

NYU School of Law Outline:
The Administrative and Regulatory State,
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Spring Semester, 2009

Contents

1	Introduction	2
1.1	Historical Overview of the Regulatory State	2
1.2	Statutory Interpretation and the Implementation of Public Policy in the Regulatory State	4
2	Legislation and Statutory Interpretation	6
2.1	Basic Legislative Process	6
2.2	Bicameralism and Presentment	8
2.3	Schools of Statutory Interpretation	11
2.3.1	Intentionalism, Purposivism, and Legal Process	11
2.3.2	Plain Meaning and Textualism	13
2.3.3	Dynamic Interpretation and Changed Circumstances	16
2.4	Statutory Interpretation Doctrine	18
2.4.1	Textual Canons	18
2.4.2	Substantive Canons and the Rule of Lenity	19
2.4.3	Extrinsic Sources of Legislative History	20
2.4.4	Interpretation in Light of Other Statutes	24
2.4.5	<i>Stare Decisis</i> and Statutory Precedents	25
3	Regulation and the Administrative Process	26
3.1	Congress and the Agencies	26
3.1.1	The Nondelegation Doctrine	26
3.1.2	Legislative Control over Agencies	28
3.2	The President and the Agencies	29
3.2.1	Appointment and Removal	29
3.2.2	Other Mechanisms of Presidential Control	30
3.3	The Judiciary and the Agencies	31
3.3.1	Agency Exercise of Judicial Authority	31
3.3.2	Due Process and Administrative Agencies	32

3.4	The Administrative Procedure Act: Rulemaking and Adjudication	36
4	Reviewing Courts	38
4.1	Judicial Review of Agency Policy	38
4.2	Judicial Review of Agency Factfinding	41
4.3	Judicial Review of Questions of Law	43

1 Introduction

1.1 Historical Overview of the Regulatory State

- The Early Days
 - There wasn’t much in the way of federal government regulation until comparatively recently. It used to be mostly state-led, and most law was private ordering, with the common law of torts, property, contract, and the like controlling. Judges were in charge.
 - Starting in the first few decades of the 20th century, things started changing.
 - This was in part due to the new balance of power of the antebellum era, and partly due to the industrial revolution.
 - The Progressive Era saw some federal regulation of industry; the Sherman Antitrust Act, for example.
 - The primary concern then was to help the consequences of industrialization, breaking up conglomerates.
 - The States were helping the negative consequences for workers, in occupational health and safety areas.
 - The big shift here was that states were inadequate to fix the problems, because of their jurisdictional limits.
 - This led to the formation of the first federal agencies: the Interstate Commerce Commission and the Federal Trade Commission, among others.
 - Louis Brandeis, a reformer and legal scholar skeptical of business, argued that America had to regulate trade to preserve its values.
 - He also encouraged the court to look at facts, not simply legal principles.
 - The Supreme Court struck down the Sherman Act, saying its application should be governed by a “rule of reason.” Who knows what that meant.
 - Lower courts were at a loss to decide what was legal.
 - This led to a new belief, that independent, nonpartisan agencies could make policy decisions scientifically, dispassionately, the way older judges thought law could be administered.

- The New Deal
 - The real impetus for the modern administrative state.
 - It provided for the FDIC (to prevent bank runs), the modern FTC, redistribution of resources such as Social Security, and social policy agendas such as the NLRB, FDA, SEC, FCC...
 - The Supreme Court and FDR were at war. The “four horsemen of the apocalypse,” older justices who supported laissez-faire economic policies, eventually relented after FDR’s reelection. (See Con Law for more on *that* sordid story.)
 - The New Deal also advanced a new vision of law. Before the New Deal it was believed that the common law was neutral, dispassionate, like a science. Now, law was understood to be about making social choices.
 - So, since there was no “natural law,” the New Dealers wanted to give power to the agencies instead, because they thought those experts and technocrats could engage in policymaking better suited to the public need.
 - Separation of powers was viewed as “dysfunctional”: given its purpose to make it hard to pass legislation, there was no way to respond to the emergencies that developed. The agencies were created for that situation.
- The Rise of Public Choice Theory
 - The agencies were subject to capture by special interests. The people most likely to appear before the agencies often, the industries being regulated, became the squeaky wheels.
 - The Right and Left had different ideas on how to solve that problem.
 - The Right wanted less regulation.
 - The Left (and Nader) wanted judicial review, transparency, and good governance.
 - The “rights revolution” of the 1960s-70s led to the Left winning, with still more regulation.
 - The Civil Rights movement helped; agencies such as the EEOC were created.
 - The War on Poverty and “risk” regulation both developed in this period.
- The Reagan Era
 - A new, anti-regulatory ethos. It’s still with us, even though there are criticisms of deregulation.
 - The major innovations of this period still exist:

- * Cost-benefit analysis (which Dean Revesz insists is not inherently any political side).
 - * Centralization of executive power (an oversight mechanism).
- Nowadays: The Big Picture
 - American history is a cycle: regulate, centralize, deregulate, protect states' rights, repeat.
 - But in each cycle, some things stay...including the Administrative and Regulatory State.

1.2 Statutory Interpretation and the Implementation of Public Policy in the Regulatory State

- There are a *lot* of theories of statutory interpretation. Primarily:
 - Formalism
 - * Read statutes narrowly
 - * Based on a distrust of legislatures; according to Blackstone they are formally superior but functionally inferior.
 - * “Legislatures act capriciously, and the judicial branch judiciously.”
 - * Judges should limit the scope of what laws created by the legislature cover.
 - * The modern form of formalism is textualism. See Scalia.
 - Legal Realism
 - * A response to formalism; law is affected by the social. It doesn't sit in the ether waiting to be discovered.
 - * Law is a creation and elaboration of social policy. Judges interpreting the law should account for social facts.
 - * Pure logic is inadequate.
 - * We are all legal realists; some think that judges should not think about social consequences but most are affected.
 - * Proponents:
 - Holmes: Law is a product of social struggle. Judges have to balance factors, legislatures should be deferred to up to a point.
 - Cardozo: Judges should pay attention to policy, but principles, like precedent, should also guide.
 - Brandeis & Frankfurter: Critics of Holmes; more robust arguments about institutional competence. A lot of faith in legislatures.
 - Legal Process

- * Law has a purpose. Judges should determine what it is and advance that.
- * Law is an institution, with lots of actors; broad dispersion of decisionmaking is good.
- * The interaction between the private and public will produce better results.
- * The way to determine if law is good is to see if proper procedures were followed.
- * The ultimate insight: If you have the right procedures, and a law is passed pursuant to same, it is binding.
- * Less focused on the substance of the laws, of course.
- * Hart & Sacks wrote the bible of the school.
- Law and Economics
 - * Recall last semester.
 - * Not really a theory of statutory interpretation as much as a worldview on the larger question.
- Critical Legal Studies
 - * Law reinforces the dominant (white male) power structure.
 - * Born out of realists.
 - * The law, even looking at social facts, doesn't matter. Politics will out and the power structure wins.
 - * Flawed through lack of an alternative vision. Who do we trust? No one?
 - * Also not so much a theory as a worldview.
- Fuller, *The Case of the Speluncean Explorers*: Spelunkers cannibalize one of the crew to survive. Law: “Whoever shall willfully take the life of another shall be punished by death.”
- *Formalist/Textualist*: Truepenny, Keen.
 - Truepenny: No exceptions are in the law, so he has to apply it as written. He does leave himself the “clemency appeal” escape hatch, to the executive. The judge’s obligation is to apply the law as written, but the morality can be better served by the pardon power.
 - Of course, there is no guarantee the executive will do so.
 - Keen: Judges shouldn’t be “updating” the law; it’s not about right and wrong, but positive. This is what the legislature wrote. If we start adding exceptions, the law won’t be clear, and people won’t be able to conform their behavior to it.
 - There is no self-defense exception in the law, and even if there was, would that cover? This case tests the boundaries of that exception. We want clarity from the legislature because it is democratically accountable; the people, not unelected judges, should decide the morality and express their will.

- *Abdication*: Tadding. He can't live with the formalist requirement, so he withdraws. The problem is, he's a free-rider. He's a formalist who can't live with his formalism.
- Note: What do "willful," "take a life," or "another" mean?
- Is this not willful because they had no choice? Even formalists face term confusion.
- Was the life not taken because he was going to die anyway? This fails the laugh test.
- What about "another"? Animals? Fetuses? Judges assume it's another person from the "whoever" language but it's not clear.
- The Hart & Sacks "rule of lenity" says any ambiguity should be resolved for the defendant.
- *Realist*: Handy.
 - Our government is of men, not laws; there's a public opinion poll.
 - Should judges be relying on a public opinion poll?
 - We don't want the law to become divorced from people, and "common sense" and "intuition" aren't the same as the judge applying his own views.
- *Legal Process*: Foster.
 - Punishing the explorers would not further the purpose of the law; as with "skim the potatoes and peel the soup," we want the servant to understand.
 - Likewise, self-defense is recognized; also, enforcement here would be no deterrence.

2 Legislation and Statutory Interpretation

2.1 Basic Legislative Process

- As outlined in Federalist #10, the threat to the public good is faction.
- Faction is any set or group of people who have an interest distinct from the public at large.
- Political parties and special interests both qualify.
- Majority factions tend to be the most dangerous, as the majority in a democracy can impose its will on the minority.

