Tips—For the exam, know how to formulate an argument for each type of question according to the steps you need to go through in the analysis.

I. Introduction to Federal Administrative Law

- Administrative law [federal] often deals with what we call “public law.” Administrative law is about “regulating the regulators.”
  - In this case, the “regulators” are the administrative agencies.
    - In the constitutional separation of powers, the administrative agencies are often putatively located within the executive branch. However, they often appear to be exercising powers that more properly belong to the congressional or judiciary branch.
- The main statute governing administrative agencies is the Administrative Procedures Act (APA). However, the general rules set out in the APA can be trumped by the more specific rules in the organic statute.
  - The “organic statute” is the one that essentially created the administrative agency.
- The judiciary branch is responsible for the interpretation of statutes governing administrative agencies (Chevron).
- Why do we have administrative law?
  - To guard against “agency problems.”
    - For example, in some cases, the administrative agency’s goals may differ from those of the rest of the government (i.e. Congress’s goal(s) when it created the agency or delegated authority in a certain area to a particular agency).
  - To prevent bureaucratic abuse and/or corruption.
  - To further democratic ideals.
    - Decisions by administrative agencies are subject to judicial review.
      - Some argue that judicial review is permissible because the courts are trying to enforce the will of Congress, which is a democratically–elected body, unlike the courts.
      - The contrary argument (in support of Chevron deference to agency decisions) is that at least the agencies are accountable to the President, who is democratically–elected, whereas the courts are not accountable to any democratically–elected body or official.

II. Introduction to Due Process: Goldberg v. Kelly

- Introduction
  - The issue in this case is whether the state should be constitutionally obligated (under the Due Process Clause) to provide a pretermination hearing before cutting off welfare benefits.
    - Argument for yes: The court suggests that specifically in the context of welfare, cutting off benefits causes a “grievous loss” to the person whose benefits have been cut off. This argument is based on a core concern for human dignity.
    - Argument for no: Requiring the state to provide a pre–termination hearing before it is allowed to cut off benefits increases the costs of administering a welfare system. Because welfare recipients are indigent by definition, the state will be unlikely to recover any benefits (money) wrongly paid while waiting for the hearing to occur or while the hearing is ongoing.
• The dissent also argues that allowing the state to immediately cut off benefits upon a determination of ineligibility (without having to conduct a pretermination hearing) is really not a deprivation at all. Essentially, the dissent argues that the state is not taking anything away if it is merely declining to continue giving a gift.

• Rules
  o Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

• Holding
  o When welfare is discontinued, only a pretermination evidentiary hearing provides the recipient with procedural due process.
    ▪ The government’s interests in conserving fiscal and administrative resources are not overriding in the welfare context.

III. Introduction to the Nature of Administrative Law and Administrative Agencies

• Review—Some Reasons for Administrative Law
  o Error correction or prevention
    ▪ This was the concern in Goldberg
  o Democracy and the rule of law
    ▪ Need to restrain unelected bureaucrats
      • Subjection to political control (e.g. removal by the President)
      • Holding to statutory mandate (e.g. judicial review)
        o Goldberg’s take on the interest of government.
      • [This may also be a reason to limit the size, scope, and power of administrative agencies].
  o Individual rights—dignity/autonomy
    ▪ This was another concern in Goldberg— the possibility that these massive federal bureaucracies would steamroll individual interests.

• Review—Some Concerns with Administrative Law
  o Cost [of administering the system]
    ▪ Highlighted by Justice Black in his Goldberg dissent
    ▪ Obstacle to comparative agency efficiency
    ▪ Potential distortion of agency work (Mashaw on welfare’s depersonalization).
      • “Depersonalizing” welfare makes the system cheaper to administer, because employees are making fewer subjective choices.
    ▪ Notes—Requiring the state to provide a pretermination hearing before cutting off welfare benefits may create two negative consequences:
      • States may become more reluctant to add people to the welfare rolls in the first place (or at least reluctant to do so without first conducting a thorough [and time-consuming] investigation to make sure that individual qualifies); and
      • Additional money spent on pretermination hearings reduces the amount of money available to directly help qualifying individuals.
  o Anti-democratic obstacles to government action
    ▪ Highlighted by Justice Black in his Goldberg dissent
    ▪ Is the administrative process more manipulable by elites?
  o Power to judges and agency lawyers
In his *Goldberg* dissent, Chief Justice Burger objects to the Court supplanting “apparently reasonable” HEW results.

