**Legislation and the Regulatory State**

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**Where do Agencies Fit in the Constitutional Structure?**

**Why can we even have agencies?**

Art II §2 c.2 -> appointment clause “all other officers” -> implies agencies.   
 c.1 -> May Require opinion in writing of principal officer of head of exec dept.  
 c.3 -> Take care that the laws be faithfully executed and commission officers of the U.S.  
 Note that this is a Shall obligation, implying power. Also written in passive, implying   
 control of a bureaucracy executing laws  
Vesting Clause -> “vested with the executive power” in art II, unclear if this is an independent grant of power or a mere reference to powers described later. Former approach seems to be the one in Art I and Art III, but seems easier to assert here.   
A Congressional role is implied the language saying offices “created by law”

Art I §8 -> sweeping clause, allows for necessary and proper and all laws needed to “carry into execution” the preceding §8 congressional powers.

**And what do they give us over the other branches?** Expertise, Fairness and Rationality, Interest group representation, political accountability, Efficacy and flexibility, Coordination, and Efficiency

**What Kinds are there?** There are **Independent Agencies** and **Executive Agencies**. Gap not as large as it seems as **Strauss** notes. Internal structures are frequently the same, civil service dominates, sometimes created for politics, sometimes to escape them (like for money). There’s presidential control indirectly, through appointments and budgets, and DoJ rep in court, though even executive agencies can contradict the president or resist with size of the professional civil service. politics over all of this. Remember the civil service is far larger, and the levers on them are indirect, and the relationship with the appointees affects agency success and personal success.

**What about hiring and firing?** The Constitution says impeachment for officers, suggesting under experssio unis that you would need to be impeached, but no one buys that, saying this is better seen as the only way that Congress can remove, but not the president (power to fire heavily debated in the first congress. Decision of 1784 gave the president the power to fire.) The President needs to be able to manage the officers, and so the right to fire is an implied power from faithfully execute. Recess appointments are covered in Art II, §2 c.3.

According to the Constitution, there are 2 kinds of civilian workers: **principal officials** and **inferior officers**, but other employees come in under the necessary and proper clause, legislatively as civil service. (the SC has upheld the idea that they can be fired only for cause)

Personal loyalty to the appointer, the prez, gives the executive power, but it raises a question of whether the Senate should just be a rubber stamp. Two basic issues here: legal issues and policy/practical issues. Since the 80’s the WH has played a more aggressive role below the agency head level, helping to ensure loyalty.

Congress’s influence comes in other ways. They can refuse to let the president appoint at all, as Art. II §2 c.2 says that Congress MAY appoint w/prez, dept. head, or courts. Diluting presidential power at the cost of their “advise and consent” role. The Classic example here was a special prosecutor outside the DoJ, appointed by the court, but these inferior officers have a boss and less power.

**Meyers and Humphry** – Meyers’ firing of a senatorially protected post master saw the SC rule unconstitutional a boost to presidential powers. In **Humphery’s**, FDR tried to fire an FTC commissioner, but the SC said that the firing was invalid, allowing Congress to require firing for cause. {check}

Reconciling these two cases can be tough. Several options. 1) least important is that they were different **kinds of jobs** with the postmaster being purely executive. 2.) Different **kinds of restriction**: you can’t fire without the congress [which was not allowed] v. you can only fire for certain reasons. 3.) Subjective question of **how much interference there is in the president’s job**, so the State dept. couldn’t be replaced with an independent agency, but there’s no bright line here.

See also **Public Company Accounting Oversight Board(peekaboo)**: part of the SEC members are appointed by the SEC but firable only for cause and by the SEC. Raises two questions:

1. Is the SEC the head of a department for article II purposes? Or is it something other than a department, but allowing it is in keeping with the structure. SC says you can be a department if you are a free standing component of the executive branch.
2. For cause removal is now double, diluting presidential control. Supreme Court has forbidden “double” for cause.   
   Notably nowhere in the SEC statute does it say they can be only removed for cause, but the other side stipulated this

Congress can also qualify an appointment: party balance requirements are the big example here, but there is a constitutional questions, and you probably couldn‘t force things the other way.

Lastly Congress can have an impact through **Advise and Consent** Process. The legal issue here is what does that mean. Does it require meeting before? Not much case law, just practice, which ebbs and flows. District judges are basically picked by the president and home state Senators, while the SC is very different, usually the senate is pretty deferential on cabinet appointments. Only 15 of the latter have ever been rejected, half as many as SC nominees, but sometimes people withdraw or are just filibustered. Note that the NLRB is probably the most politicized agency, and it’s hard to point to the expertise they provide, but now they can’t reach quorum after an SC ruling and the filibusters. The ATF has had an acting head for 6 years.

**Recess Appointments and Noel Canning - Art II, §2, cl.3**-> basic idea is what to do if they are in recess. Senate was once gone 6 months at a time. Today the problem is inaction, not absence, different from the original purpose. For the NLRB they were appointed on 4 January, so they get two years instead of one year, since you then get a free session. **Noel Canning** did not address the recess appointments of Art. III judges, which creates a problem because of the need to remove them. But it did answer questions on What is a recess and what does it mean for a vacancy to happen?

Now recess appointments are invalidated, so the question is does this apply retroactively? Court will be explicit and it usually does not. There is also the **de facto officer doctrine**, which says that if someone acted in an official capacity despite the later discovered legal defect, their decisions stand. NLRB is going to ignore this until the SC weighs in, but legally a defacto repeal of the law, same as de facto repeal of not appointing.

What is a recess? – two kinds, intra-session, inter-session, Noel Canning says that only inter-session recess allows appointments, but before the ruling intra-session recesses of sufficient length allowed this. The case emphasizes “the” recess vs. the possible alternative of “a recess” this is the less controversial prong. They also bring in the “next” session, suggesting it creates a dichotomy and ensures the Senate has a chance to evaluate the position w/o it lasting too long, though it’s an edge argument.

What does it mean for a vacancy to happen? – Most natural is “arise” during the recess as court hold here, this is a bolder claim than the above. Many say happens just means exist. Focusing on purpose, not language, but despite its popularity, it is counter textual. The one textual argument in factor would be that happen meaning arise would allow prez to sit on it and then dodge advise and consent.   
  
pro forma sessions also played a role here, court rejected the idea that they shouldn’t count.

**Why Regulation?**

**Can’t we just rely on the markets plus common law?** Markets are one way to structure decisions, but contract law may produce unacceptable outcomes. Torts can regulate and contracts too can help markets, so is regulation needed? Consensus says no. limits of Courts may not allow effective use of torts because of requirements of proof and the costs of a suit, and the problems of widespread small harms, or latent harms. Also, courts are reactive, not preventive and some defendants are judgment proof or protected by statutes of limitations. There is also a Kantian dilemma, where it is hypocritical not to act as you believe, but the consequences of individual action are irrelavent, and so does it matter if you don’t live up to your ideal?

Specifically:

1. Not all harms are compensable (McPherson killed privity, but can still only recover for negligence)
2. Difficulties of Proof
3. Difficulties of Causation, especially in toxic tort situations
4. Difficulty of ID’ing defendant and getting paid
5. Latent harms/SoL
6. Bad Incentives. Wide spread, but small, harms are free.

**McPherson v. Buick** eliminated the privity rule in Negligence Suits. **Rochte** showed the attention paid to this by businesses.

Basic tensions in Common Law v. Regulations

**Compensatory v. Preventative** -> Overstated at times, regulation doesn’t exist until problem emerges, and court cases influence future cases.

**Actual Harm v. Risk of Harm** -> Most modern regulatory regimes are about controlling risk, so they’re about protecting everyone, not compensating the few who actually suffer. This is a question about how the harm is defined

**Institutional Competence** -> judges and juries are Non-expert generalists, but legislatures and agencies can have significant expertise.

Free market environmentalists say tort law and nuisance can be enough, with no need for the EPA or car safety regs, since the market will provide. But, to a certain extent this is how the system works now, but w/regulations setting a floor, which prices some people out of the market but with others paying more than they want to pay. But, like with Dolphin safe tuna, why isn’t the market allocation acceptable? (The Tuna case was easy for the market because charismatic megafauna make a good narrative, the cost was low, and the link was direct.)

One answer to that can be found in airbags and their inherent complexity. Or in medical disclosures, which people will ignore usually. There’s also the issue of cognative bias (n. 3, pg 78.) people are bad at understanding risk, and then decide poorly even w/all info available. (but should govt respond to this?)

See **Breyer** on market failures

**Externalities**, which people seek to internalize through law, he calls them **Spillovers**). Recall negative externalities are when the harm exceeds the benefit creating a failure positive externality is when something would be worth it societally if it were undertaken, but it won’t be because the gain can’t be captured. Most of Breyer’s other arguments here are outdated. This includes his focus on the **traditional economic rational** for regulation, which was monopoly (shortages, income transfer to address monopoly pricing, ensuring a fairness counterweight to monopoly power in courts and in politics) as well as **Rents** (which even he doesn’t buy, except in extreme situations or when justified by other policy reasons like transferring to some consumers out of “fairness” due to regression or surprise) There’s also:

1. Inadequate information
2. Unequal Bargaining power
3. Rationalization (meaning industry planning)
4. Moral Hazard (like in healthcare, where costs are hidden and distorted)
5. Paternalism
6. Scarcity (meaning avoiding the market entirely for policy reasons, think a sudden famine)

To justify a regulation w/o appeal to consumer preferences must look to Economics and Externalities. The Key question here is do consumers really care about externalities. Note that in addition to positive and negative externalities there are also **Pure Public Goods** (Non-rivalrous and non-excludable; national defense is the classic example). For libertarians, this is the maximum government role, since markets will never produce this because of transaction costs and Free Riders, as people want it free, but don’t want to be the sucker.

Breyer notes four justifications: [look at the class notes for this] externalities and information are the most important. The first two are “traditional” and less important in the modern era. We now prefer to let markets mostly run. Other issues include **Rents** and **natural monopolies**, which are cheaper in practice, but lack of competition which skews incentives.

There is a question of whether labeling really is regulations. You can ban false claims, you can force disclosure and you can direct regulation based on information asymmetry. The last would clearly be regulatory, but the other two arguably are nore.

**Cass Sunstein’s Article**

Argument that consumer preferences don’t always lead to the right outcome because consumer preference and citizen preferences can diverge. **Driven by 4 factors**: **aspirational** **goals** fulfilled through the collective, **altruistic** aims met through politics, using politics to vindicate **second order preferences**, and desire for **pre-commitment**. The last is most important (bottom of 80) rating citizen’s preferences v. consumer preferences (think broadcast reqt’s) it’s paternalistic, but can be thought of as self-paternalism based on the idea of pre-commitment.

Sunstein believed in **Social Justifications**: maybe you just have a right to a safe car? Or maybe the market can’t effectively provide anti-descrimination protections? Or maybe some things the market might produce would be irreversible once produced.

**Regulatory Tools**

Types of Regulation

1. Standards – actual direct requirements can be the three categories below. Entities usually know more, making performance better, but design regs prevent unintended consequences and are easier to enforce, but performance still more common.
   1. Design/technology specification (have x type of airbag)
   2. Performance standards/emission limits (driver must have XX change to survive crash)
   3. Ambient/Harm based (pollution specific, certain content in lake) **New York v. U.S.** said that states did not have to comply.
2. Product Bans/use limitations – No PCBs, or PCP for that matter. Usually congressional. EPA once tried to ban asbestos, but failed. Speed limits are use limitations, as are seatbelts
   1. This, like standards, are Command and Control Reg {I think standards}
3. Marketable allowances/Taxes: Cap and Trade. He put up the two smokestack example. Some reductions are gained more efficiently. Taxes end up working the same way (with people lower to the extent it is economical). Some say that this makes monitoring easier, since there is a stake in effective enforcement for emitters now. Seen as preferable to command and control in harnessing market forces, but the weakness is that it gives up control. It also can create geographic hotspots were local problems are severe. There is also a question about creating a “right to pollute” that raises moral issues. Built in is some will do better, and some worse, and you need to deal with the worse, so for something like car safety, you may want a floor, not just a cost.
4. Challenge regulation/environmental contracting – offer a target and let the regulated try to meet them, off w/ a waiver of some kind
5. Subsidies
6. Deposit/refund – like a bottle deposit.
7. Liability rules -> like requiring drivers to have insurance, strengthens the common law.
8. Planning or analysis requirements – like needing to make an environmental impact statement.
9. Info disclosure -> like requiring crash tests and enforcing labeling. Recall discussion of if this really is a reg. Can be design based or performance based or a mix.

**The Legislative Process**

All regulatory agencies are created by statutes and bound by them. Thus, analysis here often begins with reading the statute. Note the major theories of the process are:

1. **Olson’s Public Choice Theory**- large groups hard to organize so interest groups have the advantage, assumed congress people pursue re-election, means politics dominated by seekers of private goods
2. **Social Choice Theory** – Arrow’s theorem leading to cycling when there are paired choices.
3. **Positive Political Theory** – Game theory comes in, statutes develop for many players, not just the legislators , but also the president or median legislator, or even to anticipate future judicial action.

Note that **veto gates** are why so little material becomes law.

