Admin review (part 2)

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Overall structure

- **What agencies do**
  - Adjudication versus rulemaking
  - Adjudication
  - Rulemaking
- **How agency actions are reviewed**
  - Substantive standards of review (i.e., *Chevron*)
  - Other requirements for review
    - Reviewability, timing, standing
- **How agencies fit into the constitutional structure**
  - Agencies and Congress
  - Agencies and the president

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Rulemaking

- **Hard-look review**
  - Application of § 706
    - § 706(2)(A): court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"
    - factual determinations in adjudications: *Universal Camera, Allentown Mack, Richardson v. Perales, Data Processing*
    - policy determinations in rulemaking: **hard-look review**

Rulemaking

- **Hard-look review**
  - Agencies must:
    - articulate a satisfactory rationale for its action at the time, not *post hoc* rationalizations;
    - supply a reasoned analysis justifying any reversal of course;
    - consider alternative ways of achieving its objectives; and
    - examine the relevant data and consider the relevant factors

Rulemaking

- **Hard-look review**
  - Agency action is arbitrary and capricious if the agency:
    - relied on factors which Congress did not intend it to consider;
    - entirely failed to consider an important aspect of the problem; or
    - offered an explanation for its decision that runs counter to the evidence before the agency

Rulemaking

- **Hard-look review**
  - Demanding example: *National Tire Dealers & Retreaders v. Brinegar*
    - agency has clear authority to enact safety rules
    - agency made clear judgment that requiring retreaded tires to have permanent labels was necessary for safety
    - but the court evaluated the agency's reasoning and decided it wasn't persuasive

Rulemaking

- **Hard-look review**
  - Supreme Court example: *Motor Vehicle Manufacturers v. State Farm*
    - statute requires agency to consider if standards are “practicable,” “meet the need for motor vehicle safety," and “stated in objective terms”
    - agency said automatic seatbelts would work as well as airbags and then scrapped rule since automatic seatbelts wouldn’t work
    - Court: that makes no sense

Rulemaking

- **Hard-look review**
  - Changes in policy
    - *State Farm:* withdrawal of regulation is agency action like any other, subject to review
    - *FCC v. Fox:* but different policy views is a reasonable reason to change the rule, if the new rule is supported by the statute

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Standards of review

- **Agency interpretations of statutes**
  - Agencies interpret statutes all the time
    - e.g., statute tells agency to issue rules that will protect traffic safety; agency has to interpret what “traffic safety” means
    - e.g., statute tells agency to adjudicate who is entitled to disability benefits; agency has to interpret what counts as a “serious” disability
  - How should such interpretations be reviewed?

Standards of review

- **Statutory interpretation before *Chevron***
  - Courts make individual, case-specific decisions about whether to defer to agency interpretation
    - *NLRB v. Hearst:* are newsboys employees?
      - Court spends several pages on issue before announcing that “[t]hat task has been assigned primarily to the agency created by Congress to administer the Act”
      - not really clear why

Standards of review

- **Statutory interpretation before *Chevron***
  - Courts make individual, case-specific decisions about whether to defer to agency interpretation
    - *Skidmore v. Swift & Co.:* are employees entitled to overtime?
      - statute doesn't provide for deference to Administrator's policies
      - but they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"
      - power to persuade, not to control?
      - *Skidmore* makes a resurgence in *Mead*

Standards of review

- ***Chevron Chevron Chevron Chevron Chevron, Chevron Chevron Chevron Chevron Chevron, CHEV-RON!!***
    - Puts coherent framework on pre-*Chevron* cases that sometimes deferred and sometimes did not
    - frames issue as whether agency's action was "based on a reasonable construction of the statutory term"
    - announces two-step analysis

Standards of review

- ***Chevron Chevron Chevron Chevron Chevron, Chevron Chevron Chevron Chevron Chevron, CHEV-RON!!***
  - Two steps:
    - 1. whether Congress has “directly spoken to the precise question at issue” or whether statute is silent or ambiguous on the question
    - 2. if statute is silent or ambiguous, “whether the agency’s answer is based on a permissible construction of the statute”

