Statutory Interpretation – Spring 2013

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# Regulatory Regimes and Their Alternatives

## Agencies in the Structure of Modern Federal Government

### Overview

* + - 1. **Definition of an Agency:** An agency is a unit of government created by statute. Agencies may have the power to act with the force of law.
         1. **APA Definition of Agency (An Agency is NOT):** Agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include: (1) Congress; (2) the courts; (3) the territories or possessions of the US; (4) government of DC; (5)
      2. **Agencies and Democracy:** Since agency’s act with the authority of law, there is a constant tension about whether agency actions actually adhere to the will of the majority.
      3. **Benefits of Agencies:** (1) Expertise; (2) fairness and rationality; (3) Interest representation; (4) political accountability; (5) efficacy and flexibility; (6) coordination; and (7) efficiency.
         1. **Expertise:** Agencies have broad access to information, specialized knowledge, and trained staff, as well as time to research issues.
         2. **Fairness and Rationality (APA Procedures; Formal Rule Making; Informal Rule Making):** Agencies are subject to procedural requirements imposed by statute. This is supported by the requirements for conducting formal action as well as informal action. APA provides standard for judicial review.
         3. **Interest Representation:** Agencies are open and accessible to a wide range of interests. Agencies have incentives to consider and accommodate different views to minimize the issue that parties later may seek to challenge in courts.
         4. **Political Accountability:** Agencies can be seen as indirectly accountable to people because the President supervises their decisions.
         5. **Efficacy and Flexibility (Anti-Gridlock; Agile):** Agencies can implement policies that are preferred or needed when gridlock grips Congress. Many agencies have the capacity to respond quickly to changing circumstances.
         6. **Coordination (Inter-Agency Consistent)**: The coordination of agency policies can allow for consistent and uniform regulatory regimes.
         7. **Efficiency:** Agencies have the resources to consider the expected cost and benefit of regulations.

### Agencies and the Constitution

* + - 1. **Agencies are Extra-Constitutional (View 1):** The Constitution does not speak directly to the creation of agencies and, therefore, they are extra-constitutional with few requirements. SCOTUS supports this perspective.
      2. **Article I & Article III Agencies (View 2 –** **Bush’s View):** Article I vests all legislative power with Congress, and Congress passes the laws that create agencies. Since Congress can delegate its powers under the necessary and proper clause, agencies can derive their authority from the Constitutional grant to Congress. Similarly, courts cede power to agencies to adjudicate issues like an Article III court because because **(1)** their dockets are full and **(2)** the judiciary still have the capacity to review, which is the most important part.
         1. **All Actions Must Conform to Constitution and Statutory Grant:** Whenever an agency acts, it must conform to its statutory grant as well as not offend any provision in the Constitution. Since Congress can offend the Constitution, there is no rational reason to allow agencies to offend the constitution.
         2. **Final Agency Actions are Subject to Judicial Review (APA § 701):**  Agencies are never the final arbiter on an issue. It is always possible for a court to review an agency’s action or process and strike down any determination the agency made.

### Types of Agencies

* + - 1. **Executive-Branch Agencies (Under President; At-Will Employment):** Executive-branch agencies appear under the President in the government organizational chart and are run by officials who can be fired at the will of the President.
      2. **Independent Agencies (Not At-Will; Quasi-Legislative/Judicial Agencies):** Independent agencies have head that are not subject to plenary presidential removal. Independent agencies generally are run by multi-member commissions or boards rather than a single administrator. Allowing the president to hire and fire at will would result in a disruption of the separation of powers by allocating too much power to the executive branch.
         1. ***Influences on an Independent Agency (Strauss):*** **(1)** obedience to authority; **(2)** avoidance of pain of antagonistic committee hearings; **(3)** threat of **budget reductions**; **(4)** and a general desire for the good will of the political leadership

**Direct Influences (Bush):** **(1)** Appointment and confirmation process; **(2)** budget; and **(3)** congressional hearings.

* + - * 1. ***Presidentially Selected Commissioners/Chairman (Strauss):***The Chairman of an agency is selected by the President and generally holds the position at the president’s pleasure. Chairman play a powerful role in the overall direction of an agency.

### Agency Employees and Agency Policy

* + - 1. **Political Appointees:** Political appointees are individual who are nominated by the President (President conducts the initial due diligence) and confirmed by the senate in a confirmation hearing.
         1. **Picking Your Friend:** President tend to nominate people who they know either personally or professionally. The President seeks to reward those who are close advisors and supporters.
         2. ***Senate Conformations (False Hype) [Reich, Locked in the Cabinet]:*** Article expressed Reich’s perspective of the Senate confirmation process. He felt that it was more of a dog-and-pony show; no real information was discovered, and the Senate did not learn much about a candidate. Instead, the nominee acted in a manner that showed his deference to the Senate.
         3. **Disagreements with President Tend to Result in Resignation:** Generally, political appointees will adopt the perspective of the President. However, in cases where the parties disagree, dismissal resignation is likely.

***Whiensman – EPA*:** Christie Whitman resigned from the head of the EPA. The Associated Press believed that it was because of significant ideological differences between Whitman and President Bush regarding the Kyoto protocol and other environmental regulations. Interestingly, her resignation letter read more like a marketing tool.

***US Attorneys:*** Bush Administration fired 8 republican DAs. There was a theory that the dismissals resulted from political influence (or were political repercussions for particular actions). Official reports sited reasons like poor performance, failure to prosecute particular cases, etc.

* + - 1. **Career Civil Servants:** The civil service is a merit system, where positions in government agencies are awarded on the basis of competitive examination. Pay is determined by position and seniority, with fixed salary steps set by statute and regulation. Employees do not serve at will. Rather, they can only be dismissed for cause – absenteeism, proven incompetence, dishonesty, and the like.
         1. ***Guerrilla Warfare for Handling Disagreements (Rourke):*** Usually, bureaucratic opposition to official policy is covert rather than open. Civil servants talk to friendly legislators and reporters.
         2. ***Role = Insure Competent Design (Rourke):*** In the formal theory of public administration, the role of the career staff is regarded as primarily that of ensuring competence in the design of policy.

## Common Law as a Regulatory Regime

### Overview:

* + - 1. **Regulation through Tort or Contract:** An alternative to a governmental regulatory scheme is to police interactions through tort law and/or contract law. However, these bodies of law may not be sufficient to regulate human behavior.

### The Limitations of Tort Law

* + - 1. **Privity of Contract Required (Old/Bad Law):** In order for a P to recover damages against a D for an act of negligence, the P had to show a contractual relationship between the P and the D.
         1. ***Winterbottom v. Wright [Mail Coach Accident]:*** Wright had manufactured and maintained carriages and had a contract to provide the Postmaster-General with mail coaches. Wright agreed to keep these mail coaches in a safe condition. The Postmaster-General had a contract with another company to provide drivers for these coaches. One of these drivers, Winterbottom, suffered severe injury when the wheel of one of Wright’s coaches collapsed. Winterbottom did not have a direct contractual relationship with Wright.   
            **HOLDING:** Since there was no privity, the cause of action fails. After Wright had done everything to the satisfaction of the Postmaster-General, and after all matters between them had been adjusted, and all accounting settled on the footing of their contract, the Court should not subject them to be ripped open by this action of tort brought against them.
      2. **Reasonable Certainty of Injury:** When a thing is reasonable certain to place life and limb in danger, it is a thing of danger and liability attaches in the absence of privity. This requires a showing that (1) a product was used by a third-party without additional tests; (2) the manufacturer had knowledge that the danger was probable

**Policy (Manufacturer on Notice):** The nature of the item provides a warning to the manufacturer or a potential liability.

* + - * 1. ***MacPherson v. Buick Motor Co. (Broken Wooden Wheel) [pg. 50]:*** D is a manufacturer of cars. It built a car and sold it to a retailer dealer. The dealer resold the vehicle to P. While P was in the car, it suddenly collapsed, which caused P to suffer an injury. The car collapsed because one of the wheels had rotten wood spokes. The defect could have been discovered by reasonable inspection, which was not performed by Buick. The wheel was bought from another manufacturer, who had no had quality issues before.   
           **HOLDING:** The nature of an automobile gives warning of probable danger if its construction is defective. The D knew the danger. It knew also that the car would be sued by persons other than the buyer (the dealer). The D was not absolved from a duty to inspect by the fact that it bought the wheel from a reputable manufacturer.
    1. BOP on P**:** The mere fact that a P was injured in an accident is insufficient for proving negligence; the P must show that D failed to perform the required duty.
       1. ***Rotche v. Buick Motor Co. (Cotter Pin Accident) [pg. 54]:*** Rotche bought a car from a Buick dealership. The car was driving at 30mph when it suddenly veered left, struck a curb, and started rolling down the road. The front-end of the vehicle was pretty destroyed. After the accident, a mechanic found that a clevis and two cotter pins were missing. The mechanic also found a loose cable. The accident occurred several months after the vehicle was sold. Buick introduced evidence showing that the vehicle was inspected on several occasions, and that there was never a defect in those parts noted. The vehicle was inspected at the factory (1), it was then inspected at an intermediate plant between the factor and the dealership (2), and the vehicle underwent a final inspection by the dealership (3).   
          **HOLDING:** Ordinary care in the building of an automobile requires that the free ends of a cotter pin used to hold a clevis in place be clinched or separated. However, given the great weight of inspections, P failed to show that D acted negligently.

### Industry Changes Designed to Avoid Liability

* + - 1. **Advertising**: companies made their safety claims more realistic and cautious
      2. **Customer** **Service**: companies began providing repair services that extended beyond their standard warranties.
      3. **Business Organization**: companies started to design their corporate structure in a manner that made it hard for Ps to sue them.
      4. **Disclaimers and Limited Warranties**: companies limited their liability as much as possible by disclaiming warranties and by instituting things like liquidated damages clauses.

### Other Limitations

* + - 1. **Retrospective vs. Prospective Application:** A court-imposed new rule applies prior to conduct. As a result, the parties may receive something of an unfair penalty or windfall. Statutes typically apply to conduct that occurs after enactment.
      2. **Reactive vs. Proactive:** Courts cannot reach out to prevent injury; they have to wait for a case to present itself. However, legislatures and agencies can take action at any time.
      3. **Uncertainty:** Courts often introduce uncertainty in the common law through transforming prior precedent. This practice leaves future parties and courts without a clear sense whether or to what extent the law has changed. In contrasts, legislatures and agencies do not typically suffer from these sorts of uncertainties. First, federal statutes apply in all jurisdictions across the US. Second, legislatures and agencies typically create rules of general application and future effect.
      4. **Institutional Competence:** Courts lack the technical or specialized skill to craft the rules that govern risk-generating activities; they are not well suited for making phase-in schedules, for gathering the information necessary for making an informed decision (limited by the parties to the dispute), and they lack the necessary time to properly decide a matter. In contrast, legislative agencies do not summer from any of these issues.
      5. **Political Accountability:** Judges in federal courts are insulated from democratic politics.
      6. **Parties vs. Interested Participants:** Adjudication is restricted to the parties to the case. The legislative process is open to anyone why can garner legislative attention (big businesses only?)
      7. **Collective Action Problems:** Adjudication is dependent on private initiative, which not only requires an injury and a legal cause of action but the wherewithal to bring a lawsuit. In contrast, legislatures and agencies can act independent of private initiative.

## Justifications for Regulations

* + 1. Economic Theory (Market Failures)**:** Economic theory justifies regulation because of market failures – sometimes the market, reinforced by the common law, will not supply consumers with their preferred option.
       1. **Self-Policing Model Deficient**: Self-policing model emphasized the limited responsibility of government for economic well-being. It was premised on the view that the individuals and corporations were best able to safeguard their well-being through market transactions. However, certain market failures still occurred with grave economic social consequences.
    2. Breyer’s Justification (Dealing with Structural Problems)**:** The justification for intervention arises out of an alleged inability of the marketplace to deal with particular structural problems. Breyer views regulation as (1) a surrogate for controlling natural monopolies that develop.   
       1. **The Control of Monopoly Power:** Regulation to prevent monopolies is desirable because charging monopolistic prices causes the price of a resource to increase while the quality decreases.

**Natural Monopoly:** There is a claim that some industries, like telecommunications, cannot efficiently support more than one firm because of economies of scale.

**Entrepreneurial Signal**: If a monopolist is making exceptional profits, other entrepreneurs will be motivated to enter the market. The question is how high are the barriers to entry.

* + - * 1. **Traditional Increased-Output Rationale**: Regulation is desirable to ensure that there is an efficient allocation of scarce resources, resulting in the least amount of waste.

**Perfect Competition Model:** In a perfectly competitive market, firms expand output to the point where price equals incremental cost – the cost of producing an additional unit of their product.

**Monopolistic Pricing:** A monopolist curtails production in order to raise prices. Higher prices mean less demand, but the monopolist willingly forgoes sales.

**No Discipline of the Market:** Monopolists do not feel the pressure of competitors who would threaten to lower their own costs, subsequently lower their prices, and thereby capture sales. The monopolist may be lazy about production costs.

**Waste Results from Monopolistic Pricing:** Consumers compare the high monopoly price of the monopolized products with the relatively cheaper prices of competitively produced products and by more of the latter even though (1) they may prefer more of the former and (2) it costs society less in terms of real resources to produce more of the former and less of the latter.

* + - * 1. **Additional Bases for** **Regulation**

**Income Transfer:** The effect is to transfer income from the users of the service to the investors – and an income transfer that is generally believed to be regressive, and hence undesirable.

**Income Transfer Exacerbated by Elasticity:** Initial investors receive a windfall; future investors, who pay more for the shares, do not. Consumers indefinitely pay the extra charges each year that constitute the increased profits that the company now enjoys. The more essential the service, the greater the amount that this income transfer is likely to be.

**Fairness:**  The competitive market does not provide the firms within it much opportunity for the arbitrary or unjustifiable discriminatory exercise of personal power.

**Regulations As A Proxy for Fairness:** The regulation system, by providing recourse for grievances against the monopolist, offers a remedy that to some extent makes up for the lack of competition’s guarantees against unjustified discrimination.

**Power (Corporate Social Responsibility):**  Regulation is also advocated by those who fear concentration of substantial social or political power in the hands of a single firm that controls an essential product.

* + - 1. **Rent Control or Excess Profits**

**Rent = < 100%:** A firm will earn an economic rent if it controls a source of supply that is cheaper than the current market price. It is a rent and not a monopoly profit if the cheaper source could not supply the entire market.

**Monopoly Profit = 100%:** A monopoly profit results from a firm controlling a source of supply that covers an entire market.

* + - * 1. **The Rationale for** **Regulation**

**Transferring Income (Prevent Price Gauging):** Regulation seems permissible when producer’s rents are large and occur suddenly.

**Reason for Fair Distribution**: (1) extra profit accruing to these producers is somehow undeserved (plain luck); (2) the income transfer from consumer to producers or to their shareholders that these profits represent is thought to be regressive; and (3) the amount involved is large.

* + - 1. **Compensating for Spillovers (Externalities)**

**Externalities = Spillovers**: Externalities arise when the unregulated price of a good does not reflect the true cost to society of producing that good. The difference between true social cost and unregulated prices are “spillover” costs (or benefits).

**Measured in Terms of Particular Good/Service**: You always evaluate spillovers in terms of a particular product; it must assume that obstacles to bargaining lead to significantly greater use of a product than would be the case if costless bargaining were possible; it must also assume that the result of intervention will better approximate the bargained-for solution (market solution).

**Collective Action Creates Externalities:** All legal action creates externalities through transactions costs. Ironically, regulation is often necessary to remedy these increased transaction costs.

* + - * 1. **The Rationale for** **Regulation**

**Avoiding Waste:** The regulation of spillover costs is justified by the desirability of avoiding economic waste.

* + - * 1. **Critique of Rationale**

**Coase Theorem**: If bargaining were costless, spillovers would not exist.

**Collective Action Problem**: Bargaining is not costless. Thus, the residents may suffer the pollution despite a willingness to pay more than 1 cent per point to avoid it, simply because it is too difficult for them to band together. As the number of affected people increase, communication because more expensive, bargain become more complicated, and a clear consensus is harder to obtain.

**Economic Efficiency**: The idea is to maximize the welfare of the world’s individuals as measured by their preferences revealed in the marketplace.

* + - 1. **Inadequate** **Information**

**Information = Backbone of Market:** For a competitive market to function well, buyers must have sufficient information to evaluate competing products.

**Information Asymmetries:** Competitors have an incentive to produce information because they want consumers to know why their product is the best.

* + - * 1. **The Classic Rationale for** **Regulation**

**Skewed Incentives to Produce Information:** The incentives to produce and to disseminate information may be skewed. Some information is expensive to produce initially but very cheap to make available once produced.

