### Issues in Every Question

- Statutory InTheories of Judicial Behavior

- CBA

- Economic Factors

- Scientific Factors

- Political Factors

- Delegation doctrine (only been used twice)

- Chenery Principle

- “Dogs Not Barking”/Acquiescence interpretation

**Dynamic Statutory Interpretation**

* + First, understand the assumptions underlying the original directive, including purpose. Then figure out how the statute can best meet its goals in a world that is not that of the framers
    - Dangers:

1. judges may not be all that good at figuring out when new developments justify deviation from a clear statutory directive
2. Approach does not adequately repect the constitutional and other safeguards built into lawmaking process
3. May undermine the interest in legal stability and predictability

**Questions to ask when interpreting**

* Is it ambiguous?
* How do we know when the statute is actually defective?
* What is the role of the judge?

**Do Not Drive Results**

**Intent**

## Hierarchy of Legislative History

### Criticisms of legislative history

* Murky
* Open to manipulation
* “Looking over a crowd and picking out your friends”

|  |  |  |  |
| --- | --- | --- | --- |
| Theories of Interpretation |  |  |  |
| **Theory** | **Explanation** | **Use** | **Pros** |
| **Intentionalism** | Search for the ***specific intent*** of the legislature on this issue |  | Legislature did not *intend* for women to serve on jury |
| **Purposivism** | What would the legislators have done if they confronted this question? | Legislative History  Subsequent/related Legislation | In modern context, those legislators would likely want women to serve on jury |
| **Textualism** | Precise statutory language | Statutory Text  Dictionaries |  |
| **New Textualism** | Search for the “***ordinary meaning***” of the text in context |  | Predictable |
| **Positivist** | Content of the law is exhausted in clear, explicit, definite enactments; ***say what you mean, mean what you say*** | Uses Syllogistic reasoning |  |
| **Pragmatist** | Individual justice is worth giving up objectivity and predictability; ***what is the most functional solution?*** |  |  |

|  |  |  |
| --- | --- | --- |
| Substantive Canons |  |  |
| **Rule** | **Explantion** | **Example** |
| **Rule of Lenity** | Criminal statutes, ambiguity is viewed most favorably for the D | Plane theft, is it a vehicle? |
| **Remedial Purposes Canon** | Remedial Canons are construed broadly |  |
| **Constitutional Avoidance Canon** | Avoid interpretation of statutes that render them unconstitutional if other interps. are permissible |  |
| **Federal Clear Statement Rule** | Certain interests require a “clear statement” by CG to be affected | MO statute requires judges to retire @ 70; ADEA prohibits discrimination based on age. Because judges weren’t explicitly mentioned in exceptions, they’re not included |
| **Presumption Against Federal Preemption** | Federal statutes are construed so as not to preempt state law, where possible w/o clear statement (weaker than CS^ rule) |  |
| **Presumption against Retroactivity** | Statutes have no retroactive effect burdening private rights unless CG clearly states intent |  |
| **Void for Vagueness** | Crim statutes are void on their face if too vague to give fair warning |  |
| **Repeal by Appropriations** | Appropriations statute will not be read to modify a substantive authorization unless done so explicitly | Continued funding of TVA Dam would impliedly repeal the ESA |
| **Absurdity** | Read statutes to avoid absurd results  “need not border on the luncatic” | Escape a burning jail |

|  |  |  |
| --- | --- | --- |
| Linguistic Canons |  |  |
| **Canon** | **Explanation** | **Example** |
| **Ejusdem Generis** | When a list is followed by a general term, the general term must be restricted to the same class of the specific word it follows  ***(has a catch-all)*** | Auto, truck, wagon, moto, any other vehicle no for rails  Does not include planes  McBoyle v. US |
| **Catch-Alls** | Catch-alls should not be artificially confined |  |
| **Noscitur a Sociis** | When a Word in a list is ambiguous, its meaning is determined by the words in the rest of the list  ***(No catch-all)***  **Using**: define/deny a category | *Holy Trinity*   * Majority defines excepted category as brain-toilers; priests fit * Dissent could’ve defined categories as artists and domestic servants; priests don’t fit |
| **Lists are not always meant to be exclusive** |  |  |
| **Expressio** | Items not on the list are assumed not covered (to include one is to exclude another) |  |
| **Plain Meaning** | Unclear language should be ordinary everyday meaning as ***understood by avg person on street @ time of enactment*** | Tomato may be a fruit to a botanist, not ordinarily though |
| **Avoiding Redundancy** | Every word should be given its own meaning | Falsely made, forged, altered, or counterfeited |
| **Presumption of Uniformity** | Words should be construed to mean the same thing throughout the statute whenever possible  ***Caveat: Broad terms*** | Using firearm in drug deal is ambiguous in one section; later section lists barter as one use |
| **Terms of Art/Common Law Terms** | If a statute uses a common law term, it carries with it the common law meaning | Falsely made in synonymous with forged |
| **Whole Act Rule**  **“In Pari Materia”** | Words should be unanimous throughout a statute |  |
| **Whole CODE** | Statutes addressing the same subject matter should be read as if they were ***one law*** |  |

**Holy Trinity (Classic Statutory Interpretation; (Strongly Purposivist)**

**Facts**: British pastor came from England. Statute prohibits assiting the migration of foreigners under contract “to perform labor or service of any kind.”