- To prevent the “tyranny of the majority” the Government created mechanisms: separation of powers (including within a governmental branch; for example, originally the senate was not popularly elected), for example.
- Ambition was also set up to counteract ambition.
- Representation would insulate decisionmakers, in part, from the public will.
- Deliberation was valuable, which would purify views into the “diamond of the public interest.”
- We want a lot of competition, where the best ideas will win out.
- But often, the great is exploited by the small. Interest groups form when individuals have a strong enough interest. If the individual interest is low but societal benefit is high, there won’t really be a group. Environmental legislation, for example.
- *Weber*: Employer had a plant, company was trying to fix racial disparity in hiring by creating a voluntary affirmative action process for black craftsmen.
 - The plan would modify the plant’s training program to operate not on pure seniority but also assuring 50% of the members were minorities, until such time as the percentages matched the local workforce.
 - Weber claimed that, but for that set-aside, he would have been accepted.
 - Weber argued that Title VII prohibited private employers from creating voluntary affirmative action plans.
 - §703(a): “... fail to hire, discharge, or otherwise discriminate against an individual on the basis of race...” meant, in Weber’s argument, all distinctions, not just those made to further disadvantage minorities.
 - Weber’s approach is formalist/textualist.
 - What about the claim that “discriminate” means “invidious”? Arguably the rest of the statute reads that requirement out.
 - The majority says the overriding spirit/purpose of the legislation, to address past inequality, would be undermined by a literal reading.
 - If employers wanted to maintain strict seniority, the cycle of poverty would not be broken.
 - The floor debates about the bill suggest this was the driving force.
 - Hiring 50% African American workers would take too long; the majority says legislation is not supposed to take 25 years to fix. (The dissent argues just that.)

- The dissent says that the legislative history proves the intent was to have an absolute meaning.
- Dissent points to §703(j): “Nothing...require[s] any employer to give preferential treatment.”
- The majority had argued that “no requirement” is not the same thing as “prohibition.”
- Dissent says that this is the circumstance (j) was designed for; employers were concerned about abandoning existing seniority practices, but (j) assuaged their fears.
- Dissent also looks at the legislative history, saying that the only way to prevent de facto coercion into these “voluntary” affirmative action programs was to ban affirmative action fully.
- The dissent claimed that the purpose of the Act was not to retroactively address past discrimination, but ban it going forward. He claimed, with a purposive analysis, that the statute’s purpose was equality.
- The legislative histories examined in cases like *Weber* include:
 - Floor debate between sponsors and committee chairs
 - The House Report (a summary of the process and indicator what the House as a whole thinks a bill means)
 - Amendments introduced (used to show concerns to be taken account of in analysis)
 - Historical motivation
 - The minority report (an answer from opponents in the House)
 - Sometimes, Committee Reports; but they don’t stand for the House as a whole.
 - Memos between House and Senate.
- What is most helpful or reliable? Amendments enable compromise, floor statements that lead to changes are helpful, memos from individuals are just that...it’s complicated.

2.2 Bicameralism and Presentment

- One procedure to ensure deliberation and accountability of legislation was the bicameralism and presentment requirements. They force deliberation, and require the legislatures to talk to constituents.
- *INS v. Chadha*: The Court strikes down the legislative veto.
 - Congress had passed a law saying that one house of Congress could override the Attorney-General’s decision to excuse an alien from deportation.

- Why have the legislative veto? Probably to give Congress a way to control executive action and prevent abuse of the relief power granted to the Executive. Without it, the relief power probably wouldn't have been passed.
- Justice Burger writing for the majority argues that resolution circumvents bicameralism and presentment. It avoids the procedures for passing legislation, as required by the Constitution.
- The other concern is that of the tyranny of the legislature. Congress has a lot of power: namely, control of the budget.
- In short, if the veto was “legislative” in character, it had to go through the legislative process.
- It was legislative in character because absent Congress's action in this case, Chadha could have stayed in the US. Clearly, Congress's action affected Chadha's legal rights.
- As such, for Congress to make this change, it must go through the legislative process: both houses, presentment to the President for possible veto, and so on.
- Once Congress has delegated authority to the President, says the Court, they can't second-guess him. Congress can't reserve an override outside the system.
- It's a violation of separation of powers if Congress tries to override like this, because the President has the power to enforce the law.
- White, dissenting, said that the key virtue of the legislative function was to give Congress the ultimate authority over the law, and promote executive accountability—keeping Congress's control over legislation.
- The executive was very different at the time of the Framers, who didn't anticipate the executive doing the kind of things of *Chadha*.
- White makes a functional argument, that the veto performs a crucial function consistent with the reasons we have separation of powers.
- The majority argument is formalist, relying on text.
- The dissent is functionalist: it says that the legislative veto is consistent with the structure of the Constitution, even if it's not in there specifically.
- Functionalist arguments are more adaptable.
- Separation of powers, argued here, allows for accountability, checks and balances, and proper procedure.
- It also encourages institutional competency: the branches make the decisions they are good at making.
- Deliberation in the legislative process cuts both ways: Congress values deliberation, but that has already occurred, in the passing of a law with a legislative veto.

- Congress has always weighed in on when relief may be granted, but can't account for anything. So it delegated power but reserved a right to override the Executive.
 - Functionalists might not have an easy way to just say “we don't want Congress to be lazy,” while a Burger formal approach would just avoid the question: “here is the Constitutional procedure, follow it.”
 - Justice Powell, concurring in the judgment, is concerned with the legislature usurping *judicial* power: they adjudicate individual rights under existing law, which sounds pretty judicial.
 - Powell wasn't concerned with usurping the executive or delegations of the legislature.
 - Powell wants to stay narrow, not wanting to destroy hundreds of legislative vetoes, but wants to invalidate those which usurp the judicial power.
 - Every time a non-judge adjudicates, *that* is a violation of separation of powers.
 - There is a big question about the extent to which any one Congress has control over legislation, future Congresses, or previous Congresses.
 - That's when we look to legislative history; “what is the meaning of legislation to the Congress that enacted it?”
 - The key question here is whether the Court should look only to the Constitution, or the functional approach too.
- *Clinton v. New York*: The Line Item Veto Act allowed the President to cancel any discretionary spending, limited tax benefit, or entitlement benefits.
 - The majority (Stevens) wrote that the procedure was a violation of separation of powers.
 - The President was, functionally, amending the *enacted* statute unilaterally without Congressional approval.
 - The line-item veto is formally unconstitutional, since it's not in Article I, §7.
 - The Tariffs Act case is different, because it's OK to allow the President to extend tariffs into the future because Congress made a policy judgment.
 - Here, the President is making a fundamentally *different* policy judgment.
 - The dissent (Breyer) says that doesn't make sense; the President is *allowed* to make discretionary spending decisions. The executive isn't amending the statute, just using a passed statute on others.

- Comparison: If a statute said the President could prevent the just-mentioned provision if he did X, Y, and Z, that would be OK.
- Breyer says it's silly to require Congress to put a line-item veto provision in every statute it enacts.
- It's a pragmatic angle: there are so many bills, why force Congress to break them all up into individuals for veto options?
- Breyer also says that there is no problem of separation of powers because the nondelegation doctrine provides a check.
- Congress can delegate power to the executive so long as it provides intelligible principles for the delegation.
- Scalia points out that this is just like delegation as well, like the ability to refuse to implement appropriated money.
- The line-item veto hasn't appeared in individual bills since.
- Maybe Breyer's right and it would be too complicated, or Congress didn't want it, maybe both.
- Or there are different people in power.

2.3 Schools of Statutory Interpretation

2.3.1 Intentionalism, Purposivism, and Legal Process

- The classical set of rules, laid out in *Heydon's Case*.
- The *Mischief Rule*:
 - Looks at the mischief, and the problem or defect it was supposed to remedy.
 - What was the common law before the act?
 - What was the mischief for which the common law did not provide?
 - What remedy was given?
 - What was the true reason for the remedy?
 - Judges should construe statutes to suppress the mischief and suppress interpretations which would allow bad results and continue the remedy.
- The *Golden Rule*:
 - Give words their ordinary meaning unless that meaning would produce absurd results.
 - The legislature, it is assumed, intends non-absurd results. The judge's job is to implement goals that the legislature wanted to accomplish.
 - This is considered to be the best and most complete rule.

- The *Literal Rule*:
 - Implement even absurd results, because it isn't clear what absurd is.
 - Hold a legislature to the literal meaning, so the legislature can amend the statute if they don't like the absurd way it was implemented.
- *Holy Trinity*: The statute says it's unlawful for any person to assist/encourage a foreign alien to immigrate for the purpose of performing a labor or service. So does a rector from Britain count as a "labor or service"?
 - Justice Brewer, applying the literal rule, says "Trinity Church violated the statute."
 - Brewer could, though, have said that labor meant manual labor, and the contemporary definition of manual labor did not include doctors, teachers, and other professionals.
 - Or, they could say that they look to the common law precedent as well as the dictionary to define terms.
 - And that leads to the Webster's Third story.
 - But, Breyer looks at the purpose of the statute: the mischief rule says that the evil Congress is trying to remedy is the importation of poor laborers, not ministers.
 - And the golden rule would say that keeping the ministers out would be downright *absurd*.
 - The Court ignores §4 of the statute, which creates criminal liability for importing a laborer, mechanic, or artisan.
 - Could one argue that the list in §4 informed the list in §1?
 - What about §5? Exempting actors, artists, lecturers, and singers? Wouldn't that suggest that those are included in service, and that Congress knew how to exempt?
- So, when we're considering purpose, we need to know how to find the purpose.
- Roscoe Pound suggested looking to the reasonable legislator, not the cynical one.
- Also, we could look at general public morality/knowledge.
- *United States v. Caminetti*: Federal statute criminalizes taking women across state lines for immoral purposes.
 - Bringing someone across state lines to be his mistress clearly includes this in the plain meaning. So the majority upheld the conviction.
 - But the dissent looked at the legislative history, the concern seems to be of sex slavery; for that matter, the law was called the "White Slave Traffic Act"!