1. **Bill Introduction**-.
2. **Committee action-** may go to more than one commitee. Hearings can be held. They can markup, and it may be reported by committee with or without amendments or recommendation on its passage. The House as the **Ramsayer rule** requiring committee reports specify all the changes made to existing law. can also just let legistlations die.
   1. **Senate Report Exemplar**
      1. Purpose and Need
      2. Scope of the Bill
         1. Describes what a motor vehicle is, and what motor vehicle safety is, reaching those in and around cars, as well as those that must deal with non-operating cars.
      3. Interim and Revised Standards
         1. Says how often standards are to come outThe goals is to say what to achieve
         2. In making a standard, reasonableness must be considered, as well as the type of vehicle.
      4. Penalties and injunction
         1. Gives an example of the maximum penalty in terms of a ine.
      5. Inspection, Records and Reports
         1. Describes what is in the bill
      6. Effect on state law
3. **Floor Scheduling-** Some legislation is privileged, committee leader can call those directly to the floor. The majority has the primary scheduling responsibility.
   1. **The House –** here minor and major legislation work differently. Major bill mostly go to the Committee on Rules to request a resolution in the form of a rule that provides for consideration of the measure by allowing the speaker to move the house into **the committee of the Whole**, **special rules** can be highly specific to the legislation. This includes the **king of the hill method.**
   2. **The Senate –** Bringing up a bill requires a motion to proceed to consideration by the majority leader, usually done with unanimous consent. motion to proceed is itself debatable, and can be filibustered. Rule 22 sets out a time consuming method to break a filibuster.
4. **Floor Consideration-** most minor legislation just passes through voice vote or unanimous consent.
   1. **The House-** The committee of the whole has special rules, The committee of the whole can’t pass legislation, so if it goes through it gets reported back to the house. It is then called as a previous question, meaning no further debate occurs amendments can be approved as a block or one by one. If a motion made to recommit to committee fails there is a vote
   2. **The Senate-** no detailed rules for debate and amendment.
5. **Resolving differences between houses**- the legislation must be approved by both, in identical form, before going to the executive. This can be done by having one house adopt a measure from the other house. They can also hold a conference, where disputes can be resolved, and returned to the houses for approval. The latter is preferred for complex legislation. The presiding members appoint the conferees, an average one have 12 reps and 10 senators.
6. **Variations-** things like trade bills get fast track, limiting debate. There is also a special procedure for fiscal policy.
   1. **Title**
   2. **Enacting Clause** saying that it is law, and stating the purpose
   3. **Short Title** the Popular name, or short name, often an acronym.
   4. **Statement of Purpose, Preamble, and Findings**  sometimes includes facts that serve as background.
   5. **Definitions** typical, but not universal, they are operative language
   6. **Principle Operative Provision** The heart and soul of the statute, what it prohibits or imposes or requires.
   7. **Subordinate Operative Provisions and Exceptions** Others separate from the main one, or exceptions like nothing shall be construed to do X. that can also just be in the principle section though
   8. **Implementation provision** – The legs and arms to the operation’s heart and soul. Enable it to do what it wants, through things like sanctions, can be integrated into the operative provision.
   9. **Specific Repeals and Related Amendments** not required
   10. **Preemption Provision** bars the application of state law, with power from the supremacy clause, optional
   11. **Savings Clause** The opposite of a preemption clause, like saying compliance does not alleviate tort liability
   12. **Temporary provisions** limited duration portion of the law
   13. **Expiration date** a sunset clause, exception though
   14. **Effective date** rarely can apply retroactively.

**And after it passes?** When a law is passed, it gets a public law number, sequential session of Congress-# in that congress. When passed it is free standing, then it is taken and put in a collection, like a case in “statutes at large”

Titles in the act have nothing to do w/ the U.S. Code, were titles are named and #’d and organized alphabetically. A special office in the House of Representatives decides where best in the titles to fit statutes. Non operative provisions are cut out, but operative provisions, including purpose, get codified.

Statutes always start with “an act to” can have a statement of fact, and purpose. Audience can be layman, later interpreters and interest groups who may want a symbolic victory. Not all laws have titles, which are for organization. Cited as provides a popular name, if practice doesn’t provide one. The habit now is for it to be an acronym.

Definitions are important, and tell an agency what I actually must do as well as constraining it.

Note that in the sample statute for NHTSA, the secretary could establish “**by order”** which is something produced by an adjudication, this may have been a mistake, and was later changed since it should allow promulgation of rules §108 is what actually applied to manufacturers, saying they couldn’t make bad cars. The act gave enormous discretion in creation of these rules, saying only that cars should be reasonably safe, which is ambiguous. To define it you could look to hearings, to what people worried about, or a balance or a C-B analysis. The act also laid out a **statutory standard** to guide the **regulatory standards**, here that standard was **practicable**, **Motor vehicle safety**(defined in statute), and stated in objective terms.

This reflects how to make a reg: **Problem -> tool -> stringency -> target**

Picking that up more generally, there are three recurring approaches to how to determine an “unreasonable risk” or just to how best to make a regulation.

1. Balancing -> Cost v. Benefits, can be more or less quantitiative
2. Do your best -> regulatory standard at all you can, just short of impossible a “best available tech standard”
3. Safe has meaning: definitional approach, define a minimum, for NHTSA maybe eliminating accidents, though statute pulls against that when it notes in other places that accidents will occur.

Also, which of these three is easiest, generally, best-available is easiest, and balancing requires you to know even more than “safe”

You could try to define “unreasonable” maybe as **Too Big** (no more than x parts per million) or as **avoidable** (similar to do your best) or **disproportionate** (not cost-benefit justified). Courts generally read unreasonable, as in the CAA, as requiring the Too Big standard, but here, practicable could lead you to put the bar below best.

Regardless of which is chosen, the agency clearly has enormous discretion, and the regulatory content at the time of passage is totally undefined, save for the time frame on producing the standard.

§103(d) on pre-emption stys states can’t set their own standards, harkening back to the supremacy clause (states were allowed to set standard for own purchases) this is why city couldn’t regulate private taxies, also explicitly did not give you a defense to tort liability for following NHTSA regs. (f) talks standards, (H) gives the deadline  
§105 allowed judicial review, including **pre-enforcemnent**, with 60 days to go to court, and specifying which court would handle appeals.   
§108 actually deal with private parties, mandating that they follow the standard (A)(1) focuses on manufacturers, not dealters, who are held only to do care, in §107, rules apply onlt to initial sales or resale, not to individ owners  
§109 penalties – fines for non-compliance, has to be a provision establishing this, agencies can only do what’s been authorized.   
§110 injunction allows agency to go to court for injunctions jail violators  
§111 repurchases and recall  
§112 inspection authority  
§113 Notification fo problem  
§114 certification req  
§115, creates the now NITSAA, headed by Senate confirmee  
§119 rule making authority  
§120 reports to congress  
§121 appropriations. This is the authorization, appropriation committee still actually needs to do this.   
§126 specifies performance and not design standards. Need to take costs into account and balance it with risk, helps to explain and shapes interpretation.

Miscellany:

1. **Soda Regulation Discussion**- Paternalism and precommittment, case was a preenforcement review, which became the norm for agencies in the 60’s
   1. **The court decided-** thatit was beyond their rule making power, since it was a health department reg,
   2. **Also –** called it arbitrary and caprcious, meaning that of itself won’t achieve goals and is unfair.
   3. **Was an –** article 78 proceeeding, which is NY law which allows you to challenge agency actions, like §706 of the APA.

**Non-Delegation**

Agencies enforce, write rules, and adjudicate. They are doing tasks assigned to other branches of Gov.

**So what does the Constitution say?** Art I §1 says that ALL legislative power is in Congress. But why keep it in congress? There’s a tension between a “better vs. a “more democratic” decision, though in some cases more democratic is better. Democratic responsiveness of Congress as opposed to those in the “bowels” of an agency (can depend on how cynical you are about elections.) Agencies might, however, have greater technical expertise and time to investigate, but that does not apply to all policy decisions.

The black letter is that there must be an **intelligible principle**, something that constrains, but this ALWAYS exists. Only two laws, both in 1935, have been struck down on non-delegation. Ever since the SC has always found an IP. See:

**American Trucking** – NAAQS and the EPA Scalia argues by analogy, also notes that constraints exist. DC circuit decision had people on edge for ruling against the EPA and saying the agency should write the rules and for saying that the agency should write the rule to bind itself, which the cir. Court though got 2 out of the 3 goals of being bound. But the SC totally rejected this approach, acting exactly as predicted, saying there can be a need for criteria, but there is no demand, as the court of appeals asked for, that there be a determinative criteria for saying how much of the harm is too much. Thomas wanted a reconsideration of the standard, but no one had asked for it.

For non-delegation, a principle is always found. And the SC is not interested in giving the doctrine teeth, partly because it’s not necessary, and partly because questions of degree are hard for the court to resolve, something that Scalia and **Dick Stewart** avowedly support. There is a bit of a spat where Stevens says we should acknowledge that legislative power is transferred, while Scalia says that such a thing is not occurring, as that would not be acceptable, though we can acknowledge that no law can be executed w/o some judgment calls. All sets of instructions are, by definition incomplete. Note that **Yakus v. U.S.** highlighted notice at the core of this. It may be that the point of non-delegation is not constraint, but Congressional involvement {go back to this}

**State of the Union** is a constitutional requirement, but with lots of interpretive breath, just look at the presence and prominence of the speech component. Seperation of power also comes up sometimes, like Alito’s not true moment.

**Mistretta** – was the case on sentencing guidelines, where the sentencing commission was formed of three judges and some presidential appointees. Challenged as a non-delegation issue, since the commission could come up with anything. The SC rejected this argument, saying that there was enough guidance, Scalia Dissented, saying since it only did something a legislature would do, it was a mini-Congress, and thus shouldn’t be allowed.

**Epsteing-O’Halloren – Non-Del and separation of powers** – some statutes are very detailed. Several factors drive how detailed congress makes the law, including things like:

* Whether Congress’s party and the prez match, despite the fact that this seems short sighted. You could create an independent agency, defraying prez’s influence, might drive their creation, could also do it to avoid one side or the other taking partisan advantage, like the FCC, where congress recognizes that some questions, if some policy questions are assumed, might just have “correct” answers. However, these days most agencies are executive, since the idea of technocrats with the right answers has fallen by the wayside.
* Information costs of time and expertise in developing the necessary background and data, so more complex questions requiring more expertise will go to the agencies.
* Nature of the relevant committee, since they have outsized power in shaping the agency. The less representative the committee is, the more power goes to the agency {check this}

**Bressman** – Agency needs to tie its own hands, since arbitrariness (favoritism, self-dealing, abuse) is the key concern. But what is the non-delegation problem. If it’s about democratic involvement, self-imposed rules don’t help. Also it might be written to not really constrain. Regardless, American trucking rejected this. The argument had 3 justifications: increased accountability through better oversight, forcing Congress to make the basic choices, and reaffirm rule of law.

If you are writing really specific rules, it may be asking too much of congress, and find that even having congress decide doesn’t really advance democratic aims. Do we think congress read or understood the detailed coke oven rules?

**Schoenbrod** is really only asking congress be forced to make fundamental, hard decisions, like what does safe mean, for clean air purposes. His point is that Congress needs to step up. There is also the rule of law issue and, w/o constraints, a bias/abuse issue. Prolongs disputes since things take longer, are more complex, avoid accountability, lead to agencies wasting effort only to be undermined by Congress. He thinks delegation is like deficits, wants more non-del.

**Mashaw** - It is reasonable to allow the congress to decide that a general agreement is enough, and that details can be worked out later or elsewhere. The democratic constrain remains in place either way. Remember that statutes, even without delegating, can be confusing and self-serving. If anything, laws that delegate are easier to understand for voters because they are more general and thus simpler.

**Rubin** – Delegation not really the proper term, since it’s an exercise. Rulemaking isn’t the legislative power, it is part of implementation. Effectively saying that it just isn’t a problem.

**Reading Statutes – Holy Trinity/Tools and Theories**

**Holy Trinity v. United States** – Way ahead of its times in terms of approach, but also highlights the central problem with approaches that go beyond the text. They are trying to get a minister to come over, signed a contract and brought him over, but ran afoul of an act passed in 1885 that prohibited facilitating bringing foreigners over for “labor or service” of “any kind” Note that it’s any person, any alies, and was clearly written to be broad.

Also, §5 gives specific exceptions, so there’s an expression Unius argument, since ministers are not listed (although it also reinforces the idea that it’s about economics, not about preventing “people like us” from coming over. §4 of the law prohibited boats from bringing, knowing, any alien laborer, mechanic, or artisan, contracted to perform services in the U.S., much narrower than §1 and does not seem to apply to the preacher, so could tell us that §1 is broader, showing it could have een written narrower, or you can say it should have covered the same people. Could use In Pari Materia, meaning it should be read as of the same scope, but this is supposed to be applied only to avoid absurd results [note this section lacks exceptions, but section V would still apply.]

Judge says statute not meant to apply to “brain toilers” but section give still seems like exception for brain toilers. Could argue that a breach is a type of lecturer, but judge’s bias might prevent. Or you could view the four exceptions as one group under noscitur a scoiis, so read the list as though there is something common among them, like there being specific people you contract for.

**The judge acknowledges he likely loses on the text**, but asks us to move outside the text. Starts with title, noting that it’s about labor, and titles do have some value.(**leg history**) Also notes legislation is trying to solve a particular problem, the importation of workers and the driving down of wages.(**Purpose**) Thus, reading it to apply here does not durther aims of the statute.

Important to distinguish PURPOSE, the issue the legislature is addressing, from INTENT, which are the means/meaning congress intended on the specific question. Using purpose can be dangerous, court could get it wrong, and there may not be such a thing as a uniform purpose, or you may go farther and use a means that was controversial or go further generally than intended (nix v. Heddon)

IN this case he also uses legislative history, the committee report, to show that they suggested changing it, but decided not to because it was late and covered, but could argue the house, having already passes it intended the broader language. But should we take this report seriously? However well it supported the outcome if they didn’t change the language. It comes down to whether we but the thing on their not being enough time (which turned out to be untrue).

And then there’s the Christianity stuff. As a “**faithful agent**” he is arguing he can’t do something congress could not have wanted to do, or is he acting as a protector of what the Congress should have done, whatever they wanted. Should this stuff even be in the opinion?

**Reading Statutes – Ordinary v. Technical Meaning**

**So which do you use?** No single unified theory on which to adopt when. Usually established meanings at common law will be used, at least presumptively, but courts consider the audience, so if there’s an industry understanding, or if the term is used in a technical context, that might change things. Criminal statutes usually get the most straightforward interp.

Substantive canons can be at play here: We could say we are a nation hostile to taxes, keen on being representative, so we read laws against the taxer or a similar pro-trade canon? Is this like the Christianity argument?

**Deciding Between Ordinary and Technical Meaning - Nix v. Heddon** – Is a tomato a fruit or a vegetable? Could look to the ordinary meaning or to technical meaning. Court goes with ordinary meaning, since it is **more likely to actually match congress’s intent** and **helps with notice**, assuming a non-technical audience. Another reason is if we agree that’s the default it helps assure uniformity of decision. But should the inquiry stop with the definition, should you look to purpose? (so a vegetable because it increases revenue? And what if there’s a secondary or different purpose?)