- (This also relates to the idea that the administrative process may be more manipulable by elites).

- Given concerns about whether agencies will act as competent and faithful agents of Congress and/or the President, why have agencies at all?

  - Necessity
    - The scope of government is too large for elected officials to be able to handle all of these issues themselves (Congress and the President have limited time).
  - Technical or topic area expertise
    - In contrast, legislators and other elected officials are often forced to be generalists.
  - Consistency/uniformity of policy
  - Political insulation
    - E.g. The Federal Reserve. It would be undesirable for the Reserve’s general policy to undergo a complete overhaul every 4 years.
  - Similarly, a desire to insulate an agency from political influence is one reason why several agencies have staggered boards, meaning only a certain number or percentage of board members can be replaced during any single administration.
  - Political accountability
    - Agencies may be more subject to political control than Article III federal courts, where judges are appointed for life, etc.
  - Idea of “deliberative democracy”
    - Agencies can invite public comment, etc. and have more time to devote to talking to people about these issues in specific detail.
  - Procedural fairness
    - Statutes passed by Congress are generally not subject to procedural due process. In contrast, rules and regulations passed by administrative agencies are subject to procedural due process requirements.
  - Notes— Historically, patronage was also important. Elected officials often used the ability to appoint others to political positions as a way to enhance their own power.

- If one has to have agencies, why not give them only minimal, ministerial powers, rather than the powerful policymaking, adjudicative, and/or prosecutorial authority that they sometimes have?

  - For example, almost no one would argue that a ministerial agency like the US Postal Service shouldn’t exist— obviously the President cannot deliver the mail himself.

- Administrative State’s Evolution

  - Policing and ministerial
    - E.g. US Postal Service
    - Government responding to specific bad behavior (e.g. antitrust laws and FTC, railroad abuses and the Interstate Commerce Commission [ICC]).
  - New Deal management and “safety nets”
    - Government continually adjusting and supervising systems.
    - Idea of a “technocratic government,” where expert agencies were viewed as a mechanism to improve society.
  - “Public interest” regulation
    - “Action–forcing” citizen suits and agency mistrust
      - (Mistrust at least when the administrative agencies were left to their own devices).
    - Anti–discrimination, health and safety, environment and consumer protection
Often concentrated costs and dispersed benefits

- Deregulation, devolution, and privatization
  - The casebook suggests that we may be entering a new era of expanding administrative agencies post–9/11 and post–Great Recession.

- Review and Preview: History and Agency Types
  - Rabin’s Stages
    - Policing and ministerial (e.g. USPS)
    - Management and “safety net”
    - Public interest
    - Deregulation, devolution, and privatization
      - Some scholars have suggested that in the wake of 9/11 and the Great Recession, we may be moving in the opposite direction toward a more powerful, centralized administrative state.
  - Rise of informal rulemaking
  - Oscillations with regard to judicial deference
  - Agency types
    - Executive
    - Independent Commission

- “Idealism” for Administrative Law and Agencies (related to Reasons/Benefits— In an ideal world, what benefits are agencies meant to provide?)
  - Rule of law and consistency
  - Procedural fairness
  - Increasing social welfare
    - Cost–benefit analysis and mobilization of resources/expertise
  - Accountability
    - To political branches or statutory mandates
    - To people? (Interest representation?)
  - Respect for individual rights and other values
  - Fostering deliberative democracy

- History of the Administrative State: Post–New Deal Procedural Developments
  - Notes— The New Deal created all of these new administrative agencies. This gave rise to the concern that the agencies would run unfettered and therefore must be subject to some kind of political control or oversight.
  - Administrative Procedures Act (APA) (1946)
    - Detailed provisions for formal adjudication and formal rulemaking.

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- Notes
  - The APA is sometimes referred to as a “quasi–constitutional” statute.
  - Informal adjudication is almost entirely unregulated by the APA, because most informal adjudications are fairly trivial.
In contrast, informal rulemaking is governed by § 553 of the APA. This section looks fairly minimal on its face, but the courts have really given this section some teeth.