Standards of review

- ***Chevron Chevron Chevron Chevron Chevron, Chevron Chevron Chevron Chevron Chevron, CHEV-RON!!***
  - Does this make any sense?
    - possibly inconsistent with APA
    - possibly a reasonable default rule against which Congress can legislate
    - possibly a reasonable use of agency expertise
    - possibly a reasonable separation-of-powers limitation on the power of the courts

Standards of review

- ***Chevron* step 1: text and other tools**
  - In analyzing the statutory questions, use traditional tools of statutory interpretation:
    - text
    - legislative history / intent
    - purpose / structure of the statute
    - canons of construction

Standards of review

- ***Chevron* step 1: text and other tools**
  - Degrees of reliance on each tool, though, are variable and hard to predict
    - *HUD v. Rucker* (public-housing leases): plain text is plain text; nothing else is needed
    - *General Dynamics v. Cline* (age discrimination): legislative history, "social history," and purpose of the statute trump seemingly plain text
- Use cases as data points and arguments

Standards of review

- ***Chevron* step 1: substantive canons of construction**
  - Canons of construction: useful tie-breakers when the statutory text isn't super-clear
  - But there are dozens, often conflicting, so it's not clear how much weight to put on them
    - Whole-Text Canon: text must be construed as a whole
    - Presumption of Consistent Usage: word or phrase is presumed to have same meaning throughout a text

Standards of review

- ***Chevron* step 1: substantive canons of construction**
  - Canons of construction: useful tie-breakers when the statutory text isn't super-clear
  - But there are dozens, often conflicting, so it's not clear how much weight to put on them
    - Surplusage Canon: every word / provision should be given effect
    - Harmonious-Reading Canon: provisions should be interpreted to render them compatible, not contradictory.

Standards of review

- ***Chevron* step 1: substantive canons of construction**
  - Puzzle: if canons are tie-breakers when statute is ambiguous, should they be applied at *Chevron* step 1, which asks if a statute is unambiguous?

Standards of review

- ***Chevron* step 1: substantive canons of construction**
  - Examples:
    - *SWANCC v. Army Corps of Engineers* ("navigable waters" / constitutional avoidance): if Congress is going to go to the limits of its authority, it must be clear
    - *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* ("taking" wildlife / rule of lenity): broad interpretation is reasonable
- Use cases as data points and arguments

Standards of review

- ***Chevron* step 2**
  - When is a statute ambiguous, but an interpretation of it unreasonable anyway?
    - often treated as synonymous with hard-look review: is an interpretation arbitrary and capricious or permissible under the statute?
    - in both cases: basically a reasonableness inquiry

Standards of review

- ***Chevron* step 2**
  - *AT&T v. Iowa Utilities Board*
    - uses same tools of statutory interpretation as step 1
      - text, history/intent, purpose/structure, canons
  - analysis looks a lot like hard-look review
    - whether agency considered factors from statute, engaged in reasoned decision making, &c

Standards of review

- ***Chevron* step 2**
  - *Encino Motorcars v. Navarro*
    - no deference when rule had procedural defect, i.e. when it would fail hard-look review
    - …but why?
      - maybe regulation is effectively void, so there's nothing to defer to
      - maybe just as it can be unreasonable to construe a statute for substantive reasons, it might be possible to construe it using an unreasonable procedure

Standards of review

- ***Chevron* step 0, or, *Chevron*'s domain**
  - When does court apply *Chevron,* versus *Skidmore* deference or no deference?
    - *Mead: Chevron* only applies "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"
      - formal rulemaking or adjudication
      - notice-and-comment rulemaking
      - "some other indication" of comparable intent

Standards of review

- ***Chevron* step 0, or, *Chevron*'s domain**
  - So:
    - Pre-*Chevron:* individual case-by-case determinations lead to chaos
    - *Chevron:* replace individual case-by-case determinations with a default rule
    - *Mead:* but make individual case-by-case determinations of when to apply the default rule
  - Plausible as a read of congressional intent?

