Do we want members of Congress determining how much ozone should be in the air or the EPA?
v. Flexibility – an agency is going to be more flexible to changing rules and conditions than Congress
1. A rule that allows delegation is generally going to be good from a flexibility perspective
vi. Fit with the Existing State of the World – *now* we have an administrative state, so the rule fits well

Legislative Control of Agencies

I. The Legislative Veto
a. Congress can pass four types of instruments:
i. Bills – given to both Houses and the President
ii. Joint Resolutions – given to both Houses and the President
iii. Concurrent Resolutions – given to both Houses only
iv. Simple Resolutions – the House or the Senate issues about an internal procedure or an expression of Congress' views on some matter, e.g.

b. A remedy to which Congress increasingly turned prior to 1983 – in order to keep more control over lawmaking – was the legislative veto, which describes a variety of mechanisms for requiring the approval of Congress, or some entity within Congress, before a proposed administrative action can become effective
    i. Fully appreciating the potential intrusion into their prerogatives, presidents have objected to the legislative veto consistently from the time of its inception
    ii. Q: Whether the legislative veto process is consistent with Article I, § 7, cl. 2 – presentment and bicameralism
c. Ex: *INS v. Chadha* (U.S. 1983): Chadha is found deportable; Attorney General suspends deportation, per the statute; Congress gets the AG's report and passes a resolution disapproving of the suspension; Chadha appeals to the 9th Cir., who finds the statute unconstitutional as against Article I; note that the title of the case is weird because the INS was on Chadha's side, but they brought this case because they wanted a definitive ruling from SCOTUS that the legislative veto was unconstitutional; SCOTUS holds that the legislative veto process violates Article I because the veto does not go through bicameralism or presentment
    i. Majority's Reasoning:
        1. Veto is legislative power
            a. It changed the status quo – changed Chadha's status
                i. Without this challenged statute, this result could have been achieved, if at all, only by legislation
            b. "The House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the AG, Executive Branch officials and Chadha, all outside the Legislative Branch"
            c. Congress' decision to deport Chadha was a determination of policy
        2. All legislative power must be exercised consistent with Article I, § 7's presentment and bicameralism requirement
        3. This specific veto did not go through presentment and bicameralism
        4. This legislative veto is unconstitutional
    ii. SCOTUS is saying that this legislative veto is unconstitutional because when Congress takes action that changes someone's status that is legislative action, so it must go through presentment and bicameralism . . . But, when an agency does something very similar, it is not legislative action, so it does not have to go through presentment and bicameralism
        1. SCOTUS' attempt to explain (FN 16):
            a. Agency activity cannot reach beyond the statute that created it
            b. If that authority is exceeded it is open to judicial review
            c. Congress can modify or revoke the authority entirely
            . . . But this can all be said about the legislative veto too – so it is not clear that any of these are really sufficient to distinguish
        2. One might say that legislative action = the above three things (i.e., from the majority's reasoning) + *when done by Congress*
            a. But when an agency does the above three things, it does not count as "legislative action"
            b. It is the source, rather than just the nature . . . at least for purposes of presentment and bicameralism
    iii. **Test**: Has Congress reserved to itself the power to take "legislative action" without following the requirements of Article I
        1. Court does not say that the problem with the legislative veto is that Congress is aggrandizing
        2. Court does say that we have language in Article I requiring presentment and bicameralism, and the legislative veto is a violation of Article I's language
d. Two Different Problems We're Worried About re: SOP

i. Aggrandizement = one branch is trying to get more power for itself by grabbing another's power
    1. Ex: President has the constitutional authority to grant pardons; if Congress passes a statute providing some specific group of people to be pardoned → this is aggrandizing the President's power for Congress
    2. Ex: *Chadha*: could argue that Congress is aggrandizing the power to executive the laws by reserving the power for itself (with the legislative veto)
ii. Infringement = one branch limits another's power
    1. Ex: President has the constitutional authority to grant pardons; if Congress passes a statute that before the President grants a pardon he must hold a hearing with the victim's family → this is Congress infringing on the President's power
    2. Ex: *Chadha*: could argue that Congress is infringing on the President's power to execute the laws

e. Formalism vs. Functionalism (Two Ways of Thinking About SOP Questions)
    i. Formalism: sees the Constitution as an instruction manual with clear rules – to determine who can do what, consult the vesting clauses of Articles I – III (think *Scalia*)
        1. No room for balancing, e.g.
        2. *Chadha* majority was very formalistic: the legislative veto violated the text of Article I, § 7
            a. This has been critiqued – why are we so concerned with exactly what legislative power is? Why are we not more generally looking at the state of affairs and seeing whether the situation is one we can live with or not
            b. The preceding determination – i.e., the decision to allow Congress to delegate to agencies in the first place – was very much a functionalist decision
                i. If the Court takes a functional approach to delegation, why not also for the legislative veto?
                    1. *See* Justice White's dissent
    ii. Functionalism: pragmatic approach to SOP where you look at whether overall the arrangement would constitute too much of an aggrandizement or infringement of another branch (think *White*)
        1. It is a matter of degree – lots of room for balancing
        2. Not so much worried about the text, but rather the relationship between the three branches and whether there is too much aggrandizement or infringement in any one case
        3. *Chadha*'s dissent (Justice White) wanted to take a functional approach
            a. "If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as prohibiting Congress from also reserving a check on legislative power for itself"
                i. If we are going to take a functional approach to delegation, we should also take a functional approach to the legislative veto

f. <u>RULE</u>: Legislative vetoes are unconstitutional
    i. *But* there are questions as to what counts as a legislative veto . . .
        1. Ex: What if § 244(c)(2) said the suspension decision by the AG will not become final for six months – a report and wait provision?
            a. This is <u>not</u> a legislative veto
                i. If Congress does not act during those six months, the decision is final

ii. If Congress does act during those six months it will be through presentment and bicameralism (i.e., they will make a law to undo what the agency did through the formal Article I process before the agency decision becomes effective)

b. Note: Report and wait provisions are OK and often used

i. Ex: APA § 801 (pg. 911)

1. The driving force behind this § was to increase congressional accountability, but this process has apparently only happened once

2. Ex: What if § 244(c)(2) said that either House can stay the effective date of an effective rule for 90 days beyond the 60 day stay that is already required by law (i.e., the APA)?

a. This is different than a report and wait provision because it is Congress reserving power to itself

i. So we need to ask: Is this legislative power (*Chadha* elements):

1. Does this change status quo?
2. Does it alter the legal rights, duties, and relations of persons outside the Legislative Branch?
3. Is Congress making a policy decision?

ii. There are arguments on both sides as to whether this additional stay counts as legislative action under the definition of *Chadha*

1. One might argue that it can have a substantive effect because one House of Congress could delay an agency policy indefinitely (but continuing to stay it)

3. Ex: Congress passes a new law that the Director of the Office of Management and Budget (Executive Branch) may suspend indefinitely the effect of any major rule adopted by any federal agency if the director does not think it maximizes net benefits to society

a. This is <u>not</u> a legislative veto because Congress is not giving itself any power in this situation – rather, it is giving the Executive Branch extra discretion over the implementation of its own rules

4. Ex: Congress passes a rule that says no major rule adopted by any agency becomes effective unless approved by a joint resolution

a. This is <u>not</u> a legislative veto because a joint resolution is passed by both Houses and signed by the President

i. This would essentially allow agencies to propose major rules (so we can take advantage of their expertise) but have Congress and the President – accountable, elected representatives – promulgate them, rather than the agency

ii. <u>KEY</u>: Look to whether Congress has reserved for itself the ability to take some action

1. Is Congress giving itself some power to exercise subsequently to the administrative process that is going on?

g. Is the *Chadha* Rule – legislative vetoes are unconstitutional – a good or bad rule (versus a rule that allows legislative vetoes)?

i. Judicial Administrability – *Chadha* Rule is less administrable than a rule that says legislative vetoes are OK because with *Chadha* the Court has to take the step to determine that something is or is not a legislative veto

1. That said, this rule is still relatively easy to administer

ii. Fidelity to the Text – might depend on whether you take a formalist or functionalist stance

iii. Accountability – we cannot hold Congress accountable for not exercising a veto over an agency's decision because there is no legislative veto
    1. So this test does not fare well under accountability
        a. Notion that agencies are not all that accountable to the people
iv. Expertise – if you allowed legislative vetoes, that would give Congress the ability to veto the expert agency's decision
    1. So this test fares well for expertise – ensures that experts are making decisions and these decisions will stick
v. Flexibility – part of the reason to delegate to agencies is because they can make quicker decisions than Congress, so if you allow Congress to veto these decisions then you are undermining the flexibility and efficiency gained from delegating
    1. So this fares well under flexibility
vi. Fit with the Existing State of the World – there were a lot of vetoes at the time and it was definitely something Congress thought it needed, so if we ask how much the rule undoes the state of things, then it does not fit very well because it invalidated many existing arrangements
    1. How does the *Chadha* Rule fit in light of our broad NDD?
        a. One view brings in the reasons for delegating to agencies in the first place – efficiency, flexibility, e.g. – and the legislative veto would undermine these rationales (i.e. run counter to the nondelegation doctrine's breadth)
            i. Therefore, the *Chadha* Rule fits well because it preserves these things
        b. One view is Justice White's, which would say if we took a hard line on delegation, it would make sense doctrinally to take a hard line on the legislative veto; but if we are going to be loosey-goosey with delegation, then we should take the same functional, lenient approach to the legislative veto
            i. Therefore, the *Chadha* Rule does not fit well
        c. One view (Rehnquist) is that Congress might not delegate to agencies in the first place if they cannot retain a legislative veto – some kind of control over the delegation
            i. This did <u>not</u> turn out to be what happened, *but* if it did, less delegation would mean less expertise, efficiency, flexibility

II. Appropriations
    a. Congress can, in principle, exercise a good deal of control over administrative action through the annual appropriation process
        i. Through the sheer size of the appropriation
        ii. By the specificity or generality of the budgetary categories used in the appropriations act
        iii. Through "riders" – specific statutory language placing additional constraints or conditions on agency powers beyond those contained in its enabling act
            1. Ex: an explicit prohibition on the use of appropriated funds for a particular project or activity that is disfavored by a majority on Congress

Executive Control of Agencies: Appointment and Removal

I. Introduction
    a. Article II, § 1, cl. 1: The executive power is vested in a President of the United States
        i. Note: There might be some powers that are not explicitly in the Constitution, but that were understood at the time of framing to be executive powers, so should be vested in the President
            1. Ex: removal power
    b. Article II, § 3: The President should take care that the laws are faithfully executed

c. Article II, § 2, cl. 2: Appointments Clause – the President shall appoint Officers of the United States
    i. Presidential appointments must be made by and with the advice and consent of the Senate
    ii. Congress may vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments
d. Notion of the Unitary Executive
    i. No Unitary Executive: All three branches are distinct
        1. Executive Branch is made up of the President's power and there is room for independent agencies
    ii. Unitary Executive Theory: President has control over the *entire* Executive Branch
        1. So all three branches are still there and distinct
        2. But there is no room for independent agencies if you believe in the real unitary executive theory
        3. Note: This is mostly a theoretical notion we find in scholarly writing – as opposed to a majority of people actually believing there is a unitary executive
    iii. False Unitary Executive Theory: Executive power got bigger and bigger at the expense of the other branches
        1. Notion that the President is taking over the Legislative and Judicial Branches

II. Appointment
a. Article II, § 2, cl. 2 makes a distinction between inferior officers and principal officers (those who must be appointed by the President and confirmed by the Senate)
    i. Q: What is an officer?
        1. Principal officer
        2. Inferior officer
        3. Employee (i.e., <u>not</u> covered by the Appointments Clause)
b. Ex: *Buckley v. Valeo* (U.S. 1975): Congress created the FEC, consisting of six voting members – two members each appointed by the President pro tempore of the Senate, the Speaker of the House, and the President; each pair of appointments had to include one Democrat and one Republican; all members were subject to confirmation by both houses of Congress
    i. <u>First Q for Appointments Clause Analysis</u>: Are these members considered "officers"?
        1. "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed by the Appointments Clause"
            a. So, officers are those employees who exercise significant government authority (SGA)
                i. SGA:
                    1. Rulemaking
                    2. Determinations of eligibility for funds
                    3. Enforcement power
                    4. Conducting civil litigation
                    5. Commemoration – *see* hypo *infra*
                    6. Advisory Opinions (?) – *see* hypo *infra*
                ii. Not SGA:
                    1. Merely an aid of congressional authority to legislate
                    2. Sufficiently removed from administration or enforcement of public law
                    3. Investigative and informative powers
    ii. Court's Reasoning:
        1. Officers have to be appointed pursuant to the Appointments Clause
        2. Officers are those who exercise significant governmental authority
        3. The heads of the FEC do exercise significant governmental authority

4. Therefore, the heads of the FEC must be appointed by the Appointments Clause (and they were not)

c. Hypo: Congress establishes a commission to give recommendations and advice to the EPA about how to reduce air pollution – officers?
    i. Issuance of advisory opinions is something that is listed as being SGA … ***but*** advisory boards are <u>not</u> headed by officers, so they do <u>not</u> need to be appointed under the Appointments Clause
d. Hypo: Congress establishes a scholarship program for students interested in studying Paleontology and sets aside $100K for the fund; Congress establishes a committee to review the applications and decide who wins the scholarship money – officers?
    i. Might argue that they are determining eligibility for funds and *Buckely* deems that SGA so they should be considered officers subject to the Appointments Clause
    ii. Might also question how much money the committee is actually giving out
        1. If it is $10, then it seems silly to deem them officers subject to the Appointments Clause
        2. People use government funds all the time in the government – to buy shrimp for a retirement party, e.g. – so there has to be some limit about what type of eligibility for funds constitutes SGA
            a. No agreement on where the line should be drawn though
e. Hypo: Congress sets up a library to commemorate someone
    i. The Executive Branch has taken the position that the decision to commemorate someone is SGA, in addition to whatever determination of funds would be committed to said commemoration
f. Hypo: Congress sets up a commemoration of Ted Kennedy
    i. Might argue that it was a commemoration, but maybe it is merely in aid of the legislative function because they are celebrating their own
        1. If this is true, then we might say that a commemoration of a member of Congress is SGA (commemoration) but is trumped by non-SGA (merely in aid of the legislative function), so no Appointments Clause analysis
g. Hypo: Smithsonian Institute
    i. It is headed by a Board of Regents not appointed under the Appointments Clause
        1. Smithsonian Institute certainly spends a lot of government funds and commemorates various things
            a. It is hard then to figure out the Smithsonian would be constitutional
                i. Justice Holmes said it would be impossible to challenge the Smithsonian, despite its patent unconstitutionality
                ii. Theory: This is a massive museum to help members of Congress understand the world; therefore, the museum is a legislative function to serve Congress (non-SGA)
h. Could the President appoint a member of Congress to sit on a body such as the FEC?
    i. No – Article I, § 6, cl. 2: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; *and* no person holding any office under the United States, shall be a member of either House during his continuance in office
        1. **Ineligibility Clause** (first half) → appears to be an anticorruption provision, preventing members of Congress from creating executive positions for themselves or voting to raise the pay of an executive position they expect to occupy
            a. If you are a member of Congress and Congress creates a position or increases the salary of a position while you are in office, you cannot take that position
                i. This eliminates conflict of interest problems

b. Ex: Imagine there is a member of Congress and while that person is in Congress, the salary for the Secretary of Defense goes up $25K, and then the President appoints a member of that Congress to the position later down the road (=unconstitutional under the ineligibility clause); suppose though that before this person takes the position, Congress passes a statute moving the salary back down to the original level … OK? Strict textual reading might suggest it is unconstitutional, despite the fact that they will not realize the salary increase; could make practical arguments too
    i. Current Executive Branch policy is to roll back the salary to get around an ineligibility problem
        1. Ex: Hilary Clinton, who was in the Senate, before becoming Secretary of State

2. **Incompatibility Clause** (second half) → an important element of separation of powers, disallowing the common practice in other countries of filling important Executive Branch positions from the ranks of the legislature
    a. If you are a member of Congress and you take an officer position, then you essentially resign your position in Congress (and vice versa)
    b. Ex: Can the President appoint a Senator to sit on a committee that decides eligibility for Paleontology scholarships?
        i. The test for "officer" under the Incompatibility Clause is probably the same as it is for the Appointments Clause – whether someone is exercising SGA
    c. Ex: Can the President appoint a Senator to sit on a committee that merely advises the President as to who it thinks should get the scholarship funds?
        i. This is probably constitutional because the committee appears to be an advisory committee, and therefore the Senator would not be deemed an officer
    d. Ex: Can the President appoint a Senator to the commission that does actually make the final decision regarding the scholarship funds, but in an advisory role (ex officio role) only?
        i. No incompatibility problem because the Senator is merely advising and is therefore not an officer
        ii. <u>But</u>, see *NRA Political Victory Fund* (D.C. Cir. 1993): It is a violation of SOP to have a member of Congress on an Executive Board that makes SGA decisions, even if the person is serving in a non-voting capacity
            1. The assumption or worry is that this person is there to influence the Board
            2. Case has received support and criticism
            3. Wex: Odd result because Congress puts pressure on Executive Agencies all the time (via money, calling them in for hearings, etc.), so why should this arrangement be any different? Only difference is that the member of Congress is actually there – sitting in the Board room

III. Removal
    a. There is <u>no</u> Removal Clause in the Constitution
        i. What the Constitution does say about removal (how officers leave their position)?
            1. Article I, § 5: Either house of Congress can expel a member with a two-thirds vote
            2. Impeachment Provisions

3. Fixed Terms for some officers (President, Vice President, e.g.)

ii. Possible Theories:

1. Since impeachment is the only method mentioned in the Constitution for removing an officer (except for Congress removing its own member), you might say it is the only possibility for removal
2. Might say that removal is an inherent executive function – it was part of the executive power when the Constitution was written
3. Might say that the mode of removal follows the mode of appointment (so if appointed PAS, removed PAS)
4. Might say that Congress can set the terms of removal when the office is created in the first place, under their Necessary and Proper powers

b. Two Removal Questions:

i. Can Congress participate in removal?

1. No (*Myers* and *Bowsher*)

ii. To what extent can Congress limit the President's removal power?

1. Harder question (*Humphrey's Executor*, *Morrison v. Olson*, *PCAOB*)

c. Ex: *Myers v. United States* (U.S. 1926): Executive officer at issue here: Postmaster General; SCOTUS: Congress <u>cannot</u> require that the President get the advice and consent of the Senate before removing an executive officer

i. <u>Rule</u>: Congress *cannot* provide in a statute that it has the right to participate in removal of an executive official

1. "The Court never has held, nor reasonably could hold, that the Congress may draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of this power. To do this would be to infringe the constitutional principle of SOP"

d. Ex: *Humphrey's Executor v. United States* (U.S. 1935): issue – can Congress place limits on the President's power to remove executive officials?; statute here provided that the President can remove a sitting commissioner of the FTC only for "inefficiency, neglect of duty, or malfeasance in office"; FTC commissioners are deemed not *purely* executive officers

i. <u>Rule</u>: Congress can in fact limit the President's removal power when the agency is carrying into effect legislative policy – when its duties are quasi-legislative or quasi-judicial

1. So we know that removal is not entirely within the President's control alone

ii. Note: This case does suggest that there is some core group of executive officials whom Congress cannot limit the President's removal power over

e. Ex: *Wiener v. United States* (U.S. 1958): SCOTUS invalidated the President's attempt to remove a member of the War Claims Commission, on the ground that the commission was an "adjudicating body"

i. The Court ***implied*** a "for cause" limitation on the President's removal power, even though there was none in the statute . . . because the commission that was concerned with judicial-type stuff (i.e., not purely executive)

ii. <u>Background Default Rule</u>: Judicial-type commissions have to be independent from the President

f. Ex: *Bowsher v. Synar* (U.S. 1986): Congress created a statute designed to achieve statutory deficit-reduction goals, and placed central responsibility to achieve these goals in the hands of the Comptroller General, who heads the General Accounting Office, an agency generally considered to be located within the legislative branch; if the deficit exceeds the amount set by Congress by more than a specified sum, then the Comptroller General will calculate how much agencies need to cut in order to reduce the deficit – and this calculation becomes binding on executive agencies; Comptroller General was removable under the statute by a joint resolution

i. SCOTUS strikes down the arrangement, but there is a difference in opinion as to why

1. Majority (Burger): This is a straightforward *Myers* case – Congress participating in the removal of an officer that is doing executive functions (by requiring a joint resolution)
    a. Statute gave the Comptroller General executive powers because he had independent judgment and discretion to decide cuts and determine funds, and he had the ultimate authority regarding what cuts would be made in executive agencies
2. Concurrence (Stevens): This is a violation of *Chadha* – all legislative action has to be done through presentment and bicameralism
    a. It does not make sense to say that what the Comptroller General is doing is either executive or legislative
    b. Better to say that when Congress makes policy to bind the Nation, it must follow Article I procedures (and this is true even when the policymaking body is an agent of Congress)
        i. Comptroller General is an agent of Congress because he is removable by Congress and the GAO is generally thought to serve the legislative branch
            1. Because the Comptroller General does not act through *Chadha*'s procedures – rather he just makes the decisions himself and the President enforces them – this arrangement is unconstitutional
3. Dissent (White): Majority's view is distressingly formalistic – there is no threat to the SOP so the Act is OK
    a. Important to White is that the President could always veto the joint resolution of removal, and therefore this gives the President a substantial amount of power over what the Comptroller General is doing

ii. *Bowsher*: (1) reaffirms *Myers* – Congress cannot get involved in removing an executive official, and (2) reminds us to analyze and understand *Chadha*

IV. Appointment and Removal Reconsidered: The Independent Counsel (IC)

a. Ex: *Morrison v. Olson* (U.S. 1988): three major issues that the majority and dissent conflict on almost every point
    i. First: Is the IC an inferior or principal officer?
        1. Note: The Judiciary ("Court of Law") appointed the IC, and this matters because if the IC is deemed a principal officer, the appointment is unconstitutional against the Appointments Clause
        2. Majority: Inferior
            a. Why? (think of as a **multi-factor test** for determining)
                i. IC is subject to removal by the AG
                ii. Duties are limited
                iii. Jurisdiction is limited
                iv. Tenure is limited (i.e., temporary position)
        3. Dissent: Principal
            a. Why?
                i. Yes removable, but only for cause, so not freely removable
                    1. This is a serious limitation on the Executive Branch's removal power
                        a. How can being hard to remove make you an inferior officer?
                ii. Duties might be limited, but they are significant
                iii. Jurisdiction might be limited, but within the jurisdiction the IC exercises full power
                iv. Tenure is not so limited – IC gets to decide when she is done

b. Scalia goes along with the multi-factor test, in order to refute the factors, but he does not think this test should apply
    i. **Scalia's One Factor Test** → supervision/subordination is a necessary condition for inferior status
        1. IC is a principal officer because she is not subordinate to anyone – not supervised by anyone in her on-going investigation
            a. And because she is a principal officer, her appointment by a court of law violates the Appointments Clause
        2. Note: This test eventually becomes *the* test

ii. Second: Does limiting the AG's removal power unconstitutionally interfere with the President's functions (i.e., can Congress limit the President's power to remove?)
    1. Majority: No – this removal provision is OK
        a. "We undoubtedly did rely on the terms quasi-legislative and quasi-judicial to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, <u>but</u> our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive'"
            i. "**The real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in this light**"
        b. <u>Test</u> re: Permissible Removal Provisions (apparently)
            i. Doesn't impede on the President's ability to perform his constitutional duty
            ii. Doesn't unduly trammel on executive authority
            iii. IC's power is not so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the IC be terminable at will by the President
            iv. **Note**: Argue these factors in the next case that this issue comes up, but there is little guidance regarding how you would do so . . .
        c. <u>Factors</u> that would weigh in favor of being someone the President has to be able to remove at will (i.e., that make you so central to the functioning of the Executive Branch):
            i. Principal officer (rather than inferior)
            ii. Relation to a specific constitutional function might make you more central to the functioning of the Executive Branch
                1. Ex: Secretary of Defense is more "central" than the Secretary of the Interior because it is explicit in the Constitution that the President is the Commander in Chief
                    a. Therefore, Congress cannot limit the President's removal power over the Secretary of Defense
            iii. Historical connection to some sort to the functioning of the Executive Branch
    2. Dissent: Yes – this removal provision is unconstitutional
        a. The "test" the majority came up with has no clear lines and is an open invitation for Congress to experiment

3. **<u>Take-Away</u>**: The majority's factors (and anything else on pgs. 81-82) are the formulation one would use to decide whether a congressional restriction on president's removal power is constitutional or not

iii. Third: Does the Act as a whole violate SOP (by unduly interfering with the role of the Executive Branch)?
1. Majority: No – taking a functionalist approach
a. There is no congressional usurpation (aggrandizement) of executive power
i. Congress retained for itself no powers of control or supervision over the IC
b. There is no judicial usurpation (aggrandizement) of executive power
c. There is no congressional infringement of executive power
i. While it is undeniable that the Act does reduce the amount of control or supervision the AG/President exercise, the Act does give the AG/President several means of supervising or controlling the prosecutorial powers that may be wielded by an independent counsel
1. AG can remove the IC for good cause
2. IC must follow DOJ policy
3. AG is involved in the decision to create the IC in the first place – AG appoints the IC
2. Dissent: Yes
a. Formalists ask:
i. What is the nature of the power – purely executive?
ii. Does the statute deprive the President of exclusive control over the exercise of that power?
. . . if "yes" to both, then the statute must be invalidated on SOP principles
b. Response to the majority's assertion that there is no congressional infringement of executive power → the whole point of the statute is to limit the executive's ability to executive the laws
i. "Shackles are not a means of locomotion"
c. In response to the majority's assertion that the IC has to follow DOJ policy, Scalia points out that there is an "*unless* not possible . . ." clause that swallows rule
d. In response to the majority's assertion that the IC is appointed by the AG, Scalia notes that once the IC is appointed it does not matter how she was appointed – she is not controlled

iv. **Summary**: *Morrison* majority gives us two loosey-goosey tests: (1) appointments – has since changed; and (2) removal – still exists

V. Officer vs. Employee Issues
a. Factors for Determining Whether Someone is an Officer or Employee:
i. Ex: *Freytag* (U.S. 1991): Special Trial Judges (STJ) of the Tax Court are inferior officers, not employees; court compared STJs (inferior officers) with Special Masters (employees)
1. Inferior Officer Factors (STJs):
a. Position established by law
b. Duties were specified by statute
c. Take testimony, run trials, take evidence, make discovery determinations
d. Have a lot of discretion in making the above decisions
e. Gets deference from the Tax Court on some findings
f. Made final decisions in some cases
2. Employee Factors (Special Masters):

a. Temporary/Episodic
b. Duties not created by statute – hired ad hoc by the courts
c. Ministerial duties (i.e., minor & not important)
d. In general, apparently get no deference or final decision making authority

3. Note: STJs are inferior officers appointed by the Tax Court, and SCOTUS held that the Tax Court qualified as a "Court of Law" required by the Appointments Clause
    a. Scalia thoughts the appointment was constitutional because he deemed the Tax Court a "Head of Departments" – he thought "Court of Law" only meant Article III courts

ii. Ex: *Landry v. FDIC* (D.C. Cir. 2000): ALJs are employees, not inferior officers
1. Key factors were that ALJs did not make final decisions and did not get deference – they only had recommendatory powers . . . despite the fact that the first four STJ factors were met

b. Hypo: The Department of the Interior enters into a contract with a private party (hired for $200) for that party to determine which students should get the federal scholarship funds; is this hired private party an "Officer of the United States" – do they perform SGA?
i. Rule: To be an officer, someone must have an on-going, formalized employment with the federal government
1. An officer is not someone who is hired temporarily, episodically, or ad hoc
    a. Therefore, this contractor is probably not an officer

ii. Ex: *Germaine* (1879): surgeon who was hired to determine the applicants for the pension qualifications was held to not be an officer of the United States because he was hired only to do a one-time job
iii. Ex: *Auffmordt* (1890): merchant appraiser who had to value goods for customs/tax was deemed not an officer because he had no continuing employment or relationship set by statute with the government

VI. Inferior vs. Principal Officer, cont'd
a. Ex: *Edmond* (U.S. 1997): at issue was the constitutional authority of the Secretary of Transportation to appoint members of the Coast Guard Court of Criminal Appeals (CCA), an intermediate court within the system of military justice; if these officers are principal, then they were unconstitutionally appointed, but if they are inferior officers, then their appointment is OK; do we look at the multi-factor test from *Morrison*?; SCOTUS: *Morrison* did not purport to set forth a definitive test for whether an officer is inferior under the Appointments Clause; CCA = inferior officers
i. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: whether one is an 'inferior officer' depends on whether he has a superior . . . We think it evidence that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate"
1. Doesn't explicitly overrule *Morrison* …
2. **Looks like the majority has said supervision is the real test**
    a. But, *PCAOB* might complicate this (*infra*)
    b. Note: The ramifications of supervision being the only factor might be bigger than we think – that is, a lot of people would be considered principal officers, but we might not really think they need to be appointed PAS because their duties are so minor
        i. Moreover, people who are supervised then become inferior officers, no matter how big and important their duties are
            1. Ex: Solicitor General would now be an inferior officer and could be appointed by a Court of Law or Heads of Departments, without Senate confirmation

c. Note: Under this test, whether someone has important responsibilities (i.e., the significance of duties) might go to the question of whether someone is an officer or employee, but <u>not</u> to the question of whether someone is a principal or inferior officer

b. Ex: *Free Enterprise Fund v. PCAOB* (U.S. 2010):
   i. <u>Issue</u>: May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?
   ii. <u>Holding</u>: Such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President
      1. The dual "for cause" limitations on the removal of Board members contravene the Constitution's SOP
      2. The President cannot take care that the laws be faithfully executed if he cannot oversee the faithfulness of the officers who execute them
   iii. <u>Test</u>: "We held in *Edmond* that whether one is an 'inferior officer' depends on whether he has a superior, and that 'inferior officers' are officers whose work is directed and supervised at some level by other officers appointed PAS"
      1. Supervision is the main criteria – the law
         a. Scalia won (think *Morrison v. Olson* dissent)
      2. Note: Independent agencies/commissions can be "Departments" for Appointment Clause purposes; and Chairmen/Commissions (multimember bodies) can be "Head of a Department" for Appointment Clause purposes
         a. "Because the Commission is a freestanding component of the Executive Branch, not a subordinate to or contained within any other such component, it constitutes a 'Department'"
   iv. Do we think that the two levels of independence make a difference as a practical matter?
      1. SCOTUS majority thinks that the diffusion of power carries with it a diffusion of accountability
      2. Could make it harder for the President to get his message to the agency he wants to affect
      3. Might depend on how big of a deal a "for cause" restriction is
         a. Other than in *Humphrey's Executor* where we learned that hating the person does not count as good cause, there is not case law interpreting this
         b. The assumption is that "for cause" is pretty meaningful, requiring a serious violation of norms, and not just for a disagreement about policy or politics
      4. In his dissent, Breyer gives the key scenario (if the President wants to remove the Board member but the SEC does not) to show that the extra level of insulation does not matter
         a. Scenario #1/#2: President and the SEC both want to keep/remove the Board member → additional layer of insulation does not matter at all
         b. Scenario #3: President wants to keep, but SEC wants to fire, the Board member → having the extra layer of insulation actually helps the President because if the SEC could fire the Board member at will, then they would do that and the President would be out of luck (and President can only remove the head of the SEC for cause)
         c. Scenario #4: President wants to fire, but SEC wants to keep, the Board member → extra layer of insulation is irrelevant
            i. One level of insulation:
               1. SEC keeps Board member

2. President cannot fire the head of the SEC because he needs cause

ii. Two levels of insulation:
1. SEC keeps Board member
2. President cannot fire the head of the SEC
. . . so if he could not have fired him in the first place, then there is no difference with an extra layer (suggesting that the real work is done in the first level of insulation)

5. Majority's Response to Breyer (in a FN): the second layer does compromise the President's ability to remove a Board member that the SEC wants to retain because with a second layer in place the SEC can shield its decision from presidential review by finding that good cause is absent (i.e., the SEC can hide behind a purported good cause shield/finding)

v. Wex thinks the SCOTUS majority probably does not like independent agencies to begin with – but their couldn't or wouldn't overturn *Morrison*, *Humphrey's Executor*, e.g. – and this was a step to chip away at Congress' ability to create independent agencies
1. Majority is almost offended that there are two layers of independence here