- “Rise” of informal agency actions
  - Especially informal rulemaking as a policymaking device.
- From judicial partnership to deference?
  - Judicial activity during a time of agency mistrust and growing informal rulemaking.
  - *Vermont Yankee & Chevron* “backlash?”
    - *Chevron* stands for the idea of giving very strong deference to agency interpretations if Congress has expressly delegated authority to the agency in that area.
- Currently rhetorical questions:
  - Where are we now? Have we entered a new historical phase?
    - Mashaw et al. on “new public administration” v. post–9/11 and post–Great Recession administrative expansions.
  - Where should we be headed?
    - What is meant by “should?” Different potential normative concerns such as efficiency, democracy, rule of law, and autonomy.

- Basic Agency Types and Congress–President Tensions
  - “Standard” executive agencies
    - E.g. Executive departments and subdivisions under Cabinet Secretaries
  - “Independent” executive agencies
    - E.g. Environmental Protection Agency (EPA) and Office of Management and Budget (OMB)
  - Independent agencies/commissions
    - FCC, FEC, Federal Reserve System, FTC, NLRB, NRC, OSHRC, SEC…
    - More insulated from presidential control

IV. Administrative Law Perspectives and Theory [Methodological Approaches]

- Formalism
  - Commonly associated with
    - Relatively bright-line categorical rules
    - Textualism or “plain language” interpretation
      - For example, Justice Scalia often refuses to look at the legislative history of a statute, and will only consider the plain text of the act.
  - Often concerned with excessive judicial discretion, but…
    - Excessive levels of judicial discretion are thought to lead to decision-making that is too subjective and/or unpredictable.
  - Potentially “activist” in the sense that strict rules can call for aggressive judicial enforcement.
  - Possible illustrative champion: Justice Scalia

- Purposivism/Pragmatism
  - Looking to ends/goals and how to achieve those goals in a real-world context.
  - Often associated with multi-factored balancing.
  - Criticized for leaving judges without sufficient guidance, thus causing subjective decisions.
    - (Which then lead to an increased risk or possibility of being reversed in a higher court on appeal).
  - Arguably supporting greater deference to government entities thought to be more competent to set and pursue instrumental goals.
  - Possible illustrative champion: Justice Breyer
For example, Justice Breyer will often begin an analysis or opinion by looking at the text of the statute, and the intent or purpose behind the statute.

• **Crude Historical “Storyline”**
  o **Formalism (late 19th and early 20th centuries)**
    ▪ Viewed as tied to traditional common–law categories, etc.
  o **Legal Realism (early/mid 20th century)**
    ▪ Helping to support purposive pragmatism of early administrative state champions.
    ▪ [In other words, legal realists argue that we need to worry more about how the law works in practice (how it functions in real life)].
  o **Idealism (early/mid 20th century)**
    ▪ Flexible administration in public interest of liberal/pluralist democracy
  o **Legal Process School (mid 20th century)**
    ▪ Legitimacy of binding law flowing from the use of appropriate procedure.
  o **Critical Theory (late 20th century)**
    ▪ Subjectivity and lack of neutral baselines
    ▪ Law as an oppressive device of elites
  o **Public Choice Theory (late 20th century)**
    ▪ Law as a product of individuals/groups (e.g. special interests) acting selfishly.
      • “Special interest” laws with concentrated benefits and diffuse costs are more likely than “public interest” laws with diffuse benefits and concentrated costs.
      • Bureaucratic empires
      • Legislators’ use of delegation and administrative law