**Choosing Between Ordinary Meanings - Muscarello v. U.S.** – Competing ordinary meanings, apotheosis of **dictionary fetishism**. Asked what carry mean “during and in relation to” majority says guns in a trunk count, everyone says ordinary meaning should apply, but which one? Can use dictionaries, to see if there’s a more dominant meaning, but is that really helpful in this context? This is Ginsburg’s “carry a firearm” vs. Scalia’s “carry” it’s why it’s hard to let dictionaries just pick which meaning wins, but middle ground is dictionary can be used to confirm a meaning is possible. 30 years ago that’s all they were for. Breyer ultimately voted to break the tie based on purpose, and afterwards congress changes the law so it explicitly reached this circumstance. Note that part of Breyer’s argument was that the different definitions needn’t be **limiting** and could coexist, bolstering majority argument that it reached, especially given his supplementing it with purpose. He also has a very high standard for the doctrine of lenity, which is only being able to guess at intent and grievous uncertainty.

**Interp. Checklist/Canons of Construction - Overview**

**Checklist**

1. Is there a plain meaning to the text.
   * 1. Ordinary
     2. Technical – Nix v. Heddon -> were legislators intending this.
     3. Common law – Babbit -> like take in sweet home.
   1. Look to the word as part of the provision, linguistic canon
      1. Last antecedent
      2. Punctuation
      3. Grammar
      4. surplusage
   2. Whole act canons
   3. Substantive Canons
      1. Rule of lenity
      2. Federalism clear statement rule
      3. Remedial Purposes Canon
      4. Presumption against pre-emption
      5. Presumption against retroactivity – for criminal acts its uncons, and could have due process even otherwise.
      6. Constitutional avoidance
         1. This is uncons, so avoid
         2. Grave question, so avoid. {does this apply only to statutes.}
      7. Against extra-territoriality
   4. Scrivner’s error, absurd.
2. Legislative history
   1. How likely is it that this influenced the voting of the actual bill, and expertise
   2. **Moore v. Harris**, how much do we weight later Congress’s intent vs. current congress.
      1. Intentionalism
      2. Purposivism
      3. Textualism
      4. Legal process purposivism – objective standard for reasonable.
      5. Imaginative reconstruction
      6. Dynamic interpretation – better notice.
      7. Desueteude

**Overview**

**Babbit v. Sweet Home** – Regulation defines statutory term, question is: is that term consistent with the statute? Statute says that no one shall “take” a protected species, which is already trouble since species are not taken. Statute then defines take with a list of terms that include harm. The regulation defined harm to include habitat modification. First the court looks up harm, comes out as to cause hurt or damage, to injure, Scalia’s dictionary has that as only the broadest designation, with others being to impair soundness of body.

Scalia appeals to Ejusdem Generis and noscuittor e sociis. majority counters that some are direct, so no common trait.

Majority also raises the whole act canon. (also “**congress does not hide elephants in mouseholes**”){mentioned SS levy case} They note that the status quo ante was no protection, a danger in purposive is that you go the same direction, but too far.

Stevens also looks to surplusage, saying if harm does not cover indirect, than why is it there, which is in tension with Ejusdem generis. Scalia also points to the traditional definition to take as a common law term of art, and knowing how it is being used.

Steven rejoins with another part of the statute allowing for incidentally taking permits, if this activity were not prohibited, the waiver would be meaningless, but this depends on their being one definition of indirect that includes habitat modification, but trapping would be an example, since it could accidentally take.

Note that this case is also about using the Common law meaning of phrases in the text, even before canons.

**The Linguistic Canons**

**Ejusdem generis -** If a set of specific items ends with a general term, then the general term is confined to covering subjects comparable to the specifics preceding it, so long as the list is susceptible to being regarded as specimens of a single genus or category.) Like Noscitur a sociis depends on the ability to recognize patterns, which can be at times an extremely subjective and culturally dependant.

In **Ali v. Federal Bureau of Prisons**, where claims against “any officer of customs or excise or any other law enforcement officer” for loss of property were statutorily barred, and the question was whether that applied to a Federal prison employee. There, the court disagreed with the way the plaintiff used ejusdem generis, saying that the structure of the phrase (disjunctive) did not work with that canon, **since it was disjunctive**, with one specific and one general category, rather than multiple specific items, comma delineated, and then ended with a general term, undermining the assumption of ejusdem generis that the legislator was focused on a common attribute when using the phrase. More importantly, in this case, it is unclear what the common attribute would be. Contrast with **Circuit City**, where surplusage combined with EG to limit how broadly you read the last term.

Contrast **Keffeler,** where the court did use it, saying where general words follow specific words, they are construed to embrace only similar objects in nature, which is also the language in circuit city, meaning that “legal process” meant something like garnishment, not any process.

**Noscitur a sociis -** “a word is known by the company it keeps.” The goal is to ensure that the reach of a statute does not unduly expand, and in many ways this can be seen as an application of Ejusdem generis. Like ejusdem generis, **it doesn’t apply absent a common feature** to link terms around the one in question.

**Dolan v. USPS** is one good example. The USPS was trying to say immunity for “loss, miscarriage, or negligent” transmission of letters or postal matter saved them in a case where a guy tripped over something left on his porch. The Court notes that a word need not be taken to the limits of its definition, and here the link is issues related to loss of mail, not misplacing a bag. **U.S. v. Williams** was a SC case, to determine breadth of a child porn statute, since it included promotes and presents on a list of banned acts. The court read the words as more limited than if viewed in isolation.

**S.D. Warren** - the court refused to apply it in determining if water was a discharge under the Clean water act, since the term was not defined, but said that when used without qualification it included discharge of a pollutant. The court said that **you couldn’t find a common feature from the one additional use of the term**, giving an example does not convert the original term into its narrower definition, especially in as complex and carefully worded a statute as the CWA.

**Expressio Unius est exclusion alterius -** “the mention of one thing is the exclusion of another”. Again justified when there is a commonality. It has force, according to the SC, only when the items are part of an associated group or series, **justifying a conclusion that unmentioned items were excluded by deliberate choice**, rather than inadvertence. **Chevron** has its own definition as well, saying you have to find a series of two or more terms that should go hand in hand, abridged in circumstance that support an inference that the left out term was meant to be excluded.

There are several subtypes of Expresio Unius:

1. If congress explicitly enumerates exceptions to a general prohibition, additional exceptions are not to be implied absent evidence of a contrary legislative intent.
2. When a statute says do a thing in a particular mode, it includes a negative of any other mode.
3. Specific to pre-emption, if congress includes a provision addressing pre-emption, and that provision is reliable on congressional intent, there is no need to infer intent from the substantive provisions.

**Punctuation** - One of the several linguistic canons. It is rarely enough to sustain or contradict interpretation on its own, but it can be used to confirm. A common instance of this is whether a word separated by a comma modifies a follow on phrase. The most famous comma question was the case of **Roger Casement**, who was “hanged by a comma”

Courts hold that language in a parenthetical is given less weight than language outside a parenthetical. In **Chicasaw Nation v. U.S.**, the court went with language outside, describing the language inside the parenthetical as being only for example purposes, and thus not binding, O’Connor disagreed.

**Last Antecedent Rule** - A limiting clause or phrase should be read as modifying only the noun or phrase immediately following. Think, “you can’t have a party or engage in any other activity that damages the house”. You can’t get out of it by saying that the party didn’t damage the house. However, like other canons, this can be superseded with other indicia of meaning. Those can be grammatical in nature, relating to verbe-tense issues or superfluous results. **Barnhart** is the example here, where they used it such that it didn’t matter that there were no more elevator operators, so long as you were healthy enough to do it (221) and **Hayes** is one where they didn’t because of grammar and superfluity if it applied only to deadly weapon and not also to crime of violence.

Also relevant to the linguistic Canons is the **Dictionary Act** – 1 U.S.C. 1. default, not absolute rules. First part says unless contrary indicates otherwise. Some reflect special interest, like fish sticks, and §7 is DOMA. {at end of notes}

Likewise, context matters. Meaning can only be understood in context, thing the dissent in muscarello. Textualists don’t act stupidly. Look at the stuff on bankruptcy, note tools of the trade are exempted, but one writing it is implements, which noscitur e socii and sets amount, undercutting the idea of pick-up trucks. Major versions are **Silence**, **Application** (meaning how the term is applied differentiating textualism from literalism, like “using” narcotics in **Smith**), and **Clues from Other Provisions** (defining tools of the trade. )

**Whole Act Canons/Whole Code Canons**

**Whole Act Rule**- look at everything, quickly shifts from a textual argument to a different one. This can come out when the same words are used throughout the statute, of course it could mean different things, this is just a presumption. “fans brought fans” obviously doesn’t require the same meaning. Based on an assumption Congress sees it this way.

**Comm of internal revenue v lundy**- Definition of the “claim” - used parallel section to bring in broader definition. Court looked to definition of claim by parallel use in a neighboring section.

**Gen dynamic v. Cline** – ADEA case where some age based rules wanted discrim on age 20 not to apply not only to old age but to all ages. The leg history was all about older workers and age in the BFOQ had age meaning age, not old age, but the court dismisses the cannon. **Surplusage** also comes back in different parts must do different things

Also here are **Titles and Provisos** which are generally not controlling or used to limit the text’s plain meaning. Can be used to break ties though.

**Whole Code Rule –** Look to completely unrelated laws to see how things apply (could say this is about showing the purpose, independent of the words)

**No repeals by implication-** not favored, and not presumed unless intention to repeal is clear and manifest. In some ways the opposite of the Whole Code impulse, it sees specific statutes as existing somewhat separately from general statutes, and thus protected.

**In Pari Materia –** Two or more laws dealing with the same subject matter read consistently, particularly if related closely in time, whether they actually deal with the same topic is key. Even a later act can be an interpretation of an earlier act, aiding in interpretation. But which do you read together? Actually arguing that there was an intent that they mean the same thing.

**U.S. v. Stewart** – Could taxpayers get a refund under a certain act based on the scope of an exemption? Two statutes had identical terms, and a predecessor of one was passed in the same year with similar language, so it counted.

**Erlenbaugh v. U.S.** is a contrasting case. There the decision involved two statutes enacted close in time. The court noted that like all Canon, In pari materia is about practical experience with legislatures using words with consistent meaning in a certain context. The two statutes in question here played different roles, one narrow, the other broader.

Also related is **Same Langauge/Inferences across statutes –** Not In Pari, but basically trying to fit the whole act rule in. This is an argument of last resort. Assumption about the legislative process that assumes that the word means the same thing.

**West Virginia Hospital v Casey –** Did reasonable attorney’s fees include expert witnesses. Scalia says no, since in many statutes that fee shifting was explicitly allowed, including one just after this. Dissent said that this ignored the purpose of this particular act. Scalia’s argument assumes that terms are always used the same, but you could assume **substantive** consistency instead of terminological consistency. You could at least ask the court to argue it. (but do we expect congress to be the same?)

**Remember Abner Mikua –** “the only canons we ever talked about were on the battlefield”

Also Remember **Santos** here**.**

**SUBSTANTIVE CANONS**

**Rule of Lenity**

**Why do ties go to the defendant –** It’s consistent with the principle of beyond a reasonable doubt, also consistent with notice, it is also unconstitutional under due process to be convicted without notice. Also the rule puts the onus of change on the party closer to the policy making. There’s something a bit incoherent about saying the rule of lenity is based on notice, since if notice is the issue, than that should be the rule

**U.S. v Santos –** Rule of lenity. Odd justice alignment, here the question was about money laundering and what “proceeds” meant. Plurality decides it is a hard question, and finding two possibilities, lenity wins. Dissent says that this frustrates purpose of the statute, but Scalia argues that is circular. Since neither party actually admitted to money laundering if it involved profits only as proceeds, they are released on lenitiy.

**More on lenity -** the big question is, how ambiguous is the statute. Alito used to be a U.S. Att and how do you take the fact of the judges may be doing insincere voting. If you see differences among judges meaning there is ambiguity (because how can one side say It’s not ambiguous if the other side disagrees.)  
Similarly, inertia as justification is interesting, but not normally part of interpretation, though it is here.   
Keeps courts from overstepping bounds and MAKING criminal law. And it would be more problematic to over rather than under criminalize, but is crime really special in this regard? And what if the intent was broader?   
In practice, lenity is rare.

**Constitutional Avoidance Canon –** two approaches:

1. **Unconstitutionality Canon –** If one is unconstitutional, and one valid, choose the one that saves the act. Old.
2. **Avoidance Canon –** one interpretation is valid, one raises a Con question, you choose the valid one. modern.
   1. **See Zadydas v Davis –** the indefinite detention of deportees case. “may be detained beyond” was ambiguous, (may suggesting only limited discretion)and so they erected the whole structure to avoid reaching it. But was it really ambiguous, and are they even avoiding the CON law question here, or are they answering it? In the dissent, Kennedy said **the Constitutional doubt rule is supposed to be limited to constructions that are fairly possible**, allowing a choice between equally plausible options, the majority reading is not plausible, being opposite to Congress’s intent
   2. Contrast **– Almendarez-Torres v. U.S.**, same justice, crime to return after deportation, 20 years if you were convicted of a violent crime. If it’s a sentencing enhancement it raises a constitutional question of whether that kind of sentence enhancement should be available to a judge. They ultimately say it is. Majority says those invoking the doctrine must believe that the alternative is a serious likelihood the statute will be unconstitutional, Additionally, the statute must genuinely be susceptible to two construction after, not before, its complexities are analyzed. Scalia counters saying the majority is wrongly interpreting the canon, **which requires not a determination of unconstitutionality, but a determination of serious constitutional Doubt.** Consider whether **ambiguity of statute** and **size of Constitutional Ambiguity** are not independent variables and it may be best to multiple them. {but is this good or bad?} Scalia dissented here, saying that a later amendment set forth “offenses” although this is out of character for scalia, though he is offering that not to prove intent, but to show that alternative interpretations are possible.

**Presumption against retroactivity –** No retroactive effect to statutes that burden private rights unless made clear by congress. Here, retroactive means it affects events from before enactment. In part this is just a matter of basic fairness. It can however be defeated if there is clear authorization

**Presumption against preemption –** applies in two circumstances: when a statute contain an express preemption provision and when it does not. In the former, courts construe the provision narrowly. In the latter, courts can imply preemption when state laws frustrate the federal scheme, or provide for mutually exclusive compliance, but they only draw this narrowly, to avoid a direct conflict.

**Presumption against territoriality -** Congress is assumed to direct its legislation only to actions within the United states.