**Issue**: Is the preacher/church in violation of the statute?

**Texutal Analysis**

* **EXPRESIO**: By specifically stating one thing is to exclude others
  + **Argument**: exceptions are listed for actors, artists, lecturers, singers, and domestic servants
    - Suggests preachers are not to be excluded
* **Ordinary Meaning**: Words should be read with their ordinary meaning
  + **Argument**: Labor implies manual labor, not preachers
* **Title of the Act**: title suggests it does not apply to preachers; however, “the title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.”

**Legislative Intent**

* **Purpose of Law**: regulate the influx of cheap foreign labor for railroad work
* **Purpose of Exceptions**: those coming to this country to add cultural diversity do not threaten the domestic Labor Market

**Avoiding Absurdity**

* Surgeon letting blood in the street
* Escaping a burning prison
* Arresting the mail carrier -> interfering with deliverance of the mail

**Legislative History**

* **Senate report:** worried about manual labor; assumed bill would be construed to apply to manual labor
  + Offering an amendment would have re-opened the bill for new issues
* **House report:** trying to keep out undesirables
* **Social Context:** Court refuses to assume legislative action to act against religion without explicitly saying so

**Critiques**

* Scalia: **Cherry picking**; the ct. is picking pieces of the legislative history to support its policy goals
* **Legislative history can be manipulated** so as to secure a result that could not be achieved if proposed on the floor

**West Virgina University Hospitals v. Casey (expert witnesses)(Classic Textualism)(Scalia)**

**Facts**: WVUH employed nat’l acctg firm and 3 doctors to be expert witnesses.

**Issue:** Are fees for services rendered by experts in civil rights litigation to be shifted to losing

party, where the statute permits award of “reasonable attorney’s fees”?

**Statutory Text**: a witness shall be paid an attendance fee of $30 per day for each day

**Textual Analysis**

* Every word should be given meaning; presumption against redundancy
  + Court looks at other statutes that award both attorney’s fees AND expert’s fees. If attorney’s fees were meant to include expert fees, these would all be redundant
* It is not the place of the court to correct inconsistencies in statutory language
  + Doing so would require a policy choice by the court

**Legislative History**

* Legislative history may not alter unambiguous language so that the “intent” supersedes the language

**Legislative Intent**

* The ct should construe text to fit most logically into body of previous and subsequent law
  + Not because it is what the legislature intended, but because it is the ct’s role to make sense of the body of law

**General Dynamics v. Cline (reverse age discrimination)**

**Facts**; Company entered collective bargaining agreement so that they need not provide health coverage to employees then under 50, once those employees retired

**Issue:**  does ADEA prohibit favoring the old over the young? Or just favoring young over the old?

**Statutory Language:** forbids discrimination because of…age

**Legislative History**

* + - * + Emphasizes ending discrimination against OLD people in favor of young
        + Sponsor (Yarborough) is quoted as saying that age discrimination can go either way

Court disregards: “a singly outlying statement cannot stand against a tide of context and history.”

**Textual Analysis**

* Age means both how old you are and “his hair grayed with age”
  + Age discrimination is “naturally understood to refer to discrimination against the older.”

**Contextual Analysis**

* Ct. looks to social history; what age discrimination is understood to have meant in commonplace

**Absurdity Doctrine**

Application need not border on the lunatic to be absurd

**Public Citizen v. USDOJ**

**Facts**: President requested advice from the ABA for nominating justices

**Issue**: Does the fed Advisory Committee Act apply to these consultations?

**Statutory Language**: each advisory committee must file a charter and keep detailed minutes of meetings. Advisory Committee = any council utilized by the prez

**Legislative Intent**

* A straightforward reading of Utilize would produce somewhat absurd result
  + What if he asks NAACP for help on EEOC nominations?
  + Democratic party for advice?
* Congress had agency policy making in mind when enacting

**Smith V. United States (O’Connor)**

**Facts**: Smith traded gun for drugs

**Issue**: Did smith “use” an automatic weapon “during and in relation to a drug trafficking crime?”

**Textual Analysis**

* Dictionary definition: derive service from
* Had congress intended the narrow definition of “as a weapon,” they would’ve said
* Statute actually said use or carry; DA failed to charge with carry
  + What does the presence of carry imply about the meaning of use?
  + About legislative intent of the statute?
* Majority says that when combined with “during and in relation to” a drug crime is enough to exclude irrelevant activities such as ass scratching