- This suggests a third place to look: the whole context of the statute.
- We can also look at the context, the common law/past precedent (the collective wisdom). This could be specific or general; it's very standard for interpreting statutes, especially criminal law and torts.
- Justice Frankfurter is said to have said that the first three rules of interpretation are "Read the Statute!" three times.
- We can also examine the legislative history of the statute, as the dissent in *Caminetti* did.
- Plus, the past enforcement of the US Code as a whole. In a discrete area such as criminal law, we want to know how it applies as a whole.
- One large concern: we don't know what hundreds of men in the legislature think a statute is intended to do. We can't really combine all the intents of the legislators involved.
- This is the classic problem with originalist/purposivist thinking.

2.3.2 Plain Meaning and Textualism

- So, as an alternative to originalism, we now take up textualism. Of course, we can't be *too* literal, that's difficult, but at least we can be better about it. What do the words mean?
- The New Textualism arose in response to the legal process school. It gives the text the meaning "it can bear," not going to other sources such as history until it absolutely has to.
- The "humpty-dumpty point"—where words mean whatever we want them to mean—is disfavored; we want to look at what words "actually mean."
- We can look at the dictionary.
- But which dictionary? Recall Scalia and Webster's Third.
- We also could look at a word's "ordinary meaning," or the definitions in the statute itself (if there are any present, and if they're not ambiguous themselves).
- *TVA v. Hill*: A dam to be built by the TVA would destroy a habitat protected by the Endangered Species Act.
 - The Supreme Court sided with the ESA, textually. The ESA said no destroying a habitat, so we don't. Social costs and balance have no place.
 - Burger, writing for the majority, also puts a lot of weight on the legislative history, establishing the categorical nature of the rule.

– This is “softer plain meaning,” some call it.

- Scalia’s textualism is far newer, and his view has made legislative history almost irrelevant.
- In Scalia’s view, the law governs, the rule of law is crucial, and for judges to interpret anything but the law is anti-democratic.
- It’s the legislature’s job, not the Court’s, to fix broken statutes. The judges should just use the law as written.
- Statutes supersede justice.
- The ordinary meaning, in Scalia’s view, is what an ordinary speaker would understand.
- Of course, he’s fairly conservative about what the ordinary speaker would understand. It’s not Joe the Plumber, here.
- Of course, we don’t exclude the possibility that terms of art could be defined in the context of the statute or the field operated in.
- This is not simply strict constitutionality; there’s nothing inherently broad or narrow about textualism.
- This is also not the same thing as plain meaning. In a plain meaning approach, lacking clarity in the statute we go to the legislative history.
- In this ordinary meaning approach, we don’t go to the history, we use the ordinary meaning that makes the text make the most sense.
- Interestingly, the New Textualism will use dictionaries, despite the valid point that those aren’t in the statutes either. But there’s a question about what dictionaries to use.
- Scalia tends to take a range and find consistency, and to look at the time frame of the statutes.
- Nowadays, the new textualism (modified) looks at the statutory scheme at issue, as well as at the US Code as a whole.
- But even though legislative history has taken a beating, it still has some value, if only to affect how the judge understands the text subconsciously.
- *Zuni Public School District v. Department of Education*: A statute entitles local school districts to aid; the Department of Education used a formula for calculating the figures to base decisions on, and by statute must disregard outliers in the top or bottom five percentile.
 - Breyer for the Court says that the calculations the Department uses are consistent with the statute.

- He makes a legislative history argument, saying that the DoE always used its method, so when Congress adopted this newest statute, it intended to reflect the method the DoE used.
 - He also makes a purposivism argument; the point is to disregard outliers, the statute doesn't care how. (But the method does affect how many outliers are disregarded, and which.)
 - Finally, since the meaning of percentile is ambiguous, we look to the experts—statisticians. They haven't objected.
 - Scalia in dissent says that starting with legislative history is insane. There's a clear textual plain meaning, just use it!
 - Steven in concurrence says that if there is better evidence of Congressional intent in history than text, text can be disregarded. And this is a case.
- *US v. Locke*: Statute said holders of mining claims must file documents “prior to December 31.” Locke family filed *on* the 31st.
 - Marshall, for the Court, says that the outcome is completely illogical. Surely Congress meant before or on the 31st. However, the statute is crystal clear. All deadlines are arbitrary anyway, and Congress gets to set whatever deadlines it wants. So the rule is clear.
 - Stevens in dissent says that the language isn't that clear; even the agency, the Bureau of Land Management, had made that mistake, so there was no rationale.
 - The point is that we need to be fair.
 - *Brogan v. US*: Does the law against lying to federal agents contain an exception for the “exculpatory no”?
 - Courts of Appeals read the exception in, saying the purpose of the false statement doctrine was to prevent perversion of government investigations, and the exculpatory no is consistent with that purpose.
 - However, Scalia for the Court said no such luck. The ordinary meaning says false statements are punishable, period.
 - The Courts of Appeals expressed concerns about entrapment, but Scalia was focused on certainty before justice.
 - Ginsburg in concurrence of the judgment made an affirmative nudge to Congress to fix the oversight, which Scalia thinks is not the Court's role.
 - There is some question about the interactions between Congress and Court. Congress might see the Court as a test bed for how legislation actually gets interpreted, while Scalia might say that if the legislative process can't fix the problem, maybe it isn't that severe.

- Stevens in dissent says that since the Courts of Appeals have been applying the doctrine for a while, Congress could have responded and didn't, so it must be OK. That's very intentionalist.
- *Green v. Bock Laundry*: A rule of evidence says a witness's credibility can't be attacked if the probative value outweighs the prejudicial effect to the defendant. But what about the plaintiff in a civil matter?
 - This is the case where even Scalia's textualism can't hold up.
 - The rule could be interpreted to mean "criminal defendant" only, all parties, "everybody but criminal prosecution," or all witnesses.
 - The majority and Scalia's concurrence read "criminal" into the statute. The majority finds legislative history suggesting the topic of the day was conviction and criminality.
 - Scalia thinks that given there is a different rule that can apply, and adding "criminal" does the least damage to the statute, they should do that.
 - The dissent says that actually, the least damage would be done replacing "defendant" with "party," extending the protection to civil cases on both sides.
- *US v. Marshall*: How do we read the term "mixture" as applied to minimum sentencing in LSD? Should we include the weight of the paper the LSD is impregnated on?
 - Posner and Easterbrook both recognize the problem of including the paper, but are bound by the text.
 - Easterbrook for the Court rules that the defendants' arguments that only the pure drug should count doesn't make sense. He does suggest that "mixture" doesn't include every carrier.
 - He makes analogies to chemistry, saying that here the LSD has seeped into the paper, and is not floating on top.
 - Posner in dissent reads out the carrier claim—people don't really buy the carrier, after all.
 - He thinks that Congress doesn't seem to understand how it works; though, in the PCP context, they do, so that undercuts this.
 - There is a constitutional avoidance argument; that is, the statute gets interpreted in ways that keep it from violating the Equal Protection Clause.

2.3.3 Dynamic Interpretation and Changed Circumstances

- The Eskridge/Calabresi "dynamic interpretation" theory argues that changed circumstances might lead judges to update statutes in light of new circumstances.

- It's dangerous, because of the principal-agent problem if nothing else.
- The “soup meat” example is used to describe some ways circumstances could change:
 - Social context changes (the shop closes)
 - New legal rules or policies (low-cholesterol diet)
 - New metapolicies (meat rationing)
- Calabresi twisted the problem by suggesting that statutory interpretation is *inherently* an attempt to reconcile a conflict.
- There are two aspects of judging that are present and in conflict:
- The responsibility to honor legislative supremacy, and the obligation to apply the law in a way that works in order to maintain its legitimacy.
- Calabresi wants to address how to handle outdated statutes.
- Often, a lack of political will (or opposition by a vocal minority) might be enough to keep laws on the books even after their effective dates.
- Contraception laws in Massachusetts and Connecticut, or *Lawrence v. Texas*, were examples—and the judiciary eventually killed them based on changes in Constitutional understanding.
- Calabresi proposed looking at several factors:
 - The age of the statute: older statutes are less likely to represent the people's will. (Unless the statute becomes a “super-statute,” and therefore gets more entrenched; see the Sherman Anti-Trust Act or the 1964 Civil Rights Act.)
 - Whether the law was designed for a particular crisis: once the crisis passes, the law may be defunct. (Unless the Legislature wants to keep the laws in place if the crisis returns; judges can't always know the exact purpose behind legislative decisions. And Congress is quite capable of creating sunset provisions.)
 - Potential Constitutional problems: since understanding of the Constitution changes, old laws at odds with new Constitutional interpretations need to go.
 - Changes in the common law: If the common law around a statute has changed, then the statute might need to conform. (Note that the common law is judge-made. This is a *lot* of power in the judiciary.)
- Why all this power?
- Judges have an informational advantage, being the party on the ground dealing with the law day by day.

- Judges have particular expertise the legislatures may (do) lack.
- Judges are politically insulated and objective, and can .
- Judges have deliberation time and aren't swayed by political needs.
- Judicial decisions will also be without compromises to pass through Congress, and more coherent.
- The problem is, this is a bit more homogeneous than we might want. The legislature is the people, not the elite judiciary.
- The institutional capacity to make change is questionable; people might defy the judges' attempts to update statutes.
- And, of course, objectivity is questionable at best.
- Much of this came up in the case study about warrantless wiretapping, FISA, the Authorization for Use of Military Force...