VII. <u>Appointments Decision Tree</u>

a. (1) Is the person an "officer"? (*Buckley* & *Freytag*)
i. Does the person exercise SGA?
1. No → can be appointed any old way
2. Yes → move to step 2

b. (2) Is the person a principal or inferior officer?
i. Is the officer supervised by someone in between the President and the officer? (*Edmond* & *PCAOB*)
1. Will have to argue your case as to what counts as supervision, how extensive the supervision is, etc. because there is not a lot of case law to guide us

ii. If the person between the President and the officer can remove at will, then the officer is an inferior officer (*PCAOB*)

iii. If the person between the President and the officer is limited in their power to remove the officer, that might make the officer not supervised and therefore a principal officer

c. (3) How was the officer appointed?
i. If the officer is principal, then appointment needs to be PAS

ii. If the officer is inferior, then appointment can be PAS, by the President alone, the Head of a Department (including independent agencies and multimember commissions), or a Court of Law (which includes non-Article III courts)

d. (4) Are there qualification restrictions?
i. Sometimes there are limitations that have to do with the qualifications that appointees are supposed to have
1. Ex: Solicitor General has to be learned in the law
2. Ex: Under Secretary of Health in HHS has to be a doctor of medicine and appointed without regard to political affiliation or activity
a. But President might argue that the second requirement is an unconstitutional restriction on his appointment power

ii. Sometimes there are procedural qualification restrictions
1. Ex: President has to pick from some list already compiled or take into advisement someone's recommendation ("after taking into consideration the recommendation of the Speaker of the House," e.g.)

iii. Are these restrictions constitutional?
1. Some authority on this, but not much
a. *Myers* and an Attorney General Opinion from the 19th century tell us that Congress can insist upon reasonable qualifications on who the

President can appoint, as an incident to the creation of the office (think N&P Clause)
    i. That is, part of the creation of the office can be identifying certain reasonable qualifications for the officers
b. However, Congress cannot tell the President exactly who to appoint through the guise of qualification restrictions (i.e., cannot direct the appointment of someone so specifically)
    i. Ex: Head of the Officer can only be the QB from the 2011 Super Bowl champ
    ii. *But* where to draw the line is tricky
    iii. **Best Approach** → functionalist/SOP: does this infringe too much of the President's appointment power? Is Congress aggrandizing some of the President's appointment power?

iv. Ex: *Public Citizen v. DOJ* (U.S. 1989): President chooses a nominee, asks the ABA for help, and the ABA prepares a recommendation of the nominee and whether they are qualified or not; the ABA is not recommending persons for appointment on its own initiative; the issue is whether the Federal Advisory Committee Act, which requires advisory committees within the meaning of the statute to hold meetings and keep minutes, applies to the ABA; although the SCOTUS majority does not reach this issue, Kennedy (in concurrence) thinks that if the FACA applies to the ABA process, then that infringes upon the President's appointment power [and this is the importance of the case for us]
    1. Question → What congressional restrictions on presidential power are OK?
    2. **Kennedy's SOP Approach**:
        a. There are certain powers explicitly given to one branch and others that are not
            i. **Explicit Presidential Powers** = pardons, presentment, appointment
                1. Congress cannot infringe upon these powers
            ii. **Nebulously Given Presidential Powers** (i.e. not explicitly in the Constitution's test) = removal power, control of presidential information
                1. Evaluate using a balancing test
        b. Conservative Formalists view the Constitution like an instruction manual – just look at the kind of power: legislative goes to Congress and executive goes to the President – clear lines
        c. Justice Kennedy says that for explicitly given powers *see* the conservative formalist approach, and for vaguely given powers *see* the liberal functionalist approach
            i. Appointment Power = explicitly given, and this open proceedings requirement from the FACA would therefore be an unconstitutional infringement on the President's explicitly given power
                1. Dicta: Wex says one could rely on this reasoning to say qualification restrictions are unconstitutional too, when they speak to appointments
        d. Liberal Functionalists view SOP questions like a balancing test – just see whether there is too much infringement or aggrandizement

v. **KEY** → If there are qualification restrictions, then evaluate them by saying that it depends on what approach the court takes – *Myers*/Attorney General Opinion/Functionalist **or** Kennedy's concurrence **or** Formalist
    1. Might just be flat out unconstitutional
    2. Say whether you agree or not

3. Say whether it goes too far or not

e. (5) Are there germaneness issues?
    i. Germaneness = duties are similar, relevant
    ii. Ex: *Weiss v. United States* (1994): While Congress may create an office, it cannot appoint the officer; the officer can only be appointed PAS . . . However, the two persons whose eligibility is questioned were at the time of the passage of the act officers of the United States who had been appointed PAS, and we do not think that because additional duties – germane to the offices already held by them – were developed upon them by the act, it was necessary that they should be again appointed PAS
        1. It cannot be doubted . . . that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed
            a. But, when Congress assigns new duties to existing offices – the Court will look to ensure that Congress is not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office
    iii. Situations where Germaneness Issues Arise:
        1. Congress adds new duties to an existing office
            a. Hypo: Augment the Powers of NASA Act: Head of NASA now gets to (i) decide eligibility for scholarships, (ii) make rules about weather data corrections, and (iii) regulate OSHA-like requirements for workplace safety
                i. First duty seems OK – germane
                ii. But the third duty gives a completely new duty to the Head of NASA
                    1. *Weiss* will apply because when the Head of NASA was appointed PAS, the relevant parties were deciding whether the nominee was qualified to carry out astronomy related tasks, so when you add a non-astronomy related duty, the President and Senate are not able to consider whether the person is indeed qualified for the new non-germane duty
            b. Note: This is the *Shoemaker* case situation referenced (and distinguished) in *Weiss*
        2. Congress creates a new office and fills it with an existing officer
            a. Because this will give an existing officer new duties, must ensure that the new duties are germane with the old duties, otherwise the Appointments Clause purpose is eroded – we will basically have Congress infringing on the presidential appointment power by deciding who to appoint to a new office
        3. Congress creates a new office and provides that it will fill that office by choosing from among a group of existing officers
            a. Note: This is the *Weiss* scenario – to determine who will serve as a military judge, JAG picks from a giant set of military officers (who are all inferior officers appointed PAS)
                i. But what if statute said: "JAG shall appoint the military judges" . . . this is unconstitutional because military judges are inferior officers and therefore must be appointed by the President, head of department, or court of Law
                ii. Is it OK for Congress to say: "There will be military judges and the JAG shall choose from existing officers to fill those positions"?
                    1. Not clear if germaneness applies

a. Rehnquist (majority): "The present case before us differs from *Shoemaker* . . . Here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers . . . There is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office"
    (1) And, even assuming *arguendo* that the principle of germaneness applies, it is satisfied here – military officers and military judges do much of the same thing, their duties are germane
b. Scalia (concurrence): Germaneness is <u>always</u> required – no reason to distinguish *Weiss* and *Shoemaker*
    (1) "Germaneness analysis must be conducted whenever that is necessary to assure that the conferring of new duties does not violate the Appointments Clause. Violation of the Appointments Clause occurs not only when Congress may be aggrandizing itself (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, without aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies. Thus, 'germaneness' is relevant *whenever* Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause (i.e., the President, the Heads of Departments, and Courts of Law)"
    (2) JAGs are neither of those three things, so if acting as a military judge is nongermane to serving as a military officer, giving JAGs the power to appoint military officers to serve as military

judges would violate the Appointments Clause, regardless of how many there are to choose from

c. Souter (concurrence): If the new officer is a principal officer, then the group who is being selected from has to be principal officers as well – otherwise you would be giving JAG the power to turn an inferior officer into a principal officer and the JAG does not have this power (can only do so PAS)
    (1) Wex: This has to be right

b. **Bottom Line**: Germaneness may or may not be required in this situation
    i. Just make whatever arguments you can as to why the positions and/or duties are similar or different
    ii. Think about whether if in the first place the President would consider this a duty that the person could do

iv. Hypo: Coral Reef Commission is established and will have the following 5 members:
1. Head of the National Parks Service (principal officer)
    a. This is a (2) situation
        i. Seems like Congress is appointing a person (which it cannot do), but it is OK here because this person was already PAS and the duties are germane – parks & reefs = similar
            1. Goals of the Appointment Clause are not subverted here
2. Undersecretary of Parks
    a. This is a (2) situation and arguably germane, but you might have a Souter problem → this person is likely an inferior officer and if the Coral Reef Commission is not supervised, then this person will become a principal officer in violate of Souter's test
3. Either the Secretary of HHS or Secretary of EPA, selected by the Secretary of the Smithsonian
    a. This looks like a *Weiss* case in its form, <u>but</u> there are only two people to choose from . . . so this might be a (2) or a (3) situation . . . probably (2) because there are only two options – so we need to analyze for germaneness
        i. Note: If there were say 10 options, it would probably be a (3) situation
4. A military officer, selected by JAG
    a. Germaneness is questionable here, *but* germaneness might not be required for a (3) situation
5. Slash
    a. This appointment is clearly unconstitutional – Slash has not been appointed to anything – no PAS

VIII. **Summary**:
a. Congress <u>cannot</u> involve itself in the removal of executive officers (*Myers*)
b. Congress <u>can</u> limit the President's removal power, so long as it does not violate the "standards" from *Morrison*
c. SCOTUS <u>may</u> – or can be found to do such things as – imply removal restriction provisions in statutes which create agencies that the Court thinks should be independent (*Wiener* & *PCAOB*)
d. Congress <u>cannot</u> create an independent agency within an independent agency (*PCAOB*)

i. Two levels of removal restrictions are different than one . . . enough so to create this rule

Other Executive Controls on Agencies

I. The President has the authority to control the Executive Branch through various instruments
   a. A **presidential directive** is a written declaration or set of instructions issued by the President, and they come in different forms:
      i. Executive Orders – often about organizing or running the government
      ii. Proclamations – usually this is the President proclaiming something, aimed at a broad audience, about an important value, e.g. – usually not legally important (but can be)
      iii. Signing Statements – President will make some comment about the bill he is signing if he sees constitutional problems, e.g.
      iv. Memorandum – sometimes delegating presidential authority
   b. All presidential directives must be based on some kind of legal authority
      i. Statute
      ii. Explicit constitutional authority
         1. Commander in Chief power
         2. Head of State power – gives the President the power to solely conduct foreign policy and diplomacy
         3. Chief Law Enforcement Power – gives the President broad discretion over federal law enforcement decisions, comes from the Take Care Clause
      iii. Implicit/Inherent constitutional authority
         1. This could be reasonably implied from an explicit power or implicit in the nature of the power conferred
   c. Presidential directives can be challenged as outside of the President's authority if it lacks some kind of legal basis
   d. Note: When presidents act, cannot really criticize them for making law that they are not authorized to make (i.e., notion that that would be legislating), because they are – presidents are acting per a statute that grants them permission to make presidential directives
      i. Ex: *Franklin v. Massachusetts* (U.S. 1992): the President is not an agency within the meaning of the APA and therefore the APA does not apply to him
         1. If the APA applied to the President, the result might be that the President would have to go through some kind of notice and comment proceeding before issuing a proclamation, e.g.

II. Presidential Transition
   a. When a new administration arrives in office, it usually says: let's hold up/pause the administrative process that is going on, because the new administration wants to review all of the rules in the pike or pending to make sure they are in line with the new administration's views
      i. Ex: President Obama's Memorandum for the Heads of Executive Departments and Agencies (in the update)

III. Executive Orders
   a. DOJ has to sign off on the legality of every executive order
   b. In the evolution of presidential regulatory oversight of agency rulemaking, the watershed event was the issuance of Executive Order 12,291 by President Reagan (and this was followed/updated by 12,866 and 13,563) → they all provided for some centralized review of the regulations of agencies
      i. **Executive Order 12,291 Purposes**:
         1. Reduce the burdens of existing and future regulations
         2. Increase agency accountability for regulatory actions
         3. Provide for presidential oversight of the regulatory process
         4. Minimize duplication and conflict of regulations
         5. Insure well-reasoned regulations

ii. The idea is that the President (through the Office of Management and Budget) should have some centralized controls to make sure that all regulations are consistent with each other, justifiable, etc.
    1. So, executive agencies send their regulations – with a cost benefit analysis to make sure that the benefits outweigh the costs, to ensure some sense of rationality – to OMB who sends them to OIRA who either:
        a. Approves the regulation
        b. Return Letter – we don't think you've justified the regulation, so try again
        c. Prompt Letter – to suggest a regulation to the agency or to tell agency that OIRA thinks some other action should be taken other than the proposed regulation sent in
        d. Review Letter – instead of sending the whole thing back to the agency and telling them they've failed, OIRA does something short of that: asks the agency to supplement the record with stuff and then send back for review
iii. Memo from Cass Sunstein (Head of OIRA) re: Executive Order 13,563
    1. Reaffirms Executive Order 12,866 pretty much in its entirety
    2. Stresses that things should be done as much as possible online, particularly the comment process, of the notice and comment procedure
    3. Retrospectiveness – every agency has to come up with a plan for reviewing the rules already on the books and making sure they are justified by a cost benefit analysis, e.g.
        a. The memo explains what these agencies are supposed to do re: retrospectively reviewing their regulations
        b. The memo states that agencies must have some group of people responsible for looking at the old regulations, and they must be different than the people who wrote the regulations and than those who are currently writing the regulations

c. Differences between the Executive Orders:
    i. The newest Executive Order calls specific things to the agency's attention
        1. Ex: "Each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts"
            a. Previous Executive Order just said that agencies can consider things "that cannot be quantified in monetary terms"
                i. Human dignity, e.g., was not explicit in the previous Executive Order so an agency may not have known whether they were justified in consider it
    ii. "To the extent feasible" is all over the new Executive Order – lawyer language – to ensure that the government can get out of responsibility for the Executive Order if it conflicts with another statute, e.g.

IV. Signing Statements (form of a presidential proclamation)
    a. Usually, these say something about how great the bill is
        i. But sometimes the president will explain that: (a) he thinks part of the bill is unconstitutional or (b) at the very least raises constitutional problems or (c) he refuses to enforce a certain provision
    b. A lot of times, the signing statements are about SOP issues
        i. Congress and the President are likely to disagree more on SOP issues than any other constitutional issue because it is going to be about which one of them gets the power

ii. Most SOP issues do not go to court, so it is not the type of thing the President will sue about

c. Signing statements give notice to the people about what the President will enforce and not, and why
    i. This is a benefit of signing statements, because even without the signing statement mechanism the President could refuse to enforce a certain provision, and we may not have similar notice as we get with a signing statement
        1. So they serve an informative function as the President can share his views with the people about the constitutionality of bills
    ii. President <u>cannot</u> refuse to enforce something solely because he thinks it is a bad idea
        1. He needs a constitutional reason

d. Signing statements became controversial during the Bush era when the ABA issued a report about how signing statements are problematic because the Take Care Clause requires the President to faithfully execute all laws, including those that he thinks are unconstitutional
    i. ABA Report said that if the President thinks a bill is unconstitutional, his options are: (i) veto the bill, or (ii) sign the bill and enforce only those things that he thinks are constitutional

e. Questions:
    i. Is the ABA right that the President is required by the Constitution to enforce laws he thinks are unconstitutional?
        1. Probably not – the President takes an oath to uphold the Constitution, so he likely has the power to not enforce, and some would argue he cannot enforce
    ii. Does the President have some obligation to be respectful to the coordinate branches of government's view as to what the Constitution requires (i.e., should he defer to the other branches, usually Congress, or use the signing statement only as a last resort in extreme cases)?
        1. A lot of people would agree that this makes sense, especially given the sensitive relationship between the President and Congress
            a. The President should not be issuing a zillion signing statements
    iii. Is the President correct about his SOP conclusions (when he is issuing the signing statement citing a problem)? Do we agree with the position that the President is taking on some particular issue – his substantive view?
        1. Keep this question separate from the first question, because we can disagree with his substantive view on SOP but still recognize his right to make signing statements generally

f. How are Signing Statements Communicated and Enforced?
    i. Hypo: Congress says someone is supposed to be on Agency A, but the President thinks this is congressional aggrandizement and disagrees that the person should be on Agency A – and he issues a signing statement to that effect ("I do not think this person can exercise any executive power on Agency A")
        1. Hopefully this person will just not show up to the meetings
        2. But if he insists on participating …
            a. Might sue to say that the agency was unconstitutionally constituted
    ii. Hypo: Congress enacts a statute saying that you cannot use certain monies to transport detainees from Guantanamo Bay, but the President ignores this restriction and transfers the detainees to NYC for trial; come trial the detainees allege that their trial is not valid because they were transferred in violation of Congress' Appropriations Clause … court will have to decide
    iii. Note: There are not great answers for either of these because the issue just does not come up that often – it would result in a constitutional standoff between the President and Congress

What Agencies Do – How Agencies Make Policy

Administrative Procedure Act (APA)

I. APA is the main source of law that constrains agencies and tells them how to act
   a. APA unanimously passed in 1946, after the New Deal and the expansion of the Administrative State

II. Major Parts of the APA
   a. Disclosure of Information – we won't cover though
      i. Ex: Privacy Act
      ii. Ex: Freedom of Information Act
   b. Provisions Governing the Availability, Time, and Forum of Judicial Review of Agency Action
      i. APA §§ 701 – 705
   c. Scope of Judicial Review and Standard of Judicial Review of Agency Action
      i. APA § 706
   d. Report and Wait Provision for All Major Rules – a 60-day window so Congress has a chance to look at the action and decide whether to disapprove via joint resolution
      i. APA § 801
   e. Procedures Governing How Agencies Make Policy [IMPORTANT]
      i. APA §§ 553- 557
   f. Definitions – not that helpful though
      i. APA § 551
         1. Subsections (4) – (7) unsuccessfully attempt to distinguish rulemaking from adjudication

III. Formal Adjudication Key Provisions:
   a. APA § 554 establishes the basic conditions under which "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" must take place
      i. Notice to the parties of the "time, place, and nature of the hearing" and the "matters of fact and law asserted";
      ii. The opportunity, to interested parties, for "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment";
      iii. A formal hearing under §§ 556 and 557 of the APA, if settlement efforts fail; and
      iv. An independent decision maker who may not communicate with outside the hearing with parties or be under the supervision of agency prosecutorial personnel

IV. On the rulemaking side, the APA provides for two levels of formality:
   a. Informal RM is governed by APA § 553:
      i. Notice of the "legal authority under which the rule is proposed";
      ii. Notice of the "terms or substance of the proposed rule or a description of the subjects and issues involved";
      iii. A comment period during which "interested persons shall have an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation"; and
      iv. Production, after "consideration of the relevant matter presented of a concise general statement of the rules' basis and purpose"
   b. Formal RM procedures are also provided in APA § 553(c), which provides for formal RM only when rules are statutorily required to be made "on the record after opportunity for agency hearing"
      i. Additional procedures for formal RM are contained in APA §§ 556 and 557

KNOW WHICH BOX YOU ARE IN!

	Rulemaking:	**Adjudication**
Formal	- triggered by **§553(c)** after hearing on record	- triggered by **§554(a)** "after hearing, on the

	- governed by **§556 & §557** - very rare	record" - governed by **§554, §556 & §557** - <u>not</u> rare → mini trials
Informal	- **notice & comment rulemaking** - governed by **§553** procedures - **5 steps**: agency gives notice, receives comments, considers the comments, issues a final rule, and explains the final rule (concise & general statement) - but, many ***exceptions***: **553(a) & (b)**	- very, very common but not legally interesting - procedures, if any, are **provided by the organic statute** - also, **APA §555** (notice, etc.)

Choosing Between Adjudication and Rulemaking

I. Ways an agency might decide:
   a. APA is the main source of guidance
   b. Organic statute
   c. Constitution
   d. Other statutes
   e. Presidential directives

II. Due Process Constraints (on the choice between RM and ADJ)
   a. Ex: *Londoner v. Denver* (U.S. 1908): due process required the agency to act through ADJ
      i. Here, only a relatively small number of people were exceptionally affected, in each case upon individual grounds
   b. Ex: *Bi-Metallic Investment Co.* (U.S. 1915): Board was going to increase something for everyone across the board, and this can be done without an individual hearing – there is no individual fact finding that has to go on in every case
      i. "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Individuals' rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"

III. Hypo re: differences between RM and ADJ: FTC decides there is a big problem where grocery stores advertise specials in order to lure people into the store and then do not have enough stock on hand for people to take advantage of the special – resolve this unfair trade practice, should the FTC use RM or ADJ?
   a. ADJ
      i. FTC would find that there is a store using this unfair trade method and it is in the public interest so they hold a hearing and the store has to show cause why the FTC should not enter a cease and desist order for the store to stop the practice
         1. At the hearing, anything and everything can be argued (the facts and the legal standard, or what the legal standard should be; store might explain the chicken shortage, e.g.)
         2. FTC enters an order after the hearing finding an unfair trade practice
            a. This order could say: "If a store advertises chickens 2-for-1, they cannot have only seven chickens … or … they have to have at least fifteen … or they have to have a reasonable number"
            b. This order could refer to something broader than chicken: all poultry, all meat, all items
            c. Let's say they decide on: "If you offer chickens 2-for-1, you have to have a reasonable number in stock and seven chickens is unreasonable"
               i. What if a store in Chicago advertises Cornish Game Hens, they only have thirty, and the FTC thinks this is unreasonable

1. FTC has to issue another order to have another hearing to determine whether this store is engaging in an unfair trade practice
    a. Again, the hearing could talk about anything and everything
    b. FTC decides they want to extend the chicken opinion to Cornish Game Hens, so they now issue a cease and desist order applicable to all poultry

. . . and this could go on and on, and you would end up with a series of orders that creates a group of precedents that basically establishes policy for the FTC in an incremental fashion over time

b. RM
    i. FTC would have to go through APA § 553 RM procedures
        1. Notice (i.e. a proposed rule)
            a. This will require a lot of research and work to get a full proposed rule ready because the agency has to think in depth about what exactly the problem is and how to deal with it
        2. Proposed rule will be posted and a comment period opened
        3. Consider the comments
        4. Adopt a final rule
        5. Explain themselves (i.e., concise general statement)
    ii. FTC issues a final rule that a store above a certain size has to have 50 chickens if you are offering 2-for-1, at least 50 boxes of Cheerios … and so on
        1. Ralph's only have 30 chickens
            a. FTC will issue a cease and desist order and have a hearing
                i. At this hearing, we will only talk about whether or not Ralph's had 30 chickens (i.e., only about the facts, and not talking about anything and everything) – because the policy has already been made we are not arguing about policy anymore
                ii. Might also talk discuss any particular reasons very specific to this store and this situation to suggest that the rule should not apply to them in this circumstance
c. At the end of the day, the distinction between RM and ADJ is not all that significant
    i. If you have a rule, you still have to ADJ to enforce the rule
    ii. If you have ADJ, you might end up with precedent that looks much like a rule
    iii. Policy is made through both RM and ADJ – it just looks somewhat different
        1. Do <u>not</u> think that policy is only made through RM and not ADJ

IV. Benefits:
a. ADJ – making policy in an incremental fashion:
    i. Working case by case allows the agency to better understand the particular facts of the case
    ii. Not as much work at the front-end as there is with RM, because you do not have to think of every possible situation, solution, e.g.
    iii. Cynical reason: an agency can choose a weak defendant if it wanted to (easier to "beat")
b. RM – making policy as a comprehensive rule from the outset
    i. Arguably you end up with better policies because of the input you get from the public (notice and comment function)
    ii. Fairness – based on the notion that people know what is OK and not OK to do under the rule
        1. With notice, people can conform their behavior accordingly
        2. No one gets singled out

3. Clearer for everyone involved because there is no guessing about what is required, for the most part

iii. Increased compliance with the rule – because affected parties have been a part of designing the rule they are more likely to comply because of their involvement in the creation

V. Rulemaking

a. Ex: *Petroleum Refiners Association v. FTC* (D.C. Cir. 1973): initially the FTC thought the only way they could deal with issues was through cease and desist orders/ADJ, but later they decided that the statute permitted them to use RM power – §6(g): FTC "may from time to time make rules and regulations for the purpose of carrying out the provisions of this title"; court must determine whether the FTC, under its governing statute, is empowered to promulgate substantive rules of business conduct; the effect of these rules would be to give greater specificity and clarity to the broad standard of illegality – unfair competition/trade practices – which the agency is empowered to prevent; court decides this case on the basis of statutory interpretation . . .

i. The court struggled to explain every little piece of its holding, but retrospectively this was an easy case – just look at the language of §6(g) – but it was not as obvious at the time of the decision

1. It could be explained that this was still early on in the expansion of the administrative state so the court was questioning whether agencies could in fact have this much power

a. Initially courts were reluctant to sign off of RM because it really expands the power of the agency

b. But the court does so here and *endorses* RM as an important policy option for the agency to consider

ii. Statutory Interpretation Arguments

1. *Expressio unius*: The Act says the FTC has a cease and desist/ADJ power, so we should assume it does not have RM power

a. Court: Maxim is unreliable, and it clearly does not apply here because §6(g) provides for RM power

2. Yes, there is RM power, but only for procedural rules or those relating to the agency's investigative or informative duties (i.e., rules that govern the agency's own behavior)

a. Court: §6(g) is very clear and does not limit RM power to only those things

i. Court also makes policy arguments linking the <u>benefits of RM</u> to the purposes of the Act (i.e., there are lots of benefits from RM, so Congress probably intended for the agency to take advantage of these benefits by giving it RM power in §6(g))

1. The availability of substantive RM gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate

2. Use of substantive RM is increasingly felt to yield significant benefits to those the agency regulates

a. May be fairer to regulated parties than total reliance on case-by-case ADJ

3. RM procedures open up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in ADJ

4. RM does not single out a single defendant among a group of competitors for initial imposition of a new and inevitably costly legal obligation

3. FTC acted for the last 50 years like it did not have RM power
    a. Court: So what?
        i. This does not influence our decision because courts decide what statutes mean, not agencies
4. Congress' behavior since the Act was first promulgated shows that it did not intend to give the FTC RM power through §6(g); Congress has over time enacted laws giving the FTC explicit RM power, so before these statutes we assume no general RM power [see FN 40, pg. 349] ← probably their strongest argument
    a. Court: Maybe that is what Congress thought, or maybe Congress was just trying to be extra cautious – granting the explicit RM power out of uncertainty, caution, and desire to avoid litigation
    b. Counter: Congress is currently considering a bill to specifically give the FTC broad RM authority (apparently even clearer than in §6(g))
        i. Court: This just shows that the issue is under close study and nothing more

b. <u>General Presumption</u> = Agencies can make rules
    i. If it is questionable as to whether the statute gives the agency RM power, likely the court will decide that the agency has RM power based on the fact that RM does have substantial advantages
    ii. Counterexample: *Amalgamated Transit Union v. Skinner* (D.C. Cir. 1990): Congress passes a law to give the Department of Transportation authority to give federal funds to state highways; §10 states that the Dept. of Trans. can investigate the safety conditions at any facility that was financed under one of these grants; if the Secretary decides there is a hazard, he has to require the recipient of the grant to submit a plan to eliminate the problem; the Secretary can hold back any further money until the problem is resolved; imagine that the Dept. of Trans. has given funds, and the Secretary decides that the rest stops do not have enough lighting and security; citing §10, the Secretary makes a rule: "If you use our funds to build your rest stop, you have to have two security guards on duty and adequate lighting"; state sues on the grounds that the Secretary does not have the authority to promulgate the rule
        1. Court: After statutory interpretation, court held that the statute did <u>not</u> give the Secretary the authority to make these types of rules
            a. The specific remedy in the statute – Secretary can investigate, demand a plan, and withhold funds – was so specific that it indicated Congress wanted the agency to proceed on a case-by-case basis, not through general RM authority
            b. There was also some legislative history to suggest that there was not supposed to be RM power given to the agency

VI. Adjudication
- a. Ex: *Chenery II* (U.S. 1947): the function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgating of rules to be applied in the future; but any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise; therefore, in performing its important functions, **an agency must be equipped to act either by general rule or by individual order**; to insist upon one form of action to the exclusion of the other is to exalt form over necessity
    - i. **<u>Starting Point/KEY</u>**: The choice between proceeding by general rule or by ad hoc litigation lies primarily in the informed discretion of the agency (assuming the statute does not require them to do one or the other)
        1. **The Court will only step in if the agency has abused its discretion**
            - a. Ex: *Majestic Weaving* – circumstance in which agencies do abuse their discretion by going through adjudication

b. Ex: *Excelsior* (N.L.R.B. 1966): prior to this case, NLRB required companies to turn over a list of the names of the employees, but not the addresses; in this case, NLRB made a "requirement" (later challenged as a "rule") that within seven days after approval of an election agreement, the employer must file a list with all the names and addresses of eligible voters (in an effort to increase union access to employees to ensure fairness in that the employees vote after learning of the arguments on *both* sides)
    i. What about this "requirement" makes it look like RM?
        1. Does not apply to these particular parties, but rather the requirement is to be applied prospectively only (30 days from the decision)
        2. Requirement is one of general applicability, so it looks like a rule under the APA
        3. It doesn't help that the NLRB refers to it as a "rule" several times
    ii. *If* the NLRB went through RM APA procedures, there would have been notice and comment, e.g., and the rule might have been broader, to include possible exceptions (i.e., when is it OK not to give the list; how do we deal with tardiness)
c. Ex: *NLRB v. Wyman-Gordon* (U.S. 1969): NLRB issued a subpoena to the company to produce an *Excelsior* list, and is now in court to enforce the subpoena; district court held the Board's order valid and directed respondent to comply; First Cir. reversed because the *Excelsior* rule had not been promulgated in accordance with APA § 553 procedures for RM; SCOTUS decides that the NLRB rule is fine as a substantive matter, so the question is whether it is procedurally OK . . .
    i. Plurality (4 justices)
        1. Was the "requirement" properly promulgated in *Excelsior*?
            a. No – the Board followed incorrect procedures in *Excelsior* because it issued a rule without going through § 553 procedures
                i. It is deemed a "rule" because it was applied in a prospective fashion only
        2. Was the Board's action in *Wyman-Gordon* legal?
            a. **Yes – the Board acted appropriately because the *Wyman-Gordon* case itself was an ADJ and the Board issued a valid order requiring the company to turn over the address list . . . so while there was a citation to *Excelsior* by the Board, that was merely incidental (so it would have been easier if they did not cite to *Excelsior*, but the fact that they did does not really matter)
                i. Dicta: If the Board had said "*See Excelsior*," the Board's case would have been stronger because the Board would have been distancing itself from the case
                ii. Dicta: If the Board had said: "We would have come out the other way, but we are bound by *Excelsior*," then there is a stronger argument that *Excelsior* is doing the real work
            b. So, the NLRB <u>can</u> still apply the "requirement" in *Wyman-Gordon* because it was an independent incident to the *Wyman-Gordon* ADJ
    ii. Concurrence (3 justices – finds judgment for the Board too, but disagrees with the plurality's reasoning)
        1. Response to (1): The procedures in *Excelsior* were fine – there was an ADJ out of which came a requirement
            a. And the concurrence is not bothered by the fact that the requirement is only applied prospectively – it still is an order from an ADJ
                i. The *Excelsior* order was nonetheless an inseparable part of the ADJ process
                ii. Making something prospective only does not distinguish RM from ADJ
                    1. Decisions on prospectivity and retroactivity are necessarily part of the ADJ process

iii. Plurality's rule that it is a violation of the APA to make a requirement that is prospective only through ADJ puts the agencies in a bad position because they may be forced to unfairly apply something to the parties in front of them

2. Response to (2): If the procedures had been improper in *Excelsior*, then enforcement in *Wyman-Gordon* would have been invalid
    a. To hold otherwise allows the agency to get around the APA – that is, the agency can violate APA procedures and nonetheless have the rule enforced later

iii. Dissent (2 justices)
1. Response to (1): The procedures in *Excelsior* were incorrect . . .
2. Response to (2): . . . and therefore <u>cannot</u> be applied in *Wyman-Gordon*

iv. Breakdown of the Votes:
1. 6 justices think that the *Excelsior* procedures were incorrect
2. 5 justices think that improperly promulgated "requirements" <u>cannot</u> be applied in the future case
. . . seems like the Board should have lost then, but they didn't – just how SCOTUS voting works

v. Wex: Unsure as to whether this is precedent – would probably be if the case looks exactly the same as this one
1. <u>*Wyman-Gordon* Precedent then</u>:
    a. If an agency is making a requirement in an ADJ it will probably apply it to the parties in front of them to avoid this problem
        i. Rather than make it prospective only
    b. If a requirement has been improperly promulgated in the first instance, it <u>cannot</u> be applied in a future case (i.e., if it is decided on a napkin, it cannot be applied in a future case)

d. Ex: *NLRB v. Bell-Aerospace* (U.S. 1974): NLRB had long interpreted the NLRA to exclude "managerial employees"; NLRB later reversed itself and held that they were covered; Bell Aerospace argued that the NLRB's decision extending the Act's coverage to managerial employees was erroneous and that, even if the Act could be construed to cover the buyers, in light of prior Board decisions excluding buyers from the Act's coverage, the Board should have engaged in RM; SCOTUS determined that t**he Board was free to read a new and more restrictive meaning into the Act**; on remand though, what procedures does the Board have to accomplish this – RM or ADJ?; Court of Appeals thought the agency must use RM on remand; SCOTUS disagreed → the Board can use ADJ
    i. "<u>The Board is not precluded from announcing new principles in an ADJ proceeding and the choice between RM and ADJ lies in the first instance within the Board's discretion</u>
        1. <u>The Board's judgment that ADJ best serves this purpose is entitled to great weight</u>"
    ii. Standard of Review: Abuse of Discretion (from *Chenery*) – as long as it is not an abuse of discretion to go through ADJ, then it is OK
        1. **ADJ here is <u>not</u> an abuse of discretion because**:
            a. The issue is too diverse and complex, making it hard to frame a generalized standard
                i. This is an area where the agency has to pay attention to the specifics of each company, and that makes ADJ proper
            b. No fines or damages are involved
            c. There would be no new liability imposed on individuals for any past actions that were taken in good faith reliance on past pronouncements of the Board
                i. **Distinction between *Bell-Aerospace* & *Majestic Weaving***

e. Ex: *NLRB v. Majestic Weaving* (2d Cir. 1966): NLRB had previously allowed such negotiations, a company relied on this statement and did something that the Board had said was OK, and then the Board changes its mind and fined the company (for doing something the Board said for 15 years was OK)
    i. Court: NLRB's actions were arbitrary and an abuse of discretion
    ii. But, it is <u>not</u> a problem if the agency has said nothing at all about X, a company does X, and the agency fines you for doing X because they make a rule (RM) or decision (ADJ)
        1. And if there are no fines at all, that makes it even more OK
    iii. <u>Factors, which if present, will start to cast doubt on the agency's ability to use ADJ instead of RM</u>:
        1. If the agency has a decision branding unfair or illegal something that was previously explicitly branded fair or legal (i.e., if the agency makes a 180 degree switch in policy)
        2. If the ADJ issues a fine or damages or some other substantial adverse consequence
        3. If the ADJ imposes new liability for past actions taken in good faith reliance on a previous agency pronouncement