***Ex. Pharmaceuticals:*** The labeling requirement can be seen as lowering the cost of buyers of searching for competing sellers.

**Fraudulent Inducement:** One of the parties to a transaction may seek deliberately to mislead the other; by conveying false information or by omitting key facts.

**Consumers Lack Necessary Understanding:** The buyer may not be able to evaluate the characteristics of the products or services they offer.

**Supply ≠ Demand:** The market may, on the supply side, be insufficiently competitive to provide all the information consumers would willingly pay for.

* + - * 1. **Other** **Justifications**

**Unequal Bargaining Power:** Assumption that there is a proper allocation of bargaining power among the parties affected. Where the existing division of such bargaining power is unequal, it may be thought that regulation is justified in order to achieve a better balance.

**Rationalization:** Governmental intervention is justified on the ground that, without it, firms in an industry would remain too small or would lack sufficient organization to produce their product efficiently. This is the argument for industry planning.

**Moral Hazard:** The term moral hazard is used to describe a situation in which someone other than a buyer pays for the buyer’s purchase (i.e. medicare).

**Paternalism:**  Although in some cases full and adequate information is available to decision makers, consumers nevertheless make irrational decisions and that therefore government regulation is needed.

**Scarcity:**  Regulation is sometimes justified in terms of scarcity. This is the deliberate decision to abandon the market shortages or scarcity normally can be alleviated without regulation by allowing prices to rise. Nevertheless, one might abandon price regulation in favor of another regulatory scheme to allow the allocation of the market to achieve some public interest objectives.

* + - * 1. **Problem of Public** **Goods**

**Public Goods**: A public good is a commodity with two very closely related characteristics: (1) nonrivalrous consumption – consumption of a public good by one person does not leave less for any other consumer; and (2) nonexcludability – the cost of excluding nonpaying beneficiaries who consume the good are so high that no private profit-maximizing firm is willing to supply the good.

**Free Riders**: People who hope to benefit at no cost to themselves form the payment of others.

**Solving the Free Rider Problem**: (1) The government may undertake to subsidize the private provision of the public good, either directly or indirectly through the tax system; (2) the government may undertake to provide the public good itself and to pay the cost of providing the service through the revenues raised by compulsory taxation.

* + 1. Democratic Theory (Social Justice): Democratic theory justifies regulation based on a rationale of social justice or welfare – sometimes people will demand more for society than any individual will seek for herself as a consumer.
       1. **External Influences (Advertising) & Consumer Preference**: People may want to have safe, efficient, inexpensive cars (actual preferences), but they buy unsafe and more expensive cars (revealed preferences) because advertising portrayed these cars as desirable.
       2. **Internal Forces (Cognitive Biases) & Consumer Preference**: People systemically undervalue or overvalue certain risks. They discount risks within their control and overestimate risks beyond their control.
          1. ***Airbags 101:*** Airbags are not as simple as they appear; there are many types, and the safety benefit of each type is not always clear. Moreover, the way the manufacturer designs the vehicle can impact the effectiveness of the airbag. All of these facts put consumers at a competitive disadvantage when trying to acquire information regarding safety for the purchase of a vehicle.
    2. Social Justifications for Regulation: Much government regulations stems from the recognition that society may aspire to certain norms of conduct for their own sake.
       1. **Sunstein’s Justification:**
          1. **Collective Desires and** **Aspirations (Madisonian Deliberative Democracy):** Some statutes should be understood as an embodiment not of privately held preferences, but of what might be described as collective desires, including aspirations, preferences about preferences, or considered judgments on the part of significant segments of society. This conforms with *Madison’s* idea of using democracy to aggregate preference.

**Political Choice ≠ Private Choice:** Political choice intrudes on the market because individual act differently in the following manners as political actors:

**Aspirational Behaviors (1):**  Citizens may seek to fulfill individual and collective aspirations in political behavior, not in private consumption.

**Altruistic Behaviors (2):** People may, in their capacity as political actors, attempt to satisfy altruistic or other-regarding desires, which diverge from the self-interested preferences characteristics of markets.

**Vindicating 2nd Order Preferences (3):**  Political decisions might vindicate what might be called meta-preferences or second-order preferences

**General Interest Perspective (4):**  People may commit themselves, with regulation, to a course of action that they consider to be in the general interest

**Can Bind Others:** Individual actors are willing to behave differently because they know that the State can bind other actor to adhere to their preferences.

**Willingness to Pay Eliminated:** Political action does not suffer from consumers having to express a willingness to pay for the outcome since the cost is dispersed across the entire society.

* + - * 1. **Social Subordination**: The motivating idea of regulation designed to eliminate social subordination is that difference that are irrelevant from the moral point of view ought not be turned into social disadvantages, and they certainly should not be permitted to do so if the disadvantage is systemic.

**Critique (Market Can Solve; Discrimination):** Social subordination theory is incomplete because markets could solve the underlying moral harm.

**Support (Market Can’t Always Solve):** Regulation premised on social subordination is necessary because, sometimes, the market cannot solve the underlying issue. Using discrimination as an example, the following issues could be present:

**Third-Party Costs (1):**  Third parties might impose serious costs on those who agree to deal with members of disadvantaged groups; customers sometimes withdraw patronage.

**Response to Stereotypes (2):** Discriminatory behavior is sometimes a response to generalization or stereotypes that provide an economically rational basis for market decision.

**Adjustment of Private Preferences (3):**  Private preferences of both beneficiaries and victims of discrimination tend to adapt to existing injustice, and to do so in such a way as to make significant change hard to undertake.

**Markets Reinforce (4):**  Markets incorporate the practices and norms of the advantaged group

* + - * 1. **Irreversibility, Future Generations, Animals, and Nature:** The fact that a certain course of conduct will lead to an outcome from which current and future generations will be unable to recover from, or that the cost of recovery would be extremely high.

***Ex. Endangered Species Regulation***

* + 1. **Public Choice Theory:** The idea that legislators are not different than any other rational actor and, therefore, take actions that serve their self-interest. This means that they will take actions that cater to the preferences of wealthy and organized constituent groups because these groups fund reelections.

## The Rules of the Regulatory Game

## Notice and Comment Rulemaking

### Overview

* + - 1. **Notice and Comment Rulemaking Process**: This process generates rule, also called regulations, which are legally binding on government officials and private parties similar to statutes.
      2. **Applies to Denials**: All standards that apply for creating rules also apply for denying a request for rulemaking.

### Making the Rule (Controlled by APA §553)

* + - * 1. **Policy (Sunlight; Uniformity):** The goal of §553 is to show what is going on behind closed doors and to make sure that the rules apply to everyone.
      1. **Initiating the Process**: An agency initiates the notice-and-comment rulemaking process in response to a *Petition for Rulemaking* from private parties, at the prompting of other government officials, or on its own.   
         1. **Issue a NPRM or ANPRM (Step 1):** The first step is usually to issue a *Notice of Proposed Rulemaking (NPRM)*, which contained one of more proposed rules and is published in the Federal Register or *Advanced Notice of Proposed Rulemaking (ANPRM)*

**OIRA Compliance if ≥ $100M (Executive Order No. 12866):** Executive-branch agency must submit any proposed rule with anticipated cost of $100M or more for review to the Office of Information and Regulatory Affairs (OIRA).

**Policy:** (1) OIRA makes sure that the rules do not conflict with other rules; (2) OIRA makes sure that the executive branch has carefully considered the rules; and (3) OIRA ensures that the costs do not exceed the benefits through the required cost-benefit analysis.

* + - * 1. **NPRM Content (APA §553b):** A NPRM must:

Be published in the federal register.

Contain a statement of the time, place, and nature of public rulemaking proceedings.

Reference the legal authority under which the rule is proposed.

Contain terms of substance of the proposed rules or a description of the subjects/issues involved.

Make any studies used as the basis of the rule available.

***NHTSA Standard 208 (Passive Restraints):*** The rule discussed a requirement for passive restraints because of the number of lives saved. There were several alternatives including: (1) reversal of phase-in sequence; (2) simultaneous compliance; (3) rescission; (4) education; and (5) airbags. Impact of these proposals: 750-7500 lives, but it does not tie out the benefit to each proposal. (after 10 years, so long term benefits).

* + - * 1. **Exceptions (APA §553b):** APA §553b does not apply to (1) interpretive rules, (2) general statements of policy (giving flush to a statement of rules), (3) rules of agency organization, procedure, or practice, or (4) if the agency could show that having a notice and comment procedure would be impracticable, unnecessary, or contract to the public interest.
      1. **Conducting the Process (APA §553c):** After filing notice, an agency shall give interested person an opportunity to participate in the rulemaking.
         1. **Interested Persons:** As compared to parties, interested persons is an inclusive standard and includes individuals, partnership, corporations, associations, or public and private organizations other than the agency.
         2. **Comment Period:** Comments are a means for interest parties to be hard on the proposed rules. The comment period needs to be sufficient to allow interested parties to comment on the rules. This is generally a 60-90 day window. The agency must address material and substantive comments.

***NHTSA Standard 208 (Passive Restraints):*** NHTSA received comments for numerous sources including: (1) citizens; (2) vehicle manufacturers; (3) insurance companies; (4) suppliers; and (5) consumer/health organizations.

**Considering Comments Submitted After Close = Arbitrary and Capricious.**

* + - * 1. **Final Rules as Logical Outgrowth:** The final rules must be a logical outgrowth of the original NPRM, otherwise you have to restart the process. A logical outgrowth is one where the parties should have anticipated that change was possible and thus reasonably should have filed their comments during the notice and comment window.

**Factors:** (1) unfairly surprised; (2) reasonable prediction; and (3) undue hardship.

***NHTSA Standard 208 (Passive Restraints):*** NHTSA chose recession, which was not a surprise because it was one of the initially stated options. However, the court struck down after applying a hard look standard, arguing that NHTSA failed to adequately discuss the alternative of requiring airbags (*See State Farm*).

**Ex-Parte Communications:** A panel of the DC circuit has required disclosure of all ex-parte communications. *HBO* is one perspective on this, but there are others. Other cases suggest different outcomes.

Agencies may have their own ex parte regulations regarding rulemaking proceedings.

* + - 1. **Completing the Process:** The agency completes the NPRM by issuing a final rule.
         1. **Statement of Basis of Rule:** APA § 553 requires an agency to publish a statement of the basis for the rule along with the final rule. The basis and purpose statement must set for the rationale and legal authority for the rule.
         2. **Higher Standard For Judicial Review:** Courts tend to want as much information as possible in order to facilitate judicial review. The less information, the more likely a regulation is to get struck down as being arbitrary and capricious.

## Statutory Analysis

### Overview

* + - 1. **Jurisdictional Issue:** Agencies can only create rules within the boundaries of their organic statute.
      2. **Relevant/Prohibited Factors:** An agency may be limited when evaluating certain factors when conducting statutory analysis.
      3. **Retroactive Rule-making (Bowen v. Georgetown):** A statute will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed in express terms.
         1. **NHTSA Illustration (Retroactive CAFÉ Standards):** Automakers, especially GM wanted the NTHSA to promulgate a rule that would retroactively reduce the required average fuel economy for fleet vehicles. The change would create retro-active credits for all of the manufacturers. NHTSA declined.

### Chevron Two-Step + Admin Block

* + - * 1. **Applies to Procedural and Substantive Issues:** The Chevron two-step applies to both procedural matters (how to create the rule) as well as substantive matters (within the scope of the statute).
        2. **Policy (Better Left to Legislature):** Administrative regulation are highly technical and complex. It is better to leave conflict and debate about these decisions to the democratic process (legislature, etc.) instead of judges.
        3. **Deference Limited to Organic Statute:** An agency’s deference is limited to its organic statute because congress has only delegated authority to the agency to speak with the force and effect of law in regards to its organic statute. Any interpretation outside of the organic statute (APA, etc.) does not get any deference.
        4. **Litigation Posturing = Low Deference:** If you make a rule in result of litigation, you are less likely to get deference
      1. **Is the statute clear on the specific issue (Step 1)?**
         1. **Yes:** Then the agency is bound to adhere to the statutory answer.
         2. **No:** The agency looks for a pre-1984 court decision that addresses the particular issue or moves on to step 2.

***Chevron USA v. Natural Resource Defense Counsel (Bubble Concept) [pg. 438]:***Clean Air act required States to achieve certain air quality standards. Air quality standards were identified the by the EPA. If a State did not meet the standard set by the EPA, they were considered a non-attainment state. Non-attainment states were required to establish a permit program regulation new or modified major statutory sources of air pollution. The EPA promulgated regulation indicated that the State could adopt a plant wide definition of the term stationary source. This implied a bubble concept.   
**HOLDING:** Congress did not define the term explicitly, nor speak to whether it was appropriate to include a bubble concept in a major statutory source

**Contradiction of Prior Ruling in Case:** (1) if prior to Chevron, then the court’s interpretation stands, but, if after, the prior ruling does not matter.

* + - * 1. **What To Look At:** Terms of the Statute; Legislative History; and Purpose of the Statute.
      1. **Is the interpretation permissible (Step 2)?**
         1. **Arbitrary and Capricious Standard:**  All constructions are permissible unless they are arbitrary, capricious, or manifestly contrary to the statute.

***Chevron USA v. Natural Resource Defense Counsel (Bubble Concept) [pg. 438]:***Clean Air act required States to achieve certain air quality standards. Air quality standards were identified the by the EPA. If a State did not meet the standard set by the EPA, they were considered a non-attainment state. Non-attainment states were required to establish a permit program regulation new or modified major statutory sources of air pollution. The EPA promulgated regulation indicated that the State could adopt a plant wide definition of the term stationary source. This implied a bubble concept.   
**HOLDING:** Debate over whether bubble concept was better when dealing with maintaining pollution levels as opposed to improving pollution levels.

* + - * 1. **What To Look At:** Terms of the Statute; Legislative History; and Purpose of the Statute.
        2. **Contradictory Interpretation:** Assuming that the statute is ambiguous on the particular issue, there is no requirement for agency consistency over time; in other words, an agency can create an interpretation that overrides and contradicts an earlier interpretation.
      1. **Is there an admin block to the rule?**
         1. **Check APA §553 Compliance:** Even if an agency’s action survived the two-step, failure to comply with the APA would result in the rule getting struck down.

### Mashaw’ Perspective on Statutory Interpretation

* + - 1. Times that Agencies Conduct Statutory Interpretation
         1. **Forms:** legislative rules, interpretive rules, statements of policy, manual issuances, advisory opinions, letters, press releases, after dinner speeches, formal adjudication, informal adjudications, interpretive memoranda, guidelines, rulings, etc.
         2. **Occasions**: Disputes, inquiries, political probications, and autonomous policy decision.
         3. **Process**: depends
      2. Methodology for Statutory Interpretation
         1. Text
         2. Legislative history
         3. Statutory history
         4. Purpose of the statute
         5. Cannons of construction
         6. Past agency practice
         7. Balance of completing congressional purposes
         8. Industry or scientific understanding

### Mashaw’s Perspective on Legislative History

* + - 1. **Professor Strauss’s Argument (Direct Custodial Relationship):** Agencies have a direct relationship with Congress that gives them insight into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation.
      2. **Issues with Judicial Interpretation:** (1) Loss of independence because of the appearance of political motivation by being defenders and declarers of the law; (2) If courts are to act as faithful agents an yet avoid immersing themselves in contemporary political processes, one way to go out it is to give discretion to those who cannot avoid it.

## Scientific Analysis in Agencies

* + 1. Why Have Scientific Analysis? (Risk Assessment & Risk Management) Scientific analysis helps agencies to evaluate the risk of a bad event occurring and to develop appropriate responses.
       1. ***NHTSA Illustration (Airbags and Advanced Airbags*):** Change from barrier test to sled test because it provided better information regarding the uncertainties surrounding the effectiveness of air bag. It led to a rule requiring the installation of advance airbags or a switch to disable the airbags for small-stature people.
       2. ***NHTSA Illustration (Seat Belts):*** One of the reasons for not adopting seatbelts was that the agency did not have enough information about the effectiveness. This uncertainty made the agency select the low end of the benefits that could have been derived by implementing passive restraints.

