

1. **Regulatory state**
 - a. Collection of federal governmental laws and institutions that determine significant aspects of social and economic policy
2. **Administrative agencies**
 - a. Primary source of federal law today
 - b. More binding rules than Congress
 - c. Adjudicate more disputes than the federal courts combined
 - d. Cost of compliance is about 1 Trillion dollars
3. **Sources of federal law**
 - a. Constitution
 - i. Shapes what sort of authority congress can give to agencies
 - ii. Only one with 27 amendments
 - b. Statutes
 - i. Create agencies and give them power
 - ii. 383 passed by 11th congress
 - c. Regulations
 - i. 3,955 in 2008
 - ii. Thousands of "orders" issued by largest adjudicatory system in the world
 - d. Structure of government
 - i. Branches
 - ii. Departments
 1. Not mentioned in the constitution
 2. Also called agencies
 - iii. Agencies
4. **Agency**
 - a. "each authority of the government of the US whether or not it is within or subject to review by another agency" Administrative Procedure Act
 - b. Unit of government set up by a statute and authorized by statute to have certain powers or responsibilities.
 - c. Congress and courts are NOT agencies
 - d. Independent establishments and gov. corporations
 - i. Independent executive branch agencies
 1. Nominated by president with consent of senate
 2. Can remove at will (politics)
 - ii. Independent regulatory agencies for commissions
 1. Agencies like NLRB
 2. Headed by multi-member boards
 3. Usually required or tradition to have only one additional member from party in power
 4. Appointments are staggered
 5. Can only be removed "for cause"
 6. Board/commission indicates independent regulatory agency with a multi-member body
 - iii. Difference is about relationship to president
5. **Limitations of tort law as regulatory regime**
 - a. Tort law gave ability to sue
 - b. MacPherson v. buick
 - i. Ask what effect did the principle have on the behavior of manufacturer
 - ii. **Liability to foreseeable users for foreseeable harm**
 - iii. Did have an effect here
 - iv. Made buick change their inspection system
 - c. **Limits of tort law:**
 - i. **Discretionary**

- 1. Safety is uncertain
- 2. Tort will operate to change behavior
- ii. **Reactive rather than proactive**
- iii. **Retroactive**
- iv. **Uncertainty**
 - 1. **Not uniform. Only based on legal issue at hand**
- v. Latent injuries and risk
- vi. Sometimes no incentive to have litigation
 - 1. **Underinclusive**
- vii. Enforcement

6. **Contract**

a. Market failure

b. Ability to pay

c. Information asymmetry

- i. Depends on circumstances
- ii. What info we want?
- iii. Ability to demand?
- iv. Ability to process?

d. Biases even if we know all of the information

- i. Reduce low probability risks
- ii. Endow things with greater value once we have them

e. Collective action problems

- i. **Market power**
- ii. **Public goods**
 - 1. **Free rider problems**

f. Externalities

- i. Justification for environmental regulation
- ii. Difficulties of collective action

g. Sunstein

- i. **Sometimes want government to vindicate long-term aspirations for society**
- ii. **Rights revolution**
- iii. **Actual/revealed preferences**
 - 1. *Revealed: how everyone acts*
 - 2. *Actual: what they actually want*
 - 3. *Paternalism*

h. Try to phase the regulatory regime over time so that there is not a disincentive to buy the new product

i. Legislature v. judges

- i. Judges are not experts in that particular area

7. **Justifications:**

a. Information (economic)

b. Ability to pay

c. Collective action problems

d. Market failures

- i. **New deal statutes**

e. Externalities

f. Paternalism

8. **The Legislative Process**

a. Proposal:

- i. Private group suggests bill to representative, legislator can propose the bill too. Sponsor must push bill through. Agencies and committees can be involved too.

b. Committee:

- i. Parliamentarian chooses the committee based on the subject matter

1. Can go to more than one committee
 - ii. Committee chair will decide on what gets heard.
 1. Majority on committee can overrule chair
 2. *Vetogate* opportunity
 - iii. House can sign a petition to discharge to bring bill to floor, but this rarely happens.
 - iv. **Committee report (legislative history)**
 1. Reasons for this:
 - a. Time issues
 - b. Efficiency.
 - c. Also, that way more congresspeople can have a say
 - c. Scheduled to be heard
 - i. Another *vetogate* opportunity
 - ii. Budget matters can come up at any time, so they go by faster
 - iii. **House Rules committee**
 1. Open rule or closed rule for amendments or no amendments.
 - iv. Senate
 1. No rules committee. Rules have to be decided by unanimous consent. Any senator can block the rules.
 2. *BIG vetogate here (fillibuster)*
 - d. Floor
 - i. Debate,
 - ii. **Record comes out of this (history)**
 - iii. Amendments
 - iv. If it passes, it has to go to the other house
 - e. Other house
 - i. Conference committee. (*vetogate*)
 1. Come up with an agreement.
 2. **Committee report (legislative history)**
 - ii. Has to go back to the houses again to vote on same specific bill
 1. **Another record (legislative history)**
 - f. President
 - i. Veto, sign, pocket veto
 - ii. Congress can't override a pocket veto.
 - iii. Houses can override veto with a supermajority
 - iv. **Signing statement MAY be legislative history**
9. Lobbyists come in at every step of the way
10. **Statute (Auto safety legislation)**
 - a. Title
 - b. Enacting clause
 - c. Titles (like chapters)
 - i. Section 101: Short name of the law given
 - ii. Section 102: definitions
 - iii. Section 103: Secretary establishes motor vehicle safety standards.
 1. Part c gives time to comply (6 months)
 2. Part f: what Secretary must do. Broad discretion. Has to get information from automakers, which mean they have to cooperate too.
 - iv. Section 105: gives some time to file a challenge to go to circuit court of appeals. Common provision (some form of judicial review)
 - v. Section 112: power to conduct investigations and inspections. Again, common to regulating agencies.
 - vi. Section 115: establishes an agency. Name has changed over time. Authority to issue this is in the Secretary, but he is given an agency.
11. **Schechter Poultry "sick chicken case"**

- a. Issue here is how much power can Congress give to an agency
 - b. Non-delegation doctrine: (1935) never been used since.
 - c. The statute in question Gave president HUGE power to evaluate terms of codes of fair competition. No limiting language in statute itself.
 - d. Court struck down the statute.
 - e. Reasoning:
 - i. Fair competition is not defined. It is not just the opposite of unfair competition.
 - ii. **No INTELLIGIBLE PRINCIPLE to guide discretion**
 - iii. **Here, this was the ENTIRE economy**
 - 1. **Should be a DISCRETE subject**
 - iv. Court decides this based on the language of the statute, precedent, definitions, etc.
12. Host of new statutes during new deal establishing new agencies.
- a. Those with limited subjects were less likely to be shut down
13. **American Trucking**
- a. Clean air act passed in 1970
 - b. Section 109 (b) (1) provides for the EPA to set primary ambient air quality standards, which are a **requisite to protect the public health with an adequate margin of safety.**
 - c. Has to have some number to choose air quality standards. Issue of whether this gives an intelligible principle. EPA argued that it could not consider costs.
 - d. Holding:
 - i. EPA can't cure its own delegation problem. If it does that, then the agency is legislative, and the agency cannot legislate
 - ii. However, he determines that the term "**requisite to protect the public health**" means **sufficient, but not more than necessary.**
 - iii. This may or may not be as specific.
 - iv. Comes up with an intelligible principle
 - 1. States that degree of discretion varies with the scope of the power
 - v. **Can't consider costs**
 - 1. **Not within the test.**
 - 2. **Reads silence to mean that the should not consider costs**
 - 3. **Also discusses the structure of the statute**
 - vi. Additions: what silence indicates, how easy it is to find an intelligible principle.
 - e. Concurrence (Breyer): finds that we should look to legislative history as well since phrases may mean different things.
 - f. Concurrence (Stevens): Argues that EPA is given some legislative function, but that this is constitutional regardless.
 - g. Concurrence (Thomas): argues that there is an intelligible principle, but doesn't like that method for testing overall.
14. **Administrative procedure Act**
- a. Lays out procedures that agencies must follow
 - b. Provides for judicial review
 - c. APA applies to all agencies unless one is specifically exempted by congress
15. **Statutory Interpretation**
- a. Tools
 - b. Theories
16. **Holy Trinity**
- a. Facts:
 - i. church contracted with an alien to serve as a rector with the church
 - ii. The US filed a lawsuit arguing that it was against a statute prohibiting labor
 - iii. Idea that this was a test case
 - b. Tools used:
 - i. **Textual analysis**
 - 1. Look first at text because that is the law.