        . . . these things could lead to a court finding the agency abused its discretion by choosing ADJ over RM
f. Ex: *Ford v. FTC* (9th Cir. 1981): FTC, through ADJ, found that Ford was engaged in unfair trade practices and fined Ford; in this ADJ, the FTC announced a requirement that car dealers cannot do what Ford has been doing; Ford alleged that the FTC could not do this because the FTC has to act through RM
    i. Based on what we know, the court should have said it was OK for the FTC to do this through ADJ because the FTC had never previously said that it was OK for car dealers to do this practice and then they changed their mind
        1. There was no reliance by dealers on some FTC pronouncement
    ii. 9th Cir.: FTC must use RM because: (1) the unfair trade practice finding would have general application; and (2) the parties to this proceeding had no warning that their acts were improper
    iii. Dissent (Reinhart, from the denial to hear this case en banc): the 9th Cir. panel's decision got all relevant case law wrong – administrative agencies can use ADJ to make policy, fine people, etc.
        1. Reinhart is clearly right under SCOTUS precedent
    iv. <u>Note</u>: **This case is just wrong** – it has been criticized and followed only sporadically

VII. Hypos
a. FTC is concerned that movies are being advertised as starting at time X, but then do not actually start until X+20mins for commercials; FTC decides to issue a cease and desist order to Lowes – this is the first time they have said anything about the issue; after the hearing, FTC decides it is an unfair trade practice and fines Lowes $1K and orders them to stop
    i. Result: OK – this is <u>not</u> a *Majestic Weaving* situation where there was a prior affirmative pronouncement by the FTC on this matter before this ADJ
b. FTC brings an order against Lowes, but decides that they do not want to punish Lowes without any notice, so the FTC says that from now on this practice is prohibited (and they issue an order to that effect); six months later they go after Coolidge Corner Theater for doing the same thing and not complying with the new rule
    i. Result: Unclear – this is a *Wyman-Gordon* problem
        1. Maybe the court would say we've already considered this exact situation and we decided it was OK (*See Lowes*)
        2. Maybe the court would say that the votes were all over the place in *Wyman-Gordon*, so they will consider the issue and case anew – and they would pick one of the three positions from that case

c. Congress passes a new law saying that the FTC, by notice and comment RM under § 553 shall set out guidelines when movies have to start in relation to their advertised time; but before issuing the rule (working on it, but haven't finished it), the FTC goes after Lowes and fines it
    i. Lowes might say that they assumed there was no rule against what they were doing until the rule mandated by Congress came out from the FTC – almost like a reliance argument
    ii. FTC might say that they still have the cease and desist power when they see an unfair trade practice, so they think they can still do this, despite Congress's law telling them to pass a rule
        1. That is, they understand they have to make a rule and they are in the process, but nothing expressly takes away their cease and desist power in the interim
    iii. Lowes might argue that Congress intended the FTC to not bring cease and desist orders until the rule was formulated
    iv. Maybe *Ford v. FTC* (bad/weird case) can provide some arguments – in this actual case, part of the facts were that the agency had a RM thing concurrently going on when it brought the ADJ against the dealer, and this was one factor that the court thought was important when it invalidated the FTC's ADJ decision
        1. So if there is a RM proceeding in process at the same time the agency brings an ADJ, a court might be more apt to say that the issue should really be resolved through the RM process that is already concurrently going on
        2. However, might say that while notice and comment will give the agency tons of relevant information, having a hearing through ADJ will teach the agency different things in a different way … so maybe a court would say that ADJ during the pendency of RM is OK because the agency wants to learn more this way
            a. Perhaps companies should be on notice that they should be careful during the pendency of the RM procedure
d. Same law from Congress that instructs the FTC to set out a rule about movie time guidelines – now the FTC issues a rule, but it does not go through notice and comment (when it should have); FTC tries to enforce its rule against Lowes in a cease and desist hearing, clearly relying on this new rule; FTC fines Lowes
    i. Result: This is a situation where you would combine the votes in *Wyman-Gordon* and conclude that *if* an agency has issued a rule improperly, it <u>cannot</u> enforce it (this is a little unclear, but) . . . especially if the agency is very clear that they are applying the new rule that was clearly improperly promulgated
        1. An agency must follow APA procedures (where required) to enforce their rules
e. FTC brings a cease and desist order against Lowes and through ADJ issues an order that it is OK to start the movie up to 15mins after the advertised time; Kendall Square Theater is showing 10mins of previews and the FTC goes after them alleging an unfair trade practice and fines them
    i. Result: *Majestic Weaving* problem – as long as Kendall can say they relied on the decision in the Lowes case and acted on a good faith reliance on what the FTC already said was OK
f. Lowes asks FTC to tell them how long they can start their movies after the advertised time; FTC issues a private opinion letter to Lowes telling them it is OK to start up to 15mins after; FTC goes after Kendall for starting their movies 10mins after
    i. Result: OK – there was no public announcement by the agency and nothing in the fact suggested that Kendall knew or should have known about the private opinion letter, so there is no reliance
g. FTC issues some order – one that every reasonable communications lawyer should know about – and goes after Kendall for violating the order; Kendall defends by saying that they had a horrible lawyer and did not know about this order

i. Result: Probably comes down to what a reasonable person would know, but looks like Kendall is in trouble

h. Assistance Public Director for Movies – not an official position or the head of the agency – issues a public letter (i.e., not an ADJ decision from the FTC) saying that he thinks 15mins is OK/in the view of this office 15mins is OK; Coolidge Corner relies on this letter; FTC goes after them for starting 10mins after
   i. Result: Depends on what level of authoritativeness the agency announcement that such reliance is based on is and how reasonable reliance on such an announcement is
      1. Notion that as you go down in agency authority, the reasonableness of your reliance likely decreases
         a. Possible Factors:
            i. Is this the office that normally makes pronouncements for the agency on these types of things?
            ii. How high is this person in the agency?
               1. Agencies have different levels, so sometimes things do not necessarily always need to go through the head of the agency

Rulemaking Procedures

I. <u>Modes of RM</u>:
   a. **Formal** → when the organic statute requires rules to be made "on the record, after a hearing," § 553(c) instructs to use §§ 556 – 557 procedures (instead of § 553)
      i. §§ 556 – 557 set out the procedures for formal RM and formal ADJ
         1. Creates a very formal, judicial-like hearing
      ii. Rare
      iii. Ex: *Allegheny* (U.S. 1972) & *Florida East Coast* (U.S. 1973): Sections 556 and 557 need be applied only where the agency statute, in addition to providing a hearing, proscribes explicitly that it be "on the record"
         1. We do not suggest that *only* the precise words "on the record" in the applicable statute will suffice to trigger §§ 556 and 557 . . . but the language needs to be pretty close – requiring <u>both</u> a hearing **and** for it to be on the record
         2. "Hearing" = interested parties get a chance to be heard in some way – could be through in person hearings, written submissions, e.g. – but it does <u>not</u> have to mean a formal, judicial-like hearing with the right to present evidence and testify
   b. **Hybrid** → more formal than informal, but less formal than formal
      i. Occurs when Congress requires procedures in addition to § 553's notice and comment in what would otherwise be informal RM (but less strict than §§ 556 – 557's requirements)
      ii. Way to Create Hybrid RM:
         1. Statute – agency shall use RM, but instead of following § 553 it instructs the agency to follow the procedures laid out in the statute
            a. If hybrid RM is created by statute, then it is totally fine – no questions about it
            b. Ex: Clean Air Act
         2. Courts – impose additional procedural requirements on agencies, perhaps if dissatisfied with the record produced after notice and comment
            a. Ex: D.C. Cir. in the 1960s and 1970s started adding additional procedural requirements onto the APA the agencies had to comply with
            b. Eventually, in *Vermont Yankee*, SCOTUS invalidated this kind of hybrid RM imposed by courts

i. Courts are stuck with whatever procedures the APA requires – they <u>cannot</u> add their own

c. **Informal** → notice and comment (§ 553)
   i. Main type of RM
   ii. Major Requirements:
      1. Notice of the proposed rulemaking (i.e., full text proposed rule)
      2. Opportunity to Comment
      3. Concise General Statement (of the rule's basis and purpose)

d. **Totally Informal RM** → when a § 553 exception applies, so that the agency is <u>not</u> required to go through notice and comment RM
   i. Exceptions:
      1. § 553(a)(1): a military or foreign affairs function of the United States
      2. § 553(a)(2): a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts
      3. § 553(b)(A): interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice
      4. § 553(b)(B): when the agency finds good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest
      5. § 553(d): certain report and wait exceptions

II. Why have Notice and Comment?
   a. Concern that it is very easy for anyone to comment, even if they know nothing about the rule or area of law
   b. Major rationale is a consequentialist argument – that if we allow for comments we will end up with better rules (notion that agency gets data, analysis, etc. that it would not otherwise have)
   c. Open government
   d. Public participation
   e. Fairness
   f. Political rationales – notion that it is good because we ought to allow people to be involved
   g. Democratic rationales – notion that we want people to express their views about policies that affect them
   h. Does notice and comment replace any of the democratic, political, or accountability values that we lose when Congress delegates to an agency in the first place?
      i. Some people do believe that having a broad notice and comment procedure solves some accountability problems caused by congressional delegation to agencies
      ii. If you do think that the notice and comment requirement is really important and legitimizes the administrative state, then you might be very wary of the exceptions that allow agencies to get out of notice and comment procedures

III. <u>Notice</u>
   a. Ex: *Small Refiner Lead Phase-Down Task Force v. EPA* (D.C. Cir. 1983): The adequacy of the agency's notice depends on how well the notice that the agency gave serves the policies underlying the notice requirement
      i. <u>Notice Purposes</u>:
         1. Improving the quality of the RM by allowing the rule proposed to be tested by exposure to diverse public comment
         2. Affording fairness to affected parties by giving them an opportunity to express their views
         3. Allowing more effective judicial review of the final rule by enabling the rule's critics to develop evidence in the record to support their objections
   b. Ex: *Chocolate Manufacturers Association* (4th Cir. 1985): **Q:** What counts as sufficient notice?; Chocolate Manufacturers are surprised when the final rule disallows flavored milk because the agency has always said it was OK, so manufacturers were lulled into think it would always be OK – never on notice of the possibility of disallowance; **Agency's response**: 78 comments came in and that could have put you on notice – and/or – we invited comments on all parts of the rule, so

everything was in play; **Court**: the Department's proposed rulemaking did not provide adequate notice that the elimination of flavored milk would be considered in the rulemaking procedure

i. Background: Agency does a lot of leg work before issuing a proposed rule (and has to go through RM because the statute required that); the proposed rule contained: 12-page preamble, general purposes, discussion at length about fat, sugar, etc., specific list – that says flavored milk is OK, the longstanding position of the agency – and that interested parties have sixty days to comment ("the public is invited to submit written comments in favor of or in objection to the proposed regulations or to make recommendations for alternatives not considered in the proposed regulation"); agency gets over 1,000 comments – 78 about getting rid of flavored milk

ii. **Court**: There is no question that an agency may promulgate a final rule that differs in some particulars from its proposal – an agency, however does not have carte blanche to establish a rule contrary to its original purpose simply because it receives suggestions to alter it during the comment period – an interested party must have been altered by the notice to the possibility of the changes eventually being adopted from the comments

1. **Test**: Notice is adequate if the changes in the original plan are in character with the original scheme and the final rule is a "*logical outgrowth*" of the notice and comments already given
    a. Note: Later cases make clear that it is the "logical outgrowth" of the proposed rule (not just the proposed comments)
        i. Argument is that if the proposed rule does not put someone on notice, then the logical outgrowth of the comments would be unfair
        ii. Maybe today though, now that everything is online, there is a difference – easier to monitor comments that may affect you
    b. If the final rule materially alters the issues involved in the rulemaking or if the final rule substantially departs from the terms or substance of the proposed rule, the notice is inadequate
        i. Here, the total effect of the history of the use of flavored milk (longstanding use), the preamble discussion (which did not include flavored milk on the list of foods posing specific problems), and the proposed rule (which expressly noted that flavored or unflavored milk was permitted in the individual food packages) could not have led interested parties to conclude that there would be a change regarding flavored milk
            1. Insufficient notice resulted in affected parties not receiving a fair opportunity to contribute to the administrative RM process

iii. Ex: Recent D.C. Cir. case (2009): a final rule qualifies as a "logical outgrowth of the proposed rule" if interested parties should have anticipated that the change was possible

1. Therefore, cases finding that a rule was not a logical outgrowth often involve situations in which the proposed rule gave no indication that the agency was considering a change

iv. Rule Against Surprise Switcheroos: If an agency puts forth a proposed rule and then considers the comments and puts forth a new rule that is not a logical outgrowth from the proposed rule, this is a violation of § 553's notice requirement

1. At some point when the final rule departs so far from the proposed rule that it did not put people on adequate notice

c. Adequacy of notice issues arise also when an agency relies on background information not revealed in its notice

i. Ex: *Nova Scotia* (2d Cir. 1977): court struck down a rule issued by the FDA that had been based on undisclosed scientific data in the agency's possession when it issued the notice of proposed rulemaking; **court distinguished scientific data received from *outside sources* – which must be revealed during the notice stage – from information supplied during the comment stage and inferences drawn from the agency's own expertise** . . . the agency may rely on the latter two sources without specifically focusing commenters' attention on them
    1. ***Portland Cement* Rule**: When the basis for a proposed rule is certain information or data (i.e., if it is a scientific decision), the information or data which is believed to support the rule should be exposed to the view of interested parties for their comment
        a. Dicta: Does the *Portland Cement* Rule survive *Vermont Yankee*?
            i. D.C. Cir: Yes
            ii. Concurrence: *Portland Cement* is inconsistent with *Vermont Yankee*
    2. LOOK for something that the agency is substantially relying on

IV. Concise General Statement
- a. Section 553 requires agencies to incorporate into their rules a "concise general statement of their basis and purpose"
    i. This requirement appears to be designed to improve the decision making process by requiring agencies to furnish reasons for their rules
        1. Section 553, however, contains no guidance on what the concise general statement must contain
            a. For example, what part of "concise general statement" would mandate that the agency address all material questions raised in the comment period?
            b. But, APA §706 requires courts to review agency action in some substantive way
- b. Ex: *Nova Scotia* (2d Cir. 1977): court was dissatisfied with the agency's explanation for its regulation, especially with its failure to explain why all fish were treated alike when the record contained evidence that species-by-species treatment might be warranted
    i. It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered
        1. The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures . . . Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body
    ii. We expect that the concise general of basis and purpose will enable us (i.e., the court) to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did
        1. Agency's decision must be rational (and not arbitrary and capricious) and it is hard for courts to determine this if there are not procedural requirements to force the agency to explain itself
- c. **BASIC RULE**: Under the concise general statement requirement, agencies must respond to vital questions that are brought up during the comment period, allowing the court to ensure that the agency acted rationally
    i. Line-drawing Problem: What counts as a "vital" or "material" comment?
        1. Agency will have to decide – some decisions will be obvious, but with not-so-obviously vital comments, agency should likely err on the side of caution and address the comment
            a. Note: This rule will raise the costs of agency administration because agencies will have to spend more time and resources responding to these vital questions/comments . . . so weigh against whatever

benefits you think is in the comment procedure (ex: better, more informed rules)

V. Ex Parte Contacts (independent research, judge calling plaintiff, judge calling third party to ask for info, e.g.)
   a. Are ex parte contacts OK? (sliding scale)
      i. **Judicial Proceeding (Trial)**: ex parte contacts are not allowed – general ban
         1. Assumption that our trial system is founded on the presumption that truth and fairness will come out best if there is a full adversarial process, without shady stuff going on off the record
      ii. **Legislative Proceedings**: legislators considering a bill (for example) can have ex parte contacts (going to the constituents or experts to get questions answered and get more information)
         1. We want legislators to go out and educate themselves
      iii. **Formal ADJ/Formal RM**: ex parte contacts are not allowed in most situations
         1. § 557(d) sets out very specific rules about ex parte contacts
            a. Notion that parties are not supposed to talk to the decision maker in an ex parte fashion, and if they do it must go on the record
      iv. **Informal RM in Conflict Private Claims to a Valuable Privilege**: it is clear that in this rare situation there can be no ex parte contacts
         1. Ex: *Sangamon Valley* (D.C. Cir. 1959): concerns a situation of an informal RM where the agency is deciding which of two parties are going to get a contested benefit; due process concerns are there in the background (but the court does not clearly spell these out)
            a. Wex: If you are fighting against ex parte contacts, you might want to try and argue (if at all possible) that your case is a *Sangamon Valley* case → two parties involve, case is about allocating one thing as between the two parties
      v. **Typical Informal RM**: 96% sure ex parte contacts are allowed (*ACT*, *Sierra Club*, and *Vermont Yankee*), but there is a 4% chance that they are not allowed (*HBO*)
   b. When an Ex Parte Contact Could Occur:
      i. Before issuing the proposed rule
         1. Ex parte contact must be disclosed *if* it forms the (or some) basis for the proposed rule so that interested parties can comment
            a. Remember: Data or information that forms the basis for the proposed rule must be disclosed (*Nova Scotia*/*Portland Cement* Rule)
         2. If the ex parte contact does not influence the proposed rule, agency is not required to disclose
      ii. After the proposed rule has been issued, during the comment period
      iii. After the comment period has closed, but before the final rule is issued
      iv. After the final rule is published
         1. If the ex parte contact changes the agency's mind about the rule, then the agency has to start all over again (and disclose)
         2. Most likely ex parte contacts received after the final rule is published will be ignored by the agency
   c. Ex: *HBO v. FCC* (D.C. Cir. 1977) [informal RM]: "Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those in the know is intolerable"
      i. *HBO* Rule: No ex parte contacts in informal RM
         1. Once a notice of proposed RM has been issued, any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the RM proceeding, should refuse to discuss matters relating to the disposition of a RM proceeding with any interested private party prior to the agency's decision

a. If ex parte contacts nonetheless occur, any written document or a summary of any oral communication must be placed in the public file established for each RM docket immediately after the communication is received so that interested parties may comment thereon

ii. Statutory Hook for this Rule?
1. Court is quoting language from § 557(d), which applies to formal RM and ADJ, but the court nonetheless appears to think it is important and can extend to informal RM too
a. So any statutory hook appears to be finding a general policy expressed in § 557(d) . . . but nothing like the "concise general statement" language the *Nova Scotia* court had to connect the rule to

iii. Other Reasons Given for the *HBO* Rule:
1. Need everything in the RM process subject to adversarial testing
2. Secrecy is inconsistent with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits
3. "Agency secrecy stands between us and fulfillment of our obligation"
a. The public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings
i. It is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority
1. This course is foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information

iv. ***Nova Scotia*'s "vital question response" rule** and ***HBO*'s "no ex parte contacts" rule** are born of the same concern → the court has to make sure the agency is making a reasoned decision, and not an arbitrary one, and if there are two records, how will the court know whether the agency acted arbitrarily or not . . . but they are different in the sense that *Nova Scotia*'s rule <u>is</u> hooked to some actual statutory language in § 553, whereas *HBO*'s rule <u>is not</u>
1. And this difference can become important in light of *Vermont Yankee* (lower courts cannot add additional procedural requirements onto § 553)
a. (i.e., HBO rule may not survive *Vermont Yankee* . . .)

v. *HBO* caused a stir in Washington because the general understanding of the time was: "of course you can have ex parte contacts in informal RM" – the FCC did not think it was doing anything wrong by talking to the broadcasters after the comment period closed
1. Concern was that this case would cause agencies to turn their proceedings into much more formal affairs and thus transform the nature of informal RM
a. But, it turns out that *HBO* is a real outlier
i. Ex: *ACT v. FCC* (D.C. Cir. 1977): another panel of the D.C. Cir. sharply criticized the implication in the *HBO* opinion that ex parte contacts should be banned in every case of informal RM
1. "The problem is obviously a matter of degree, and the appropriate line must be drawn somewhere. In light of what must be presumed to be Congress' intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment stage, we would draw that line at the point where the rulemaking proceedings involved competing claims to a valuable privilege"

2. This case really undermined the *HBO* holding, but did not explicitly overrule it

ii. Ex: *Sierra Club* (*infra*) really undermines *HBO* without overruling it

1. Views ex parte comments in a positive, beneficial light
2. Assumes agency could accept ex parte contacts and not even docket them, if they are not of central relevance

iii. Ex: *Vermont Yankee* (*infra*) super-duper undermines *HBO*

vi. WEX: the *HBO* rule is basically dead, but it not completely clear

1. 96% clear that the HBO rule does not really exist anymore

d. Ex: *Sierra Club v. Costle* (D.C. Cir. 1981): EDF's procedural objections stem from either (1) comments filed after the close of the official comment period, or (2) meetings between EPA officials and various government and private parties interested in the outcome of the final rule, all of which took place after the close of the comment period; note that this case was decided under the Clean Air Act – not the APA – which has hybrid RM procedures in addition to what § 553 mandates: hearings with oral presentation, submission and rebuttal information, expanded docket (including documents that are of central relevant to the RM)

i. 300 Comments (after the comment period, but before the final rule – comments were docketed but the comment period was not re-opened) → "<u>As a general matter, nothing in the statute prohibits EPA from admitting all post-comment communications into the record; nothing expressly requires it, either</u>"

1. "Although no express authority to admit post-comment documents exists, the statute does provide that: 'All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the RM shall be placed in the docket as soon as possible after their availability.'"
    a. This provision is not limited to the comment period – it allows EPA not only to put documents into the record after the comment period is over, but also to define which documents are of central relevance so as to require that they be placed in the docket
        i. It was not the drafters' purpose to guarantee that every piece of paper or phone call related to the rule which was received by EPA during the post-comment period be included in the docket
            1. EPA **<u>can</u>** place post-comment documents into the docket, but it need not do so in all instances
2. Such a reading of the statute accords well with the realities of Washington administrative policymaking . . . In a proceeding such as this, it would be unrealistic to think there would not naturally be attempts on all sides to stay in contact with the EPA right up to the moment the final rule is promulgated . . . Common sense must play a part in our interpretation of these statutory procedures (i.e., everyone knows and expects that these ex parte contacts exist)
3. **Court defends ex parte contacts in informal RM** (compare these benefits with *HBO*'s negative view):
    a. Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall

i. Informal contacts must enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs

b. The possibility of course exists that in permitting ex parte contacts with rulemakers we create the danger of one administrative record for the public and this court and another for the Commission

i. But under the Clean Air Act procedures, the promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket

1. Thus EPA must justify its RM solely on the basis of the record it compiles and makes public

4. When does it become a <u>problem</u> to accept comments after the comment period has closed?

a. When the agency relies on the comment in a significant way and it is placed on the docket, but it is only two days before the final rule is issued – interested parties need time to comment on the post-comment comment

i. This is consistent with *Nova Scotia* → if information or data is being relied upon, it must be aired out with enough time for meaningful comment

5. Note: Even though this case relies on the Clean Air Act, the same rule would apply under the APA – <u>the agency cannot *rely* on a late comment without sufficient time for comment on the comment</u>

ii. Meetings (7 were docketed, 2 were not docketed) → statute does not explicitly treat the issue of post-comment period meetings

1. There is <u>no</u> prohibition on ex parte meetings

a. Having these meetings is quite important, particularly with the White House

b. We want executive policymakers to have meetings with the agencies who make decisions

2. The statute does not require the docketing of all post-comment period conversations and meetings, but a fair inference can be drawn that in some instances such docketing may be needed in order to give practical effect to § 307, which provides that all documents "of central relevance to the RM" shall be placed in the docket as soon as possible after their availability

a. Applying this to meetings make sense because otherwise you could get around the docketing items of central relevance requirement by simply speaking to the agency rather than writing

b. Basically, <u>if there is a general principle that comments that have information or data that is relied upon when writing the final rule have to be docketed so as to make them available for comment, then the same thing really has to apply to conversations and meetings too</u>

i. This is not a statutory argument, but one based on general principles

3. Hypo: Chief of Staff tells the EPA that the President really, really wants the agency to finalize the environmentally friendly rule, and this influences the agency

a. This would not have to be docketed because it is not informational data

b. It is always possible that undisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from

the outcome that would have obtained in the absence of Presidential involvement . . . *but* responding to presidential pressure is just something agencies have to deal with, and the courts need not be involved

4. Bottom Line: Two undocketed meetings did not need to be docketed
    a. One was informational – not something of central relevance
        i. So no violation of the implied central relevance docketing requirement for meetings
    b. One was a White House meeting – no essential information or data gathered that the agency purported to rest its final decision on

iii. **Statement of General Principle** (worth flagging & reviewing):

1. "The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution is not shared – it rests exclusively with the President . . . To ensure the President's control and supervision over the Executive Branch, the Constitution – and its judicial gloss – vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an independent agency, but always part of the Executive Branch"
    a. "Our form of government simply <u>could not function</u> effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive"
    b. "We assume that unless expressly forbidden by Congress, such intra-executive contacts may take place, both during and after the public comment period"
    c. Hypo: Congress passes a statute saying that after the comment period is over, the President and his staff may not have ex parte communications with agencies – constitutional?
        i. This is a SOP problem – infringement of the President's power to take care that the laws are faithfully executed
            1. Cite to the above language to support the importance of the President's involvement in agency decision making

VI. <u>Hybrid Rulemaking</u>

a. Congress has, on many occasions, statutorily added to the minimal procedures required by APA § 553 for informal RM, without going all the way to requiring formal RM
    i. Such statutes typically add oral hearings and cross-examination to the RM process, procedures that are usually associated with ADJ
        1. Thus, they have become known as "hybrid" procedures
b. Even in the absence of such statutory hybrids, some courts have been tempted to embellish upon the rather sparse informal RM framework erected by APA § 553
    i. Especially in the D.C. Cir. (the self-proclaimed activist liberal judges), this occurred so that there would be more substantial records built so that the court could ensure that agencies decisions were reasonable
        1. Judges were concerned that the agencies were making unreasonable decisions, but without making a record upon which they could judge this, there was nothing the court could do

ii. Judicial imposition of hybrid procedures was always plagued by the question of legitimacy → on what authority may courts impose greater than § 553 procedures in informal RM?

c. Ex: *Natural Resources Defense Council v. Nuclear Regulatory Commission* (D.C. Cir. 1976): it is clear that the NRC relied heavily on Dr. Pittman and his 20-page statement in issuing its final rule; NRDC wants to cross-examine Dr. Pittman, but they do not get to; NRDC petitions the court to overturn the commission's decision to adopt the rule and to grant Vermont Yankee's license; their main contention was that the commission's refusal to allow cross-examination of participants or submission of interrogatories to the staff members who prepared the Environmental Survey violated NEPA's requirement that adverse environmental effects be investigated to the fullest extent possible
   i. D.C. Cir. agreed with NRDC, finding the commission's action "capricious and arbitrary"
      1. While conceding to the agency discretion to select the most effective procedures to compile a record, the court stated that it must scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided
   ii. While the court does decide there is something wrong with this RM proceeding, it is hard to know what they actually thought was wrong: insufficient procedure or not enough evidence in the record?
      1. It is unclear because these two things are closely related and relatively circular – how do you know if an agency acted reasonably? look at the record, but if the record is limited, then you just don't know . . .
   iii. Remedy: Commission must come up with some procedures (possibilities given) to make it clear on remand/generate a record that their decision is supported by enough evidence

d. Ex: *Vermont Yankee v. NRDC* (U.S. 1978): SCOTUS decides that the D.C. Cir. relied on a conclusion of procedural deficiency, so SCOTUS reviewed that decision to decide whether more RM procedures needed to be afforded or not
   i. Generally speaking, § 553 of the APA established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting RM procedures
      1. <u>Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing court are generally **not** free to impose them if the agencies have not chosen to grant them</u>
         a. Legislative history makes this clear → Congress intended that the discretion of the agencies, and not that of the courts, be exercised in determining when extra procedural devices should be employed
   ii. Policy: If courts continually review agency proceedings to determine whether the agency employed procedures which were best in the court's opinion, judicial review would be totally unpredictable
      1. Agencies operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full ADJ procedures in every instance
         a. This would totally disrupt the statutory scheme and the inherent advantages of informal RM would be totally lost

e. **Ramifications of the *Vermont Yankee* Decision**:
   i. Requirement of courts that there be cross-examination and oral hearings (i.e., things clearly not authorized by the APA)
      1. Statutory hook? Nothing from APA § 553
      2. This requirement does <u>not</u> survive *Vermont Yankee*
   ii. Requirement of isolated decision makers / no ex parte contacts (*HBO*)
      1. Statutory hook? Nothing from APA § 553
      2. 96% sure that this requirement does <u>not</u> survive *Vermont Yankee*

a. Ex: *Maritime Association* (D.C. Cir. 2000): judicial imposition of an ex parte contacts ban would violate *Vermont Yankee* . . . even if the *HBO* rule survived the other D.C. Cir. decisions (i.e., *Sierra Club* and *ACT*)

iii. Requirement that the final rule be a "logical outgrowth" of the proposed rule (*Chocolate Manufacturers*)
1. Statutory hook? The word "notice" in APA § 553 – if the requirement is not met, then the parties affected will not have effective notice
2. Given the link to the notice requirement, this requirement likely <u>does</u> survive *Vermont Yankee*
a. That said, might argue that this it is a real stretch to link this requirement to the word "notice"
i. Fair argument, but unlikely a court would accept

iv. Requirement that the agency reveal information and data that it relies on for the final rule (*Nova Scotia*/*Portland Cement* Rule)
1. Statutory hook? Might say it is part of the "notice and comment" requirement of APA § 553 – if you do not reveal this information then parties might not have notice about what you are doing and why, and therefore cannot comment
a. This is the best hook, but it is a little iffy
i. *See* Beerman & Lawson article & *Radio Relay* (D.C. Cir. 2008) (concurrence): Because there is nothing in the bare text of § 553 that could remotely give rise to the *Portland Cement* requirement, some argue that *Portland Cement* is a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures
ii. At the very least, others say that *Vermont Yankee* raises a question concerning the continued vitality of the *Portland Cement* requirement that an agency provide public notice of the data on which it proposes to rely in a RM
2. So far, this requirement <u>has</u> survived *Vermont Yankee* though
a. *But see* Beerman & Lawson article & *Radio Relay* concurrence

v. Requirement that the agency respond to vital comments when it issues the final rule (*Nova Scotia*)
1. Statutory hook? "Concise general statement" require in APA § 553
2. This requirement likely <u>does</u> survive *Vermont Yankee*

vi. **KEY** → Need some plausible statutory language in § 553 to hook any additional requirements onto if they are to survive the *Vermont Yankee* test

VII. <u>Exception to Notice and Comment Rulemaking</u>

a. When Congress adopted the APA, it explicitly exempted several categories of administrative policymaking activity from some or all of the requirements of § 553
i. Subsection (a) categorically exempts from the operation of § 553 any RM involving "a military or foreign affairs function" or matters of "agency management or personnel or public property, loans, grants, benefits, or contracts"
ii. Subsection (b) contains exceptions from the notice and comment requirements (exception "when notice or hearing is required by statute") for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" and for situations in which an agency has "good cause" to dispense with notice and comment
1. By far the most contentious issue has involved drawing the line between rules subject to § 553 notice and comment requirements (so-called legislative rules), on the one hand, and "interpretative rules" or "statements of policy," on the other . . .