Standards of review

- ***Chevron* step 0, or, *Chevron*'s domain**
  - Exceptions:
    - occasional cases find congressional intent to defer to agency based on features of individual agency actions
    - occasional cases say that a particular decision is too important to the country for the agency to get deference
  - One potential way to summarize these cases: *Chevron* is less a rule than a canon of statutory interpretation

Standards of review

- ***Chevron* and *stare decisis***
    - What happens if a court interprets a statute to mean "X," but later the agency says it means "Y"?
        - *Brand X:* the agency can do that; the court's interpretation doesn't lock it in
            - follows from theory of *Chevron:* Congress has delegated to the agency the power to make that choice
            - therefore, agency can change interpretations
            - note that this gives agencies a lot of power
- *Baldwin:* Justice Thomas changes his mind

Standards of review

- **Agency interpretations of ambiguous regulations**
  - What happens if an agency interprets its own regulation to mean "X," and a court reviews that interpretation?
    - *Auer:* the agency's interpretation is entitled to deference
      - regulation is a creature of the agency, so the interpretation is entitled to deference unless plainly erroneous
      - agency has expertise and context

Standards of review

- **Agency interpretations of ambiguous regulations**
  - Criticisms:
    - not super-coherent:
      - *Chevron:* agency interpretation of ambiguous statute after notice and comment gets **much deference**
      - *Mead* and *Skidmore:* agency interpretation of ambiguous statute without notice and comment gets **little deference**
      - *Auer:* agency interpretation of ambiguous regulation without notice and comment gets **much deference**

Standards of review

- **Agency interpretations of ambiguous regulations**
  - Criticisms:
    - Justice Scalia in *Talk America:* separation-of-powers problems
      - agencies interpreting statutes are interpreting something from a different branch
      - here, not so much
  - incentives to write deliberately vague regulations
    - though courts might police that

Standards of review

- **Agency interpretations of ambiguous regulations**
  - *Kisor v. Wilkie: Auer,* but on life support
    - *stare decisis*
    - but new limitations:
      - genuine ambiguity
      - *after* exhausting usual tools of interpretation
      - interpretation must be reasonable
      - (more)

Standards of review

- **Agency interpretations of ambiguous regulations**
  - *Kisor v. Wilkie: Auer,* but on life support
    - *stare decisis*
    - but new limitations:
      - court must make independent inquiry into "character and context" of agency interpretation
      - issue must implicate agency expertise
      - interpretation must reflect "fair and considered judgment"

Standards of review

- **Agency interpretations of ambiguous regulations**
  - So now we have an *Auer* step zero
    - 🙄
  - Fallback: was the interpretation reasonable under *Skidmore?*
    - though that will turn on the same sorts of issues the court analyzes deciding whether to defer under *Auer!*

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Other requirements for review

- **Reviewability**
  - Which agency actions can be reviewed in court?
- **Timing**
  - When can those agency actions be reviewed in court?
- **Standing**
  - Who can challenge those agency actions in court?

Reviewability

- **Which agency actions can be reviewed in court?**
  - Two relevant sources of law: APA and organic act
  - APA § 701(a): "This chapter [on judicial review] applies … except to the extent that—
    - "(1) statutes preclude judicial review; or
    - "(2) agency action is committed to agency discretion by law."
- So agency actions are reviewable unless:
  - the organic act precludes it, or
  - the agency action is committed to agency discretion by law

Reviewability

- **Preclusion**
  - When the organic act precludes review
  - Can be express or implied
    - express preclusion, oddly, can be treated more skeptically by the courts
      - *Johnson v. Robison* (review of veterans' benefits)
      - (see also *Bowen v. Michigan Academy of Family Physicians:* "strong" presumption of reviewability)

Reviewability

- **Preclusion**
  - When the organic act precludes review
  - Can be express or implied
    - implied preclusion can be found based on the statutory structure and purpose
      - *Block v. Community Nutrition Institute* (milk market orders)
  - but the fact that Congress has specified forms of review does not necessarily preclude others
    - *Bowen v. Michigan Academy of Family Physicians* (Medicare reimbursement rates)

Reviewability

- **Committed to agency discretion**
  - Puzzle: How can something committed to agency discretion be unreviewable, when under § 706 courts review agency actions for abuse of discretion?