**Structural Analysis**

* In the next subsection, barter is listed as one use of a firearm
  + Terms should be construed uniformly throughout

**Legislative Intent**

* Statute is to stop guns and drugs combo

**Blanchard v. Bergeron(White)**

**Facts**: Blanchard awarded 10k, jury awarded 7.5k in attorney’s fees. Later reduced to 4k per the contracted 40% contingency fee

**Issue**: Does a contingency fee cap reasonable attorney’s fees?

**12 factor test**

1. time and labor required
2. difficulty of the questions
3. skill req’d
4. preclusion of other employment
5. custom
6. fixed or contingent fee
7. time limitations imposed by client/circs
8. amount of $$ involved; results obtained
9. experience, reputation, ability
10. undesirability of case
11. nature of professional relationship
12. awards in similar circs

**Legislative History**

* 12 factor test referenced in committee report
  + Was that done so to influence later judicial construction?

Separation of Powers

* Structural support in text (Vesting Clauses)
* Separation (Autonomy) for:
* Congress
  + P can’t send them home, but can call them to session
  + Filibuster and Senatorial Holds
  + Impeachment
  + Veto Overriding
* P
  + Veto
  + Appointment/Removal
  + Nationally Elected
* Judicial
  + Life Tenure
* One Branch’s autonomy can also be it’s check/balance on another branch

### Presidential Power (Youngstown)

1. President acts with express or implied permission of congress

* Maximum authority; includes all of his power plus all that CG can delegate

1. President acts in absence of grant or denial (***zone of twilight***)
   * + Only his independent powers are at work
2. Acts incompatible with will of CG

* His Const power minus CG const power
* **Question becomes**: does the POTUS have constitutional authority to do what he is doing?

President needs some flexibility, coupled with a readiness to treat recent and considered statutory policy judgments as binding without modification

To honor statutory policies while meeting the practical needs of governance

### Presidential Supervision of Agencies

* **Vesting clause**: executive power
* **Faithful Execution Clause**: take care that the laws be faithfully executed
* **Opinions in Writing**: requiring agency opinions in writing?

Question to ask: How far reaching do/should the powers granted herein extend?

### Presidential Removal of Officers

* The President is responsible for the administration and execution of the law; he needs to be able to remove subordinates.
* Think Business
* President has information advantage
* You listen to who can fire you

**Myers v. United States**

**Facts**

* Appointee postmaster general of Oregon was forced to resign w/o advice & consent
  + Appointed with advice and consent of senate
* Senate refused permission

**Issue**

* + Whether under the constitution the president has **exclusive power of removing executive officers** whom he has appointed with advice and consent

**Rule**

Yes.

President has general administrative control over those executing the laws.

The power of **advice and consent does not impliedly extend to removals**.

**Humphrey’s Executor**

**Holding**

constitutional for CG to put cause requirements on presidential removal of members of FTC

FTC has classic structural characteristics of an *independent* regulatory agency

1. Multiple members
2. Staggered Terms
3. Political Balance

**Argument**

Independent agencies are totally independent of the President except for apptmt

Fragmented vision of executive

**Rule**: Cause restrictions are constitutional

Malfeasance

Neglect of duty

Inefficiency in office

**Morrison v. Olson (Functional) (Supersedes HE & Myers)**

**Facts**

* If AG has reasonable grounds to investigate ranking gov’t official, he applies to a special court to appoint an independent counsel
* The Independent counsel then hast he investigation and **prosecutorial powers of a federal prosecutor**
* Removal may occur only if AG has good cause
* AG Olson then went under investigation for lying to CG

**Holding**

Independent Council is an inferior officer; therefore, Ct appointment is ok

Factors for determining whether inferior

1. superior that can remove her
2. Duties are limited to prosecutions, NOT forming general policy
3. Duties are limited to certain crimes and Ds
4. Job is temporary, expires after matters are handled

Conflicts of interest would impair executive appointment

**¡Modern Rule!**

**Court reformulates constitutionality of removal test:** does a removal restriction ***impede*** the president’s ability to perform his constitutional duty?

Closer the officer lies to the president the more likely restrictions impede

**Majority argues that CG is not aggrandizing merely encroaching** b/c court has limited POTUS power not assumed it

Counter Analysis: Zero sum game, whack-a-mole

**PCAOB v. Free Enterprise Fund**

**Facts**

* SEC cannot remove board members except for good cause
* POTUS cannot remove SEC members except for good cause

**Issue**

2 levels of for cause restrictions allowed?

**Holding**

No.