b. Concerns:

i. Whether the APA procedural requirements are adequate to protect the values that are lost when Congress delegates legislative power to agencies – most importantly, accountability to the public
    1. One major rationale for notice and comment is to replace some democratic accountability that is lost when Congress delegates power to agencies
        a. Without notice and comment, the public would not be able to participate in agency policy/lawmaking, and that seems troublesome from an accountability/public participation perspective
        b. Notice and comment might not be all that ideal though if only major organizations and lobbyists are commenting – or – if idiots are e-commenting since it is so easy
        c. Maybe notice and comment as a meaningful substitute for the democratic legitimacy and accountability you lose when Congress delegates is a farce
            i. Notion that despite public participation, the public cannot vote agency heads out of office if they do not listen
            ii. But, could challenge the agency in court and notice and comment might give you some ammunition on the back end (probably only works for substantive comments though, and we have to consider review *and* standing requirements to see if a lawsuit is feasible)
    2. Another rationale for notice and comment is that it improves the outcomes and results in better rules being made (or so we want to think)
        a. So maybe the requirement is good from a "make good policy" perspective
ii. That said, we might be wary of these exceptions if we think that notice and comment does in fact save the democratic legitimacy of the administrative state
    1. However, if you don't think the notice and comment procedure is very significant in the first place, you might care less about the exceptions

c. Benefits & Costs to Requiring Notice and Comment

i. Potential Benefits
    1. Better rules – because you have the benefit of input from interested parties
    2. Individual empowerment – notion that it is good to have affected parties take part in the formation of the rule
    3. Democratic accountability – notion that it is more democratic to have a system in which the government is making rules that are informed by the input of individuals and this effects government accountability
ii. Potential Costs
    1. Expensive – costly to research, study, etc.
    2. Time delay – long process
    3. Resources spent
    4. Might forgo making useful rules if the above costs are too much
        a. And this might have additional consequences because RM has its benefits
    5. Could cause agencies to choose ADJ

d. <u>Three Different Types of § 553 Exceptions</u>

i. § 553 does not apply at all

1. § 553(a)(1): if it is a military or foreign affairs function
    a. On its face, the plain language suggests this is quite a broad exception, but this exception has not gotten much attention, so it is not clear how broadly it will be read

i. Ex: *O'Leary*: This exception does <u>not</u> apply to being a civilian guard at the Department of Energy, therefore rule has to go through notice and comment
1. Exception applies *only* when the activities being regulated directly involve military functions (so this is a narrowing interpretation)

ii. Often the question comes up about whether immigration rules count as a foreign affairs function
1. 2d Cir.: The purpose of the exception is to avoid the public airing of matters that might inflame or embarrass relations with other countries
2. Many immigration rules <u>do</u> have to go through notice and comment

2. § 553(a)(2): if it is a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts
   a. Really broad exemption
      i. Public property could include any land that the government owns (which is a lot – airports, parks, e.g.)
      ii. Loans – small business, agricultural, HUD, city transportation loans, e.g.

ii. Notice and comment requirement does not apply at all

1. § 553(b)(A): if it is an interpretative rule, general statement of policy, or rules of agency organization, procedure or practice
   a. Ex: *Lincoln v. Vigil* (U.S. 1993): Indian Health Services decided to close its clinic and did so without notice and comment; SCOTUS: they did <u>not</u> have to engage in notice and comment RM because the agency's decision is either considered a "rule of agency organization" or a "general statement of policy" . . . which SCOTUS has described as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"
      i. Whatever else may be considered a "general statement of policy," the term surely includes an announcement like this one, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation
   b. *Main exception we are dealing with (*infra*)
2. § 553(b)(B): if the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest
   a. Agencies use this exception often
   b. Courts will review the agency's explanation if someone brings a challenge
   c. "Unnecessary" = rules that pertain to technical or minor matters
      i. Ex: government instruments have to be signed in ink
   d. "Impracticable"/"Contrary to the Public Interest" = emergency-like situations – when a rule has to be issued quickly or when notice and comment procedures would defeat the agency's goals
      i. Ex: national security matters
      ii. Ex: if a rule is going to freeze prices, the agency does not want notice and comment because then people will up their prices during notice and comment

3. Note: Many agencies will do notice and comment, even if they are not required to

iii. Report and wait 30 days exceptions

e. Major Exception We're Dealing With = § 553(b)(A)

i. **Legislative (Substantive) Rules**: do require notice and comment

1. Features:
   a. Supplement a statute (i.e., add or modify) – not simply construe it
   b. Effect a change in existing policy or law
      i. (alters the legal rights of the public)
   c. Based on new evaluations or facts/events/etc. in the outside world
      i. Factors external to the language of the statute
      ii. Important in *National Family Planning* & *Syncor*
   d. Involves an arbitrary choice (not in the "arbitrary & capricious" sense)
      i. Arbitrary choices are seen as legislating
      ii. A rule that turns on a number is likely to be arbitrary
      iii. Important in *Hoctor*
   e. Substantial interest in the rule – the greater the public interest, the greater reason to allow public to participate (*Hoctor*)
   f. Agency's views its pronouncement have a present, binding effect (*Community Nutrition*)
      i. Look to agency's own language – binding norm? or musing?
      ii. Look to exceptions – why exceptions if rule is not binding?

ii. **Interpretative Rules**: do not require notice and comment

1. Features:
   a. Clarify a statutory term
   b. Remind parties of existing duties
   c. Confirm a regulatory requirement
   d. Tracks a statute and explain what the statute already requires
   e. Rule that interprets (or whose goals/focus is to figure out) a specific term or phrase – notion that the rule must *interpret* something
   f. Maintains a consistent agency policy
   g. Cloistered, appellate-court type reasoning
      i. (as opposed to an arbitrary choice)

iii. **Policy Statements**: do not require notice and comment

1. Features:
   a. Tentative statement of the agency's view
   b. Agency does not intend its pronouncement to have a present, binding effect
      i. Agency is merely musing about its view

iv. **Note**: Courts sometimes treat interpretative rules and policy statements as one in the same, *but* they are actually quite different and distinct

f. Summary:

i. National Family Planning

1. Q: substantive rule or interpretative rule?
2. A: substantive rule
   a. It repudiated a prior legislative rule
   b. New rule rested on a policy decision – not statutory interpretation (i.e., words)

ii. Hoctor

1. Q: substantive rule or interpretative rule?
2. A: substantive rule
   a. No cloistered, appellate-court like reasoning – no interpretative process

b. Substantial public interest in the rule

iii. Community Nutrition

1. Q: substantive rule or policy statement?
2. A: substantive rule
    a. The agency's pronouncements have bound itself with its action levels

iv. American Mining Congress

1. Q: substantive rule or interpretative rule?
2. A: interpretative rule
    a. No legislative gap (i.e., the Part 50 Reg. was sufficient for enforcement)
    b. No amendment of a prior rule (i.e., part of the Part 50 Reg.)

v. Paralyzed Veterans of America

1. Q: substantive rule or interpretative rule?
2. A: interpretative rule
    a. No legislative gap (i.e., DOJ could have proceeded against arena based on 4.33.3 alone)
    b. No amendment (i.e., because no prior contrary position taken by DOJ)

vi. Syncor

1. Q: substantive rule or interpretative rule?
2. A: substantive rule
    a. FDA was not interpreting any statutory or regulatory language
    b. FDA changed its view because of a new evaluation of circumstances in the world
    c. There is a legislative gap because of the 1984 Guidelines
        i. But court does not actually rely on or decide this issue because of the first rationale listed

g. Ex: *National Family Planning v. Sullivan* (D.C. Cir. 1992): (1) Statute (Title X): "None of the funds appropriated shall be used in programs where abortion is a method of family planning"; (2) 1988 notice and comment regulation: "A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning"; (3) *Rust v. Sullivan* (U.S. 1991): SCOTUS upheld the constitutional and statutory validity of the 1988 regulation – importantly though, the government was required to defend the regulation in front of the Court so it had to take a position on what the regulation meant: complete ban on abortion counseling (in a nutshell) – and once the government has taken a position on a particular law in a brief or oral arguments in front of the Court, it becomes much more solidified and changing its mind later is not going to be looked fondly on by the Court; (4) 1991 Directive (at issue in the case): the 1988 regulation will not be interpreted "to prevent a woman from receiving complete medical information about her condition for a physician," including information about abortion . . . did this Directive need to go through notice and comment – is it an interpretative rule or a legislative rule? (government did not try to defend it as a policy statement)

i. Holding: "When an agency promulgates a *legislative* regulation by notice and comment directly affecting the conduct of both agency personnel and members of the public, whose meaning the agency announces as clear and definitive to the public and, on challenge, to SCOTUS, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment RM normally required for amendments of a rule"

1. This holding, if we view it as that, can be construed as being quite narrow, but the dictum is quite broad re: what distinguishes interpretative rules from legislative rules (added to the list *supra*)
    a. "The Directives themselves suggest that the amendment was motivated not by an interpretation of the regulation's terms, but instead by a previously unacknowledged concern for the special

relationship between doctors and their patients . . . Nowhere in the Directives were interpretations of the regulatory terms 'abortion' and 'counseling' mentioned as the target of the new policy"

i. They are evaluating something in the outside world, not specific to interpreting the statute

ii. They are not linguistically trying to figure out what "counseling" means, e.g. (i.e. something specific to the statute)

b. **This was a complete reversal of their earlier policy – one that they defended in front of SCOTUS**

i. An agency <u>may</u>, for good cause, change a regulation and even its interpretation of the statute through notice and comment RM, but an agency <u>may not</u> constructively rewrite the regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result

ii. Note: An agency's own description of its rule is descriptive and important, but <u>not</u> dispositive

h. Ex: *Hoctor v. USDA* (7th Cir. 1996): (1) Statute: "USDA has to come up with standards to govern the humane handling and care of animals by dealers"; (2) Structural Strength Regulation (done through notice and comment): "The facility housing the animals must be constructed of such material and of such strength as appropriate for the animals involved … also to protect the animals from injury and contain the animals"; (3) Internal Memo (interpreting the Structural Strength Regulation): "Dangerous animals must be inside of a fence at least 8ft high"

i. Holding: Legislative rule

1. The Internal Memo is <u>not</u> *interpreting* anything – there is no active interpretation going on when an agency chooses a number to represent some standard

a. At the other extreme from what might be called normal or routine interpretation is the making of **reasonable but arbitrary rules** that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of interpretation

i. A rule that turns on a number is likely to be arbitrary in this sense

1. <u>When agencies base rules on arbitrary choices they are legislative, and so these rules are legislative or substantive and require notice and comment RM</u>

b. There is no process of cloistered, appellate-court type reasoning by which the USDA could have excogitated the 8ft rule from the Structural Strength Regulation

i. The rule is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose

ii. Courts are uncomfortable with making arbitrary choices as they view this as legislative function

2. The rule is arbitrary but that does not make the rule a matter of indifference to the people subject to it (and there are thousands of animal dealers with legitimate concerns)

a. The greater the public interest in a rule, the greater reason to allow the public to participate in its formation (i.e., through notice and comment)

i. Suggests a substantial interest idea → courts may be more likely to require notice and comment in cases where there would be a lot of comments

ii. What if . . . Internal Memo was written as a Policy Statement: "We are of the tentative view that the regulation of structural strength will be satisfied in most cases by an 8ft fence" (e.g.)
    1. If a case came up, the agency would have to show why a 7ft fence was not structurally sound (rather than just having the person subject to an automatic violation if the court finds the fence was not 8ft tall, as would be the case with a rule)
    2. Dicta: Agencies have to consider the effects of issuing a policy statement vs. promulgating a rule through notice and comment
        a. For example, if you think you will have 87% compliance with a policy statement, then maybe you choose to forgo notice and comment
        b. Or, you may think notice and comment will help increase compliance, so the agency goes through notice and comment for this benefit (even if it does not have to)

iii. Agency could try to argue that Hoctor violated the Statute itself (versus the Internal Memo) – would have to argue that the Statute has an inherent containment norm . . . *but* this is a stretch here because the Statute does not contain any substantive requirements, just tells the agency to make such rules

iv. Agency could try to argue that Hoctor violated the Structural Strength Regulation (even without this Internal Memo) – again, this is a stretch
    1. Posner thinks that the Regulation is more about strength than height, so even if the agency did cite the Regulation, it would have to argue in ADJ that an 8ft fence is necessary to be structurally sound . . . but the agency would much rather rely on RM than having to go through ADJ

v. **Key**: If you have a number that feels chosen in an arbitrary way, compare to *Hoctor*
    1. If it is similar, then argue it is a substantive rule

vi. **Note**: This case is different from *National Family Planning* because nothing in the Memo repudiates the Regulation – it just elaborates on the regulation
    1. But, same result → substantive rule

i. Ex: *Community Nutrition v. Young* (D.C. Cir. 1987): FDA issued action levels about when various adulterations in food will trigger possible enforcement proceedings; FDA argues that this is a policy statement (i.e., we're not binding ourselves to this level, just musing about what we think the level should be), so it did not need to go through notice and comment . . . and we know from *National Family Planning* that courts give some deference to the agency's own characterization, but it is not dispositive

    i. Holding: Legislative rule – based on the agency's own statements, the court concludes that the FDA intended to create a binding standard
        1. The language employed by FDA in creating and describing the action levels suggests that those levels have both a present effect and are binding
            a. The language clearly reflects an interpretation of action levels as presently binding norms
                i. This type of mandatory, definitive language is a powerful, even potentially dispositive, factor suggesting that action levels are substantive rules
        2. This view of action levels – as having a present, binding effect – is confirmed by the fact that FDA considers it necessary for food procedures to secure *exceptions* to the action levels
            a. This language implies that in the absence of an exception, food with aflatoxin contamination over the action level is "unlawful"

i. **Why would you need an exception if the levels are not binding?**

3. On several occasions, the FDA has made statements indicating that action levels establish a binding norm
    a. Look to agency pronouncements to see if the agency is just musing about something or whether they intend the statement to be binding
4. The fact that the action level does not bind food producers in the sense that they are not automatically subject to enforcement proceedings for violating the action level (as would a more classic legislative rule) points in favor of the agency's characterization as a policy statement, but this is not determinative
    a. Wex: This might have played a role *if* this was defended as an interpretative rule (instead of as a policy statement)

ii. Starr (concurring in part, dissenting in part): The *Pacific Gas*-enunciated factor – **whether the pronouncement has the force of law in subsequent proceedings** – should be deemed determinative of the issue
1. In a sense, notice and comment procedures serve as a congressionally mandated proxy for the procedures which Congress itself employs in fashioning its "rules," thereby ensuring that agency "rules" are also carefully crafted (with democratic values served by public participation) and developed only after assessment of relevant considerations
    a. *But* the only time this is necessary is when the agency's own standard/pronouncement is being enforced – not when the statutory standard is being enforced
        i. Here, the adulteration concept came from Congress and was promulgated through normal democratic means, so there is no need to make up any lost democracy through the notice and comment process
2. Starr's Test: Only if the regulations themselves are independently enforceable by the agency is notice and comment required

j. Ex: *American Mining Congress* (D.C. Cir. 1993): statute gives the agency the general authority to regulate health and safety conditions in mines and gives the agency authority to require mine operators to give them information they need to keep the mines safe; pursuant to this authority, the agency issues Part 50 Regulations (using notice and comment); (1) Part 50 Reg. said that mine operators have to report accidents and diagnoses within 10 days; (2) agency issued a Program Policy Letter (PPL) stating agency's position that certain x-ray readings qualified as "diagnoses" of lung disease within meaning of agency reporting regulations; petitioner thinks PPL should have gone through notice and comment; agency deems this PPL an interpretative rule; agency not defending this as a policy statement, nor could it – it is not merely musing about how things are going to work in the future
    i. **Attorney General's Manual on the APA** (1947)
        1. **Substantive Rules** → rules, other than organizational or procedural, issued by an agency pursuant to statutory authority and which implement the statute; such rules have the force and effect of law
        2. **Interpretative Rules** → rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers
        3. **General Statements of Policy** → statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power
    ii. Holding: Interpretative rule
        1. Court gives four factors for identifying a legislative rule:
            a. Is there a legislative gap? Does the agency need the rule for enforcement?

i. If the agency needs the rule for enforcement, then there is a legislative gap and the pronouncement is a legislative rule
1. Ex: SEC has the power to make rules governing fairness in the securities market, and it shall be a violation of the Act to violate any SEC rules – there is nothing in the Act that allows the SEC to go after something they think is generally wrong, they have to make the rule first – so before there is a rule, there is nothing the agency can go after anyone for = a legislative gap
ii. Here, there was no legislative gap – the agency did not need the PPL to bring an enforcement action, they could have gone after someone for not turning over a diagnosis under the Part 50 Reg.

b. Publication in the CFR
i. This makes something look more like a legislative rule than an interpretative rule
ii. Wex: This factor is not really that important

c. Was the agency intending to exercise regulatory power?
i. Has the agency explicitly invoked its general legislative authority?
ii. Look at what the agency actually said

d. Is this an amendment of a prior rule?
i. If a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first, and an amendment to a legislative rule must itself be legislative
ii. *But* . . . "A rule does <u>not</u>, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted"
iii. Important factor in *National Family Planning*

. . . If the answer to any of these questions is "<u>yes</u>" then it is a legislative, not interpretative rule (according to the court)

iii. Judge does not seem to care about reading § 553 exceptions broadly
1. "The ability to promulgate interpretative rules, without notice and comment, does not appear more hazardous to affected parties than the likely alternative. Where a statute or legislative rule has created a legal basis for enforcement, an agency can simply let its interpretation evolve ad hoc in the process of enforcement. The protection that Congress sought to secure by requiring notice and comment for legislative rules is not advanced by reading the exemption for 'interpretative rules' so narrowly as to drive agencies into pure ad-hocery – an ad hocery, moreover, that affords less notice, or less convenient notice, to affected parties"
2. "A non-legislative's rule's capacity to have a binding effect is limited in practice by the fact that agency personnel at every level act under the shadow of judicial review"
a. Ultimately, there is a good chance that someone will challenge an agency interpretation – either under an arbitrary and capricious argument or *Chevron* prong 2 – and the court will determine whether the agency considered the effectiveness of its rule
i. **So we do not have to be so worried that agencies are not going to go through notice and comment and that will result in worse rules** . . . agencies have to consider objections to

their rules regardless in anticipation of defending its rules after implementation in court

iv. Note: Court stresses that deciding whether an interpretation is an amendment of a legislative rule is different from deciding the substantive validity of that interpretation
    1. An interpretative rule may be sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation of the agency's statutory authority

k. Ex: *Paralyzed Veterans of America v. D.C. Arena* (D.C. Cir. 1997): (1) Statute: Title III of the ADA (no discrimination on the basis of disability); Congress has directed DOJ to flesh out the general principles of Title III by issuing regulations; (2) Access Board drafted Regulation 4.33.3: wheelchairs must have lines of sight comparable to the general public; (3) DOJ later adopted Regulation 4.33.3; Access Board had a view that 4.33.3 did not require lines of sight over standing spectators (but Access Board is a private entity and is not responsible for the regulation); court decides that DOJ did not have a view about whether the lines of sight needed to be over standing spectators (despite a speech to MLB stadium operators by the deputy chief of the Public Access Section of DOJ – too low-level of a position to be stating DOJ policy); (4) DOJ later issued a Manual: "lines of sight comparable" *must* include sightlines over standing spectators; because of this "must" language, we know it is not a policy statement (musing about the future) – so, is this a substantive rule or an interpretative rule?
    i. Holding: Interpretative rule
        1. Is this an amendment of a prior rule? [factor (4) from *AMC*]
            a. Court considers the baseball speech, and decides ultimately that DOJ never authoritatively adopted a position contrary to its manual interpretation, and is therefore permissible
                i. A speech of a mid-level official of an agency is not the sort of fair and considered judgment that can be thought of an authoritative departmental position
                    1. It is not equivalent to the technical assistance manual which represented formal agency action upon which affected parties could reasonably rely
                    2. *Cf.* If the speech was given by the A.G., e.g.
        2. <u>Force of Law Test</u> [factors (1) – (3), with legislative gap being the most important]: Did the agency need the policy manual in order to bring an action against the arena, or could it have relied on 4.33.3?
            a. DOJ could have relied on 4.33.3 itself, even without the Manual interpretation, to seek lines of sight over standing spectators
                i. The Manual interpretation is <u>not</u> sufficiently distinct or additive to the regulation to require notice and comment
            b. Gloss on Legislative Gap Issue: Are there limits on being able to go after someone based on the initial regulation – fairness concerns? ↓
            c. DOJ's interpretation of its regulation has real consequences – but that is always true when a Department or Agency selects an interpretation of an ambiguous statute or rule, and often we acknowledge a government agency's right to do so as an "interpretative" rule without notice and comment
                i. The distinction between an interpretative and substantive rule more likely turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute or rule
                    1. If the statute or rule to be interpreted is itself very general, using terms like "equitable" or "fair," and the "interpretation" really provides all the guidance,

then the latter will more likely be a substantive regulation
2. Here, however, DOJ's position is driven by the actual meaning it ascribes to the phrase "lines of sight comparable" – the legal base upon which the rule rests

3. Note: Court appears to make factor (4) from *AMC* a separate inquiry, almost a threshold inquiry as to whether there is a permissible construction of the regulation, then the court considers the FOL test (factors 1 – 3) to determine whether the rule is a substantive rule having the force of law or whether it is an interpretative rule
    a. Otherwise similar reasoning and outcome as *AMC*

ii. Hypos:
1. Statute Variations:
    a. (1) Illegal for stadium to violate Regulations issued by the agency
    b. (2) Illegal for stadium not to give "equitable access" to disabled patrons
    c. (3) Illegal for stadium not to give disabled patrons "lines of sight comparable to the general public"
2. Agency "Rule" → "Stadium must provide lines of sight over standing spectators"
    a. (1) This "rule" is clearly a substantive rule under Statute (1) because there is a legislative gap – the rule is doing all of the work (versus the statute)
    b. (2) Court might say that the language in Statute (2) is so vague and general that it is not doing any work, but rather the rule is doing the work, which makes it a substantive rule
        i. There is a question about how much guidance the statute gives the regulated party concerning what they can and cannot do (*see* "general terms … 'fair,' 'equitable'" quote *supra*)
    c. (3) Language in Statute (3) is from the actual case and is doing most of the work in saying what the stadium can and cannot do – the rule makes the pronouncement crisper, but there is enough in the statute that the rule is not really a substantive rule (i.e., it is not doing all of the work)
        i. Notice and comment not required

iii. Is this important? → "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking"

l. Ex: *Syncor* (D.C. Cir. 1997): (1) Statute gives the FDA authority to enforce provisions regarding adulteration and misbranding of drugs; (2) 1984 Guideline: nuclear pharmacies are not going to be regulated under the Act; (3) 1995 Notice: nuclear pharmacies should be regulated under the Act; FDA indicated that its 1995 publication was to supersede its prior 1984 publication – substantive rule or interpretative rule?
    i. **Interpretative Rule vs. Policy Statement** → an agency's policy statement does not seek to impose or elaborate or interpret a legal norm; by issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach; the agency retains the discretion and the authority to change its position – even abruptly – in any specific case because a change in its policy does not affect the legal norm; thus, policy statements are binding on neither the public nor the agency
        1. Primary Distinction = whether the agency intends to bind itself to a particular legal position

ii. **Interpretative Rule vs. Substantive Rule** → an interpretative rule typically reflects an agency's construction of a statute that has been entrusted to the agency to administer; a substantive rule *modifies* or *adds* to a legal norm based on the agency's own authority, which flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking
    1. Primary Distinction = how tightly the agency's interpretation is drawn linguistically from the actual language of the statute
iii. Note: An interpretative rule can construe an agency's substantive regulation as well as a statute
    1. In that event, the interpretative rule is, in a sense, more binding on the agency because its modification, unlike a modification of an interpretative rule construing a statute, will likely require notice and comment procedures
        a. Otherwise the agency could evade its notice and comment obligation by "modifying" a substantive rule that was promulgated by notice and comment RM
iv. Holding: Substantive rule
    1. The 1995 publication does not purport to construe any language in a relevant statute or regulation – it does not *interpret* anything (and this is the driving force of the opinion)
        a. Instead, FDA's rule uses wording consistent only with the invocation of its general RM authority to extend its regulatory reach
        b. Think: *National Family Planning*
    2. FDA changed its view because of new evaluations of circumstances in the outside world (i.e., factors external to the statute)
        a. The reasons FDA advanced for its rule – advancement in technology, expansion of procedures in which PET is used, unique nature of PET – are exactly the sorts of changes in fact and circumstance which notice and comment rulemaking is meant to inform
    3. Legislative Gap (court does not discuss because relies on the above two) – FDA cannot rely on the statute because of the now-contrary 1984 Guideline . . . the 1984 Guideline creates the legislative gap
        a. Without the 1984 Guideline, the FDA *may* have been able to bring an action on the basis of the statute alone (i.e., no legislative gap)
v. Dicta: Judge Williams in *American Mining Congress* – we do not want to interpret the interpretative rule exception too narrowly because that will force agencies into pure ad hocery
    1. We are not as worried about that problem in this case because this is not a case where the FDA could choose pure ad hocery over RM
        a. FN 9: This is not a situation in which the agency has the option to proceed to adopt its new regulatory extension through internal ADJ

m. **KEY**: This area is enshrouded in considerable smog, therefore, if you get this problem, you'd want to look at the issue under all of the rubrics we've seen
    i. Ex: "Courts have used various tests . . . Some use these factors, others focus on these factors . . . One would come out this way, another would come out this way . . ."

Adjudication

I. Judicial Model of ADJ → the authoritative resolution of factual and legal disputes, involving the application of general policy to a particular party or action
    a. In each instance, the agency takes evidence, hears arguments, and renders a disposition that, unless overturned on appeal, is legally binding on the parties involved, including the agency itself
        i. Two Main Issues:
            1. When can agencies constitutionally ADJ cases, given Article III? When can agencies exercise quasi-judicial power?
            2. What are the procedures under the APA that govern agency ADJ?

II. Agency Authority to Adjudicate

a. Article III: "The judicial power of the United States shall be vested in one supreme Court . . . The judges shall hold their offices during good behavior and shall receive a compensation which shall not be diminished" → so Article III judges exercise judicial power, have life tenure, and salary protection

i. Agencies do not have life tenure or salary protection, yet they often exercise what seems like judicial power (i.e., deciding active disputes between two specific parties)

1. Note: Article I courts and ALJs (e.g.) are completely the same for our purposes – all non-Article III courts

a. Article I courts = legislative courts (tax, bankruptcy, e.g. – special courts created by Congress that do not have the Article III characteristics)

i. So it has always been the case that people without tenure and salary protection have been able to ADJ certain matters

2. Why would Congress give Article I courts the power to ADJ (rather than having Article III courts decide everything)?

a. Congress may want to increase their own power and control

i. Public choice-type rationale

ii. They can control Article I courts through appropriations, ability to change the statute, e.g.

iii. They cannot control Article III courts

b. Expertise – special area of law decided by specialists

c. Efficiency – Article III courts are already clogged up, so we either have a court clog or we have to appoint lots more Article III judges (if we do not have Article I courts), and maybe we want to keep the federal judiciary small and prestigious

3. When can Congress create these Article I courts and when does it not violate Article III?

a. Congress has a lot of latitude to create these courts, but at the margins there are some issues

b. Four situations where Congress can *clearly* create Article I courts to ADJ:

i. Courts for the U.S. Territories (Guam, e.g.)

1. Article IV gives Congress plenary power to govern the U.S. territories – making these like Article IV courts

ii. D.C. Courts

1. Judges do not need to have life tenure and salary protection

iii. Military Courts

1. Essentially rests on Congress's authority to create rules for the armed forces

2. Military courts cannot try civilians, spouses of military members, e.g.; but they can decide criminal cases, impose the death penalty, e.g. . . . all without Article III judges and certain protections we have in Article III courts (right to counsel, e.g.)

iv. ADJ of Public Rights

1. *Civil* disputes between individuals or private parties and the government

a. Ex: tax, immigration, labor board, FTC fair trade

2. Government has sovereign immunity unless it waives it (i.e., unless Congress says you can sue the government), so if the government can control whether you can sue it, then maybe it follows that the government can decide how you sue it (i.e., through Article I courts vs. Article III courts)

. . . The first three rest on independent grants of power to Congress

c. Hard Case → ADJ of *private* rights by non-Article III courts (i.e., non-Article III courts deciding disputes between two private parties)
    i. *Schor* (U.S. 1986) gives us the test

b. Cases Leading up to *Schor*:
    i. Ex: *Cromwell v. Benson* (U.S. 1932): case involves an individual versus his employer (two private parties); court distinguished ADJ of public rights vs. private rights
        1. For private rights matters, an Article I court can play some role (making routine findings of facts, e.g.), but Article III courts have to be able to decide de novo all of the questions of law
        2. Although much of this case has fallen away, it did create the concept that **in some private rights cases, a non-Article III court can serve as an adjunct to an Article III court to decide some decisions, as long as the Article III court has the ultimate control over the decision**
            a. This concept allows magistrate judges to play their role
                i. Ex: *United States v. Raddatz & Peretz* (U.S.): upholding magistrate judges and many of their functions as non-Article III judges that act as appropriate adjuncts to the district courts that decide criminal cases
    ii. Ex: *Northern Pipeline* (U.S. 1982): important, messy case that threw some confusion into this topic; bankruptcy judges had 14-year terms and no salary protection; bankruptcy courts had very broad jurisdiction and powers to hear private right claims (i.e., could hear any sort of case that was related to some bankruptcy case); their powers were impressive – they could hold jury trials, issue habeas writs, declaratory judgments; SCOTUS held that the federal bankruptcy courts were unconstitutional in the way they were constituted at the time under Article III
        1. **Plurality**: Bankruptcy courts are completely unconstitutional based on how they are organized
        2. **Narrower Concurrence**: On this specific claim (a state contract claim), the exercise of jurisdiction was unconstitutional
    iii. Ex: *Thomas* (U.S. 1985): agency was given the power to make a decision in cases where one party is disputing another party about how much one owes for a data collection (binding arbitration with limited judicial review)
        1. SCOTUS upheld this arrangement as constitutional
            a. SCOTUS rejected the idea that private rights could never be ADJ by non-Article III courts
            b. This legislative court was created to hear private disputes closely related to government regulated activities
                i. "**Congress may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution**"
                    1. Yes, this was a private claim, but it arose as an integral part of an overall government regulatory scheme (i.e., pesticide registration), so it is OK to let the agency ADJ

2. SCOTUS tries to give some guidance on this issue and delineate the murky boundaries of Article III
    a. They seemed to be fairly deferential to Congress – a retreat from what happened three years earlier in *Northern Pipeline*

c. Ex: *Commodity Futures Trading Commission v. Schor* (U.S. 1986): issue – whether the Commodity Exchange Act empowers the CFTC (agency entrusted to implement the Act) to entertain state law counterclaims in reparation proceedings and, if so, whether that grant of authority violates Article III of the Constitution; Act provides that any person could seek redress for violations of the Act in front of the CFTC or in a federal district court; CFTC promulgated a regulation which allows it to ADJ counterclaims arising out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint; Schor thought that Conti (broker) violated the Act and bought suit in front of the CFTC rather than district court; broker originally brought a counterclaim in district court, but Schor convinced him to bring it in front of the CFTC instead; Schor changes his mind only after he loses, and then he alleges that it is a violation of Article III to have the CFTC settle the counterclaim; D.C. Cir – CFTC lacks authority to ADJ common law counterclaims (unconstitutional); SCOTUS reverses – this arrangement does <u>not</u> violate Article III
    i. SCOTUS: Two interests served by the requirement that Article III judges decide some subset of private right claims:
        1. **Personal Interest** → individuals have the right to have independent, impartial decision makers decide their disputes
            a. This interest ***is*** waiveable
                i. The right inures to the individual, so the individual can waive it – just like some other personal constitutional rights – and here is was explicitly waived by Schor when he asked Conti to bring the counterclaim in front of the CFTC
                    1. And it was implicitly waived by the fact that Schor brought his action in the CFTC rather than the district court in the first place (because he thought CFTC was quicker and less expensive)
            b. Note: Because this interest was waived, there is not a lot of discussion in the opinion about what test might apply here
                i. If we are faced with this question and there is no waiver, after dealing with the structural interest (for which there is a test), *need* to address the personal interest
        2. **Structural Interest** → speaks to SOP, checks and balances – safeguards the role of the judicial branch from infringement (and maybe also usurpation)
            a. This interest is <u>not</u> waiveable by an individual because it is not the individual's right – rather, it is about the power of the judiciary and its relation to Congress
                i. "When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect"
                ii. *Always* need to consider this interest, even when the personal interest has been waived
            b. <u>TEST</u>:
                i. (1) Do the Article III courts keep essential judicial power?
                    1. Article III courts can continue to hear these claims – federal jurisdiction is not barred
                        a. The choice of forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected

ii. (2) Are Article I courts exercising essential judicial power?
    1. CFTC deals only with a particularized area of law
    2. CFTC orders are enforceable only by order of the district court
    3. CFTC orders are reviewed under a standard that has teeth – not necessarily a deferential standard
    4. CFTC legal rulings are subject to de novo review
    5. CFTC does not exercise all ordinary powers of district courts
        a. Ex: CFTC does not preside over jury trials or issue writs of habeas corpus

