# GENERAL RULES OF INTERPRETATION

1. **Plain meaning rule** – directs courts to give effect to the text if it has a plain meaning (mutual agreement on that interpretation)
2. **THERE IS NO PAROL EVIDENCE RULE IN STATUTORY INTERPRETATION**
3. **Title** – states basic purpose or function of the statute
4. **Statutory purpose and statutory context**
5. **Legislative intent and legislative history**
6. **Intentionalism** – look to what Congress might have intended
7. **Purposivism** – look to the purpose of the statute; why was it enacted?
8. **Legal Process Purposivism**
9. **Imaginative reconstruction**: applies when Congress failed to appreciate an issue and therefore cannot be understood to have had an intention as to that issue. Court must stand in the shoes of Congress; ask how the enacting legislature would have resolved the issue if it had been envisioned
10. **Textualism and new textualism**: text should be the sole tool of interpretation within its statutory context
11. **Dynamic interpretation**: see courts as partners w/Congress – share equal role
12. **Absurd results**: If faced with a choice between an interpretation that would allow for an absurd result, and one that wouldn’t, the court should choose the one that wouldn’t
    1. *See Holy Trinity*
13. **Rule of Lenity**: in criminal statutes, construe in favor of the D
    1. As a general rule, criminal statutes are generally interpreted narrowly in order to make sure the state crafts a statute with such specificity as to sufficiently warn people of the consequences
    2. “Fair notice” so that a person with ordinary intelligence would be aware of what conduct is prohibited

# INTRODUCTION

## Why does the legislature’s intent matter?

* 1. Accuracy and good governance
  2. Legitimacy: the power that a democratic body conveys
     1. If looking more toward accuracy you may desire to look more at strict interpretation; desire not to have unelected judicial officials interpreting statutes
  3. Look to the intent of the legislature to achieve what it’s aiming for (to help improve accuracy)

## Fundamental Problem for Statutory Interpretation

1. Normally, statutes would include legislative histories to explain why the statute was put in place
2. Do we interpret the statute along its plain language or do we run it through limitations in its application?

# STRUCTURE OF STATUTES

## Basic Structure of Modern Statutes

* 1. Title
     1. Basic purpose/function of the statute
  2. Enacting Clause
     1. Proclaims the fact that the statute has become law, but often repeats basic purpose/function
  3. Short title or Popular Name
     1. Popular Names important b/c they’re easy to find; all the statutes are indexed for ease of use
  4. Statement of purpose, preamble, and findings
     1. More elaborate statement of purpose than the one in the formal title or enacting clause; preamble would contain introductory information about the statute; findings simply restate the purpose of the law, but may include factual material that served as statute background
  5. Definitions: don’t always appear, but act as operative language
     + 1. References to organizations – may be acronyms, short forms, or substituted terms
       2. References to repeated provisions
       3. Increased precision – statutes often use words in a particular sense [special definition for a word, specific to the statute]
       4. **DON’T ASSUME** that definitions will get rid of all ambiguity in a word; drafters often reintroduce ambiguity, intentionally and unintentionally
  6. Principal operative provisions (“heart and soul” of the statute)
     1. \*Not always separate from implementation provisions
     2. Contain the result that the statute is trying to achieve or the state of the world that it’s designed to create
     3. Some impose prohibitions on public/private conduct (restraint of trade; industry restraint)
  7. Subordinate operative provisions and exceptions
     1. Operative provisions that are separate from the principal OP; have an effect on the world but they’re supportive of or secondary to the main objective
  8. Implementation provisions (“the legs and arms” of the statute)
     1. Enable the statute to do what it purports to do
     2. All statutes require implementation; e.g. criminal statutes may impose criminal sanctions (e.g. imprisonment) to enforce their operative provisions, civil statutes may impose other penalties
     3. Not always separate from the operative provisions (can be express/implied in the OP)
  9. Specific repeals and related amendments
     1. If a statute either repeals/amends a preexisting statute, it may do so expressly
     2. Repeal/amendment of prior statutes by **implication** happen too but they’re disfavored
  10. Preemption provision
      1. Bars the application of state law (*Supremacy Clause* – Fed law is supreme to state law)
      2. A statute can preempt state law *implicitly*. Remember express, field, conflict
  11. Savings clause
      1. Preserves the application of state law in some respect; might provide info concerning the relationship between the federal/state law
  12. Temporary provisions (if any)
      1. A part of a statute with a limited duration, while the rest of the statute remains in effect
  13. Expiration date(Exception to normal method of perpetuity for statutes)
      1. A provision that indicates a date on which the statute will expire
  14. Effective date
      1. The date on which a statute becomes effective, generally later than the date of enactment
      2. Some statutes may be applied **retroactively**, but they are relatively uncommon (remember retroactive criminal statutes are unconstitutional)

# THE LEGISLATIVE PROCESS

## The basic process by which a bill becomes a law; Congress requires:

* 1. A majority vote of both houses (bicameralism), and
  2. A presidential signature (presentment)

1. **OR**
2. A two-third majority vote of both houses of Congress to override a presidential veto

## Introduction of Legislation

* 1. Bill is drafted. May be *drafted* by anyone but the drafting party lends credibility
  2. Must be introduced by a member of congress during session (strategic and key for support)
  3. In the Senate – three readings are required in total. Last one after hearings and debate
  4. In TX there’s a Texas Legislative Counsel (non partisan) in charge of drafting

## Committee Action/Referral to Committees (where bills go to die)

1. House Speaker of Senate’s presiding officer will refer legislation to the appropriate committees;
2. Senate committees may send legislation to a subcommittee, while most House committees must do so unless they vote to retain the legislation at the full committee
3. Chair of committee has ability to schedule hearings, markup and propose amendments
4. A bill reported from a committee must be accompanied by a **committee report** that provides the committee’s justification for the bill (most authoritative source of legislative history)
5. **Ramsayer rule**: requires that committee reports specify all the changes in existing law that are made
6. Most bills **die** in committee from inaction; never get a hearing scheduled.

## Floor Scheduling/Calendaring

1. House:
2. Four calendars; major legislation referred to rules committee to shape debate on the bill
3. Requirements for germane amendments
4. Unanimous consent for legislation calling 🡪 no discussion, no formal vote
5. **Consent calendar**: limited to measures involving spending of less than $1million
6. **Special rules** tailor floor action to individual bills (<10% of bills get special rules)
7. Senate:
8. Two calendars
9. No Rules Committee to report special rule; they usually need a consensus to limit debate
10. No germaneness requirements
11. Filibuster option allowed. Important for halting bills

## Floor consideration

1. Minor legislation 🡪 brief, no amendments offered, approved by voice vote or unanimous consent
2. Major legislation 🡪 amendments offered, usually
3. Floor debates are printed in the congressional record, not given much weight in court.
4. House:
5. Committee chairs request a hearing from the Rules Committee and a special rule for major legislation
6. Committee of the Whole conducts general debate on the bill, then moves to debate and votes on amendments (which must be Germaine to the bill.
7. To be passed legislation is sent back to the House
8. Senate:
9. Lacks detailed rules/process for debating/amending legislation on floor
10. Must have unanimous consent on ways to limit debate
11. May filibuster

## Reconciliation

1. A Conference Committee: no formal rules but charged w/harmonizing the bills
2. Simple adoption(house/senate can just adopted each other’s bills): far less likely
3. May exchange amendments until they agree on them
4. Only allowed to discuss discrepancies, not introduce new amendments

## Presentment (to the President)

1. Can veto
2. Pocket veto – killing the bill by not signing the veto w/in 10 days; can’t be revived
3. Signing statement – the President can sign the veto/bill but he would offer his own interpretation of it
   * 1. Given very little weight by courts, unless it supplements congress’s intent

## Lawyer Strategies

1. Intervene early and often
   * 1. In the committee, during drafting, in the senate during filibuster
2. Participate in drafting process
3. Assist in the amendments and hearing process
4. Build relationships before you introduce the bill
5. Know <10% of bills become law. Many killed during intro; committee referral; filibuster, schedule

## Theories of Legislative Process

1. Public Choice Theory and Role of Interest Groups – it’s more difficult to organize large groups w/diffuse interests than small groups w/common interests; Statutes reflect the self-interest of the well-organized groups that prevail upon Congress to enact them
2. Rational actor will act rationally to maximize their individual gain
3. Primary interest is being reelected
4. Interest of the issues is located differently among parties
5. Legislative process caters to special needs rather than to public at large
6. Social Choice Theory and the Problem of Cycling – a multi-member body with 3 or more options will engage in “cycling” if the options are voted in pairs; how people actually go thru mechanics of deciding
7. One person is given the power to limit the number of rounds
8. The way votes take place matters
9. Inherent paradox that equal powers can create a deadlock
10. Positive Political Theory and the Role of Institutions
11. Individual legislators seek to ensure that legislation reflects their preferences, knowing that they’re not the only players in the game
12. People make decisions based on what they think other people are going to do
13. Ppl don’t vote in a vacuum – they’re aware of how other people vote (think game theory)
14. Pluralist Theory – Humans form groups and work together to promote their shared goals
    * 1. Segments power among groups, creates politics
         1. Pros: free market economics; determines factions with power
         2. Cons: Free riding – no one takes responsibility; benefits small organized parties
    1. Proceduralist Theory - Design the process to build procedures that will lead to what you want
       1. Only the best laws survive, leads to sense of legitimacy and stability
       2. Hampers creativity; presumption for the status quo
15. **KEY QUESITONS FOR THIS SECTION:**
16. Is ambiguity bad?
17. It may help get the bill out, and not kill it
18. How does a judge respond to an intentional decision by a legislature for ambiguity?
19. What is the appropriate role for outside lobbyists?

## Law formation of the Civil Rights Act and Civil Rights Cases

* 1. Written by president. Marked up to strengthen b/c knew house would water it down
  2. Referred to rules committee as was b/c house thought it would die there b/c too strong
  3. The rules committee chose to sit on it to kill the bill
     1. To avoid the rules committee there are 3 options
        1. Discharge petition – almost no chance
        2. Calendar Wednesday – alphabetically and “c” was too far down the list
        3. House Rule 11 – any 3 members of the committee can request a hearing. If not scheduled within a time limit after, can force a hearing.
  4. Gender added during committee and passed to Senate when it went straight to calendar
  5. 14 day filibuster to move to front of calendar – refused to hear anything else.
  6. 58 day senate filibuster defeated by cloture. House accepted amendments. Pres signed
  7. **Griggs v. Duke Power Company** (disparate impact/disparate treatment (per se illegal))
     1. Promotion plan required high school diploma. Black employees claimed they were denied ability to advance beyond menial laborer category
     2. Court said title 7 of civil rights act did not encompass the present and continuing affects of past discrimination. Educational requirements should have been waived for employees hired before practice was implemented.
     3. The court used legislative history to say that if job requirements make an intelligence test valid then they are fine. Must serve legitimate purpose
  8. **United Steelworks of America v. Weber** (disparate treatments by private parties)
     1. Steelworkers union collectively bargained a plan that reserved 50% of the openings in training program for black workers until the plant was in line with the percentage of black workers in the local labor force.
     2. SC held that Title VII prohibition against disparate treatment (racial discrimination) did not condemn all private race-conscious affirmative action plans. No indication it was a state action. Did not hurt the interests of white employees to advance and was temporary.
  9. **Johnson v. Transportation Agency** (sex basis is not disparate treatment, if particularized)
     1. Agency had affirmative action plan to increase female representation. Promoted over a more qualified male.
     2. Court said sex can be a factor considered in a plan to improve the representation of minorities and women in the workforce if done on a flexible, case by case basis.
  10. **Ricci v. DeStefano** (disparate impact alone, not enough to discard necessary job requirements)
      1. City had test for promotion. Discarded it to avoid disparate impact claims against blacks
      2. Whites/Latinos brought case of disparate treatment due to discarding the test results
      3. SC said city improperly discarded test to achieve a more desirable racial distribution. No evidence that the test was discriminatory or that discarding it was necessary to avoid disparate impact. The test was job related and necessary for the business.