2.4 Statutory Interpretation Doctrine

2.4.1 Textual Canons

- Textual canons encourage/provide consistency, ensuring that all judges are on the same page.
- They ensure that the law is intelligible, that the judges are constrained, and they signal the legislatures how the laws are going to be interpreted.
- Some of the canons of interpretation:
 - *Ordinary Meaning*: Courts will presume that the terms used will have their settled meaning unless Congress directs otherwise. The “core” meaning. Not #5 down on the dictionary. (debated in *Weber*: What is the meaning of “discrimination”?)
 - *Noscitur a Sociis*: Light may be shed on the meaning of an ambiguous general word by the reference to the more specific words associated with it.
 - *Ejusdem Generis*: “Of the same class, kind, or nature”: terms are defined with reference to the terms around them.
 - *Expressio unius est exclusion alterius*: “The expression of one means the exclusion of all others”: If §1 says X, Y, Z and §2 merely says X and Y, Z is not included in §2.
- *Circuit City v. Adams*: Is a C. C. employee excluded from coverage of the Federal Arbitration Act of 1926, because the statute §1 excludes “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”?

- The Court applies the *ejusdem generis* canon, saying that “any other workers” should be interpreted in terms of “seaman” and “railroad employee.” Therefore, the C. C. employees are in.
- Souter, in dissent, suggests that *ejusdem* should just create a rebuttable presumption, and the legislative history trumps that.
- Note also that the Commerce Clause is much broader than it was when that Act was passed.
- *Noscitur/Ejusdem* and the redundancy canon (when Congress uses two words each one has meaning) are in tension.
- *Expressio unius* is a presumption against reading excluded terms into the statute.
- *Chan v. Korean Air Lines*: The Warsaw Convention governs accidents and torts related to airlines; a passenger got a ticket without notice. Does that count?
- The Grammar Canons:
 - Last Antecedent Rule: Qualifiers only apply to what they are immediately connected to. (The Social Security Act elevator-operator case.)
 - Gender neutrality: “he” means “he or she.”
 - Conjunctive or disjunctive connectors: and/or rules. (Formal logic, bitches!)

2.4.2 Substantive Canons and the Rule of Lenity

- There are lots of substantive canons, which have been in and out of favor; some are more consistently used than others. See the appendix of EFG.
- The presumption against implied repeal is *very* important; constitutional avoidance is used often, as is the presumption against preemption.
- Liberally construing a statute, rather than strictly, is a presumption, not a categorical rule.
- This allows judges to extend a statute to new situations—see *Circuit City*, where the dissent would have applied the Arbitration Act liberally.
- *Sweet Home*, the ESA case, discussed the definition of “harm” in similar liberal-strict interpretation.
- Statutes in derogation of the common law used to be construed strictly; the justification was that we should assume Congress only wanted the statute to apply to the narrow category. This is an old rule, based on when the judiciary was viewed as superior to the courts.

- Presumptions are often in favor of the government... except in the *rule of lenity*.
 - If there is ambiguity in a criminal statute, resolve the ambiguity in favor of the defendant.
 - This rule emerged because of the notice-giving function. We want to be sure to interpret statutes to give notice because of the constitutional undertones.
 - People need to know how to conform their actions to the law.
- *Muscarello*: Breyer and Ginsburg disagree as to the meaning of the word “carry.”
 - Breyer thinks the meaning is sufficiently clear; there may be disagreement, but not a grievous ambiguity.
 - Ginsburg asks where to draw the line, and points out that this much disagreement on the courts suggests enough ambiguity to justify the rule.
 - Breyer’s opinion suggests that the rule of lenity has eroded over time. It’s a fiction that people read the statutes in the first place.
- Substantive canons do not obviate textual canons. They’re additional ways of interpreting text. Sometimes, they’re tie-breakers once the textual analysis is done.
- Sometimes they’re presumptions: Congress did not intend to legislate extraterritorially, or to legislate in violation of the Constitution.
- IT stacks the deck initially, and presumes that the statute is not going to mean something.
- The burden of proof shifts to the other side, to prove that yes, Congress did intend that.
- The canons are substitutes for imperfect information; this justifies their use as tiebreakers, but not as much as presumptions.
- There’s also political considerations; they often inform the decision to use the substantive canons as presumptions as opposed to tiebreakers.

2.4.3 Extrinsic Sources of Legislative History

- Common Law
 - Less important, nowadays. It functions as a gap-filler for older, more sparse, statutes. Today Congress makes its delegation and its regulatory scope clear.
- An Introduction to Legislative History

- “Statutory History” means the formal history–legislative history. And the entire circumstances of the passage of a statute (Rehnquist’s “imaginative reconstruction” in *Leo Sheep*).
- *Leo Sheep*: Is there an implied easement in land granted to private individuals out of the railroads?
 - * Rehnquist does historical analysis to see what Congress would have thought about the access question at the time.
 - * He finds that Congress at the time would not have reserved an easement, but would have preferred to negotiate terms of passage individually.
 - * Rehnquist believes that this was not intended to be a litigated issue.
 - * Or, if all else fails, there’s always eminent domain.
 - * It’s not the best use of statutory history; *Weber* is more conventional.
- Statutory history, which is tricky, shouldn’t trump formal legislative history.
- Committee reports tend to be the core of the legislative history. The committee has the expertise, whereas the rest of Congress is a passive recipient.
- It often represents both the deliberation and the consensus.
- The catch is, the strong personalities on the committees often have a lot of sway, undermining the “consensus” angle.
- Plus, staffers, lobbyists, and other parties can insert things that haven’t been vetted.
- Scalia is skeptical of LH for that reason.
- *Blanchard v. Bergeron*: §1988 allows judges to set reasonable attorney’s fees in §1983 (civil rights) suits. Should the fees be based on the contingency agreement?
 - * The Court found that the “reasonable” fee was higher than contingency.
 - * The definition of “reasonable” was not in the statute.
 - * The Court looked at the legislative history, which suggested that an attorney should be compensated for “all the time reasonably expended” (more specific). It suggests that the lawyers should be paid based on an hourly rate.
 - * However, *Johnson v. GA Highway* is a problem; it says that “a lawyer shall not be given a fee greater than contractually bound.” But it says that “reasonable” is objective.
 - * The Court also discusses policy, and makes a determination based on that.

- * So why, Scalia asks, go into the Senate report?
- * A policy favors not using contingencies, because §1983 actions often result in injunctions, not damages. So there's a policy favoring hourly arrangements to encourage lawyers to take those actions.
- * Scalia suggests that no one ever reads the Senate reports, that since the report cites lower court cases it's now bound the Supreme Court to those...
- * Scalia would say, "the statute is the law. It passed the procedures. It has the support of the Constitution. That's what counts."
- *Sinclair*: The mischievous staffer. What to do when the legislative history and the statute conflict? Statute says that Chapter 11 bankruptcy cases commenced before the Act was passed can't be converted to Chapter 12; legislative history says that in some rare cases they can.
 - * Scalia, of course, would say go with the statute.
 - * The Seventh Circuit says similarly: the text is clear. There must have been a mistake, but no matter. We have the statute.
 - * A Breyer-type argument suggests that the statute was passed to relieve an economic crisis, so why prevent people already suffering from getting the relief?
 - * But another section of the statute gives steps for a conversion, which some suggest means conversions are allowed.
 - * But in the end, text trumps history.
- Easterbrook's rule: Legislative history is context, but not intent. Intent and meaning are different.
- Legislative history, also, is often "losers' history": as in the wilderness cases, unpassed amendments are put into the reports.
- Whose Statements Count?
 - Should priority be given to the statements of the committee or sponsors?
 - It's probably worthwhile to consider the sponsors' statements, as they probably thought about the issue before bringing it before Congress. That's very purposivist.
 - Other members of Congress often can defer to same.
 - But is it possible to draw a distinction between, say, the sponsor and the committee chair?
 - Should other legislators' positions be skipped, since they're opposed? Or *should* they be given weight because they represent consensus and a broader view?

- In the Alaska Lands Act case, looking to Udall or Melcher, for example, would not give us what Congress, as a body, thought.
- The committee chair’s opinion might carry weight, because he oversaw the debate and helped get the bill to the floor.
- Legislative Deliberation
 - The Montana Wilderness (Alaska Lands) cases: Representative Udall thought the laws applied only to Alaska, and tried to bring an amendment to that effect; then he stuck the language in the congressional record!
 - Some representatives wrote to the Attorney General assuming the laws applied nationwide, and he proceeded under that analogy.
- Post-Enactment Legislative History
 - A later act had similar Montana Wilderness-type provisions for Colorado, but they were deleted because the sponsors believed that they were already covered by the Alaska Lands act.
 - Is it OK for Congress to play the role of the Courts, to interpret what previous laws meant?
 - What about the letter Senator Melcher wrote months beforehand (dug up by a Georgetown student)?
 - The Court might also get information about how a law has been interpreted by agencies/the Government, through the Solicitor-General and amicus briefs or court cases.
- Presidential Signing Statements
 - Often presented as legislative intent. Tend to either try to change, or clarify, the bills the President is signing. (No line-item veto means the President can’t, say, veto part of a bill for unconstitutionality.)
 - If the President has the power not to enforce the law, then arguably the ultimate law is what the President says.
 - Should the Courts be able to force the President to enforce the law? Probably—checks and balances.
 - The ABA worries about signing statements, because they can be considered the President rewriting the law.
 - Ref. the Alito memo.
- Legislative Inaction
 - Congressional acquiescence: is Congressional silence relevant?
 - If Congress is aware of the way courts/agencies interpret statutes, and doesn’t act to change the policies, then it implicitly accepts the assumptions.

- Is this valuable? It would be better for it to be a matter of repeated affirmation.
- *Bob Jones v. US*: IRS interpretation of a statute not required but not forbidden; Congress’s silence is proof of its acquiescence?
 - * Congress had 13 separate opportunities to overturn the IRS ruling on the grounds that it wasn’t a proper interpretation of the statute.
 - * It can be argued that such evidence is *not* determinative, because we don’t know what Congress’s failure means: besides, under Article I §7, this has no significance.
 - * Note also the circumstances in which this arises (racial discrimination).