**Federalism Clear Statement Rule** – Ask him about it. Federalism clear statement says that a court doesn’t read a law to interfere with state sovereignty unless the language clearly shows congress wanted that result. Presumptions are supposed to be a bit weaker than clear statement rules, since they are a default that can be overcome not only by clear language, but also by strong evidence. Note that this is different from lenity, and other substantive canons, in that it is not a tie-breaker, but a protection for the states and a requirement imposed on the congress.

**Gregory v Ashcroft –** ADEA case, suit is about the Missouri retirement age requirement for judges. First question is does it apply to state employees, which it does, but there is an exception for “policy making” level employees. Question is whether judges are in the group. Note that they go out of there way in the decision to avoid saying judges make policy. Note that this isn’t quite the **federalism clear statement rule**, we prefer to leave states alone, traced back to the 10th amendment, and that canon tries to get Congress to think it through. Dissent says that this is clear though, since it applies to the states and so exception doesn’t come in

**Scrivener’s Errors and Absurd Results and the Debate about Canons**

Scrivener’s errors are obvious typos, like December 32nd. Absurd results is more normative like in **U.S. v. X-Citement videos**, where the court said it was absurd for a law to allow prosecution of the postman carrying unopened mail.

**United States v Locke –** Sometime language is clear but seems senseless, here a small family business for decades is mining the same spot, but the court says that deadline are always arbitrary and so a line must be drawn somewhere. Also, no estoppel against the govt. Public interest in respecting the law, not a misstatement of the law?

1. **Could you have done Casey –** the attorney’s fees approach here to get around the plain meaning? Probably not
   * 1. **Might have been able to use-**
        1. **Absurd Result**
        2. **Unlikely result make me look for drafting error**
        3. **Invoke Background norms, like end of calander yrear or a broader norm like no traps for the unwary.**
2. **Recall Holmes –** “Do Justice!” “that’s Not my Job!”
3. **Cannons At WAR –** page 280. Llewelyn argued that the Canons can always be countered by an equal and opposite canon, like broad remedial v. narrow common law derogation. Also note Scalia’s disagreement. He thinks it’s not so terrible that there might be a disagreement among canons, and that while some might be opposite, not all of them are really like that.
   1. **Scalia v Posner –** Could have just said no animals, but should it let dogs in? Booth think it’s bad, Posner things it sinks textualism. He accuses Scalia of using textualism to answer a question that can’t be answered, what something really meant, and that it thus leads to confirmation bias through cherry picking and canons like lenity that are not textual. The response notes a difference between legislative history and *history* history.

**Legislative History: Conventions of use and Prospects for Misuse**

**The Era of Legislative History –** the 60’s and 70’s. Now much less common. Scalia won’t join part of a decision that cites it. The full list is on 286, with the top 6 below.

1. Committee Reports – highest position in the leg.his hierarchy. Written by experts and can be read more widely than the bill. But, are not voted on, do not reflect later debates, cannot be amended. The exception is conference committee reports, but they are generally less helpful since they address only the points of disagreement.
2. Author or Sponsor Statements **–** Reliable because prepared by a knowledgeable person.
3. Member Statements –Can be valuable, even if made by the “losing” side.
4. Hearing Records –Shows their info. But not for the whole congress, and not all known at the time
5. Other Legislative Statements –like leg his. from subsequent statutes, or amendments can work in whole code canon style. Sometimes this can refer to later statutes as though part of legislative history.
6. Presidential and Agency Statements – Think signing statements, which presume the president has read the bill which he may even have proposed., as might be the vase with agencies as well. But their interpretations, even if their job, may be strategically offered, or different from Congress.

**What are the Basics:** Item 19 on the list of legislative history says that the weight of statements is based on the speaker, people who vote against are outsiders, much like you or I. Both what’s said in Mark-up, and what they do matters. Legislative history can be used to illustrate PURPOSE (their goal) or to illustrate INTENT (what was in the head of Congress) **Member statements after passage** are the least valuable, almost Nil. **Committee reports** are the most important (since they are written by experts, to explain the meaning, and committees do most of the real work, this Ease/delegation/care/reliance) They are also at least theoretically less strategic than member statements.

**Moore v Harris** – Pneumoconiosis case, with the benefits presumptions. Guy is turned down on “self-employment” distinction. Agency says employee is a term of art and canon says apply it, but statute says employed is a more general term, and every other place says worked in a coal mine, so shouldn’t change in language have meaning? Two analogies applied: the dog that did not bark, meaning that the fact that the legislative history is silent on this point tells us something and that they wanted the terms to be used interchangeably {ask what this means – I think I know}

Big counter arguments are the early adoption of the interpretation and congress’s failure on re-enactments to change it (failure to amend). But the trick here is they may be misled, and later that actually did amend it (which dissent sees as controlling). Counter arguments here are that it’s irrelevant, bearing neither on the language of the original or its intent. Also, it’s a question of if they were just clarifying. this is an INTENT case, for majority, which argues they did not mean in that term what the secretary says.

**Look back at two cases** – First Gregory v. Ashcroft, then WVA Univ Hosp. v. Casey

* + - 1. **First** – Justice White actually looks to legislative history. This is an attempt to look into the heads of the enactors. Note that there is no legislative history for that act, but ot discussions of later amendments. But can you really impute that understanding from Congress to Congress? He tells a story from that, where Senator Irvine says it shouldn’t apply to judges, and it is amended to reflect that concern, you can also note that the committee response language isn’t actually the same, it may not actually have gone as far as he wanted, especially since he voted against it and it changed in conference.
      2. **Second** – in WVA, Stevens notes in the dissent that sometimes putting on “thick grammarian spectacles” can lead us to screw up, missing Congress’s intent

**Why not use Legislative History?**

* + 1. **Not the Law** – and judges should only apply the law
    2. **Not accurate** – doesn’t really describe legislature’s views, and can be manipulated
    3. **Indeterminate**- You can prove whatever you want, like picking out friends at a cocktail party
    4. **Costs** – high costs to lawyers, judges, and layman, and makes the law less transparent.

**Montana Wilderness Association v United States Forest Service**- Railroad owns land, wants permission to build a road. They rely on the Alaska Lands Act, passed after the arg began. So that’s the first wringkle, there’s a presumption against retroactivity, and there’s constitutional ban on ex post facto laws (but that’s only criminal), but it comes in because of the **Schooner Peggy Principle** -> which says that a court applies the law in effect at the time of the decision. This law isn’t a problem because it does not change the legal consequences of past actions.

There is a text argument saying that it is at least ambiguous, especially since you are addressing sections (a) and (b) to two different secretaries, explaining why there’d be a split.

The judge could have stopped there, but he goes on to look at Legislative history, which at first seems to go against the holding, suggesting it was supposed to be national, but he picks them apart and the author’s post passage statement could be strategic (think Mo Udall “the gentleman is absolutely correct”) the only part that directly applies is Udall saying it only applies in Alaska, but he submitted an amendment saying that it applied only there and it was rejected (though that can be interepted either way) also udall’s statement wasn’t made on the floor, but inserted later as R+E.

There’s also a “**dog that didn’t bark**”, in that they didn’t debate the issue during the Senate revisions aimed specifically at removing overbroad sessions, suggesting this is an attempt to fit the elephant into the mouse hole.

But, then in Montana Wilderness II they have to overturn, because they find more persuasive weight in the conference with the same guys, and here, like in Brown and Williamson, there’s reliance and thus “effective ratification”.

**Handling Societal Change and Dynamic Theory**

**Eskridge** – argues that we should read statutes dynamically as a descriptive matter, the other theories are incoherent and judges don’t really do this.

**Alienkov** He favors the archeology and nautical analogies with the latter as policy. The trade is a weakened controllingness of statutes in favor of current coherence, something that may well be the intention of Congress. This is related to **Synchronic Coherence,** which notes that norms change and fairness, justice, and notice require the law to change with them to avoid surprise. It’s the most plausible current meaning the words will bear. To lessen judicial freedom here, you can look at enactable alternatives from the modern Congress at the time of interpreting – **Elhauge (pg 362 n. 3)**

**Desuetude** is a related idea: that the judiciary can abrogate statutes, something often left to prosecutorial discretion. The idea is that the law doesn’t fit the modern legal framework, lacks majority support, and yet remain on the books despite infrequent use. Critiques are that it asks too much of the judge, and would otherwise be unconstitutional.

**Franklin v Hill** – Courting the person’s daughter, then getting sued. Raises question of whether a law can get to the point where it is so old that it should simply be discarded. Court ultimately invalidated based on sex discrimination, but concurrence said look to a bad premise, and disuse as Desuetude example.

**Bob Jones University v**. **U.S** – Unusual case, since the IRS adopted the stance against the exception and then changed its policy during the case, so the court had to appoint a lawyer. 501(c)(3) asks who is tax exempt for charitable orgs, and lists several groups ending with “or educational”, and there’s a similarly ended list in the definition of charitable. The court though goes beyond text, saying it must be for public policy in order to be charitable. A key question is whether, or to what extent, the intent of the enacting congress matters, since they passed this. Majority is saying that the purpose was to support public policy, which no overwhelmingly recognizes the evil of segregation

Charitable is one of several distinct attributes, so charitable doesn’t seem to be one of the reqt’s. Two textual ways around this: Say that Charitable colors the whole provision (but this is countered that it’s like using the title and it’s defined elsewhere) OR say Bob Jones is not charitable. The Argument here is that **there’s an overarching notion here**, and maybe a different approach where the judge is not a faithful agent, **but** **a partner in lawmaking**, The majority here is adopting a big picture view that is much like Holy Trinity. This is something like saying that courts should step in if Congress is pathological and thwarting majority will, connects to something like gerrymandering or correcting typos. See also **Footnote 4**, if burden falls on a group that can’t participate, a “discrete and insular minority” you must examine the law more closely, that is a **representation-reinforcing** judicial role, and it’s what Scalia flipped in the VRA oral arguments.

Easiest argument to make on allowing judges to update is that it’s what Congress wanted, think language like cruel and unusual punishment. Alternatively, you could do a Modest or robust version of statutory interpretation

**Sunstein** – Reverse Imaginative Construction - public policy through imaginative reconstruction with a twist, where you bring the Congress forward is the modest version. The Robust version is you disregard the enacting congress, particularly on an issue like race discrimination, and things are kept up with the time. It’s not about the current legislature, but how the passing legislature would pass with a present frame of mind,

**The Major Schools of Interpretation**

**Intentionalism** – Most common/mainstream. Based on faithful agent theory. The touchstone here is: What did Congress actually have in mind, remember to distinguish from purpose. The questions are, can you really trust the history, do you think there really was intent on this particular topic, or generally, and whose intent matters? Also, Breyer reminds us that legislative intent **is a judicial tool**, one that helps judges interpret and so long as it is used as part of their interpretive task, it wouldn’t matter if political choice theory were correct, which is otherwise a major critique of the theory (since it makes the text the maximum that could get agreement). **Andrei Marmor** (pg. 82) is a scholar here, noting that there must be some level of intent to pass legislation.

**Purposivism** – Statutes always have a purpose, can help with {something}, Hart and Sacks in **The Legal Process**, recognized that purpose can be difficult for courts to divine, but also that they could assume “**that reasonable legislators pursue reasonable purposes reasonably.**” They noted that some statutes have explicit purpose, and that if it is rightly designed and intended and consistent, it should be binding. When that is not available, purpose must be inferred. They describe some steps:

1. Assume good faith efforts to discharge Constitutional powers and duties
2. Compare new law with old, ask why reasonable men would enact that way, looking at unquestioned application
3. Look to context like legislative developments and public understanding of the problem
4. Look at legislative history for GENERAL purpose, not specific intent unless consistent with broad purpose. Never use secret legislative intent to come to a conclusion counter to a purpose indicated elsewhere or disadvantageous to private people w/o reasonable access to the history.
5. Look to post enactment decisions and actions and popular constructions on what meaning the words may bear.
6. As a last resort rely on the more general presumptions of the law.

**Textualism** – As pitfall of others are pronounced, textualism waxes. Also claims to present real constraint on judges decisions. Scalia is the most ardent champion of textualism, or “new textualism”. First he justifies it constitutionally, as only the text makes it through the legislative process and thus only it is the law. Bigger threat even then finding the unexpressed intent though, is people who think they have found it, or want to think that, in furtherance or their own ends and beliefs. Other scholars note that it makes no sense to speak of legislative intent as coming from anything but the statute, given the process and the unrecorded compromises that go into it. In Scalia’s article, he notes Legislative history dates back only to the 40’s and critiques it heavily (84). He also uses the word incunabula.

**Imaginative Reconstruction** – Associated with Posner, who traces it to Aristotle, saying the problem is unanticipated events. Goal is to figure out what Congress would have done if they thought about it, unlike purposivism, it not idealist, it’s the real congress with real compromises and maybe you can’t find a purpose. Variants allow for other things {can it be triggered by changing circumstance? No.} This approach adds two factors to the judge’s inquiry: the values and attitudes of the legislators from that period (since it is not a judge’s job to keep a statute up to date) Also, if a statute includes a common law term, it should be used as a clue that the writers intended it to be part of the same sort of common law approach judges have taken in the past. Alternatively, a statute can take the opposite approach, clearly restrict judicial inventiveness and interpretive independence. Avoid Hart & Saks idealism, and make artificial guesses only when there is no way to determine real intent. Accept that some bills are compromises that judges must follow.

Sunstein says reverse this, bring them forward and do this, rather than going back.

**Dynamic Interpretation** – What is the meaning in light of changed circumstances. (prices for coffee skyrocket) - this was done above in the nautical example of Alienkov.

**Legal Process Purposivism** – Difference is in where you find the purpose, attributing purpose, rather than discovering it. This is the Hart and Sacks Idea. {need better explanation} Also a stronger embrace of imposing on the Congress a purpose.

**Boutilier v INS** – The “psychopathic” immigration case. Legislative history is completely clear that psychopath encompasses homosexuality. 15 years later it’s before the court, and they agree 6-3. But Should it come out the same way today? Does it matter that the term was broad if the senate didn’t mean it that way. Purposeivists might be able to get around it arguing that the whole lists’s purpose doesn’t fit it. You might distinguish the concept (the big idea) from the conception (particular instantiation) and do it that way. Statute was amended in ’65 to confirm the application and then again in 1990 to exclude only those who were dangerous to others, does that undercut the idea that the courts should use **dynamic interpretation** What if the same case came up again with this as precedent. Do statutory decisions have the same weight? More? Less? Part of the reasons courts stick with other courts is because they want to maintain legitimacy, but that is less applicable in statutory settings, where law can actually be cited to the statute, not only to past precedent. Tacit acceptance can weight towards more, but can also just show inertia. Also statutes should outweigh the common law.