# AGENCY IMPLEMENTATION AND INTERPRETATION

1. Agency Implementation of Title VII
   1. Independent and Executive Agencies
      1. Most statutes designate an agency with whom administration vests and gives adjudicative and rule making authority. Creates experts overtime
      2. Independent agencies – rotating terms and presidential administration; litigation authority
      3. Executive – 1 person runs it; serves at pleasure of person who appoints; ends with the term end of appointer – no litigation authority
   2. Title VII’s Hybrid approach
      1. EEOC created, no giving authority to make rule or adjudicate with force of law
      2. Left as an independent agency to avoid pressures
2. Tools by which agencies regulate
   1. Substantive/Legislative rulemaking
      1. Announce policy and give legal force; enforce with sanctions
      2. Must follow formal rulemaking procedures: Notice and Comment
   2. Agency Adjudication
      1. Orders with force of law which can be judicially enforced
   3. Initiation of litigation in court – gives agency the power to initiate suits to enforce statutes
   4. Informal Guidance, policy statements, interpretations
      1. Offer opinions about what law requires – used to get around formal rulemaking
      2. Signals what lawsuits the agency will enforce
      3. Disparate treatment/impact (discrimination per se v. job tests for legitimate reason)
   5. Advice giving and conciliation
   6. Investigation, information gathering and promulgation/publicity
      1. Present findings of patterns/ratio to the public
      2. Useful in targeting companies that are secretly or inadvertently violating rules
      3. Put employers on notice of the rule
      4. Normalization creates a standard to follow
3. Agency administration and judicial review
   1. Even if an agency adjudicates, still can be subject to judicial review (think Chevron deference)
   2. Judicial opinions trump agency decisions (which are non-binding). May give deference to agency
   3. Once an agency or court has interpreted a statute, that interpretation rules unless congress overrides
4. Interpretations which depart from the text of a statute must have been found to be more faithful to the legislative intent of the statute than the literal interpretation would be.

# STATUTORY INTERPRETATION BY COURTS

## Historical precursors to legislative theories: basic problems in making and application of the law

* 1. **The mischief rule** – for the true interpretation of a statute, consider 4 things
     1. Common law prior to the statute
     2. What is the mischief or defect for which the common law did not provide
     3. What remedy parliament appointed to cure the defect
     4. The true reason for the remedy. Statute must be constructed to suppress the mischief and advance the remedy according to the true intent of its formers.
  2. **The “Golden” Rule** – interpret statute based on intent of legislature
     1. take the whole statute together, giving words their ordinary meaning, unless when so applied they produce an inconsistency, absurdity or inconvenience so great as to convince the court the intention could not have been to use the ordinary meaning; justifying some other meaning
     2. consider what is best for all
  3. **The Literal Rule** – Enforce as written unless it creates absurd results.
     1. If the language of the statute is plain, with only one possible meaning, legislature must be taken to have meant and intended what is plainly expressed. Enforce as intended unless it would result an absurd results.

## Every court should start with:

1. Text (facial meanings of words; usually the specificity driven by the purpose of the statutes)
2. Integrating the structure of the statute (e.g. title and the way it’s divided up into different parts)
3. Still ambiguous? That’s Congress’ problem
4. Certain results doctrine (probably the most controversial and makes *Holy Trinity* subject to criticism)

## Theories of Statutory Construction

1. Textualism: **determine the interpretation of the statute based on the specific text in statute; only look to 4 corners of statute**; follow the “plain meaning” of the statute’s text; serves Congress bc it chooses the words. Does not go broader and consider other indications of Congressional intent.
   * 1. Goal: understand the words
     2. Tools: text & textual aids
     3. **Whitfield v. US**
        1. Forced Accompaniment during bank robbery. Old lady had heart attack when moved.
        2. Court used definition and its common use in literature by Dickens to determine the words meaning at the time the statute was drafted
2. Intentionalism: **specific intent Congress had for specific words used;** identify and follow the intent of the statute drafters; Starts with words of statute; if ambiguous serves Congress by following intent, considers other indications of Congressional intent like legislative history.
3. Goal: actual intent of the drafters
4. Tools: text, textual aids & extrinsic sources of statutory meaning (not of word meaning)
5. Purposivism: **larger purpose of Congress and interpret the statute to achieve that purpose;** choose the interpretation that best carries out the statute’s purpose; address the evil at which statute aimed; less interested in mind reading, more general view of Congressional intent as purpose. Involves extrinsic sources of Congressional intent like legislative history.
6. Goal: evil the legislature sought to address
7. Tools: text, textual aids & extrinsic sources of statutory meaning
8. Imaginative reconstruction: **when Congress has not clearly stated an intent or purpose for a particular language in the statute; court should “imagine” what Congress would have said in face of a particular question; what would a “reasonable Congress” do in face of a specific question?** Figure out what Congress would have done if faced with current problem; extrapolate from general priorities of the enacting Congress. Given what we know about the enacting body, what would they have done?
9. Goal: what would legislature have intended if presented with the current problem
10. Tools: text, textual aids & extrinsic sources of statutory meaning
11. Dynamic Interpretation: **idea that courts are partnered w/ Congress and should explicitly refer to the judge’s values in interpreting statutes; one of the more proactive and liberal theories**; Update the statute to make it a workable model for today in light of current circumstances, interpret in best way possible even if it means departing from enacting Congress; interpret in light of contemporary circumstances. Not about being a faithful agent of the legislature, rather partnering with legislature to come to the best result. Only theory that considers contemporary Congress rather than enacting Congress.
12. Goal: what is best for modern society
13. Tools: All including extrinsic sources of dynamic meaning
14. **Reasons to Alternatively Interpret Statutes** 
    1. Correcting Legislative Mistakes - **Scrivener’s Errors**
       1. **Shine v. Shine** (obvious mistakes should not be enforced)
          1. Did a bankruptcy law overrule the need to provide for a spouse?
          2. Obvious mistakes should not be enforced, particularly when it overrides common sense and evident statutory intent
          3. Mistake must be clear
       2. **US v. Locke** (case where dates were found to not be obvious mistakes)
          1. Marshall – couple has a mining lease and filed an annual renewal for the least on December 31st. The statute said it had to be filed BEFORE December 31st. Lease not renewed
          2. Court said the statute was clear, there is no error, and no absurd result.
    2. Coherence with public norms
       1. **In the Matter of Jacob, In the Matter of Dana** (avoid objectionable results)
          1. Mother was forced to give up child
          2. Court said the statute allowed adoptions for gay/lesbian parents, open adoptions and step parents. Do not have to give up child. Language is flexible
          3. When a statute can be construed in multiple ways, the court will adopt the construction which avoids injustice, hardship, constitutional doubts or other objectionable results.
       2. **Bob Jones University v. US** (dynamic theory of interpretation and congressional consent)
          1. Race/religion was used as discrimination by university in its acceptance methods. School did not admit black students, was still given a tax exempt status
          2. Court said judgements about whether a class of institutions advance public interest are best left to congress. Can be flexible in interpreting old laws in modern times
             1. Look beyond plain meaning/framers intent
             2. Consider current public norms and promote public values
             3. Congressional acquiescence – if congress does not revise the courts result then it signals consent.
    3. Policy Arguments that support Textualism
       1. Less prone to manipulation - Judicial abuse- interpretation allows court to figure out most reasonable option and see if the test supports.
       2. Plain meaning is consistent with congressional intent
       3. Ordinary meaning leads to common understanding by the masses
       4. No court construction is “natural” – they are all choices
       5. East of application and fairness
       6. Has gone through the legislative process as it was written
    4. Policy Arguments against Textualism
       1. Meanings are attributed to the background of the listener
       2. Legislature are not always reasonable as seen by public choice theory. Often act on behalf of groups to curry favor
15. ARGUMENTS TO MAKE IN DEFINITIONS
16. See what Congress says for a definition
17. If defined, presumption is to use definition
18. Get experts who can help clarify
19. Look to other decisions
20. If it arises today: look to agencies
21. Look at technical definitions
22. If it’s a CL term, use the CL if not defined
23. ARGUMENTS TO MAKE IN FAVOR OF TEXTUALISM
24. **Formalistic**: intentionalist approaches are inconsistent with…
25. Rule of law
26. Separation of powers
27. Prohibition of delegation of legislative power to subgroups.
28. **Legal Process**:
29. Judges aren’t competent to evaluate legislative history
30. Gives willful judges a mechanism to evade, rather than enforce, the law.
31. **Institutional**:
32. Predictability of process-depend on Courts to just read text and no more. Textualism that yields harsh results sends message to judges not to make policy and message to Congress to statutes will be interpreted as written and Congress must update or fix laws
33. Enhances democracy and legislative accountability (put it in writing)

## Hierarchy of Tools of Statutory Interpretation

1. Text of statute (all theories)
2. Text is written in statute, words are law
3. Congress chooses the words, shows Congressional intent
4. Textual aids-devices or sources useful in interpreting words
5. Dictionary, personal background, trade meaning, time, shared use
6. Canons of construction
7. Extrinsic sources of statutory meaning
8. Legislative history
9. Social historical context
10. Extrinsic sources of dynamic meaning- indications of contemporary meaning

## Textualist Critique of Legislative History

1. **Public Choice Theory**
2. Legislators sell statutes to highest bidder. Therefore, statutes should be interpreted strictly.
3. Legislative history is a cheap and easy way of getting extra benefits.
4. **Social Choice Theory**
5. Concept of legislative intent is meaningless and incoherent because of strategic voting and agenda manipulation, statutes are simply the end product of a chaotic and arbitrary process.
6. No need to look for intent that doesn’t exist.
7. **Arrow’s Theorem**
8. Complex decisions tend to be multi-tiered.
9. Only way to break cycle is to give one player (committee chair) power to set agenda and close cycling; has ability to determine the outcome.
10. Means consensus point may not be majority preference

## Textual Canons of Construction – move from broad to narrow

1. Textual canons help courts interpret statutory language based on the surrounding text
2. Linguistic canons (sometimes called grammar canons or syntactic canons): rules or presumptions about how words fit together within a particular provision
3. Whole act canons: presumptions/rules about the meaning of a term in relation to other terms, phrases, or provisions in the same statute
4. Whole code canons: seek to make sense of a word in light of other statutes in the US Code; if you’re seeking to reconcile the text of one statute with the text of another statute