    . . . This is all in contrast to the bankruptcy courts that got struck down in *Northern Pipeline*
iii. (3) Origins and importance of the right to be ADJ
    1. The right being ADJ here is a private right – a counterclaim that arises under state law – but there is not a clear public right/private right distinction in the sense that the former can be ADJ by non-Article III courts and the latter cannot
    2. This private right is incidental to and dependent on a federal law public right claim
        a. There is no substantial threat to SOP
        b. This is a legitimate right for an Article I court to consider
    3. ASK: Is this a traditional public right? A private right linked to a public right?
iv. (4) Reasons why Congress gave judicial power to the Article I court/agency
    1. Legitimate Reasons:
        a. Efficiency
        b. Expertise
        c. Independence – Congress wanting to create an independent agency
    2. There are no public choice, cynical concerns here about why Congress might have given this power to CFTC

    . . . Could think of this as a 3-factor test, with (1) and (2) combined to express "the relative allocation of judicial power," since they are mirror images of each other

c. "Nor does our discussion in *Bowsher v. Synar* (U.S. 1986) require a contrary result" . . .
    i. Need to consider whether we have aggrandizement or infringement
        1. Court rejects the idea here → "Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch"
        2. <u>But</u> one might argue there is actually congressional aggrandizement – it is Congress really making sure that it is the only branch that has power over this agency (for the most part, except for judicial review of CFTC rulings)

a. Counter: No aggrandizement because parties can still freely choose to go to the district court
    i. Counter to the Counter: No one is actually going to the district courts because going to the CFTC is so much easier

ii. Dissent: "Unlike the Court, I would limit the judicial authority of non-Article III federal tribunals to those few, long-established exceptions and would countenance no further erosion of Article III's mandate"
    1. The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence
        a. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case
            i. The danger of the Court's balancing approach is that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated (i.e., accumulation over time of small encroachments on SOP)
                1. So be wary of this
    2. Dissent also counts the majority's determination for the first factor (1 & 2) → federal jurisdiction may be retained, but it is completely undermined given how expedited the alternative option is

d. Ex: *Noriega-Perez v. United States* (9th Cir. 1999): petitioner who had been previously convicted, imprisoned, and fined for conspiracy to possess forged, counterfeit, and false documents brought action challenging the final order of Executive Office of Immigration Review, imposing monetary fine for civil document fraud; fines are an important issue – agencies cannot put someone in jail (e.g.), but agencies impose fines all the time; if a fine is considered criminal, it is pretty unlikely that the agency will be able to issue it; agency here issued a $96,000 fine and the majority and dissent disagree about whether the fine is criminal or civil and about whether the non-Article III court can impose such a fine; *Schor* factor (1) turns on whether this fine is defined as criminal or civil – that is, if this is deemed a criminal fine, that weighs against the agency re: relative allocation of judicial power; <u>majority's holding</u>: civil (fine is not excessive in relation to the non-punitive purposes, historically not seen as punishment, labeled as civil by Congress …)
    i. *Hudson* Inquiry
        1. Did the legislature, in establishing the penalizing mechanism, indicate whether it was criminal or civil?
            a. If the legislature labels it criminal, then the court will almost surely deem it criminal
                i. Notion that part of what makes something criminal is the stigma
            b. Here, Congress labeled the mechanism a civil sanction
                i. The legislative label here will govern, *unless* seven "useful guideposts" show by the clearest proof that the civil penalty is so punitive that it is actually criminal in nature
        2. Does the sanction impose an affirmative disability or restraint?
            a. Monetary fines do not constitute an affirmative disability or restraint (i.e., it is not prison)
        3. What is the historical understanding of the sanction – treated as criminal or not?

a. Monetary fines – especially in an area of intense, pervasive regulation like immigration – have not historically been thought of as punishment

4. Does the statute require a finding of scienter?
    a. Here, the conduct prohibited requires a showing of scienter – a traditional requirement of criminal liability – before sanctions may be imposed
        i. Majority does not spend a lot of time here though
5. (Factors 5 – 8) Whether the penalty is so excessive in relation to non-punishment purposes that it can only really be described as retributive punishment [*most important factors*]
    a. Does the sanction promote the traditional aims of criminal punishment – retribution and deterrence?
        i. There is no indication that the provision for civil fines here is intended to promote retribution, although it is intended to have a deterrent effect
            1. But, the mere presence of a deterrence purpose is insufficient to render a sanction criminal, as deterrence may serve civil as well as criminal goals
    b. Does the sanction apply to behavior which is already a crime?
        i. Notion that the behavior is criminalized and there is also a civil penalty (?)
            1. "The placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tends to dilute the force of this factor"
    c. Does the sanction have an alternative non-criminal purpose?
        i. Ex: remedial purposes
        ii. Here, the non-punitive purposes are: (i) reimbursing the government for enforcement expenditures under the Immigration and Naturalization Act, (ii) ensuring that persons committing fraud do not profit from their acts, and (iii) immigration regulation
    d. Is the sanction excessive in relation to the alternative purposes?
        i. Ex: $96,000 fine is not excessive for defendant's 300 fraudulent violations

ii. Dissent: Defendant is being fine for immigration document fraud – a form of criminal punishment for Article III purposes
    1. This sanction is not properly understood as a fine that arises out of a comprehensively regulated area
        a. This is just a fine for doing something bad (document fraud) that happens to be connected to a comprehensively regulated area (immigration)
    2. To judge excessiveness in relation to non-punitive purpose, you do not look at the actual fine, but rather to the statute that authorizes the fine to see what it authorizes on its face
        a. Here, the statutes authorizes a fine of $250 to $2,000 for each document
        b. **In order for the majority to be right here, the fine must bear some relation to the investigation costs for it to be remedial** (and the dissent argues it does not)
            i. The only remedial purpose this fine could serve is to reimburse the government, and $250 to $2,000/document is

totally unrelated to how much the government spent on investigation
1. Ex: government might have spent $100,000 on investigating, but only finds one document, so they can only get up to $2,000, per the statute

iii. ***Schor* Analysis** (i.e., plugging the civil/criminal fine determination into the *Schor* factors)
1. Majority → Arrangement is not unconstitutional
a. Personal Interest:
i. This interest has <u>not</u> been waived as it was in *Schor*
1. "SCOTUS (in *Schor*) has pointed to a party's consent to an initial ADJ before a non-Article III tribunal as a significant factor in determining that Article III permits ADJ"
ii. Nevertheless, we conclude that, because of the due process protections afforded by the scheme at issue here and the historic treatment of immigration issues as matters subject to initial resolution in an administrative forum, Congress' delegation of ADJ power over § 1324(c) disputes does not violate Article III
b. Structural Interest:
i. (1) Relative Allocation of Judicial Powers
1. Article III courts retain their essential attributes
a. Substantive evidence standard of review on questions of fact (which is more deferential than the clearly erroneous standard, e.g.)
b. De novo standard of review on questions of law
c. District court must enforce the fine
2. Limited jurisdiction assigned to agency
a. Agency may only impose a civil fine
b. ALJ is given jurisdiction over a particularized area of law
3. **This is where the criminal/civil fine determination gets incorporated**
ii. (2) Origins of the Right
1. Classic public right to regulate immigration is being ADJ
a. Immigration public right has always been dealt with by government agencies/Article I courts
iii. (3) Reasons Congress Gave Power
1. Efficiency
2. Cost concerns (reduced expense)
. . . both are typical and legitimate reasons
2. Dissent → Finding that the fine is criminal will likely end the case – *Schor* analysis would not be necessary
a. Personal Interest:
i. The majority does not explain how an ALJ who is part of the executive branch is not dominated by that very branch
ii. There is no escaping the fact that the ALJ who is deciding the case necessarily has a conflict of interest because any fine levied by the ALJ will go to the branch of government controlling the ALJ

. . . The scheme here is exactly the type of domination feared by the *Schor* Court

1. **Dissent has serious concerns about defendant's right to an independent judiciary**

b. Structural Interest:

i. (1) Relative Allocation of Judicial Power

1. Disagrees with the majority about what the statute actually requires – in that, the dissent does not think the district court has to enforce the fine
2. Although legal matters can be reviewed de novo, the fact that factual findings can be review under the substantive evidence standard (i.e., not totally de novo), cuts in favor of unconstitutionality
3. This is a criminal fine, and those can only be imposed by Article III courts

ii. (2) Origin of the Right

1. Immigration cases are those about who gets to come into the country and who does not
    a. This is a document fraud case – not an immigration case
    b. *Cf.* If you murder an immigration official, your murder trial is not going to be decided by an Article I court because the violation is related to immigration

iii. (3) Reasons Congress Gave Power

1. This is a run of the mill criminal case and you cannot justify moving a criminal case from an Article III court to an Article I court based on efficiency and cost concerns

iv. **KEY**: If you encounter an excessive fine on the exam, draw on whatever side's arguments you find persuasive

e. Statute Hypo: 8 U.S.C. § 1229(a): The Immigration Judge shall have authority – under regulations prescribed by the Attorney General – to sanction by civil money penalty any action (or inaction) in contempt of the Judge's proper exercise of authority

i. Judge's Power Possibilities:

1. Immigration Judge can put a lawyer in jail until she turns over a document
    a. Seems to be the most classically criminal – not a civil money penalty
        i. Least likely option to survive a challenge
2. Immigration Judge can fine the lawyer $1,000/day until a document is turned over
    a. Might be hard to link the $1,000 to some amount that the court lost
    b. Purpose:
        i. Not to reimburse the government for money spent or lost
        ii. Maybe it is retributive
        iii. Maybe it is so-called coercive or persuasive – the idea is to get the person to turn over the document, which helps the court exercise its power
            1. **Key**: We want to link the fine to some amount or reason to think that this is the amount of money that would get someone to turn over the document
3. Immigration Judge can fine the lawyer $100/day for lateness
    a. Might argue that this fine is linked in the sense that the court had to keep people an hour overtime, e.g., and that cost the court

4. Immigration Judge can fine the lawyer $1,000 for disturbing the courtroom because she threw a chair
    a. Similar argument – need some rational connection between the fine and the conduct/result
    b. Note: Wex does not think you need to have a 1:1 ratio, as long as there is that rational connection (i.e., if chair cost $750 and the fine is $1,000 – that's OK)

III. Adjudication Under the APA

a. Formal ADJ Trigger = § 554(a): "This section applies in every case of ADJ required by statute to be determined on the record after opportunity for an agency hearing"
    i. Note: This language looks similar to the Formal RM Trigger – § 553(c): "When rules are required by statute to be made on the record after opportunity for an agency hearing, §§ 556 and 557 apply" – *but* courts have applied them somewhat differently
        1. Ex: Statute prohibits discharge of pollutants into the water, except if it can be shown that the standards imposed are more stringent than necessary to protect fish and wildlife; Statute says that the exception will be allowed after opportunity for a public hearing; ALJ has an informal hearing and grants the permit to discharge; environmentalists contend that § 554(a) should apply, requiring a more formal hearing; Q: does "after opportunity for public hearing" trigger all the formal ADJ requirements?
            a. If this was RM, answer would definitely be no
                i. To get from informal RM to formal RM, you <u>have</u> to have the magic words – on the record **+** hearing
                    1. So trigger language to get from informal to formal RM is stricter than that to get from informal to formal ADJ . . .
            b. Circuits take 3 approaches re: § 554(a)'s formal ADJ trigger:
                i. Same as RM context: the magic words are required – on the record + hearing
                ii. A presumption that a "hearing" actually does trigger the formal ADJ requirements – a presumption of formality
                    1. In our hypo, under this approach, formal ADJ would likely be required
                iii. Defer to the agency's choice under *Chevron*

            . . . The answer is <u>not</u> as clear as the RM context for what triggers formal ADJ from informal ADJ

b. Ex: *Portland Audubon Society v. Endangered Species Committee* (9th Cir. 1993): court is deciding whether Committee proceedings are subject to the ex parte communications ban of § 557(d)(1); court notes that the ex parte prohibition applies whenever the three requirements set forth in § 554(a) are satisfied: the administrative proceeding must be (1) an ADJ, (2) determined on the record, and (3) after the opportunity for an agency hearing; <u>court</u>: these three requirements are easily met – the statute clearly requires the agency to make its final determination "on the record" and it must be "based on … the hearing held"
    i. Are communications from the President and his staff covered by § 557(d)(1)?
        1. Although the APA's ban on ex parte communications is absolute and includes no special exemption for White House officials, the government advances three arguments in support of its position that § 557(d)(1) does <u>not</u> apply to the President and his staff:
            a. The President and his staff are not "interested person[s]"
                i. Notion that because the President is at the center of the Executive Branch and does not represent or act on behalf of a particular agency, he does not have an interest greater than the interest of the public as a whole

b. The President and his staff are not "outside the agency"
    i. Notion that Committee members are Executive Branch officials so communications between them and the White House staff cannot be considered to come from "outside the agency"
    ii. This is a hard-line unitary executive view
        1. But because independent agencies exist, that suggests SCOTUS does not buy into the unitary executive theory
    iii. Think about the alternative: Do we want the President and his staff to be able to influence the ADJ in certain individual cases?
c. If the APA's ex parte communications ban encompasses the President and his staff, the provision violates the doctrine of SOP
    i. Notion that under Article II, the President controls the Executive Branch, so to tell him he cannot talk to these agencies is an infringement on his power
    ii. Wex thinks there is something to this argument
        1. If you are going to argue that the ban as applied to the President is unconstitutional, then you would do so by saying that it is an infringement on the President's power

2. Court finds all three of the government's arguments without merit:
    a. The legislative history of § 557(d) makes clear that the term "interested person" was intended to have a broad scope and was meant to include public officials
        i. According to the court, no ex parte communication is more likely to influence an agency than one from the President or a member of his staff
    b. The Act explicitly vests discretion to make exemption decisions in the Committee and does not contemplate that the President or the White House will become involved in Committee deliberations – therefore, they are "outside the agency" for purposes of the ex parte communications ban
        i. Also, because Congress has decided that Committee determinations are formal ADJ, *Costle* supports, rather than contradicts, the conclusion that the President and his staff are subject to the APA's ex parte contacts ban
            1. Remember: *Costle* recognized that political pressure from the President may not be inappropriate in informal RM proceedings
    c. Congress in no way invaded any legitimate constitutional power of the President in providing that he may not attempt to influence the outcome of administrative ADJ through ex parte contacts
        i. Congress' important objectives reflected in the enactment of the APA would, in any event, outweigh any de minimis impact on presidential power

ii. <u>Remedy</u> – what if someone does have an ex parte contact in an ADJ?
    1. Remand to the Committee to hold, with the aid of a specially appointed ALJ, an evidentiary hearing to determine the nature, content, extent, source, and effect of any ex parte communications that may have transpired between any member of the Committee or its staff and the President or any member of his staff regarding the determination of the exemption application at issue

a. *Portland Audubon* remedy

2. § 557(d)(1)(C) – requires the agency to disclose the communication in the public record of the proceeding, which enables opposing parties to offer rebuttal evidence or arguments
3. § 557(d)(1)(D) – if the improper contact comes from a party, the agency has discretion to take adverse action against the party, such as dismissing its claim
4. Likewise, a reviewing court has equitable discretion to vacate an agency action infected by an improper ex parte communications
5. ***PATCO*** (D.C. Cir.) **factors relevant to determining the appropriate remedy**:
    a. Gravity of the ex parte communications
    b. Whether the contacts may have influenced the agency's ultimate decision
    c. Whether the party making the improper contacts benefitted from the agency's ultimate decision
    d. Whether the contents of the communications were unknown to opposing parties
    e. Whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose

c. <u>Informal ADJ</u>

i. Informal ADJ is the "dark matter" of administration, a large collection of administrative transactions virtually invisible to all but the immediate participants (i.e., the agency making a decision about rights as between you and the agency)

1. Recall that APA § 551 defines "adjudication" as "agency process for the formulation of an order" and "order" as a "final disposition . . . of an agency in a matter other than RM but including licensing"
    a. In that sense, presumably, agencies "adjudicate" not only when they impose sanctions for violating a rule, but also when they deny an application for a license or permit, order changes in a license or permit, refuse to award a grant or loan, deny a request for an advisory ruling or opinion, withhold a requested service or privilege, decline to initiate an investigation or prosecution, charge a fee for a service, or perhaps make adverse statements about someone in the press
        i. All of these decisions have a quality of "finality," adversely affect someone, and rest on a particularized inquiry
        ii. Yet only relatively rarely do enabling statutes require the agency, when taking such actions, to provide the sort of "hearing" that triggers the APA's formal ADJ model

ii. Procedures that apply to informal ADJ come largely from the organic or general statute that guides the agency's decisions and actions – not the APA

1. APA says almost nothing about informal ADJ – that is, ADJ that does not meet the trigger for formal ADJ – except for § 555: "Ancillary Matters"
    a. §555(b): A person compelled to appear in person before an agency is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative
    b. § 555(d): Agency subpoenas can be decided by the court, if contested
    c. § 555(e): Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial
        i. So, if a federal agency denies your petition (e.g.), it is supposed to tell you and briefly explain why

d. Miscellaneous Points:
    i. Hypo: EPA is using formal ADJ under the APA to consider revoking someone's pesticide permit based on the health hazard of the pesticide; ALJ holds a hearing with testimony on the subject but decides she wants additional information/help understanding the scientific issues – can the ALJ speak to an EPA scientist (i.e., in the agency) to get help?
        1. This is not a violation of § 557(d) because the EPA scientist is not "outside the agency"
        2. This is a violation of § 554(d) though because the ALJ cannot "consult a person or party on a *fact* in issue, unless on notice and opportunity for all parties to participate"
            a. This essentially extends the ban on ex parte contacts in formal ADJ to people within the agency, if the question is about a *fact* in issue
            b. Presumably then, ALJ could not consult the EPA scientist unless it was on the record, etc.
        3. Note: If she wanted to speak with someone at the EPA about a *legal* issue, then that presumably would be OK
    ii. APA §§ 554 – 557 provide for the procedures such as evidence, cross-examination, and official notice in formal ADJ
        1. Ex: § 556(d) provides that:
            a. The proponent of a rule or order has the burden of proof, except as otherwise provided by statute
            b. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence
            c. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence
                i. Note: This evidence could include hearsay, e.g.
                    1. But, if the agency's decision solely relied on hearsay, you might try to argue that the agency's decision is invalid because it was not supported by reliable, probative, and substantial evidence – as required by this same section: § 556(d)
                    2. That said, courts have held that hearsay can be by itself substantial evidence in an agency decision if there is some reason to think that the hearsay is reliable
            d. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts
    iii. ALJ Independence (from the agency they work for) Provisions
        1. 5 U.S.C. § 3105: ALJs are assigned to cases in rotation as far as possible
            a. This is so agencies cannot assign an ALJ to a specific case because they know how the ALJ will decide
        2. 5 U.S.C. § 7521: Negative employment actions (ex: removal, suspension, or reduction in grade) against ALJs may only be brought for good cause by MSPB after a formal hearing
            a. This is not done by the agency that the ALJ works for, but rather by another agency – Merit System Protection Board
        3. 5 U.S.C. § 5372: ALJs are entitled to pay prescribed by the Office of Personnel Management, independent of agency recommendations or ratings

a. This is so the agency that the ALJ works for does not control their pay
4. APA § 557(d): prohibits ex parte contacts
5. APA § 554(d)(2): ALJ may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency

iv. If ALJs are made independent of the agency, doesn't that undercut one rationale for giving power to the agency in the first place – expertise – because the ALJ cannot be guided by the experts?
1. Ultimately, not really
a. § 557(b): When the ALJ makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appear to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, *the agency has all the powers which it would have in making the initial decision* except as it may limit the issues on notice or by rule
i. Basically, the agency – experts – can pretty much review de novo any decision that the ALJ has made
1. So the ALJ is independent, but ultimately the ALJ's power is limited, so it is unclear whether their independence matters all that much
a. That said, independence does matter in a sense because not every case will raise a conflict between the expertise of the agency and the ALJ and not every case will be appealed to the agency

<u>Judicial Review of Agency Action – Standards</u>

Judicial Review of Agency Legal Interpretations

I. <u>What can you argue when you are challenging an agency's action</u>?
a. Agency is improperly constituted
i. This agency, which has made a negative decision for you, is unconstitutional for some reason
1. Ex: heads of the agency should have been appointed PAS, but were appointed by the Secretary of an agency instead
2. Ex: qualification restrictions were too strict
3. Ex: removal powers make the agency unconstitutional
b. Agency has not follow the required procedures
i. No matter what the outcome of the agency's decision, not only does the agency's bottom line have to be OK, but it has to have followed the proper procedures to get there
1. Ex: § 553 Notice and Comment/Informal RM Procedures
2. Ex: §§ 556 – 557 Formal ADJ Procedures
c. Agency has acted unconstitutionally or otherwise unlawfully (i.e., in violation of some statute, not necessarily its own statute)
i. Ex: regulation violates someone's First Amendment rights
ii. Ex: regulation violates some other enacted statute
d. Agency has exceeded the scope of its powers – done something it is not authorized to do
e. Agency's legal interpretations are contrary to a/their statute (*Chevron* & *Mead*)
i. In the course of administering its statute, the agency *interprets* the statute and does so in a way that is contrary to the statute – either in an unreasonable way or in violation of the clear terms of the statute

f. Agency's factual or policy conclusions are unsupported by substantial evidence or are arbitrary and capricious
    i. Substantial evidence standard applies to agency decisions that come out of formal agency decisions
        1. This standard applies if the agency has acted formally – RM or ADJ
    ii. Otherwise, the arbitrary and capricious standard applies

II. Note: Sometimes an agency will smoosh their factual and legal conclusions together
a. Hypo: NEPA Statute: An agency has to do an Environmental Impact Statement (EIS) if it does an action that significantly affects the environment; the FAA builds an airport on a field that has a bunch of animals on it and the project will result in water pollution; agency has to decide whether it will have to do an EIS; agency decides that the project will kill 1,000 bunnies, displace 2,000 bunnies, and will result in X# tons of dioxide flowing into the river – and they determine that is not a significant effect on the environment
    i. Has the agency made a legal interpretation?
        1. Sort of, if you pull it apart – they are saying what they think "significantly" means – but there is also a factual determination
        2. This is <u>not</u> what *Chevron* is for – a court would <u>not</u> apply *Chevron* here because there is no explicit definition of what the agency thinks "significantly" means
            a. If the agency issued an actual, explicit definition of "significantly" (= shocks the conscious, e.g.), then that would be a *Chevron* question

III. *Skidmore* Respect
a. Ex: *Skidmore v. Swift* (U.S. 1944): Agency interpretations/rulings do <u>not</u> constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do . . . ***But***, they are made in pursuance of official duty, based upon more specialized experience and broader investigations and information that is likely to come to a judge in a particular case
    i. We consider that the rulings, interpretations and opinions of the agency, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for ***guidance***
        1. <u>The weight of such a judgment in a particular case will depend upon</u>:
            a. The thoroughness evident in its consideration
            b. The validity of its reasoning
            c. Its consistency with earlier and later pronouncements
            d. All those factors which give it power to persuade, if lacking power to control
b. An agency gets *Skidmore* respect after a court determines that the agency has validly considered the issue and did a good job interpreting
    i. A court <u>does not</u> defer to the agency's interpretation – just letting it stand
    ii. A court <u>does</u> use the agency's interpretation to inform their own interpretation
        1. A court ultimately makes its own decision, but may do so by adopting the agency's interpretation, e.g.
c. Scalia hates *Skidmore*
d. All of this changes with *Chevron* though . . .

IV. *Chevron* Doctrine
a. Ex: *Chevron v. Natural Resources Defense Council* (U.S. 1984): statute: if there is an increase in omissions from a stationary source, then the company must get a permit; relevant statutory term = "stationary source"; Q: must the EPA interpret "statutory source" to apply to each source of pollution (each smoke stack), or can the agency pretend like there is a giant bubble over the whole plant and only require the permit if the total omission is increased past the relevant level (bubble concept); EPA had a history of going back and forth, but in 1981 they decided they are going to use the bubble concept everywhere and promulgated a regulation to that effect;

environmentalists do not like the bubble concept and challenge the agency's legal interpretation of "stationary source"

i. When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions:
    1. First, always, is the question whether Congress has directly spoken to the precise question at issue
        a. If the intent of Congress is clear, that is the end of the matter – for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress
        b. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation
    2. Second, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute
ii. *Chevron* Two-Step:
    1. Does the statute clearly preclude the agency's interpretation?
        a. Yes: Agency loses
        b. No: Proceed to Step 2
    2. Is the agency's interpretation reasonable?
        a. Yes: Agency gets deference
        b. No: Agency does not get deference
iii. Note: There is very little in the case itself about *why* agencies should have the interpretation power before courts
    1. "Judges are not experts in the field, and are not part of either political branch of the government"
        a. SCOTUS suggests that agencies should have the interpretive power because: (i) they are experts and (ii) they are accountable through the President/Executive Branch
            i. This looks like the Court making an independent judgment (rather than the Court saying that this is what we think Congress wanted)
iv. Note: An agency only gets deference in interpreting statutes that ***it*** has been given to administer (*Adams Fruit* Doctrine, pg. 145)
    1. *Chevron* Threshold Q (1): Does the agency administer the statute?
        a. It is usually clear from the statute who gets to administer it, but need to look out for the issue
            i. Sometimes two agencies are given the power to administer/enforce the statute …
    2. All agencies must follow the APA and no one agency administers the APA
        a. Therefore, agencies <u>do not</u> get deference for interpreting a provision of the APA
v. Note: It is clear law that agencies get deference for their reasonable interpretation of their own regulations [*Seminole Rock* (U.S. 1945)]
    1. Professor Manning's Critique: *Seminole Rock* is wrong because it does not comply with SOP because the agency makes and interprets the regulation; *Chevron* is correct because it maintains a SOP where the legislature makes the law and the agency interprets it
        a. This has <u>not</u> changed the law in any way though
vi. Note: Under *Chevron*, an agency can change its interpretation to a new interpretation in the future so long as it is reasonable
    1. Can change because there is new science, e.g.

2. Can change for policy reasons – new President wants de-regulation, e.g. [mentioned in discussion of *Mead* & *Brand X*]

b. Debate About How Many Steps *Chevron* Actually Has
   i. Some argue *Chevron* only has one step – has the agency made a reasonable interpretation of the statute?
      1. If the statute precludes the interpretation, then obviously the interpretation will not be deemed reasonable
      2. Usually there is not much analysis on step two because if you decide the statute is ambiguous, then there are at least two things the agency could have done and one of those things is what the agency actually has done
         a. Ex: Does the term "stationary source" clearly preclude the agency's bubble concept, or is it ambiguous as to whether the agency can use the bubble concept or not?
   ii. Best for us to keep the steps distinct though

c. Is *Chevron* a Good Rule?
   i. The choice to delegate policymaking power is accompanied by a decision about who can interpret what a statute means (i.e., legal interpretation power)
      1. If Congress is explicit about this, then it is an easy question
      2. In the typical case though, Congress is silent about who gets the legal interpretation power
         a. <u>Rule</u>: In this situation, courts should defer to agency interpretations of law
   ii. Expertise – perhaps we do prefer agencies to interpret because of their expertise
      1. Ex: "stationary source" is a term of art, so we'd likely rather have the EPA think about the proper definition than judges, who presumably know nothing about the area
   iii. Flexibility – the agency is still within congressional control, whereas courts are not, so if you disagree with the interpretation, it might be easier to change if the agency has the first go
      1. Notion that courts are not going to be able to change their interpretation of a statute as conditions change (political, social, economic), the same way an agency will be able to
   iv. Critique:
      1. Might argue that agencies are susceptible to interest group pressures
         a. Agencies are captured – in the sense that they serve the regulated big money interests usually – and we have doctrines that arguably promote agency capture
            i. Ex: ex parte contacts in informal RM are OK – this allows business clubs to come in and meet with the EPA (*Sierra Club*) and broadcasters to meet secretly with the FCC (*HBO*)
         b. Judicial review is necessary to safeguard against administrative capture
   v. Fit with Administrative Law State/Doctrines: Does *Chevron* fit well with . . .
      1. A rule that allows ex parte contacts in informal RM?
         a. Might argue this is not a good fit because *Chevron* furthers the potential for agencies to be captured and influenced by special interests
            i. And this calls into question the expertise rationale that might otherwise justify deferring to agencies, because now they are not actually experts – they are captured
         b. Might also argue that we'd rather change this rule, rather than changing *Chevron*
            i. Ex: no ex parte contacts in informal RM allowed anymore

2. The *Schor* rule that allows Article I judges to exercise significant judicial power?
    a. One rationale for the *Schor* rule was that Article III courts still had significant review over non-Article III court decisions
        i. What happens to this rationale if Article III courts are deferring to Article I courts under *Chevron*?
3. Reading the interpretative rule exception to notice and comment broadly?
    a. If we interpret this exception broadly, then agencies may get out of both the notice and comment check *and* the after-check from the courts
        i. Maybe this suggests that *Chevron* is wrong, or that *Chevron* should be limited to where the agency has already gone through notice and comment
        ii. Maybe if the agency does not go through notice and comment it should be checked harder by reviewing courts
4. The nondelegation doctrine?
    a. Professor Farina argues that *Chevron* is incompatible with the nondelegation doctrine
        i. Notion that the whole idea of the nondelegation doctrine is to set up some intelligible principle agencies must follow and then courts can review the agency's decision against the intelligible principle, but if agencies can interpret their own statutes, that undermines the checking function that justifies the nondelegation doctrine in the first place

d. Reasons why Courts would Defer to Agency Interpretations:
    i. SCOTUS thinks agencies are experts
    ii. SCOTUS thinks agencies are accountable through the President/Executive Branch
    iii. SCOTUS thinks Congress intended courts to defer to agencies
        1. This is not the Court deciding on its own whether agencies are good or bad, but rather what Congress intended
            a. And SCOTUS might think this because it believes that Congress thinks agencies are experts and/or accountable
        2. Ex: *Smiley v. Citibank* (U.S. 1996): "We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"
            a. This justification feels different than *Chevron* – in that *Chevron* did not seem to rest on an understanding about congressional intent about what is best

e. Scope of *Chevron*: What Kinds of Agencies get *Chevron* Deference?
    i. If the rationale is that agencies get deference because they are experts, then maybe only those agency actions that actually involve application of expertise should get *Chevron* deference
        1. Might say only after there has been notice and comment – that might signal that the agency used its expertise
        2. Might ask who made the decision – agency head or just the ALJ?
    ii. If the rationale is that agencies get deference because they are accountable through the President, then maybe only executive agencies should get *Chevron* deference because even though independent agencies are accountable to the President in some ways, they are not accountable in the sense that their Heads can be removed by the President
    iii. If congressional intent is the rationale, you may come to a different conclusion (may not though)

1. If the key is congressional intent, then we'd ask which subset of decisions would Congress have wanted to give agencies deference on?
    a. If you assume Congress views itself in a competition with the President for power, you might think that Congress would only want courts to defer to independent agencies (and not executive agencies)
        i. Notion that why would Congress (who is often at odds with the President) want to give the President extra power over deciding how statutes are interpreted (via the executive agencies)

f. Legal Justifiability of *Chevron*
    i. APA § 706: the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action
        1. Is *Chevron* inconsistent with § 706 by directing courts to defer to agency interpretation?
    ii. If expertise or accountability is the rationale, you might say that deference violates § 706 because courts do not have authority to ignore § 706's requirement that courts interpret statutes
        1. Counter (Scalia's dissent in *Mead*): (i) before the APA, the assumption – in the origins of federal court judicial review – was that courts defer to agencies, (ii) which means that when the APA says: "courts shall decide all relevant questions of law" – that just means: did the agency go beyond its discretion such that it should not get deference?
            a. Essentially, this "relevant questions of law" language assumes the whole regime of deferring to agencies, which existed before the APA and *Chevron* is just reviving this notion
            b. And if this is the case, *Chevron* is not inconsistent with § 706
    iii. If congressional intent is the rationale, you might say that this rationale is more consistent with § 706 because we should assume that all new statutes (that either post-date the APA or are amended after the APA) include a silent proviso saying the agencies get deference, thus essentially implicitly amending § 706
        1. So we might say that Congress has superseded § 706 every time it passes a statute that gives an agency power
        2. Ex: new statute says: § 1 – EPA shall regulate copper discharge; silent § 1(a) – EPA gets deference for interpreting § 1

g. *Chevron* Full Inquiry
    i. *Chevron* Thresholds
        1. Does the agency administer the statute?
            a. No: The case is outside of *Chevron*, and the court interprets the statute itself (without any *Skidmore* respect)
                i. Ex: APA – no agency administers this
            b. Yes: Go to Threshold Q (2)
        2. Does the procedure giving rise to the agency's interpretation qualify for the *Chevron* Two-Step under *Mead*?
            a. No: Apply *Skidmore* respect
            b. Yes: Go to *Chevron* Two-Step
    ii. *Chevron* Two-Step
        1. Does the statute clearly preclude the agency's interpretation?
            a. Yes: Agency loses
            b. No: Go to *Chevron* Step 2
        2. Is the agency's interpretation reasonable?
            a. Yes: Agency gets deference
            b. No: Agency does not get deference

h. Step One Issues
    i. What Does the Court Look at when Deciding if the Statute is Ambiguous or Clearly Precludes the Agency's Interpretation? (What is it OK for them to Consider?)
        1. Most of the time SCOTUS will do all of the things it generally does when it does statutory interpretation when deciding *Chevron* Step One (which is to look at every possible source of meaning, rather than strictly relying on the plain language of the statute)
            a. Ex: *INS v. Cardoza-Fonseca* (U.S. 1987): SCOTUS looked to the Act's plain language *and* legislative history – court said it was a pure question of statutory construction
                i. Scalia concurred separately because he wants to ***only*** look at the text of the statute when determining whether something passes *Chevron* step one (i.e., not rely on tools of statutory construction)
            b. Ex: *Babbitt v. Sweet Home* (U.S. 1995): what does "take" mean in the Endangered Species Act?; "take" is defined in the statute by a list of other words/examples; "harm" is in that list, and is defined in a regulation issued by the Secretary of the Interior – which is being challenged as inconsistent with the Act
                i. Majority thinks the "definition" of harm is perfectly appropriate
                    1. Considers: the text of the Act, dictionary definitions the broad purpose of the Act, other sections of the Act
                ii. Dissent (Scalia) thinks the text is very clear – relies on dictionary definitions
                    1. "Take" = direct and intentional action upon an animal
                    2. Therefore, this indirect action does not satisfy the definition
            c. Ex: *MCI v. American Telephone* (U.S. 1994): can "modify" refer to a giant change or just a little change?; Scalia just wants to look up "modify" in the dictionary, and he concludes that "modify" means a small change
                i. This is an example of Scalia-esq *Chevron* analysis in that SCOTUS did not do as comprehensive of an inquiry as there has been
                    1. In the majority opinion, Scalia relied purely on the text of the statute and dictionary definitions
            d. Ex: *Young v. Community Nutrition Institute* (U.S. 1986): Court found ambiguity in a section of the Food, Drug, and Cosmetic Act dealing with the power of the FDA to set tolerance levels for poisonous or deleterious substances in food; the Act provided that, when the FDA finds that there are harmful substances in a food, it "shall promulgate regulations limiting the quantity therein or thereon to such extent as it finds necessary for the protection of public health"; notwithstanding the word "shall," the FDA refused to promulgate a tolerance level for a particular carcinogen, claiming that the "to the extent" clause modified the word "shall"; SCOTUS found sufficient ambiguity in the statute to defer to the FDA's interpretations
        2. However, the Court has <u>not</u> explicitly announced what you should look at to decide if an interpretation passes Step One or not, so it is a somewhat open question . . .

ii. What Does the Notion of "Clearly" in *Chevron* Step One Mean?
    1. Two Possibilities (in which you could use "clearly"):
        a. "Obviously"
            i. Under this possibility, maybe you are supposed to look at the text and figure out how long it takes you to conclude that the agency loses
                1. Very quick? Agency loses
                2. Not very quick? Agency wins (because it was not "obvious")
        b. "With a very high degree of confidence"
            i. Under this possibility, maybe you are supposed to look at everything you can possibly look at and think very hard about the issue – at the end of the day you ask: how confident am I that Congress did not want the agency to do what it did?
            ii. Ex: *FDA v. Brown & Williamson Tobacco* (U.S. 2000): in determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation; the meaning – or ambiguity – of certain words or phrases may only become evident when placed in context – in context with (i) the overall statutory scheme, (ii) other acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand, and (iii) common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency
                1. To determine that the Act precluded an interpretation that authorized the FDA to regulate tobacco products, the Court considered: the language and purpose of the statute, Congress' 35 year history surrounding making tobacco laws, among many other things
                2. "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps . . .
                    a. In <u>extraordinary cases</u>, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation"
                        i. Notion that tobacco is such a huge thing that if Congress wanted the FDA to be able to regulate it, it would have said so
                        ii. Q: Does this create an "extraordinary circumstances" exception to *Chevron*, such that if there is a really big issue out there we have to see if Congress expressly said they wanted the agency to regulate??