### Assessing Risk

* + - * 1. **Risks:** A risk is where we know the potential outcomes and the probabilities tied to each of those outcomes.
        2. **Uncertainty:** An uncertainty is where we may not be able to define what states of the world are possible.
        3. **Ignorance:** Ignorance is where we cannot be confident in our ability to detect threats.
      1. **Two-Part Process:** (1) Risk assessment and (2) risk management
         1. **Risk Assessment (Information Gathering):** The first step is to acquire and process information about the risk. Risk assessment is a process for calculating the probability and magnitude of identified adverse effects. The process is used to identify activities that require regulatory attention, to select the nature and stringency of an appropriate regulatory response, and to choose among the many potential objects of regulators’ efforts.
         2. **Risk Management (Policy Application):** In risk management, the substantive decision to take or without regulatory action is made. Unlike risk assessment, risk management is motivated by political, social, and economic policy.
      2. **Ropeik & Gray’s Perspective on Risk**
         1. **Overview:** The issues with scientific analysis is that it is inherently imprecise and there are a lot of questions that science has not answered yet.
         2. **Scientific Methodologies:**

**Toxicology:** The study of poison where animals are used as a surrogate to understand the impact of a compound on humans.

**Reasons for Imprecision:** (1) Humans aren’t rats, and we don’t know the best species to use as an indicator; (2) Maximum Tolerated Dose (MTD) – animal get exposed to a dose that is far greater than any dose you would normally get exposed to; (3) in vivo tests in living animals, or in vitro tests in a lab dish or beaker, isolate and test just one compound at a time (no mix).

**Epidemiology:**  Studying what has happened, or is currently happening, to real populations in the real world, and trying to make sense of which hazards and exposures might be associated with which consequences.

**Reasons for Imprecision:** (1) Epidemiology can usually provide only associations because of *confounders, which are hidden clues that muddle the results.*

**Statistical Analysis:** Using statistical datasets to find clues about risks.

**Reasons for Imprecision:** (1) Incomplete datasets; (2) Interpretations of statistical results is inherently subjective; (3) Aggregates dissimilar people into the same categories.

* + - * 1. **Reliability of Risk Assessment (Judgment Call):** Agencies make judgment calls based on their estimation of the relevant similarities and differences between the method of analysis and the risk at issue.
      1. **Wagner’s Scientific Charade Argument (Scientific vs. Trans-Scientific Questions)**
         1. **Limits of Science:** Contemporary science is incapable of completely resolving the level at which a chemical will pose some specified, quantitative risk to humans.

**Trans-Science Questions:** Trans-science questions arise from a variety of particular and theoretical limitation on scientific experimentation. These questions exists where there are gaps in knowledge that cannot be answered by science. These questions exists because scientist cannot even perform the experiments to test the hypothesis.

**The Fragmented Contribution of Science:** The insight that science can give us is fragmented and occurs sporadically.

**Dual Characteristics of Science-Policy Problems:** In order to distinguish between questions that can get answered by science and those that must remain trans-scientific requires knowledge of both science and politic. The fact that there is a science requirement implies that a scientist is best suited for making the determinations.

* + - 1. **Scientific Uncertainty**
         1. **How to Handle the Uncertainty (Conservatism):** When making decisions in the face of uncertainty, many agencies believe that the best route to take is a precautionary or conservative approach, which tends to overstate the risk and understate the benefits.

**Yuccan Mountain Counter-Example:** However, the Yucca Mountain nuclear waste storage is an example where agencies deviated from this theory; they allowed for lower analysis thresholds (10,000 yr vs. 1,000,000 yr.) Arguably, this was done because it was not practical to get data on the longer period.

* + - 1. **Wagner’s Perspective on Intentional vs. Unintentional Abuse of Science**
         1. **Thesis:** Agency scientist and bureaucrats engage in a science charade by failing (1) to identify the major interstices left by science in the standard setting process and (2) to reveal the policy choices they made to fill each trans-scientific gap.
         2. **The Unintentional Charade (Judgment Post-Science):** This occurs when agency officials mechanically assign the standard-setting task to agency scientists and associated technocrats. When faced with a trans-science questions, these scientist face two choices: (1) continue indefinitely to look to science or (2) substitute their own values.

**Indefinite Search:** This is applied by the more cautious scientist, however this is time consuming and leaves research gaps.

**Value Substitution:** The issue is that these value judgments rest on politics and scientist are not accountable to the public in the same manner as agency heads.

* + - * 1. **The Intentional Charade (Judgment Post-Science):** This occurs when agency bureaucrats consciously disguise policy choices as science. The intentional charade typically occurs only after agency scientist have begun developing a standard. The real problem is that the public has no knowledge of the fact that scientists made policy judgments because they are masked as science.
        2. **The Premeditated Charade (Judgment Pre-Science):** This occurs when a policy judgment is made before the scientific analysis begins. The science is merely used to justify the premeditated policy determination. Nevertheless, the agency’s decision is clothed in actual science and the public is none the wiser.

## Economic Analysis

### Overview

* + - 1. **Getting the Dollar Impact:** Agencies use economic analysis to assign a dollar amount the benefits of a regulation and then examine those benefits in relation to their cost.
         1. **Origins:** (1) Common sense; (2) living in a world of finite resources; and (3) the way we run out lives.
      2. **Statutory Requirement (OIRA; Executive Order 12866):** Executive orders since President Reagan have required cost-benefit analysis for all proposed major regulations. A regulation is major if its costs ≥$100M.
      3. **Quality Based on Assumptions:** The quality of a cost-benefit analysis depends entirely on the accuracy of the assumptions the agency makes when conducting the cost-benefit analysis.

### Mechanics of the Cost-Benefit Analysis

1. **Requirement to Monetize:** In order to conduct a cost-benefit analysis, an agency must monetize (assign a dollar value) to each benefit and cost of regulation.
2. **Viscusi’s Perspective on Valuing Statistical Lives (The Fatal Tradeoff)**
   * + - 1. **Valuation Methodology**

**Willingness to Pay Concept:** The appropriate benefit measure for risk reductions is the willingness to pay to reduce the particular outcome. The selling price for changes in risk establishes the value for risk increase.

**Issue:** The willingness to pay concept can vary depending on who is valuing the risk, or life. For example, a *family member* will value a life or a risk reduction towards another family member at a higher price when compared to a disinterested third party.

**Human Capital Approach:** (*Individual Computation*) Measuring the value of a life based on the present value of the income the deceased would have earned net of taxes and his or her consumption. (*Societal Computation*) The present value of taxes the deceased would have paid because those represent the financial loss experienced by society.

* + - * 1. **The Value of Statistical Lives**

**Goal:** The ultimate purpose of the value-of-life literature is to provide some basis for sensitive analysis.

**Willingness-to-Pay:** What amount we are willing to pay in order to reduce a risk.

**Willingness-to-Accept:** The willingness to pay for added safety to the amount that we require to bear the risk.

**Statistical Lives:** Placing a price tag on the incremental reduction in the probability of an adverse outcome that might otherwise have affected some random member of the community.

* + - * 1. **Further Notes (Issues) on Monetization**

**Heterogeneity of Life:** Are all lives of equal value? Depending on your perspective, the answer is probably not.

**Stated Preferences vs.** **Revealed Preferences:** The idea is that people act differently from the way that they say they act.

**Stated Preference:** Stated preferences are measured by surveying individuals about how much they are willing to pay to avoid increased risk.

**Revealed Preferences:** Revealed preferences are measured by observing market data regarding what people are willing to face or avoid a risk (hazard pay, for example).

**Variations Among Agencies:** Sometimes, different agencies will attach different values to the same lives.

**Updating Valuations Over Time:** Just as people change, the value of a statistical life should change too. One variable that materially impacts the analysis is the level of affluence in the sample set.

**Cognitive Biases:** People suffer from predictable irrationalities or cognitive biases that cause them to misperceive risk.

**Mistakes in Estimation:** People tend to overestimate the likelihood of low-probability events and underestimate the likelihood of higher risk levels. Risk perceptions may also be affected by the visibility of the risk, by fear associated with it, and by the extent to which individuals believe they can exercise control over the risk.

**Distortions in Monetary Valuation:** Economic valuation of risk also tend to be distorted by underlying misweighting of risks.

**Status Quo Bias/Reference Risk Effect:** Individuals generally place too high a value on preventing increases in a risk form its current level.

**Voluntarily Assumed Risks:** The valuation of risk is likely to depend on how the risk is generated. People tend to tolerate voluntarily assumed risks more than those which they have no control over.

1. **Selecting a Discount Rate**
2. **What is a Discount Rate?** A discount rate is used to convert a future cost or benefit to a present dollar amount.
3. ***NHTSA Illustration (Average Fuel Economy):*** The NHTSA selected a discount rate of around 7.5%. This seemed to be the most appropriate figure considering how the benefits were dispersed to society (US) as a whole while the cost were centered on a few industry participant.
4. ***Southwest Terminal at Hobby v.*** ***United Terminal at IAH:*** Both airlines use critiquable assumptions regarding the impact of the addition of a new terminal. One of the key assumptions is the discount rate, which modifies the benefit of the additional jobs, tax revenue, etc.
5. **Sustein’s Perspective on Cost-Benefit Default Principles ([1] Ambiguity in Selecting 🡪 Discretion; [2] Complicated because Several Good Options; [3] Moral Dimension of Nonmonetary Benefits/Costs; [4] Harms to Future Generation Issue)**
6. **The Discount Rate Question (How Do We Chose?):** What legal constraints should be imposed on the agency’s choice?
7. **No Guidance (Majority Rule):** Usually statutes are silent; When this happens, the failure to use a cost-benefit analysis could result in a rule getting struck down as being arbitrary and capricious. *This means that agencies have discretion when selecting an appropriate discount rate.*
8. ***NHTSA Illustration (Average Fuel Economy):*** The NHTSA selected a discount rate of around 7.5%. This is what the industry normally uses when determining an appropriate discount figure.
9. **The Impetus for Discounting (Investment Value;** **Time Preference):** The impetus for discounting future effects stems from the judgment that, in the context of money, discounting future benefits and losses is entirely rational, even simple: a dollar today is worth more than a dollar tomorrow.

**Policy For:** (1) investment value, also known as opportunity cost and (2) time preference.

**Policy Against:** When applied to statistical lives, this theory does not make much sense because (1) we cannot invest people like capital and (2) people are perceived to have inherent value.

1. **Latent Harms = Harms Occurring Later in Life:** Latent harms are harms in the form of exposures whose consequences will occur late in someone’s lifetime. Applying a discount rate here makes perfect sense.
2. **Harms to Future Generation:** Harms to future generations are harms that will not manifest until a group of people, who are not alive now, are born. Applying a discount rate here, and monetizing, is challenging because it *appears to require truly extraordinary sacrifices from the present for the sake of the (infinite) future.*
3. **Circular A-4, Regulatory Analysis:** Circular A-4 requires the following in order to comply with CBA.
4. [1] schedules of the monetized benefit and cost that show the type and timing in an undiscounted form.
5. [2] benefits and costs the agency can quantify, but cannot monetize, including their timing.
6. [3] benefits and costs the agency cannot quantify
7. [4] identify or cross-reference the data or studies on which the agency bases the benefit and cost estimates.
8. The use of proxies for actual market value is permissible.

### The Controversy Over Cost-Benefit Analysis

* + - 1. **Sustein’s Argument that CBA Permits Morally Condemnable Actions**
         1. **Why Do We Have Cost-Benefit Analysis?** The most attractive parts of the movement for cost-benefit analysis have been rooted not in especially controversial judgments about what the government out to be doing, but out of pragmatic instruments designed to reduce three central problems: (1) poor priority setting, (2) excessively costly, and (3) inattention to the unfortunate side-effects of regulation.

**Impact of Cost-Benefit Analysis:** (1) spurs government action and efficiency by providing a legitimatizing mechanism for regulation. (2) accomplishes statutory goals at lower costs.

**Benefits:**

**Cognition (Full Accounting):** People have a hard time understanding the systemic consequences of one-shot interventions. Unless they are asked to seek a full accounting, they are likely to focus on small parts of problems, producing inadequate or even counterproductive solutions. Cost-benefit analysis is a way of producing that full accounting.

**Democracy (Countering Interest Groups):** Interest groups are often able to use cognitive problems strategically, thus fending off regulation that is desirable or pressing for regulation when the argument on its behalf is fragile. In other words, the cost-benefit analysis provides a transparency by exposing the accounting for a public view.

**Real-World:** The central point is that cost-benefit analysis can be seen as a real-world instrument designed to ensure that the consequences of regulation are placed before relevant official and the public as a whole, and intended to spur attention to neglected problems while at the same time ensuring that limited resources will be devoted to areas where they will do the most good.

* + - * 1. **Source of Controversy (Poor People):** Poor people often have little ability, and hence little willingness, to pay, and some people will be inadequately informed and therefore show unwillingness to pay for benefits that would improve lives. Conversely, extremely wealthy people could have the exact opposite effect.
      1. **Ackerman & Heinzerling’s Pricing the Priceless**
         1. **The Limits of Quantification**

**Missing Components Out (Leaving Out; Severely Discounting):** (1)CBA generally ignore other, nonquantified, health and environmental benefits. When these factors are considered, they are heavily discounted, making the benefits of preventative regulation seem trivial. Therefore, cost-benefit analysis tends to skew decision making against protecting public heal and the environment.

**Overstated Costs:** In general, agencies tend to overestimate the cost of regulation prior to its implementations. Also, cost-benefit analysis does not typically include money-saving possibilities, such as new efficiencies or new technologies or reduced consumption.

* + - 1. **Regulatory Impact Analysis (CBA Alternative):** (1) determine the risk trigger; (2) determine the level of regulation set by the statutory standard.
         1. **Risk Trigger:** The risk trigger requires an agency to make a prediction of a particular risk. IF the risk exceeds the threshold, it should be regulated down to the threshold.

### Statutory Variations in Economic Analysis

* + - 1. **Sunstein’s Discussion of Statutory Options**
         1. **Flat Bans on Consideration of Costs:** Some statutes have a “Delaney Clause,” which prevents an agency from employing cost-benefit analysis, specifically from evaluating the costs.
         2. **Significant Risk Requirement:** Some statutes require agencies to address only significant or unacceptable risks. Risks that do not reach a certain level need not and perhaps may not be addressed. Significant risks fall short of cost-benefit analysis in the sense that it is entirely benefits-based; costs are irrelevant.
         3. **Substitute Risk and Health-Health Tradeoffs:** Some statutes require agencies to consider whether a regulation controlling one risk would, in doing so, create a substitute risk. If regulating does create the substitute risk, agencies are permitted to decline to regulate, or to regulate to a different point.
         4. **Feasibility Requirements:** Some statutes require agencies to regulate to the extent feasible or achievable. This focuses solely on the costs, and not the benefits. These statutes forbid agencies from regulation to a point that is neither (1) technically feasible because the relevant control technology does not exist, nor (2) economically feasible because the industry cannot bear the cost without significant or massive business failure.

**Three-Step Process:** (1) whether the cost is excessive; (2) whether some statutory end would be adversely affected; and (3) whether the maximum requirement might create collateral harms.

* + - * 1. **Cost-Benefit Analysis:** Some statutes ask agencies to balance costs against benefits mostly through a prohibition of unreasonable risks alongside a definition of unreasonable the refers to both cost and benefits.

## Political Analysis

### Overview

* + - 1. **Considerations:** (1) public attitudes; (2) distribution effects; and (3) political preferences.
         1. Public attitudes
         2. Distribution effects
         3. Political preferences
         4. Voter backlash
         5. Use of political capital
         6. Budget
         7. Congressional backlash
         8. Executive orders
         9. Hearings
         10. Degree of polarization
      2. **Public Attitudes and Distribution Effects (Distribution; Fairness):** Agencies look to how the public is likely to react to a regulation and who the regulation is likely to affect. Distributional concern more typically arises when a problem burdens a discrete portion of the public.
      3. **Political Preference:** The preferences of current political offices concerning the implementation of a statute.
         1. ***EPA Smog Emissions Denial #1 (To Everybody But Congress)*:** EPA denied a petition to start rulemaking for measuring vehicle emissions in order to reduce global climate change. The denial was premised upon on political motives; (1) conflicts with other nations; (2) President Bush had an initiative to solve this problem or design a method. They reasoned that President Bush had the obligation, and had taken the initiative, to address the issue of global climate change and that their actions in rulemaking may conflict with potential regulations and initiatives promulgated by Bush.
         2. ***EPA Smog Emission Denial #2 (To Congress)*:** (1) research budget already used; (2) long-term research necessary; and (3) EPA does not have statutory authorization to make law impacting air pollution. *Congress is addressed in this situation to make it explicitly clear that the statute is what prevents them from acting.* However, when addressing groups, it is about the politics

### The Internal Structure of Rulemaking

* + - * 1. **Considering the People:** Agencies are specialized, and officials within an agency have different areas of expertise that all combine to produce policy.
        2. **Informal Influence:** There will be a lot of discussion and debate over new rules, but most of this discussion and debate will occur behind closed doors.
        3. **Farce of Models:** Arguably, all models for internal agency decision making are a farce because all decision are approved or resolved by agency heads.
      1. **McGarity’s Perspective on the Internal Structure of EPA Rulemaking**
         1. **Overview**

**Modern Agencies Do Not Fit Old Paradigm:** The modern federal agencies that administer social regulatory programs do not comfortably fit within the New Deal paradigm. There are many classes of beneficiaries, multiple harms, and a variety of sources of input.