## Textual/Linguistic Canons applied to ordinary meaning

1. General Strategies
2. Courts almost start w/text itself (narrow) then expand outward to other statutory provisions, statute structure, then other statutes (so narrow 🡪 broad)
3. Linguistic Canons
4. Ejusdem Generis - “of the same kind” (time, class or nature)
5. When general words follow a list of specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to the objects enumerated by the preceding specific words
6. Catch-all term
7. ***Ali v. Federal Bureau of Prisons*** (U.S. 2008) – a list alone isn’t sufficient; must share a common attribute. Ejusdem generis doesn’t apply to “disjunctive” pairings.
8. Ex. “Execution, levy, attachment, garnishment, or other legal process.”
9. Consider the outcome of th statute if it were interpreted any other way
10. Noscitur a Sociis - “a thing is known by its companions” (known by associates)
11. A word is known by the company it keeps; a word is given more precise content by the neighboring words with which it is associated
12. Ensures that a term is interpreted consistently with surrounding words so as not to unduly expand statutes beyond their reasonable reach
13. A word is given more precise content by the neighboring words with which it is associated
14. ***United States v. Williams*** (“presents” child pornography)
15. List of words in statute:
16. Advertises, promotes, presents, distributes, solicits
17. Narrower than ejusdem generis
18. Like ejusdem generis, noscitur doesn’t apply if the list has no common feature.
19. Expressio Unis - “the mention of one thing indicates exclusion of another”
20. Requires listing of specific terms that support the inference that the failure to include others reflected an intentional decision by the legislature
21. Puts a burden on the legislature to define comprehensively 🡪 you mean what you say
22. Again, requires group that share a characteristic or association
23. More specific variations of expressio unis include:
24. A list of specific exceptions to a general prohibition means that Congress intentionally excluded any further exceptions.
25. If the statute requires an action to be performed in a particular way, that requirement reflects a decision by Congress to prohibit other ways to perform that action (**big in energy & environmental law**)
26. Specific legislative provisions on pre-emption mean that Congress intended to foreclose other general types of Preemption
27. Implied preemption in a statute; however, Congress can specifically write the preemption in the statute
28. Other Linguistic Canons
    * 1. Rule of surplusage – don’t interpret in a way that makes other part superfluous or not needed.
29. Punctuation – commas, periods, colons, semicolon location have an effect on meaning
30. Punctuation alone is rarely sufficient to sustain or contradict an interpretation
31. Arguments based on punctuation are less strong than those based on other tools or canons
32. Usually given very little weight
33. The Last Antecedent Rule
34. A limiting phrase only applies to the clause immediately before it, and doesn’t migrate upward through the statute
35. List, followed by a qualifier. The qualifier only applies to last term in list.
36. The errant teenager’s house party
37. “We don’t want you to throw a party, or do anything that will damage the house” 🡪 teenager throws a party, says “well nothing damaged the house”; the last antecedent “damage the house” may apply to just “do anything” but the “party” itself stood alone so it wasn’t prohibited
38. Punctuation can trump this rule and make apply to entire list
39. Conjunctive vs. Disjunctive
40. Terms connected by a disjunctive should be given separate meanings, unless the context dictates otherwise
41. “And” vs. “or”
42. Limited weight of parentheticals
43. And: applies to all those connected
44. Or: applies to each term individually
45. May (permissive) vs. Shall (mandatory)
46. But note ambiguity of “shall”
47. Federal Rules of Civil Procedure – aimed to get rid of the ambiguity by taking “shall” out and using “must”
48. The Dictionary Act, 1 U.S.C. §§ 1-8
49. Supplies rules of construction for all legislation
50. Contains an escape clause to eviscerate the act: only applied unless the context indicates otherwise – which judges always do
51. Presumption of consistent meanings
52. “He” – applies to both genders
53. Golden rule – absurd results doctrine. If pm leads to absurd result you can interpret in another way

## Whole Act Canons

1. Whole Act Rule – view statutory terms as a part of the entire legislation in which they were enacted
2. SCOTUS – in reading a statute we must not look merely to a particular clause, but onsider it in connection with it the whole statute
3. Identical Words – Consistent Meaning
4. Identical words/phrases w/in same statute should normally be given the same meaning
5. However, age discrimination case found that “age” had different meanings within the same statute because of legislative history
6. **Avoiding redundancy and surplusage**
7. Note: rule against redundancy or surplusage can be applied not only to a provision within a statue but words within a statute
8. Also, canons often work together
9. Titles and Provisos
10. Titles generally do not add or take away from a conclusion, but may be cited if they support the analysis
11. Provisos are classes that state exceptions to or limitations on the application of a statute (“provided that”); should be narrowly construed

## Whole Code Canons

1. Whole Code Rule – courts should construe language in one statute by looking to language in other statutes
2. In pari materia
3. If you have two different laws, try to interpret them consistently
4. Individual statutes should be construed together with other statutes
5. Assumes that when Congress passes a new statute, t acts aware of all previous statutes on the same subject; applies with **greatest force** when the statutes were enacted by the same legislative body at the same time
6. Inferences across statutes
7. SCOTUS: when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it’s appropriate to presume that Congress intended that text to have the same meaning in both statutes
8. Statutes not dealing w/the same material, but you can extract practice or history to interpret similar terms
9. **E.g.** attorneys fees including expert fees question: Congress named expert fees in some statutes, but not others – clearly they initially disregarded it
10. Repeals by implication
11. Presumption against this
12. Should either:
13. Expressly overrule
14. Be unable to resolve without conflict
15. **Note**: many states have statutes on how to interpret statutes, but the courts haveve held that they’re not bound by such statutes

## WHEN TO USE WHAT TOOLS:

1. For words
2. Dictionary
3. Common law
4. Technical meaning
5. Judicial notice
6. Sentence/Paragraph
7. Ejusdem generis
8. Noscitur a sociis
9. Expressio unis
10. Or v. And
11. May v. Shall
12. Punctuation
13. Last antecedent rule
14. Bigger than a paragraph
15. Whole act canon
16. Whole code canon
17. In pari material

## Other Textual Cannon Cases

## *Rector, Holy Trinity Church v. United States* (text can be disregarded if absurd result)

1. US sued a pastor who contracted w/a church to move from England to NY under a statute prohibiting corporations to prepay and encourage immigration of aliens
2. Parties agreed a literal interpretation would include pastors, but said apply the 3 rules
3. Ct: ministers not included in the statute
   * + 1. Absurd results: Congress wouldn’t have wanted to exclude ministers; probably meant to prohibit manual laborers
       2. Must look at mischief act remedies: wanted to prevent indentured servitude
       3. Textual approach burdens Congress: arguably ministers were literally within the statute
       4. Congress intent: arguably an expansion that contravenes what the text literally says
          1. Scalia would say they’re ignoring the text to rewrite the statute
       5. Said we are a Christian nation
4. US: look to the text of the provision
5. Church: look to intent (who writes the legislative history? Staffers); who decides what’s absurd and what does the court get to do in response?; religion argument
6. Ct: Looked at title of act; legislative history; mischief rule; circumstance; congress reports
7. Common sense should be used to avoid absurd interpretation and results
   1. **Tennessee Valley Authority v. Hill** (didn’t overrule text based on implied congress intent)
      1. Tried get injunction to stop construction of a Dam which would kill an endangered species (snail darter) in violation of the endangered species act
      2. SC said Tellico dam would kill the snail darter. The survival of the fish required the permanent halting of an almost completed dam for which congress had expended large sums of money.
      3. Intent of act was to halt and reverse the trend of species extinction whatever the cost….the value of endangered species was incalculable. It is in the best interest of mankind to minimize loses of genetic variations which are potential resources.
      4. Said the act required agencies to consult and get approval when conducting acts which harm endangered species. Text of act was clear, refused to use a balancing test
      5. Last rule in time, is first in precedent. Continuing construction paid for by congress was not enough to show intent, regardless of the 12 years of history.
      6. Response to the court’s ruling was congress amended the act to allow exceptions and Tellico dam received an exception.
   2. **Green v. Bock Laundry Machine Company** (PM unless absurd)
      1. Prisoner on work release had arm torn off reaching into a dryer. Claimed he was not properly informed of the danger of using the dryer. Bock used the prisoners convictions as impeachment evidence.
      2. Rule 609 of federal rules of evidence only allowed impeachment of defendants not plaintiffs. Court overturned saying it was be an absurd result to not allow plaintiff to be impeached.
      3. Plain meaning only if not an absurd result. You can look at extrinsic documents to determine if an absurd result was intended.
   3. ***Muscarello v. US*** (denied the rule of lenity)
      1. P sold MJ, carried it in his truck to place of sale; also carried a handgun in the glove compartment; argued that he didn’t carry it “on his person”
      2. Statute said whoever “uses or carries a firearm” during and in relation to a crime in violence or drug trafficking gets an extra 5 years in jail added to sentence
      3. Issue: whether “carries” means on one’s person or in vehicle
         1. Ct: Majority:
            1. Primary definition of carry – convey from one place to another in a vehicle, not limited to on a person; cites use in classical texts like bible and Moby Dick; 1/3 of modern press usage is this definition
            2. Purposivism – purpose was to combat the dangerous combination of drugs and guns by persuading drug dealers to leave gun at home; if in car, it’s available for use even if not immediately accessible when locked in truck
            3. “Carries” is narrower than “transport” b/c it implies possession and shorter distance

*CANON*: Congress intended each part of statute to have an independent effect

* + - * 1. Narrow definition of use from Bailey is ok b’c if “use” were interpreted broadly, it would swallow up meaning of “carry”

*SURPLUSAGE CANON*: Congress intends each term to have particular, non-superfluous meaning

* + - * 1. Narrow reading would not apply to firearms such as grenades or poison gas that wouldn’t be carried on persons

*CANON*: must read words in context of entire statute; must take account of surrounding words

* + - * 1. Carry can’t mean “immediately accessible,” doesn’t square with the statute’s exception of locked glove compartments
        2. Rule of lenity doesn’t apply b/c there’s no grievous ambiguity

*CANONS* only apply to ambiguous words

* + - 1. Dissent (Ginsburg, Rehnquist, Scalia, Souter)
         1. Meaning of “carry” is ambiguous, so RoL in D’s favor applies
         2. Must interpret whole phrase “carry a firearm” *Canon*
         3. Cites literary counterexamples of Kipling and Roosevelet using narrow definition
         4. Cites MASH as example of contemporary use of carry in the limited sense
         5. Narrow meaning of carry is compatible with statute and other firearms statutes

*CANON*: construe statutory constructions harmoniously

* + - * 1. RoL should apply b/c narrow def of “carry” not impossible
        2. Congress could have chosen “possess” or “convey” but it didn’t

*CANON*: in choosing particular words, Congress deliberately did not use others

* 1. **West Virginia University Hospitals v. Casey** (similar documents can provide meaning)
     1. WVUH treated patients from neighboring state’s Medicaid program. Objected to new reimbursement rates. Won but not awarded attorney fees
     2. Scalia used doctrine of the whole and the record of statutory usage in previous acts b/c congress uses the same term the same way each time and it is essentially universal.
     3. Court consulted other statutes which award fees to determine if attorneys fees were part of the included wording of expert fees. Said that they were not.
  2. **Taniguchi v. Kan Pacific Saipan, LTD**. (judges have discretion when using dictionaries)
     1. Court interpreters act passed to reimburse litigants for interpretation during cases. A Japanese baseball player fell through a floor and sued for reimbursement of his written interpretation
     2. There was a question about how to define interpreters. Ended up not allowing written interpretation and only oral interpretations.
     3. Alito looked at 14 dictionaries and determined it meant oral interpretation
        1. None of the dictionaries had the same meaning. Most seemed to support oral and written interpretations.
        2. Dictionaries often have multiple meanings
     4. RBG cited historical cases which referred to the word interpreter AND the purpose of the transaction.
        1. Looked at the judge’s interpretation of the word rather than common interpretation, because the term is being applied in a judicial context
        2. Focused on practice and not allowing a written meaning to the word
  3. **US v. Costello** (used google to determine current use/meaning of word)
     1. Defendant convicted for harboring illegal alien. The ordinary meaning of the word harboring was questioned
     2. The government pulled a dictionary meaning from the time the statute was passed
     3. Judge Posner argued for a current reasonable meaning – said dictionary has too many variances
        1. Used blacks law dictionary and google this to determine current use
        2. To harbor means more than just housing. It means sheltering or concealing
     4. Rule of lenity – to what extent should congress allow common meaning spoken in the area to be applied to the statute.
  4. **Yates v. United States** (application of cannons to a list of items in a statute)
     1. Red Grouper Case – tried to get fisher for catching 3 fish that were under the size limit of the law. On trip back to dock, crew threw the fish overboard and replaced with 3 fish that complied with law.
     2. Attempted to use SOX to say they destroyed evidence
        1. Feds had been using SOX broadly to catch people doing various things that involved destroying tangible objects
        2. Had been interpreted to cover any tangible object
        3. Court said can’t use SOX like that anymore. Used Nositur, Esjusdem and the rule of surplusage. Said that tangible objects were inconsistent with the other listed terms in the statute. Must be limited to financial documents. Looked at statutory intent, the title of the act as well.
  5. ***Babbitt v. Sweet Home***