• **Formalism (rules) v. Purposivism (standards) Summary and Overview**
  o Arguments in favor of formalism (rules; plain language/textualism)
    ▪ Formulism limits judicial discretion.
      • Instead, it leaves the decision–making to the political (democratically–elected) branches of Congress, which are the President and Legislature.
    ▪ Formulism provides better public notice and predictability
      • Formalist judges consider fewer types of evidence, so we can better anticipate their decisions.
        • In *American Trucking*, however, Scalia is willing to look at the historical context of a case and the relevant canons of construction. However, he still resists looking at the legislative history, because he views the legislative history as being too subject to manipulation by both sides.
      • Note, however, that this argument is premised on the theory that people actually understand the plain language of the law and believe that will be applied as such.
        • *Example*— A sign on public property says “No vehicles in the park.” Would the average person understand this to mean only no cars (i.e. motor vehicles), or would it also be understood to ban scooters, strollers, etc.?
    ▪ Formulism may provide ex ante incentives to Congress to engage in clearer drafting and write more unambiguous rules.
      • Why? Because formalism will not look to sources like the legislative history to bail Congress out and enforce its intent when that intent was not made clear in the text of the statute itself.
      • It is also commonly argued that rules will at once be both over–inclusive and under–inclusive.
• For example, one rule states that the President must be at least 35 years old. But clearly there will be people over 35 who still are not mature enough to be President, and people younger than 35 who are.

○ Arguments in favor of purposivism (standards; pragmatism/contextualism)
  ▪ Purposivism better empowers Congress to achieve its goals.
  ▪ Purposivism recognizes real–world limitations on the legislative process, and therefore envisions a sort of cooperative model between the courts and Congress.
  ▪ Purposivism better reflects the intent of legislation by looking at the context in which it was passed (legislative history, etc. not just the plain language of the statute).
  ▪ Example— It is arguably unclear what is meant by the “no vehicles in the park” sign. But the legislative history may reveal that Congress clearly intended to only prohibit motor vehicles, i.e. cars. Thus, purposivism may be better placed to fulfill people’s expectations of how the law will function and be applied, because Congress’ intent is more fully reflected in the process.
  ▪ Purposivism is better able to respond to changing societal circumstances, and thus provides greater flexibility and adaptability.
  ▪ Note that Scalia’s counter–argument would be that if adaptation in the law is necessary, that action should be undertaken by the legislature, rather than the courts.
  ▪ Purposivism may be better at achieving justice in the individual case. It is possible that the harsh lines of formalism also yield harsh results.

V. Structural Limitations— Nondelegation (*Whitman v. American Trucking Associations, Inc.*)

  • The “Structural Constitution”
    ○ Vesting Clauses
      ▪ Article I, Section 1
        • “All legislative Powers herein granted shall be vested in a Congress…”
      ▪ Article II, Section 1
        • “The executive Power shall be vested in a President…”
      ▪ Article III, Section 1
        • “The judicial Power…shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”
    ○ Presentment Clause
      ▪ Article 1, Section 7
        • “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the president…”
        ○ Could you argue that the entire structure of the administrative state essentially constitutes an end–run around the Presentment Clause?
    ○ Necessary and Proper Clause
      ▪ Article 1, Section 8, Clause 18
        • “The Congress shall have Power…to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”
        ○ [Note that the nondelegation doctrine may be more robust under state vs. federal law. Note that there actually is not much in these sections/clauses for Congress to work with— this is why some argue that the nondelegation doctrine is actually fairly weak].
  • Nondelegation Doctrine— Locke and the “Intelligible Principle” Test
Inalienable Powers?
- “The Legislative cannot transfer the Power of Making Laws…” John Locke (1690).

The “Intelligible Principle” Test
- “If Congress shall lay down…an intelligible principle [for agency ratemaking], such legislative action is not...forbidden.” J.W. Hampton, Jr. & Co. v. US (1928).
- This is the basic test for determining whether a delegation of power by Congress is constitutional!

Notes
- An initial question may be what is meant by “vest” and what constitutes “legislative powers?”
- At some point, the “rational basis” test applies to Congressional action. However, Congress need not have had that basis in mind at the time it enacted the statute. Instead, Congress is free to act as a purely political actor.
  - This “rational basis” test also applies to agency actions. In contrast to Congress, however, agencies cannot act as purely political actors. Instead, agency actions must be in accord with the intelligible principle laid out by Congress to guide its action.

Potential Arguments on Delegation— Positive and Normative
- [Sometimes these arguments will blend, because positive law may incorporate some of our normative ideas about how the law should function].

Arguments in favor of delegation
- Necessary & Proper Clause
- Gap–filling is necessary in order to have a functioning government
- Efficiency and expertise
- Political insulation as compared to Congress
- Political accountability as compared to the courts
- Agency action allows greater opportunity for public participation?