- 2. Suggests legislative supremacy
 - a. Arguments that church violated the law-text
 - i. The text specifically lists exceptions.
 - b. Arguments that it did not violate the law-Text
 - i. Could argue that it is one of the exceptions.
 - ii. Also could argue that these exceptions are not limited, so the rector could be included.
- ii. Intentionalism
 - 1. Court looks at three things to determine intent:
 - a. Looks at whole legislation
 - b. Then look to circumstances
 - c. Looks at absurdity argument
- iii. **Whole legislation**
 - 1. **Title**
 - a. **Argument is that the title focuses on the manual labor or services.**
 - b. **Ex. American Jobs Creation act**
 - i. **Tax holiday as a job creator**
 - ii. **This is an example of how a title may be a political tool**
- iv. **Purposivism**
 - 1. **Context**
 - a. People were pushing to prevent unskilled foreign laborers. Idea that this was not to prevent rectors.
 - 2. Ex. Senate committee report
 - a. Gov can argue that the decision to not include the amendment means broader meaning.
 - b. Church will argue that it wasn't included because they believed it would be interpreted to mean manual laborers.
 - c. Congress left the ambiguity there to achieve consensus.
- v. Absurdist argument
 - 1. Absurd result argument
 - a. If Congress would have considered this issue, it would have found the way the court did
 - i. **Imaginative reconstruction.**
- f. Bottom line: court finds that the reasonable purpose of the statute was manual laborers

17. **Theories:**

18. **TEXTUAL analysis**

- a. Most agree to start with text.
- b. Scalia

19. **Intentionalism analysis**

- a. Idea that Congress did have an intent, but for whatever reason did not have time.
 - i. Court then has the role of the archeologist.
 - ii. Oldest established theory of statutory interpretation.
 - iii. Look to history

20. **purposivism**

- a. Assumes that congress has a larger purpose
- b. Outgrowth of intentionalism
- c. Some general purpose even if we can't get intent.
- d. Congress has scarce resources and limited time, and may not have considered every factual situation.

21. **Legal process purposivism**

- a. Looks to what a reasonable legislator would have done

- 22. **Imaginative reconstruction**
- 23. **Institutional competence**
 - a. Argument that congress is in the best position to make these decisions.
 - b. Disadvantage in that it will take longer
- 24. Dynamic interpretation (textbook)
 - a. Idea that courts do decide based on their own thoughts/ideas and should work as partners with Congress

Text-Based tools

a. Ordinary meaning v. technical meaning

- i. Court will decided based on looking at which audience the statutes addresses.
- ii. Ex. Criminal statutes are always addressed to the public.
- iii. If the statute is a technical one, for example directed at an agency, court may imply the technical meaning of the word.

25. Muscarello v. US

- a. Facts:
 - i. Section 924c (1) : anyone, who during a drug trafficking crime, carries a firearm get a five year additional sentence
 - ii. Two meanings of carry that are relevant
- b. Holding: congress meant the broader meaning.
- c. Reasoning:
 - i. Court looks at common usage and dictionary terms.
 - ii. Also look at intent or purpose of the statute
 - iii. Majority argues that there is no grievous ambiguity
- d. Dissent:
 - i. Also begins with a textual analysis
 - ii. Differs in which definition to apply. Finds that there is a grievous ambiguity.
 - iii. gives deference to the defendant (rule of lenity) because there are two plausible meanings of 'carry', which makes the term ambiguous
- e. Change in the law after the fact. Now carries includes the trunk. Using means having it on your person, in your hand, or firing it.
 - i. Could argue this means that the decision does not apply
 - ii. Could also argue that this was a clarification.
- f. .

26. Textual canons of construction

- a. Reflect general beliefs regarding meaning of word in relation to other language in sentence, statute, entire code.
- b. Three sub-categories**
 - i. *Linguistic*
 - ii. *Whole act*
 - 1. *Surplusage rule*
 - iii. *Whole code*
- c. View is that Congress knows that the courts will use them, so it is presumed to legislate with this background understanding.