**No One Person Knows It All:** No single individual within an agency has genuine expertise in all of the required areas. Out of simple necessity, they must trust the staff to make the right calls on the scores of micro-issues that might form the basis for subsequent judicial challenges.

**Institutional Expertise:** Institutional expertise that transcends the knowledge and expertise of any individual person or office within the agency.

**Bureaucratic Pluralism:** The capacity of the institution to integrate the contributions of widely varying professional perspectives into a single coherent product.

**Clash:** Bringing together persons with expertise in all of the relevant disciplines present a high potential for clash. The place can be immensely creative or devastating destructive.

**Policy Management for Clash:** Policy management is ensuring that lower-level decision making entities adhere to the policies articulated by upper-level policymakers

* + - * 1. **The Team Model**: The basic decision making unit is the team composed of representatives from all the institutional subunits within the agency that have an interest in the outcome of the rulemaking process.

**Delegation Permissible**: Groups are encouraged to delegate to subunits in order to reach a conclusion.

**Pressure for Consensus**: The team model puts pressure on members to reach consensus regarding the issues.

* + - * 1. **Hierarchical Model:** Under the hierarchical model, a single office is responsible for all aspects of a rulemaking initiative except for the final determination of whether the rule is consistent with the particular statute involved.
        2. **Outside Advisor Model:** Under the outside advisor model, the program office retains primary responsibility for drafting the proposed and final rules and the attendant supporting documentation. However, the program office is free to call upon other offices in the agency or external technical experts for advice as needed. All external technical experts are not formally part of the rulemaking process.
        3. **Adversarial Model:** Under the adversarial model, staffers with different perspectives are forced to confront one another in an adversarial setting. Each office is responsible for assembling its own information and analysis and for critiquing the information and analyses of the other offices. Disagreements over facts, assumptions, inferences, or policies are aired in an adversarial fashion before ultimate agency decision maker.

### Formal/Informal Adjudication

1. **Formal Adjudication**

**Policy Against:** (1) formal adjudication is routinely retroactive and (2) there are relatively few opportunities for the public to participate in formal adjudication.

***Boston Medica Center Corporation and House Officer’s Association/Committee of Interns and Residents:*** Formal adjudication was held to resolve the question of whether hospital interns and residents were employees under the terms of §2(3). The National Labor Board held that there is no reason to exclude them form the definition of employee, which is read broadly. In doing so, they overruled several previous cases on the issue. The NLB made its determination by looking at the plain meaning that the term employee was ambiguous. They argued that (1) the statute clearly included interns and residents as employees and, in the alternative, (2) that Chevron deference allowed them to create this definition of employee.

1. **Do Not Apply §553c, but §556 and §557 (APA §553c):** Formal adjudication is not covered by §553c because it provides a statutorily-required opportunity for a hearing. Instead, apply §556 and §557.
2. **Notice Requirement (APA §554b):** Person (parties) entitled to notice shall be timely informed of

The time, place, and nature of the hearing

The legal authority and jurisdiction under which the hearing is to be held

The matters of fact and law asserted.

1. **Opportunities Provided to Parties (APA §554c):** The agency will provide an (1) opportunity for parties to resolve the agreement peaceably or (2) a trial like hearing in accordance with §556 and §557.
2. **Analogous to a Bench Trial (APA §556d):** Formal adjudication is analogous to a judicial bench trial; parties have a right to:

Present their position using oral or documentary evidence

Conduct cross-examination as may be required to a full and true disclosure of the facts

**Federal Rules of Evidence Inapplicable:** FER is inapplicable in cases of formal adjudication, unless the material evidence is irrelevant, immaterial, or unduly repetitive.

A reasonable opportunity to submit proposed findings and conclusions, exceptions to decisions, recommended decision, and supporting reasons for all of the above.

A statement justifying the agency’s decision.

1. **Precedential Value:** A final decision hold precedential value within an agency.
2. **Ex Parte Communication Prohibition (APA §557e):** The APA prohibits ex parte communications about the proceedings of a formal adjudication.

**Evaluative Standard (APA §557e):** If there is an instance of ex parte communication, the communication will get evaluated against the standard of avoiding impropriety.

1. **Record for Decision (APA §556e):** The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision.

**Going Beyond the Record (APA §706e):** Going beyond the record triggers §706e, which requires that a court set aside findings, conclusions, etc. that are not supported by substantial evidence.

1. **Informal Adjudication (APA §555)**

## Guidance Documents and Other Commentary

### Overview

* + - 1. **Guidance:** Guidance is expressly exempted from the requirements of notice-and-comment rulemaking and *includes*:
         1. (1) interpretive rules
         2. (2) statements of policy
         3. (3) handbooks or enforcement manuals.
      2. **Non-Binding Regulation:** Guidance is not binding on the agency or the regulated entities. In practice, a guidance policy will prompt a regulated entity to change its behavior because it will establishes law for all those unwilling to pay the expense, or suffer the ill-will of challenging the agency in court.
         1. **Rule-Like Guidance:** If guidance documents start to act with the force and effect of law, the court may strike them down because the agency created a rule without adhering to the required APA §553 process.
         2. **Obligatory Statements in Guidance:** Obligatory statements in guidance are treated as binding, which means that the guidance may get struck down by the court for circumventing APA §553.
         3. **Binding v.** **Nonbinding Test:** Is the agency describing the rule of changing it is a substantive way? Substantive changes must go through APA.
      3. **Advantages:** (1) issuing guidance is relatively cheap; (2) agencies also retain flexibility to change the guidance inexpensively and cheaply; (3) agencies may also be able to forestall the expense of litigation; (4) agencies issuing guidance are subject to less congressional oversight or media attention; and (5) agencies can experiment more fluidly with different rules when they issue guidance.
      4. **Disadvantages:** Regulated entities face several disadvantages when agencies release guidance documents, including: (1) reliance concerns – the agency is not bound to comply with the statement in the guidance document; (2) lack of entitlement – regulated entities do not get the same opportunity to influence guidance as they would if it was rulemaking; (3) limited review from congress or president – guidance documents receive very little legislative or executive evaluation, unless they fall within Executive Order 13,422; and (4) judicial review – guidance documents are not considered to be final agency action and, therefore, court rarely find standing.

**Executive Order 13,442:** Executive Order 13,442 gives OMB the option to demand consultation with an agency prior to its issuing a significant guidance document.

* + - * 1. ***Consumer Product Safety Commission; Toys which Present Choking Hazard:*** Agency guidance document showing that the agency would start testing and enforcing the overall rule for testing product for children on products with fabric-like components. Agency explained that there was no reason why there was no enforcement. Agency also explained that there the technological barriers to testing no longer existed.
        2. ***FCC;*** ***Broadcast Indecency:*** Document gives guidance regarding what content is obscene or indecent speech. Obscene speech is never protected under the 1st Amendment. However, indecent speech is protected, and there is a balance between the interest of the child and the interest of the utterer. Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs are indecent if they call outside of the safe harbor time. The guidance document contained language saying that it was not binding, for study purpose, and should not be relied upon (making this guidance statement not very helpful.   
           **Ness’ competing obligations:** (1) 1st amendment; (2) protection of children; and (3) create a voluntary code of conduct.   
           **Tristani Dissent**: the problem is that the FCC has not been enforcing its rules anyways.

### Other Descriptions of Agency Behavior

1. **Overview**
   * + - 1. **Capture Theory:** Agencies are dominated by regulated industry through (1) client politics, (2) recommendations of commissioner based on industry experience, (3) influence from special interest groups impacting Congress and the President.
         2. **Iron Triangle Theory:** Agencies are caught between Congress and regulated industries.
2. **Wilson’s Perspective on the Impact of Capture Theory**
   * + - 1. **Agencies and Interests:** (1) Dominant interest group favoring its goals; (2) dominant interest group hostile to its goals; (3) two or more rival interest groups in conflict over its goals; and (4) no important interest group.

**Client Politics (Civil Aeronautics Board + Flight; FCC):** Client politics occurs when most or all of the benefits of a program go to some single, reasonably small interest (an industry, profession, or locality) but most or all of the cost will be borne by a large number of people.

**Entrepreneurial Politics (NHTSA; FDA):** Entrepreneurial politics occurs when the cost are heavily concentrated on some industry, profession, or locality but the benefits are spread over many if not all people.

**Concern Over Fleeting Interest:** Employees must worry that the social movements that created their tasks may desert the fledgling agency because of shifting interests or waning passions, leaving it to confront a hostile interest group alone and unprotected.

**Interest-Group Politics (OSHA; NLRB):** Interest group politics occurs when the program of the agency produced both high per-capita costs and high per capita benefits.

**Critiqued From All Sides:** Anything the agency does will be criticized by somebody and bureaucrats don’t enjoy criticism. The political superiors of these agencies will tilt depending on who is in congress or the presidency. Under these condition, it will be hard to know what one is supposed to do.

**Majoritarian Politics (Sherman Antitrust Act; Surface Transportation Board; Federal Election Commission):** Majoritarian politics occurs when agencies operate in an environment in which no important interest group is continuously active. This happens when the bureau and its program appear to offer widely distributed benefits and impose widely distributed costs.

**Tone at the Top:** Its vigor or laxness would be almost entirely the result of the character of its head and the kind of backing he received from the president. These agencies tend to proceed on issues on a case-by-case basis.

1. **Weingast’s Perspective on the Agency-Clientele Relationship** 
   * + - 1. **Model of Agency Equilibrium:** Agency policy equilibrium results from combinations of three factors: (1) low or intermittent presidential interest; (2) clear court precedent with little expectation of change; and (3) stable patterns of public opinion and the relative balance of interest groups.
         2. **Congressional Structure and Policy Making (Divide Interest; Self-Selection):** Committees and subcommittees limit the political choice possibilities. (1) The committee system divides the legislative responsibilities into separate police jurisdictions, where the committee member will have a disproportionate influence over policy. (2) committee membership is primarily a self-selection mechanism.

**Interest Groups:** Interest groups seek the benefits of legislation and policy-making.

**Congress:** Congressmen seek reelection and career advancement.

**Agency:** Agency heads and commission members, anxious to further their career and goals of power and prestige as well as completing their own pet project and policy initiatives.

* + - * 1. **Congressional Control of Agencies:** (1) formal control through hearing; (2) informal control through budget, etc.

**Informal Control:** Congressional oversight tends to occur through indirect and ex parte communications. Some informal controls include: (1) appointment process; (2) budget;

**Formal Control:** Hearings and investigations are used to influence decisions and stymie unwanted policy initiatives by uncooperative agency members.

1. **Seidenfeld’s Perspective on Agency Decision-Making**
   * + - 1. **Decision Makers’ Incentives that Affect Agency Propensities to Act:** Staff members and agency heads face career advancement, social incentives, and ideological incentives.
         2. **Psychological Influences on Decisions Whether to Act**

**Decision Making Heuristics and Biases:** Heuristics (rules of thumb) allow individuals to make decision within the complexity of the real world. These can lead to biases when there is a mismatch between the heuristic and the real world.

**Propensity Theory:** Propensity theory is the influence on decision making of framing a decision as involving gains and losses from a reference point. Most individuals are risk adverse with respect to gains but risk seeks with respect to losses. Also, individuals will weigh the prospect of losses more heavily in their decision than gains.

**Status Quo Bias:** The status quo bias refers to the individual’s tendency to maintain the status quo rather than engage in behavior that leads to change in the state of the world.

**Omission Bias:** The omission bias is the bias more directly relevant to agency decisions on whether to act in response to a perceived problem because the omission bias refers to an individual’s non-rational propensity to refrain from acting.

**Influence of Social Role and the Propensity to Act:** (1) personal identity and (2) social identify theories.

**Personal Identity Theory:** Personal identity refers to how people think of themselves as different from others.

**Social Identity Theory:** Social identity refers to how people think of themselves as similar to others or fitting within various social schemas or categories.

**Social Identity and Social Role:** Social identity motivates particular kinds of action that will result in social confirmation of the identity so that an individual will take action reinforcing the social expectation. Identity motivates particular kinds of action that will result in social confirmation of the identity so that an individual will take actions reinforcing the social expectations attached to the role.

**An Official’s Job as a Social Role that Affects the Propensity to Act:** The more salient the official’s identity as a member of the agency, the more sensitive that official will be to opportunities for behavior confirming that identity.

**Social Role Theory and the Omission and Action Biases:** When one is put in the role of a person with authority to do something about an issue involving fundamental values, that person will feel a moral compulsion to act.

# Branches of Government and Limitations on Agency Action

## Presidential Control

### Overview

* + - 1. **Overriding Assumptions:** The President seeks to assert control of agency action. The president can take the formal, visible, and effective step of replacing recalcitrant agency officials with individuals more amenable to administration views or withhold funding until agency officials change course, or the president could make a more subtle request that an agency simply take a particular action.
         1. **Administrative Preferences:** the president asserts control over an agency to ensure that agency action roughly tracks administration preferences. This allows the president to better implement his agenda and enhance the prospects of reelection or a lasting legacy.
         2. **Supervision Responsibility:** The president also has a constitutional responsibility to supervise agency actions.
      2. **Accountability (Normative Value of Intervention):** Presidential control can enhance the accountability of agency action because the president is an elected official and, therefore, imports the majority’s will on an agency.
      3. **Efficacy (Normative Value of Intervention):** Presidential control can improve efficacy of agency action by coordinating multiple agencies toward a single end.

### Control of Agency Personnel

1. **Appointment Power:** The President can control agency personnel through the ability o appoint and fire the heads of agencies. In using this power, the president will generally select people that follow administration priorities.
   * + - 1. **Removal is a Costly Decision:** Actual removal of an agency leader is a politically costly move for the president; it will result in considerable publicity and creates the need for a replacement acceptable to the Senate. Sometime, to circumvent the bad press, agency heads will voluntarily still down/resign.
2. **Controlling Independent Agencies:** Since independent agency personnel have greater shielding in terms of their employment, the president can control them through the initial appointment process, budget negotiations, or through asserting greater control over executive-branch agency officials that interact with the independent agency.

### Control of Appropriations

1. **Presidential Participation in Budget Process:** The president participates in the appropriations process, proposing a budget and working with Congress on annual appropriation legislation.
   * + - 1. **Discretionary Withholding:** The president has the discretion to withhold funds once appropriated, unless Congress specifically prohibits such impoundment.
         2. **No Line-Item Rejections:** The president cannot issue line-item rejections to an apportionment bill; the president can either accept the whole or reject the whole.
         3. **No Amending the Budget:** The president alone cannot amend a duly-enacted appropriations statute.

### Regulatory Planning and Review

1. **CBA:** Cost-benefit analysis is a critical part of a larger process for centralizing regulatory planning and review. Therefore, it is one of the president’s most important tools.
2. **Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) [Executive Order 12866]:** Created by executive orders, these organizations coordinate regulatory planning and review among executive-branch and independent agencies. *Independent agencies are only subject to planning mechanisms.*

**Executive Order No. 12866 (Regulatory Planning and Control):**

**Purpose:** (1) enhance planning and coordination with respect to both new and existing regulations; (2) reaffirm the primacy of Federal agencies in the regulatory decision-making process; (3) to restore the integrity and legitimacy of regulatory review and oversight; and (4) to make the process more accessible and open to the public.

**Planning Mechanism (§4):** This is the process one must take in order to get a rule published

**(1) Policy Meeting:** Meeting with the VP to seek a common understanding

**(2) Unified Regulatory Agenda (Signal to Other Agencies):** Produce an agenda of all regulations under development and review, and make sure that the agencies desired rules are harmonized with other rules.

**(3) Regulatory Plan (Draft + Supporting Analysis):** Explain why the rule is good, including the CBA.

**(4) Regulatory Working Group:** The group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues including, (1) the development

**Conference:**

**Centralized Review of Regulation (§6):**

1. **Executive Orders:** Executive orders are binding on executive-branch institutions or official stow home they are directed, create no cause of action against the government, and apply only to the extent permitted by law. The president can revoke or amend an executive order at any time. New presidents can follow existing executive orders, replace them with new executive orders, or revoke them entirely.
2. **Return and Prompt Letters (Communication of Preference)**
3. **Return Letters:** Return letters address proposed regulations. They remit proposed regulations to the responsible agency for reconsideration, providing an explanation of the deficiencies and suggestions for further development.

***DOT Testing Lithium in Batteries:*** Letter asking the agency to perform additional analysis to support a rule regarding new regulation on the batteries.

1. **Prompt Letters:** Prompt letters address an agency’s plans or priorities for a given year.