1. Org saying that Endangered Species Act (ESA) was interpreting “harm” too broadly to include “habit modification and degradation.” The Interpretation of Section 9(a)(1) of the ESA to provide the following protection for endangered species:
2. “Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to:
3. (B) ‘take’ any such species within the United States or the territorial sea of the United States.
4. Section 3(19) of the Act defines the statutory term ‘take’:
5. “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
6. Majority (Stevens)
7. Ordinary meaning of “harm” that encompassed habitat modification that resulted in actual injury or death to endangered or threatened species.
8. Rule of surplussage
9. Harm only adds to the definition of “take” if it means only direct damage.
10. Broad purpose of the statute
11. There is a broad protective purpose,
12. Looks at incidental takings: subsequent congressional amendment: if the taking was narrow there would be no need for this.
13. In Pari Materia – statutes addressing the same subject matter should be read as if they were one law.
14. Whole statute construction
15. The fact that the Secretary was authorized to issue permits for takings that § 9(a)(1)(B) of the ESA would otherwise prohibit, if such taking was incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, strongly suggested that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings.
16. Legislative history supports court’s decision
17. Dissent (Scalia, Chief Justice, Thomas)
18. Harm is a term of art from common law
19. Surrounding words (noscitur)
20. Other words in the series indicate direct action, so harm would be the same
21. Absurd results based on majority interpretation
22. Whole statute: used in other provisions
23. Whole act: critical habitat
24. Expressio unius??? Congress explicitly prohibits habitat modification by federal agencies, so it cannot be implied to do so in any other section.
25. NO LEGISLATIVE HISTORY
26. NOTE: both analyses start narrow, focusing on the words themselves, then expand outward
27. KEY SCALIA METHODS OF INTERPRETATION
28. Text is the law
29. It’s disrespectful for the court to interpret a statute broadly that goes beyond what Congress has already said
30. It’s up to Congress to change the statute

## Substantive Canons – generally require ambiguity

1. Rules about how the law should look. Generally more useful than the grammer/linguistic cannons
2. Categories:
   * 1. Subject Matter Cannons
        1. Presumptions toward the end (goal) of the statute
        2. Presumption that we will not violate treaties
        3. Presumption that congress doesn’t intend its laws to apply outside US unless it expressly says so
        4. Presumption that laws are not applied retro-actively
        5. Presumption of judicial review
        6. Presumption against degradation of traditional brank powers
        7. Presumption that congress will not withdrawal a court’s equitable power
        8. Presumption that congress does not intend to invade agency rights
        9. Presumption against diminishment of American Indian Rights
        10. Presumption against removing public grants or revenues
3. **Rule of lenit**y
4. When there’s more than one interpretation in a criminal statute, pick the interpretation more favorable toward the defendant (rooted in issues of notion and fairness)
5. YOU MUST HAVE AMBIGUITY TO USE RULE OF LENITY
   * + - 1. **Muscarello v. US** – revisited

Denied rule of lenity b/c congress intended the word to have more than one meaning in order to have a broad net in catching criminals

Limited in only that it must be related to a drug related or violent crime

* + - * 1. **McNally** – applied rule of lenity

Based on a statute that involved postal fraud. Used legislative intent to show that the act was made to protect the mail system

Used rule of lenity to say kickbacks were not covered by the act b/c if congress had wanted to cover them, they should have included it explicitly in the act

* + - * 1. **Skilling** – applied rule of lenity

stockholders being defrauded in a financial scheme.

Used RoL to narrow the construction of statute and say it was not about bribes or kickbacks

* + 1. **Cannon of civil forfeiture** 
       1. Allows police to seize assets that might be related to the crime so that they cannot be used to aid the defense of a criminal

1. **Canon of remedial purpose**
2. Treated dismissively in courts b/c most statutes are remedial
3. If a statute has a remedial purpose (typically civil statute) then ct will give it an expansive interpretation to help it achieve is remedial role
4. Never been overturned or expressly limited/still powerful in some areas of law
5. Particularly helpful w/financial, environmental, health cases
6. **Canon of constitutional avoidance**
7. When ambiguity, ct should adopt the interpretation that will spare it from having to resolve a question about the constitutionality of the statute. The other interpretation will likely render a statute unconstitutional
8. Extra step: court must determine whether choosing a particular interpretation would very likely render the statute unconstitutional
9. Constitutional avoidance requires that the issue is rooted in a protected right**.**
10. Two Forms:
    * + - 1. **Unconstitutionality Canon**

2 interpretations 🡪 1 const., othr unconst

First step: a judge must declare a statute to be unconstitutional; must be unconstitutional in one interpretation

Older, more traditional version

* + - * 1. **Constitutionality Avoidance Canon**

Just has to raise a potential issue of unconstitutionality; the one that really exists and gives courts more leeway

Need to avoid unconstitutional interps & interps that would raise doubts on the constitutionality of it

Simply says it *could* be constitutional; don’t have to decide that it actually is; just has to raise a flag

More modern formulation; a stuate must be construed, if fairly possible, so as to avoid no tonlyt he conclusion that it’s unconstitutional but also gave doubts upon that score

1. **NLRB v. Catholic Bishop of Chicago**
   * + - 1. NLRB issued cease and desist orders against several religiously associated schools for declining jurisdiction when they are only religious institutions

NLRB being denied jurisdiction over completely religious schools under the 1st amendment.

School therefore exempt from bargaining with teacher union allowing the school to control what was taught and avoid discrimination cases in hiring

* + - * 1. SC said it would not construe an act in a way which called the 1st amendment into question. Therefore the statute did not cover teachers at religious schools
        2. Applied constitutional avoidance over Exclusio. Even though the act had a list of covered employers.
        3. Substantive normally get favor or linguistic cannons

1. **Fair Housing Authority of San Ferdando Valley v. Roomates.com**
   * + - 1. list of qualities you would like your roommate to have. Could include gender, race and religion
         2. constitutional avoidance once again used to avoid 1st amendment issue
         3. interpreted dwelling in the housing act to have a narrow meaning including a couch or bed
         4. where you live is intimate part of private life and a penumbral right
2. **Federalism clear statement rule**
3. Requires Congress to use specific language when affecting certain substantive interests; diff from other substantive canons b/c they have an institutional dimension 🡪 shifts interpretive responsibility from courts to Congress
4. Legislative drafting commandment from courts to Congress: courts won’t give an interpretation to legislation that will unduly infringe on sovereign of the state absent clear express language that’s intended to invoke the supremacy clause
5. Can’t look behind statute to the intent. Congress must express intent
6. ***Gregory v. Ashcroft*** 
   * + - 1. if congress didn’t state it clearly, then judges shouldn’t interpret it that way
         2. federal act required judges to retire at 70. In conflict with a Missouri Law
         3. court said federalism, preemption and supremecy is normally good. But if the federal law is so vital or integral to the state, the act must clearly state that it intends to override the state law.
         4. The Act listed – elected officials, employees of elected officials
         5. Nositur could have been used to show a common theme but court said must be an unmistakable intent by congress.
7. **Montana v. Wilderness Association**
   * + - 1. Wanted to pave road through a national forest. Tied implied easement based on an Alaskan statute.
         2. Repeal of statute by implication is disfavored. If congress wanted to change a prior law they would do so with clear and express language
         3. Congress does not hide elephants in mouse holes
8. **Presumption against preemption**
9. \*\*Federalism principle seems stronger than the presumption against preemption in that it must be explicit
10. Preemption can be used “as a carpet bomb or a smart missile”; that is, you can target the exact nature of the preemption
11. Congress can still preempt state laws as long as intent is clear. Can also have implied preemption
12. Purpose: provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by Courts
13. History: notion that “historic police powers of the State are not to be superseded…unless that was the clear and manifest purpose of Congress”
14. Default: a statute should be construed so as not to preempt state law; can be overcome based on clear language or other strong evidence that Congress intended otherwise
15. Application
16. When a federal statute contains an express preemption provision

Cts can construe the provision **narrowly** to preempt some state laws but not others

Cts can still imply preemption if state laws frustrate the federal scheme or compliance w/both fed&state laws is possible

1. When it does not
2. *Karl Llewellyn* has criticized the use of substantive canons by arguing that they can employ a converse canon for each one. School of “legal realism” Pg. 749

**EXTRINSIC SOURCES OF STATUTORY MEANING**

1. What can be used outside of the statute to interpret it?
   1. Common law
      1. There is a presumed displacement of common law now. In the old days attempts were made to preserve common law
      2. Laws evolve.
      3. Smith v. Wade
         1. Common law can be used to show legislative intent at the time of statute’s enactment
   2. Legislative background (in order of power)
2. **Committee reports**: usually the most reliable measure of intent
3. Can look to House or Senate; the one closer to the actual bill is probably better
4. Has been circulated w/in whole committee (best is Conference Commitete Report [circulated thru all of Congress; but usually shows what was disagreed upon], worst is House/Senate Committee [biased])?
5. Written by those charged w/ responsibility of a bill/best informed about that bill?
6. Not always reliable b/c they’re not subjected to a vote by a full chamber of Congress; cant be amended (so don’t reflect disagreements)
7. Can be misleading
8. Blanchard v. Bergeron
   * + - 1. SC used house and senate reports referred to them to determine congressional intent to disallow attorney fee reimbursement
       1. Enray Sinclair Case
          1. Family farm foreclosed. Congress tried to help farmers with a new chapter to the bankruptcy code.
          2. Language in statute said it only applied prospectively
          3. Intent and committee reports used to allow retroactive application
       2. Can use legislative drafting manuals as a guidepost
9. **Author or Sponsor Statements**
10. Prepared by an individual knowledgeable about the bill (like the drafter)
11. Weaker than committee report b/c prepared by one voice instead of whole chamber, also bills change before being passed.
12. Amicus briefs – filed by drafters and detail their intent. Often written after the fact
    * + - 1. Perez v. Wyeth
13. **Member statements**
14. Affected content of bill
15. Such as in floor debates; those on losing side will get less weight
16. **Hearing records**
17. Include oral testimony, written submission of reports, and comments/questions from members; only attended by the committee members, not the entire Congress
18. **Other Legislative Statements**
19. Court can make an assumption that the legislative history of one statute can support an inference about what Congress meant with regard to another
20. The closer in time/subject matter, the more persuasive
21. **Presidential and Agency Statements**
22. Increasingly gaining weight

## Intent and Purpose-Based Tools

1. Difference between statutory and legislative intent
   * 1. Statutory intent can be gleaned directly from the text and structure of the legislation itself
     2. Legislative intent: intentions and expectations of legislature that passed the statute
2. Hester’s Analysis:
3. Start w/the text of statute – if ambiguity, look at canons to parse the meanings
4. Is legislative history a supplemental tool or inappropriate?
5. Answer varies from person to person; LH can supplement an otherwise unambiguous statute, or some people may think that LH is inappropriate and we should stick w/in 4 corners of statute
6. Hester’s problem:
7. How do you ascribe meaning to an action taken place that’s formed bya large group? How do you choose which one you’re going to give import to?
8. Statutory Intent v. Legislative Intent
9. For statutory just look to how language changes; look to amendments; do not look at opinions/letters
10. Considerations/criticisms of legislative intent:
11. Judges can manipulate legislative history, pick which parts to support
12. But isn’t the same true for substantive canons?
13. Representatives may try to create history in the record
14. One reason that you usually don’t look at legislative intent for after a bil has passed
15. Issues of democracy: unelected judicial officials making decisions that should be left for the legislature?
16. Sources of LH, in order of strength:
17. Criticisms of Judicial Reliance on Legislative History
18. **Easy to manipulate**
19. **Look to initial clear language or amended language?**
20. **The same committee, same members interpreting the act** come out differently
21. Reasons Post-Enactment LH discouraged:
22. CO legislators didn’t hear it
23. If it’s ambiguous they may try to make a strategic statement after the fact

# AGENCIES IN THE STRUCTURE OF MODERN FEDERAL GOVERNMENT

## Fundamentals of Administrative practice

* 1. Reporting/transparency
  2. Options for implementation of statutes
     1. Agency – under APA
     2. Courts
     3. Criminal Law
  3. Constitutional issues
     1. Non-delegation doctrine – limits how much power congress can delegate to agencies

## Agency – a unit of government created by statutes

* 1. Agency means each authority of the Government of the US, whether or not it’s within or subject to review by another agency, but does not include:
     1. Congress
     2. Courts of the US, etc.