27. Babbit Case

- a. Facts:
 - i. Reviews an agencies interpretation of a statute.
 - ii. Taking is defined as, among other things, "harm"
 - iii. Harm has been construed by the agency to mean *significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns.*
 - iv. Court frequently invokes a **reasonable** interpretation

1. This is because it is an agency interpretation.
 - b. Holding:
 - i. Look first to dictionary definition
 - ii. Look to the purpose, and Stevens interprets it as broad.
 - iii. Also, the amendment would not make sense if it were indirect.
 - iv. Two canons here: surplusage rule [mentioned in other sections], expressio
 - c. Scalia:
 - i. Again looks first at dictionary definition.
 - ii. Canons used:
 1. Noscitur
 2. expressio
 - iii. Section 7 directs the federal government to avoid habitat destruction and section 5 giving the secretary the purpose to buy land. (expressio)
28. **Linguistic canons**
- a. **Ejusdem generis**
 - i. Idea is that a general term is confined to covering subjects comparable to the specifics it follows
 - ii. Has to be some sort of common category to compare with.
 - b. **Noscitur a sociis**
 - i. Term is interpreted consistently with surrounding words to that statutes are not expanded beyond their reach. "known from its associates"
 - ii. There must be some common feature.
 - c. **Expressio unius est exclusio alterius**
 - i. The mention of one thing is the exclusion of another
 - ii. Idea is that terms has something in common
 - iii. Ex. Express exceptions usually excludes implied ones.
 - iv. Ex. Where it lists something to be done in a particular mode, this excludes other modes
 - v. Ex. Rules for pre-emption provisions.
 - d. **Whole Act rule**
 - i. **Identical words are given consistent meaning unless there is an indication that Congress used the term in different ways**
 - e. **Surplusage Rule**
 - i. **Avoid reading a statutory provision or words within a provision in a way that would render something else in the statute redundant.**
29. **Babbitt Case**
- a. Noscitur a sociis
 - i. Harm should be a direct application like the other words
 - b. Rule against Surplusage
 - i. SC said "harm" must have an independent meaning
 - c. Expression unius est exclusion alterius
 - i. ESA mentions habitats elsewhere
 - ii. No expression unius,
 1. Preserving habitats through gov. purchases is distinct from harmful activities.
30. **Which is right?**
- a. Two theories: **judicial activism or restraint**
 - b. **Practical consequences of each choice**
 - c. **Institutional competence of the Court v. the Secretary**
31. **Substantive Canons**
- a. Not about how language is used, is about how statutes should be read in cases of doubt.
 - b. Critical issue is *whether they are triggered*
 - c. Rule of lenity
 - d. Canon of constitution avoidance
 - e. Federalism clear statement rule

- f. *Presumption against preemption*
- g. *The presumption against retroactivity*
- h. *Presumption against extraterritorial application*

32. **Rule of Lenity**

- a. The court will give a criminal defendant the benefit of the doubt when a criminal statute is ambiguous.
- b. **Ambiguous *criminal statute***
- c. Vindicates their idea of giving criminal defendants the benefit of the doubt.
- d. **Must be sufficiently ambiguous**
- e. Traditional rules of linguistic tools, whole act and whole code canons
- f. Ex. Santos case
 - i. **Facts: proceeds or receipts for money laundering statute**
 - 1. No definition provided
 - ii. **Reasoning:**
 - 1. Look to dictionaries (ordinary meanings for CRIMINAL codes)
 - 2. Rest of statute
 - 3. Federal criminal code
 - 4. International treaty
 - 5. Model money laundering act and 14 states
 - iii. **Dissent: should use all the appropriate tools, many times other statutes include receipts, absurdity argument, legislative intent. Finds that there is not a grievous ambiguity.**
 - iv. **Majority opinion: favors lenity in the face of ambiguity. More judicial restraint**

33. **Constitutional avoidance doctrine**

- a. Court will avoid interpreting ambiguous statutes in ways that raise serious constitutional questions.
- b. **Two elements**
 - i. ***Ambiguity***
 - ii. ***Grievous constitutional question***
- c. More ambiguity will be less likely to go to constitutional invalidation.
- d. Less ambiguity may be more likely for constitutional invalidation

e. **Reasons:**

- i. Congress presumed to enact constitutional statutes
- ii. Desire to avoid conflicts with co-equal branch of government
- iii. Favors judicial restraint
- iv. Gives congress the opportunity to rewrite the statute

f. **Steps:**

- i. If court determines that provision does violate the Constitution it has to determine whether it can be severed from the statute or whether the whole statute must be found unconstitutional. This is based on whether Congress would have enacted the statute without the unconstitutional provision.