Reviewability

- **Committed to agency discretion**
    - *Overton Park:* this is a "very narrow" exception, for when there is "no law to apply"
        - here, the statute told the Secretary the policy to follow, even if it involved some discretion
            - but see *Webster v. Doe* (CIA officer)
                - (though more demanding standard for constitutional claims)
- *Lincoln v. Vigil* (Indian Children's Program): presumption for lump-sum distributions

Reviewability

- **Agency inaction**
  - What counts as an agency action in the first place?
    - APA § 551(13): "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"
  - APA § 706: "The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed…"
  - so when is failure to act reviewable?

Reviewability

- **Agency inaction**
  - Bottom line: courts will review inaction, but it takes a lot for them to overturn it
  - *Dunlop v. Bachowski* (union election): when statute requires action after a finding, court can compel action
    - though narrow scope of review

Reviewability

- **Agency inaction**
  - *Heckler v. Chaney* (FDA / death penalty): presumption against review of inaction
    - despite *Overton Park*
      - agencies have limited resources, many competing priorities, expertise, &c
  - *American Horse Protection Association:* but presumptions can be overcome
    - see also *Massachusetts v. EPA*

Timing

- **When can agency actions be reviewed in court?**
  - Several distinct timing doctrines:
    - final agency action
    - ripeness
    - duty to exhaust administrative remedies
  - A lot of overlap and inconsistencies

Timing

- **Final agency action**
  - APA § 704: agency action is reviewable if:
    - it's made reviewable by statute (i.e. the organic act), or
    - it is "final agency action for which there is no other adequate remedy in a court"
  - APA: "preliminary, procedural, or intermediate agency action or ruling not directly reviewable" can be reviewed later "on the review of the final agency action"
  - APA: default rule that Congress can change in a particular context

Timing

- **Final agency action**
  - So what counts as a “final agency action”?
    - not defined in APA
  - *Franklin v. Massachusetts* (census): must be sufficiently direct and immediate to have direct effect on day-to-day business
    - note: no final agency action here because the president isn’t an agency!

Timing

- **Final agency action**
  - So what counts as a “final agency action”?
    - not defined in APA
  - *Bennett v. Spear* (Fish & Wildlife biological opinions): two things must be true
    - consummation of agency’s decision-making process, and
    - legal consequences must flow from action
      - here, largely practical in nature since agencies treat them as binding

Timing

- **Final agency action**
  - So what counts as a “final agency action”?
    - not defined in APA
  - *Army Corps of Engineers v. Hawkes Co.* (jurisdictional determinations): alternatives that cost a lot of money and create a lot of risk aren’t adequate alternatives
    - dubious, but maybe the whole point of a jurisdictional determination is to know without having to pay all that money or take on that risk

Timing

- **Ripeness**
  - A dispute must be “ripe” for judicial review
  - Two reasons:
    - prevent premature litigation over abstract disagreements
    - protect agencies from judicial interference until they are finished and an agency action has been made concrete and actually affected people

Timing

- **Ripeness**
  - Two ways a dispute can fail to be ripe:
    - **<u>fitness</u>**: when review would turn on factual record developed during enforcement
    - **<u>hardship</u>**: when waiting until enforcement wouldn't impose any particular hardship
  - *Abbott Labs v. Gardner:* makes pre-enforcement review *much* easier to obtain
    - pure legal question (drug labeling)
    - immediate hardship (destroying existing labels)

Timing

- **Duty to exhaust administrative remedies**
  - If the agency has an internal appeals process, then one might have to use it before going to court
  - Reasons:
    - sometimes required by statute
    - avoids premature adjudication before factual record is developed
    - gives agency chance to fix its mistakes
    - respects executive authority and agency autonomy
    - can be more efficient

Timing

- **Duty to exhaust administrative remedies**
  - But: *not* a black-and-white rule
  - Ex.: *McKart* (draft): no exhaustion requirement
    - administrative remedies are no longer available
    - criminal remedies are harsh
    - foregoing exhaustion won't harm agency
    - no factual development or expertise needed
- But see *McGee*
  - factual development — conscientious objector

Timing

- **Duty to exhaust administrative remedies**
  - Test: *McCarthy v. Madigan* (prisoner tort suit)
    - has Congress spoken?
    - if not, balancing test:
      - litigant's interests in immediate judicial review
      - government's interests in efficiency and administrative autonomy
  - *note:* after this case, Congress imposes strict exhaustion rule, which the Court upholds

Timing

- **Duty to exhaust administrative remedies**
  - APA § 704: “agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, **for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority**.”
    - question: does “final” cover exhaustion?