2 level for cause restrictions makes it so the president is not able to determine whether there is good cause for removal of PCAOB member; he can’t make SEC determine it either

***POTUS is accountable to the people*** he needs control of his branch

Can neither ***ensure the laws are faithfully executed*** or be ***held responsible for breach of faith***

Judgment

Snip-snip no SEC->PCAOB for cause removal provision

Counter-Analysis (functionalist view of contemporary gov’t)

* Removal is not important tool of supervision
* President’s power to get something done depends on:
  + Who controls the budget/funding
  + Relationships between one agency/dept. and another
  + (Purely Political Factors)

### Legislative Veto

* Delegation with a gimme-back provision if Executive steps out of line
  + Majority of one house can invalidate executive action
  + i.e. actions must be **approved by acquiescence** by both houses
* Reigning authority in agency land

**Chadha v. INS**

**Facts:** CG uses LV to shoot down AG’s suspension of Chadha’s deportation

**Holding and Rule**: Does the legislative veto have the purpose and effect of altering the legal rights, duties, and relations of persons outside CG?

Yes

So, it requires Bicameralism

**Rule:** Congress must modify statutory delegations by the same process it makes them

**Bruff’s Rule:** incompatibility clause(can’t serve in Exec and Leg at same time)- we must know ***where legislation ends and execution begins***

### Congressional Removal of Executive Officers

* Removal
  + CG may NOT participate

**Modern Rule: (Morrison)**

* + - CG may limit President’s ability to remove with “***for cause***” restrictions ONLY IF the restrictions ***“won’t impede the POTUS performance of his constitutional duties”***
  + CG only power here is purse strings; legislative, funding, and oversight can drive someone from office(Pure Politics)

**Bowsher v. Synar (Formalist)(Burger)**

**Facts**:

Congress appointed the Comptroller General to settle discrepancies in estimates btwn CBO and their executive counterpart OMB

***CG retained a removal provision***; by joinSt resolution for usual cause

**Rule**:

CG may not play a direct role in removing exec officers, except for impeachment

* SCOTUS **rejects unitary executive theory** (that P must have direct lines and plenary power to remove all executive agents)
  + We want certain officers to be protected from at will firing? Yes, but the issue is tied to the function, not the office.

Controlling removal is controlling execution of the law

**You obey who can fire you**

### Appointments of Executive Officers

* President nominates principal officers
* CG may have inferior officers appted by ***the president, cts, or heads of depts***.
* CG creates the offices, defines their powers, and sets qualifications through Nec/Prp clause
* Anyone exercising significant authority pursuant to the laws is an officer and the appointments clause governs
* CG retains powers of investigation

**Buckley v. Valeo (Formalist)(Unanimous)**

**Facts**

* FEC gets 6 appointees
  + 2 house
  + 2 Senate
  + 2 President

**Rule**

Congress may not appoint those who execute the law

Incompatibility Clause

Agencies

How an agency interprets a statute:

• **Statutory**: the agency considers the authority that the statutes grants and the instructions that it provides to determine what actions are

required and permitted

o Ex: A detailed statutory analysis occurs in NHTSA’s 1988 refusal to amend the CAFÉ standards retroactively in order to let manufacturers

avoid penalties.

o Note Bowen: statutes not read to allow retroactive rules without clear statement.

• **Scientific**: examines the scientific data that the problem requires; examines the existing and potential technology for responding to risks

• **Economic**: assesses the costs in relation to the benefits of different alternatives

• **Political**: considers public attitudes and political preferences

• Agency must ensure that

o Regulation is in its jurisdiction (statute)

o Regulation is consistent with terms of its statute

Executive Orders – executive control of agencies

**12,866 (Executive Agencies Only)**

* OMB/OIRA acts as gatekeeper for all significant rulemakings
* Forces a CBA, risk assessment and cost-effectiveness, ***regulatory alternatives*** (including not regulating)
  + Must pick whatever choice ***maximizes net benefits***
    - ***Who decides*** what constitutes a benefit?
      1. Obama wants ***comprehensive analytic reasoning***
* Current order doesn’t require that *everything* be quantified
* Benefits must ***justify costs***, not exceed as in olden days
* Orders are:
  + - 1. Addressed to the bureaucracy
      2. Reviewed by OLC in DOJ for legality before their issuance
      3. Attempt to create no private CoA against gov’t
      4. Apply only to the extent permitted by law
      5. Binding on executive branch
* ***Consultation with OMB*** not directive by
* Provides a ***centralized review***

**12,866 2 Functions-> planning and review**

* Maximize net benefits
* Planning functions
* Review, § 6
  + When agencies do 1st proposal and 1st rule...they send w/ CBA to OMB
  + Appeals up to President, usually delegated to VP

Coordination

* + - Pick up balls dropped by agency

Nudging Agencies

* + - OMB can say, “what are you doing about XYZ?”