g. **Zadvyadas v. Davis**

- i. Re-wrote Rule
- ii. Rule of lenity cannot apply

h. **(Z) Dissent:**

- i. Though it was *clear enough*. Court doesn't have power to totally rewrite the statute

i. **Almendez -Torres**

- i. Majority: Though the ambiguity did not raise a grave enough doubt.
- ii. Dissent: thought rule of lenity should apply.

34. **Federalism clear statement view**

- a. *Court requires a clear statement by Congress when it seeks to alter the traditional balance between the federal and state governments.*

b.Purpose: Respects state interests and prevents statutes from sweeping too broadly

c. Question: what constitutes a clear statement?

d. Gregory v. Ashcroft

- i. Idea is that the court won't use the statute unless it's very clear
- ii. Not enough ambiguity to invoke the constitutional avoidance doctrine
- iii. probably was constitutional
- iv. Can Ensure deliberation
- v. People can oppose this.
- vi. Holding: should have been made clearer. Not totally clear that judges are on the "policy-making level"
- vii. Dissent: it is clear, but still exempt because they are on the "policy-making level"

35. canons

a. External sources from text

b. Focus attention of the court on certain important issues

c. **Linguistic canons:** focus on text of statute

d. **Substantive:** focus *court's attention and congress's attention* on different considerations and values

e. Won't be tested on all of Llewellyn's list

36. **Intent and Purpose-Based Tools**

a. Look at context in which it was passed to determine legislative intent

b. Legislative history

- i. Full record concerning the debates and passage of the statute
- ii. Ex. Committee reports, floor debates, planned colloquy's, executive branch statements, prior/subsequent legislation
- iii. A hierarchy

c. Moore v. Harris

- i. **Usually court engages in text-based analysis and uses history to support this.**
- ii. **Sometimes, though, legislative history is used to resolve ambiguity or rebut a plain-language meaning.**
- iii. **Text arguments:**
 1. **Employed doesn't have to mean employed by another**
 2. **START WITH PLAIN LANGUAGE**
 3. **Opposite argument is that other titles in the act have a broader definition of a miner "working in a coal mine"**
- iv. **History arguments:**
 1. **Conference committee report**
 2. **Statements by members**
 - a. **Some more important than others.**
 - b. **Ex. Sponsors**
 3. **Secretary's argument: Congress made a mistake. Courts says not the kind of error congress would have made and language too ambiguous to support an error.**
 4. **1972: reenacted the same language**
 5. **1978: explicit that applied to self-employed**
 6. **Secretary's letter**
 - a. **No mention of exclusion**
 7. **Silence is also important. Would have been more discussion**
- v. **1978 amendment**

37. **Hierarchy of legislative history**

a. Committee reports

- i. Highest position in hierarchy
- ii. Best informed members
- iii. Read widely

- iv. Problems: may replicate ambiguities, leave out details, may be doctored
- b. Sponsor statements
 - i. Individual is knowledgeable about the bill
 - ii. May also be a strategy
- c. History of bill, rejected proposals
- d. Floor and hearing colloquy (2 representative have an often scripted dialogue)
- e. Views of nondrafters
- f. Legislative inaction
- g. subsequent history (including presidential signing statements)
 - i. However, court is making an assumption that the history of one statute can support an inference about Congress's intent about another

38. Montana Wilderness Association v. United States Forest Service

- a. Textual arguments:
 - i. D's arguments
 - 1. States that national forest system does not mean just AK
 - ii. P's arguments
 - 1. Whole act
 - 2. Whole code
 - 3. Other subsection has similar provisions
- b. Looks to legislative history (confirms interpretation)
 - i. *Senate committee report*
 - 1. Issues with it
 - a. Only represents views of a few, doesn't take into account later interpretations,
 - ii. *Silence was a huge issue*
 - 1. Reasons why: mistake?
 - iii. *Melcher's statements*
 - 1. Only one voice.
 - 2. Less credibility
 - iv. Udall's statements
 - 1. Amendment rejected-indicates broader
 - 2. But made statements that it applies only to AK
 - v. *Letter exchange*
 - 1. *Given less weight*

c. Real holding: looks to Subsequent history

- i. Looks to subsequent history
- ii. Considered whether to provide the same access
- iii. Very close in time
- iv. Same players
- v. Very closely considered.