**When is Stare Decisis Strongest?** The official answer is Stare Decisis is STRONGEST for statutes, followed by common law, with Constitutional interpretation the weakest, because only the courts can correct Constitutional interpretation, but the legislature can step in to correct statutes or common law decisions.

**STATUTORY INTEPRETATION BY AGENCIES**

The overwhelming majority of Congressional action is fleshed out by agencies. The biggest component of which is Notice and Comment Rule Making. The rules for this, and other actions, are baselined by the APA. Pg. 824 has **definitions of Rule** (§551(4) general/particular, future effect, implement/interpret/prescribe law or policy) also §551(6) defines an order, which is a final disposition not a rule, created via adjudication. The APA also gives the procedures for this, like §553 on procedures for rulemaking, though note that §551 on rule definition says explicitly applies to revision.

|  |  |  |
| --- | --- | --- |
|  | **Rule Making** | **Adjudication** |
| **Formal** | If “on the record” rules in §§ 556-57, but rare | §§554, 556-57. This is like a mini trial and usually happens when the non-APA statute says that it must be on the record |
| **Informal** | §553 notice and comment, this is the most common way to write regulations. There are exceptions, like the SSA, but they don’t often get used as SSA doesn’t | Off record, very rare. |

**Process for Notice and Comment under §553**

The first step is in §553(b) **Notice Published in the Federal Register**. Though these days it is also published elsewhere, like regulations.gov, along with supporting documents and even comments not posted are published there. This process can be started with a petition for rulemaking or on the agency’s initiative.

The statute demands that the notice include:

1. The time, place, and nature of public Rulemaking procedure, if any (§553(c))
2. Reference to legal authority for the proposed rule
3. Draft of Regulation or general description of the problem “describe subject plus {illegible}” (subject t& issue description or Terms/substance in the text)
   1. Final rule must be a “**logical outgrowth**” of the proposed rule, or you have to do notice again, so can be specific or general
   2. Almost always there will be actual language, to avoid challenge, that means that a lot of work has been done before Notice and Comment begins, and the process becomes about talking people out of things.
   3. For truly careful agencies there are also advanced NPRM, which are for big time rule, and these are more general and turn things into a two-step process.
4. At a minimum, to avoid arbitrary and capricious required are (based on State Farm):
   1. They decided based on relevant and not on irrelevant factors
   2. Considered all important aspects of the issue
   3. Considered alternatives
   4. Made a rational connection between evidence and conclusion
   5. Offered a plausible, though not necessarily idea, policy
   6. Justified changes from past policy
   7. Disclosed data
   8. Considered comments

The format stays the same, and pg. 406 has the basics of the section, with “**supplemental information**: making up the bulk. All of this is called the preamble {maybe}[some stuff here on first stat inter page in middle going into detail on 49 C.F>R. 571]

Statute has no time period (must be published 30 days before it takes effect), but the current E.O. sets it {notice and comment?} at 60 days. But this can be extended. Agencies are not bound by or limited to comments, but they must respond to serious comments

“Concise, General statement of basis and purpose”, originally to be short, but now huge as a result of the pressure of judicial review. §552 is long because it includes FOIA, but it requires that “substantive rules of general applicability” be published in the federal register. At that point, discussion becomes concrete, saying what they are actually doing. In the old days, you have to be fairly involved to know what was going on or participate, and private citizens, with some exceptions like form letter campaigns, played a small role.

**Mawshaw on Agency Practice & Statutory Interpretation** - Agency Statutory interpretation – He looked at the pre-ambles. Agencies need to interpret statutes in many more contexts than do courts. Textualism is often in evidence, including some formalistic plain meaning arguments, while legislative history is less prominent than one might think, though when it comes up there is no apology or question of reliability. Noted it might also have to do with who submits comments. Mostly they use committee reports. They speak in one voice, so there is no debate about methodology in the rules. The two agencies he looks at differ, EPA at one point explicitly calls a circuit court wrong and refuses to follow outside that case. EPA was also more reliant on Chevron, possibly because it gets sued more.

Different factors inform the courts and agencies. Notably some principles, like the canon of constitutional avoidance, simply do not make sense for agencies to use, as with courts not being activist. Mashaw that there is also basically no overlap in the “Canons”, things like being activist, following presidential direction, and avoiding constitutional questions.

Some argue that the agencies, which are in closer touch with congress, are thus better faithful agents and so it makes sense for them to use leg. Hist more, as it is more useful and accurate for them. It is also necessary for them to guard the statute from a new congress or president. On the other hand, if the statutes are unclear and the agencies are executive they are committed to the opposite sort of dynamic interpretation by their nature, far less moored to the original statute. For agencies, the use of political material is part of their democratic legitimacy.

Note that things like purpose might make more sense for an agency, which then does advise and consent, than a court where it raises notice and subjectivity concerns. Courts review their actions usually, driving mimicking, but note not everything is reviewed, and there may be room in deference to allow for different methodologies.

**Practice and Framework of Agency Statutory Analysis**

Statutory – {nothing here yet} refers to bit on pg 413,referring the NHTSA example to “practical and objective” standards

**Chevron U.S.A. Inc. v. NRDC** – the MOST cited Supreme Court case of All time. Has made lower courts more deferential. But Supreme Court rejects as much as before. some studies cast doubt on the whole enterprise.

New sources of pollution needed a permit, which depended on attainment/non-attainment area. The “Bubble theory” had been adopted in attainment areas, Carter kept it out of Non-attainment areas. Reagan reversed.

The Court sort of throws up its hands on the interpretive Question. Intent is no help since Congress didn’t consider this issue. Purpose suggests the bubble could go to maintain in attainment areas, but in non-attainment areas, there seemed to be more in keeping with a desire that there would be a constant drop. There’s a clear economic argument for it, and policy debates rage, but that’s not really for the court. **So Stevens says he can’t find the answer in the statute and should defer to the agency.**

**The Chevron Test:**

1. Did Congress Directly Speak to the issue?
2. If not, go with the agency if their decision is based on a permissible construction of the statute.

The **strong** reading of Chevron is that ANY ambiguity leads to deferral, which means that it happens in almost all cases. The **Narrow** reading is that you linger longer in step 1. The **Weakest** reading is that if there is a “better” reading in step 1, then you go with that, and you can bolster that by really going after the agency in step 2.

Thus there are sort of two spheres, a **Judicial Sphere** and an **Agency Sphere**. Non-delegation works in the background of the judicial sphere, which involves express or implicit {something}, more Rule of Law accountability, Judicial independence may mean shouldn’t defer as much. You can see it as honest delegation - Congress has passed its authority to the agency, and reading stuff in just delegates to inexpert courts.

In the Agency Sphere, in step two there is deference to the agency. But why? Step 1 short circuits the APA requirement that courts review everything, since the claim is the law is ambiguous, but that’s still anti-marbury, since someone else is deciding the law. Congress invests them with authority either explicitly or implicitly. About what the statute means or is it about filling a policy gap? Stevens seems to be going with the latter, but the fear is willful misinterpretation by a politicized agency. (courts less politicized, and so less likely to do so.)

The Justifications for Chevron are:

1. Agencies have greater expertise and accountability, better for policy, worse for law
2. This Creates good incentives for congress to be clear.
3. It is a boon to uniformity, since courts defer (This is **Strauss’s argument**){}

Does it matter that the policy in Chevron was a flip-flop by the agency? Should it make it MORE deferential, showing that this isn’t about the law, but expertise or policy? Generally, deference is **reduced** when an agency is not consistent over time. Here, unlike in Brown and Williamson, Either is okay because bother are valid under the statute, as this is more a policy question.

Before Chevron there were two strands: strong deference and weak deference. After it, there are again two strands: **Skidmore Deference** (weak and statute focused) and **Chevron deference** (strong and about gap filling).

**Scientific Interpretation**

**Scientific** – Will it do any good? In car reg, it was the Rabbit/Chevette tests, that the agency dismissed. To what extent should a court second guess? Also, what do you do w/deeply held, but irrational concerns, like being trapped in a car?

Health Safety and Environment buck the trend of large, econ focused regulation or deregulation. They often require tech people to set bounds, and there’s the scientific question of risk. Whether Health based (make safe), tech based (make best), or a balance, to do those you must understand the risk first (less for tech, though you still need to know status quo is too high, and most tech statutes still say use it to remove “significant” risks)

**Viscusi** defines the risk as the probability of an outcome, based on knowing the outcome and the probability. Number of people killed is not the risk. Uncertainty is lacking one of these things. Ignorance is not knowing if we know. Determining those numbers is **Risk Assessment**. **Risk management** is the qualitative question that comes after about whether, or how, to live with that risk. This can require looking at a comparison with the second best option, or looking to moral culpability of the involved, and many different items.

The other theme is uncertainty. Just figuring out if something is dangerous is a challenge, as noted by **Ropeik and Gray**: Look at toxicology. The tests are usually animal tests, Doxim kills hamsters but not guinea pigs, and cyclamate is a carcinogen for one specis of rat, and then just in the males. But researchers assume that people aree more sensitive. Researchers also test one compound at a time, ignoring interactions and use huge doeses to insure results, requiring the use of a curve to estimate does response, but default linear curves might be wrong. Could be Super, sub or threshold. Scientists err on the side of caution, but they also make assumptions like that risks are spread evenly, or base models on a ridiculously exaggerated “maximally exposed Individual” (MEI).

Epidemeology can supplement this, but there’s no control group (like Mormons and arsenic) and consumption patterns, changes in amount over time, or incomplete reporting cause problems. This leads to **confounders** Statistical analysis also limited and under reporting even worse here; big questions about exposure levels.

**Viscusi** notes thatthese uncertainties can’t be handled by science directly, and balancing them is a policy question that often ends up buried in scientific documents like risk assessment and seems to disappear this uncertainty can lead to risk being overstated, and to inconsistent agency responses. This can be premeditated or unintentional or intentional as **Wagner** notes, since there are trans-scientific questions and science itself is fragmented. She calls the resulting problem the **Science Charade**, based on scientists using science for trans-scientific questions—where science can be asked but cannot answer, for instance because it cannot run an experiment on humans, and lacks a good model for them—or cloaking policy decisions in scientific language or, worst, making a policy choice and then just justifying it with science. (pg. 92)

Should regulators incorporate logical fallacies of the pop into analysis. like Availability Cascades (Newtown) or Alar. **Other Fallacies** – New risks are more feared than old risks. Man-made risks more feared than natural ones, controlled risks less than uncontrolled. Risks that are “horrible” more heavily weighted, but should regulators account for this? Should they do it for legitimacy? Note that people will pay more to remove the last bullet than the penultimate bullet.

Sometimes the response to this, like in §19 of the Rio Declaration is to declare that you can’t use scientific uncertainty as a reason to bar cost effective actions. This is often used to shift the burden of proof onto the proponent of the policy, rather than the public. This is called **The precautionary Principle**. Clean Air Act has a weak version of this “reasonably anticipated to endanger” rather than known to harm. Under the Common law, proof is usually required.

**Sunstein** doesn’t like the precautionary principle, since precautions also create risk: because of unanticipated consequences, like an unexpected danger (inflammable, or uncertainty in application). Think also the FDA, which Prohibits new drugs unless approved but if they’re over protective there can be a negative outcome.

**Yucca Mountain** – Example of best as the enemy of the good, at least what NAS wanted to do. This is an issue of their being scientific uncertainty but with an obligation to ask.

**Economic/Cost Benefit Analysis**

**Economic** – What’s the cost. Backlash potential comes in here.

**How do Agencies Approach Economic Issues** ? Pg. 96 in notes: Statutory variations in accounting for the Economy:

His Version

1. Ignore Costs: just make things safe
2. Balancing: could be explicit cost benefit, or just consideration of factors
3. Significant risk regs: this is slightly different, being about threshold
4. Feasibility: technology based.

Reading

1. Flat Bans on Consideration of Cost: like the **Delany Clause** no additives that caused cancer, no matter how slight, or the CAA, which are to be based on public health alone, with the cost of compliance left out
2. Significant Risk requirements: Ignoring risks below a certain level. Costs become irrelevant, since it is about only benefits. Once below threshold, no regulation, once above, regulation, even if low compared to the costs.
3. Substitute risks and health-health tradeoffs: Consider whether regulating one risk would create a substitute risk. If so, agency can decline/modify regulation. Many “consideration” requirement have a feature like this, requiring the EPA using safety factors in calculating emissions rates.
4. Feasibility requirements –“to the extent feasible[/achievable]” = focusing on costs no benefits. forbids agency from regulating in a way not technically/economically feasible this blurry line blocks excessively expensive regs.
5. Consideration Requirements – Like the above, but explicitly linking it to something like cost, to be considering in view of the maximum degree of reduction that is achievable. The idea is that the agency qualifies pursuit of the maximum reduction by asking whether the cost is excessive, whether energy requirements would be affected negatively, and whether the maximum might create other harms (in the specific example) {}
6. Cost Benefit requirement: Usually done by prohibiting “unreasonable” risks and defining unreasonable in reference to both costs and benefits. Agency must calculate costs and benefits and compare them. There is, as yet, no super requirement for this, but the congress and the executive have often required this for major regs.

An example is the SDWA which has three steps. Step 1 is to set a maximum containment level goal, a pure health approach defined as when health effects occur plus a margin. Step 2 is to set a max level as close to the MCLG as is possible. Step three is, run a C-B, and if the Max level isn’t cost effective, the agency proposes a max level justified by C-B. Step one here anchors, and it puts the Burden of proof on those justifying lowering, rather than justifying raising.

**When do you do Cost Benefit?** – Can be organically required, Leg-Flex requires for some, and 12,866/12,291 says that any reg w/annual cost of compliance over 100 million and some other categories must go to OIRA and include a “regulatory impact analysis” which is a C-B. Even when statutes ban it, it usually mostly gets done. OIRA usually finds that overall regulations are in the black. EPA usually especially so, but in part because environmental impacts are so hard to quantify. There are also always unquantified benefits.