3. Wex gets the sense that the Court was quite confident it came up with the right decision in the end, but it was not "obvious"

c. Bottom Line: It would seem that the second possibility is the answer – that it does not have to be "obvious" right away

i. SCOTUS has not explicitly recognized this problem, but to the extent that they have implicitly answered it, the second possibility would be the better approach

i. Step Two Issues

i. If an agency gets to Step Two, it very rarely loses

1. When an agency loses on Step Two, either the agency's interpretation completely fails to advance the goal of the statute or it is so bizarre that it is obviously unreasonable
2. Lawson: Step Two losses have recently gone up from almost never to seldom
3. Most of the work is done in Step One

ii. Why is *Chevron* Step Two Not Usually an Issue?

1. Because it is usually clear from the analysis in Step One that the agency's interpretation is inherently reasonable

a. Ex: EPA says "stationary source" permits the bubble concept; environmentalists say "stationary source" means individual smoke stacks

i. Step One's original formulation is: "Is the statute ambiguous?"

1. The Court is <u>not</u> deciding whether the statute is ambiguous *in the abstract*
2. The Court is deciding whether the statutory phrase at issue is ambiguous *in context* – with respect to the parties' arguments

a. Once the Court has decided that the phrase is ambiguous between the two parties, they have essentially already decided that both are reasonable – the correct interpretation could be either one

b. Ex: "FDA shall make specific rules to promote fruit safety"; the FDA then makes a rule about hot dog safety under this statute; someone challenges

i. You could imagine the court asking: Is "fruit" ambiguous, in the abstract?

1. Yes, it is ambiguous in the abstract, so let's go to Step Two: Is a hot dog a fruit?

ii. If courts use Step One and consider the term in the abstract as to whether the statute is ambiguous, then there would likely be room in Step Two for more analysis

1. But this is not what courts do – they are usually asking about ambiguity *as between two alternatives*

2. Maybe in cases where the agency loses on Step Two, courts are deciding that the agency's interpretation is just so unreasonable that they do not even really consider Step One – they just decide the case as a Step Two case

iii. Is *Chevron* Step Two the Same or Different from Arbitrary and Capricious Review?

1. Arbitrary and capricious review looks at whether the agency has acted in a rationale way – the court is looking at its reasoning process in reaching its conclusion
2. Some people view them as the same

a. They consider "reasonable" from *Chevron* Step Two as the bottom line and the reasoning process

3. Wex thinks of them differently
    a. *Chevron*'s "reasonable" inquiry is concerned with whether the bottom line that the agency comes up with makes some reasonable sense in light of the statute
        i. What the agency did
    b. Arbitrary and capricious review is concerned with how the agency arrived at its decision (rather than looking at the conclusion itself)
        i. How did the agency decide what to do
4. Note: Have to think about and address both problems, regardless of what you call them and how you characterize them

V. *Mead* and the Revival of *Skidmore* Doctrine
- a. Ex: *United States v. Mead* (U.S. 2001): Mead's day planners are at issue – whether they count as bound diaries or not; this is informal ADJ – a specific controversy/party and no requirement that this ruling letter be made on the record after a hearing; <u>SCOTUS</u>: a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the "force of law", but under *Skidmore* the ruling is eligible to claim respect according to its persuasiveness; we now know that *Chevron* only comes into play in a subset of agency interpretations – when Congress intended the agency to act with the force of law
    i. <u>Majority's Reasoning</u>:
        1. ***Chevron* Two Step applies <u>only</u> when Congress gives the agency the power to act with the "force of law" (which in and of itself is unclear – not defined in the case – but we know to look at the procedures that Congress makes the agency use)**
            a. "Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"
        2. **Formal procedures indicate the existence of the "force of law"**
            a. "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in formal ADJ or informal RM, or by some other indication of a comparable congressional intent"
            b. (and the agency actually does engage in formal ADJ or informal RM)
        3. **Even without formality, sometimes there might still be the "force of law"**
            a. "We have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"
                i. Maybe this is when the agency has the power to make binding decisions, at a high level, in a reasoned fashion . . .
        4. **But these Customs ruling letters at issue do not have the "force of law"**
            a. <u>Factors re: NO "force of law"</u>:
                i. On the face of the statute the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law
                ii. The ruling letters are not binding on third parties
                iii. There are too many ruling letters to claim they have legal force
                    1. 46 different Customs officers issue 15,000 each year
                iv. There are too many offices issuing these, which are decentralized

1. Not even the letter from Headquarters indicates a more potent delegation

v. There is not a lot of reasoning put into the ruling letters

b. → Classification rulings are best treated like interpretations contained in policy statements, agency manuals, and enforcement guidelines

i. They are beyond the *Chevron* pale

5. Courts should still apply *Skidmore* respect (where the interpretation does not qualify for the *Chevron* Two Step)

a. "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires"

i. "There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case"

b. Consider *Skidmore* factors

ii. Multi-Part Link: Procedures → Force of Law → *Chevron* Deference

1. Both of these links, however, are at least questionable and certainly not well defended by Souter

a. It is possible that in the end he did come up with the right rule, but he has not explained himself very well

i. i.e., no reason is given as to why force of law leads to getting deference – and force of law is not even defined in the opinion

ii. i.e., no reason is given as to why force of law is linked to formality (and no precedent to consult either)

1. D.C. Cir. line of cases (*AMC*, e.g.) discussed "force of law" in the context of the interpretative rule exception, but it does not appear that Souter is talking about the same thing

a. "Force of law" in the D.C. Cir. line of cases meant something like: presently binding and does not need any extra regulation for its enforcement (i.e., legislative gap notion)

b. Reverse of *Mead*'s link: If force of law, then formal procedures are required (in informal RM context where the only applicable exception is the interpretative rule/policy statement one)

b. Maybe an agency should get more deference if it has subjected its regulation to notice and comment procedures because this gives the agency legitimacy . . .

i. This is a plausible story to link procedures to deference . . . but it is not necessarily what Souter is saying

iii. Dissent (Scalia): Thinks the majority interjected a significant amount of non-clarity into administrative law → Scalia thought you pretty much always applied the *Chevron* Two Step, but now the majority says you only apply it if the force of law exists, which exists if there is some combination of factors – and then you add the possibility for *Skidmore* respect on top of that = confusion

1. "We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come. I would adhere to our established jurisprudence and defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing"
    a. He thinks *Mead* is inconsistent with the Court's precedent and with the origins of federal court review of agency action
    b. "To decide the present case, I would adhere to the original formulation of *Chevron* . . . Any resolution of the ambiguity by the administering agency that is authoritative – that represents the official position of the agency – must be accepted by the courts if it is reasonable"
        i. Dicta: This would include the government defending its interpretation in front of SCOTUS, that would make the interpretation the authoritative view of the agency
2. Scalia's Arguments:
    a. Theoretically, there is no (and should be no) necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively question of law (i.e., deference)
        i. Formal ADJ is simply to ensure production of a closed record for determination and review of the facts . . . which implies nothing about the power of the agency subjected to the procedure to resolve authoritatively questions of law
        ii. Informal ADJ is an extremely important part of the administrative system and SCOTUS has endorsed it (*Bell Aerospace* and *Chenery*), and *Mead* will undermine that whole mode of policymaking
        iii. Non-notice and comment RM is also important (i.e., the exceptions) and when an agency takes advantage of this, its rules will be deprived of *Chevron* deference/authoritative effect
        iv. Some informal procedures (i.e., not informal RM or formal ADJ) are required to be made personally by really top people in the agency (A.G., Cabinet Secretary, e.g.) without any prescribed procedures, and is it really plausible that decisions specifically committed to these high-level officers are meant to be accorded no deference, while decisions by an ALJ are left in place without further discretionary agency review are authoritative?
            1. Scalia thinks this is absurd
    b. As a practical matter, the principal effect of *Mead* will be protracted confusion
        i. Wex: This is clearly true – lower courts have no real idea what *Mead* is about
        ii. Additionally, lower courts will have to deal with confusing *Skidmore*
    c. Another practical effect will be an artificially induced increase in informal RM
        i. Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect . . . because *Mead* had deemed informal RM a safe harbor

ii. And this all despite SCOTUS' endorsement of informal ADJ and RM procedures pursuant to a notice and comment exception

d. Majority's approach will lead to the ossification of large portions of our statutory law
   i. Basically, this will lead to the Court making more interpretative decisions than agencies and this will limit agencies' discretion to change their view after the fact
   ii. Hypo: Statute: "It is illegal to sell fruit without a sticker containing nutritional info" – does tomato count as a fruit?
      1. Under the *Chevron* regime (pre-*Mead*): agency issues an informal ADJ interpreting tomato as a "fruit"; someone challenges this interpretation and the Court defers – "fruit" is ambiguous, so we defer to the agency's reasonable interpretation; 5 years later the agency changes its mind that tomato is not a "fruit," in another informal ADJ; someone challenges and on review the agency wins
         a. When the Court defers to the agency's interpretation, it is not the Court reaching a result about what the statute means, so if the agency later changes its mind, it is OK as long as they follow the correct procedures and their interpretation is reasonable
      2. Under *Skidmore* (which is what Scalia thinks will happen a lot after *Mead*): agency issues an informal ADJ interpreting tomato as a "fruit"; someone challenges this interpretation and the Court reviews – "fruit" is ambiguous – but the agency's interpretation does not qualify for the *Chevron* Two Step (assuming that the criteria from *Mead* are not met); Court next looks at the agency's interpretation using *Skidmore* respect and agrees with the agency that tomato is a "fruit" – but now the Court has made its own interpretation of the statute that tomato is a "fruit"; 5 years later if the agency changes its mind and someone challenges the new interpretation, the agency will lose because the Court has already said that tomato is a "fruit" (. . . assumes Scalia)
         a. Because Scalia thinks that once the Court does this, the agency will not be free to adopt an interpretation contrary to what the Court has said the statute means
   iii. Note: Scalia's concern has been largely undermined by *Brand X*
      1. *Brand X* (U.S. 2005): Scalia's assumption about ossification – that an agency will lose in the latter situation – is wrong; the agency will win in that situation *as long as* the Court's original decision said that "fruit" was ambiguous (i.e., if it was plausible that it could go either way)

a. If the original Court decision had said: "of course the agency is right" – then the agency, when it tries to change its mind later, would lose (i.e., because the Court did not admit that the statute/term was ambiguous in the first place)

2. Problem: Now when a Court is interpreting a statute and applying *Skidmore*, it should probably think about whether it is deciding the agency's decision is one of several probable interpretations or whether it is the only probable interpretation, because this will have an effect on whether the agency can change its mind later
    a. Scalia's *Brand X* dissent is concerned about what will happen to the cases that were decided before *Brand X* – that is, the cases where the Court was not conscious that it needed to be explicit whether the interpretation was one of several possibilities or the only possibility
    b. So, it is in the agency's interest for the Court to decide that the agency's interpretation is one of several possible interpretations and the agency wins on that ground
        i. It is not in the agency's best interest for the Court to hold that the way the agency interpreted the statute was the only, unambiguous way, because then the agency cannot change their mind years down the road

3. Note: Scalia says that the *Chevron* doctrine "was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches"

b. <u>Threshold Q #2: Does the agency interpretation qualify for *Chevron* Two Step under *Mead*?</u>
    i. **Formal RM**: yes – would get *Chevron* Two Step (if formal RM ever happened)
    ii. **Formal ADJ**: yes – formal ADJ has the requisite formality that shows that Congress intended the agency to act with the force of law
    iii. **Informal RM**: depends . . .
        1. If notice and comment is used, then yes
            a. Notice and comment RM is a safe harbor (like formal ADJ) – you know that whatever comes out will qualify for the *Chevron* Two Step
        2. If notice and comment is not used, then it is unclear
            a. Think about the notice and comment exceptions – military rules, property rules, e.g.
                i. Although notice and comment is not required, if the agency chose to do it anyways, then they would likely qualify for the *Chevron* Two Step under *Mead*
            b. *Mead* does suggest that interpretative rules do not get deference as a class, but this is not absolutely the case – unsure why the Court said this
            c. Would likely get *Skidmore* respect though

iv. **Informal ADJ**: ????
    1. Most agency action falls into this category
        a. Should the agency get deference for interpretations that come out of informal ADJ?
    2. **KEY**: Compare your case to *Mead* to determine whether the interpretation qualifies for the *Chevron* Two Step → well, the ruling letters in *Mead* did not qualify for the *Chevron* Two Step, does the interpretation at issue in my case look like these ruling letters or not?
        a. Ask about the factors that seemed to be important to the Court in Mead:
            i. How binding is it?
                1. In *Mead*, the ruling letters were binding on only the party to the transaction, and not to third parties . . . and even with respect to the affected party, it was revocable at any time
            ii. How formal is it?
                1. Wide variety of formality even within the informal ADJ box
                2. In *Mead*, the letters were issued very informally without any procedures . . . so even a single hearing would be more formal than *Mead*
            iii. What is the judicial review? How final are these decisions?
            iv. How centralized is the agency/interpretations?
            v. How reasoned?
            vi. How authoritative?
        b. Ask about the factors discussed in *Barnhart* (U.S. 2002):
            i. The interstitial nature of the legal question
            ii. The related expertise of the agency
            iii. The importance of the question to administration of the statute
            iv. The complexity of that administration
            v. The careful consideration the agency has given the question over a long period of time
v. Note: Qualifying for the *Chevron* Two Step (this Threshold Q #2) and actually getting *Chevron* deference are two different analyses

c. Normative Question: Does the *Mead* Rule Make Sense? If not, what might be a better rule?
    i. Congress is considering two statutes: (1) *Chevron* Two Step will apply only to interpretations arising out of informal RM and formal ADJ – and – (2) *Chevron* Two Step will apply only to decisions made and/or endorsed by the Head of the Agency prior to litigation beginning
        1. Statute (1):
            a. This rule is different than the one in *Mead* because *Mead* is based on the force of law and procedures for getting there
            b. Under *Mead* it is not clear that a rule that does not go through notice and comment does not qualify for the *Chevron* Two Step (probably doesn't, but we do not know for sure), and Statute (1) makes it clear that if the rule does not go through notice and comment (i.e., exceptions) it does not qualify for the *Chevron* Two Step
            c. Under Statute (1), it is clear that no informal ADJ qualifies for the *Chevron* Two Step, but under the *Mead* rule some information ADJ *may* qualify
            d. Benefits: This Statute is much clearer than the *Mead* rule – if you are an agency, you know what to do to qualify for the *Chevron* Two Step,

and if you are a lower court, you know what to do (i.e., we are not worried about applying *Mead*'s factors)
                i. This would solve Scalia's concern about *Mead* confusing the lower courts
                    1. So this Statute weighs in favor of judicial administrability
        e. Drawbacks: This Statute is an amplified version of Scalia's concern in *Mead* that agencies will use even more formal procedures . . . but is this a good or a bad thing?
            i. Good – encouraging the agency to go through notice and comment procedure allows for more involvement of/communication with the public, and this is good for agency accountability
            ii. Bad – there are advantages of ADJ – flexibility to decide case-by-case as new circumstances come up, e.g. – and this Statute will incentivize agencies to use a more cumbersome procedures, unnecessarily
            iii. Either Or – the agency, looking at its incentives, will either go through the cumbersome procedures to get *Chevron* deference at the back end, or they will go through more flexible procedures and give up *Chevron* deference
                1. The latter choice requires you to ask whether *Chevron* deference is a good rule
                    a. If you do not like the *Chevron* rule – because public choice/agency capture arguments, e.g. – then you might like this latter choice (i.e., maybe agencies not getting *Chevron* deference is a positive for you because you think courts are better at interpreting statutes)
    2. Statute (2): We are no longer concerned about the various procedures that are the prereqs to *Chevron* deference, but rather whether the Head of the Agency signed off on the interpretation before litigation
        a. Less incentive to go through notice and comment RM than you would under *Mead* and definitely less than Statute (1)
        b. Have to think about whether you think having the Head of the Agency sign off is a good or a bad thing
            i. Maybe there is more accountability if the Agency Head has to sign off on all agency decisions/interpretations
                1. Agency will not be able to simply pass the buck by saying: "I didn't approve this interpretation, it was the Under Secretary . . ."
        c. Every decision that satisfied this procedure would qualify for the *Chevron* Two Step
            i. Are there issues determining what the Agency Head signing off is? Does it literally mean signing off, or could he adopt the interpretative in some other way?

Judicial Review of Agency Decisions of Fact and Policy

I. APA § 706(2) = what standard of review is appropriate when courts are reviewing agency determinations of fact or policy (<u>not</u> legal interpretations)
    a. § 706(2): The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be –

i. (A): arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law
ii. (E): unsupported by substantial evidence in a case subject to §§ 556 and 557 or otherwise reviewed on the record of an agency hearing provided by statute
iii. (F): unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court

II. Substantial Evidence

a. **Substantial evidence standard of review applies only to review of agency decisions made in formal proceedings** (i.e., formal RM or formal ADJ under APA §§ 556 and 557)
    i. Remember: Trigger for formal RM → "RM shall be done on the record after a hearing" – and – trigger for formal ADJ → (i) magic words, (ii) presumption that certain things are formal if statute says "on the record," or (iii) defer to the agency's decision whether it is formal or informal ADJ
        1. So, if the statute reads: "Agency shall make a rule after a hearing" – the rule that comes out of this proceeding will be *informal* RM (since no "on the record" requirement) and therefore no substantial evidence review
    ii. Once we are applying substantive evidence review, we are in *Universal Camera*
b. Ex: *In re Universal Camera* (N.L.R.B. 1948): Rule: the company cannot fire an employee for doing things that are OK under the Labor Act; Q re: whether the company fired Chairman for a permissible reason or not; NLRB filed a complaint that the month delay between the argument and the firing shows that the argument was a pretext for the firing and the firing was actually about the union activity; ALJ found for the company – firing was OK; standard Board uses to review the ALJ: § 10(c) of Labor Act (pg. 169); if this were a district court that made the finding (rather than an ALJ) and the appellate court was reviewing, the standard would be "clearly erroneous" – courts will not reverse a lower court's findings of fact unless the lower court has made a decision that has its basis in a plainly erroneous understanding of the facts (so if there are two permissible possibilities, the finding of the trial court will be adopted); if the Board was using a clearly erroneous standard, they could probably not reverse the ALJ; under § 10(c) the Board is not supposed to just defer to the ALJ, they are supposed to use the § 10(c) standard to figure out what the right decision is; Board thinks that the ALJ did not appreciate the N.L.R.B.'s case; Board found by a preponderance of the evidence that the ALJ was wrong
c. Ex: *NLRB v. Universal Camera* (2d Cir. 1950): 2d Cir. is reviewing the Board's decision, which found – by a preponderance of the evidence – that there was an unfair labor practice; court must decide what change, if any, the Taft-Hartley Amendment of 1947 has made → § 10(e) now reads that the findings "shall be conclusive" "if supported by *substantial evidence* on the record considered *as a whole*"; before this amendment, the Act just read "substantive evidence" so courts were looking at any scrap of evidence that would tend to support the Board's decision and were not looking at any evidence that tended to disprove the Board's decision (i.e., they were not looking at the *whole* record)
    i. 2d Cir. has no idea what it should do with the ALJ's decision here, since it came up contrary to the Board's
        1. Four Steps Used:
            a. If this were a district court's reversal of a special master, then the appellate court would reverse the district court because a special master's finding is unassailable
            b. But, § 10(c) says that the ALJ's findings are not as unassailable as a special master's
                i. So this gives the Board more power than the district court would have with regard to a special master
            c. So, the appellate court cannot consider the ALJ's findings at all
                i. 2d Cir. assumes that the ALJ's findings are either unassailable (like a special master's) or are just irrelevant

d. Upholds the Board's decision as reasonable/rationale, and thus, supported by substantial evidence

d. Ex: *Universal Camera v. NLRB* (U.S. 1951): **SCOTUS thinks that the 2d Cir. was wrong when they concluded that appellate courts could not consider the ALJ's findings at all**
   i. Substantial Evidence Standard:
      1. "Substantive evidence is more than a mere scintilla"
      2. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"
      3. "It must do more than create a suspicion of the existence of the fact to be established . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury"
      4. "The substantiality of the evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record"
      5. **KEY** → Quote this language when applying the substantial evidence standard
   ii. **Q:** What weight should the reviewing court give the ALJ's findings when reviewing the decision of the Board for substantial evidence?
   iii. **A:** Reviewing court "should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial" (i.e. whatever probative force the ALJ's findings intrinsically command)
      1. There is a middle ground – so not "nothing," but they are not unassailable or irrelevant
         a. We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve
         b. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree
         c. **We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion**
         d. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony
         e. The significance of his report depends largely on the importance of credibility in the particular case
            i. Notion that in cases of credibility when the witnesses are disagreeing about what happened, the ALJ's findings have to be given a lot of weight when deciding whether the Board's decision is supported by substantial evidence
         f. To give it this significance does not seem to use materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial'

e. Ex: *NLRB v. Universal Camera* (2d Cir. 1951): On remand, the 2d Cir. reversed the Board once they gave weight to the ALJ's findings, which strongly suggested that the company had acted properly in this case

f. Hypo: What if the ALJ's decision had rested not on the evaluation of the credibility and testimony from the trial, but rather on the form of the dismissal/firing? – that is, the ALJ said: "In my experience, when a boss orders an inferior to fire someone rather than doing it himself, that it usually because he wants to fire the person for an improper reason; therefore, I think Kende fired Chairman for an improper reason"; on review, the Board disagrees with the ALJ: "In our experience, there is no meaningful inference to be made here because he asked someone else to

fire the employee"; Board's decision is appealed to the 2d Cir. and the 2d Cir. has to give the ALJ's contrary findings whatever probative value they deserve . . .

i. The evidence relied upon by the ALJ is not in-person testimony or credibility determinations, so the Board can make an independent decision based on the facts
    1. Notion that the ALJ did not get any benefit that the Board did not

ii. The Board is appointed by the President because of their expertise in the particularized area of law, therefore, the Board is in a better place to make an inference about what the form of dismissal says about the motive for the dismissal
    1. So while we might suggest that the ALJ knows a little bit about the situation, it is the Board that has the expertise to make these secondary or derivative (versus primary) inference

iii. **KEY** → When considering what probative value the ALJ's findings have, need to ask what kind of findings the ALJ made
    1. More weight for credibility findings
        a. In credibility cases, it is almost always the ALJ's decision that wins, and the Board's decision that reverses the ALJ's decision is deemed not supported by substantial evidence
    2. Less weight for findings that relate to things within the Board's expertise
        a. Board will get most of the deference when the finding relates to a general understanding about the Board's expertise (labor relations, e.g.)
    3. BUT, what if the ALJ's decision is mixed – "I am finding for *Universal Camera* both because of the testimony *and* because of some secondary derivative inference" and the Board reverses?
        a. Unclear – just have to argue it out

III. Arbitrary and Capricious

a. Unlike the substantial evidence test, the arbitrary and capricious standard is not procedurally constrained
    i. It may be applied to ***any*** and ***all*** agency action
        1. In most cases – where the agency is making some decision about the facts of the law, applying facts to law, or making a policy decision – the agency has to have satisfied the arbitrary and capricious standard
        2. As a practical matter, it has been applied almost exclusively to determinations not subject to substantial evidence review, such as informal RM and informal ADJ
            a. Agencies usually win these challenges (~2 of 3 times)

b. Arbitrary and capricious test comes from:
    i. § 706(2)(A), which applies to all agency action (i.e., this review is not restricted to certain agency action)
    ii. Some people argue that the test is constitutionally based (2 separate theories):
        1. What distinguishes true legislative power is the lack of control for any arbitrariness
            a. Congress, if it wants to, can act in an arbitrary fashion (and only Congress can do so)
                i. So if power was given to an agency and the agency was allowed to act in an arbitrary and capricious fashion, they would be acting legislatively in violation of Article I
        2. All government – including Congress – is required to act in a non-arbitrary fashion

c. Know: Arbitrary and capricious standard is a very smooshy test to apply
    i. The idea is to bring common sense and ability to reason to bear
    ii. Try to analogize to the cases we've read

d. Remember: Arbitrary and capricious review does not factor into legal interpretation considerations
e. Ex: *State Farm* (U.S. 1983): Standard 208 requires seatbelts in call cars; DOT modified Standard 208 by phasing in passive restraints – manufacturer had the choice to use passive belts or air bags; DOT later rescinded the modified standard – used notice and comment procedures and held hearing – because they originally had thought that lots of manufacturers would use both of these devices, but they later discovered that manufacturers were only going to use the passive seatbelts (detachable) and not airbags, so the standard would be costly with minimal benefits; that said, they *really* rescinded because there was a new President and his administration had a de-regulatory agenda
    i. **Threshold Issue** → Is the decision to rescind the standard reviewed as narrowly as the decision not to regulate in the first place (which is usually a very, very deferential review)?
        1. No – APA § 706 review applies to standards that have been established and revoked
            a. If an agency revokes a standard, the classic arbitrary and capricious standard applies
        2. "An agency's view of what is in the public interest may change, either with or without a change in circumstances
            a. *But* an agency changing its course must supply a reasoned analysis"
    ii. **Test: Under the arbitrary and capricious standard, the agency must**:
        1. Examine the relevant data
        2. Articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made
        3. Not rely on factors Congress has not intended for it to consider
            a. So, an agency rule would normally be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider
        4. Not entirely fail to consider an important aspect of the problem
            a. If an agency goes through notice and comment, does the agency have a responsibility to consider issues that are *not* raised by the comments? Can something not brought up by anyone be an important aspect of the problem?
                i. Yes, there can be an important aspect of the problem that was not brought up in notice and comment
                ii. If someone has commented though, it is much more likely that the issue will be considered an important aspect of the problem, so the agency will likely need to address it
        5. Not offer an explanation for its decision that runs counter to the evidence before the agency
        6. Not offer an explanation that is so implausible
            a. So arbitrary and capricious if an agency offers an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise
        7. Note: There is no disagreement that these are the correct standards to apply
            a. Any disagreement will be in the application of these factors (whether something is an important aspect of the problem or not, e.g.)
    iii. **Agency's rescission was arbitrary and capricious because**:
        1. Agency failed to consider just requiring airbags
            a. Court: At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment

i. This could be deemed failing to consider an important aspect of the problem

b. Agency recited a number of difficulties that they believed would be posed by a mandatory airbag standard

c. Court does not buy the agency's explanations because they were advanced during litigation, not at the time the initial decision was made

i. "Courts may <u>not</u> accept appellate counsel's post hoc rationalizations for agency action"

ii. *Chenery*: Courts have to review what agencies do based on what the agency actually said and did *at the time it acted*

2. Agency was too quick to dismiss the safety benefits of the automatic belts

a. Respondents point to certain studies suggesting that Modified Standard 208 will substantially increase seatbelt usage

i. But it is within the agency's discretion to pass upon the generalizability of these field studies – this is precisely the issue which rests within the expertise of NHTSA

b. That said, there is no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage

i. Note: This seems very unlike what courts generally do in arbitrary and capricious review – defer to the agency's decision on a certain point, but then second guess the agency's final determination on the point

1. It seems like the Court is just opining on what it thinks people generally do with seatbelts – which does not seem like the right thing to do, but it happened (and happens)

3. Agency failed to explain why it did not just require non-detachable belts

a. The agency considered this issue, but it did so along with other "use compelling devices" – it never considered this option by itself, in its own right

b. "**While the agency is entitled to change its view on the acceptability of continuous passive belts, it is obligated to explain its reasons for doing so**"

iv. Hypos:

1. What if the agency said: "Even though we think air bags are safe, we are not going to require them because people fear them. Despite that we think this is irrational, we think it is a legitimate ground for our decision not to regulate"; and someone challenges the agency's decision as arbitrary and capricious?

a. Might say it is the agency's job to educate people rather than go along with their irrational fears

2. What if the agency argued that consumers are irrationally afraid and this will cause them to not buy new cars (i.e., the ones with airbags), or they will keep their old cars and be less safe?

a. This explanation puts the agency on better ground – it is connecting the irrational fear to some unsafe behavior

3. What if the agency reads some theorist's book and says they are not going to regulate because they do not believe in regulations – or – that during the notice and comment period they considered mandating air bag, but they believe the Libertarians so they have decided not to regulate?

a. Might say that this is a basic value judgment and not the type of thing we mean for expert agencies to decide, so therefore we should not defer
i. Note: Agencies are informed by their perspectives and value judgments (at least in the background), *but* the way we've structured the system, these value judgment arguments are <u>not</u> explicitly being made by the agencies
1. There is an assumption that that is not what agencies should be doing
2. Rather, agencies should be making technical analysis-like arguments
b. Might say that failure to regulate based on the Libertarian's theory of de-regulation negates the need for an agency in the first place, and that it is contrary to what we wanted when we established the agency

4. What if the APA said: "While articulating its concise general statement, the agency may point to foundational theories to justify its position" – that is, the APA invited agencies to consider these value judgments, e.g.?
a. Most people do not think this is a good idea
i. But is making these things hidden in the decisions a good or a bad thing – maybe we want them in the open
b. Regardless, agencies do <u>not</u> justify their decisions based on any broad theories or general principles
i. Rather, by tables, data, and other technical stuff – which is what courts review if there is a challenge

v. *State Farm*'s Importance:
1. Court's most detailed attempt to explain the arbitrary and capricious standard
2. An example of "hard look review," in which the Court looks very closely at what the agency has done and holds it to a high standard of articulation and rationality
a. Court's willingness to look more skeptically at what agencies are doing

f. Ex: *FCC v. Fox* (U.S. 2009): statute prohibits indecent language between 6:00A – 10:00P, and the FCC has the power to make regulations about what that means and to enforce the rule; initially the FCC did not consider a single, fleeting expletive to violate the statute; FCC later changed their view and brought a challenge against Bono after he said "fuck" at the Golden Globes; 2d Cir. decided that the FCC's switch in policy from allowing to not allowing fleeting expletives was arbitrary and capricious
i. **Threshold Question** → What is the agency's obligation when it changes a longstanding policy?
1. Everyone agrees that the same *State Farm* standards apply, but how do you apply them in the case of a policy change?
a. Challenger suggests that the agency has a higher burden if they change positions
b. SCOTUS rejects this
i. "We find <u>no</u> basis in the APA or in our opinions for a requirement that all agency change be subjected to more searching review
1. Our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance
a. That case said only that such action requires a reasoned analysis for the change beyond

that which may be required when an agency *does not act* in the first instance"

ii. **Test**: When an agency changes its policy, the agency must:
    1. Show awareness that it changed its position (and make this clear)
        a. "The requirement than an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position"
    2. Show that there are good reasons for the new policy
    3. *But* it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one
        a. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates
        b. This means that the agency does **not** need to provide a more detailed justification than what would suffice for a new policy created on a blank slate
            i. *Unless* – for example – its new policy rests upon factual findings that contradict those which underlay its prior policy, or when its prior policy has engendered serious reliance interests that must be taken into account
                1. It would be arbitrary and capricious to ignore such matters
                2. In such cases it is not that further justification is demanded by the mere fact of policy change, *but* that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy

iii. Dissent (Breyer): When an agency changes its policy, they likely need more explanation to meet the arbitrary and capricious standard
    1. He agrees with the *State Farm* doctrine, he just thinks that the agency needs to answer the specific question: why did you change?
        a. And this answer will usually require a more complete explanation than if the agency was acting on a blank slate (i.e., if change itself were not at issue)
        b. Breyer notes that FCC's answer cannot be: "We like the new policy better"
    2. So it is not that Breyer thinks there is a different standard, *but* applying the same arbitrary and capricious standard, you expect more articulation to make the policy change make sense
    3. Dicta: Breyer also thought that the agency failed to address the effect of this policy change on local broadcasters because they have less resources for the bleeping machines, e.g.