39. Changed circumstances

- a. Sometimes courts rely on facts in the world and how they have changed
- b. When do courts use the approach?
 - i. *Sometimes expressly*
 - ii. *At other times, it is not*
 - iii. *Some argue that courts cannot avoid this.*

40. Bob Jones University v. US

- a. Religious and educational institution
- b. Didn't believe in interracial marriage
- c. Excludes african american for awhile, then accepted for married african americans.
- d. It then prohibited interracial dating and marriage
- e. Reasoning:

- i. Map: charity--serves public purpose/not contrary to public policy--history of charity-- racial discrimination goes against public policy--therefore, IRS can make this rule because the organization went against public policy. Also looks at history of other sections and found that the IRS has broad powers.
- ii. Public charity concept
- iii. Tax exemption requires:
 - 1. 501c3:
 - a. Religious, charitable, scientific, testing for public safety, literary or educational purposes
 - b. IRS policy: can't be contrary to public policy
- iv. P's arguments: textual
 - 1. can be charitable OR educational based on the statute
 - 2. Tax codes in the past
- v. IRS's arguments
 - 1. Section 170 has the same list of organizations and defines these as charitable contributions, so they must all have charitable meanings
 - 2. Then look to the common law to find the notion of charity
- f. Dissent:
 - i. Argues that the list meant Congress recognized that they have a public benefit
- g. Why it did not have to wait for Congress**
 - i. IRS given broad authority
 - ii. Congressional acquiescence
 - iii. Passing the provision 501i
 - 1. Denied tax exemption in social clubs for racial segregation
 - iv. *Had a lot of opportunities to overturn*

41. Dynamic interpretation

- a. *Dynamic concept*
- b. *Abundant evidence of change in policy*
- c. *Time?*
 - i. *Don't know how Congress wants to respond*
 - ii. *Want to be clear that this is the policy that Congress today really would follow*

42. Formal Rulemaking

- a. Rulemaking: Creating, amending, or repealing rule based on record developed in trial-like hearing
- b. Adjudication: Agency decision resulting in order after trial-like hearing

43. Informal Rulemaking

- a. Rulemaking: Creating, amending, or repealing Rule after notice and opportunity to comment
- b. Adjudication: agency decision resulting in order
- c. More binding rules than statutes or judicial decisions

44. Statutes

- a. *Organic*
 - i. Create agency and/or command agency
 - ii. Ex. To Secretary of Transportation or EPA Administrator
- b. *Administrative Procedure Act*
 - i. Sets forth the procedures that agencies need to use when making rules or setting standards.
 - ii. **APA**
 - 1. Rulemaking v. adjudication
 - 2. Informal v. formal rulemaking
 - iii. **Formal rulemaking:**
 - 1. During adjudication. Formal hearing is mandated.
 - 2. 553(C): specifies that if organic law mandates formal rulemaking, must do so.
 - iv. **Informal rulemaking:**
 - 1. *Notice and comment rulemaking*

2. Section 553 rulemaking
 - a. Describes the notice and comment process
 - b. From section 553 of the APA
3. This is the process of creating, amending or repealing the Rule after notice and opportunity for comment.
4. *APA section 551 (4) defines rule*
 - a. "Means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...."
 - b. standards
 - c. Have same force of law as statute
 - d. **General applicability v. particular applicability**
5. Unless congress says there must be a hearing, allows informal rule making

45. Initiating the Process

- a. Where ideas come from
 - i. Parties concerned about the issue, industry itself, other government officials, secretary, etc.
- b. Petition for rulemaking
 - i. Private parties
 - ii. On its own
 - iii. Other government officials

46. NPRM

Section 553 of APA describes the process

- a. Notice of proposed rulemaking *published in federal register*
 - i. Federal register= FB of the government.
- b. **Requirements APA section 553 (b)(1-3)**
 - i. Time, place, nature of the rulemaking proceeding
 - ii. Reference to the legal authority under which the rule is proposed.
 - iii. Either the terms or substance of the proposed rule or description of subjects and issues involved