***Low Hanging Fruit:*** HUGE BENEFIT FOR CHEAP

* + - OMB will nudge the agency to implementing

### Doing a CBA

\*\*Note: CBA is discounted  OMB likes 7% “pure time preference”=3%

* ***Should we use the same for cost and benefits?***
* Use a distribution to measure uncertainty
* Do we want to keep the status quo?
* ***Should our CBA be offset in order to redistribute benefits?***

Constitution

* 3 Branches
  + Article I – Legislative
    - **Necessary and Proper Clause**: CG can enact laws necessary and proper to carry out its own powers AND can ***empower the other branches***
  + Article II – Executive
    - Meant to be weaker than leg
    - **Vesting Clause**: executive power shall be vested in the President.
      * vests the power to execute the ***instructions of CG***
      * Plenary power
  + Article III – Judicial

Delegation Doctrine

* “the power of the legislative…[is] only to make laws, and not to make legisltors…”
  + “…therefore there is latitude left to the executive power, to do many things of choice which the laws do not prescribe.”
* Arguments ***for delegation***
  + Increases political accountability
* Arguments ***against delegation***
  + Short term gains with ***deferred costs***
* **Constitutional Limit on Delegatgion**
  + Vesting Clause – “All legislative powers herein granted shall be vested in the CG”
    - Implies CG power may not be transferred
* **Intelligible Principle Requirement** (*Hampton*)
  + **Rule:** CG may delegate power that is legislative in nature if it provides an “intelligible principle” to ***guide the agency***
    - **\*\*\*Modern Application:** 
      * Low standard
      * **\*\*\*Ct. will read statutes to avoid a sweeping possibly unconstitutional delegation of power**
  + Too Broad of Delegation (*Schecter Poultry*)
    - Sweeping delegation to the President and private groups to implement codes of conduct (to approve anything “promoting fair competition”)
      * The delegation was deemed unconstitutional because CG vested in the POTUS a clearly legislative function ***without imposing necessary standards*** and restrictions

**Benzene (IUD, AFL-CIO v. American Petroleum Institute)**

**Facts:** CG told OSHA to provide safety standard “reasonably necessary or appropriate”

The standard “which most adequately assures, ***to the extent feasible***, that no employee will suffer material impairment of health”

Legislating in zone of uncertainty

**Holding:** To implement the standard without quantifying the risk, the secretary couldn’t call it a significant risk; therefore, the statute would make such a “***sweeping delegation of legislative power***” that it might be unconstitutional

^^Avoiding Readings that Imply Sweeping Delegations of Power^^

Due Process in Rule Making

Agency adjudication is subject to more stringent hearing requirements than agency rulemaking

***Londoner*-** depends on individual grounds; there is a right to be heard **Adjudicative facts about a party** (warrants due process)

***Bi-Metallic***- where a rule applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption **Legislative Facts about general conditions** (does not warrant due process)

**Rule**

Due process rights attach to administrative agency hearings that involved adjudication, but not to those that involve legislating

**Bruff:**

Due process applies to adjudicative facts whether the agency tries to use rulemaking or adjudication. So it applies in Chenery, but formal administrative adjudication is well above due process minima. Someone else being subjected to a precedent or a rule gets a hearing if they raise adjudicative facts.

**APA § 553 notice and comment procedure**

Notice and Comment Rulemaking

* ***Default*** process for making rules
  + Meant to be simple, flexible, fast, and open to public participation
* Purposes:
  + ***Informs*** the decision maker (agency)
  + Provides ***a clear record*** for courts on review
  + ***Fairness*** (Due Process)
* 3 stages
  + **Notice of Proposed Rule Making** (NPRM) is issued
    - Published in federal register
    - Must include:
      * Statement of the time, place, and nature of the proceedings
      * Reference to the legal authority under which the rule is proposed
      * Either the terms or substance of the proposed rule, or a description of the subjects and issues involved
  + Provide the Public **Opportunity to Comment**
    - Written comments
      * Oral comments phase not mandated, often occurs
    - Agency is supposed to consider the comments
    - If a ***change*** to the proposed rule is not a ***logical descendant*** of the original, it requires a ***new N&C*** phase
  + Issue a **Final Rule**
    - Accompanied by “**concise general statement of basis and purpose**”
      * Merged with arbitrary and capricious standard of review
        + *See* **(Covering Your Ass)**
        + Necessary procedural safeguard against arbitrary decision making
      * Big reason is to help Ct.s on review
      * Must address questions of “cogent materiality”
    - Record will also often include CBAs as well as various impact statements

\*\*Amending or Rescinding Rule is done by the same process

### Commenting to the Agency

As a lawyer, you should ask:

What are the apparent inclinations of the agency and how do those help or hurt my client?

What arguments about fact, policy, and law do I want to make to the agency?

What do I want to send the agency to bolster my arguments?

If my favored position seems unlikely to prevail, what are my fallback positions and how do I argue for them?