2.4.4 Interpretation in Light of Other Statutes

- *Lorillard*: Is a jury trial one of the remedies incorporated into the ADEA from the FLSA?
 - Congress specifically incorporated the FLSA remedial provisions, probably because they were well-established mechanisms.
 - The Court argues that FLSA was well-established to be jury-tried, so Congress was aware of same and knew that it would be incorporating ADEA.
 - There is a reference to both legal and equitable remedies, and “legal” is a term of law meaning “jury trial.”
 - The opposition says that the ADEA looks more like Title VII in its causes of action than the FLSA.
 - The Court concedes yes, it’s similar, but there’s a difference between cause of action and remedy.
 - Of course, there’s a perversity argument: “You’re protecting the elderly more than minorities!”
 - Counterpoint: The job there is to fix Title VII.
 - The “equitable” language, plus the incorporation of FLSA, is enough—it’s useful to pile up evidence.
- Generally speaking, if there is an explicit reference to another statute, we wonder how much.
- If it isn’t explicit, we can try to reason based on subject matter, or use statutes as a dictionary as Scalia does when trying to determine language.
- That has an assumption: That Congress is consistent across statutes. Odd.

- *Morton v. Mancari*: Implied repeal is disfavored. Unless Congress says that it's repealing an earlier statute, it's not.
- There's an institutional competence argument: Courts don't have the legitimacy to say whether Congress has implicitly repealed; that would be making policy, not law.
- The Calabresi dynamic-interpretation argument is that Congress can't go around amending or repealing every statute that's obsolete.

2.4.5 *Stare Decisis* and Statutory Precedents

- When can the Court correct itself once it goes through good-faith statutory interpretation?
- *Stare decisis* states that a Court generally should assume previous courts' decisions are right. Three tiers:
 1. Constitutional precedent: Least weight, no rigid presumption, basic presumption of correctness (so, Con Law style, the Court can correct itself easily. No option to overturn).
 2. Common law precedent: Strong presumption of correctness.
 3. Statutory precedent: Strongest (super-strong) presumption.
- We want people to be able to conform their behavior to a certain interpretation of a statute.
- Congress can fix problems that arise, so we want them to do it.
- *Flood v. Kuhn*: Prior precedents say that the Commerce Clause can't apply to baseball; the Commerce Clause has changed but the precedents haven't.
 - Also, the nature of baseball had changed; baseball was clearly an industry, which it wasn't before.
 - Douglas's opinion suggests that this is a case of first impression; there may have been precedent on the books, but there was so much change in the Court's understanding of Congress's abilities to regulate.
 - However, Congress hadn't acted to regulate baseball (there were attempts, but they'd been voted down). Congressional inaction comes to the fore.
 - Practical reasons to uphold the precedent: the MLB has a reliance interest, for one.
 - There's a certain amount of concern about retroactive litigation.
- Factors in an overturning-*stare decisis* decision include:
 1. Rule has lost its coherence/workability

2. Facts have changed dramatically
 3. Assumptions underlying the prior opinion have changed (such as constitutionality)
 4. Reliance on the rule (or no reliance)
 5. Congress has accepted the rule, and legislated based on it
- Sometimes, it's less problematic for a judge to change his own mind than for one later Court to correct an earlier.
 - There's often language: "If this was a blank slate, we would decide otherwise..."

3 Regulation and the Administrative Process

3.1 Congress and the Agencies

3.1.1 The Nondelegation Doctrine

- *Benzene*: Delegates power to the Secretary of the Department of Labor (actually, OSHA) to set standards for exposure to carcinogens. OSHA decides 0 is the only acceptable. Can it?
 - Statute: OSHA can promulgate regulations "reasonably necessary or appropriate to provide safe or healthful employment." Also, it has to be the "standard which most adequately assures, to the extent feasible... that no employee will suffer."
 - The agency claims that there is no safe level, so it wants as close to 0 as possible; it claims that the second part controls.
 - The industries think that the first part, which they contend requires a cost-benefit analysis, must be considered as well.
 - The statutory question is whether the first part, §3(8), modifies the second part, §6(b)(5), or whether §6(b)(5) controls.
 - Powell's concurrence suggests that the statute does require a CBA. The terms "reasonably necessary" and "feasible" suggest there must be a balance struck.
 - The Court thinks that the "reasonably necessary" language requires showing of a *significant* risk at a greater level than OSHA's.
 - The Court also addresses nondelegation: allowing the agency to reduce the levels to 0 would allow it to impose extreme costs on businesses without a showing of significant risk.
 - The Court construes the statute narrowly, specifically to duck the nondelegation issue (Constitutional avoidance strikes again).
 - Rehnquist's concurrence is worried about Congress not providing enough clarity in the law; it's passing the buck too much.

- He thinks Congress should have to decide whether the agency should use a cost-benefit analysis.
- Nondelegation: In brief, can Congress delegate legislative power to an administrative agency? According to the Constitution’s words, no.
- The only time a law was struck down on delegation grounds was *Schechter Poultry*, where the NIRA authorized the president to work with private trade organizations and come up with codes of fair competition.
- The Court didn’t say *why* there was a delegation problem, but the *Benzene* concurrence goes into more detail. In short, private parties were creating the definition in Congress, and the law gave the president/executive branch unlimited discretion, basically letting Roosevelt be the legislature.
- Note that in 1999 the DC Circuit struck down a law on nondelegation grounds, but that was the first time since *Schechter*.
- The problem with *Benzene* according to Rehnquist was that the statute itself was problematic. It gives OSHA legislative power, since there’s no true guideline or intelligible principle. The regulation has a purpose, but it’s too broad and gives too much discretion to the agency.
- There could be reasons for Congress to not be more clear, but Rehnquist would say it was that Congress was passing the buck. (He concurred in the judgment because it was better than disagreeing, though.)
- We want Congress to make legislative decisions because they deliberate more, and are more accountable, than the executive or agencies. That’s the functional argument.
- But nondelegation is a hard line to draw in the modern era, thanks to the modern regulatory state.
- Note also that Congressional accountability isn’t what it used to be—when interests pull in so many different directions, and say the REALID Act gets lumped into military funding and Tsunami relief...
- *American Trucking* tends to show the end of the nondelegation doctrine. Scalia said that the Court wasn’t going to second-guess Congress, and they’d often upheld similar broad statutes.
- After these cases and the certiorari denial in the border fence, is there anything left of the nondelegation doctrine?
- It still serves as a worst-case scenario, and is maybe an agency self-restraint (agencies want to survive judicial review).
- TARP, by virtue of making people upset about the delegation to the Treasury Department, may have revitalized the nondelegation doctrine.

3.1.2 Legislative Control over Agencies

- Legislatures have other ways to control the agencies:
 - Budget/appropriations (control the money)
 - Oversight hearings
 - The legislative veto (not anymore, though!)
 - Informal methods such as committee chair meetings with agency heads (related to oversight hearings)
 - The design of the agency; how it's structured, what procedures, &c. Congress makes those decisions ex ante.
- There often isn't direct power, but can informally influence an agency.
- Congress has tried to experiment with legislative appointments, but the Court struck that down: Congress can't steal executive authority, because that would be a self-interested arrogation of power.
- Note that even if the executive consents to Congressional power, that offends the separation of powers principle, which creates a horizontal division in government.
- There are two principles underlying the separation of powers decision:
- Autonomy.
 - Each branch acts independently of the others.
 - Each has its own sphere of action.
 - In this country we have the three types.
- Reciprocity.
 - Branches should be set up to interact with one another, to balance ambition with ambition.
 - This is the whole "checks and balances" thing.
 - There is necessarily going to be some coordination required in government. Blended powers include veto, appointment with advice and consent of the senate, impeachment, appropriations, and war powers.
- This system prevents tyranny, and promotes efficiency.
- There's also dangers of the principal/agent problem with agencies implementing Congress's will or the Courts interpreting Congress's statutes, and inefficiencies due to gridlock, vetoes, &c.

3.2 The President and the Agencies

3.2.1 Appointment and Removal

- There are three sections to Article II:
 1. Executive power is vested in the President, and he is elected as follows...
 2. The powers of the President, including appointing officials.
 3. He shall “take care” that the laws are faithfully executed.
- The *Myers* to *Morrison* line is a pretty good example of how constitutional meaning can evolve without anyone saying anything.
- *Myers*: A statute provided for the appointment and removal of postmasters only with advice and consent of the Senate. Was it Constitutional?
 - There’s nothing in the Constitution about removal.
 - Textually, *expressio unius* could suggest that removal is therefore excluded. But it could be argued that appointment and removal are the same thing, and removal is, in effect, an appointment power.
 - Legislative history (in this case the Constitutional Convention) suggests that the Framers were looking for a strong executive, but there was a lot of debate (and we need to distinguish the first Congress and the Convention).
 - Finally, the functional debate is persuasive here: if the Senate rejects a nominee, the President picks another. But if the Senate blocks a dismissal, then the President is stuck with a post filled by someone who is disloyal or incompetent.
- *Humphrey’s Executor*: Modifies the *Myers* holding, saying that the President can only remove “purely executive” officials, not the quasi-legislative officials such as commissioners of the FTC.
- *Weiner*: Extends the holding of *Humphrey’s* to include quasi-judicial officials.
- Note that these are not clearly-drawn lines, but at least there was something.
- Who would the quintessential executive official be? Maybe the Attorney-General, who oversees the prosecutors? So therefore, an “independent counsel,” who is basically a prosecutor, should be executive.
- *Morrison v. Olson*: There goes that distinction!
 - A statute sets up a procedure whereby following a misconduct claim the AG must investigate, and appoint an independent counsel who can be fired only for “good cause.”