Summary

I. Formal RM
- a. Procedures are set out by APA §§ 556 and 557
- b. For factual and policy conclusions, courts review for substantial evidence
- c. Legal interpretations will surely qualify for the *Chevron* Two Step (*Mead*)

II. Formal ADJ
- a. Procedures are set out by APA §§ 554, 556 and 557
- b. For factual and policy conclusions, courts review for substantial evidence
- c. Legal interpretations will qualify for the *Chevron* Two Step (*Mead*)

III. Informal RM
- a. Procedures are set out by APA § 553, plus case law precedent

i. Ex: *Chocolate Manufacturers* – when notice is sufficient
ii. Ex: *Nova Scotia* – agencies must reveal information and data on which a rule is based
iii. Ex: Ex Parte Contacts cases
iv. Ex: *Vermont Yankee*

b. For factual and policy conclusions, courts review under the arbitrary and capricious standard (*State Farm*)
c. Legal interpretations . . .
    i. If an agency uses notice and comment, then its legal interpretations will qualify for the *Chevron* Two Step
        1. So it is likely that most informal RM decisions will qualify
    ii. If an agency does not use notice and comment because of an exception, then its legal interpretations may not qualify for the *Chevron* Two Step
        1. Exception for interpretative rules and policy statements – these would not qualify for the *Chevron* Two Step, per *Mead*'s dicta
        2. Categorical Subject Matter Exceptions (military, public property, loans, e.g.) – unclear whether they would qualify for the *Chevron* Two Step

IV. Informal ADJ

a. Procedures are set out by the organic statute, plus APA § 555
b. For factual and policy conclusions, courts review under the arbitrary and capricious standard
c. Legal interpretations may or may not qualify for the *Chevron* Two Step, depending on the procedures used
    i. Answer depends on a variety of factors and how the procedures at issue compare to the facts of *Mead*
        1. Ex: what procedures the agency should use, per the statute; how binding the interpretation is; how centralized the agency/interpretation is; etc.
    ii. If the informal ADJ interpretation does not qualify for the *Chevron* Two Step, it qualifies for *Skidmore* respect

V. RULES IN EVERY CASE:

a. Agencies cannot violate some federal law or constitutional requirement
b. Agencies must always act within the scope of their statutes
c. If you are dealing with a legal interpretation that the court decides does not qualify for *Chevron* Two Step, the court is doing its own statutory interpretation, and *Skidmore* will likely factor into this
    i. *Skidmore* respect will come up whenever the court decides that something does not qualify for the *Chevron* Two Step based on *Mead*
        1. The only time *Skidmore* will not apply is if the court decides that the agency is not supposed to be administering the statute
            a. This is because the agency has not even passed the first threshold Q to get into the realm of *Chevron*
        2. Or you could say that interpretations always qualify for *Skidmore* respect, but if an agency is dealing with a statute that it was not entrusted to administer, it does not deserve any respect

Judicial Review of Agency Action – Availability (When Can You Bring an Action)

Overview of Threshold Issues

I. Before a court will hear a challenge to agency action, it has to be satisfied of the following:

a. Jurisdiction
    i. The court has to have jurisdiction
        1. The APA is not an independent source of jurisdiction because it does not confer jurisdiction upon a court in the same way as jurisdictional statutes do
        2. If you want to sue an agency, you need to sue under an organic or specific statute that gives the court jurisdiction

a. Ex: Clean Air Act gives statutes specific jurisdiction
b. Ex: 28 U.S.C. 1331 establishes federal question jurisdiction

b. Finality*
    i. The agency has to have done a final action
        1. Notion that some intermediate agency decision where the agency will make a final decision down the road is <u>not</u> sufficient
    ii. Almost always has to be an *action* (versus *inaction*)
c. Ripeness
    i. The claim must be ripe
        1. Notion that the time for the challenge has ripened – review cannot be premature
    ii. Generally this means that you cannot sue to challenge a rule that has been promulgated but not enforced
    iii. Exception: If it is causing you great hardship and your challenge is purely legal, then the court will let it go forward
        1. Ex: FDA did not have authority to make this regulation in the first place
d. Mootness
    i. The case must not be moot
        1. There has to be a live controversy between the parties for the court to decide
    ii. Exception: Capable of repetition yet evading review → if there is a kind of claim that would never be able to be heard because of the mootness doctrine, then the court will hear it
        1. Ex: Challenge to affirmative action in law school admissions – it will always be moot because it takes so long for a case to get to SCOTUS that the person will have likely graduated already and started practicing
e. P Must Have Exhausted Administrative Remedies (but not really)
    i. Notion that an agency should have the power to fix its errors before it goes to the court
    ii. Exception to the Default Rule: If an appeal looks like it would be futile
    iii. Ex: *Darby* (U.S.): There is <u>no</u> exhaustion requirement in the APA cases, other than finality, and that is because APA § 704 generally makes final agency action immediately reviewable
        1. So you do <u>not</u> have to go through discretionary appellate review within the agency before you go to court, *unless* the organic statute requires that you go through appellate review
f. Reviewability*
    i. The APA has not barred review under §§ 701(a)(1) or 701(a)(2)
g. Standing*
    i. P must have standing (constitutional *and* prudential)

II. Wex thinks this area is relatively manipulable by courts depending on whether the court wants to reach the merits of a case

Reviewability

I. APA
a. "Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review"
    i. Preliminary and other non-final agency action is reviewable "on the review of final agency action"
b. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"
c. <u>SCOTUS has read the APA as embodying a "basic presumption of judicial review"</u>
    i. The presumption in favor of judicial review applies only when "agency action" is the subject of the petition
        1. If what is being challenged is not "agency action," there is no judicial review under the APA

ii. *But* as the Court and the APA itself recognize, even with regard to agency action, the presumption in favor of judicial review is rebuttable
1. Section 701(a) specifies that the APA's provisions relating to judicial review apply "except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law (or "there is no law to apply")"

II. Agency Action
a. The APA's judicial review provisions apply to "agency action"
i. There are two ways in which activity of the federal government may not constitute "agency action" within the meaning of the APA:
1. The entity taking the action may not be an "agency"
a. APA § 551(1)(A)-(E) lists several entities that are not agencies within the meaning of the APA
i. Ex: Congress, the federal courts, the government of the District of Columbia
b. SCOTUS has decided that the President is not an "agency"
i. Thus when Congress delegates authority directly to the President, the President's own actions may not be challenged under the APA
2. Even if a petition for review successfully identifies an agency, judicial review will not be available if the petitioner does not successfully identify something that constitutes "agency action"
a. This issues comes up when the petition concerns allegedly improper agency *inaction*, or challenges an agency's overall modus operandi without identifying a particular improper agency action
b. SCOTUS reads the APA as providing for judicial review only of discrete, identifiable agency actions (*Norton v. SUWA*)
b. Ex: *Norton v. SUWA* (U.S. 2004) (9-0): SUWA brought suit against the Dept. of the Interior (BML) on the basis of public land law for not banning four wheelers in wilderness areas; SUWA thinks that BLM failed to take action that it was required to take; SCOTUS: no review for this claim of inaction; case was decided 9-0, which shows that the Court thought this was a big problem and no one wanted to open this door
i. APA authorizes suit by a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statutes (§ 702)
1. Where no other statute provides a private right of action, the "agency" action complained of must be "*final* agency action" (§ 704)
a. "Agency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"
i. The APA provides relief for a failure to act in § 706(1): "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed"
1. A failure to act is not the same thing as a denial
a. The latter is the agency's way of saying no to a request; the former is simply the omission of an action without formally rejecting a request
i. A failure to act is properly understood to be limited to a discrete agency action
2. The only agency action that can be compelled under the APA is action legally required

ii. Court interprets failure to act in line with the other discrete actions in the list – *ejusdem generis*
1. Dicta: What if we had to argue the other way, against the Court's statutory interpretation?
a. Maybe try a plain language argument – prima facie looks like it means "failure to take any action"
b. Failure to do a discrete thing is covered by "denial thereof," so failure to act has to mean something else – a broader failure to do just general stuff

ii. Rule: A claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*
1. In order to get review of inaction, that inaction has to be discrete inaction that is in fact required by law
a. Ex: If the agency must make a rule by April 29th and this day comes and goes and there is no rule yet, then this would be reviewable as a failure to take a discrete, required action

. . . Other than this, inaction is generally not going to be reviewable

iii. Policy: The principal purpose of the APA limitations discussed is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve
1. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management
a. The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA
i. Therefore, **general deficiencies in compliance lack the specificity requisite for agency action**
2. Think → Is it necessary and/or legitimate to make this distinction between action and non-action on the grounds given by the Court
a. There is a big difference between getting review and winning your review
i. Notion that the Court could grant review of the agency's decision, but the agency will get deference to its expert determination
b. Wex isn't sure whether review of agency inaction is any more intrusive than review of agency action

iv. SUWA argued:
1. If an agency fails to take any action to address a problem, then a court should be able to instruct the agency to take some action (but not tell them how to act)
a. Court responded with a policy discussion, *supra*
2. If an agency does address the problem through some final, affirmative action, then a dissatisfied party has to obtain review under § 706(2)
a. Parties cannot challenge agencies for inaction of everything they didn't do

i. Rather challenge them and say what they did do was arbitrary and capricious, e.g.

III. Statutory Preclusion of Review

a. APA § 701(a)(1): This chapter applies, according to the provisions thereof, *except* to the extent that statutes preclude judicial review
   i. SCOTUS has stated that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review
      1. So we start with a presumption that there is judicial review of agency action
         a. *Nonetheless*, if there is a statute that is extremely clear that there is to be no judicial review, then there will be no judicial review

b. Ex: *Johnson v. Robison* (U.S. 1974): petitioner brings a constitutional challenge to the statute's active duty requirement; statute: "the decisions of the Administrator on any questions of law or fact under any law administered by the Veterans' Administration providing benefits for veterans shall be final and conclusive and no court of the United States shall have power or jurisdiction to review any such decision"; **rationale** for statute's language: decrease the burden on courts, decrease the burden on the VA – we want them to spend their money on veterans not litigating cases, uniformity – let the VA make its decisions in a uniform manner, expertise of the VA to the intricacies of the statute, e.g.
   i. Court's Reasoning:
      1. **Text**: preclusion *only* applies to decisions made by the Administrator under the statute, and not to challenges to the statute itself
      2. **Legislative History/Policy**: barring constitutional challenges to the statute does not really further the rationale for preclusion
         a. Notion that these constitutional challenges are not the kinds of cases that Congress was concerned about when it established the preclusion regime in the VA statute
            i. Allowing constitutional challenges to the statute will not defeat congressional intent (i.e., will not burden the courts or the agencies – because there will not be a ton of constitutional challenges – and there are no concerns are expertise because the agency is not the expert in the constitutionality of its statute, only in administering it)
      3. **Canon**: Clear Statement Rule: If Congress wants to ban review of constitutional claims, it must do so clearly
         a. Court is not saying, though, that Congress can necessarily constitutionally bar constitutional claims . . . but they are not considering that question here
         b. Courts strive to construe statutes so they do not bar review of constitutional claims – there is a great reluctance to do so
   ii. Another Argument: Agency Practice – the agency has said that it will not decide constitutional questions

c. Ex: *Gott v. Walters* (D.C. Cir. 1985): *Robison* left open the question of how broadly or how narrowly the amended VA statute would be interpreted in cases not involving constitutional claims; petitioners here are challenging a VA manual used to administer its program concerning radiation claims on the basis that the manual was not, and should have been submitted for notice and comment; so the question is whether the VA statute barred review of the claim that this manual should have gone through notice and comment
   i. Agency (VA) did think that the statute precluded/bar judicial review of their decisions
      1. Court did not defer to the agency's interpretation, though, because the VA do not administer the judicial review sections of the statute – it is not something within their expertise to interpret whether judicial review under a statute is appropriate

a. Addition to *Adam's Fruit* Principle: If the agency is interpreting a part of its statute that it does administer, but is not aimed at it – but rather the courts – it does not get deference for this . . . and the rationales of *Chevron* would not apply

ii. Scalia (D.C. Cir. judge at the time) reads the statute as saying: "Any decision on law or fact that is made by the Administrator *in the course of* administering the statute is barred from judicial review"
   1. Here, the Administrator was administering the VA statute, and in the course of doing so came up with a manual and decided that it did not have to through notice and comment
      a. This was a legal decision made by the Administer in administering the statute
   2. Policy: Scalia is worried that if you allow judicial review of the Administrator's decisions under the APA, and if the Court ordered the VA to not apply the manual without promulgating them according to APA procedures, then the courts would have to monitor individual VA decisions to make sure that its order was being followed
      a. In other words, if in fact the agency has improperly promulgated the manual, it cannot then rely on it in individual ADJs
         i. And this follows from Wyman-Gordon → if there is an improper rule, it cannot be applied in particular cases
      b. So if we say that the manual is improperly promulgated, do we then have to review every VA decision to make sure that the Administrator did not rely on the manual in that decision?
   3. Note: Scalia is pro-Executive Branch and does not like judicial review of agency action

iii. Dissent thinks that the decision made has to be directly related to the statute that the Administrator is administering (i.e., the VA statute, not some other statute like the APA)
   1. So if the Administrator makes a decision about the VA statute, it is insulated from judicial review
   2. But if the Administrator makes a decision about the APA, it is not a decision barred from judicial review

iv. THINK: Which reading of the statute is a better way to interpret the statute?
   1. Wex – understand these two different views

d. Ex: *McNary v. Haitian Refugee Center* (U.S. 1991): the statute at issue here (§ 210(e)(3)(A), pg. 225) is a ***channeling statute***, which channels review to a certain place and time – different from a ***preclusion statute***, which simply precludes judicial review; SCOTUS decides that the statute does not bar judicial review in the district courts, despite language that channels judicial review to appellate courts

i. In channeling cases, you should ask where review is channeled to and whether review in that forum is any good – is it going to be more meaningful review in another forum, e.g.?
   1. Ex: If a case is all about factual determinations and it is channeled to the court of appeals, argue that courts of appeals are not set up to consider facts, e.g.

ii. Holding: Given the absence of clear congressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief, the District Court has jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures
   1. Were we to hold otherwise and instead require respondents to avail themselves of the limited judicial review procedures set forth in the statute, meaningful judicial review would be foreclosed

a. Notion that there is no meaningful review of the procedures concerning deportation if the only way you can challenge them is in an appellate court after a deportation hearing

2. Note: The presumption of judicial review again

iii. Two Sets of Arguments:

1. Textual

a. Statute only precludes review of a determination on an application

i. And this is not a challenge to a determination of an application denial – rather, they are collaterally challenging the procedures that are generally given in the SAW hearings as a whole

b. Statute only bars review of decisions made "on the record"

i. What is barred is when an LO makes a decision about a particular applicant and there is a record made about that applicant – which does not describe this case, which is a due process claim made anew, there is no record made yet

c. Statute only bars review of decisions that can be reviewed under an abuse of discretion standard

i. Court says it would not make any sense to have an abuse of discretion standard for constitutional claims

2. Practical

a. Contrary interpretation would lead to a lack of meaningful review

i. These types of due process claims channeled solely to appellate courts would not be meaningful because no one would bring the reviews/claims (for fear of deportation) and appellate courts lack the fact finding abilities of district courts

b. [Important that the majority engages in practical arguments . . . less important are the specific reasons for this case]

iv. Dissent (strong): The plain language of the statute provides that judicial review of a denial may be had only in connection with review of an order of exclusion or deportation

1. The Court chooses to read this language as dealing only with direct review of individual denials of SAW status, rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications (i.e., no translator provided)

a. But the accepted view of judicial review of administrative action generally – even when there is no express preclusion provision as there is in the present statute – is that only "final actions" are reviewable in court

2. Notion that the review allowed by the majority is of an agency action that is not yet final

a. The decision not to give a translator, e.g., is just a bad procedure that goes into the final decision, but is not a final agency action in and of itself

v. Dissent's finality argument is so strong, that the majority's result can perhaps be explained as an attempt to strive to find judicial review in these statutory preclusion cases, and a notion that the presumption of judicial review is in the place where that review would be the most meaningful

e. **NOTE on § 701(a)(1)**: A lot of these cases are statutory interpretation cases – very specific to their facts – so just concentrate on taking away general principles

i. Presumption of judicial review, particularly when a constitutional challenge is precluded

ii. Even in a channeling case, it seems like the Court will strive to find judicial review in a *meaningful* forum

IV. Committed to Agency Discretion by Law

a. APA § 701(a)(2): This chapter applies, according to the provisions thereof, *except* to the extent that agency action is committed to agency discretion by law
    i. This provision was interpreted by SCOTUS in *Overton Park* to bar judicial review where there is "no law for a court to apply"
        1. The provision is meant to be a narrow exception, and the legislative history of the APA indicates that it is applicable only in the rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply

b. Ex: *Webster v. Doe* (U.S. 1988): statute at issue is § 102(c): "The Director of the CIA may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States" . . . *compare with*: "The Director may terminate an employee whenever such termination is necessary or advisable"; in the statute at issue, the only question is whether the Director "deems" that the termination is necessary or advisable – the trigger for firing someone is completely within the Director's mind; issue is whether, and to what extent, the termination decisions of the Director under this statute are judicially reviewable; SCOTUS: statutory challenges are not reviewable
    i. Statutory Claims (≠ reviewable)
        1. One formulation of the § 701(a)(2) standard → "no law to apply" / "no meaningful standard against which to judge" (*Heckler*)
            a. Hypo: What if the Director fires someone because he does not like the person, even though the person is a great worker?
                i. Maybe the Director has not violate the statute if he can deem it necessary because they do not work well together
            b. Hypo: What if the Director says: "It is not necessary that I fire him, and he is a great worker, but I hate him so I am going to fire him"
                i. Applying the language of the statute, this would be a violation
                    1. We applied the law – so it is not really true that there is no law to apply, it is just that there is not much of it to apply
                        a. Just an example of the "no law to apply" standard being a little questionable
            c. What about the fact that the APA applies to all agency decisions, and it mandates that agencies cannot act in an arbitrary and capricious manner
                i. Isn't this law to apply as well?
                    1. Again, another example to show that perhaps "no law to apply" is not the right formulation of the standard
            d. This is the formulation of the § 701(a)(2) standard that SCOTUS always uses, but the Court has not been at all clear about the matter and whether it makes the best sense to use this formulation
        2. Second possibility of the § 701(a)(2) standard → maybe there is some statutory language that can signal Congress's intent to insulate super discretionary decisions from judicial review
            a. Maybe this is done by the word "deem" in the statute at issue here
                i. "The standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review"
            b. The theory is not that there is actually no law to apply, *but* rather that if Congress uses language like this – like "deem" – it is signaling its

intent not to allow these decisions to be reviewable, and courts should interpret in such a fashion

i. So under this possibility we look for certain language in the statute and assume that Congress is signaling to us that certain kinds of decisions are simply unreviewable

3. Third possibility of the § 701(a)(2) standard → maybe certain categories of agency action have always been unreviewable and § 701(a)(2) simply indicates that that is still true
    a. This is Scalia's argument – he does not think that "no law to apply" is the standard
    b. What are these categories?
        i. Prosecutorial discretion
            1. Except in very narrow circumstances, you cannot sue an agency for not bringing a charge
        ii. Traditional respect for the function of the other branches
            1. Illustrated by the fact that when the head of a department acts in a case of executive discretion, courts never reviewed that before the APA, so § 701(a)(2) suggests that since we have never had judicial review here, we still don't
    c. *Heckler v. Cheney* (pg. 247): Commentators have pointed out that construction of § 701(a)(2) is further complicated by the tension between a literal reading of § 701(a)(2), which exempts from judicial review those decisions committed to agency "discretion," and the primary scope of review preserved by § 706(2)(A): whether the agency's action was "arbitrary, capricious, or an abuse of discretion"
        i. Scalia's theory might explain this tension

ii. Constitutional Claims (= reviewable)

1. We do not think § 102(c) may be read to exclude review of constitutional claims
    a. Clear Statement Rule: Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear (*Johnson v. Robison*)
        i. We require this heightened showing in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim
            1. *Cf.* Scalia does not think there is a serious constitutional question in barring review of constitutional claims because there are many constitutional claims for which there is no review (political question doctrine, various foreign affairs things, sovereign immunity, Eleventh Amendment stuff, e.g.)

c. Summary:
    i. No clear statement rule for barring review of regular, *statutory* claims
        1. This probably comes down to statutory interpretation
    ii. There is a clear statement rule for barring review of *constitutional* claims
d. Constitutional vs. Reviewability
    i. Hypo: (1) If you are working for the government and the President wants to pardon a billionaire for purely personal gain (because the billionaire will give him $100K, e.g.) – and there is no judicial review for presidential pardon decisions – is this legal?; (2) If you are an AUSA and the U.S. Attorney says that we are not prosecuting C because they

share her religious beliefs, but we are prosecuting J (who did the exact same thing as C) because he is a different religion – and prosecutorial discretion is traditionally unreviewable – is this legal?

1. Obviously these things are not legal – both are unconstitutional regardless of whether there is going to be judicial review or not
    a. It is unconstitutional for the President to do something unconstitutional, even if no court will review the case
        i. Scalia: The President takes the same oath to uphold the Constitution as we do

ii. Constitutionality and reviewability are different inquiries

1. No judicial review is <u>not</u> a reason to act unconstitutionally

V. <u>Prosecutorial Discretion</u>

a. <u>General Rule</u>: Actions cannot be brought requiring someone to prosecute
    i. A prosecutor can decide that some person has committed a federal crime and still decide not to prosecute
    ii. We assume there are lots of legitimate reasons why an office would choose not to prosecute:
        1. Extenuating circumstances particular to this person so that they do not deserve to be prosecuted
        2. Limited resources
        3. Office does not think they can win
        4. Office needs the person's testimony for something more important
b. <u>Exceptions</u>:
    i. When an agency acts in clear violation of its governing statute
    ii. When an agency acts clearly in excess of its statutory authority
c. Ex: *Dunlop v. Bachowski* (U.S. 1975) (civil case that is the <u>exception</u> to the general rule): the statute appears on its face that if the Secretary of Labor finds probable cause, he has <u>no</u> discretion not to bring a civil case; query whether this is unconstitutional as against SOP because the legislature is making the executive branch do something when the executive branch is the one in charge of enforcing the laws; statute does use "***shall***," which can (and did, here) make a difference, but apparently there are some statutes that say "shall" but have been understood to mean "may"; in this case, the Secretary sent B a letter that they would <u>not</u> be prosecuting the matter, but without any reasons; B alleged that the Secretary was acting in an arbitrary and capricious fashion by not prosecuting; apparently the Secretary did end up issuing a statement that although there were irregularities that affected 844 votes, B lost by 907 so not enough to affect the outcome of the case (i.e. election results would remain the same), therefore not prosecuting
    i. <u>3d Cir.</u>: (1) the Secretary has to give a statement of reasons as to why they did not prosecute, so (2) B – or any other challenger – can challenge the factual basis for the Secretary's decision, and the Court can conduct an inquiry into whether the decision was arbitrary and capricious
    ii. <u>SCOTUS</u>:
        1. Yes, the LMRDA does require the Secretary to give a statement of reasons . . .
            a. So there is something for judicial review
            b. Because the Secretary is essentially B's lawyer (or someone in B's position)
                i. Notion that it is the Secretary who represents the interests of B, so if the Secretary is not going to do anything, he has an obligation to explain why that is to the person who asked
            c. Because requiring a statement makes the Secretary think and articulate their reasons in a way they might not otherwise have to
                i. Notion that it forces them to articulate a rationale that makes sense

d. To ensure agency accountability

2. Court disagrees with the 3d Cir.'s wide-ranging inquiry into reviewability

a. You do <u>not</u> have to review the factual bases of the decision – you do <u>not</u> do any wide ranging trial-like inquiry into the agency's rationale for not bringing an action

b. <u>All you do is review to see if the decision on its face is irrational</u>

i. Review of the statement is limited – just for irrationality

iii. Rehnquist writes separately → (1) There should be a statement of reasons, but (2) no judicial review, because the decision to sue or not to sue is committed to agency discretion under § 701(a)(2)

d. Ex: *Heckler v. Cheney* (U.S. 1985) (<u>classic case</u>: no review of decisions *not* to prosecute): Q about the extent to which a decision of an administrative agency to exercise its "discretion" not to undertake certain enforcement actions is subject to judicial review under the APA § 701(a)(2); respondents are prison inmates sentence to death by lethal injection who petitioned the FDA alleging that under the circumstances the use of these drugs for capital punishment violated the FDCA and requesting that the FDA to various enforcement actions to prevent these violations; FDA responded that they were not going to take action here because it was unclear if they even had jurisdiction, and if they did have jurisdiction they would not being suit because they generally only do so when there is a serious danger to public health; *Heckler* does <u>not</u> overrule *Bachowski*

i. <u>D.C. Cir.</u> found "law to apply" in the form of a FDA policy statement

1. The court held that this policy statement constituted a "rule" and was considered binding by the FDA, therefore, refusal to take action was found to be arbitrary and capricious

ii. <u>SCOTUS</u> reverses, noting that this case is different than *Bachowski*

1. Courts mentions the "no law to apply" standard and then explains it as the "no meaningful standard against which to judge the agency's exercise of discretion"

a. In such a case, the statute ("law") can be taken to have "committed" the decision making to the agency's judgment absolutely

2. Here, as opposed to in *Bachowski*, the decision is unreviewable

a. The Act's enforcement provisions commit complete discretion to the Secretary to decide how and when they should be exercised

i. Act's language gives no indication of when an injunction should be sought and the section providing for seizures is framed in the permissive – the offending food drug or cosmetic "shall be liable to be proceeded against"

b. The policy statement – on which the D.C. Cir. relied – is singularly unhelpful

i. Among other things, the language in the policy statement is vague and the policy statement was not actually promulgated in connection with any actual rule

iii. **<u>Rule</u>**: An agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)

1. ***But*** presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers

a. Ex: Mandatory statutory language in *Bachowski* ("shall," e.g.)

iv. Why no review of the decision not to prosecute?