## Roles – operation of agencies under the administrative procedure act

1. Can issue rules (sometimes called regulations) – like statutes
2. Can issue orders (similar to trial-type hearings)
3. Can order guidance (makes multi-billion effects)
4. Will sometimes step in before Congress
5. Agencies adjudicate more cases than the federal judiciary
6. Cost of compliance w/regulations make up 1/10th of GDP
7. Often get the difficult issues when Congress can’t decide; often delegated to the agency

## Scope

1. Regulations, issuance of guidance, investment/MKT regulation, adjudication, dealing w/issues Congress hasn’t spoken to

## Limits on Agencies

1. Congress creates them; their limitations apply to what they can be empowered to do
2. Functionally, they can’t impede on the other branches
3. Administrative Procedure Act (**APA**)

## Why is Delegation to Agencies Constitutional? – Administrative Procedure Act

1. Law of the Agencies: It’s the touchstone statute but not the only one
2. The APA sets express standards for judicial review; not *de novo*, but “arbitrary or capricious”

## Agencies in the Constitutional Structure

1. The Constitution is silent on the role of agencies
2. Justification for agencies:
3. **Expertise** – specialized knowledge in certain areas
4. **Fairness and rationality** – agencies are subject to procedures imposed by statute, like the legislative and judicial process; enhances legitimacy
5. **Interest representation** – enhances legitimacy b/c they act in processes that are open and accessible to the public
6. **Political accountability** – accountable to the people b/c the President supervises their decisions
7. **Efficacy and flexibility** – able to respond quickly to changing circumstances
8. **Coordination** – coordinate with other agencies across the government to allow for consistent and uniform regulatory regimes
9. **Efficiency** – agencies have the resources to act efficiently (cost-benefit analysis)

## Types of Agencies

1. Executive-Branch Agencies
2. Under the President and run by officials
3. President has plenary (at will) power to remove the head for any reason
4. Single administrative head
5. Department/agency is in the name
6. Policies will be more closely tied to the President b/c he has more tools to control
7. **Examples**: Dept. of Justice [Attorney General], FDA, EPA (**not** created by statute), NHTSA
8. Independent Agencies
9. Usually a commission
10. Run by multiple member board (*contrast with E-B Agencies*); typically with fixed, staggered terms (often a bipartisan requirement)
11. Removable by President only for “good cause” or “for cause”
12. Variations in structures within each agency
13. **Examples**: FCC, Federal Reserve Board, SEC, Federal Trade Commission
14. **The Constitutionality of Independent Agencies**
    * + 1. “Unitary executive” theory: the idea that Congress must place any agency it creates under the President’s direct supervision
        2. Arguably unconstitutional b/c they’re not under **direct** supervision by the President, but can’t be placed under Legislative or Judicial branches; do work more like executive-branch agencies than a legislature or a court; “headless fourth branch”
        3. They have their own constitution: Administration Procedure Act
           1. Arbitrary and capricious reviews; idea is that agencies can get it wrong but the court will not overturn that decision unless the court determines that that ruling is “arbitrary” and “capricious”
           2. That determination is based on the record that the agency used to base its decision; administrative record
           3. Important rule: if you don’t comment, and that issue isn’t in the comment otherwise, then that issue isn’t before the judge; if you don’t make that comment, you can’t pursue it – someone else might be able to, but not you
    1. Agencies are still checked by the three branches of government
       1. Judicial review of agency rulemaking
    2. Rule making usually takes place as informal rule-making
       1. Notice and comment rule-making
          1. The way agencies open the doors for making a rule; anybody can comment on a rule that’s been published in the federal registry; you don’t need standing or anything;
          2. Agency might respond to substantive comments
    3. Formal rule-making:
       1. Trial, etc.
    4. Informal Rule making
       * 1. APA is the starting point; if you have a particular statute and it addresses a complex area, Congress can have its own judicial review provision within that statute

## Delegation to Agencies

1. Is there a delegation?
2. It may be express or implied
3. Is there a minimum floor that delegation must satisfy?
4. There must be some intelligible principle: fairly low standard (*Chevron*)
5. General rule: delegation is a broad, flexible principle w/a low constitutional floor

## What is More Likely to be Delegated?

1. Complex issues
2. Issues that require a large volume (e.g. social security)
3. Controversial decisions
4. Remember **public choice theory**: goal of reelection

## Reasons for Delegation. Why Congress delegates instead of issuing a statute regulating primary conduct:

* 1. Constitution gives legislative power to Congress, who passes power to an agency (DOT), who passes power to a sub-agency
  2. Information costs:
     1. Costs of gathering, analyzing data are high – costly to acquire expertise and process it
     2. Industry has all the data and information.
     3. Need access, time, resources and capacity to obtain data, analyze it and determine proper regulation.
     4. Delegation allows Congress to mandate that industry give agency data. Congress also gives agency human resources needed to act on the data.
        1. Agency has a specialty, in-house experts, and can reach outside to industry/interest groups/members of relevant community
  3. Procedural costs: Legislative process is difficult. If bicameralism and presentment required for each auto safety standard, it would be extremely time consuming
     1. The more specific the legislation is, the harder for it to survive
  4. Opportunity costs: time spent acquiring expertise and passing specific leg could be spent in electorally productive activities (Epstein)
  5. Bargaining costs: Within the legislative process, political capital is required to build consensus and craft detailed statutes. Need trade-offs, log-rolling, vote-trading. If the statute is broader and allows delegation, less bargaining required.

## Benefits of delegation:

1. Can have ongoing oversight of Agency
2. Agency not static like a specific statute would be – can move and change with industry
3. Outlier committee – if want the committee to pass something that median legislator wouldn’t agree with
4. Can blame agency for policy they don’t like and take credit for good stuff agency does
5. President more likely to take the blame for agency than congress
6. To avoid making politically unpopular decisions but when they DO want to address the issue
7. In auto safety, wanted to avoid pissing off industry but had to address safety
8. Might get better policies – reduces rent-seeking by interest groups – less vote-trading and deal-making (Mashaw)
9. Easier to hold legislators accountable for broad delegations of power than for tiny details of big bills they would pass (Mashaw)
10. Administrative expertise and flexibility
11. Agencies can act quicker than Congress

## Disadvantages of Delegation

1. Monitoring costs: Principle-agent problem: Agency may want to impose its own preferences rather than those of Congress.
   * 1. Congress wants agency to pass policies that will get Congress reelected. To ensure agency produces its preferred policies, Congress has to monitor the agency.
     2. Hold hearings, inquire and monitor in other ways.
     3. High monitoring costs (so less delegation):
        1. Just before re-election (when Congress wants to allocate time in other ways)
        2. When divided government exists
        3. When committee is an outlier
        4. Low monitoring costs (more delegation):
        5. Political party alignment – Pres and Congress are same party
        6. If issues are complex (technically or policy) and not worth incurring cost of acquiring expertise, etc.
     4. E.g.: motor vehicle safety – costs of delegating are worth incurring:
        1. Issues are complex
        2. Must adapt to changes in technology
     5. Undemocratic – agency heads aren’t elected
     6. Counterproductive – agency heads may be biased, captured by industry
2. **Overall**: Congress employs its own form of cost-benefit analysis to determine how much to delegate to an agency. When the legislative and bargaining cost is lower than the monitoring costs, expect a more detailed statute with less delegation. However, if the monitoring costs are higher than the legislative bargaining costs, expect a more broad statute with more delegation.

## Congress usually delegates:

* 1. In areas it is most inefficient
  2. Where committee is captured or doesn’t have expertise
  3. When executive and Congress are of same party
  4. When committee has same membership as floor
  5. Congress usually doesn’t delegate where:
  6. Political disadvantages of delegation (loss of control) outweigh advantages

## Non-delegation doctrine: Constitutional limits to Congressional delegation

1. Congress can always pass narrow legislation that directs an agency to regulate an issue in a specific way
2. BUT Congress cannot delegate its inherent lawmaking powers/its full powers to agencies without providing specific standards the agency shall apply in administering the delegation (i.e. Congress can’t pass a statute that’s *too* vague and delegate *too* much power away)
3. Must lay out an “intelligible principle.” J.W. Hampton, Jr. & Co. v. US.
4. In New Deal: non-delegation doctrine not used much.
5. Now: also not used much to strike down acts.
6. Note: Cts have been extra deferential to Cong as to how specific they have to be in writing statutes
7. **Now**: used as canon of statutory construction
8. If a court is faced with an extremely broad delegation that might implicate constitutional concerns, it uses the canon to adopt a narrow interpretation that would restrain agency discretion. These canons are applied at Step One of *Chevron*, so that the agency does not have the discretion to adopt a broad interpretation that would raise a non-delegation issue. *See* , MCI v. AT&T,
9. Using statutory interpretation instead of non-delegation doctrine: has less sweeping effects on constitutional landscape, is more limited;
10. Some say should use non-delegation doctrine more:
    * 1. B/c legislatures avoid hard political choices by delegating blanket authority to bureaucrats – chief goal is to get reelected by delegating the divisive issues to agencies
11. Purpose of requiring intelligible principle: provide guidance and constraint on agency action, force Congress to make hard choices; give courts guidance in interpreting statutes

## Vagueness

1. How vague can Congress be in writing a statute? How vague should it be?
2. Example: “Anyone who restraints trade shall be liable for triple the damages caused by their conduct”
3. Argument for this statute being a valid and enforceable statute – Congress makes statutes vague on purpose to have agencies enforce them and interpret them as they see fit (agencies such as Federal Trade Commission)
4. Congress delegating some power to agencies and possibly courts
5. How specific you have to be is the engine to how agencies operate
6. What would lead Congress to be specific for statutes?
7. Reasons for vagueness
8. Claim benefit, duck costs (FAA, IRS)
9. Creating loopholes for corporations to pay less taxes
10. Ignorance
11. Time/resource limits (we don’t have the resources to figure out the laws for this, so here’s a vague statute and you can figure it out yourself)
12. Distrust **or** shared affiliation in the agency; Congress can go to great lengths to avoid a particular course of action, or to get a particular course of action if they trust the agency
13. What’s the cost of letting Congress be vague in writing their statutes?
    * + 1. Un-democratic

# STATUTORY IMPLEMENTATION BY AGENCIES

## Distinctions as institutions for implementing statutes:

* 1. Agencies are designed to deploy technical expertise
     1. *Contrast* w/ Courts, which are generalists; relatively limited access to technical staff, limited ability to obtain/process technical information, limited familiarity with regulatory schemes
  2. Most agency action is authorized by a relatively few, identifiable statutes
  3. Agencies have considerable control over their agenda
  4. Agencies are structured to be responsive, or accountable, to political officials