**What are we measuring?** According to **Viscusi**, the key measure is **statistical lives**, which is willingness to pay for particular shifts in outcome. This is better than the pure Human Capital approach, dealing only with predicting future earnings. For risk reduction, you look at the willingness to pay. For risks that you have to bear you look to the willingness to accept amount. They should be equal, but psychology means accepting is more expensive. He also points to the biases above, as well as other considerations, like the **heterogeneity of life** (old lives vs. young), **stated v. revealed preferences,** and **variation among agencies** (on how to value a statistical life, and how to update them over time, including making the value of a life LOWER, which really shouldn’t happen) Question is how do you quantify. You can quantify some things on markets, and other by asking how much people would pay (for a reduction in risk) or take. This is done through wage studies and through polls, and **value of a statistical life**, varies widely, from .85 million to 14.8 million.At its basic level, cost benefit is about weighing pros and cons. Ben Franklin’s **providential algebra**.

**Objections to C-B:** Include **Ackerman & Heizerling’s** note that quantification itself might be harmful (since it has limits in statistics and ignores what can’t be counted or isn’t directly studied), an external critique, and that the numbers are soft (and often come from the regulated industry and do not account for innovation/savings spurred by regulation), an internal critique, which **Revez** and **sunstein** say systematically leads to under regulation. Although Sunstein thinks it doesn’t have to be this way since it can also spur regulation and allow for smarter regulation. (pg. 490) He says that three central problems are addressed by C-B: 1.) Poor priority setting, 2.) excessively costly tools, 3.) inattention to the unfortunate side effects of regulation. It also allows addressing the cognitive problem of focusing on only one part of a problem. He does admit that it can underrepresent the poor given the focus on payment and aggregate output, and that it suffers from data shortages, which can paralyze or **irreversibility/rights** arguments that don’t lend themselves to C-B, but ultimately he concludes that it is worth it.

**Discount Rates** – Everyone agrees they’re needed, it’s just a question of how much. OMB says 3 and 7 as the bounds. The lower the better. A conceptual controversy is future lives saved. **Revez** says discounting harms to those now alive that occur later is different from discounting benefits to future generations, the latter being hard to justify.

E.O 13563 - §1 says to do C-B and then, where appropriate, allow the agency to talk qualitative and bring in equity, dignity, distribution and fairness. Distribution is particularly notable. This is the Obama admin E.O. {**Risk trigger}**

Basic objections to C-B:

1. Framework flawed, mistaken value [something] {}
2. External Critique - WTP shortcomings
   1. People are not well informed
   2. WTP is in part ability to pay, which is irrelevant to utility
   3. Unacceptable if disaggregated
   4. Citizens and consumers may choose differently
3. Internal critique – Numbers are hopelessly soft
   1. Uncertain risk exposure
   2. Risks vary in ways beyond magnitude
   3. VSL
   4. WTP/WTA disparity
   5. Discount Contraversy
4. Anti-regulatory - costs are easier to count, ex ante costs inflated by industry that provides them (though max. exposure assumptions may go the other way), indirect benefits are ignored
5. Ignores distributional consequences by focusing on net social welfare (Kalder Hicks, not pareto)

Basic argument for:

1. Sounder regulations are more efficient by definition.
2. Solves incommensurability, allowing pros and cons to be compared
3. More democratic, transparent decision, Girds better discussions allows choice on costs
4. Corrects for cognitive defects, among citizens and regulators, brings rigor to policy making

**Political Analysis**

**Policy/Politics** – Should Reg include political bases, like Reagan on deregulation. It seems like it would be valid in courts, but it isn’t. It’s not something that courts will view as relevant to upholding the statute, though the Dissent in State Farm bought it as something that should count. Citizens also might want to know, so we can do oversight. **Note that a court can uphold an agency action only on the agency’s own rationale**.

**Two basic elements**

1. **Public Attitudes** (seat belt regs impact on other regulations) and **Distribution effects** (not subsidizing bad behavior by taxing good. Also includes regs that target just one group, like poor people near polluting factories.
2. **Presidential preferences** – Rehnquist Though Presidential change was sensible. Is it reasoned to say this, or arbitrary? Remember Deference is supposed to be based on expertise AND accountability. This also comes up in Mass v. EPA.

**Massachusetts v. EPA** – Remember that §553(e) says you can petition for a rule and §555(a) says rejections must be explained. Petitioners wanted cars to be regulated, based on shall language, but this was conditioned by “in his judgment” language. EPA said they wouldn’t do it even w/authorization, and part of the reason was the president’s broader plan on global warming.

Court ultimately remands to agency to determine the threshold question. “Put another way, the use of the word “judgment” is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.” SC rejected the argument on the president’s broader plan. Agency could have argued that the threshold was too low, but that’s a different question. Scalia said that agencies are constrained and the majority reading seemed to say you can’t rely on factors not mentioned in the statute, the question being if the “shall” puts things off limits, Scalia says also that it can’t apply to not acting,.

Don’t over-read this case. If Condition precedent is met, agency shall regulate, but some cases say cost can always be taken into account if statute is silent. Less true for other factors, and still unclear for presidential preferences. {not Chevron because implementation/policy, not statutory interpretation? Failing to consider statutorily relevant factors is generally seen as arbitrary or capricious, as per state farm, even though it could easily slot into the chevron interpretation framework.}

Strong reading is that you can’t use justifications outside the statute, weak reading is that the word shall does a lot of work.

**Implementation through Adjudication**

There's sometimes a due process concern when mixing the executive and judicial functions of agencies

* The adjudication is supposed to be on the record, and there's some worry about the executive making his own decisions behind the scenes
* It is usually seen as inferior to N&C because retroactive and less open, but courts uphold it as an option

Agencies can make law through adjudication or regulations.

* The big shift to regulation was in the 60s and 70s
* In both the NLRB and the FCC cases, there didn't seem to be any relevant law exactly on point
* Advantages of adjudication
  + You get to cross examine the agency experts
  + The participation may be broader for rulemaking but it's deeper for adjudication
    - There's a lot of input from stakeholders in adjudication through amicus briefs, but none from the general public
  + Despite that, for clarity and notice, rulemaking has the edge (pg. 520-521)

Transitive vs. intransitive statutes {why is this here?}

* Transitive directly prohibits conduct
* Intransitive authorizes regulation but doesn't impose any direct prohibitions
  + There's no choice of policymaking format, the agency has to write a regulation, it can't do adjudication
  + There's nothing to comply with until the regulation is written

**Who conducts these adjudications?** Administrative Law judges, or ALJs. **Weiner** held that ALJs can only be dismissed for cause. They are also required by §557(c) to explain their decisions, giving findings, conclusions, and explanations thereof. The appeals, which usually go up to the agency head often are not required to explain their decisions though. Decisions have precedential effect within the agency.

* AJLs Are:
  + Agency employee, pay is on a “lockstep” system
  + Should they be treated like any employee or more like an Article III judge? The agency has to go to the Merit Systems Protection Board to try to fire them
* They can't issue preliminary injunctions
  + Or at least they can't do it like courts do
  + Many agencies have some statutory specific authority to tell people to stop doing stuff, and then if the party objects, they have a hearing

NLRB

* They essentially never write a regulation, they flesh out the meaning of the statute through adjudications
* If they write a rule, they're subsequently bound by it
  + Rules narrow the issues for adjudication

FTC is charged with preventing unfair trade practices, including deceptive advertising {why is he talking about the FTC}

* Until the 1960s, they never wrote a regulation, so they enforced it basically common law style as a transitive statute.
* First regulation it wrote was about gas stations posting octane

**Boston Medical Interns and Residents -** Very court case like, they look to statutory text, and legislative history, like what did not pass, and other canons, and even precedent. They do reverse their previous position. The NLRB fleshes out the statute entirely through adjudications. The NLRB is highly politicized , no one really thinks they have experience and expertise in any important way. Some people say adjudication plays to the worst aspects of the NLRB.

**APA Provisions about Adjudications** - there may be other provisions in each agency's organic act

* An adjudication is something that produces an order
* Section 554 (pg. 837) applies to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" though with some exceptions, like if there’s a de novo court trial after, or if decision relies solely on inspection, or if it’s military.
  + Agencies adjudicate a lot, and very seldom is it required to be on the record and have a hearing
* Basically about notice and getting started, those entitled get to know
  + Time and place and nature; legal authority; matters of law and fact asserted
  + First try to settle
  + Have a hearing pursuant to §556 and §557 {do we really not have to know this?}
* Looks and feels like a trial
  + There's much less discovery, though
  + Federal Rules of Civil Procedure don't apply
  + There's usually not depositions
  + They're usually between the private party and the agency, and there's really not a lot of need for discovery
    - There are strict rules on ex parte contacts between interested persons and decisionmakers.
  + Federal Rules of Evidence don't apply
    - APA: "any oral/documentary evidence may be received" and a right to cross-examine. §556(d)
    - But as a policy, they say they can exclude it if it's redundant/irrelevant/immaterial; Agencies are free to (and most have) come up with their own rules of evidence
    - The most important thing is you can have hearsay
      * This is probably because the FRE is basically about distrust of juries
      * But there's no juries, so everything goes to "weight, not admissibility", we trust the judge
      * Also, we're going to get a statement of reasons, which will be reviewed by another decision-maker
        + They have to be able to point to things in the record that support their conclusions of fact and law {appeals people or just AJLs?}
* After a decision, it goes from the ALJ to the agency
  + The Board accepts briefs and can hear oral arguments

The tendency is for the major policy decisions to come from regulations and minor ones from adjudications

* But the NLRB is an exception

Jeremy Bentham hated the common law, he though legislation was already better

* They make law the way people make law for dogs, by waiting for someone to do something and then beating them
* Ways around this?
  + Limit relief to injunctive relief {how does this come in to this}

Lack of clarity in statutes is almost always due to the inability to predict the circumstances in which it will be applied

**Agency Implementation Through Guidance**

CPSC guidance was set aside on the basis that it was a legal rule, not just an interpretation, and thus invalid because there was no notice & comment. FCC guidance alright because it was a summary, reading more like part of a judicial opinion. {what from this?}

**How do they differ from Rules?** Adjudications are looser, more indeterminate, more interpretable, than guidance or rules. “distinguishing the goals of a document are different from achieving them.” **Mendelson** (who is also a source for the below two paras) notes that they massively outnumber formal actions, and can resemble legal rules, since they are often followed for fear of the cost of challenging them.

**Why issue guidance?** Cheaper in the sense of quicker to issue and faster since no notice and comment. They are not binding, they are easier to change again not needing Notice and Comment, and there is less oversight from Congress or the White House. It can also be desired by the regulated entities, since it helps explain the law and shows enforcement priorities. Plus the alternative can be no guidance at all. They also allow for experimentation, and guide the agencies own employees. Mostly courts decline to review them, especially if they are issued at the staff level.

**What are the drawbacks?** In addition to the difference above they are less democratic, and easier to use for rent seeking and less likely to take public interests into account. Absence of N&P also means no new information. They don’t have to be explained, and there are reliance concerns, since their lack of binding force means courts don’t hold agencies to their terms. They also skirt the CRA.

**Do they get review?** A dilute version of OIRA review now applies to significant guidance, given the mixed messages from the Obama administration. OMB put out a bulleting on good guidance practices, 72 FR 3432, though it didn’t follow these practices to make it.

* 1. Also has the 100 million thing {check this}
  2. Says some senior agency official must approve
  3. That employees should not depart from significant guidance w/p justification and concurrence
  4. Requires standard elements like calling itself guidance and not including mandatory language (“shall”)
  5. Agencies have to have a guidance spot on their website, invite comments, and respond.

There is a narrative that says agencies abuse guidance documents . But a student note on this found that there was no extra guidance at the end of administrations or during divided government. There have also been very few. Less than 10% the number of significant regs. Even when GWB took over they ended up needing to only modify 11%, and found only 49 from industry and edited only 73.

**Describing Agency Behavior**

Key here is capture question is whether agencies are beholden. Sometimes statute says to advance an interest, think MMS and deepwater horizon, which lead to its dissolution.

**Wilson** – More complex than it appears, he notes four flavors:

1. **Client politics/Client Agency** - Dominant interest group favors agency goals. Leading to:
   1. Hard to avoid capture, depend on the regulated for information, often formally. National Science Foundation another good example.
2. **Entrepreneurial Politics/Antagonistic** - Dominant interest group hostile to agency. NHTSA the paradigm. Car companies hated the regulation, but benefits were diffuse. Required a policy entrepreneur to form. CFPB might end up this. Leading to:
   1. Precarious, vulnerable to lost momentum after formation, hard to attract talent and tend to be anti- the people they regulate. Big scandal at beginning helps
3. **Interest Group politics/offsetting interest groups** - Two or more rival groups conflicting over agency goals, like labor vs. management. Leading to:
   1. Take heat for everything they do, and shifting politics can undermine past actions. Studies find agency heads and interest group pressures determine behavior, with the latter setting the bounds.
4. **Majoritarian/diffuse costs** - No important interest group. – agency largely free to ask, makes own policy, though think anti-trust for potential to overstep. Leading to:
   1. Head of agency and staff determine policy.

**Weingast** – Written in 81, and so out of date for ignoring the president who has increasingly centralized power. Wrong only in emphasis. He sees **agency policy equilibrium** as coming from: 1) lack of presidential interest, clear/stable court precedent, AND stable public opinion among balanced interest groups. On the congressional side, committees and sobcommittees dominate. Between committee members and heads, the interest groups that target them, and the agency head there’s a triangle with usually shared interests. Note that much of the oversight is informal like funding and personal ties and the threat of hearings, with Congress informed through constituent actions. The three together become a “**subgovernment**” out for itself.

**Sedentfeld** – Too heavily edited to persuade here. Saying that just like behavioral economics identify, political actors may not behave the “right” way. Agency heads and staff are people to, with systematic biases like **prospect theory**, where people seek risk to avoid loss, but are averse to risk to preserve gains, leading to **loss aversion**, making action less likely when framed as a need to impose certain losses to avoid uncertain ones, a common frame for regulation. This is compounded, or rarely countered, by **status quo bias** and **Omission bias** (not vaccinating despite better odds from vaccinating). Last is **Social Role**, where people behave how they think they should based on how they see themselves and want others to see them.

**Agency Oversight – Presidential Control**

**What is the President’s role?** Not just about the agenda, but also a responsibility to supervise agencies under Art. II §3 cl. 3, the “take care clause” as well as the vesting clause, though it’s unclear if this is a formal grant of power. Control enhances bureaucratic accountability, through the national election mechanism, and helps coordination & efficiency.