1. An agency decision not to enforce often involves a complicated balancing of a number of facts which are peculiarly within its expertise (i.e., administrative concerns)

2. When an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect

3. An agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch

v. Concurrence (Marshall): Refusals to enforce, like other agency actions, <u>are</u> reviewable in the absence of a clear and convincing congressional intent to the contrary, *but* such refusals warrant deference when, as in this case, there is nothing to suggest that an agency with enforcement discretion has abused that discretion
    1. Notion that there is law to apply and while there is a presumption that if an agency decides not to prosecute based on a balancing of factors, that is OK, but there should still be review to make sure that the agency has not acted vindictively or irrationally

vi. Note: This might be a case where Scalia's categorical approach makes the most sense
    1. "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"
        a. This makes it seem like the Court is not looking at the particular statute and agency at issue, but rather more broadly considering agencies' ability to make these types of decisions
            i. Essentially this case is saying that there is a category out there which we do not review, and this is one such category

e. <u>Question remains as to what *Heckler* has to say about the choice between Options 1 and 2</u> (*infra*)
    i. **Best evidence that agencies <u>do</u> need to provide a statement is Marshall's FN** → "All members of the Court in *Bachowski* agreed that a statement of basis and purpose was required for the denial of the enforcement request at issue there. Given the revisionist view the Court takes today of *Bachowski*, perhaps these statements too are to be limited to the specific facts out of which they emerge. Yet the Court's suggestion that review is proper when the agency asserts a lack of jurisdiction to act (*see* FN 4), or some other basis inconsistent with congressional intent, would seem to presuppose the existence of a statement of basis and purpose explaining the basis for denial of enforcement action"
        1. Wex: Not sure if Marshall is right here, but it seems like a fair argument
    ii. **Another argument for the requirement of an agency statement would be § 555(e)**, which requires prompt notice of a denial, accompanied by a brief statement of the grounds for denial
        1. Not sure whether this would apply to a denial to prosecute, but could certainly use it to argue that an agency is required to give a statement of reason if someone asks them to prosecute and they deny

f. Can the agency limit its own discretion to decide whether to prosecute?
    i. Ex: Agency issued a rule through informal RM saying: "Whenever any drug is used for the purpose of killing someone, we will prosecute" – statute gave the agency discretion to act or not, but the agency commits itself to prosecute in certain circumstances
    ii. Open question
        1. Maybe yes – if the agency goes through notice and comment rulemaking, e.g.
            a. Notion that it should have to explain itself when it goes against its own limits
        2. Maybe no – argue that *Bachowski* is really just a tiny exception and we are not going to expand that just because an agency purports to limit its own discretion by some rule

g. <u>Four Options for Dealing with Decisions Not to Prosecute</u>:
    i. (1) No statement required and no judicial review
        1. Probably what the Government would like
    ii. (2) A statement is required, but no judicial review

1. Rehnquist's view in *Bachowski*

iii. (3) A statement is required, and judicial review is limited to irrationality
   1. SCOTUS majority in *Bachowski*
      a. So, do we have mandatory language like *Bachowski* putting us in this category?

iv. (4) A statement is required, and intrusive (non-deferential, wide-ranging) judicial review
   1. 3d Cir. in *Bachowski*
      a. <u>But</u> this position was reversed by SCOTUS, so not going to apply

. . . In a typical case where there is no mandatory language like in *Bachowski*, we are probably in between Options 1 and 2 – and this is only if someone asks for a rule/statement

2. *Bachowski* is different because of its mandatory language – "shall bring a civil action" – and that moves you to in between Options 3 and 4

h. Ex: *Mass v. EPA* (U.S. 2007): uber perplexing case; Wex not sure what the EPA was thinking when it came up with its explanation of what it was doing and as a result left the Court to say some things that seem to not fit with the rest of administrative law; Clean Air Act gives the EPA the power to proscribe air pollution standards for air pollutants which may be harmful; certain states ask the EPA to regulate and they say they will not because (1) they do not have the authority to regulate greenhouse gases, and (2) even if they did, they would not exercise their regulatory authority at this time for a laundry list of policy reasons

i. Facts:
   1. Statute: "If Administrator makes a judgment that X is harmful, she must regulate"
      a. This kind of statute/contingent legislation is common – if you judge something is harmful, dangerous, necessary, etc., then you have to regulate
   2. Massachusetts files a petition: Please regulate X
      a. Typical response to this type of statute
   3. EPA responds: No – we will not regulate
      a. The science is uncertain
      b. Policy reasons (using China and India relations)

      . . . and note that the agency is saying they will not *regulate* because of this – <u>not</u> that they will not make a *judgment* because of this

ii. Three Big Issues:
   1. **Standing** (*infra*)
      a. The gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination
      b. Case suggests that it is easier for a state to get standing
   2. **Merits** (i.e., is the EPA correct that it lacks jurisdiction over CO2?)
      a. SCOTUS: The EPA clearly has authority to regulate greenhouse gases
         i. Court rejects the EPA's reliance on *Brown v. Williamson*
      b. Dissent (Scalia): EPA's interpretation of the discretion conferred by the statutory reference to "its judgment" is not only reasonable, it is the most natural reading of the text
         i. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron*
            1. Because the statute is ambiguous, the EPA should get *Chevron* deference (*which is not a bad argument per Wex)
   3. **Reviewability** [focus of our discussion]

a. SCOTUS: Statute calls for the EPA to make a judgment, and the EPA has not said anything about whether they have made a judgment
    i. This would have been a different case if the agency had said: "We simply decline to make a judgment at this time" – or – "Because we do not want to interfere with international efforts, we decline to make a judgment" (but Wex thinks the latter might have still been invalid for this Court)
    ii. **Rule**: If an agency receives a rulemaking petition in a case where the statute looks like this, it has to do one of three things:
        1. Make a judgment that X is harmful and regulate
        2. Make a judgment that X is not harmful
        3. Give a reasonable explanation for not making a judgment
            a. Court does suggest that scientific uncertainty may be a valid reason for not making a *judgment*
                i. But the majority insists that is not what the EPA did here – they used science simply to say they will not *regulate*
    iii. Holding: EPA has not done Option 1 or 2
        1. *Maybe* they did Option 3, *but* the policy reasons given (China and India, e.g.) were not reasonable because they were not connected to the statutory text
            a. Therefore the EPA acted arbitrary and capricious
            b. **Problem**: It is not clear why the decision not to make a judgment was divorced from the statutory language, given that the statute does not have factors
b. Dissent (Scalia): Nothing in the statute requires the agency to make a judgment and the agency did not make a judgment
    i. "I am willing to assume, for the sake of argument, that the Administrator's discretion in this regard is not entirely unbounded – that if he has no reasonable basis for deferring judgment he must grasp the nettle at once" – so the agency has to have some reasonable basis/explanation for not making a judgment if asked [and that he is willing to assume this is controversial?]
        1. But the agency has done that here – they have put forth perfectly valid policy reasons which are legitimate ones for an agency to decide not to make a judgment in the first place
            a. *Although* they are not fine reasons not to regulate once a judgment of harm has been made
    ii. "The statute says nothing at all about the reasons for which the Administrator may defer making a judgment – the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various 'policy' rationales that the Court criticizes are not 'divorced from the statutory text,'

except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion

1. The reasons the EPA gave are surely considerations executive agencies regularly take into account (and ought to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy
    a. There is no basis in law for the Court's imposed limitation" (and Wex thinks he is right about this)

iii. *Chevron* Discussion:
1. Court suggests that there is no "extraordinary circumstances" exception, as one might have thought under *Brown v. Williamson*
    a. And this is a fairly important point from this case

iv. Did this case change administrative law?
1. Ron Kass: This case ignored all administrative law precedent by requiring an agency to give an explanation rooted in the statute if they want to not act
2. Typical understanding before this case (and what Scalia is saying): If the agency does not want to make a judgment, it does not have to
    a. An agency can decide not to make a judgment for whatever reasons it wants

v. Take Aways:
1. Maybe nothing – maybe this is just a greenhouse gases case
    a. It seemed as though the EPA said way too much and this caused the Court to think that the agency did not know what it was doing
        i. Normally agencies respond to petitions for RM by just saying: "No"; but here the agency elicited comments and then wrote a big long explanation – so maybe this explains the perplexingness of the opinion
            1. Incentive to say nothing at all – rather than yapping about why you are *not* going to regulate
    b. To the extent anything new is going on in this case, maybe it is because it is a very specific issue
2. It will probably be used in the future to argue that the Court has heightened the review standard somewhat for denials of RM petitions
    a. Whereas previously the review was very narrow and deferential
3. If you have a statute like this that conditions an agency's decision on harm, need, etc., and someone then asks the agency to regulation, the agency must do one of the three options
    a. And Option 3 is a bit of an innovation
        i. The reasonable explanation will be given a hard look to ensure it is connected to the statute's text
            1. *But* because we do not know the scope of "connected to the statutory text," the influence of the case is unknown . . .
                a. Here, there was no connection to the statutory text because the policy reasons given seem like they go to the issue of whether the EPA would regulate *even if* they made a judgment of harm

b. A classic agency explanation is: "We are not going to make a judgment right now because we are too busy and have other priorities" . . . would the Court say this reason is <u>not</u> connected to the statutory text?
    i. We don't know
    ii. If so, then this would be a really big case

4. **<u>Key Remaining Q</u>** → What reasons would suffice for *not* making a judgment?
    a. We know that "science is uncertain" <u>would</u> suffice
    b. We know that policy reasons that look like they are really about the decision to regulate or not, even if a harm was found, <u>would not</u> suffice

VI. <u>APA § 701(a) & Reviewability for Agency Action Summary</u>

a. § 701(a)(1) – review is precluded *if* a statute precludes review
    i. Start with a presumption of reviewability of agency action
        1. But, if a statute clearly and convincingly bars review, then no judicial review
            a. If a claim is a constitutional one, the court will mandate a clear statement – very explicit
        2. *Johnson v. Robison* teaches that a court will likely do whatever it can to allow judicial review
    ii. Issues:
        1. *Gott v. Walters* – whether preclusion of an agency's decision under a law it administers applies to the agency's interpretation about something the APA requires
            a. Yes – these decisions are precluded
        2. *McNary* – channeling statutes
            a. A channeling case is different than a complete bar
                i. Need to consider whether the place review is channeled will provide for meaningful review

b. § 701(a)(2) – review is precluded *if* a statute commits discretion to the agency
    i. Excess delegation is checked by the nondelegation doctrine
    ii. If you have a lot of discretion given to the agency, then there might be situations where the agency can act (i.e., not violating the delegation doctrine), but there will not be review
    iii. **Three Formulations of the Test**:
        1. § 701(a)(2) kicks in when there is "no law to apply"
            a. Notion that the discretion to the agency is so broad that the court cannot apply any law
            b. Theoretically though, there is always some law to apply (Constitution, APA's arbitrary and capricious standard, e.g.), so the Court cannot mean this in a literal sense
                i. Maybe they mean "not much law to apply" – or – "no meaningful standard" (*Heckler*)
        2. § 701(a)(2) kicks in when we see certain words that signal Congress's intent to preclude review
            a. When we see a word like "deem", that is Congress telling the Court that they do not intend for the Court to review the decision
        3. § 701(a)(2) kicks in when we recognize certain categories where judicial review has always been precluded
            a. Scalia's approach in which categories still exist from pre-APA
                i. Ex: national security, prosecutorial discretion

b. Big Q → What categories are there under this approach and how do you determine if any category exists in a particular case

Standing

I. Standing is about *who* can bring the suit – whether P is the proper plaintiff
   a. Standing is a requirement for every lawsuit in federal court
      i. It is generally <u>not</u> an issue when you have a *private* law claim
      ii. In the *public* law context – when someone is suing an agency – standing can get tricky
   b. Early on, the Court analyzed the issue of standing in terms of whether the government had infringed on a legal right of the plaintiff
      i. <u>Legal Right Test</u>: Did the statute give P some right that the agency infringed upon?
         1. Only then would there be standing
   c. This changed in 1970, when the Court decided that constitutional standing does <u>not</u> require looking at whether there is a legal right that was infringed (*Data Processing v. Camp*)
      i. You <u>do not</u> look to whether P was injured in a particular way that Congress was trying to protect when you are asking about Article III constitutional standing
      ii. You <u>do</u> look at whether P was actually harmed – whether they are worse off than before – independent of any statute/legal right
         1. And this injury could be physical, economic, aesthetic, informational (i.e., I deserve to have this information, and I do not have it any more)

II. **Constitutional Standing** → Comes from Article III, which limits the federal courts to hearing cases and controversies
   a. <u>Requirements</u>:
      i. **Actual Injury in Fact** – the injury must be concrete and particularized (to you), actual and imminent
         1. <u>Not</u> hypothetical or general
      ii. **Causation** – the injury must be "fairly traceable" to the agency action at issue
      iii. **Redressability** – the injury will likely be redressed by a favorable decision
   b. These requirements <u>cannot</u> be overcome by statute because they are constitutional
      i. Ex: "Anyone can use OSHA, regardless of whether they were actually injured by a workplace" – Congress cannot do this

III. **Prudential Standing** → Created by courts
   a. <u>Requirement</u> (that we are worried about):
      i. **Zone of Interest Test** – interest sought to be protected by P has to be arguably within the zone of interest to be protected by the statute or constitutional guarantee in question
         1. Dicta: The test might have enacted the legal right test – that the Court got rid of – right back into the law
         2. It is not clear how much "bite" this test actually has/what it requires …
            a. Ex: *Data Processing v. Camp* (U.S. 1970): banks can sell data processing systems, so now data processing system companies are mad because they have to compete with the banks – this suit ***is*** within the zone of interest of the Banking Act, which was clearly supposed to limit what banks could do so that other companies would be protected for what they do
            b. Ex: *Clarke v. Securities Industry Assn.* (U.S. 1987): banks can sell securities (same type of case as *Data Processing*) – this suit ***is*** within the zone of interest, acknowledging that the zone of interest test has not proved self-explanatory
               i. <u>The zone of interest test denies standing only if a plaintiff's interests are so marginally related to or inconsistent with the purposes of the statute that it cannot reasonably be assumed that Congress intended to permit this type of suit</u>

ii. Court noted that the test is <u>not</u> "especially demanding," and does not require an indication of congressional intent to benefit the plaintiff

c. Ex: *American Postal Workers Union* (U.S. 1991): postal service waived its monopoly over urgent letters; postal workers union sued on the basis that if you open this service to FedEx that will harm our members in that there will not be enough work for them – this suit ***is not*** within the zone of interest because the statute was intended to protect the postal service revenue and integrate the country to ensure all areas were served by the postal service (i.e., not to protect postal workers) . . . therefore, no standing

i. Court analogized the case to a hypo that Scalia used in *Lugan* → image an agency does not have an "on the record" hearing when it is supposed to and someone sues – can the company that has the contract to do the transcribing of hearings sue on the grounds that they lost transcribing contract money?

1. Of course not – they were not the company intended to be protected by the "on the record" hearing requirement (i.e., the parties were)

ii. Eight Amendment Example → imagine someone is publishing a book on the life of a convicted criminal who is on death row and the criminal does not want to challenge his sentence, but the publisher wants to – can he?

1. Of course not – the Eight Amendment is not about protecting publishers who want to make money off of writing books

3. It is not entirely clear whether this is a general prudential requirement that courts have come up with in order to generally limit their availability to Ps or whether it is specifically tied to/a requirement of APA § 702

a. If it is just a § 702 requirement, then it only applies to cases involving agencies and statutory challenges to agency action (as opposed to claims based on the Constitution or to parties not covered by the APA (i.e., Congress, the President))

i. This is because § 702 talks in terms of statute – "within the meaning of the relevant statute"

4. **<u>Note</u>**: *If* there is a citizen suit provision in a statute (as almost all environmental law statutes have) – "any citizen can bring a suit to challenge the EPA's decision on the Clean Air Act," e.g. – then the zone of interest does <u>not</u> apply, ***or*** it is expanded to include everyone

IV. Some of the standing cases are hard to reconcile, but they may just be irreconcilable . . .

a. Ex: *Sierra Club v. Morton* (U.S. 1972): Causal Link: U.S. Forest Service approved a resort in CA → Sierra Club claims this will hurt ecology and scenery → Thus, Ps will suffer an injury

i. SCOTUS: No standing because Sierra Club did not assert that any member actually used Mineral King, where the resort was planned

1. <u>"Injury in fact" requires more than an injury to a cognizable interest</u>

a. It requires that the party seeking review be among the injured

b. Ex: *United States v. SCRAP* (U.S. 1973): SCRAP challenged the ICC's approval of across-the-board increases in railroad shipping rates on the grounds that the ICC had unlawfully failed to prepare an environmental impact statement assessing the impact of the rate hike on air pollution and solid waste

i. Causal Link: No EIS → Increased rates → Increases the cost of recycling → Increases pollution and litter → Injury to the parks in the D.C. area → Injury to Ps because they use the parks in the D.C. area

1. Seemingly attenuated link

ii. SCOTUS: Standing because Ps claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources of the D.C. area
   1. Re: Injury in Fact:
      a. Clear that the standing requirement of injury in fact is <u>not</u> just about economic harm – it also includes environmental, aesthetic, etc.
      b. P will <u>not</u> be denied standing just because a lot of people share the same injury
      c. P does <u>not</u> have to have that big/serious of an injury to get standing . . . ***but***, P has to be among the injured (*See SCRAP*; *Cf. Sierra Club*)
   2. Court found that the causation requirement was satisfied – the "fairly traceable" standard was met
      a. Which is a bit remarkable given how many seemingly attenuated steps there are

c. Ex: *Simon v. EKWRO* (U.S. 1975): IRS previously gave favorable tax treatment to hospitals who gave generally free services to people who could not pay; IRS later changed their position so that all you had to do to get this favorable tax treatment is provide free ER services (not free services generally); organizations representing indigent people sued on the grounds of violation the IRS code and APA § 553 for failing to go through notice and comment
   i. Causal Link: IRS Revenue Ruling → Encourages hospitals to decrease the amount of free care → Hospitals did reduced the amount of free care → Ps were denied free care
      1. Might be reasonable to think this causal link is stronger than the one in *SCRAP* (but SCOTUS disagreed)
   ii. SCOTUS: No standing to challenge the legality of the IRS Revenue Ruling
      1. Denial of treatment <u>does</u> constitute an "injury in fact" [injury]
      2. *But*, it does <u>not</u> follow from the allegation that the denial of access to hospital services in fact results from the IRS Revenue Ruling [causation]
      3. SCOTUS expressed doubt that granting Ps the relief they sought would redress the injury that they alleged [redressability]
         a. It is speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability of respondents of the medical care they sought

V. <u>Purposes of the Standing Doctrine</u>:
   a. To improve efficiency of the federal courts
      i. Avoiding court clogs, e.g.
   b. SOP – Idea that the judicial power is a limited thing, and we want to keep it closely cabined so it does not start aggrandizing and infringing on the other branches
      i. If there is no standing doctrine, then courts can stand in general superintendence over Executive and Legislative Branch action, e.g.
   c. To improve decision making by encouraging zealous advocacy
      i. Kennedy: Requiring Ps to have plane tickets might seem trivial, but standing is not just an empty formality
         1. Standing preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action
   d. To prevent third parties – without a stake in the outcome – from stealing the case from someone who is actually injured
      i. If this were to happen, the actual injured party would be stuck with the court's decision from the unaffected, third party's case

VI. **<u>KEY</u>**: Because the standing doctrine is manipulable and sometimes the cases are hard to reconcile, always keep in mind the purposes of the doctrine

a. Relate standing questions back to the purposes when predicting the outcome of a case
    i. Ex: "This is a case where standing should be denied on the basis of the third purpose," e.g.

VII. Ex: *Lugan v. Defenders of Wildlife* (U.S. 1992): Ps challenge a rule promulgated by the Secretary of the Interior interpreting the Endangers Species Act in such a fashion as to render it applicable only to actions within the U.S. or on the high seas; Ps' claim to injury is that the lack of consultation with respect to certain funded activities abroad increases the rate of extinction of endangered and threatened species

a. When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred or proved in order to establish standing depends considerably upon whether P is himself an object of the action (or inaction) at issue
    i. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it
    ii. When, however, P's asserted injury arises from the government's allegedly unlawful regulation (or lack of) of someone else, much more is needed
        1. When P is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish

b. The desire to use or observer an animal species, even for purely aesthetic purposes, ***is*** undeniably a cognizable interest for purpose of standing . . . ***but*** the injury in fact test requires that the party seeking review be himself among the injured
    i. Essentially Ps need to show, through affidavits, that they were actually planning to go back in fact (i.e., had current plans) to see these endangered animals – that they already bought the plane tickets, e.g.
    ii. <u>Such "some day" intentions – without any description of concrete plans or indeed even any specification of when the some day will be – do not support a finding of the "actual or imminent" injury that our cases require</u>

c. **Standing Theories Proposed**:
    i. The fact finder could reasonably conclude that Ps, based on affidavits and testimony, would imminently return
        1. Court rejects this "some day" allegation
        2. (Blackmun thinks this is all you need to show at this stage of litigation)
    ii. Ecosystem Nexus – any person who uses any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located a great distance away
        1. This theory could have strong (all ecosystems are interconnected and therefore will all be harmed) or weak (adjacent ecosystems will be harm) versions
        2. Court: Precedent teaches that P claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it
    iii. Ps are harmed because the object of their interest is harmed
        1. Animal Nexus – anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing
        2. Vocational Nexus – anyone with a professional interest in such animals can sue
            a. Under either approach, as soon as the animal that you are interested is harmed, people who are interested in that animal are harmed at the same moment
        3. Court: It goes beyond the limit and into pure speculation and fantasy to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection

d. Procedural Injury
    i. Court of Appeals found that respondents had standing because they had suffered a procedural injury

1. The injury in fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law
    a. That is, the law gave all persons a procedural right to insist that there by consultation on international projects, so any citizen should be able to sue to ensure that the government is following the correct procedures

ii. SCOTUS <u>rejects</u> this view
    1. **We have consistently held that P raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him from than it does the public at large – does <u>not</u> state an Article III case or controversy**
        a. <u>Examples where SCOTUS found *no* standing</u>:
            i. Where a tax payer challenged the propriety of certain federal expenditures
            ii. Where a citizen sued saying Justice Black's SCOTUS appointment violated the ineligibility clause
            iii. Where a tax payer challenged the government's failure to disclose expenditures of the CIA in violation of the Constitution
            iv. Where a citizen claimed it was a violation of the incompatibility clause for a member of Congress to hold a reserve position in the military
            v. Where a citizen sued to prevent a condemned criminal's execution on Eight Amendment grounds

            . . . These are all just general grievances by a citizen that the government has not done what it is supposed to do ≠ standing

            . . . P <u>must</u> be the person who is actually and specifically injured because of the situation complained about = standing
                1. Ex: If your SCOTUS case was decided 5-4 and Justice Black was the 5th vote against you, then maybe you could have standing to allege he was appointed against the ineligibility clause

e. **Procedural Rights Important in One Way Though** (FN 7, not in the book)
    i. Causal Link: No consultation requirement rule → If you do not have consultation, then (i) the U.S. agencies will fund the project and (ii) there will be no ameliorating measures suggested by the Dept. of the Interior → Leads to bad projects being built that harm animals → Harm Ps
        1. <u>No</u> link/causation requirement is required from the actual procedures claimed to have been violated and the alleged immediate change in the behavior of the agency (so between the first two items)
            a. "Procedures → Agency changes behavior → Injury"
                i. <u>Do not</u> need to show: "Procedures → Agency changes behavior"
                ii. <u>Do</u> need to show: "Agency behavior→ Injury"
    ii. So, although SCOTUS has expressly declined to examine whether proper execution of the omitted procedure will likely prompt a modification of the government's act (*see Lugan* n.7), the Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonable risk of increased injury to its particular interest

1. Think about the *Chocolate Manufacturers* case: the causal link required would be that if the agency takes chocolate milk off the list → chocolate manufacturers are injured
    a. P did <u>not</u> have to prove that if chocolate had been in the proposed rule (i.e., proper notice had been given) that that would have in fact led the agency to keep chocolate milk

iii. Without this rule, Ps are never going to be able to show that the omitted procedure, had it been done, would have resulted in a different agency action
1. Without *Lugan* n.7 Ps would have an incredibly hard time getting standing in these procedurals challenge cases

iv. Justice Blackmun's critique of Scalia's approach to procedural injury standing:
1. Ironically, this Court has previously justified a relaxed view of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review (see *Chadha*). The Court's intimation today that procedural injuries are <u>not</u> constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our common understanding of what activities are appropriate to legislatures, to executives, and to courts
    a. Notion that the Court struggles to justify the difference in treatment between things like the *legislative veto* (which is unconstitutional because there is no presentment and bicameralism) – **and** – *agency action* (which looks like legislative power, but it is OK despite no presentment and bicameralism)
    b. NDD tells us that it is OK for Congress to delegate lots of power to agencies because we do not have to worry about agency power being unchecked because there is judicial review of agency action
        i. <u>But</u>, if judicial review is not available in a lot of cases because there is no standing, then this check is no longer there
    c. Doesn't the *Chevron* Doctrine, deference, and strict standing make us worried all over again then?

f. **Redressability** (only four justices (a.k.a not a majority))
i. Ps failed to demonstrate redressability
1. Since the agencies funding the projects were <u>not</u> parties to the case, the District Court could accord relief *only* against the Secretary
    a. He could be ordered to revise his regulation to require consultation for foreign projects
        i. But this would <u>not</u> remedy Ps' alleged injury *unless* the funding agencies were bound by the Secretary's regulation, which is an open question
    b. Stevens (concurring): We must presume that if this Court holds that the Endangered Species Act requires consultation, all affected agencies would abide by that interpretation and engage in the required consultations (even if they are not before the Court in this suit)
    c. Blackmun: The Secretary/Government has previously taken a contrary position – that he thought the promulgated regulations were binding on the agencies
        i. So the Government should <u>not</u> now be able to change its position to say that the agencies *do not* have to consult
2. U.S. agencies generally supply only a fraction of the funding for a foreign project (10%), and Ps have <u>not</u> shown that the projects they have named will either be suspended or do less harm to listed species if that fraction is eliminated

a. Stevens: It is <u>not</u> merely speculative that foreign governments will change their behavior to get the U.S. money (even if it is a smaller fraction)
b. Blackmun: It is *less* about cutting off the funding, and *more* about whether the Dept. of the Interior can offer suggestions or guidance that will help ameliorate the harm to the species when the projects do go forward

g. Are the purposes of standing furthered or undermined by the Court's decision in *Lugan*?
    i. *Lugan* might further the purposes of standing in that if Ps are too attenuated from what is actually happening, they would not be the best people to bring the claim in the most zealous manner
    ii. Some people think that *Lugan* was underinclusive and cut too many proper Ps out
        1. If Ps are concerned enough to bring the case, then maybe that should be sufficient
    iii. We might have concerns that a big interest group might just find a P and the case is not really about P, but more about the interest group
        1. Maybe interest groups would be the more zealous advocate
        2. Maybe interest groups will prevent individual Ps, more directly affected, from bringing cases
        3. See Roberts' dissent in *Mass v. EPA*: I would reject these challenges as nonjusticiable
            a. The Court's standing jurisprudence recognizes that redress of grievances of the sort at issue here (greenhouse gases/global warming) is the function of Congress and the Chief Executive, not the federal courts
                i. Notion that when big interest groups bring cases about issues like this, they should be pushed off to the legislature as much as possible

VIII. In numerous standing cases, SCOTUS has been called upon to decide whether the causal connection between an alleged violation and alleged injury is too remote

a. Ex: *Linda R.S. v. Richard D.* (U.S. 1973): mom claimed that she was injured in her ability to collect child support by the fact that a TX statute had been construed to criminalize the failure of a father to support his legitimate children but not to address the failure of a father to support his illegitimate children; (mother also complained that the statute treats people unequally, but the Court dismissed that as too abstract a concern – need something more concrete)
    i. <u>Causal Link</u>: TX statute distinguishing what support a father has to pay → Cannot prosecute the father → Father does not have to pay P for child support → P has less money (i.e., an economic injury)
    ii. <u>Court</u>: No standing because even if the father were prosecuted and jailed, the prospect that prosecution will result in payment of support can, at best, be termed only speculative (i.e., father would be deemed a criminal, but mother would not in fact get money)
        1. No causation/redressability
b. Ex: *Warth v. Seldin* (U.S. 1975): low-income and minority residents challenged restrictive zoning practices of an exclusive suburb on the grounds that they were denied equal protection of the law
    i. <u>Causal Link</u>: Suburbs exclusive zoning practices → Ps cannot move to the suburb → Ps end up living in worse conditions
    ii. <u>Court</u>: No standing because Ps cannot prove that absent the restrictive zoning practices there is a substantial probability that they would have been able to move into the suburb, and that if the Court affords the relief requested that the asserted inability of Ps will be removed
        1. No causation/redressability

c. Ex: *Arlington Heights* (U.S. 1977) (follow-up case): proposed developer of a federally subsidized low- and moderate-income housing development challenged as racially discriminatory the refusal of the village to rezone the chosen site to allow the development; he said that people were going to move into these houses, but for the zoning practices; P was substituted into the case as someone who said he was going to buy a unit from the developer
    i. Court: Standing – enough there to make out the causal requirement for standing
d. Ex: *Allen v. Wright* (U.S. 1984): Court denied standing to the parents of black children attending public schools who sought to challenge the IRS's implementation of its policy denying tax exempt status to racially discriminatory private schools
    i. Causal Link: IRS gives tax exempt status to racially discriminatory private schools →
        1. → Government broke the law here
            a. Court: Rejected as too abstract
                i. This argument generally loses
        2. → Parents of black children suffer stigmatic injury through the discrimination itself
            a. Court: Rejected as too abstract
                i. Any black parent in the country could raise this claim, so it is not particularized enough
        3. → If you have this policy, then private schools will discriminate → White parents will send their children to the cheaper private schools → Decreases the integration of the public schools → Harms black parents and children because they will end up attending segregated schools
            a. Court: Insufficient to make out standing
                i. Ps' frustration in attempting to secure education for their children in desegregated public schools was not "fairly traceable" to the challenged conduct of the IRS
                ii. There is a lot missing in terms of proof in a lot of Ps' links:
                    1. Uncertain how many racially discriminatory private schools are in fact getting tax exemptions
                    2. Speculative whether withdraw of a tax exemption would lead the school to change its policies
                    3. Speculative whether any given parent of a child attending such a private school would decide to transfer the child back to public school as a result of any changes in policies made by the private school
                    4. Speculative whether in a particular communicate a large enough group of parents and schools would reach a collective enough decision to have a significant effect on integration in public schools
    ii. NOTE: *Allen* & *EKWRO* seem to suggest that there is wariness about causal links for standing in tax policy cases
e. Ex: *Duke Power Co.* (U.S. 1978): Act capped liability for nuclear power plants → Encourages/Increases the likelihood of power plants → (i) Low level radiation and thermal pollution of water; (ii) Risk of future injury – it could fail in the future (i.e., standing based on a risk of future harm); (iii) People will be scared (i.e., present fear of the future injury = a current harm)
    i. Court: Standing
        1. Key was the District Court's finding of causation between the cap and the increased building of power plants (i.e., the cap actually did lead to increased construction)
        2. SCOTUS based its decision of injury in fact on (i), and did not consider whether the risk of future injury or whether the current fear of future injury counted as injury in fact for standing

f. **KEY** → Use these cases to make arguments for or against standing

IX. Associational Standing

a. On what basis can an association (as opposed to its members) have standing to sue?
    i. Ex: *Warth v. Seldin* (U.S. 1975): There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities *the association itself* may enjoy
        1. In attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties
    ii. What if a statute made it harder for an association to get members?
        1. Hypo Statute: "All associations have to file disclosure reports with the government noting its members' occupations"
            a. Association challenges this on First Amendment grounds as forced speech
                i. This is not a question of associational standing because the Association is bringing the claim on its own behalf
                1. *Hunt*'s three-part test is not required

b. *Hunt*'s Three-Part Test:
    i. An association has standing to bring suit *on behalf of its members* when:
        1. Its members would otherwise have standing to sue in their own right;
            a. Association needs to allege with sufficiency that at least one member is suffering an Article III injury
        2. The interests it seeks to protect are germane to the organization's purpose; and
            a. Usually this is not a big issue
        3. Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit
            a. The individual P does not need to be part of the suit – OK to just have the association as the named party
            b. *But*, if some individual member is seeking damages, that is a different case and he has to bring the suit himself
    ii. Threshold → The thing has to actually be an association (so a four-part test)
        1. Ex: *Getman v. DEA*: Getman and High Times Magazine petitioned DEA to make a rule
            a. Court: High Times is not an association – it does not have members, only subscribers

X. State Standing

a. Ex: *Mass v. EPA* (U.S. 2007): If a state is the plaintiff, it might be easier to get standing than if the plaintiff was an individual . . . but there was not much more discussion re: why? how much easier? etc.
    i. The fact that the plaintiff in this case was a state was considerably relevant
        1. "The court has previously recognized that states are not normal litigants for the purposes of invoking federal jurisdiction"
        2. Massachusetts owns a great deal of the territory alleged to be affected (which reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power)
    ii. Dissent: Relaxing Article III standing requirements because asserted injuries are pressed by a state has no basis in our jurisprudence, and support for any such special solicitude is missing in the majority's opinion
        1. Under the law on which petitioners rely, Congress treated public and private litigants exactly the same
    iii. Standing Comparison:
        1. Injury

a. **Majority**: Global sea levels are rising and beginning to swallow MA land (faster than it would without greenhouse gas contribution) – so MA coastal land is being injured by the greenhouse cases
b. **Dissent**: This cannot be a particularized harm in the way that standing requires – it is an injury based on increased temperatures across the globe generally . . . this is an issue for the legislatures
    i. Argued that the loss of land is a conjecture, that the models are inexact, and that 100 years is not imminent
        1. Should "imminence" change based on the type of case we have?

2. Causation
    a. **Majority**: Cars cause a lot of greenhouse gases, even if it is not the main source – U.S. car contribution is significant
        i. Moreover, small effects on the coastline are enough
    b. **Dissent**: MA needs to make a more specific allegation – can MA show that it is the U.S. car contribution to greenhouse gases that is actually affecting the MA coastline?
3. Redressability
    a. **Majority**: The Court can make orders that will slow down global warming, and slowing it down is enough for the majority
        i. All MA needs to do is show that a regulation will slow or reduce greenhouse gases and global warming, and that is sufficient for standing
    b. **Dissent**: MA needs to make a more specific argument – MA has to show how decreasing the greenhouse gases from cars will likely redress the specific injury that is claimed, which is injury to the coastline

iv. Massachusetts won, and this was a relatively surprising case

MISC.

- Agencies are:
  - Controllable by Congress in certain ways
    - Created by Congress
  - Controllable to some extent through the President (appointment, removal, Executive Branch)
  - Controllable to some extent through the courts (judicial review of agency decisions)

- Scalia is a real executive power person → Pro-Executive Branch

- APA applies even if the statute does not mention the APA
  - APA itself mandates that its provisions govern certain administrative proceedings

- ***PCAOB***
  - The statute did not say that the President cannot remove the SEC Commissioner – there was no "for cause" limit in the statute – just something everyone assumed to be true
    - Lawson: Everyone involved in the case stipulated to the fact that the SEC was an independent agency, even though there was nothing to that effect in the statute
      - Everyone just assumed the SEC Commissioner was removable only for cause
  - Generally, the things we assume to be independent agencies are independent agencies even if there is nothing in the statute that specifies that
  - Take away could be that if we see a Commission (that looks like the SEC) there is a pretty strong presumption that it is an independent agency
    - Assume independent agency
    - Imply a "for cause" removal restriction (if the statute is otherwise silent)

- § 553 Exceptions
  - Do not forget about the smaller exceptions (even if there is another major exception you are also dealing with)!

- *Mass v. EPA Problem*: (a) Someone petitions the agency for a rule, (b) Agency responds and lists the reasons why it is not making a rule, (c) Agency's response arguably does not correspond to the statute
  - There is an incentive to say nothing at all, rather than yapping about why you are not going to regulate

- § 555(e): An agency is always supposed to respond to a petition for RM
  - If they do nothing at all, might argue the agency action was unreasonably delayed under § 706(1)

- NEW RULE CONSIDERATIONS
  - Will the rule undermine any purposes (of the NDD, of standing, etc.)?
  - Will the rule incentivize or disincentivize certain procedures?
  - What are the advantages and disadvantages?
  - What exactly does it change? How is it different?
  - Is there anything ambiguous or unclear about the rule?