## Agencies Implement Statutes Largely by Promulgating Rules

1. Started by an agency drawing it up or proposing it, or
2. Petitions from citizens
3. Statutes may require promulgation of regulations by a certain date
   * 1. If missed deadline, can be sued
     2. Creates a constituency to fight for deadline
4. Courts can require agencies to take action

## Administrative Procedure Act: How agencies can regulate

1. Formal – formal adjudication/formal rule-making
2. Trial-like process
3. Case-by-case disposition of issues
4. 2 parties involved
5. Overseen by an administrative law justice (ALJ) or other admin staff
6. Only required if for states in the organic statute
7. Common for situations re: individual rights (immigration agencies, etc.)
8. Generate binding legal rules – used to set or change agency policy
9. **SEC v. Chinery** I & II
   * + 1. Court says deference is granted to the agency on an arbitrary or substantial evidence standard of review which predates the APA
       2. Rule must be “on the record”
       3. To what extend do offices owe a duty to their shareholders? This was a case involving a public company which was restructuring
       4. Can they buy stock in the company they are re-creating or that they know they are going to flip later?
       5. In case 1 – the court read the statutes that said there was a fiduciary duty, but said it was for the courts, not the agency to decide
       6. In case 2 – the court said the SEC committee proceeding looks and sounds like a court setting and should be allowed to determine if there was a fiduciary duty on its own…withing the SEC’s rulemaking and it would give deference
       7. More than just a policy. Needs to be an agency hearing
          1. Rooted in agency discretion
          2. Court gives a deferential review to SEC cases
       8. Majority said this was only a change in its interpretation
       9. Dissent in case 2 claimed it was an expansion of agency power
10. **US v. Florida East Coast Railway**(formal rulemaking trigger if statute says “on the record”)
    * + 1. Shortage of rail cars lead to an act intended to increase production of cars by placing a levy on the rental of railcars.
        2. Was the RR commission justified in making the rule w/o following formal rulemaking?
        3. The language of the statute gave the committee the ability to make rules if reasonable “after hearing”
           1. Court said after hearing could mean simply putting together information, did not need a full hearing…written documents were enough…b/c you were “heard” by presenting the agency with information
           2. Said the APA only triggers formal rulemaking requirement when statute says “on the record”. The APA is not designed to supplant or replace other statutes rulemaking. Just a default if those statutes are silent
        4. The nature of an agency action may dictate if rulemaking must be formal
11. **NLRB v. Bell Aerospace Company** 
    * + 1. Issue is when you have to use notice/comment and not simply agency discretion
        2. Case was about certain professions and rights that were exempt from the national labor relations act
        3. Many managerial type employees were exempt. Case brought to determine who was an exempt employee
        4. Court follows Chenery II but hints at certain escape hatches even if arbitrary adjudication
12. Adjudication is a Rare exception – normally agencies set regulatory standard using notice and comment rulemaking rather than adjudication.
    * + 1. Some states favor hearing proceedings over notes and comments
        2. There is a creeping change b/c it is easier to use the adjudicatory proceedings to get rules through than notes and comments.
13. **Advantages**:
    * + 1. Allows agency to delay (ex. FDA hearings on peanuts)
        2. Generates publicity)
        3. Allows all parties their day in court
14. **Disadvantages**:
15. Time and resource intensive
16. B/c of that, not usually voluntarily adopted
17. Informal
18. **Notice-and-Comment Rulemaking Process** (from APA)
    * + 1. **US v. Nova Scotia Food Products Corp**.
           1. FDA placed regulations on COD in regard to storage and baking before sale
           2. Nova Scotia sells smoked whitefish. Business would die b/c if they followed the temperate requirements for baking the fish turned to mush
           3. Brought suit against the FDA
           4. Informal Rule making should follow notice and comment process

Federal agency must give notice of proposed rule.

People can respond and give comments which become part of the record

Federal agency makes final rule w/ response to comments and descriptions of the changed made since proposal

* + - * 1. Several smoked fish companies had complained about the statute causing dmg to business, a lack of alternatives, and the regulation of all fish even those that were free from the disease the act was preventing
        2. FDA did not respond to these comments in its final ruling. Its findings and conclusions to the question were therefore not on the record and the act was not allowed to stand.

1. “Window” of time the agency gives the public for input
2. ANPR – Announced Notice of Public Rule Making
   * + - 1. Notice that the agency is planning to impose a rule
         2. Not common – let people get ready for the rule
3. NPRM – Notice of Proposed Rulemaking
4. When the actual text of the rule hits the streets
5. Just proposed; agency is taking the first proposed rule; will include questions and invite comments and questions; it’s a way to give the public what it wants to do but a way to show where it needs help
6. Usually where the agency will take the public’s comments
7. What happens if you don’t submit a comment? If you miss it, too bad
8. SNPR – Supplemental Notice of Proposed Rulemaking
9. Why would an agency want to do a supplemental notice between the Notice and the Final? To notify people of the changes after including those changes; agencies must give notice to the public of the changes in the rule
10. Final – Final Rule
11. Record is set; you can petition for review but otherwise, you’re stuck w/what you have
12. **Informal Adjudication**
13. Another type of informal rule-making besides notice-and-comment
14. Includes:
15. Issuance of guidance documents/memos
16. Interpretive rules (without NPRM) process
17. Internal memos for staff of agency
18. Letters/ opinions to private parties in response to applications/requests (letter ruling) – most like adjudication because pertains to particular parties/disputes
19. Doesn’t always result in binding legal rules
20. **Advantage**:
21. Quick and easy
22. Preferable for deciding small issues and quickly clarifying prior rules
23. Allows avoidance of publicity/scrutiny (of public, industry, politicians) when making big changes
24. Flexibility – can take small, interim steps w/out making binding legal rules that would require rescinding/amending through formal rule-making again
25. Can try to circumvent process by issuing ambiguous
26. Intepretive Guidance
    * 1. Exempt from notice/comments
      2. Shall have to publish and put on register
      3. Explain how an agency will interpret a law going forward
      4. Perez v. Mortgage Bankers Association
         1. Court debating what an interpretative rule can do
         2. NLRB changed exemptions for mortgage loan officers
            1. Issued an interpretation in 2006 saying they were exempt
            2. Issued an new interpretation saying they were going to be treated as non-exempt salesman. No notice or comment process
         3. Court said an agency was allowed to change its own interpretative rule at any time. No need for notice and comments
         4. Reference to the Auer case – same way courts defer when interpreting agency made laws, they also get deference when reviewing their own regulations.
27. General statements of policy
    * 1. Hudson v. Federal Aviation Admin
         1. Claims FAA violated a previously published circular about exiting a plane using a slide during tests
         2. Courts allowed the statement over the circular due to using permissive language

## Judicial Review: APA §§ 701-706 allow judicial review of agency rules and orders. Court “shall” under § 706:

1. Compel agency action unlawfully withheld or unreasonably delayed; and
2. Hold unlawful and set aside agency action, findings, and conclusions found to be
3. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
4. Contrary to constitutional right, power, privilege, or immunity;
5. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
6. Without observance of procedure required by law;
7. Unsupported by substantial evidence in a case subject to §§ 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided for by statute; or
8. Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

## Tools of Statutory Interpretation

1. Agencies essentially use the same tools in interpretation as courts
2. Factors Considered When an Agency is Making a Decision:
3. **Statutory** – considers the authority that the statute grants and the instructions that it provides to determine what action is required/permitted
4. Agency must ensure that regulations are within the scope of the statute and consistent w/the terms of the statute (interprets language before applying it)
5. **Scientific** – examines scientific data, existing and potential technology for responding to risks
6. **Economic** – cost-benefit analysis
7. **Political** – public attitudes and political preferences
8. An agency doesn’t perform all of these for every regulation
9. An agency may have to determine as part of its statutory analysis whether its statute precludes or limits other analyses

## Judicial Guidance

1. Agencies have incentives to interpret their statutes in a way that will likely survive judicial review. Agencies can apply the tools of statutory interpretation in a manner similar to courts
2. *Chevron v. NRDC* (1984) Pg. 531
3. Clean Air Act Amendments of 1977 required States that hadn’t achieved the national air quality standards established by the EPA pursuant to earlier legislation to establish a permit program regulating “new or modified major stationary sources” of air pollution
4. EPA allowed State to adopt a plant-wide definition of “stationary source”, which could technically allow an existing plant that contains several pollution-emitting devices to install or modify one piece of equipment w/o meeting the permit conditions if the alteration doesn’t increase the total emissions from the plant
   * 1. Issue: Whether EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial groupings as though they were encased within a single “bubble” is based on a reasonable construction of the statutory term “stationary source” 🡪 **yes**
5. Ct: EPA’s definition of the term “source” is a permissible construction.
6. A review of the EPA’s varying interpretations of “source” over time demonstrated that it consistently viewed the term flexibly, in the context of implementing policy considerations in a technical and complex area
7. It was not the agency, but the Court of Appeals that read the statute inflexibly in 1980 to command a plant-wide definition for plants designed to maintain clean air, and to forbid such a definition for programs designed to improve air quality
8. Basic legal error for Ct. of Appeals to adopt a static definition of the term “stationary source” when it had decided that Congress itself had not commanded that definition
9. **BOTTOM LINE: CONGRESS NEVER SPOKE**
10. It doesn’t matter *why* Congress never spoke; the fact is that there’s a gap and the gap is implicit delegation of authority to the agency
11. Agency must speak consistently; must speak within in area in which it has expertise
12. **Chevron Test**:
13. Did Congress speak clearly to the issue? If so, you’re done w/ the analysis
14. If Congress was silent, agencies’ interpretations is entitled to deference in court
15. Another formulation:
16. Step 0: Does Chevron apply?
17. If there is an agency interpreting or implementing a statute, *Chevron* applies. Move to Step 1.
18. Step 1: Is the intent of Congress ambiguous?
19. If not: (it is clear) you must follow the statute
20. If it is ambiguous proceed to step 2
21. Step 2: Congress delegated power in its use of ambiguity; look to see if the interpretation was reasonable. (agencies tend to win in step 2).

“Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”

1. **Chevron purposes**
2. Step 1 court reviews statute de novo:
3. **Judicial competence** in interpreting statutes
4. **Political insulation**: somewhat insulated against political pressure, so better able to remain faithful to Congressional intent
5. Step 2 court defers to agency:
6. **Agency expertise**: specialized knowledge of the particular area of law and mechanics of political context and how statutory regime fits; agency better suited to make policy judgments
7. **Political accountability**: democracy, agency not directly accountable since not elected, also sometimes political pressure can steer agency too far, but agency is indirectly accountable
8. **Delegation**: Implicit/explicit delegation of Congress to agency: explicit-“Secretary shall…” implicit-agency fills gaps/ambiguity; ambiguity=delegation; Congress wants agency to fill gap