Arguments against delegation
- Constitutional questions (Vesting Clauses, Separation of Powers)
- Lack of accountability as compared to Congress
- Expertise potentially obscuring policy decisions
- Potential enervation of democratic institutions
- Potential power imbalance (inter–branch, intra–agency)
- Potential for agency narrow–mindedness or capture

Historical Tests for Nondelegation
- Non–Critical “Details” Test
  - This test essentially represents the idea that delegating power to administrative agencies is permissible in order to “fill in the gaps.”
    - The problem with this test, however, is that some of the more modern statutes have very broad delegations of authority. In those situations, this argument becomes less plausible.
- “Contingency” Test
  - “The Executive may act as the mere agent of the law–making department to ascertain and declare the event upon which its expressed will [is] to take effect.” Field v. Clark (1892).
    - In other words, this test presents the idea that the agency is just conducting the necessary fact–finding to fulfill Congress’ will.

Nondelegation Violation
- Introduction
In 1935 (Panama Refining and A.L.A. Schechter), the Court for the first— and last—
time struck down congressional enactments as unlawful delegations of legislative
power.

- **Panama Refining v. Ryan** (1935)— “Hot Oil” Case
  - In *Panama Refining*, the Court found that Congress failed to set out any policy, any
    standard, any rule, etc. to guide the President’s action.

- **A.L.A. Schechter Poultry Corp. v. United States** (1935)— “Sick Chickens” Case
  - In *Schechter*, the Court found the statements of congressional policy in the Act “wholly
    insufficient” as criteria for the President’s exercise of his wide authority under the
    statute.

**Whitman v. American Trucking Associations, Inc.** (2001)

- **Background**
  - Clean Air Act required the EPA to issue primary and secondary “national ambient air
    quality standards” (NAAQS). EPA revised the NAAQS for particulate matter and
    ozone and respondents challenged the new standards.

- **Questions presented** are whether § 109(b)(1) of the CAA delegates legislative power to the
  EPA and whether the Administrator may consider the costs of implementation in setting the
  NAAQS under § 109(b)(1).

- **Scalia’s Majority Opinion**
  - The canon of constitutional avoidance instructs that other things being equal, courts
    should construe statutes to steer clear of constitutional problems that could otherwise
    result in invalidation.
    - For Scalia, however, the canon of constitutional avoidance is often not
      applicable, because he frequently finds the statutory text “unambiguous.”
  - The Court found that the statute “unambiguously bars cost considerations” in setting
    the standards.

- **Text**
- **Statutory context**
  - Scalia points out that other sections of the statute explicitly allow
    considerations of cost. He draws a negative inference from the
    statutory structure to conclude that because Congress explicitly
    included a cost–benefit analysis in other sections and failed to do so
    here, it clearly intended to bar cost considerations in implementing §
    109(b)(1).

- **Historical context**
- **Clear statement rule and colorful metaphor**
  - Congress “does not…hide elephants in mouse holes.”

  An agency cannot cure an unlawful delegation of legislative power by adopting in its
  discretion a limiting construction of the statute.
  - The very choice of which portion of the power to exercise would itself be an
    exercise of the forbidden legislative authority.
    - In other words, agency constraint is sufficient to satisfy the
      nondelegation doctrine only if that constraint is imposed by Congress
      (rather than the agency constraining itself).

  The allowable degree of agency discretion depends on the scope of the power
  conferred.
  - The nondelegation test is minimal and has been met in this case— the scope of
    discretion § 109(b)(1) provides is well within the outer limits of the Court’s
    nondelegation precedents.

- **Stevens’ Concurrence**
Stevens says let’s be honest— the EPA has been delegated legislative power, and that is okay so long as Congress has set out a sufficient “intelligible principle” to guide its action.

- The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it.
  - If Congress had taken this action instead of EPA, it would clearly be an exercise of legislative power.

Notes
- Assuming the result is the same, the only difference between the agency taking the action and Congress taking the action is that when Congress acts, it is not limited by a statute— it is subject only to the limits of the Constitution. In contrast, when an agency acts, it is constrained by the statute (organic act) conferring its power or authority.
  - Specifically in this case, EPA must justify its regulation on the basis of protection of human health.
  - So to some degree, Congress gets to act as a pure instrument of political will (i.e. a Congressman can vote for a bill simply because he owes another Congressman a favor, and not because he necessarily supports it).