Timing

- **Duty to exhaust administrative remedies**
  - *Darby v. Cisneros:* answer is yes
    - general presumption of reviewability
    - § 704 indicates a clear choice
    - so if an agency wants to require exhaustion, it must:
      - enact a rule, and
      - stay the agency action during the appeal

Timing

- **Duty to exhaust administrative remedies**
  - Agencies may or may not want to require exhaustion
    - how much work will an appeals process require?
    - how much litigation will an appeals process prevent?
    - will the case go to court no matter what?

Standing

- **Who can challenge agency actions in court?**
    - General framework (*Data Processing*):
        - constitutional standing under Article III
            - injury in fact
            - causation
            - redressability
        - statutory standing or prudential standing
            - is injury arguably within the zone of interests intended to be protected by the statute or constitutional guarantee in question?

Standing

- **Constitutional standing under Article III**
  - Three requirements in more detail:
    - **<u>injury in fact</u>**: plaintiff has suffered an injury that is concrete and particularized
    - **<u>causation</u>**: causal connection between injury and conduct giving rise to the complaint
      - *a.k.a.,* injury is fairly traceable to conduct
    - **<u>redressability</u>**: a decision in the plaintiff's favor will likely redress her injury

Standing

- **Constitutional standing under Article III**
  - Injury in fact
    - *FEC v. Akins:* inability to get information and evaluate candidates is sufficient
    - "generalized grievance" is not sufficient
      - often, claims held by a large group and claims that are "abstract" go hand in hand, but not here
  - unclear, arguably incoherent line
  - dissent: separation-of-powers problems
    - executive branch enforces the law

Standing

- **Constitutional standing under Article III**
  - Injury in fact
    - *Spokeo v. Robins:* Congress creating standing
      - "particularized" and "concrete" are distinct requirements
        - concrete: must actually exist, be real, not be abstract, but not necessarily tangible
        - particularized: must affect the plaintiff in a personal and individual way

Standing

- **Constitutional standing under Article III**
  - Injury in fact
    - *Spokeo v. Robins:* Congress creating standing
      - Congress can't just create standing
      - contra Justice Kennedy in *Lujan*

Standing

- **Constitutional standing under Article III**
  - Injury in fact
    - *Spokeo v. Robins:* Congress creating standing
      - but Congress has a role
        - history: tells us if the “alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit”
        - Congress: “is well positioned to identify intangible harms that meet minimum Article III requirements”

Standing

- **Constitutional standing under Article III**
  - Causation
    - *Allen v. Wright* (IRS / racist private schools): logical connection between asserted violation and asserted injury is too attenuated
      - law requires nonprofits not to discriminate
      - IRS is failing to enforce this law
      - tax subsidy makes it cheaper for white parents to send kids to private school
      - public schools are less diverse
      - this harms black schoolchildren

Standing

- **Constitutional standing under Article III**
  - Causation
    - *Allen v. Wright* (IRS / racist private schools): logical connection between asserted violation and asserted injury is too attenuated
      - injury is “highly indirect”
      - harm “results from the independent action of some third party not before the court”
  - *but note:* demanding causation cases disappeared after *Heckler v. Chaney*
    - agency exercises of prosecutorial discretion are presumptively unreviewable

Standing

- **Constitutional standing under Article III**
    - Ex.: *Lujan v. Defenders of Wildlife:* Congress gave all citizens standing, but insufficient under Article III
        - why do this instead of provide for better political enforcement?
        - no injury in fact when plaintiff members had no plans to travel
        - no causation when intervening actions by foreign governments
        - no redressability when vacating rule wouldn’t necessarily affect funding and funding wouldn’t necessarily affect projects

Standing

- **Statutory standing or prudential standing**
  - Is injury arguably within the zone of interests intended to be protected by the statute or constitutional guarantee in question?
  - *Nat'l Credit Union Admin.:* commercial banks
    - pretty broad interpretation

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Agencies and Congress

- **Congressional delegation of policy making**
  - Vesting clause of Article I, Section 1:
    - "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
  - So does agency rule making violate this provision?