***EPA Ocean Protection:*** OIRA - Lack analysis about how you have statutory authority to, impact on small businesses, and oversight. Until those are provided, you cannot institute rules. EPA – Showing agency has promulgated rules on the subject before, puts money into the cause, and plans to do more in the future. The EPA is trying to push the ball to state actors, even though OIRA wanted more. The letter shows OIRA spurring an agency.

***OSHA AED Recommendation:*** OIRA – AEDs are really good. Evidence shows that there are material benefits that far outweigh the cost. There are good authorities confirm that lives could get saved. Other agencies have issued rule as well. Think about starting the process. OSHA – Sounds like a great idea. We have done a few things before. There are questions about having lay personnel using a use AED machines. Undertone, we will consider it, but will not do anything.

1. **Debate About Regulatory Planning and Review (Is OIRA Good?)**
2. **Proponents**

**Accountability:** OIRA improve the legitimacy of agency action because it increases the accountability of decisions that would otherwise have been made by unelected bureaucrats.

**Efficacy & Efficiency:** OIRA’s coordination function and cost-benefit focus improves the efficacy and efficiency of agency rulemaking by limiting redundant or conflicting regulation, spurring sluggish agencies, and producing rational and efficient regulation.

1. **Opponents**

**CBA (Monetize; Performance):** CBA is not always effective because some risks are difficult to monetize. Furthermore, in the performance of its CBA review, OIRA consistently weakens rules that impose high costs as opposed to strengthening rules that propose large benefits.

**Administrative Resources:** OIRA neither has the staff nor the time to perform review in an adequate manner.

**Gets Involved Too Late:** OIRA intervenes too late in the rulemaking process to offer meaningful input.

**Back-Door Politics:** OIRA’s process is not an open process but a secret conduit by which regulated entitites can exercise undue influence over the regulatory process.

***DOT Tire Pressure Monitoring Rulemaking:*** OIRA – REJECTION LETTER: DOT rule is bad because it does not allow for indirect tire pressure monitoring systems. Argue that the analysis is not complete because it does not consider the benefit of additional ABS vehicles on the road. Moreover, it is much cheaper to allow indirect method. The extent of the letter indicates OIRA’s position on what the final rule should be. (1) the agency is not being follows; (2) the action the agency is going to take is high stake.

***DOT Frontal Offset Testing (Selective Intervention):***

### Presidential Directives

1. **Pre-Regulatory Directives Through Official Memoranda:** The president can use official memoranda to executive-branch agency heads to instruct an agency to take a particular action under its regulatory authority.
2. **Pros**
3. **Directly from the President:** There is little ambiguity about the goals the agency should pursue because these memoranda are written by the president.
4. **Accountability:** Presidential directives come from the President, they enhance accountability of the resulting agency action more so than other measure. Moreover, since they are open to public view, they also enhance the accountability of agency action.
5. **Efficacy:** Presidential directives can spur sluggish agencies and, thereby create more effective regulation.
6. **Cons**
7. **Legal Authority:** It is hard for the president to pin down the legal authority that authorizes him to intervene.
8. **Danger of Playing with Agencies:** Presidential intervention could result in creating regulation that circumvents the rigors of the legislative process.

### Other White House and Agency Involvement

1. **Informal or Invisible Influence:** The White House offices often contact agencies in informal and invisible ways, through phone calls or meetings.
2. **Anti-Majoritarian:** White House offices are run by officials that are not elected or confirmed by the Senate.

## Congressional Control

### Overview

* + - 1. **Congressional Interest in Regulating:** Once congress decides to delegate, it has an immediate and ongoing interest in ensuring that subsequent agency action roughly tracks legislative preferences for two reasons:
         1. **Reflect Constituents:** One reason why congress has an interest in agencies is to ensure that agency action reflects the preferences of the constituents who can help members of congress get re-elected.
         2. **Comply With Statutory Mandate:** A second reason why congress has an interest in agencies is to ensure that agency action comports with statutory mandates and popular preferences.
      2. **Issues Congress Faces:** (1) ability to monitor and (2) information about what agencies are doing.

### Informational Tools

1. **Organic Statute Language:** Congress sometimes writes specific reporting requirements into organic statutes.
   * + - 1. **Hindsight Issue:** Most language requiring reporting that congress puts in organic statutes is backward looking; it pertains to implementation activities in the preceding calendar year and does not furnish information about agency action while still under consideration, which is a time when political intervention is particularly effective.
2. **Congressional Review Act (CRA):** The CRA requires both independent and executive-branch agencies to submit major rules, as well as other information including any cost-benefit analysis of the rule, to congress or the General Accounting Office before the rule may take effect.

**Information Overload Issue:** While the CRA has may benefits, sometimes it result in congress having more information than they can handle.

**Dispatch Issue:** Sometimes, congress may know about a problem, but it cannot gather enough support to solve that problem in a timely manner.

**Too Little Too Late Issue:** Sometimes, the information provided to Congress comes too late for Congress to provide any meaningful input.

* + - * 1. **60-Day Review Window:** Major rules do not become effective for at least 60 days in order to provide adequate time for congressional review.
        2. **Joint Resolution:** A joint resolution can overturn a rule either with the president’s approval or with a super-majority vote over the president’s veto.

### Control Tools: What Congress CAN Do

1. **New Legislation (Actual or Threatened):** Congress always has the power to abolish or restrict an agency’s authority. Often, merely threatening an agency of a reduction in power is sufficient for influencing agency action.
   * + - 1. **Advantages:** (1) threats are easier to make than new legislation; (2) threats can come from any member of congress; and (3) threat can be made in a private setting.
         2. **Disadvantages:** (1) Agencies can ignore threats knowing that Congress is unable to acquire the influence necessary to write new legislation and (2) only new legislation is certain to produce change.
2. **Appropriations Legislation:** Congress has the power to dictate the size of an agency’s budget.

**Disadvantages:** (1) Agencies are free to determine the credibility of the threat and (2) there is a coordination problem when the committee responsible for appropriations is different form the committee responsible for the substantive mandate.

* + - * 1. **Constitutional Authority:** The Constitution state, “No money shall be drawn form Treasury, but in consequence of appropriations made by law. The power to appropriate is a legislative power. Under law, public funds, therefore may only be used for purposes for which congress appropriated the funds.
        2. **Account:** The basic unit of regular and supplemental appropriations bills is the account. Under these measures, funding for each department and large independent agency is distributed among several accounts.
        3. **Omnibus Appropriations:** An omnibus appropriation occurs when congress has packaged two or more regular appropriation bills together in one measure.

1. **Oversight Hearings:**
   * + - 1. **Functions Served:**

**Uncover Facts:** Congress can use hearings to uncover facts in aid of further legislative activity, such as statutory amendments or funding reductions.

**Pressure Agencies:** Congress can use hearings to pressure agencies to conform their policy to legislative preferences without further legislative action.

**Accountable:** Congress can hold hearings to hold officials accountable for their actions in the traditional sense of the word – a public airing of blaming.

* + - * 1. **Advantages:**

**Informality:** Congress need not enact legislation to move agency action in a direction consistent with its preferences.

**Effectiveness:** The visibility of oversight hearings may improve their effectiveness as compared to less formal control tools.

**Accountability:** Oversight hearings ensure accountability and keep agency action on track.

* + - * 1. **Disadvantage:**

**Frequency:** The frequency of oversight hearings can be harmful because it takes officials’ time, energy, and attention to handle a hearing. This time, energy, and attention could be applied to actual agency matters.

**Not Well-Intentioned:** Some agency hearings serve political purposes but no obviously public-regarding ones.

***Coile, EPA Chief Sits and Takes His Punishment:*** EPA rejected California’s waiver request. California wanted to have some of the most strict greenhouse gas regulation. Proffered reason was to avoid regulatory patchwork. EPA chief says that it was only his decision, and the agency refused to reveal numerous documents that could aid congress in answering its question.

* + - * 1. **Communicating Within Hearing:**

**Willing:** Sometimes, agency heads are willing to attend hearings voluntarily

**Content Compromise:** Sometimes, agency personnel are not willing to speak at hearings without an agreement that congress will limit their questions in certain areas.

**Subpoena Power:** Congress can also use its subpoena power to compel compliance, holding official who defy those subpoena in contempt of Congress.

**Contempt of Congress:** Contempt of Congress is a federal misdemeanor, punishable by a maximum $100,000 fine and a maximum one-year sentence in federal prison. A contempt charge can originate in either the house or senate.

* + - * 1. **Executive Privilege:** Executive privilege enables the Presidents to protect the confidence of executive communications from legislative or judicial investigation based on an implicit notion of separation of powers.

***How Congressional Checks on Executive Branch Authority Derailed an EPA Administrator (Case Study):*** Ann Gorsuch took a strong voluntarism stance at the EPA, which caused the agency to strictly construe statutory mandates and refuse to promulgate new rules. She started by closing the EPA’s enforcement office. She spent time in the Department of Interior instead of the EPA. After lots of internal complaints, Congress called a hearing regarding superfund money. Gorsuch refused to testify after instructions that she would get protected by executive privilege. Congress filed contempt charge and DOJ eventually stopped representing her on the contempt issue.

**What Information Does Executive Privilege Protect?**

**Who Does Executive Privilege Apply To?**

***Kane, West Wing Aids Cited for Contempt; Refusal to Testify Prompts House Action (Investigation of US Attorney Firings):*** House approved contempt charges against White House Chief of Staff and Counsel because of their refusal to testify in the investigation of the mass U.S. Attorneys. Congress wanted to know whether that office was politicized. Parties voting for the contempt charge said that there were trying to use them to gain information. D.C. Circuit Court of Appeals refused to answer this serious dispute between two co-equal branches.

1. **Fire Alarms:** Monitoring an agency by shifting the cost of monitoring to others.
   * + - 1. **Police Patrols (Congress Monitors):** Police patrols are tools that require congress itself to monitor agency action.
         2. **Fire Alarm (Constituents Monitor):** Fire alarms are tools that position constituents to monitor agency action and alert congress (i.e., sound a fire alarm) when legislative intervention is necessary.

**Administrative Proceedings:** Administrative proceedings (like notice-and-comment rulemaking) act as a fire alarm by allowing interested parties to participate in the development of agency policy, acquiring information about such policy along the way and triggering legislative intervention when it departs from their preference.

**Relationship Issue:** The connection between administrative procedures and legislative monitors it too general and cannot be tested as an empirical matter

**No Impact Issue:** Providing information is insufficient to make administrative procedures useful to Congress

**Legal Tool Issue:** Administrative procedures are viewed by scholars as legal, not political, tools because they promote notice, fairness, deliberation, and the like.

**Citizen-Suits Provisions:** Congress can obtain information by placing citizens in the judicial process through citizen suit provisions that authorize any person to seek judicial review of agency action. These provisions provide citizens greater incentive to watch agency action and report to Congress when such action departs form their preferences.

**Other Statutes (Freedom of Information Act):** FOIA provides records to any person upon a requires that reasonably describes such records.

### Regulation Tools: What Congress CANNOT Do

1. **Legislative Veto:** A legislative veto is a statutory provision that enables congress to reverse an agency decision without enacting a new statute.
2. **One-House Veto:** Only one house is needed to veto an agency’s action. This removes the need for bicameral consensus.
3. **Two-House Veto:** Allows congress to veto without obtaining the president’s signature or a two-thirds majority vote to override a prudential veto.
4. **Committee Veto:** A committee – a small group of people – who deal with the agency on a regular basis and conduct the oversight of that agency have the veto power over that agency’s actions.
5. **Negative Legislative Vetoes (Unconstitutional):** Negative legislative vetoes have the effect of reversing an agency decision.
6. ***INS v. Chadha (Deportation Case) [639]:*** Chadha overstayed his student visa and was asked to show cause why he should not be deported. After a hearing, the immigration judge ordered that Chadha’s deportation be suspended on the grounds that he would suffer “extreme hardship” if deported. Under the Act, once the Attorney General’s recommendation for suspension of a deportation was conveyed to Congress, the House had the power to veto the Attorney General’s determination. After the House veto of the Attorney General’s decision to allow Chadha to remain in the United States, Chadha was deported. Since the House action was pursuant to the Act, the resolution was not submitted to the Senate or presented to the President.   
   **HOLDING:** (1) Trying to pass legislation without having the issue get passed by both houses and congressional signature.   
   **CONCURRING (Powell):** (1) Agrees, but would limit the holding to just this instance because there could be other legislative vetoes that lack issue; (2) The separation of powers is violated when (a) a branch interferes or (b) assumes a function against the will of the Constitution; and (3) Congress, in this instance, went so far as to act using an unchecked power to act like a judiciary.   
   **DISSENT (White):** (1) Too expansive; (2) the legislative veto is an indispensable tool for controlling agencies; (3) the legislative veto tends to be used as a shield, not a sword; and (4) agencies are allowed to use this power, and it is not unrestricted because the law could get reformed and is reviewable.

**Presumption:** The presumption is that the challenged statute is valid. However, convenience and efficiency are not the primary objectives of a democratic government.

**Presentment Clause (Art II §2 Cl.** **2; Separation of Powers; External Check):** (A) Powers conferred to congress should be most limited because they will pass oppressive laws. Important because (1) it allows the President to protect himself, (2) to prevent the passage of bad law, and (3) to provide a natural perspective because the president is elected via a surrogate of the popular vote.

**Bicameralism (Art I.** **§§1, 7; Internal Check):** Both houses must pass legislation to prevent tyranny of a particular house. The idea was to divide the legislative power to limit it.

1. **Positive Legislative Vetoes:** Positive legislative vetoes require an agency to obtain congress’ approval before a decision becomes effective.
2. **Layover Vetoes:** Layover vetoes are when congress can require an agency to report a decision to a specified committee and wait for a period to allow legislative review.

### Congressional Control of Agency Officials

* + - 1. **Permissible Controls:** Congress may indirectly influence agency officials towards particular actions. These pressures include:
         1. **Appointment Process (Const.** **Art. II § 2):** The Constitution allows congress to directly participate in the appointment of agency officials.
         2. **Passing Law:** Congress may pass laws that require agency officials to perform certain functions.
         3. **Hearing/Oversight:** Congress may use hearings and oversight committees to assert indirect control over an agency.

1. **Establish Policy Standards (*Pillsbury Footnote 4)***
2. **Prescribe the Agency’s Structure and Procedure (*Pillsbury Note 4)***
3. **Appropriate Funds (*Pillsbury Footnote 4)***
   * + 1. **Impermissible Control:** Congress may not directly influence agency officials because it violates either the *separation of powers* or *enactment clause*.
          1. **Removal Power Prohibited (Unless Impeachment):** Congress may not have the power to remove an officer charged with the executive of laws.

***Bowsher v. Synar (Comptroller Balancing Budget Law) [pg. 655]:*** Congress passed the Gramm-Rudman-Hollings Act to eliminate the budget deficit. The budget defined a maximum deficit amount for each fiscal year. When spending exceeds the maximum amount, board cuts in federal spending are made to reach the targeted deficit level. Half of the cuts are made to defense program and half are made to nondefense programs. Proposals for cuts are made by the Office of Management and Budget and the Congressional Budget Office. The final decision is made by the Comptroller General. Congress has the power to remove the Comptroller General.  
**HOLDING:** The act was unconstitutional because it vested participation in an executive function after enacting legislation. To permit would be to effectively allow a congressional veto.  
**CONCURRENCE (Stevens):** Comptroller is an agency of Congress. Therefore, Comptroller must adhere to Constitutional and statutory requirements when acting with the force and effect of law (either through APA rulemaking or bicameral passage of legislation). In the instant case, the Comptroller could make law without following these procedures.

**Does the Officer Have Executive Power?** An officer that is charged with interpreting a law enacted by Congress to implement a legislative mandate is charged with the execution of the law, which is an executive power.

***Bowsher v. Synar (Comptroller Balancing Budget Law) [pg. 655]:*** Congress passed the Gramm-Rudman-Hollings Act to eliminate the budget deficit. The budget defined a maximum deficit amount for each fiscal year. When spending exceeds the maximum amount, board cuts in federal spending are made to reach the targeted deficit level. Half of the cuts are made to defense program and half are made to nondefense programs. Proposals for cuts are made by the Office of Management and Budget and the Congressional Budget Office. The final decision is made by the Comptroller General. Congress has the power to remove the Comptroller General.  
**HOLDING:** The executive nature is revealed by § 251, which requires the Comptroller to exercise judgment when implementing the act and § 252a3, which gives the Comptroller ultimate authority to determine which budget cuts are made.

**Does Congress Have Control Over Officer?** Congress is deemed to have control when it can directly influence an officer’s actions through a threat of removal based on very broad terms, such as inefficiency, neglect of duty, or malfeasance.