**Control of Agency Officials and Personnel**

**Appointments** - This ties back to **Meyers (**Prez removal powers**)** and **Humphrey’s Executor** **(**conditions allowed**)** and appointments, as well as the public accounting oversight board case (free enterprise fund v. Public Accounting Oversight Board), holding double for cause unconstitutional as too large a dilution of presidential power. This still leaves a question about Administrative law judges, who can only be fired for cause, but the argument is that they are employees, not officers or inferior officers, so the appointment clause doesn’t apply at all. If they are officers, then there is a big problem.

The president can hire and fire, at executive agencies anyway and within the realm of politics. At independent agencies he still has some input and can often appoint the chairmen of their committeees.

**Control of appropriations**

**Appropriations** – The President does have a key role here, he participates in the budget, presenting them, even for independent agencies. This is OMB’s real job, actually. There’s also the spending power, since the president doesn’t need to spend every dollar, and if Congress doesn’t restrict **impoundment** the president can just withhold.

Veto – The president doesn’t have the line item veto. Congress passed a law applying it only to certain kinds of appropriations. Challenged on two lines: non-delegation (no intelligible principle), which SC didn’t take up, and that this was legislation and could proceed only through the presentment clause processes (which the SC credited). Some think the act might have been saved by a different title, and Scalia said it was just impounding. The case was **Clinton v. City of New York**. (President couldn’t amend a duly enacted bill by repealing portions.)

**Directive Authority, OIRA, and 12,866**

**12,866** – Descendent of Regan’s 12,291. Obama actually took comments on his proposed revision, 13,563, which Sunstein called a mini constitution for the administrative state. 12,866 is triggered by regulatory action.{check}

I - The statement of principles is not very liberal, at least in its rhetoric. C-B, confidence in markets, performance regs rather than design regs (pg. 108)

IV – planning mechanisms – This section is about coordination, a key part of oversight. All agencies produce a **regulatory agenda**, putting out everything that is up for review. 4(b). May and October are the dates. Ther’s also the **Regulatory Plan**, which is the most important things that gets merged into the October regulatory agenca meeting. This doesn’t just allow coordination, but also about transparency. There is a cost of ossification and reduced speed. Here the independent agencies are included, though the rest of 12,866 does not include them. There’s also a regulatory working group, and quarterly OIRA meetings w/ local reps/NGOs

1. There is an **agencies’ policy meeting**, early in the yearly cicle, Veep convenes advisors and heads of agencies to look at prioirities.
2. **Unified regulatory agenda (URA)**, for which agency includes independent agencies, are requires to prepare an agenda about developing/under-review regs as directed by OIRA.
3. **The regulatory plan** also includes the independents
   1. As part of the URA, each agency prepares a plan of the most significant actions it reasonably expects to issue in that fiscal year. Must contain
      1. Statement of objectives and how they relate to prez objectives
      2. Summary of planned actions, including alternatives and cost estimates
      3. Legal basis for action, including if required
      4. Statement of need and what the benefits are.
      5. Schedule for action, including legal deadlines
      6. POC
   2. Plans are due by 1 June.
   3. An agency head who expects a conflict should notify OIRA administrator, who can forward that to everyone
   4. If the OIRA admin believes the reg is inconsistent with the presidents priorities or this E.O., he will notify everyone.
   5. Veep can coordinate
   6. Plans developed shall be published annually, which will be available.

VI – Centralized Review – This is the controversial part. 3(f) defines significant actions here as 100 mil, material adverse effects, serious inconsistency, altering entitlements, or raising a novel issue. Most regs are no significant though, and most significant regs rare not economically significant. Once Id’d econ major regs require full C-B, though 3(b) says just a bottom line. OIRA than reviews this, and the E.O. gives a timeline. Review is for what OIRA or the agencies ID as significant.

* 1. Each agency should provide a list of planned actions to OIRA when it asks including those it thinks will be significant. Those not significant will nto be subject to review unless OIRA yell them they need to be. OIRA can also wave planned review.
  2. If there is review, the issuing agency gives the text with an explanation of the need. An assessment of the costs and benefits, and how it advances the statute and the president’s goals.
  3. For those significant actions the agency also provides additional info: the benefits of the action, along with quantification. Same for the costs. Same for cost-benefit of feasible alternatives, and why the chosen action is preferable.

X – **Nothing here displaces the law, or judicial review**, and it doesn’t create a right of action. Can’t sue if you think OIRA violated it. Ultimately, OIRA decides what is significant.

**So what can OIRA do?** Beyond the above, they can send **Return Letters** and **Prompt Letters**. Both are rare. OIRA is not a law shop, nor a decider. They are a convener. Sunstein wrote NO prompt letters. Not much there, though in theory they allow OIRA to take more initiative. Prompt/return letters seem premised on the idea that there is always a fear of over regulation, even with appointees from anti-regulation presidents, who tend to go native. There’s also a question of relative priorities, since agencies tend to view their own behavior as most important.

**Criticisms of OIRA?** OIRA is biggest on Cost Benefit. Some critics go after the particular methods of OIRA, particular given the persistence of career employees from the Regan era focused on economics. **Ravez and Bagely** say there’s no real basis for over regulation as a base assumption, so OIRA’s de-reg emphasis is unjustified, but you could reorg OIRA to act on sins of omission to. Failure to regulate gets no review, other than weak prompt letters. You could let OIRA review things like denials of requests for rulemaking, denial of petition is already judicially reviewable though. OIRA is also is **easily overwhelmed** by much larger and more expert agencies, though both sides usually agree changes are for the better. OIRA allows a thinking through of all the implications, including the unintended ones. (**Public Citizen v. Minetta** was the case related to the sample return letter, where the court remanded to the agency [tires and ABS]) In the article below, Sunstein notes that the principle critique of OIRA is that it politicizes the process, either on its own or by allowing the White House to intervene. But this ignores the fact that OIRA’s work is outside the WH and technical. When Significant issues do arise, they are legal questions usually, which only afterward leads to more technical work shared among all the actors. He notes that political issues are taken into account, but is not a major part of the work, emerging through meetings with officials like the WH CoS. {}

**Sunstein** - OIRA myths and realities {THIS PART ASK HIM}.

Sunstein sees OIRA as being primarily an information aggregator and dispenser, a resolver of interagency problems and liason with the public and those who suggest alternatives, with C-B being a secondary element, even when it comes to specific rules.

He notes the whole office is basically just 45 people, laid out like state or the CIA. The administrator is Senate confirmed, but the deputy is non-political and now there are political appointee deputies. He highlights the importance of E.O. 13,563, which incorporates much of the C-B stuff and says that agencies must use C-B to make regs, tailor them to minimize buden, and pick those that maximize net benefits, of various kinds, including distributive impacts. He also walks what happens after the 90 days OIRA has for review.

1. Conclude review, with the rule published as is
2. Return the rule to the agency via a return letter (1 only issues in current admin, but the number is a bad measure of how much impact OIRA has. Return letters often refelect executive consensus.)
3. Encourage the agency to withdraw the rule in light of interagency concerns. (often done even without OIRA intervention. )
4. Work with OMB director to get 30 day extension.
5. Work with the agency to obtain an indefinite extension. )

Most of the regs end up changed and improved by this, often from interagency comments.

1. **Scope** - George W. amended 12,866 to cover guidance, but the Obama administration formally revoked but then sent mixed signals. Arguably 12,866 §3(d) would apply, but it edits the APA boiler plate to say “force and effect of law” seeming to exclude it.
2. **Action** – OIRA doesn’t review inaction except by happenstance, this is what made prompt letters so enticing, possible OIRA denial reviews
3. **Independent agencies**- Most people think it would be Constitutional. Reagan OLC said so. Note OIRA has no veto, though the president might under the take care clause, which suggests some extra power he has and responsibility for this area, as does the grant of the executive power, which may be a grant of authority. He can also specifically require opinions in writing from agency heads, but there is a fear of sparking a crisis. But would it be good? Aren’t these agencies supposed to be independent? Portman introducted a bill that would authorize the president to extend E.O.’s to the independent agencies, which would solve any problem.

**Congressional Control of Agency Action**

**Tools of Control**

**New Legislation** – Congress can do this, but it’s hard. Gorevich.{Gorsuch?}

**Appropriations** – Power of the purse, occasionally extreme, as with the defunding of the FTC. “no money” clause makes spending from the treasury a legislative power. (reinforced by the anti-deficiency act)Can also be targeting at specific rules or enforcement or development of a particular reg. Appropriations bills can sometimes turn substantive, doing it this way does somewhat circumvent “expertise” of the substantive committee. This is also less visible and accountability depends not just on some visibility, but also on it not being quite so easy to log-roll and it not being attacked to effectively veto proof bills like these. It also makes it hard to engage in debate and remember that the appropriations committee is not the same committee as the one that is an expert in the agency’s activities.

**Oversight** – Hearing are the most visible aspect, but there’s plenty of informal stuff too. On pg 842 there’s §557(d) of the APA which limits contacts, but (d)(2) says it does not limit provision of info to Congress. Pg 825 has definition of ex parte contact, which likewise exempts status reports, which Congress asks for info, often as a prod. Publicized hearings are theater, but they can also get good information. Note though that a committee can be captured by an agency, and oversight itself is a skill. Also, politics can enter into this, if the party in power is sympathetic, or if the president asserts executive privilege as in the Gorsuch example (pg 116), where there was a standoff, ending in a deal, ending in them getting the stuff late.

The basic process is: Request for appearance and/or documents. If there’s resistance, Congress can subpoena and hold those that don’t comply in contempt, which hands the case to DoJ for prosecution as a misdemeanor. The president can also assert executive privilege, an implied power that goes back to **U.S. v. Nixon** flowing from Sep of Powers.

Then there’s the **legislative veto**, as in…

**Chadha v. INS** – Congress un-un-deports 6 people out of ~300. Either house could veto on its own. The idea of the legislative veto is that it’s a way to keep some power over agencies. It makes congress the decisionmaker, but it’s not clear that this actually increases accountability, since it is an invisible process, with a voice vote only. It can also lead to even vaguer initial delegations of power, since Congress can swoop in later. The decision itself is famously formal. Finds that this is legislation, which can only be, according to Art. I §7, done through the legislative process, which this isn’t so it is out. It was “legislative in purpose and effect.” The keys are **bicameralism** and **presentment**, which the ruling says are needed for legislative action. Thus the values question doesn’t come into it, since it is “legislative in purpose and effect” altering rights, duites and person, but doesn’t a subpoena do that? And aren’t they just delegating?

The Powell concurrence says it is a more case specific issue, and really invades the judicial authority since the Congress is interpreting a law in an individual circumstance, so that would be a legislative veto. Many people like this opinion. His objection wasn’t as much interference in another branch, but assuming its function.

The White Dissent says that it’s okay, because it’s what the Constitution has in mind. Nothing happens unless all three branches agree. Here the weirdness is that he gets deported, making it a bad law. He wanted the real test to be whether there was a disruption of the work of another branch, which this clearly wasn’t since it was a quasi-legislative action in the first place.

As a note **trowel v. benson** is the case that said the executive could adjudicate. In the big footnote, the Agency acknowledges that agency actions are quasi-legislative, and that there is some law making power, but that the check on that law making power is the statute itself, meaning this is a question of delegation, a check that does not exist for Congress, and delegating authority doesn’t imply a veto.

**Congressional Review Act** – a response to Chadha, this requires regs to go to congress, allowing a joint resolution to remove them within 60 days. Only one of these has ever succeeded, and that was to kill a midnight reg. Recently they have tried to strengthen this with the…

**REINS Act** – Largely tracks the CRA and keeps many of the section. But it changes it to require approval instead of disapproval for major regs. §801 all nrules go to congress and the comptroller general, he provides info. (b)(1) says no major rule takes effect w/o a joint resolution of approval. If not, then no effect. §802 gives the process, a 15 day timeline to report out of committee, no amendments. §803 extends the current review act to non-major rules. §804 says any agency including independent agency, and it defines major rule. §805 judicial review is not affected by Congresses endorsement.

The question here is, is it constitutional. Seems to function the same way, since one house can kill it, but maybe it’s just saying the agencies propose laws, and Congress approves them. Question is whether you categorize as legislative or executive. Note that it’s still reviewable by courts as a reg, and published in the FR, not the U.S.C.

There’s also a question of whether it’s a good idea. To sides, one is that it will lead to less and can’t lead to more, and that it will encourage better drafting. On the other side, it may not actually lead congress to pay attention (or make good decisions in areas beyond their expertise) and there’s not much accountability in NOT acting.

Last is the question of Constitutionality. To what extent is it just Chadha. Functionally it is a one house veto.

He mentioned the X-Citement video case []

**Judicial Control of Agency Action – Policymaking**

Both are in Chapter 7 of the APA (pg 844).

**Key APA provisions**

§702 – creates the cause of action, but only for injunctions, not for money damages. This is the waiver of sovereign immunity. Allows persons wronged, adversely effected, or aggrieved.

§703 – Background statutes will give details on the suits, mostly.

§704 - Agency action reviewable by statute; final action w/out other adequate remedy subject to judicial review

§706 – the KEY section. Gives scope of the suit in terms of grounds to set aside. They can order the agency to act (1), and they can set aside defective action that is: (not organic statutes can supplement/shift standards)

* 1. arbitrary & capricious or an abuse of discretion not in accordance with law. 706(2)(a) (policy review)
  2. Unconstitutional (just like a statute)
  3. Outside jurisdiction or inconsistent with the statute (this is a review of interpretation)
  4. W/O observing legal procedures, which can come from the Constitution, the APA, or the organic statute, (or 12,866 if it didn’t say no review in it).
  5. For formal proceedings, (§§ 556,557)facts must be supported by “substantial evidence” a higher standard (facts are not reviewed for informal, like N&C, which falls under arbitrary and capricious)
  6. Review own conclusions as a court in a de novo trial (never happens)

**Key Cases –** The contrast here is between State Farm’s “hard look” and Fox TV’s more forgiving majority standard, requiring acknowledgement but not any particular explanation of why they were abandoning the policy.