**United States v. Nova Scotia**

**Facts**

* + - Commissioner of Food and Drugs employed a Notice and Comment
    - Bureau of Commercial Fisheries objected on the ground that the application of uniform TTS specs to all species was not **commercially feasible**
    - Suggested alternative
    - Commissioner did not respond

**Issue**

Was the regulation valid, having not responded?

**Holding and Rule**

No

When the basis of a decision is science, that science should be released for comment (on the record)

**Public/Reviewing Ct. are entitled to why one course was taken over another**

Cts. Should say *SOMETHING* in response to significant comments in basis statement

\*\*Opportunity to comment must be a ***meaningful opportunity***, meaning that interested parties have a sufficiently clear idea of the rule the agency is considering, and also the ***evidentiary basis for the proposal***, including scientific studies or data being relied upon.

Exceptions to § 553 Rulemaking

**Purpose of exceptions:**  to balance the benefits of notice and comment with the practical needs of the administrative state.

1. Notice and comment procedures are not required for matters pertaining to:
   1. Military/foreign affairs
   2. Agency management or personnel
   3. Public property, loans, grants, benefits, or contracts
2. **§ 553(b) nor does notice and comment procedure apply to**
3. Interpretive rules, **general statements of policy**, or rules of agency organization
4. When the agency for **good cause** finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest
5. **Good Cause Exception**

* Good Cause Exception
  + **Unnecessary**: Routine determination insignificant in nature and impact and inconsequential to the industry and public
    - Cts. construe narrowly to issues where there is **NO controversy whatsoever**
  + **Impracticable**: there is some kind of **emergency situation** that makes the delay associated with notice and comment intolerable
  + **Contrary to Public Interest**: advance notice of the proposed rule would prompt undesirable anticipatory behavior by affected parties
* General Statements of Policy (aka guidance document)(aka interpretive rules)
  + Agency memo, letter, speech, press release, manual, or other official declaration of agency’s agenda, policy priorities, or plans for future implementation of authority
  + **Less public input=broader judicial review:** less deferential

APA Judicial Review § 706

Presumption of Reviewability

No review if the agency action is ***committed to agency discretion*** by law OR ***precluded by statute***

**§ 706(2)(A)** courts must invalidate any agency action that is “**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law**”

Arbitrary- agency has failed to consider all the “relevant factors” in making its decision

**I.e.** agency must consider **relevant factors** and not make **clear error in judgment.**

* **Judiciary Roles**
  + - Interpreting statutes to determine whether agency action is consistent with it
    - General review of agency decisions to ensure they’re not arbitrary or capricious
* **Cts. can invalidate on 4 grounds**
  + - Substantive arbitrariness
    - Unconstitutionality
    - Absence of statutory authority
    - Procedural defect
* **Hard look review; more robust form**
  + - Although a reviewing court should be deferential to the agency’s fact finding/judgment, Cts. are obligated to make sure agency ***carefully considered all relevant aspects***; that they took a “hard look” at the issues
* **\*\*MODERN RULE:** Overton Park Rule
  + - To make finding that action is arbitrary, capricious, or abuse of discretion, reviewing court “must consider whether the decision was ***based on consideration of the relevant factors*** and whether there has been a ***clear error of judgment***

Was the error so clear as to deprive the agency’s decision of rational basis?

**Ethyl Corp. v. EPA**

**Facts**

* + - After notice and comment, EPA admin determined that leaded gasoline posed a “significant risk of harm
    - CAA authorized EPA admin to regulate gasoline additives whose emission products “will endanger the public health or welfare”

**Issue**

1. Did admin correctly interpret CAA?
2. Did evidence at rule-making proceedings support final decision?

**Holding and Rule**

1. Yes
2. Yes

Need not decide whether decision is supported by preponderance; **Ct. must sustain if it has a rational basis in the evidence**

Judges are not to substitute their judgment for admin

1. Agency decision making process is like a chain
   1. If there is a link missing, that gap is inherently an arbitrary step taken by the agency
      1. So long as the ***path taken is reasonably discernible*** agency action will be upheld

### Problems with Adjudication

* No Predictability
* License to make up rules as they go?
* No input from everyone affected

### Benefits of Adjudication

* Insulated from political pressure

### Retroactivity

Retroactivity would per impermissible only when “the ill effect of the retroactive application of a new standard” outweighs “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles”

**Assessing the legality of Retroactive Application**:

1. Whether case is one of first impression
2. Whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law
3. The extent to which the party against whom the new rule is applied relied on the former rule
4. The degree of the burden which a retroactive order imposes on a party
5. The statutory interest in applying a new rule despite the reliance of a party on the old standard

^when courts will not tolerate retroactive application

e.g. Chenerys did rely on old rule, but were not punished

**SEC v. Chenery Corp. (I)**

**Rule**

Cts. will consider ONLY **the basis for that action proffered by the agency** in the rule; agencies may not offer additional post hoc justifications during litigation.