***Bowsher v. Synar (Comptroller Balancing Budget Law) [pg. 655]:*** Congress passed the Gramm-Rudman-Hollings Act to eliminate the budget deficit. The budget defined a maximum deficit amount for each fiscal year. When spending exceeds the maximum amount, board cuts in federal spending are made to reach the targeted deficit level. Half of the cuts are made to defense program and half are made to nondefense programs. Proposals for cuts are made by the Office of Management and Budget and the Congressional Budget Office. The final decision is made by the Comptroller General. Congress has the power to remove the Comptroller General.  
**HOLDING:** (1) Congress had removal power under § 703e1B based on disability, inefficiency, neglect of duty, malfeasance, etc.; (2) Congress always viewed itself as controlling the Comptroller because the Comptroller’s primary function was to audit the government, a power reserved explicitly to Congress; and (3) the vagueness of the removal provision makes the Comptroller effectively subservient.   
**DISSENT (White):** The removal concern via control is chimeric. (1) removal requires a joint resolution and approval by the president – this is no different than passing a law; (2) congressional removal ≠ congressional veto; (3) legislative branch is not taking power because of the requirement the process the remove adheres to *Chadha*; and (4) *Youngtown* shows that you can have overlap between powers without problems.

* + - * 1. **Mental Process Hearing = Procedural Due Process Violation:** Congress may not conduct hearing that focus directly and substantially on the mental decision processes of an agency for that agency’s pending case.

**Policy (Fair Trial):** There is a concern with the right of private litigants to a fair trial and the appearance of impartiality. The appearance of impartiality is not possible unless those who exercise the judicial function are free from powerful external influence.

***Pillsbury v. FTC (28% to 48% Market Share Anti-Trust) [Supp.]:*** Pillsbury acquired Ballard & Ballard Co. in 1951 and Duff in 1952. As a result, it market share went from 28% to closer to 48%. This led to an investigation by the FTC under § 7 of the Clayton Act. To violate, it must be shown that a merger may substantially lessen competition or create a monopoly, where substantially lessen is measured based on whether the anticompetitive effect is probably. FTC Chairman determined that government made a prima facie case and were waiting for Pillsbury’s response. The entire process was very long. Congress held a hearing where Senator Kefauver grilled FTC Chairman Howrey about his thought process on the case. Howrey eventually recused himself from the Pillsbury because of the degree of advocacy he was required to take during the hearing. 4 members of Howrey’s possey attended and at least 3 were tainted because of the questions of the Senate by Congress’ pointed questions. This creates a procedural due process question.   
**HOLDING:** The course of questioning before the Senate subcommittee deprived Pillsbury of the kind of hearing contemplated by the Supreme Court. However, facts such as time and change in personnel since the tainting statement or hearing would allow an agency to revisit the issue. **The issue was agency back benchers taking part in the decision after getting exposed the Congress’ desired outcome.**

## Judicial Control

* 1. Judicial Control of Agency Action
     1. Overview
        1. **Retroactive Control:** Judicial control is the process that occurs only after the agency action is complete or final. Control is retroactive because judges must wait until someone files a lawsuit before they can evaluate an agency’s action.
        2. **Right of Review:** 
           1. **Individual Cause of Action (APA § 702):** A person suffering a legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review of the agency action.
           2. **Failure of Other Remedies (APA § 704):** An agency action made reviewable by statute and final agency action when there is no other adequate remedy
     2. **Judicial Control of Agency Policymaking**
        1. **Scope of Review:**

**Hard Look Doctrine:** The hard look doctrine allows the court to require that an agency issue rules that are logically sound, factually supported, and thoroughly considered.ion Applies when there are lots of people, money, or significant interest effected.

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** Since 1929, cars have been the leading cause of accidental deaths in the US. In 1966, Congress passed legislation to improve the design and safety features of vehicles. Under the National Transportation and Motor Vehicle Act, the Secretary of Transportation issues motor vehicle safety standards that shall be practicable, meet the needs for motor vehicle safety, and stated in objective terms. In 1977, NHTSA rescinded a NPRM that would have required some form of passive restraints because the primary way of effecting the NPRM, automatic seatbelts, showed signs of being ineffective. Also, the cost of requiring automatic belts was > $1 billion.   
**HOLDING:** The decision to rescind Standard 208 was arbitrary because (1) there was not a reasoned explanation for why airbag would be excluded and (2) by failing to analyze the continuous seatbelts in its own right, the agency failed to offer the rational connection between the acts and judgment required to pass judicial review.

**PARTIAL CONCURRENCE (Rehnquist):** The recession did not pass the arbitrary and capricious test because the agency did not explain why it declined to implement that requirement explicitly.

**PARTIAL DISSENT (Rehnquist):** Majority goes too far when it applies its holding to the automatic seatbelt. The threshold for providing an explanation is low; the majority says they will accept a less than clear explanation. There was evidence to support the assumed decrease in the expected usage. Comparing those to the cost provided an adequate basis for forgoing the rulemaking, and changes in administration are perfectly acceptable reasons.

|  |  |  |
| --- | --- | --- |
|  | Ignore – Yes | Ignore – No |
| Know – Yes | Arbitrary or Capricious | Pass |
| Know – No | Knowable = Arbitrary & Capricious  Unknown/Unknowable = Pass | Knowable = Arbitrary & Capricious  Unknown/Unknowable = Pass |

* + - * 1. **Arbitrary and Capricious Test:** A court should apply an arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law standard test when evaluating notice and comment rulemaking or informal agency action. Under this standard, an agency must:

**Scope:** The court may look at and beyond the record.

**Policy (APA):**

**Transparency** – explain why the evidence does not apply

**Uniformity –**  we want people and agency to know what the processes or for doing something

**(1)** examine the relevant data and

**(2)** articulate a satisfactory explanation for its action, including a rational connection between the facts and the choices made.

**Factors:**

**Congressionally-Approved Factors:** whether the agency considered factors that Congress did (didn’t) intend for it to consider.

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** Rules must be practicable, reasonable, and appropriate. Airbags – mandate was to ensure vehicle safety (that was paramount). Airbags would accomplish this, and the agency concedes this.

**Consider All Aspects:** whether the agency failed to consider an important aspect of the problem.

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** NPRM included option for airbags as passive restraint, but NHTSA did not evaluate it. NHTSA said they did this because airbags cost more and industry did not like them.

**Decision Against the Weight of the Evidence:** whether the agency made a decision that was contrary to the weight of the evidence.

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** Airbag -- There was a lot of data showing that airbag provided material safety benefits to those riding in cars. Therefore, this option merited discussion, at the very least. *It is not enough to say that there is substantial uncertainty. The agency must explain why that matters.*

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** Automatic Belts – (1) Benefits are not in doubt; (2) no direct evidence for contrary conclusion; (3) no reliable real-world experience that usage rate won’t increase because of inertia

**Implausible:** whether the decision was so implausible that it could not have originated from the agency’s expertise.

**No Judicially-Generated Rationale:** A court may not supple a reasoned basis for the agency’s action that the agency itself has not given.

***Motor Vehicle Manufacturers Ass’n of the US v. State Farm Mutual Automobile Insurance Co. (Standard 208 Challenge) [pg. 667]:*** There must be a rationale beyond the industry does not like the device because the industry had waged a war against seatbelts.

* + - * 1. **Substantial Evidence Test (APA § 706.2E):** A court should apply substantial evidence test when evaluating formal adjudication or if the statute requires.

**Evidence Limited Record:** An agency must base its opinion on evidence in the record in order for the opinion to have substantial support.

* + 1. **Judicial Control of Agency Statutory Interpretation**
       1. **Overview**
          1. **Judicial Role:** (1) to enforce the boundaries of the statute and (2) to assess the reasonableness of the agency’s interpretation.
          2. **Applies to Procedural and Substantive Issues:** The Chevron two-step applies to both procedural matters (how to create the rule) as well as substantive matters (within the scope of the statute).
          3. **Deference** 🡪 **Force of Law:** When a court defers to an agency interpretation, the interpretation has the force and effect of law.

**Litigation Posturing = Low Deference:** If you make a rule in result of litigation, you are less likely to get deference

**Deference Limited to Organic Statute:** An agency’s deference is limited to its organic statute because congress has only delegated authority to the agency to speak with the force and effect of law in regards to its organic statute. Any interpretation outside of the organic statute (APA, etc.) does not get any deference.

* + - * 1. **Policy (Better Left to Legislature):** Administrative regulation are highly technical and complex. It is better to leave conflict and debate about these decisions to the democratic process (legislature, etc.)
      1. **Step 0: Did Congress Delegate Authority to the Agency?**

**Yes:**  See Step 1b and apply Chevron deference

**No:** See Step 1a and apply Skidmore deference

* + - * 1. **Express Delegation:** Express delegation occurs when it is apparent from the agency’s organic statute that Congress would expect the agency to speak with the force and effect of law. The strongest express indicator of an express delegation is when congress allows an agency to promulgate rules through notice-and-comment rulemaking or formal adjudication.

***US v. Mead Corp (Custom’s Tariff on Day Planners) [pg. 707]:*** Customs issued a classification that caused Mead’s planners to face a 4% tariff in import because they were classified as bound diaries. (1) The classifications issued by the custom offices only bind the parties involved, not the entire industry. (2) The Customs office indicates that they do not intend for these ruling to bind other parties. (3) Customs never set out with a lawmaking pretense in mind. (4) Customs office issues 10,000 to 15,000 classification a year, many of which are self-refuting.   
**HOLDING:** There is no indication that congress intended the letters issued by customs to be binding.   
**DISSENT (Scalia):** **(1)** The Mead Doctrine will cause confusion for years to come. **(2)** The improper presumption is that the judiciary should resolve statutory ambiguity instead of the agency, unless the agency has formal procedures in place. This is result in an increase in the number of formal rulemakings and adjudications and a decrease in flexibility for the agency. **(3)** It does not make sense that agencies head, who are accountable to the judiciary and the public, are not granted deference but an administrative judge, who has no comparative accountability, is granted deference.

* + - * 1. **Implied Delegation:** Implied delegation can be shown when Congress provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

***US v. Mead Corp (Custom’s Tariff on Day Planners) [pg. 707]:*** Customs issued a classification that caused Mead’s planners to face a 4% tariff in import because they were classified as bound diaries. (1) The classifications issued by the custom offices only bind the parties involved, not the entire industry. (2) The Customs office indicates that they do not intend for these ruling to bind other parties. (3) Customs never set out with a lawmaking pretense in mind. (4) Customs office issues 10,000 to 15,000 classification a year, many of which are self-refuting.   
**HOLDING:** (1) the rule look more like **interpretive rules** because of their limited applicability and lack of precedential function. (2) the classifications do not look like notice-and-comment rules because there is **not real opportunity for outside parties to intervene** and the number of rules issued makes the idea that they speak with the force and effect of law self-refuting.   
**DISSENT:** **[See 1-3 above]**. (4) **Protracted Confusion** – There is very little guidance for lower courts and would leave to an almost overnight increase in employment of rulemaking to avoid adverse consequences. (5) **Ossification of Statutory Law** – Once the court speaks, it becomes law. This is contrary to the view that agencies had discretion. (6) **Agency Resolution of Ambiguity** – Ambiguity means that Congress intended agency discretion. Congress could have been clear. (7) **Don’t Want to Impose/SOP –** Scalia does not want to add additional procedures because it would speak a Congressional intent that Congress never wanted included.

***Barnhart v. Walton (Social Security Disability; “DISABILITY”) [pg. 720]:*** Social Security Act authorizes payment of disability insurance benefits and Supplemental Security Income to individual with a disability. A disability is an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to law for a at least 12 consecutive months. The Agency promulgated several regulations interpreting the statutory phrase and rules for applying it, such as an income rule and a duration rule. P had a mental illness that prevented him for 11 months, but challenged the agency’s interpretation that prevented him from collecting the benefit.   
**HOLDING:** (1) the interstitial nature of the legal question, the (2) related expertise of the Agency, (3) the importance of the question to the administration of the statute, and (4) the careful consideration of the Agency has given to the question over a long period of time all indicate that *Chevron* applies. The agency’s actions look as if they went through the notice and comment rulemaking.

**Due Process Undertone:** The amount of procedure suggests that the court felt there was enough due process to justify the agency’s action without violating rights of the citizen.

**Rules in Anticipation of Litigation:** Rules in anticipation of litigation get no precedential value.

***Barnhart v. Walton (Social Security Disability; “DISABILITY”) [pg. 720]:*** Social Security Act authorizes payment of disability insurance benefits and Supplemental Security Income to individual with a disability. A disability is an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to law for a at least 12 consecutive months. The Agency promulgated several regulations interpreting the statutory phrase and rules for applying it, such as an income rule and a duration rule. P had a mental illness that prevented him for 11 months, but challenged the agency’s interpretation that prevented him from collecting the benefit.   
**HOLDING:** This was a longstanding issue.

* + - 1. **Step 1a: Is the Interpretation Persuasive?**
         1. **Deference Based on Persuasiveness:** A court may find that an agency’s interpretation may merit some deference whatever its form, given:

**(1)** the specialized experience and broader investigations and broader information available to the agency and

***US v. Mead Corp (Custom’s Tariff on Day Planners) [pg. 707]:*** Customs issued a classification that caused Mead’s planners to face a 4% tariff in import because they were classified as bound diaries.   
**HOLDING:** Tariff regulation is highly detailed and Customs has information that it can bring when making subtle distinctions between products. A court has no real starting point when analyzing the question of whether a daily planner that allows for the user to write entries, or that uses three-ring clips is a diary and bound, respectively.

***Skidmore v. Swift & Co. (Overtime Pay for On-Call Firehouse Employees) [pg. 723]:*** Seven employees at D’s packing plant sued for overtime. The employees were day laborers, who worked from 7 to 3:30 5 days a week. Several days a week, they were required to stay at or in the immediate vicinity of a compound provide by D and respond to fire calls. Fire call were rare and employees could do whatever they wanted when there was not a call In other words, they could use the time as they saw fit.

**(2)** given the value of uniformity in its administrative and judicial understandings of what a national law requires.

***US v. Mead Corp (Custom’s Tariff on Day Planners) [pg. 707]:*** Customs issued a classification that caused Mead’s planners to face a 4% tariff in import because they were classified as bound diaries.   
**HOLDING:** The ruling by Customs was thoroughly explained because it came from the head office instead of one of the 43 satellite points of entry. However, there is nothing within the agency to suggest that there could be harmonization because of the number of outlets and rulings.

**(3)** the complexity of the regulation

**(4)** the timing of the litigation (anticipation)

***Skidmore v. Swift & Co. (Overtime Pay for On-Call Firehouse Employees) [pg. 723]:*** This is not relevant because it was a longstanding rule.

**(5)** the consistency with prior rulings

***Skidmore v. Swift & Co. (Overtime Pay for On-Call Firehouse Employees) [pg. 723]:*** The ruling was just a formalization of a rule that existed for a long period of time.

* + - * 1. **Binding Interpretations:** Judicial interpretations under *Skidmore* are binding on future courts and agency actions.
      1. **Step 1b: Is the Statute Ambiguous?**
         1. **Yes:** Then the agency is bound to adhere to the statutory answer.

**Binding Interpretations:** If a court rules that a statute is clear, that ruling caries precedential weight in future cases and agency action.

* + - * 1. **No:** The agency looks for a pre-1984 court decision that addresses the particular issue or moves on to step 2.

***Chevron USA v. Natural Resource Defense Counsel (Bubble Concept) [pg. 438]:***Clean Air act required States to achieve certain air quality standards. Air quality standards were identified the by the EPA. If a State did not meet the standard set by the EPA, they were considered a non-attainment state. Non-attainment states were required to establish a permit program regulation new or modified major statutory sources of air pollution. The EPA promulgated regulation indicated that the State could adopt a plant wide definition of the term stationary source. This implied a bubble concept.   
**HOLDING:** Congress did not define the term explicitly, nor speak to whether it was appropriate to include a bubble concept in a major statutory source

**Contradiction of Prior Ruling in Case:** (1) if prior to Chevron, then the court’s interpretation stands, but, if after, the prior ruling does not matter.

* + - * 1. **What To Look At:** Plain Language; Legislative History; and Purpose of the Statute.

**Plain Language of Particular Provision:** In evaluating whether Congress has specifically answered spoken to the particular issue, the court evaluates the plain language of the statute using common and ordinary meanings, unless the words acquired a specific meaning. The court accomplishes its plain-language by looking at the dictionary.