- The Court overrules *Humphrey* and company without saying so: “cannot be made to turn on whether purely executive.”
 - It’s not clear where something is executive, but this should be. So why break the distinction?
 - The Court sets up a new test: the President can only remove if it’s a “fundamental executive power” being served, if the official is impeding the President’s ability to take care that the laws are executed.
 - This abandons a formal conception of the separation of powers and focuses on helping officials do their jobs.
 - The Court says that there’s still a for-cause removal.
 - Scalia points out the twisted logic—now the “for cause” removal is supposed to be enabling the President to act?
 - The Court also points out the ex ante prevention mechanism: the President appoints the AG, who appoints the independent counsel.
 - Scalia’s words about the dangers of a “Moby Dick”-like obsession were prophetic: Ken Starr.
- In the end, Congress did not renew the IC statute, which was a post-Watergate attempt to control the executive in the first place.

3.2.2 Other Mechanisms of Presidential Control

- Why do we want to control agencies? What dangers to they represent?
- They can be insulated from the executive, and the legislature, which means less accountability but more separation from politics.
- The Executive Branch has independent agencies/commissions, executive agencies, and occasionally more direct Executive groups like the OMB.
- By statute, the President can remove EA officials/heads, not IA.
- Often IAs are commissions, meaning it’s harder to change policy and it’s harder for the executive to lean on someone.
- Independence from politics means legitimacy. But are the IAs different from the EAs?
- The appointment power is significant; the President can shape the direction of an agency. (And then there’s the Dick Cheney thing with the EPA.)
- And then there’s OIRA review. Starting in the 80s OIRA reviews any agency decisions for a cost-benefit analysis. They can send regulations back, and under Reagan there was no time limit for OIRA.
- That changed under Clinton.

- Some argue that OIRA process is biased against regulation, because cost-benefit analysis is seen as preventing it.
- This is substantial centralized control over agencies. Which some argue could be consistent with the design, in the way the President gets a veto over laws.
- Cost-benefit analysis is about maximizing benefits, comparing the compliance costs, monitoring costs, lost profits, administrative costs, &c. to the benefits in lives saved, health improved, innovation spurred, preventive savings of health care, preservation of resources, or consumer confidence.

3.3 The Judiciary and the Agencies

3.3.1 Agency Exercise of Judicial Authority

- Agencies adjudicating presents a danger of the agencies usurping the powers and responsibilities of the judiciary.
- *Schor*: Schor sued a company, under an agency proceeding; the company countersued and Schor agreed to let the counterclaim go under the agency proceeding too. When Schor lost he claimed that the authority didn't have the right to have listened to the counterclaim.
 - The claim was a public dispute, thanks to a right conferred by statute.
 - The counterclaim was a private contract claim between the two parties.
 - The issue was whether the Act creating the CFTC delegated it judicial powers, and whether that was a constitutional problem.
 - Litigating the private dispute arguably deprived Schor of his right to an Article III court.
 - But Schor had waived his right, so the Court doesn't overturn.
 - But can one waive the separation of powers?
 - The dissent describes three historical exceptions and makes a prophylactic argument (we can't let this start, where will it end?).
 - The majority also points out that there is an option for *de novo* factual review, so basically article III courts aren't being closed out of the process.
- Agency adjudication: Immigration judges.
 - Pre-1983, the DoJ/AG oversaw both the INS and the Immigration Judges (IJ); they were often one and the same and part of the same DoJ division. This was a problem. (The Court actually had said it was a problem in the 1950s, but Congress had exempted immigration from the general problem. Over time the IJs managed to become something akin to actual judges—law degrees, robes, &c.)

- In 1983, the Executive Office of Immigration Review was created, under the AG in the DoJ, but separate from INS. IJs were separate people with separate career tracks.
- But they were still in the same department; no impartiality, no independence.
- Eventually DHS was formed, and they absorbed INS (into ICE), so EOIR and the BIA are in the DoJ and ICE is in DHS. This was advocated when DHS was created.
- There are still problems, since some IJs are political hacks and there may be a preference for IJs opposed to immigration depending on the president. But it's an improvement.
- Congress created the IJs, but they're not Article III courts. The AG created the BIA to narrow the flow of cases to the Courts of Appeals.
- But Congress preserved a route to the CoA, for constitutional concerns if nothing else. Judicial review reduces concerns about usurping the judiciary.
- The BIA was set up to lessen numbers, have an intermediary evaluation (akin to the federal courts of appeals from the district courts).
- But there was a caseload explosion creating a backlog.
- Ashcroft was concerned about security if people's cases took seven years (they could be gone by then!), and even the Bush administration didn't want to detain everybody.
- The streamlining regulations were set up to reduce that backlog, but there was a lot of controversy over firing the entire Democratic part of the BIA and going down to one-person decisions.
- Worse yet were the summary affirmances.
- *CAIR v. DOJ* argued that the new rules were arbitrary and capricious, but the success from 1999-2002 was enough to make its extension in 2002 not arbitrary.
- There's an argument that the streamlining didn't get rid of the work, it just shifted it to the CoA.

3.3.2 Due Process and Administrative Agencies

- When agencies engage in adjudication—like courts—some procedures are necessary under the Fifth and Fourteenth Amendments.
- *Londoner* and *Bi-Metallic* established the general rule that a hearing is required when the agency is engaged in adjudication, but not in legislation/legislative-type activity.
- When there's adjudication, individual factual determinations are involved. It's sensible for an agency to be required to provide specifics.

- When a rule is generally applicable we assume it reflects reasoned decision-making and people's voices can and will be heard even if in a general way.
- Which one a given process is depends on the facts.
- So what process is enough when due process constraints apply?
- The traditional understanding was rights, but not privileges, were protected. *Goldberg v. Kelly* shot that down because entitlements, which may come from custom or from law, should be protected (due to a cultural shift in what the government was thought to provide for people).
- It's an agency decision, of course—Congress can still repeal the law and take away the entitlement.
- *Goldberg* also expanded property interests. Property is redefined to include, in this case, welfare benefits being retained (because it's a matter of survival). Deprivation is different than being given something.
- The *Goldberg* test was a change from a balancing test of “which is greater, the government's interest or the individual's?”
- Now it's a threshold question first, “is there a liberty/property interest?” and then, “what kind of process is it owed”?
- *Roth* and *Perry* crystallized the test.
- The balancing is now in the second part of the inquiry (*Matthews v. Eldridge*).
- Starting in the 1960s the definition of “property interest” broadened beyond the rights/privileges distinction. It began to include entitlements from constitutionally protected interests, statutory and common law interests, and even common practice interests.
- *Perry*: Perry had worked for a community college that didn't explicitly have tenure but had an unofficial presumption of job security, and lost his job. Does the informal expectation of job security create a property interest? Court ruled yes.
- Liberty interests are freedom from incarceration and detention, the most basic sense of liberty.
- It also includes the right to pursue a livelihood and occupations.
- *Roth* claimed a liberty interest in maintaining a reputation, but the Court required something more prejudicial than just losing a job.
- When Megan's Law and sex offender registration came up, the Supreme Court eventually decided that the due process was at the legislative level, and they'd had it when the law was passed. The plaintiffs wanted individualized hearings, but didn't get them.

- Life interests don't come up—that's Eighth Amendment. Agencies can't deprive of life.
- Quality of life is liberty.
- *Londoner* and *Bi-Metallic* are different, because they go to the legislation/adjudication question.
- The process owed tends to be this:
 1. Notice.
 2. Hearing.
- The reasons for a hearing being key:
 - Requires the government to give reasons (protects against arbitrary action).
 - Permits both parties to give their story and rebut the other's. This promotes fairness and accuracy.
 - Ensures legitimacy of the system.
 - Opportunity to be heard encourages participation and feedback.
 - Promotes transparency in governmental decisionmaking.
 - Creates a system of consistency and precedent.
 - Which promotes predictability.
 - Is, in and of itself, a recognition that people have claims they're entitled to.
- Note that the right to counsel at someone else's expense is *not* guaranteed in the civil context, necessarily.
- The procedures often used to ensure these objectives are met:
 - Counsel: As above, allowed but not always guaranteed.
 - The right to present evidence.
 - The right to cross-examine/interrogate witnesses.
 - The right to present oral and/or written evidence. Oral evidence is important if the person is not educated or represented. It also allows for more interaction and, if there is counsel, a back-and-forth. But it's more resource-intensive, because it requires a trier of fact to be present.
 - The right to have an impartial decisionmaker (a judge or a jury—usually a judge in administrative matters), who provides reasoned opinions based on the evidence before him or her.
 - The right to a record to demonstrate the facts and the course of the proceedings.

- All the Constitution says is that due process is required when life, liberty, or property are at stake.
- The *Matthews* balancing test examines three factors:
 - The private interest that will be affected.
 - The risk of erroneous deprivation of said interest under the current procedures, and the value of additional procedures.
 - The governmental interest (including fiscal and administrative burdens of more procedures).
- In *Matthews* itself, because the statute allows for retroactive reinstatement, and the statute is about disability and not need in the way the *Goldberg* case was, it's not as great a hardship. So in this case more procedure in advance is not necessary.
- Additionally, the presence of relevant evidence in the form of a doctor's examination is less prone to interpretation than the welfare issues in *Goldberg*.
- Balancing in action:
- Immigration.
 - In 1903 the Court ruled that the weight of the interest in not being deported was enough to require due process. It didn't specify what process was required, though. Over time that was elaborated.
 - In immigration there's a trial-type procedure with opportunities to appeal to the agency, and then the courts.
 - So the streamlining raised so much controversy because it changed this.
- Terrorism.
 - *Hamdi* challenged his designation as an enemy combatant. Court ruled some procedure was due.
 - The Administration was not letting the defendant see the evidence against him. This is a problem.
 - Hearsay might be OK in some cases, because of the nature of the proceeding.
 - An impartial decisionmaker is required, but a military tribunal might be OK for those purposes.
 - Sometimes courts entertain claims that there should be process, but don't spell out procedures. It can be a back-and-forth between agency and court.