Agencies and Congress

- **Congressional delegation of policy making**
  - Three possibilities:
    - Agencies exercise legislative powers, validly delegated by Congress
    - Agencies exercise legislative powers, illegitimately delegated by Congress
    - Agencies don’t exercise legislative powers, but do something else

Agencies and Congress

- **Congressional delegation of policy making**
  - *Schechter Poultry:* nondelegation doctrine
    - National Industrial Recovery Act gave president authority to adopt “codes of fair competition” governing behavior in particular industries
    - one of two cases in which the Court struck down a statute on nondelegation grounds
      - both in 1935

Agencies and Congress

- **Congressional delegation of policy making**
  - *Schechter Poultry:* nondelegation doctrine
    - "intelligible principle" test: does the statute contain some standard constraining the exercise of delegated authority?
      - this is the "essential legislative function" Congress must not delegate
  - "fair competition" fails this
    - but: many vaguer statutes have been upheld
      - "the public interest"

Agencies and Congress

- **Congressional delegation of policy making**
  - A useful framework: two axes along which a statute might delegate legislative authority
    - subject-matter limits
      - “the poultry industry”
      - “disability benefits”
    - means limits or mechanism limits
      - “minimum wages”
      - “price controls”

Agencies and Congress

- **Congressional delegation of policy making**
  - A useful framework: two axes along which a statute might delegate legislative authority
    - *Schechter Poultry:* statute had neither
    - a statute with subject-matter limits would almost certainly be fine
      - e.g.: Natural Gas Act
    - a statute with means limits would almost certainly be fine
      - e.g.: National Labor Relations Act

Agencies and Congress

- **Congressional delegation of policy making**
  - Renewed interest in the 1970s and 1980s
    - *Benzene:* several justices express nondelegation concerns
      - Rehnquist: reasons for doctrine
    - *Mistretta:* Supreme Court backs away

Agencies and Congress

- **Congressional delegation of policy making**
  - Renewed interest in the 1990s and 2000s
    - *Whitman v. American Trucking:* DC Circuit forces the issue
      - Supreme Court: “requisite to protect public health from the adverse effects of the pollutant” is plenty specific
    - also: asking EPA to constrain its own authority as a solution is nonsensical

Agencies and Congress

- **Congressional delegation of policy making**
  - Renewed interest in the 2010s and 2020s
    - *Gundy v. United States:* divided Court punts
      - Kagan, Ginsburg, Breyer, Sotomayor: this is fine
      - Alito: *stare decisis,* but would reconsider the issue if a majority of the Court was interested
        - plus Kavanaugh in *Paul*
      - Gorsuch, Roberts, Thomas: revive the doctrine now

Agencies and Congress

- **Congressional delegation of policy making**
  - Renewed interest in the 2010s and 2020s
    - *Gundy v. United States:* divided Court punts
      - plurality:
        - this is a narrow delegation
        - Article I doesn't deny Congress the necessary resources of flexibility and practicality to perform its functions
        - Congress can obtain the assistance of coordinate branches

Agencies and Congress

- **Congressional delegation of policy making**
  - Renewed interest in the 2010s and 2020s
    - *Gundy v. United States:* divided Court punts
      - dissent:
        - broad and unconstrained delegation
        - separation of powers isn't flexible and functionalist; it's a formal tool to constrain government power and protect individual rights and sovereignty
        - would still allow agencies to fill gaps
- stay tuned!