## Economic Analysis

1. Determining how rules are produced within an agency (usually done behind closed doors)
2. Some statutes dictate that you must do an economic analysis (CBA [cost benefit analysis])
3. Cost Benefit Analysis (CBA): an action is desirable when the benefits generated exceed the costs
4. Usually at the federal level, the fulcrum is “What effect does it have on human life? Do the number of lives it saves justify the costs?”
5. Executive orders may require that you do CBA. Might have to submit to Office of Management and Budget (OMB)
6. Valuing Statistical Lives – what’s the basis for the dollar amounts assigned to human lives?
7. **Statistical life** – concept of the value of a life spread throughout the entire population, not based on one individual. Usually calculated by willingness to pay: how much more will you pay for a percentage reduction?
8. Look at questionnaires to see how much people are willing to pay
9. See what people are already doing (such as hazard pay)
10. Tort evaluations
11. EPA has considered calculating some rules that would count the elderly at a lesser rate, but this has been a very tough political issue
12. Stated Preferences vs. Revealed Preferences
13. Stated preferences 🡪 surveying individuals about how much they are willing to pay to avoid increased risks
14. Revealed preferences 🡪 observing in job market data how much workers demand in hazard pay to accept risky jobs
15. OMB A-4 (Still law)
16. This is what agencies have to look at when making regulations; must prepare this internally before presenting it to the executive branch
17. To provide results, you should:
18. Include separate schedules of monetized benefits and costs that show the type and timing of benefits and costs, and express the estimates in constant, undiscounted dollars
19. List the benefits and costs you can quantify, but cannot monetize, including their timing
20. Describes benefits and costs you can’t quantify; and
21. Identify or cross-reference the data or studies in which you base the benefit and cost estimates
22. **Note**:
23. Cannot use a discount rate (OMB will use its own)
24. Issues that can’t truly be monetized require that you try to do so
25. Create a sliding scale for those things you’re unsure of
26. Discount Rate: Interest rates in reverse – the costs are not incurred until later. Future generations will play a very little role in a discount rate. Often set at 6-7%.
27. **Reasoning**: a dollar today is worth more than a dollar tomorrow. Doesn’t apply to lives.
28. Criticisms of CBA:
29. You ignore things you can’t monetize
30. Skewed in favor of interest groups who can manipulate members

# Agency Oversight by the three branches

## Presidential Control

* 1. Authority:
     1. The Take Care clause of the Constitution
     2. Vested executive power in the President
  2. Main powers:
     1. Control over agency personnel (i.e. firing power0
        1. Usually a behind the scenes power
        2. Does not apply to independent agencies (must have cause); tends to be less responsive
        3. There are political costs for firing someone (Nixon)
     2. Control of appropriations (i.e. funding)
        1. Congress holds the purse, the President creates the budget (impounding offunds; can theoretically do unless Congress has mandated the spending)
     3. Regulatory planning and review (format)
        1. Have had to funnel through OMB since Reagan
        2. **Executive Order 12,866**
           1. Regulatory planning

Federal agencies should promulgate only such regulations as are required by law

First, come up with the list of actions you plan to take (Intra-agency); pull up inventory rules; go to OMB and OIRA

Inter-agency plans

Applies to **all** agencies including independent agencies

* + - * 1. Regulatory review

Where agencies have to justify their rules using cost-benefit analysis

USE OMB A4 analysis

Send to OIRA

* 1. Planning process applies to everyone; even independent agencies must tell OMB what is on the plate
     1. **Pros**: adds more oversight
     2. **Cons**: inefficient; may be overseen by economists who are not looking at the environment, etc. OIRA is not accountable
  2. President can issue an executive order requiring executive-branch agencies to perform CBA
     1. Prompt and return letters
        1. **Prompt** – address an agency’s plans or priorities for a given year; suggest thata n agency “explore a promising regulatory issue for agency action, accelerate its efforts on an ongoing regulatory matter, or consider rescinding or modifying an existing rule”
        2. **Return** – remit proposed regulations to the agency that produced them for reconsideration, providing an explanation of the deficiencies and suggestions for further development
     2. OIRA has to respond to judicial decrees (can’t sit on a regulation past its effective date)
     3. Quicker than an order through statute
     4. Transparent except for Homeland Security executive orders; they’re not subject to judicial review; not statutes, not regulations; operate as a separate sphere of power
     5. Not permanent
  3. Presidential Directives
     1. Very rare; telling an agency what to do; often involves national security and confidential
     2. Pre-regulatory directives in the form of official memoranda to executive-branch agency heads; directives instructive an agency to take a particular action under its existing regulatory authority – such as telling FDA to regulate cigarettes and other tobacco products under the Food, Drug, and Cosmetics Act

## Congressional Control

1. Strategic reasons: to ensure that agency action reflects the preferences of the constituents who can help its members get reelected
2. Public-regarding reasons: to ensure that agency action comports w/statutory mandates & pouplar preferences
3. Congressional Review Act (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 and the General Accounting Office before the rule may take effect
4. Bypasses Senate filibuster
5. Expedited process
6. Congress can have a new rule passed with as many as the approval of 30 members
7. Joint resolution; bicameralism requirements 🡪 then presentment to President
8. Tools:
9. **New Legislation**:
   * + 1. Congress can enact new legislation to assert control of agency action; legislation might abolish an agency or restrict its authority
       2. Self-defeating if Congress always ahs to intervene
10. **Appropriations Legislation**:
11. Congress can restrict funding for a particular agency or regulatory program
12. Allows Congress to assert continuous control
13. Funding is easier to alter than provisions in other bills
    * + - 1. Funding for any particular agency program is just one item in a larger bill that reflects diverse legislative interests and that Congress intends to pass
14. **Note**:
15. Pay attention to Anti-Deficiency Act (you can’t pre-commit he government to spend money)
16. Appropriations bill do more than say Give Money to X; can also be a platform for people to exert fine-grained control

Language counts; appropriations committee might put language expressing desires for the committee and a report (like Congress doesn’t think this should happen until a certain study has been performed or something; agency will usually try to satisfy the Congressional direction, even though it’s not legislative)

1. **Oversight Hearings**
2. Convene hearings to review agencies’ actions to see if it meets Congress’ standards; uncover facts in aid of further legislative activities
3. Informational tool
4. Can also be used to hold officials publicly accountable (public airing or blaming)
5. Serve as a warning
6. Relatively informal
7. If you fail to show up, you may be defunded or even subpoenaed and held in contempt
8. Congress can give full immunity; or use immunity (only in proceedings) to encourage people to testify
9. May invoke executive privilege (not always successful)
10. Procedure:
11. Congressional committee sends a letter requesting that an agency official appear and sometimes to produce documents
12. Congress can subpoena the official, or compromise to provide a more limited testimony or produce documents w/o appearing
13. Confirmation process – require a senate vote before hiring agency officers

## Judicial Control

1. Courts will generally exercise control of agency action only *after* the agency action is complete or “final” b/c they have to wait until the action is challenged
2. Courts have limited remedial options; to what extent can a court dictate what the agency can do?
3. Administrative Procedure Act
4. Look at the statute that directly governs the dispute
5. Does judiciary have the ability to review the agency?
   * 1. Can be review of agency action or agency interpretation
     2. **Hard Look Doctrine**
        1. Formal adjudication process used by agency must be supported by substantial evidence
        2. Informal actions including notice and comment rulemaking must not be arbitrary and capricious
           1. Presumption that judicial review should have teeth – close scrutiny of agency
           2. Court can’t use judicial review to sub. Its judgement for the agencies
           3. Agency must examine all relevant information, explain its decisions in detail, justify departures from past practices and consider reasonable alternatives before reaching policy decisions

Courts look at the process, not the answer reached

Courts presume that agency knowledge to make informed decision

Courts consider if the decision is plausible, based on the process

* + - * 1. **Citizens of Overton Park Inc. v. Brinegar**

1. Secretary of Transportation approved highway to be built through Overton Park (would sever zoo from rest of park)
2. S didn’t show factual findings or indicate why he believed there was no feasible or prudent alternatives, or why changes would reduce the harm to the park
3. **Explicit standard for S** in statute (§ 18 of Federal-Aid HWY Act)
4. Prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of hwys thru public parks if ‘feasible and prudent” alternative route exists
5. If no such route is available, statutes allow him to approve construction thru parks only if there has been “**all possible planning to minimize harm**” to the park
6. Ct uses “arbitrary and capricious” standard from APA; standard of review is very narrow; court can’t substitute agency’s judgment with its own
7. Procedural deficiency; formal findings aren’t required but affidavits aren’t sufficient; very existence of the statutes indicate that protection of park land aws to be given paramount importance
8. Procedural error was not stating *any* reason for building the hwy
9. Whole record wasn’t up for review, which is required by APA
10. Note:
11. Before *Chevron*
12. Gives agencies strong incentives to show how they got to a decision
    * + - 1. **Heckler v. Chaney**

Can the FDA approve drugs to kill people intentionally

Was there an agency action to review? They were not enforcing law on the company selling the drugs

A decision to not enforce is subject to almost absolute agency discretion. Agency gets to choose who and when to enforce

* + - * 1. **HBO** case – can’t have sham rulemaking that doesn’t show up in the record if you have already gone through notice and comment
        2. **Vermont Yankee Nuclear Plant**

Courts can’t impose their own additional standards on agencies based on their interpretation.

* + - * 1. An agency rule would be arbitrary and capricious if:

1. Agency has relied on factors which Congress has not intended it to consider
2. Entirely failed to consider an important aspect of the problem
3. Offered an explanation for its decision that runs counter to the evidence before the agency, or
4. Is so implausible that it could not be ascribed to a difference in view or the product of agency expertise
   * + 1. Can’t approve projects that use public land unless there is no feasible and prudent alternative and the program includes all possible planning to minimize harm to public land.
     1. Softening the hard look doctrine
        1. No remand, if the answer is so obvious that it is a waste or if experts are better suited
5. Procedural requirements in rulemaking proceedings
   * 1. Agencies should observe judicial norms of openness when they affect private parties and the public interest
     2. Federal courts impose procedural requirements on informal rulemaking under the cover of liberally interpreting notice and comment rather than admin law.
6. **Motor Vehicle Manufacturers Ass’n v. State Farm (arbitrary and capricious)** 
   * 1. Insurance company contesting the national highway traffic safety administrations (NHTSA) rescission of a passive restraint safety standard for new cars.
     2. Claimed the recession by the agency was arbitrary and capricious and failed the hard look doctrine as it was not supported by substantial evidence.
     3. Initially data said seat belt use was too low to reduce injuries to an acceptable level and said manufacturers had to install passive restraints into new vehicles. Auto-seatbelts and airbags
     4. Later said didn’t have to b/c there would be resistance to these features and the auto industry was in hard times. Also claimed the features did not significantly increase safety
     5. Evidence showed that no companies were using the safer airbag method. All doing the auto-seat belts which were detachable and did not increase safety. It was going to cost $1B to implement and was not worth the minor safety increase
     6. Court held the rescission was arbitrary and capricious b/c it did not consider requiring air bags before rescinding. Can’t let the industry dictate safety when the reason for the act was the industry was not safe to being with.
7. **Judicial Deference to Agency Interpretation**
8. When the statute is not clear courts should defer to experts who worked with the statute day-in and day out and developed wisdom about what worked and what did not.
9. See *Chevron*
10. Agencies must implement legislative enactments and their range of discretion in doing so is determined primarily by the language of those statutes
11. Defines important features of the relationship between agencies and courts
12. The stringency of judicial review should be governed by the extent to which Congress delegated basic policy decisions to the agency (if Congress wanted to constrain agency discretion by drafting precise language, then the courts would make sure that agencies abide by that; but if Congress wants to increase agency discretion by using vague language, then courts should respect that choice)
13. Remember 2-step approach:
14. Did Congress speak clearly on the issue? If so, you’re done w/analysis
15. If Congress was silent, agencies’ interpretations is entitled to deference
16. Bottom line: Just determine *whether* Congress spoke, not *why* they didn’t
17. Before *Chevron 🡪* ***Skidmore v. Swift & Co****.* (Fall back option – not binding but respected)
18. 7 employees of Swift & Co brought an action under the Fair Labor Standards Act to recover overtime, liquidated damages, and attorneys’ fees, totaling approx. $77k
19. Worked as part of fire response team and stayed outside working hours to answer alarms. Wanted to be paid for down time. Swift refused claiming that down time was not work hours under the FLSA
20. Administer of the wage and hour division of the department of labor filed an amicus brief showing that the employer was meant to pay waiting around time which was not related to eating or sleeping.
21. Court said the amicus brief was not binding but should be respected due to the body of experience and informed judgement. Weight of the brief given based on the agencies
    1. Thoroughness of consideration
    2. Validity of its reasoning
    3. Consistency with earlier/later pronouncements
22. Level of deference should depend on
    1. Of congress delegated the agency lawmaking authority
    2. Whether the agency interpretation was contemporaneous with the statute
    3. Level of public/private reliance on agency interpretation
23. SC remains the expositor of what law is but should be open to agency input. If statute is unclear seek agency interpretation.
24. **Chevron USA Inc. v. Natural Resources Defense Council**
    * + 1. Clean air act enacted requirements on states that had not achieved national air quality standards. Required the states to establish a permit system for new or modified major stationary sources of air pollution.
        2. The EPA promulgated a regulation permitting an exception… States to adopt a plant-wide definition of the term “stationary source.” This definition allowed an existing plant that contained several pollution-emitting devices to install or modify one piece of equipment without a permit if the overall plant emissions were not increased. (as if all were in the same bubble)
        3. The legislative history of the amendments contained no specific comment on the “bubble concept” or the question of whether a stationary source was permissible under the permit program
        4. Court said two methods are available to determine the correctness of agency's statutory interpretation
           1. Did congress speak directly or is intent of congress clear?
           2. Follow congress intent
        5. If statute is silent or ambiguous on an issue, is the agency's answer based on a permissible construction of the statute?
           1. If **express delegation** by congress to agency the agency interpretation is given controlling weight unless **arbitrary or capricious** or manifestly contrary to the intent of the statute…follow the APA
           2. If **delegation is implicit** courts may not substitute its interpretation for a **reasonable** agency interpretation ….unless statute or history clearly show not congress's intent
        6. Policy arguments are more properly addressed to legislators or administrators, not to judges. In these cases, the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasonable fashion, and the decision involves reconciling conflicting policies
        7. The EPA’s definition of the term “source” is a permissible construction of the statute which seeks to accommodate balance in progress in reducing air pollution with economic growth.
        8. A review of the EPA’s varying interpretations of “source” over time demonstrated that it consistently viewed the term flexibly, in the context of implementing policy decisions in a technical and complex arena.
        9. It was not the agency, but the Court of Appeals, that read the statute inflexibly in 1980 to command a plant-wide definition for plants designed to maintain clean air, and to forbid such a definition for programs designed to improve air quality. It was a basic legal error for the Court of Appeals to adopt a static definition of the term “stationary source” when it had decided that Congress itself had not commanded that definition
        10. "When I am confused…I go with the agency"
25. **Steps of Chevron**
    * + 1. **STEP 1: Did congress specifically address the statutory question directly?(statute language and legislative history) (if so agency has no authority…)(if no, authority is delegated to agency)**
           1. **Express delegation by congress - review standard is arbitrary and capricious**
           2. **Implied delegation by congress - review standard is reasonable**
        2. **STEP 2: Is the agencies interpretation reasonable?** 
           1. **If so, courts defer to agency (agency interpretations are allowed to change over time)**
26. Example of how SCOTUs applied *Chevron* Step 1
27. *FDA v. Brown & Williamson Tobacco Corp.*
28. FDA asserts that it can regulate tobacco products under the Food, Drug, and Cosmetics Act (“Act”) b/c nicotine is a “drug” within the meaning of the Act as “combination products”
29. Ct: FDA cant regulate those products
30. Reasoning: Congress clearly precluded the FDA from asserting jurisdiction to regulate tobacco products; would go against Congress’ intent for the overall regulatory scheme and in the tobacco-specific legislation if it enacted subsequent to the FDCA
31. **MCI v. ATT**
    * + 1. MCI wanted review of case which held that the **Federal Communications Commission's** authorization of permissive de-tariffing for nondominant long distance carriers violated the Communications Act
        2. The court held that the Communications Act, did not allow the FCC to make fundamental changes in their authority. **Since an agency's interpretation of a statute was not entitled to deference where it went beyond the meaning the statute could bear, the court affirmed the decision of the lower appellate court.**
32. After *Chevron* – *Mead*
33. *US v. Mead Corp.*
34. Establishes whether you can even get to the *Chevron* analysis; if you can’t, go back to *Skidmore* analysis; holding: *Chevron* shouldn’t apply – thousands of tariff decisions are issued each year and each decision has no precedential value
    * + - 1. US customs wanted deference for its tariff classification policy (to determine which duty applies)
          2. Issue was if US customs had authority and if Mead's interpretation was warranted
          3. Said that Chevron test did not apply due to(**Mead factors to step 0**)**(Skidmore Rules of Thumb to determine how worthwhile an agencies interpretation is and how much respect its due)**
          4. **Procedural defects - no notice and comment session**
          5. **No express congressional intent to show that congress meant to delegate in the statutory language**
          6. **No precedential value b/c each shipment of planners is unique**
          7. **Too many transactions, results too varied, lack consistency**
          8. B/C Chevron does not apply…use Skidmore (not binding but respected deference) and court determines deference. Binding precedent so agencies cannot change interpretation over time.
          9. Scalia dissent…this causes confusion, creates a map to let agencies play the system by ensuring they qualify for Chevron so that their interpretation rules. Deference also allows agencies to change its mind of time so having court decide removes this ability
35. **Modified Chevron test after Mead**
    * + 1. **Step 0: Did congress delegate to the agency the general power to issue interpretations which carry to force of law and has the agency exercised that authority? (Look at the Mead factors to determine…If not, use Skidmore)**
        2. **Step 1: Did congress address the specific statutory question directly?**
           1. **Express delegation on the question: arbitrary and capricious (which applies to all agency action)**
           2. **Implied delegation on the question: reasonable**
        3. **Step 2: If not, was the agency interpretation reasonable**? (within the reasonable range of answers)
36. **Gonzales v. Oregon** – Failed Chevron Step 0
    * + 1. Assisted suicide act passed in Oregon allowing assisted death of patients
        2. Attorney general issued interpretation of the controlled substance act which said you can’t assist in suicides
           1. Statute said legitimate medical purpose. Have to request drugs from AG and request must be lawful and serve the public interest
           2. AG issued an interpretive memo that reread public interest and lawful wording to exclude suicide. No notice/comment
           3. AG argued that the interpretation was not on the statute, but of its own regulation and as such should be given Auer deference (extreme)
        3. Court holds no deference is given to the interpretative memo b/c the statute was designed to give congress the power to regulate drugs. Congress never delegated to the AG
           1. Step 0 of chevron not met b/c AG was not given authority.
           2. Under Skidmore found that AG should not be respected b/c the process was not sound.
37. **Auer Deference** – Does an agency get deference when determining the scope of its own interpretive powers?
    * + 1. When an agency interprets its own regulations courts generally not only give Chevron deference, but give a form of super deference
           1. No one has better idea of agency intent than the agency which created and enforces the statute
           2. Needs to be an actual interpretation of the statute. Not just a rehash
        2. Kor-Alaska
           1. Reopen gold mine and dumped waste in a beautiful lake ruining it. Claimed they did not need permit from EPA to do so b/c they were filling the bottom of the lake which was governed by the Army Corp of Engineers via a delegation by the EPA.
           2. Auer deference used for court to say EPA delegated the power to the army corp. and Kor Alaska wins.

Did not matter it was delegated through an internal memo. As long as agency is interpreting its own position, super deference

* + - 1. Palm Beach County Board v. Harris
         1. Constitutional issues get greater scrutiny and bypass chevron test. Little to no deference is given. Courts decided fundamental rights

1. Preemption issues – to what extent do agencies get deference for their preemptive interpretations which bypass state law?
   * + 1. If congress gives express preemption in the statute – yes
       2. Also consider field/conflict
       3. Grier v. American Honda – Agency Preemption of state law
          1. Drove a Honda and got stuck in tree. Sued saying not having an airbag was a defect
          2. Court gave deference to the DOT’s interpretation that multiple safety features were fine, not just airbags based on their knowledge and expertise

Even though based on amicus brief, gave deference

Applied chevron even when preemption exists

* + - 1. Wyatt Cases
         1. State and fed rules for labels on drugs were different
         2. Claimant had to amputate arm after taking medical drugs (for nausea) and getting gangrene
         3. Wyatt claimed any state laws that made the label inefficient were preempted by the federal statute
         4. Court said federal preemption did not preempt b/c Wyatt could have easily applied with both state and federal law….there was no conflict. Ignored Tobacco rulings
         5. Tobacco Case Precedent - historical police powers of state are not preemptive unless congress makes its intent clear and manifest

In another case the drug manufacturer could not comply with both state and federal laws

Was a generic drug, had different disclosure requirements for side effects. Allowed to simply mimic the name brand drugs label

Court said impossible to comply with both state and federal law b/c state law required more than just copying the prescription label

Here would have a case if took the original drug, but not the generic. Theory is that the if the real drug updated, then the generics would copy

1. Does chevron deference trump court precedent?
   1. **Telecom case (Deference to agency interpretation of stare decisis) - Step following Chevron**
      1. **Stare decisis and Chevron do not trump each other.** 
         1. **Chevron wins if Chevron step 1 is met and agency gets deference**
         2. **Stare Decisis wins if congress has expressly answered the interpretative issue**
      2. Statute that differentiates between telecom carriers and information carriers
      3. Issue hung on if internet was a utility or not
      4. TC based its ruling on case precedent…review court said should have used Chevron
         1. Said if stare decisis is not completely clear must use Chevron deference over stare decisis
         2. Gave deference to an agency interpretation of a previously decided court issue
      5. Court applied Chevron step 1 and step 2….then continued to say it was not arbitrary or capricious
         1. Chevron is only about agency interpretation of statutes…
         2. **If chevron step 1 and 2 is met…go on to determine if agency action is not arbitrary and capricious under the normal APA test (If chevron is met, apply this step)**
2. Do agency determinations on national security issues/ foreign affairs issue get deference?
   1. Agency Interpretation on national security is entitled to strong deference unless congress has specifically determined otherwise - Curtis Wright Doctrine
      1. For economic and military foreign affairs issue (more strong from military actions)
   2. Therefore interpretations of agencies under the president's wartime power are generally given deference
3. ANALYSIS
4. *Skidmore* – sets standard of review of agency action (respect, not binding)
5. Court retains interpretive authority
6. *Mead* – establishes whether you can get to *Chevron*; if you can’t, go back to *Skidmore*
7. *Chevron’s* level of deference is only available if certain procedures back up interpretation
8. *Chevron* – 2 step test
9. “Step 0” is passing the initial threshold of whether you can even get to *Chevron*

MASTER CHEVRON GUIDE

Justifications for Chevron deference:

1. Congressional delegation
2. Agency expertise
3. Political accountability.

**ChevronTest**:

1. Step 0 (*Mead*): Has Congress delegated to the agency the general power to issue interpretations which carry the force of law and has the agency has exercised that authority in issuing the interpretation at issue:
   1. No 🡪 Don’t go on. – Use Skidmore
      1. Skidmore – agency interpretation is not binding but court respects it due to the agencies experience and expertise in making informed judgements. Amount of respect given based on
         1. Thoroughness of agency consideration in its interpretation
         2. The validity of the agency reasoning
         3. Agency interpretations consistency with earlier/later pronouncements
         4. Other persuasive powers of the agency (procedural defects like lack of notice/comment? No precedential value to other interpretations?)
   2. Yes 🡪 Go on to Step 1.
2. Step 1: Did congress address the specific statutory question directly?
   1. Yes 🡪 Express delegation: you must follow the statute. Move on to Arbitrary and capricious
   2. Yes 🡪 Implied delegation: is the agency interpretation reasonable? (similar to step 2)
   3. No 🡪 Move on to step 2.
3. Step 2: Was the agency interpretation reasonable?
   1. Yes? 🡪 Courts give deference
   2. “Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute”
   3. No 🡪 Skidmore!

**Auer Deference** – Super deference for an agencies interpretation of its own interpretations