- Thomas’ Concurrence
  - Thomas doubts the “intelligible principle” test— he argues that some powers may simply be too important, too undeniably “legislative” to be delegated.
  - In other words, Thomas argues that there is a “ceiling” on the number and types of situations to which the intelligible principle test can be applied.

- Review— Nondelegation and Separation of Powers
  - Nondelegation Doctrine
    - “Intelligible Principle” Test
      - The amount of acceptable agency discretion depends on the scope of the power delegated to the agency. American Trucking.
      - The intelligible principle test is meant to ensure that the agency has some sort of rational, reasonable basis for its chosen action.
        - Again, the nondelegation doctrine is generally weak in practice. However, it can be viewed as a sort of “backstop” principle.
  - An administrative agency cannot cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute (Chevron is irrelevant). American Trucking.
  - The Court last used the federal nondelegation doctrine to strike down a statute in 1935.

VI. Structural Limitations— Legislative Veto (INS v. Chadha)
- Background
  - Historically, a foreign alien sought to overcome a finding of deportability by INS through a private bill.
    - This was a cumbersome and time–consuming response. So Congress enacted the Immigration and Naturalization Act of 1952.
  - Immigration and Naturalization Act of 1952
    - Under the Act, the Attorney General was given the power to suspend deportation upon a finding, inter alia, that deportation would result in “extreme hardship” to the alien, his spouse, parent, or child, who is a citizen or lawful resident of the US). If either the Senate or the House passed a timely resolution against suspension, the alien
would be deported. If not, the Attorney General would cancel the deportation proceedings.

- In this case, however, the resolution against suspension was given almost no consideration by Congress—there was virtually no process (“kangaroo court”).

- Question in this case was whether the challenged action (one–House veto) is of the kind to which the procedural requirements of Article I Section 7 (presentment and bicameralism) apply.

- Court says the action taken by the House was “essentially legislative in purpose and effect,” because the action had the purpose and effect of altering the legal rights, duties, and relations of persons. Thus, the action was subject to the Article I standards of Presentment and Bicameralism.

- Analysis of the Court’s Decision
  - Arguments that the Court’s decision was legally correct:
    - The constitutional requirements of Presentment and Bicameralism were intended to prevent an end–run against constitutional safeguards (i.e. Congress calling something that has the effect of law a “resolution,” “vote,” etc. instead of a bill).
    - Burger argues that the nature or character of the actor in this case (the House of Representatives) creates a presumption that the action was legislative (in other words, the presumption is that because the Legislature took the action, the action is legislative).
    - On the contrary, could you argue that the House’s action was actually adjudicative instead of legislative, because it involved the legal rights of six specific individuals? In contrast, general rulemaking typically involves the promulgation of prospective rules that are not aimed or addressed towards any one specific group.

- Burger’s Majority Opinion
  - Burger rejects pure pragmatism
    - “Convenience and efficiency are not the primary objectives…of democratic government and our inquiry is sharpened by the fact that Congressional veto provisions are appearing with increasing frequency.”
  - Burger also points out that the framers believed that the powers conferred on Congress were the powers to be the most carefully circumscribed.
    - Article I, Sections 1 and 7 “represent the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”
  - Burger argues that the legislative character of the actor in this case (the House) creates a presumption that the action itself was also legislative.
    - “When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.”
    - Contrast Stevens’ concurring opinion in American Trucking, in which he argued that “the proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it.”
  - The majority also emphasized the purpose and effect of the House’s action. The House’s veto here was “essentially legislative in purpose and effect,” because it “altered the legal rights, duties, and relations of persons”—all outside the legislative branch!
  - In addition, the majority points to the nature of the congressional action (private bill) supplanted as additional evidence that the House’s action was “legislative.”
  - Finally, the majority discusses the nature of the action in question.
    - “Disagreement with the [Attorney General’s] decision…involves determinations of policy that Congress can implement in only one way.”

- Powell’s Concurrency