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Agencies and the president

- **Presidential appointment and removal**
  - Agencies have a wide array of structures:
    - some are headed by a single Senate-confirmed official who can be fired by the president at will
      - Secretary of Labor
      - Director of the Patent and Trademark Office
    - some are headed by a single Senate-confirmed official who serves a fixed term and may or may not be fired
      - Director of the FBI

Agencies and the president

- **Presidential appointment and removal**
  - Agencies have a wide array of structures:
    - some are headed by a multi-panel commission that typically serve fixed terms, have limits on party composition, and can only be fired for cause
      - Federal Trade Commission
      - Federal Election Commission
      - Securities and Exchange Commission
- some are just weird

Agencies and the president

- **Presidential appointment and removal**
  - Does the Constitution constrain these structures?
    - yes
    - appointments clause constrains appointment of officers
    - structure of the Constitution implies a removal power

Agencies and the president

- **Presidential appointment and removal**
  - Appointments clause of Article II, Section 2, clause 2, provides two rules of appointment:
    - **principal officers**: "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," are nominated by the president with the advice and consent of the Senate
    - **inferior officers**: "such inferior Officers, as [Congress] think[s] proper," appointment may be vested "in the President alone, in the Courts of Law, or in the Heads of Departments"

Agencies and the president

- **Presidential appointment and removal**
  - Issues:
    - who counts as an officer
    - what kind of officer
      - principal officer
      - inferior officer
    - who else can appoint
      - heads of departments
      - courts of law
    - what effect does this have on removal

Agencies and the president

- **Presidential appointment and removal**
  - Who counts as an officer: officers versus employees
    - *Germaine:* continuing position established by law
    - *Buckley v. Valeo* (FEC): exercise significant authority pursuant to laws of the United States
      - employees: “lesser functionaries subordinate to officers”
  - *Lucia v. SEC:* ALJs are officers even though Commission has to adopt their decisions
    - authority during hearings
    - practical effects

Agencies and the president

- **Presidential appointment and removal**
  - What kind of officer: principal versus inferior
    - *Morrison v. Olson* (independent counsel): factors
      - subject to removal (but only for cause)
      - certain, limited duties (but broad powers)
      - limited in jurisdiction (but so are others)
      - limited in tenure (but no time limit)
    - *Edmond v. United States* (military judges): rule
      - inferior officers must be subordinate to another officer below the president

Agencies and the president

- **Presidential appointment and removal**
  - Who else can appoint: heads of departments and courts of law
    - *Freytag v. Commissioner* (special tax judges)
      - 5 justices:
        - Article I courts can be courts of law
        - “department” means “Department”
        - (probably not the current law)
      - 4 justices:
        - only Article III courts are courts of law
        - “department” is broader
        - (probably the current law)

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - vesting clause of Article II, Section 1:
      - "The executive power shall be vested in a President of the United States."
    - take-care clause of Article II, Section 3:
      - "The President shall take care that the laws be faithfully executed…."
    - one possible implication: the president must have some power to remove officers

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - two theories:
      - **political model**: When a new president comes into office, he or she can fire entire executive branch and put in appointees
      - **for-cause model**: Some employees are immunized by president removal on political grounds

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - *Myers v. United States:* president has the exclusive power to remove officers
    - *Humphrey's Executor v. United States:* but this can be limited to cause for FTC commissioners
      - legislative intent
      - political independence is necessary
      - quasi-legislative (reports) and quasi-judicial (adjudications)
      - does not exercise executive power

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - *Morrison v. Olson:* independent counsel isn't quasi-legislative or quasi-judicial…
      - *Humphrey's Executor* is not a bright-line rule
      - test: "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty"
      - president still has a "degree of control"

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - *Free Enterprise Fund v. PCAOB:* multiple layers of insulation
      - limiting principal officers to removal for cause is okay (independent agencies)
      - limiting inferior officers to removal for cause is okay (independent counsel)
      - stacking both limitations is not okay

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - *Free Enterprise Fund v. PCAOB:* multiple layers of insulation
      - reflects debate on the Court between formalist and functionalist views of separation of powers
        - separation of powers provides a structure to accomplish certain goals, so see if a statute adheres to that structure
        - separation of powers is intended to accomplish certain goals, so see if a structure accomplishes those goals

Agencies and the president

- **Presidential appointment and removal**
  - What effect does this have on removal?
    - *Free Enterprise Fund v. PCAOB:* multiple layers of insulation
      - toothless remedy: the limitation on removal is read out of the statute
      - so no incentive to bring similar challenges in the future

The end

- **Thank you for a wonderful semester!**
  - Sorry about that whole coronavirus thing