- Courts are careful about requiring procedures, because if (for example) they raise the difficulty of removing a person from welfare, the welfare agencies will make it harder to put a person on welfare.
- Cost-benefit analysis: there's always limited resources.
- Justice Black in *Goldberg* is worried about the Court manufacturing constitutional requirements, and it's a slippery slope in the making.
- Also, judicial review undermines the fleetness of the administrative state. It shuffles the decisionmaking power to the courts, and takes the wind out of the agencies.
- But in the end, we figure out the interest, the risk of erroneous deprivation, and the costs of adding more procedures.

3.4 The Administrative Procedure Act: Rulemaking and Adjudication

- The APA sets standards for agencies, to create consistent procedural requirements for them. It sets a framework for agency action.
- In 1946, post-New Deal there was a proliferation of agencies. There was therefore a movement for reining them in, making sure their decisions were cabined by procedures.
- The main values are consistency and accountability.
- For *formal adjudication*: Subject to §554, requiring trial-type procedures on the record. Procedures in §556-57 govern. Most of what we've been dealing with has been formal adjudication.
- For *informal adjudication*: There are no procedures specified.
- For *formal rulemaking*: Procedures in §556-57 govern, procedures for a hearing, evidence; a trial without adversary. *No one uses this.*
- For *informal rulemaking*: Notice and comment. Interested persons must have an opportunity to comment, but the agency doesn't have to base a decision on those comments. §553 requires that the public weigh in, but it's not participatory in the same way. Courts have imposed some requirements: Agencies have to give notice in the Federal Register of the rule and the legal basis, and they must respond to substantial comments.
- Informal rulemaking is pretty popular over adjudication.
- Of course, unless notice or hearing are directly required, this doesn't apply to interpretative rules-clarifications of preexisting norms or rules.
- That's got a certain amount of controversy, too.

- *Florida East Coast Railway*: Unless the organic (originating) statute provides for a “formal hearing on the record,” or something very similar, we’re in notice-and-comment land.
 - The action here was a ratemaking, a likely candidate for formal rulemaking; the Court interpreted the APA to require a literal “on the record” statement.
 - There were good reasons for the Court to make such an interpretation; §§556-57 are quite onerous—the peanut butter fiasco took ten years to standardize. (Some of the APA problematic stuff was removed later.)
 - The Court is reluctant to impose trial-type procedures lacking crystal clear indication of congressional intent; but the DC Circuit was, in the 1970s, willing to add procedural requirements to informal notice-and-comment.
- Unless Congress requires §§556-57, the agency gets to choose between adjudication and informal rulemaking.
- Why the agency would prefer rulemaking:
 - Adjudication is making a choice in particular cases.
 - Rulemaking allows broader policymaking; prospective and therefore fairer, in theory.
 - Rulemaking can account for the underrepresented interests through notice and comment (anybody can participate) without requiring that an agency answer every comment.
 - There’s a lower cost of entry because adjudication would require counsel.
 - Rulemaking creates consistence through broad generally-applicable rules.
 - Rulemaking promotes transparency.
- The BIA and the NLRB use adjudication; the BIA appreciates the flexibility of deciding cases especially for persecution.
- Notice and comment can lead to a flood of information, though. Important voices can be shouted down.
- Likewise, rulemaking can create politicization, and facts lead to much greater clarity.
- §553 requires an agency to give a “concise general statement” of the basis and purpose of the rule, which requires that the agency justify itself somehow.

- Agencies also appreciate the lessened opportunities for review present in rulemaking (no need for a written record, no appeals of the adjudicative judgment...).
- Judicial standards of review are different, also. The standard is arbitrary/capricious, whereas formal adjudication is substantial evidence.
- Scalia doesn't like rulemaking, though.
 - The centralization of oversight in OMB/OIRA has made it less attractive, because their rulemakings might have to go back to the drawing board.
 - Agencies might be incentivized to pass rules that are satisfactory to OMB and the courts, instead of the best policy, or not to pass rules at all.
 - This process is “ossification.” Rulemaking is no longer flexible enough.
 - If the time advantage is gone, we may as well go back to adjudication. But there's an empirical question about whether there is true ossification; more agencies still use rulemaking.

4 Reviewing Courts

4.1 Judicial Review of Agency Policy

- §706 of the APA sets out the criteria for reviewing agency decisions. Formal proceedings must be established by substantial evidence, while notice and comment and informal adjudications cannot be arbitrary/capricious.
- Judicial review of *policy* can be of both rulemaking and adjudication; the doctrine in the 1970s that circumscribed agency policymaking authority is “hard look” review.
- *Overton Park*: The original “hard look” case.
 - There are two requirements for the Secretary of Transportation before he allows a highway to be built through a public park:
 1. There must be no feasible & prudent alternative.
 2. The route must minimize harm to the park.
 - This case is brought by citizens and environmental groups who claim the Secretary just rubber-stamped the local agency decision, and should have made his own formal factfindings.
 - The Court holds that though there are no requirements for formal findings, the Secretary must justify his decision to prove he considered all the factors. They also reject his post-hoc affidavits.

- First, the court must ask whether judicial review is appropriate. Some decisions are completely discretionary (and therefore not reviewable), while others are based on law (and therefore reviewable).
 - There is a presumption, embodied in §706, in favor of judicial review of decisionmaking.
 - But §701 excepts purely discretionary decisions from review, as well as any places the statute says “no review.”
 - Congress might not want judicial review in highly political areas, but generally it’s a tool for control over agencies.
 - The government here tries to claim that there is no law to apply, but the Court says the statutory criteria are clear, and they direct the agency to place great weight on the preservation of parks (allowing them to review whether the Secretary followed that directive).
 - The Court applies arbitrary/capricious, which means that the decision must be based on the relevant factors, and there must be no “clear error of judgment.” (The court isn’t supposed to substitute its own judgment for the agency’s, of course.)
 - The Court remands, because the *only* evidence of the Secretary’s decisionmaking is the post hoc affidavits. The district court should get testimony from the decisionmakers, to decide whether it’s arbitrary and capricious.
 - In the end, of course, the road doesn’t get built thanks to the agency giving up.
- The *Overton Park* case produced a process for determining whether agency policy decisions followed APA requirements:
 1. Ask whether judicial review applies.
 2. If so, determine whether the decision was arbitrary or capricious.
 - In the ’70s the Court added procedures to requirements of agency action, to demonstrate arbitrary/capriciousness; the value of the court supervision would be accountability, checking the biases, and thoroughness (creating incentives for agencies to address the concerns of the people likely to challenge agency action).
 - Note also that underlying *Overton Park* was that the alternative site for the highway was through a racially integrated neighborhood.
 - So. “Hard look” review requires that:
 - The agency must look at the whole record, not just part—they shouldn’t cherry-pick evidence which supports their decision.
 - The agency must have a well-reasoned explanation, not just a concise one;

- The agency must justify any departures from past practice. This is controversial because some argue that a Reagan agency can reverse policy based on politics, since the Reagan administration won the election.
- The Courts have added some procedural requirements to the APA: Publication in the Federal Register, a time period for comments, a concise general statement...
- *HBO v. FCC*: Notice/comment was a sham.
 - The Court said that the FCC had had lots of *ex parte* communication with interested parties (such as HBO).
 - The Court relies on the hard-look doctrine, and said that all of the evidence relevant must be on the record.
 - The DC Circuit tried to improve openness because of the precedential factor.
- In our system, Congress gets the ball rolling, or the presidential agency wants to initiate rulemaking.
- *ex parte* communication isn't always all bad, because sometimes industries don't want sensitive information on the letter, and prefer the candor of private (akin to attorney-client) communication.
- And *can* the courts even require different things than Congress was?
- Besides, it might be more ossification.
- *Vermont Yankee*: Environmental groups challenge the rulemaking and grant to Vermont Yankee of a nuclear plant.
 - The DC Circuit says that though the agency did follow §553, the procedures were inadequate overall.
 - However, the Supreme Court reversed, saying that the Circuit was Monday-morning QBing. Congress laid out the rules for the agency to justify its decisions, the DC Circuit shouldn't have gotten involved.
 - Courts should not be second-guessing policy judgments.
- *State Farm*: End of a long saga of an agency trying to implement the NTMSA. Lots of N&C rulemaking.
 - The original rule required passive restraints, and the car companies objected.
 - The White House pressured the agency to move to the interlock, because the industry said it would be too expensive to install airbags.
 - But the public hated airbags. Carter, in office in 1976, revisited the passive restraints and planned a phase-in during his second term.

- And then Carter lost to Reagan, so by 1981 the agency decided to scrap the rule. But was the rescission arbitrary and capricious?
- The agency rationale is the study, but Rehnquist points out the problems with same.
- There's also a big cost, though the agency sees no increase in safety.
- Of course, the fact that the policy is debatable might suggest it's the agency's call.
- Of course, what really made the rescission arbitrary and capricious was that the agency didn't even consider mandating the airbags; the Court doesn't say that in so many words but does suggest that the agency decision can be arb/cap if it failed to consider alternatives.
- The Court cites *Bob Jones*, saying that Congress not doing anything is not enough to qualify as acceptance.
- The aftermath of *State Farm*: Elizabeth Dole's rules about passive restraints without enough mandatory seat belt laws ended up with mandatory airbags and many mandatory seatbelt laws.
- Note that the statute does give the agency authority to issue technology-forcing rules.