DON’T MIMIC CTS.  Agencies are granted ***power statutorily***, USE IT!

**SEC v. Chenery Corp. (II)**

**Facts**

* Chenery group was trading securities during a reorganization in order to retain 51% interest
* In *Chenery (I)* the SEC held this to be fraudulent
  + - SCT said that it was not fraudulent, so the SEC’s stated rationale for the charges could not be sustained
* On remand SEC charged the company’s officials on different grounds, again rejecting

**Issue**

Was the SEC precluded from using this adjudication to announce a new standard of conduct?

**Holding and Rule**

No

“**The choice** between proceeding by general rule, individual, or ad hoc litigation **is that of the informed discretion of the admin agency.**”

Making the agency approve this then go through notice and comment to promulgate the same rule for future such fact patterns would make a **mockery of the administrative process**.

This flexibility is important where there may be unforeseeable problems, inexperience with the problem, or the problem is so specialized and varied that a general rule would be impossible.

### Discerning a Rule from a Policy Statement

1. Does it have the force of law?
2. Does it create a new duty?
3. Is it just drawing a crisper line as to how the agency reads a statute?

Does it depart from the text?

**FPC Order No. 467**

**Facts**

* + Fed Power Comiss issued guidance document stating that the agency favors residential customers and disfavors contracts that foresaw interruptions in time of power shortage
  + 2nd Stage disfavors boilers and other inefficient uses of electricity

**Issue**

Was the issuance of order 467 a substantive rule that would require notice-and-comment?

**Holding and Rule**

No.

The distinction between rule and general statement of policy is the different practical effect

Interpreting v. Regulating

**Rule**- standard of conduct w/ **force of law**

**Gen Policy- not a binding** norm, facilitates long range planning & promotes uniformity

Modern Hard Look Review

**State Farm v. Chevron**

* State Farm = for issues of ***policy/fact***
  + If it’s not arbitrary, it’s reasonable
* Chevron = for issues of ***law***

**Elements of Arbitrariness Review** (*State Farm*)

1. Review is *narrow* and the court is *not to substitute its own judgment* for that of the agency (Chenery)
   1. Agency makes policy choices
2. Court must see whether agency has considered *relevant factors*  and whether there has been a *clear error of judgment* (*Overton Park*)
   1. Clear Error of Judgment- agency:
      * 1. Relied on irrelevant factors
        2. Failed to consider an important problem
        3. Gave explanation that runs contrary to the evidence such that it cannot be considered reasonable
3. Agency must supply the explanation, court cannot (*Chenery*)
4. Review is on the administrative record compiled by the agency
5. Remedy=Remand, do it again

**State Farm Test** (Standard of review for § 706)

* Comprehensive analytic rationality

## Covering Your Ass in a Basis Statement

**Requisite Steps in Judicial Review**

Did the agency:

1. Authority to regulate?
2. Base its decision on ***relevant factors*** AND no irrelevant factors?
3. ***Consider all important aspects*** of the problem?
4. ***Consider alternatives*** within the ambit of existing regulation?
5. Make a ***rational connection between evidence and conclusions***?
6. ***Offer a plausible policy***, even if it isn’t the choice the Ct. would’ve made?
7. ***Justify changes*** in course from prior policy?
8. ***Disclose scientific or other data*** upon which it relied?
9. Why was one path ***chosen over another?***
10. ***Consider comments*** submitted in response to NPRM?
11. ***Refrain from making any procedural errors*** (e.g. failure to provide notice)?
12. ***Get the law right***?

## Skidmore

Agency’s interpretive rules will be given deference according to their persuasiveness

Applicable where statutory circumstances indicate ***no intent to delegate general authority*** (explicit nor implicit) to make rules with force of law

Applies to any ***informal agency action*** (anything not notice and comment or formal adjudication) that doesn’t go through notice/comment ***AND ISN’T GUIDANCE*** (letters, memos, etc.)

**Rule:** An agency interpretation is only entitled to Skidmore deference, whereas more formal rule making processes get Chevron Deference

* + - I.e. More Procedure=More Deference
* i.e. the Ct. will pay attention to the agency’s arguments but not defer
  + Some deference because of ***experience, broad investigative powers***

### Skidmore Review

* + - Ct. does de novo review
      * If their interpretation differs from the agency, remand to agency for N&CR
    - Ct. will look to agency’s reasoning as persuasive source
      * Weight of arguments depends on:
      1. Thoroughness of consideration
      2. Consistency over time
      3. Validity of reasoning

## Chevron (gentlemen’s code)

Notice and Comment Rulemaking or Formal Adjudication, generally

* When a court reviews agency’s construction of the statute it is confronted with 2 questions