**State Farm –** NHTSA was supposed to write the safety standards for passive restraints, then they revoked. Review was for arbitrary and capricious. Meaning is it adequately explained and does it make sense. The agency is trying to show it used reasoned decision making Core of the review:

**Court can’t set aside a rule that is rational, based on a consideration of the relevant factors, and within the scope of authority delegated by statute**. Narrow rule and not an occasion for the court to substitute its own judgment for the agency’**s but, the agency must examine the relevant data and articulate an explanation that includes “a rational connection between the facts found and the choice made”.** This means checking that relevant factors were considered, and looking for clear errors of judgment.

Failure could happen if the agency **relied on factors Congress did not intend**, **failed to consider an important aspect of the problem**, **offered an explanation that runs counter to the evidence**, or is **so implausible that it could not derive from a difference in view/agency expertise**. The **court does not supply some reason of its own to remedy this, if it finds them**, but the court can uphold a slightly unclear path anyway, so long as the path is discernible.

Part V-A is 9-0. Saying the agency didn’t ask the obvious question of why not simply require air bags. This is becomes a de facto requirement to consider reasonable or obvious alternatives (can be based on being obvious to a common person, or mentioned in N&C). You are bound by the agency reasoning, so if it’s not considered, can’t go forward.

V-B, and V-C are 5-4, with dissenters saying the standard as applied is simply too high. The first is a failure to explain facts that exist and connect them to choices made. The Second is that there is no connection between facts and judgment to justify a categorization. Basically the same thing. Key defect of item two is that there would be no increase, or not enough to justify, a predictive, factual conclusion, that the court is not convinced of. (weren’t relying on the studies they’d cast aspersions on, but more on inertia and reality, wanted it explained). The second is not an unsupported factual determination, it’s a mischaracterization of the spool belt. (all three are failures of full explanation.) Courts usually defer on things like whether to use studies, but here they think that ignoring the inertia issue entirely goes too far. Likewise, they just lumped spool belts in with other similar features without justification.

The Counter case is **Fox TV v. FCC** – Stems from that Guidance Doc on fleeting expletives. Court upheld, saying that this was not arbitrary and capricious. It’s not an interpretation of a rule, but a guidance document about how policy would be implemented. This is a transitive statute, with some enforcement discretion. Guidance documents in reality are really ambiguous though, but this is an important conceptual distinction. It seems like a change in views here. Scalia says that the FCC needed to do, and did, three things:

* 1. Acknowledge the change {permissible?}
  2. Have a good reason to support it
  3. That the agency thinks it’s better (true by default, since they chose it.)

The clash with breyer is on point 3, since Breyer wants more than just acknowledging the change, but also a justification of why the agency thinks it’s better.

There’s also a question of whether the independent agency thing matters. Breyer thinks it should, Scalia and the majority disagree. First question is whether there is an extra check on executive agencies, so courts should do more to regulate the independent agencies. But independent agencies have more congressional oversight. Second was what illegitimate influences might color their decision making. Breyer think politics is here heavily. But is that more of a problem for these agencies, and why would that be illegitimate?

**Other Cases**

**NY Council Assn. of Civilian Technicians v. Fed. Labor Relation Auth.,** in ’85 interpreted State farm as saying there is no heightened standard of scrutiny, but the agency must explain why the original reasons are not dispositive any more. There the court said that they could change their mind even without changed circumstance, or legal challenge, more experience, so long as it had a reasoned explanation of why the new rule was as good or better than the old rule. {so did Fox just extend this?}

In **Verizon v. FCC** in 2002, the SC said that State Farm’s hard look, was a function of the flip flop, and did not apply to a first time application of a statute. The majority in Fox seems to take the opposite approach. Might too hard an approach encourage ossification. After fox, there is a need to acknowledge the change, but not a need to compare and explain why the second is better. is that too low a standard?

**Judicial Control of Policy Making - Interpretation of Legislation**

**Chevron –** judges will often say good on 1, and even if ambiguous, also on 2, to cover. Must be one agency only.

**The Chevron Test:**

Step 0 – Really two parts: First: Has Congress has given the agency the power to state proposition w/ the force and effect of law? Second: Has the agency actually done so? This is based on **Mead**, and note that process can matter significantly here. **Barnhart** complicates this, applying a sort of a totality test, saying that the issue is interstitial, the agency has expertise, the issue was complex to administer and, the agency has long considered it meant that it got chevron because deference depends in part on the interpretive method used and the nature of the question asked. (in Barnhart, like Mead, there was no N&C.)

If you fail in Step 0, then you go to **Skidmore**: Agency rulings/interpretations/opinions are not controlling, but can provide guidance with their weight dependent on: Thoroughness, Validity of Reasoning, Consistency with earlier and later pronouncements (including lack of flip flops), and “all factors that allow it to persuade.

Step 1 - Court asks: did Congress address “the precise question” at issue (court enforcing what it sees as Congress’s decision.)

In a footnote, Stevens says you use “traditional tools of statutory interpretation” but do you? The traditional view is that you look at the text, then other tools if the text gives no answer. The minority view is that you look at the text, and if that is ambiguous you go to the agency without the other tools.

There’s also a question of how uncertain you have to be to get a yes or a no in step 1.

Nominally, **MCI** and **Brown & Williamson** are resolved in this step. But the steps really aren’t as distinct as they seem.

Step 2 - If not, go with the agency, given greater expertise and accountability, if their decision is based on a permissible construction of the statute.

The language here is in Chevron, and is basically so long as it is not arbitrary, capricious, or manifestly opposed to the statute, but one way to read that is to ask whether it is a reasonable policy choice, which isn’t really about being contrary to statute. IF it’s about interpretation, then the steps conflate, if not than it has become policy, not interpretation. (the desert example, which must still be bout policy if you’re still talking statute in step 2. Anything but A&C here would just make it step 1.

The **strong** reading of Chevron is that ANY ambiguity leads to deferral, which means that it happens in almost all cases. The **Narrow** reading is that you linger longer in step 1. The **Weakest** reading is that if there is a “better” reading in step 1, then you go with that, and you can bolster that by really going after the agency in step 2.

If they win under Chevron, they can change the interpretation. If they win under skidmore, it would need to persuade the court that the new interpretation is actually better, since the court still technically has authority on the interpretation.

The two major cases are both resolved “in step 1”, against agency, though reverse happens sometime. In both could argue the other side easily.

**Case Details**

**MCI v. AT&T** – Statute said long distance carriers had to file rates, but also allowed the FCC to modify, and as competition rose they eliminated the filing requirement for non-dominant carriers. Question was did modify allow that interpretation. They go back and forth on the dictionaries between the dissent and the majority, with Scalia weighing only contemporary dictionaries. There’s also a limitation on Modify in the statute, the 120 maximum for delay, which can also go both ways. You could read all of this into step 2 though, saying that it is ambiguous, but that this particular interpretation is wrong. Stevens is much more purposive, saying that things have changed and that this is what Congress wanted, but unclear if in step 1 or step 2. Calls this paradigmatic on judicial deference.

**Brown & Williamson** – 5-4. Straight forward reading of the text seems to support the dissent. Majority argument is built on two pillars. First, that the fit is wrong, since if they had the authority they’d have to ban it, which clearly was not the intent of Congress. Second, that there was effective ratification, thanks to the 6 later laws passed while FDA believed the other way, creating a regulatory scheme that can’t otherwise function, something that went beyond mere acquiescence. It’s hard to tell what step the dissent is in, they mostly talked statute.

Some argue there should be different approach for cases like this one that deal with Jx, something the court is deciding right now. B&W didn’t have to decide this, since it was resolved in step 1. If it’s about Jx, it’s a tougher argument that their expertise should apply, over the courts, and there might be abuse from agencies, but both arguments also play the other way.

It’s rare that agencies lose in step 2, but it does happen, like 1999’s Iowa Utilities Board case.

**U.S. v. Mead** – Figuring out if tariffs apply. Court said ruling letters did not bespeak an intent to bind. Reasons were that Congress gave another agency review authority, the agency didn’t behave like they were binding, and so many were made. **Procedural requirements are a signal that Chevron applies, but are not the reason that it applies.** When there is no Chevron, than skidmore applies.

**Barnhart v. Walton** the SSA case. Breyer’s broad test described above.

**Skidmore v. Swift and Company**: About whether they are waiting to work, or working to wait. Notaly means that some interpretations get more weight than others. Note that this was private parties involved, the agency was on the sidelines. It is **Categorically** different from Chevron, not just weaker, based on the idea that here there is a belief that there is a correct answer that the court can uncover. Thus, flipping suggests wrong because it shows that one of the two selected must be wrong.

**Brand X** – Page 727 – Odd case, no details, but affirms that if the court says that an statute passes step 1, then the construction of the statute does not preclude other, later constructions. This can happen even if the agency was not a party to the initial ruling, and the court reverse engineers the position.

**Judicial Control of Agency Procedure**

**Why is this allowed?** Under APA §706 you can get something set aside for being procedurally invalid, violating either the APA or some other Constitutional provision or statute, for instance setting aside pseudo guidance that is really a rule. The definitive example is:

**Vermont Yankee** – Needed the two different approvals for the reactor, agency decides it wants to answer the one question generically, when normally there would be an adjudication procedure with lots of process. No one doubts it can be done through rule making, but DC circuit ruled it had to be done with more process. The Supreme Court reverses, saying that it’s not for the courts to create new procedures, and that §553 sets out the maximum amount that Congress was willing to allow the agency to enforce. So they can do more if they choose, but the court won’t make them. Much of the justification for this is policy based. The Court is worried about predictability and incentives and over litigation, as well as judges just using their bias.

**So did Vermont Yankee Kill off every requirement?** Not quite, the expansive reading of the APA stays in place, as do specific interests read into other statutes, and more basic constitutional requirements like due process. The Court in Vermony Yankee also admitted that “totally unjustified departures from long-standing agency processes” would be reviewable. It did, however, end the prospect of administrative common law.

Note that procedure isn’t special in relation to Chevron. If it’s about interpretation, regulat Chevron still happens. There’s no conflict with Mead, because mead just says that N&C would have been enough, not that more was needed.

Note the possibility of **Hybrid** **rulemaking** like OSHA writing regs after hearings or the FTC doing something similar. Chevron still applies, despite the fact that these things are about procedure. you can have additional or slightly different rulemaking procedures created by the agency's organic statute or some other statute

**Availability of Review / Standing**

Reviewability bars courts from hearing claims. Like standing it limits judicial review. But it is more narrowly focused than standing, preventing certain statutory claims, rather than all review. The APA creates a broad right to judicial review as a backdrop in §702, allowing any person suffering a legal wrong from action or adversely affected by action within a statutory meaning, can get review of that action. Thus there is a  **Presumption of judicial review**. Unreviewability can emerge if there is a superceding statute that precludes it, something §701 APA acknowledges as possible. **§701(a)(2) also exempts review when the agency action is committed to agency discretion by law.** In those cases the idea is there is no criteria to judge, since Congress just gave the agency the choice. Courts can also place things in this category simply to avoid micromanaging the branch.

There are 6 components:

1. **Art. III** **Reqs** – These cannot be waived and are Jx. They must be PROVEN.
   1. Plaintiff suffered a judicially cognizable injury, actual or imminent that is. This is an **injury in fact** and most things count, but not ideology.
   2. Fairly traceable to D’s unlawful conduct AND
   3. Likely redressed by the relief requested by P.
      1. B and C combined are referred to as nexus
2. **Prudential –** these can be overridden, as they are just for convenience of the courts
   1. no generalized grievances – can still be widely shared though.
   2. within legal “zone of interest” – This is written into §702, which says “within the meaning of the relevant statute” so agencies regulated by it or maybe benefitting.
   3. usually no 3rd party standing allowed, though with some exceptions, must assert own rights and interests

Major Cases

**Lujan** – question of whether the endangered species act applies outside the U.S. Defenders argue this is a mis-reading, and the court says species might be worse off, but court rejects their standing. Didn’t buy their ecosystem, animal, or vocational nexus arguments. Credited the aesthetic injuries, but said the harm is not imminent, (real, immediate, likely, etc…) Scalia notes that they assume that it might save, despite uncertainty, adding that procedure is different in that you can rgue that there’s a better chance and your odds were just hurt, a variant on the **independent actor problem**, like with hospitals and the indigent. As such, Scalia believes that the regulated have an easier time meeting the nexus test than those that benefit from regulations. {go back to the footnote} effectively, that the Congress can’t give the courts the authority to take care the laws be faithfully executed, as it’s not theirs to give.

In his concurrence, Kennedy said Congress could articulate a chain of causation, but it’s not quite clear.

**Lions v. LA** – Police put a guy in a chokehold, but no injunctive relief, because no sense he’d likely to end up in a chokehold again.

**Mass v. EPA** – State says losing coastline, will need to take steps to stop and court says this is concrete enough, though the dissent is not convinced, seeing it as too general, while stevens thinks it is a particular harm. There’s a sense that it should appear like a law suit, and if it doesn’t it should be solved through politics. The dissent also argues you fail nexus, since redressability is impossible.

Barnhart is about whether Chevron applies. Skidmore is what you do once you decide Chevron doesn’t apply. Breyer’s version of Chevron looks something like Chevron. Scalia doesn’t think there is skidmore anymore, for Breyer, there’s only skidmore, though he would never say it. For Breyer the deference cases are always gestalt instances about how seriously we should take agency action. For both of them there is no step 0. There are triggers for chevron that don’t line up with mead, Barnhart not cited that much, for when you apply Chevron. What Breyer is doing in Barnhart is deciding whether Chevron applies and then deciding under it, it’s just his ideas of what the triggers are is kind of a mess. You can see barnhart as an alternative to mead

In pari materia is a framework, like Chevron or skidmore, not a rule.

There’s an understandable intuition that there should be something different about jurisdiction, it seems more dangerous, but at the end of the day, there’s not really any difference between Jx and substantive questions on relevance of expertise, chance for abuse, need for oversight.

“all text require interpretation” think **interpretive v. legislative rules**. The idea of an interpretive rule is that the law is the same, it’s just that it’s been clarified by the agency, the law isn’t supposed to actually be different. Chevron isn’t supposed to apply to interpretive rules, there is no step 2, you are in judge land. When law gives out, deciding what the rule should be, then that’s not interpretation any more, chevron kicks in, the court has to defer.

12,866 – Regulatory plan (annual) v. Regulatory agenda (6 mo) – the latter is more mechanical, just a list of all the things we are working on. The plan involves judgment, highlighting what’s important.

Livermore was the person that wanted there to be responses to refused rulemaking.

Good cause exception to skip notice and comment rulemaking. Agency better equipped to handle partial court revisions.