4.2 Judicial Review of Agency Factfinding

- The NLRB has five commissioners, cases are originally decided by ALJs (administrative law judges); one big question is, to whom should the courts of appeals defer, the ALJs or the Board? And how or what must the CoA/SC require of the agency in reviewing the ALJ's factfinding?
- There are similar issues in the immigration context.
- *Universal Camera*: Dispute over the basis for the firing of Chairman.
 - Chairman argues that he was fired as an unfair labor practice for testifying in favor of a separate maintenance employees' union.
 - But there's an alternative explanation—insubordination at a Christmas party, where Weintraub told C to fire someone else.
 - The Board discounts the insubordination claim, because of the delay between the insubordination and the firing.
 - However, W claims that the delay was because Pulitzer told W that C was going to quit and they didn't need to fire him.
 - Question: Why doesn't the delay between *testimony* and firing discount that claim?
 - Largely because it would have been too obvious to fire him immediately.

- The SC overturns the Board’s decision, saying that the lower court didn’t apply the correct standard to the Board’s decision.
 - The correct standard was “substantial evidence on the record as a whole,” the lower court hadn’t reviewed “the record as a whole.”
 - The APA §706 says “substantial evidence,” and the “on the record as a whole” part dates from the Taft-Hartley Act.
 - The Court reads them together.
 - The Courts, under those Acts, were supposed to use their independent judgment to control agencies. One way to do that was to require looking at evidence as a whole. The legislative history of both acts suggests that Congress wanted the Courts to incentivize independent adjudication.
 - On remand the Court requires the CoA to give weight to the ALJ’s factfinding (they can’t quantify the weight, though; that would require the courts to make judgments reserved for agencies). They have to provide the deference that the factfinding “reasonably” or “intrinsically commands.”
 - The standard of review has two components: Evidence on the record as a whole has to support the NLRB, and the court has to provide deference to the ALJ’s factfinding “to the extent it reasonably commands.”
- If a rule didn’t require the Board to look at the ALJ’s findings, that would undermine the whole point of the ALJ.
 - Are we trying to replicate the relationship between trial court and the courts of appeals?
 - Maybe not. The NLRB is a policymaking board, so it should be able to determine policy; if courts hold the agencies to the ALJs it undermines the expertise of the Board.
 - The NLRB also knows the biases of the ALJs, and how good or bad they are.
 - The NLRB is trying to be political, and advance policy—different adjudication than Article III.
 - *Allentown Mack*: Two pieces of evidence the Board didn’t look at, the Court says there’s a problem.
 - Breyer objects to that Court conclusion, arguing that it’s reading out the “objective” part—the Board was using its expertise to ferret out discretionary evidence, turning the standard into a jury-like standard.

- The NLRB was effectively not including those pieces of evidence because it was calling them unreliable; the Court says it should have to do that by changing the standard, not by redefining factfinding.
- The Court wants the flexibility of having all of the evidence on the record.
- The jury analogy is suboptimal because it's a different setup.
- Congress wants more scrutiny between the CoA and the NLRB than between the CoA and a trial court, or a trial court and a jury.

4.3 Judicial Review of Questions of Law

- *Chevron*, at last. Plants seeking permission from the EPA to emit from new or modified sources had to get a permit and meet stricter standards; Chevron wanted to evade those requirements by arguing that the whole plant should be a bubble, and the rule was whether overall emissions increased.
 - The EPA regulation allowed the bubble concept; the question is, does the statute?
 - The Court develops a two-step procedure:
 1. Is Congress clear? (Did Congress, in this case, specify whether a plant could be a bubble? No.)
 2. Is the agency reasonable in interpreting the statute? (Can the statute be fairly construed to support the concept of a bubble? Here, eventually, yes.)
 - Stevens's theory of why deference is appropriate: The agency has technocratic expertise; the statute is a balancing act, and lacking the specificity someone has to make the decision, and who better than the agency? Certainly not the Courts.
 - Judges aren't policy/agency topic experts (not environmentalists, in this case); the agencies are.
 - It's also a democracy issue; leave policy questions to the more accountable bodies (agencies are moreso than judges)
- Scalia, in *Sweet Home*, says that the agency interpretation fails step 1: "Congress is clear!"
- Every part of statutory interpretation is relevant at step 1.
- *Chevron* changed the world. No Supreme Court decision has ever invalidated an agency decision under step 2 (though circuits have, occasionally).
- The rate of agency affirmance has gone up, though the magnitude of that change is in debate.

- Before *Chevron* there was *Skidmore*, which said to give the agency “the weight it is naturally given.”
- The factors in *Skidmore*:
 1. Degree of agency’s care
 2. Consistency
 3. Formality
 4. Relative expertness
 5. Power to persuade (this is what the factors add up to)
- Other factors include contemporaneous enactment (if this was close in time to the passage of the statute, then the agency might well have been involved), public reliance (we don’t want to undermine a whole industry), longstanding application (implies legislative acquiescence), and changed facts.
- All of those factors collapse into “reasonableness” in *Chevron* step 2.
- Pre-*C*, the Courts (says Scalia) would see if Congress intended to delegate, and Congressional ambiguity was a possible but not definite indicator.
- Now, ambiguity is presumed to mean delegation; the question is, what is ambiguous? Scalia has a rigorous Step 1 analysis.
- Scalia likes this because it limits and simplifies (which he loves, says Souter).
- So, what should the court apply in determining ambiguity for *C* step 1?
 1. The text; dictionaries, and various other tools (plain meaning, other parts of statute, the code, the canons. . .)
 2. Purpose—a subset of all of the other factors
 3. Legislative history (including context)
 4. Other Congressional acts (both acting and acquiescing)
- A study shows that at step 1, a court relies more on legislative history than non-*C* cases.
- *MCI v. AT&T*: §203(b) says that the FCC may “modify” tariffs; the FCC eliminates them for nondominant carriers.
 - Is that a “modification”? Eventually we figure out that Webster’s Third notwithstanding, “modify” means a small change. The majority says that this is too big a change and throws it out.
 - The dissent argues that it’s a means-versus-ends issue; the actual impact on consumers is very small.

- The dissent says that defining modify isn’t enough—the agency interprets the word to allow it to make changes consistent with the purpose, and that should get deference.
- And then we get *Mead* and *Gonzales*, which complicate matters substantially.
- *Brown & Williamson* is basically a Step 1 case: the Court says it’s not possible for Congress to have intended to delegate a power as broad as tobacco control to the FDA without saying so (“no elephants in mouseholes”). That’s essentially a policy judgment.
- A new canon of interpretation: Congress does not delegate major power to agencies without clarity.
- Debatably applies in *Gonzales*, too.
- There is an argument that *Chevron* step 2 influences step 1; the dissents in some cases don’t divide into steps.
- *Christiensen* started to ask whether *everything* that the agencies did deserved deference.
- *Mead* formalized the rule: Only agency decision making “with the force of law” gets *Chevron* deference. Lacking that, *Skidmore* deference.
- Formal adjudication and rulemaking definitely get deference.
- Notice-and-comment rulemaking resembles lawmaking, so it does.
- Informal adjudication? Maybe. (We end up doing a *Skidmore* analysis to determine whether it gets *Chevron* deference! And then, if not, we do *Skidmore again* to determine whether it is persuasive under *Skidmore* itself.)
- An interpretive rule: depends. Interpreting an agency’s own regulation gets “super-deference” under *Seminole Rock*, but interpreting a statute gets less deference. (And the majority in *Gonzales* says that interpreting a rule that simply “parrots” the statute cannot be a back door to super-deference.
- *Mead* was about daily planners and how they should be classified for tariff purposes.
 - Do the customs officials’ determinations get the force of law?
 - Court rules no, because the classifications are not binding on third parties and there are so many.
 - So *Skidmore* applies; remanded to decide under that standard.
 - Scalia’s dissent argues that the rule will bind agencies to their own decisions, and therefore the ambiguity and flexibility will stop.

- Oddly, we now have a sort of “step 0”: “Does this decision by the agency have the force of law?”
- *Gonzales v. Oregon*: Court tries to determine what the Attorney-General can do under the Controlled Substances Act. Ashcroft’s rule interpreted the cSA to say it was unlawful for doctors to assist in suicide.
 - §811 says the AG can “add, remove, or reschedule.” §821 says the AG can “control the manufacturing, dispensing, and distribution of drugs.”
 - The Court defines “control” as a term of art found in the definitions section, saying that §802’s definition of “control” as adding/removing drugs from schedules binds §821 (and therefore the AG can’t just declare something to be violative of the law; Ashcroft is overreaching his power).
 - Scalia’s dissent says that “control” applies to a different subsection; in the subsection containing §821, “control” gets its ordinary meaning, which includes banning.
 - The majority also applies the elephant-in-mousehole principle, that Congress would not stick the AG’s power to rule assisted suicide legal in the middle of the CSA. They’d be clearer.
 - The majority also points out that the HHS Secretary has expertise over medical issues. Though this is countered by the point that the AG controls the narcotics; there isn’t any medical expertise issue.
 - The majority looks at the whole statute, and it’s about abuse, addiction, trafficking; not assisted suicide. The majority isn’t about to criminalize doctor conduct when it’s unrelated to the trafficking of illegal drugs.
- *Chevron* Step 1 matters. Scalia thinks the statute is clear, so the AG’s actions are OK.
- The majority cites *Glucksburg* to reinforce that the justices wanted to leave determining the legality of assisted suicide to the states.
- An alternative to the step 0 logic puts Step 1 first, then “step 0,” then step 2. Note also that there are some cases of anti-deference (such as the rule of lenity).