1. Has CG directly spoken to the precise issue?
   * 1. Use classic statutory interpretation to decide
   1. If the intent of CG is clear, end of matter
   2. If statute is silent or unclear as to congressional intent towards question at hand, See 2
2. Is the agency’s answer based on permissible construction (***is it reasonable*?**) of the statute?
   1. What is permissible construction of the statute?
      1. See State Farm Test

* If CG has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to interpret and promulgate a specific provision of the statute by regulation
  + Controlling unless arbitrary capricious, or manifestly contrary to the statute

\*\*Note: *Chenery* still applies, Ct. cannot substitute its reasoning for that of the agency, so long as the agency has ***made a reasonable interpretation***

**New Rule From Chevron**: Statutory silence/ambiguity is equivalent to explicit delegation.

* + By not specifying whether source meant point or bubble, congress may well have said “Any source of pollution, as defined by the EPA”
* While agency interpretation of the word sources did change over time, their ***approach to defining sources remained consistent.*** They consistently kept flexibility in order to adapt to ever changing conditions and policy goals
  + Agency must continually wisdom/effectiveness of policies and adapt accordingly
* So Long as the decision/interpretation made by the agency is reasonable, the Ct. will not judge the merits of *HOW* the agency got there
* **When a challenge** to an agency construction of a statute **centers on the wisdom** of the agency’s policy rather than whether it is reasonable within the authority delegated by CG, the challenge **must fail**
* **Reasons to defer to agency**

1. Superior Expertise
2. Political Accountability of the Executive branch as a whole
   1. Pragmatic
   2. CONSTITUTIONAL! Democratic decision making
3. Uniformity; Nationwide rules

* **Legal Justifications for Chevron Deference**
  + Congress may delegate to an agency the ***authority to make discretionary policy*** decisions so long as CG supplies an ***intelligible principle*** to guide the agency

## Mead

* Administrative implementation of a statute qualifies for Chevron deference ***when it appears that CG delegated authority*** to the agency generally to make ***rules carrying the force of law***, and the promulgation was under that delegation
  + Such delegation may be shown by agency’s power to engage in adjudication or notice and comment, or by some other indication of CG intent
* *Chevron****-***  when CG explicitly or implicitly leaves gap to be filled by agency, ensuing (gap-filling) regulation is binding unless procedurally defective, arbitrary/capricious, or manifestly contrary to statute
* Great indicator of delegation meriting *Chevron* deference is express congressional authorizations to engage in rulemaking or adjudication that produces regulations/rulings
  + i.e. where congress doesn’t grant power for the agency to promulgate rules or regulations, no deference
* CG does delegate decision making power, but the decisions would not bind more than the parties to the ruling

**Chevron Step Zero (MEAD)...To defer or not to defer**

Did congress intend (Chevron) deference? [Statutory Interpretation]

Best sign that CG meant to delegate power to make binding interpretations: they delegated authority to use notice-and-comment and formal adjudication (considered ***safe harbors*** because they have the force of law)

Was the agency using safe-harbors?

Sometimes Chevron deference is given to ***less formal*** agency action

Factors for determining if less formal agency action gets Chevron:

* + - * Who made the decision? Expert? Statutory Delegate?
      * Nature of the Rule...

Decentralized?

Technical?

* + - * Specificity of the rule...

Binding on anyone outside the decision at hand? All 46 offices have diff rules

* + - * Nature of Judicial Review...

Depth of allowable review is good indicator of CG’s intended deference

De novo review gives ***NO DEFERENCE***

* + - * Expertise, complexity, care taken by agency

**Chevron Step One...Is it Clear?**

* + - Has CG spoken directly to the Issue? statutory interpretation
    - Statutory ***silence/ambiguity=Delegation to Agency***

**Chevron Step Two...Is the Agency’s Interpretation Reasonable?**

* + - Let’s use the State Farm test, blurred lines
      * Reasonable v. Arbitrary/Capricious

**Requisite Steps in Judicial Review**

Did the agency:

1. Base its decision on ***relevant factors*** AND no irrelevant factors?
2. ***Consider all important aspects*** of the problem?
3. ***Consider alternatives*** within the ambit of existing regulation?
4. Make a ***rational connection between evidence and conclusions***?
5. ***Offer a plausible policy***, even if it isn’t the choice the Ct. would’ve made?
6. ***Justify changes*** in course from prior policy?
7. ***Disclose scientific or other data*** upon which it relied?
8. ***Consider comments*** submitted in response to NPRM?
9. ***Refrain from making any procedural errors*** (e.g. failure to provide notice)?
10. ***Get the law right***?

NOTE\*\* State Farm analysis will vacate and remand to agency if faulty reasoning is provided

Chevron Step 2 will then judge the merits of the policy choice and if it comes to the same conclusion as the agency, it will ignore a ***faulty interpretive method***