***MCI Telecommunications Crop. v. AT&T Co. (Long Distance Communication Tariff; “MODIFY”) [pg. 681]:*** The court looked at words with similar roots (mod). Each of these words had a narrower connotation of a minor change. MCI presented evidence from *Webster’s Third International* showing that modify meant “to make a basic or important change.”  
**HOLDING:** There was no reason to find ambiguity in the definition from an outlier dictionary that (1) contradicted itself and (2) did not exist when the legislation was passed. You cannot modify in a way that makes the language meaningless.   
**DISSENT (Stevens):** Dictionaries are a good start, but not necessarily the end of the analysis. The majority fails to differential between minor modification over time and a major modification. Also, Black’s Law Dictionary establishes a definition where major would be identified with undermining the statute’s purpose.

***FDA v. Brown & Williamson Tobacco (Cigarettes within FDCA; “DRUG/DEVICE”) [pg. 690]:*** The section defines drug to include articles intended to affect the structure or any function of the body. The section defines device as an instrument, apparatus, implement, machine, contrivance, or other similar or related article intended to affect the structure or any function of the body. Nicotine exerts psychoactive or mood altering effects on the brain. It appears to be intended because the bodily impact was so widely known and foreseeable that it must have been intended.   
**DISSENT (Breyer):** Under the 3rd definition of a drug in the statute, Nicotine falls within the Congressional definition. There is also a clear indication that cigarette companies have intended sales because of the circumstances surrounding. The statute itself allows for this change to occur. The industry could also change in a manner that brings it under the statute.

**Other Provision in Section/Other Sections:** Looking at other provision in the statute, and comparing those provisions to the provision in question, can provide significant insight into Congressional intent regarding the meaning of a provision. *An interpretation that creates a coherent regulatory scheme is preferred*.

***MCI Telecommunications Crop. v. AT&T Co. (Long Distance Communication Tariff; “MODIFY”) [pg. 681]:*** § 203b2 prohibits changes to the required notice time (cannot be shorter than 120 days).   
**HOLDING:** It does not make sense that an agency could determine that the statute was entirely inapplicable, but cannot change the notice window.   
**DISSENT (Stevens):** §203b2 is only a limitation on stiffening the regulatory scheme. The statute fails to speak regarding relaxing the regulatory scheme.

***FDA v. Brown & Williamson Tobacco (Cigarettes within FDCA; “DRUG/DEVICE”) [pg. 690]:*** The section defines drug to include articles intended to affect the structure or any function of the body. The section defines device as an instrument, apparatus, implement, machine, contrivance, or other similar or related article intended to affect the structure or any function of the body. Nicotine exerts psychoactive or mood altering effects on the brain. It appears to be intended because the bodily impact was so widely known and foreseeable that it must have been intended.   
**HOLDING:** (1) The statute contains a provision saying that misbranded cannot be sold unless properly branded. However, you cannot properly brand tobacco products because it is inherently dangerous. This would be absurd because this is an industry of national importance.

**DISSENT (Breyer):** (1) the remedies offered by the statute are not without discretion; the FDA could offer a more lenient remedy. Regardless, that would not be a reason to eliminating J; (2) there is no explicit language denying J over tobacco products.

**Subsequent Congressional Enactments:** Subsequent acts by congress can shape our focus on Congressional intent.

***FDA v. Brown & Williamson Tobacco (Cigarettes within FDCA; “DRUG/DEVICE”) [pg. 690]:*** There were six other statutes passed since the FDCA. The agency also said on several occasions that it did not have authority.   
**HOLDING:** (1) the fact that Congress passed six statutes addressing the issue suggests that Congress never intended to delegate authority to the FDA. (2) The agency also declared that it never had the power.   
**DISSENT (Breyer):** It is completely reasonable for an agency to change its opinion. (1) The amount of information has changed in terms of scientific data and industry perspective. (2) Administrative poicy changed.

**Common Sense or Economic/Political Importance:** Analysis of a statute should be guided by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.

***MCI Telecommunications Crop. v. AT&T Co. (Long Distance Communication Tariff; “MODIFY”) [pg. 681]:*** The agency’s interpretation would impact 40% of the industry. Congress indicated that this is an important industry to the national economy. Last, the statute’s goal is to improve competition, but there is evidence that the tariff would deter competition by creating a costly barrier to entry.   
**HOLDING:** (1) 40% of an industry is so large that it would represent a fundamental change; (2) the desirability of a policy cannot alter the meaning of a statute. In this case, the statute requires a rate-regulation, despite a potentially harmful impact. The agency could modify the form, content, and location of required filing. They could also defer and potentially waive the filing. However, all of these actions cannot rise to the level of fundamental change.   
**DISSENT (Stevens):** The goal of the FCC is to “make available . . . rapid, efficient, nation-wide and world-wide wire and radio communication.” Creating barriers to entry deter from that goal.

***FDA v. Brown & Williamson Tobacco (Cigarettes within FDCA; “DRUG/DEVICE”) [pg. 690]:*** The section defines drug to include articles intended to affect the structure or any function of the body. The section defines device as an instrument, apparatus, implement, machine, contrivance, or other similar or related article intended to affect the structure or any function of the body. Nicotine exerts psychoactive or mood altering effects on the brain. It appears to be intended because the bodily impact was so widely known and foreseeable that it must have been intended.   
**HOLDING:** This is an industry that is really important to the national economy. Since Congress has created a distinct regulator scheme, there is no deference to the agency; Congress probably did not give difference.

* + - * 1. **When to Look?** Although this may be dicta, there is evidence in several cases (*MCI’s* discussion of dictionary definition in particular) that all language-based evaluations should occur at the time of passage, not the time of litigation.
      1. **Step 2: Is the Agency’s Interpretation Permissible?**
         1. **Arbitrary and Capricious Standard:**  All constructions are permissible unless they are arbitrary, capricious, or manifestly contrary to the statute.

***Chevron USA v. Natural Resource Defense Counsel (Bubble Concept) [pg. 438]:***Clean Air act required States to achieve certain air quality standards. Air quality standards were identified the by the EPA. If a State did not meet the standard set by the EPA, they were considered a non-attainment state. Non-attainment states were required to establish a permit program regulation new or modified major statutory sources of air pollution. The EPA promulgated regulation indicated that the State could adopt a plant wide definition of the term stationary source. This implied a bubble concept.   
**HOLDING:** Debate over whether bubble concept was better when dealing with maintaining pollution levels as opposed to improving pollution levels.

* + - * 1. **What To Look At:** Terms of the Statute; Legislative History; and Purpose of the Statute.
        2. **Contradictory Interpretation:** Assuming that the statute is ambiguous on the particular issue, there is no requirement for agency consistency over time; in other words, an agency can create an interpretation that overrides and contradicts an earlier interpretation.

## Judicial Control of Agency Procedures

1. APA Maximum**:** Generally speaking, the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. An agencies can grant additional procedural rights in the exercise of their discretions, but reviewing courts are not free to impose them if the agencies have not chosen to grant them.
2. ***Vermont Yankee Nuclear Power Corp. (Procedures for Granting Nuclear Power Permit) [pg. 729]:*** Under the Atomic Energy Act, the Atomic Energy Commission was given authority to regulate nuclear power plants. They set up separate permitting requirements; one permit to build and another permit to operate. In 1967, after an adjudicatory hearing and necessary review, the Commission granted Vermont Yankee a permit to build a plant and operate it. Commission did not evaluate the effects of the operations of reprocess fuel or waste disposal because there were rulemaking proceedings done to handle that issue. The Commission did not retroactively apply the standard in the final rule to already-issued permits.   
   **HOLDING:** While waste is a big issue (100 pounds of radioactive waste would be produced), the Commission acted within its statutory authority when it considered the back end of the fuel cycle in individual licensing proceedings.
3. **Agency-Bound Exception:** If an agency binds itself to an additional procedure, then the court can bind the agency to take that procedure.
4. **Constitutional Consideration Exception:** The court can bind an agency to additional procedures when constitution concerns, like due process, are invoked.
5. **Organic Statute Exception:** The court can bind an agency to additional procedure if those procedure are in the agency’s organic statute.
6. **Extremely Compelling Circumstances:** This is an escape clause used as a hedge against future agency events. More than likely, the extremely compelling circumstances fall within the other exceptions.

## The Availability of Judicial Review

1. Standing**:** Article III “case and controversy” requirements confine the business of federal courts to questions presented in an adversarial context and in a form historically viewed as capable of resolution through judicial process. Standing requires the P to show (1) injury, (2) causation, and (3) redressibility.

**State Standing:** States are not normally litigants for the purpose of invoking federal jurisdiction, but statutory prerogative can overcome that presumption (EPA statute requires providing relief to State and may present state action).

* + - * 1. **Injury:** P must demonstrate that it suffered a concrete and particularized injury that is actual or imminent

**Statutory Causes of Action:** Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. To do this congress must identify, at least: **(1)** the injury it seeks to vindicate and **(2)** the class of persons it seeks to protect.

***Massachusetts v. EPA (Please Save Our Beaches) [pg. 738]:*** EPA refused to act pursuant to the Clean Air Act in terms of regulating emission. MA filed a petition for rulemaking that was denied without any explanation of the reasoning.   
**HOLDING:** MA suffered from the tides rising (10-20cm of land lost). There was also the risk of hurricanes and disease spreading if global warming was not stopped. MA also alleged impact in the future from continued warming (impacts that would be felt in 100 years).   
**DISSENT (Roberts):**

* + - * 1. **Causation:** P must show that the injury is fairly traceable to the D. Agencies do not resolve massive regulatory problems in one fell regulatory swoop. Instead, agencies whittle away at an issue while developing a more nuanced understanding.

**Tentative = Irrelevant:** The first step an agencies takes might be tentative, but that does not support a notion that a federal court lacks jurisdiction for want of causation.

***Massachusetts v. EPA (Please Save Our Beaches) [pg. 738]:*** EPA refused to act pursuant to the Clean Air Act in terms of regulating emission. MA filed a petition for rulemaking that was denied without any explanation of the reasoning.   
**HOLDING:** Transportation sector emits an enormous amount of CO2 into the atmosphere (approximately 6% of the worldwide total). Within the US, the transportation sector emits about 1/3 of the total emissions.   
**DISSENT (Roberts):**

* + - * 1. **Redressibility:** P must show that there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. (1) The agencies undertakes rulemaking or (2) the agency discloses why they denied the rulemaking. That justification is measured against the arbitrary and capricious standard.

**Policy:** (1) This achieves the APA’s goal of promoting transparency. (2) Also, this results in a reduction of control by the agency. (3) Moreover, this would result in agency paralysis because they have to commit additional resources to explaining their reasons for not undertaking low-priority action.

***Massachusetts v. EPA (Please Save Our Beaches) [pg. 738]:*** EPA refused to act pursuant to the Clean Air Act in terms of regulating emission. MA filed a petition for rulemaking that was denied without any explanation of the reasoning.   
**HOLDING:** A reduction of global emissions would slow the place of global warming. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if the EPA provided relief.   
**DISSENT (Roberts):**

* + - 1. **Political Question Exception:** There is no case of controversy when it relates to a political question.
      2. **Advisory Opinion Exception:** The courts are unable to issue advisory opinions through the constitutional grant of power in Article III.
      3. **Mootness Exception:** A case that would otherwise have standing loses that standing because the mootness in terms of the injury or redressibility.

1. Ripeness
2. APA Procedural Blocks
3. **Right of Review (APA § 702):** A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review of the agency’s action.
   * + - 1. **Other Limitation on Right to Review (APA § 702.1):** §702 does not affect other limitations on the judicial review.
         2. **Acting Against Organic Statute (APA § 702.2):** § 702 does not confer authority to grant relief if the cause of action is (1) a statutory cause of action and (2) the statute granting the cause of action expressly or impliedly forbids the relief sought.
4. **Action Reviewable (APA § 704):** A court has power to review actions that are made **(1)** reviewable by statute or that are final agency action and **(2)** there is no other adequate remedies (exhaustion of administrative remedies).
5. Remedies:
   * + 1. Win on Step 1 🡪 Client wins; rule struck down.
       2. Win on Step 2 🡪 Reverse & Remand; engage in new rulemaking + influence through change (*e.g.,* new policy, lobbying, etc.)

# Legislation

* 1. Legislative Process
     1. Objectives
        1. **Passage Not Necessary:** A bill does not have to pass in order to have an impact. The fact that the media may examine it could spur public discussion on the matter.
           1. ***FTC Museum Bill:*** FTC bill causes there to be a focus on the agency. The introduction of a bill that might never succeed could forces the agency to respond to the underlying issues within the bill.

**Response Indicates Agency Vulnerability:** An agency’s response dictates its own perception of its vulnerability to external forces. Responding takes resources.

**Agency Counter-Measures:** The agency can target key issues that the bill sponsors represent and show how the agency would not solve those problems in a world where the bill passes.

* + - * 1. **House Rules Committee:**  The house rules committee sets the agenda because of the size of the House.
      1. **Introduction of a Bill:** A bill is introduced in the house and in the senate
      2. **Conference Committee:** Differences in the bill are resolved in the Conference Committee.
         1. **Resolving Differences:** Committee leaders make their recommendations based on seniority, interest in the legislation, and other factors.
         2. **Lobbying Members:** Outside parties can lobby members of the conference committee in order to say their influence for a particular version of a bill. *Lobbying can occur from all stakeholders.*
      3. **Presidential Veto:** The president can veto a bill proposed by congress. However, this power is not frequently used because (1) congress can overrule the president; (2) there may not be enough support to get another bill to pass; and (3) the Senate may block future bills out of spite; and (4) the House may block future bills out of spite.
    1. **Theories of the Legislative Process**
       1. **Public Choice Theory and the Role of Interest Group:** It is more difficult to organize groups with diffuse interest than small groups with common interest. These small groups have a disproportionate impact on legislation.
          1. **Acting in Self-Interest:** Congress people will act in their self interest. That will push them to bending to the will of small group.
          2. **Free-Rider Problem:** A rational actor will attempt to free ride when the cost of inaction are defused over a large group of people. This free rider problem suggest that it should be nearly impossible to organize large groups of individuals to seek broadly dispersed public goods.
       2. **Social Choice Theory and the Problem of Cycling:** Cycling occurs when people are able to rank their preferences of various choices and compare the relative desirability of certain choices within that. In order to get political action, the committee leader must end the cycling by limiting the number of voting rounds.
       3. **Positive Political Theory and the Role of Institutions:** Individual legislators seek to ensure that legislation reflects their preferences, knowing that they are not the only players in the game. As a result, individual legislators develop statutes not only taking account of their own preferences, but the reaction of others who participate in the process.

# Judicial Interpretation

* 1. Interpretative Tools
     1. Text**:**
        1. **Ordinary Meaning:** Words and phrases should be given their ordinary and customary definition that existed at the time of enactment. This definition could get established via dictionaries or culture.
           1. ***Holy Trinity:*** SCOTUS concedes that the Church’s action was within the letter of the statute.
           2. ***Nix v.*** ***Hedden (Tomato):*** Dictionary – tomatoes is probably a fruit. However, there are too many definitions and dictionaries to know for sure. Customary – the experts have differing conclusions, consumers serve it at dinner. This *customary use prevails and a tomato is defined as a vegetable.*
           3. ***Muscarello (“Carry” Drug Traffic):*** Dictionary – on your person; Writers – Melbell and other classics said that carry was on your person. Newspaper – NYT manual of style and the Boston Globe have their application of carry. Carry means the 26th definition in the oxford English dictionary (i.e., to carry is to have it on one’s person).
        2. **Technical Meaning:** Whether a word has a technical meaning is based on whether there is **(1)** a common law interpretation of the phrase, **(2)** an audience to which the statute is addressed, **(3)** an industry understanding of the term, and **(4)** a term that appears in a technical context.
           1. **Common Law Meanings:** A term that has an established meaning at common law will generally be interpreted according to that established meaning.
           2. ***Mead:*** Is a daily planner a binder?
     2. Title of the Act**:** A court may considering the title of the act in determining the intent of the legislature.
        1. ***Holy Trinity:*** An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States.   
           **HOLDING:** This obviously reaches only to manual laborer and nobody reading the statute would believe that laborer includes preachers.
     3. Statutory Purpose**:** The evil that the statute is designed to remedy.
        1. ***Holy Trinity:*** The fear of importing cheap unskilled labor that would undermine the ability for nationals to get low-wage jobs.
     4. Legislative History**:** Those things that were brought to the legislatures attention provide insight into the intent of Congress.
        1. ***Holy Trinity:*** The term were changed in the committee hearings in order to ensure passage. Originally, the bill used the language “manual labor” or “manual service”, but it was redrafted to include “labor or service” because everybody understood it to mean manual labor/service.
     5. Constitutional Coherence**:** A court should interpret a bill in a manner that does not violate the constitution.
        1. ***Holy Trinity:*** The US is a religious people and, therefore, it is unlikely that legislation that specifically addresses religion is inclusive of religion. The court cites King James I, the constitution of 44 states, and the profound influence religion has in our daily lives. Here, interpreting the bill as criminalizing the church would impede the amendment (violate the establishment clause).
        2. ***Muscarello (“Carry” Drug Traffic):*** Person was arrested on a drug offense. The cops found a gun in his glove box.
  2. Interpretive Theories: While we have great theories, it should be applied based on the perspective of the judge.
     1. Intentionalism**:** The court looks to find the actual or specific meaning that Congress meant for a particular word or phrase to carry.
     2. Purposivism**:** The court looks to the broad purpose of the statute and the overall aims of the statute when interpreting it.
     3. Legal Process Purposivism**:** Courts inquire into the purpose of a statute by asking what a reasonable legislature legislature would have sought to accomplish under the circumstances. Thus, Courts should interpret statutes assuming that the legislature was made up of reasonable persons pursuing reasonable goals.
     4. Imaginative Reconstruction**:** The court should stand in the shoes of Congress, asking how the enacting legislature would have resolved the issue if it had envisioned.
     5. Textualism**:** Courts look to the text of the statute and see if a particular meaning is revealed. The text should be the sole tool, and interpreted against other provisions.
     6. Dynamic Interpretation**:** Courts should interpret in a manner that allows them to act as partners with Congress in developing the meaning of the statute. In dynamic interpretation, courts apply their own understanding and values in order to interpret.
  3. Textual Canons
     1. Linguistic (Grammar/Syntactic) Cannons**:** Linguistic cannons are rules or presumptions about how words fit together within a particular provision.
        1. **Ejusdem Generis:** When a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specific it followed. *Requires a common feature.*
           1. ***Washington State Dep’t of Social and Health Services v. Guardianship Estate of Keffler (Common Feature):*** The statute in question protected social security benefits from “execution, levy, attachment, garnishment, or *other legal process*.”   
              **HOLDING:** SCOTUS applied *ejusdem generis* and determined that other legal process should be understood to be processes much like the processes of execution, levy, attachment, and garnishment. At a minimum, this would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.
           2. ***Ali v.*** ***Federal Bureau of Prisons (No Common Feature):*** 28 U.S.C. §2608c states that claims against “any officer of customers or excise or another other law enforcement officer” for loss of property are barred.   
              **HOLDING:** SCOUTS held that *ejusdem generis* did not apply because this provision is disjunctive (it is not a list separated by commas).
        2. **Noscitur a Sociis:** A word is known by the company it keeps. This cannon is used to ensure that the meaning of a word is interpreted consistently with the surrounding terms and does not expand that statute beyond its reasonable reach. *Requires a common feature.* 
           1. ***Dolan v. USPS (Common Feature):*** P tripped over an item that the postal carrier negligently left on his porch. Postal service claimed that the suit was barred by a statute stating that claims arising from “loss, miscarriage, or negligent transmission of letters or postal matter.”   
              **HOLDING:** SCOTUS held that negligent transmission could not extend the statute’s power beyond those concepts indicated by lost or miscarriage (the specific language).
           2. ***US v.*** ***Williams (Common Feature):*** Child pornography statute subjected criminal penalties against anyone who knowingly “advertises, *promotes*, *presents*, distributes, or solicits” through the mail or other sources child pornography.   
              **HOLDING:** SCOTUS held that promotes or presents meant implying a transactional connotation based on the other items in the list. Therefore, these words essentially mean to try to induce another into purchasing child porn.
           3. ***S.D. Warren Co. v. Maine Board of Environmental Protection (No Common Feature):***The Clean Water Act does not define “discharge,” but does specify that “the term discharge when used without qualification includes discharge of a pollutant, and a discharge of pollutants. The dam operator released water from a dam.   
              **HOLDING:** SCOTUS held that the Clean Water Act was only giving examples, not trying to narrow the broader discharge term.
        3. **Expressio Unius Est Exclusio Alterius:** The mention of one thing is the exclusion of another. Courts apply the cannon when they can infer from the inclusion of one term that the omission of another term was intentional.
           1. **Commonality Required:** SCOTUS has repeatedly held that *expression unius* does not apply to every statutory listing or grouping, but only applies when the items are members of an associated group or series justifying the inference that items not mentioned were excluded by deliberate choice.
           2. **Enumerated Exception:** Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied without evidence of contrary legislative intent.
           3. **Prescribed Method Exception:** When a statute limits a thing to be done in a particular mode, it negates the use of any other mode.
           4. **Preemption Exception:** When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state authority.
        4. **Punctuation:** Courts may consider the punctuation of a phrase to confirm an interpretation, but punctuation alone is rarely sufficient to sustain or contradict an interpretation.
           1. **Parenthetical Given Less Weight:** Courts have held that language inside a parenthetical is entitled to less weight than language outside a parenthetical.

***Chicasaw Nation v. US:*** The Indian Gaming Regulatory Act exempts tribes from paying certain gambling-related taxes. Specifically, the law states, “The provisions of the IRC (including §1441, 3402(q), 6041, and 6050I, and chapter 35 of the IRC) concerning the reporting and withholding of taxes with respect to the winnings from…   
**HOLDING:** SCOTUS refused to give the parenthetical reference to chapter 35 more weight than the “reporting and withholding language” outside the parenthetical. It held that the language within the parenthetical was an *illustrative list*.

* + - 1. **Last Antecedent Rule:** A limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows.
         1. ***Barnhart v. Thomas:*** P sued for social security benefits. The Act defines disability as “the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of more than 12-months.   
            **HOLDING:** The phrase concerning work in the national economy only modifies the clause that immediately precedes it: “engaging in any other king of substantial gainful work.” P is not entitled to benefits because she was able to perform her previous work regardless of whether that work still existed in the national economy.
      2. **Conjunctive (And) v. Disjunctive (Or):** Terms connected by a disjunctive word (or) should be given separate meaning, unless the context dictates otherwise.
         1. **Careless Usage Exception:** The word “or” is often used as a careless substitute for the word “and.” When a court senses a careless usage, it may substitute the disjunctive word (or) for the conjunctive word (and).
      3. **May v. Shall:** The word may connotes permissive or discretionary action, whereas the word shall connotes a mandatory one.
         1. ***Ex. Pro bono rules:*** The professional rules of responsibility say that you may and should do pro bono work, but it does not mean that you are required to do pro bono work.
         2. ***Ex. Tunney Act:*** These are settlement between the private parties and the government. When the court receives an agreement, the statute stated that the court **may** engage in certain activities to ensure that things were in the public interest. The DC circuit said that the court must enter the agreement without any additional hearings. Congress changed the statute and said that the court **shall** perform the additional hearing. The DC circuit took that same legislative history and said that congress cannot compel the courts to additional hearings. The DC circuit affirmed the prevision interpretation that courts must accept agreements without additional hearings.
      4. **The Dictionary Act (1 U.S.C. §§1-8) [See pg. 225, if applicable]:** The Dictionary Act applies in determining the meaning of any act of congress, unless the context indicates otherwise. Based on ***Rowland v. California Men’s Colony, Unit II Men’s Advisory Council***, courts are largely free to disregard the dictionary act (and they often do).
    1. Whole Act Cannons**:** Whole Act cannons are presumptions about the meaning of a term in relation to other terms, phrases, or provisions in the same statute.
       1. **Whole Act Rule:** In reading a statute, a court must not look merely to a particular clause, but consider the clause in connection with the whole statute. This presumes that congress intended **(1)** to give identical words the same meaning throughout the statute and **(2)** for each individual provision to work together creating a coherence and avoiding redundancy.
          1. **Identical Words = Consistent Meaning:** A standard principle of statutory construction provides that identical words and phrases within a statute should normally be given the same meaning. However, this is not an absolute rule.

***Internal Revenue v. Lundy:*** The issue was whether a “claim” under 26 U.S.C. § 6512b3 means a claim filed on a return.   
**HOLDING:** Claim used in § 6511a indicates that a claim for refund is timely if filed by the taxpayer within 3 years. If a claim could *only* be filed with a return, these provisions of the statute would be senseless. Therefore, the meaning of claim in both §§ is the same.

***General Dynamics Land Systems, Inc. v. Cline:*** The issue was whether the ADEA prohibits employers from favoring older employees over younger employees. Age was the terms at issue.   
**HOLDING:** The presumption that identical words has the same meaning is not rigid when such variation in the connection in which the words are used as reasonably warrant the conclusion that they were employed in different parts of the act with different intent.  *Age, standing alone, can be readily understood as meaning several things. So it is easily understood that Congress chose different meanings as different places in the ADEA*.

* + - * 1. **Avoiding Redundancy & Surplusage:** A statute should be construed in a manner where no clause, sentence, or word shall be superfluous, void, or insignificant.
      1. **Titles:** While courts may look to the title of a statute, SCOTUS has repeatedly held that “a title alone is not sufficient.”
      2. **Provisos:** Provisos are clauses that state exceptions to or limitations on the application of a statute. *E.g.,* provided that.
    1. Whole Code Cannons**:** Whole code cannons seek to make sense of a work in light of other statutes in the U.S. Code.
       1. **In Pari Materia:** Statutes addressing the same subject matter generally should be read as if they were one law.
          1. **Later Interprets Former:** Under *in pari materia,* a later act can be regarded as a legislative interpretation of an earlier at in the sense that it aids in ascertaining the meaning of words used in their contemporary setting.
          2. ***US v. Stewart (Applying):*** The issue is whether the taxpayer was entitled to a refund on taxes on capital gains on farm bonds issued under the Federal Farm Loan Act.   
             **HOLDING:** SCOTUS evaluated two different sections of the IRC to figure out the answer. It concluded that because a later provision exempted interest from farm bond, but not the capital gains, it was clear that congress intended to make the capital gains taxable.
          3. ***Erlenbaugh v.*** ***US (Not Applying):*** D were convicted of violating 18 U.S.C. § 1952, which makes it unlawful to use a facility of interstate commerce in furtherance of certain criminal activity. Ds, who circulated a gambling publication across state lines, challenged their convictions on the basis of an exception in a different statute (18 U.S.C. § 1953). That statute was on the same day as § 1952.  
             **HOLDING:** The two statutes paly different roles in achieving the same broad common goal. § 1953 has a narrower, specific function. § 1952 is concerned with a broad spectrum of unlawful activity. § 1952 focuses is effort on denying individual who act for such a criminal purpose access to the channels of commerce. Thus, while § 1952 and § 1953 both seek to inhibit organized criminal activity, they take very different approaches to doing so. To introduce into § 1952 an exception based upon the nature of the material transported in interstate commerce would carve a substantial slice from the intended overage of the statute.
       2. **Inferences Across Statutes:**
          1. **Language Similar to Other Statutes:** SCOTUS has stated that when congress uses the same language in two statutes having similar purpose, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.
          2. **Prior Judicial Interpretations Incorporated:** When prior judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate the prior interpretation into the enacted statute.
          3. **Expressio Unius Inferences:** Sometimes a court will apply other rules of statutory construction to create negative inferences.

***West Virginia University Hospital, Inc. v. Casey:*** The issue was whether 42 U.S.C. § 1988, which authorized shifting reasonable attorney’s fees to the losing party in civil rights litigation includes expert witness fees.   
**HOLDING (Scalia):** No. When looking to several statute, when congress intended to allow the shifting of expert witness fees, the incorporated language like “in addition to …” or “and …”.   
**DISSENT (Stevens):** Comparison to other statutes was irrelevant because congress enacted the fee shifting provision in that statute in a hope to overrule a prior SCOTUS decision that prohibited courts form making the prevailing whole.

* + - 1. **Repeals by Implication:** A repeal by implication is disfavored by the courts and only arises when either **(1)** a later statute expressly contradicts the original act or **(2)** it is absolutely necessary in order that the words of the later statute shall have any meaning at all.
         1. **Saving Clause:**  A saving clause prohibits a court from repealing part of a statute by implication by stating that “nothing in this act shall serve to repeal anything in this other act.”
  1. Substantive Canons**:** Substantive canons are rules about how the law should look; they expressly protect or reflect substantive values.
     1. Rule of Lenity (Criminal Statute Only)**:** The rule of lenity applies when criminal statutes are ambiguous, as determined through the application of other tools of statutory construction. Ambiguity concerning the ambit of criminal statutes should be resolved in favor of the D.
        1. ***US v. Santos:*** Santos is a guy operating a laundry business. He is contributing to the economy by gainfully employing people. The federal money-laundering statute prohibits a number of activities involving criminal “proceeds.”
     2. Remedial Purpose Canon**:** Remedial legislation (legislation directed at remedying a prior problem) should be construed broadly to effectuate its purpose.
     3. Constitutional Avoidance Canons**:** This doctrine requires a court to avoid interpretations of statutes that render them unconstitutional or raise serious doubts about their constitutionality, at least when other interpretation of the statute are permissible.
        1. **Unconstitutional Canon (View 1):** As between two possible interpretations of a statute, where one is constitutional and the other is unconstitutional, the court’s duty is to adopt the one what will save the act (the constitutional one).
           1. ***Zadvydas v. Davis:*** when an alien has been found to be unlawfully present in the US and a final order of removal has been entered, the Government ordinarily secures the alien’s removal during a subsequent 90-day statutory “removal period,” during which the alien normally is held in custody. The prisoner was detained beyond the 90-day window. The issue is whether this intention can last indefinitely.   
              **HOLDING:** (1) A court will interpret in a way that is constitutional. This is accomplished by granting detention for “reasonable” time. The shortening of the period to 90 days is evidence about   
              **DISSENT (Kennedy):** Argues that there is a separation of powers issue. By creating an implied term, the judiciary limited the power of the executive branch. Kennedy says language giving discretion to the attorney general regarding the detention period is sufficient for showing that Congress intended a longer window. The window could be expanded to the constitutional maximum.
        2. **Constitutional Avoidance Canon (View 2):** A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon the score.
           1. ***Almendarez-Torres v. US:*** 8 U.S.C. § 1326 forbids an alien who once was deported to return to the US without special permission, and it authorizes a prison term of up to, but not more than, two years, § 1326(b)(2) of the same section authorizes a prison term of up to, not more than, 20 years for “any alien described.”   
              **HOLDING:** The penalty provision authorizes a court to increase the sentence for a recidivist. It does not define a separate crime. Consequently, neither the statute nor the Constitution requires the government to charge the factor that it mentions, an earlier conviction, in the indictment. Upon a close reading, it subsection (a) saying “subject to” subsection (b), showing an obvious incorporation. Court links by looking to the title of the statute/section (*Criminal Penalties for Deported Aliens)*. There is no constitutional problem because there is not serious problem. Policy decisions about recidivist criminals are completely permissible.   
              **DISSENT (Scalia):** Scalia complains that interpreting as a higher penalty means that the state does not have to prove beyond a reasonable doubt the higher penalty. In the tradition of criminal law, you have to prove the prior convictions in the indictment. This statute does not requires that. Majority improperly relies on four non-textual factors (typicality of recidivism as sentencing factor; titles; legislative history; and risk of unfairness).
     4. The Federalism Clear Statement Rule**:** Clear statement rules require Congress to use specific language when affecting certain substantive interest. Mere ambiguity is not enough for a court to adopt an interpretation affecting such interests.
        1. ***Gregory v. Aschcroft:***
     5. The Presumption Against Preemption**:** The police powers of the states are not to be superseded unless that was the clear and manifest purpose of congress.
        1. **Express Preemption:** In the absence of legislative precision, courts may determine the substance and scope of Congress’ displacement of state law. Where the text of a preemption clause is open to more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.
        2. **Implied Preemption:** Court may imply preemption if state laws frustrate the federal scheme or compliance with both federal and state law is impossible.
     6. The Presumption Against Retroactivity**:** A statute operates retroactively if the new provision attaches legal consequences to events completed before tis enactment. Courts decline to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.
        1. **Explicit Congressional Authorization:** A court can overcome the presumption against retroactivity only when the statutory language is so clear that it could sustain only one interpretation.
        2. **> Remedial Canon:** The fact that retroactive application of a remedial statute will almost always give broader effect to the statute is insufficient to rebut the presumption against retroactivity.
        3. **> Current Law in Effect:** SCOTUS has treated the presumption against retroactivity as an exception to the general principle that a court should apply the law in effect at the time of the decision.
     7. The Presumption Against Extraterritorial Application**:** Congressional legislation is mean to apply only within the territorial jurisdiction of the US, unless a contrary intent clearly appears.
     8. Scrivener’s Errors**:** Courts may correct legislative drafting mistakes to effectuate what Congress really meant to say or what otherwise makes sense of the statute.
     9. Absurd Results**:** Courts presume that Congress intends statutes to have sensible effects or that statutes should have sensible effects, as a normative matter.
        1. ***US v. Locke****:*