47. Comment period. APA section 553 (b)

- a. Gives fair time for everyone to submit meaningful comments
- b. Must examine and determine relevancy.
- c. Proposal must be a 'logical outgrowth' of existing proposals.
 - i. Therefore, cannot issue without a new comment period.
- d. Must disclose info upon which rule based with enough time for meaningful comments
- e. Final rule must be foreshadowed by the proposal to ensure meaningful comments

48. Final Rule

- a. Statement of basis and purpose
- b. Address vital question raised by comments and enable courts to see major issues ventilated and why agency responded in the way it did
- c. Responses to comments
- d. Rational and legal authority for the rule
 - i. SC mandates an extensive explanation for final rules
- e. Impact analysis section
 - i. Significant rules

49. *APA section 706(2)(A):*

- a. **Court will hold unlawful and set aside agency action, findings, and conclusions found to be--**

- i. **Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**
- b. **Reasons for this:**
 - i. More accurate rules
 - ii. Non-arbitrary
 - iii. Procedural benchmark
 - iv. Helps judicial review: court knows why agency did what it did.
 - v. Better chance of compliance
 - vi. Legitimacy
 - 1. Fairness issue

50. Courts

a. Vermont Yankee

- i. Facts: reviewing agency procedures
- ii. Nuclear power plants must get a license to build then to operate
- iii. Must show the environmental impact
 - 1. Agency held that this effects all nuclear power plants so the issue should be given to rulemaking. General rulemaking.
 - 2. Hearings were given.
 - a. General written comments were allowed, but not cross-examination.
- iv. Procedure: Lower courts should have been able to cross-examine.
- v. Holding: **No additional requirements can be imposed unless in APA**
- vi. Exception: **Due process, organic statute, if agency departs from a longstanding practice,**
- vii. Reasons:
 - 1. *Agencies are in a better position than judges to make the decision of what procedures are required. Courts ultimately don't see the record.*
 - 2. *This would drift toward more formal proceedings.*
 - 3. *Congress WANTED informal rulemaking, and we don't want to get rid of it with unpredictable judicial review.*

b. APA specifically does not limit additional procedures recognized by law

- i. However, SC still says that courts are not in the best position to do this.

c. Choices if rule struck down

- i. *Can restart the process again*
- ii. *Can send out final rule but give a different explanation*
- iii. *Can just not promulgate the rule*

51. Example in Agenda

- a. Can't examine scientists
- b. Must give a **meaningful opportunity to comment. This might be flawed without data**
- c. Can't do this. Nothing in APA says that they must comment on every public comment.
- d. B's argument is that we want to ensure that this was not an arbitrary decision.

52. Interpretation of the AOA from AG (found to be persuasive):

- a. Findings of fact and conclusions of law are not necessary in NPRM. An elaborate examination of the rules or procedures is not needed for NPRM.
- b. Because times have changed, courts will **not allow agencies to get away with less of a statement of purpose.**
- c. This goes against VT Yankee somewhat, but courts have created new requirements to ensure that the agency decisions are non-arbitrary.

53. Rule: Procedural Comments

- a. Statement of basis and purpose
- b. Must review comments
 - i. Must respond to vital issues
 - ii. Groups comments

54. Input into regulatory decisions

- a. Statutory
- b. Scientific
- c. Economic analysis
- d. Policy/political considerations

55. **Statutory analysis. Standard 208**

- a. Exclusion text-based argument
- b. Legislative history
- c. Statutory scheme (whole act)
- d. Differences from courts:
 - i. Looks to equity

56. **Chevron v. NRDC**

- a. One of the most cited cases. DOJ always cites this since it gives agencies more discretion.
- b. Develops relationship between courts, congress, and agencies and executive branch
- c. **Increases discretion of agencies**
- d. **Given presidential administrations a lot more power.**

e. Facts:

- i. 3 programs established by the Clean Air Act that required stationary sources to adopt strict tech-based limitations on emissions.
- ii. These programs kicked in when new stationary sources or modified existing stationary sources
 - o Section 111(e) prohibited the operation of any new source in violation of a performance standard. Section 111(a) defined stationary source as "any building, structure, facility, or installation which emits or may emit any air pollutant"
 - o Section 302(j) stated that major stationary source is any stationary facility or source which directly emits, or has the power to emit, 100 tons or more of air pollutant
- f. Issue: statute never defined source. Could have meant any portion or the whole plant.
- g. Bubble concept: don't have to worry about each individual apparatus. More about what's coming out of facility overall.
- h. Procedure: DC Circuit found different definitions in different places. To improve air quality, had the apparatus or dual approach. If program was to maintain air quality, used bubble test.
- i. EPA said that permit program is for those who have not met the standards. At first had a dual approach. Then switched to the bubble approach.
- j. Issue: Whether the statute allows the interpretation of stationary source as allowing the bubble concept

k. Holding:

- o **Chevron two step process:**
 1. **Whether congress has directly spoken on the precise issue**
 - a. **If so, stop here**
 - b. **No deference here**
 2. **Agency interpretation was reasonable**
 - a. **Not about what court would do, just has to be reasonable.**
 - b. **Rational, reasonable, etc. [can't be arbitrary or capricious]**
 - c. **Deference given here**
 - d. **In chevron, could have meant either interpretation**
 - e. **Idea that agency is an expert and is accountable to the political branches**

- b. Looks at statutory interpretation tools to determine if Congress spoke on the issue.

l. Policies:

- o *Statute did not speak on this.*
- o *Agencies have access to data, work with this everyday*
- o *Judges are not experts*

- *Accountability*
 1. *When congress has not legislated on the issue. If they have, no policy choice is being made by the court.*

57. **Statutory analysis**

- a. Always start with text
- b. **Also always use purpose**
 - **Some just use text to find this**

58. **Scientific and Economic Analysis**

- a. Risk
- b. Uncertainty
- c. Want to minimize risk in the face of uncertainty
- d. Yucca Mountain Case
- e. Valuating life
 - Cognitive biases
 - Willingness-to-pay v. willingness-to-accept
 - Discount rates

59. NHTSA Occupant Crash Protection (Skipped)

- a. Measures risk of air bags to smaller passengers. Discusses fatalities. Looks to the exact impact on fatalities. Responds to uncertainty in the effect on fatalities by implementing short term and long term goals. Allowed manufacturers to decide exact method.

60. **Two Steps**

- a. **Assess the risk**
 - Toxicology
 - Statistics
 - Epidemiology
 - All show judgment calls,
- b. **Manage the risk**
 - Interplay between policy and science
 - Economic reasons
 1. *Cost/benefit analysis*
 2. *Alternatives?*
 3. *Create more risks?*
 4. *Nature of the risk*
 5. *Consider other risks or benefits*
 6. *Feasibility*
 7. *Look to population?*
 8. *Politics*
 9. *Certainty*
 10. *Cognitive biases (willing to pay less than willingness to avoid)*

61. **Benzene Case: considerations**

- a. Facts: agency standard lowers benzene exposure amount to 1 ppm from 10 ppm
- b. Two provisions of the statute: *reasonably necessary or appropriate standards. Most adequately assures, to extent feasible, that no employee will suffer material harm*
- c. Research branch of agency recommended higher standard. Gave evidence that below 10 ppm may still be dangerous, but uncertain whether it is or isn't at 1 ppm.

- d. Policies: cancer policy that if we don't know safe level, there is no safe level
 - Pros and cons for each side
 - Population may be taken into account.
 - e. Holding:
 - Can only regulate if there is a significant risk of harm. Considered both statutes. Reasonable necessary leads to meaning that there must be a significant issue.
 - f. **Considering Costs**
 - *Don't consider costs: American Trucking*
 - *Regulate if feasible: this case. Facts. Dissent.*
 - *Plurality: threshold risk of harm. Holding.*
 - *Consider other costs*
 - *Consider costs as one factor*
 - *Demonstrate that benefits outweigh or justify costs*
 - g. **Weighing Costs**
 - **Justifying: (or)**
 1. Interpret statute to support rule
 2. Powell's concurrence.
 - **Benefits outweigh costs**
 1. CBA: Benefits outweigh costs
 - h. **Approaches**
 - Statutes use many approaches for determining whether the agency used an adequate standard.
 - Look to statute
 - If not in there, have to argue it is **reasonable**
 1. **In this case, was not reasonable. Had to consider only significant risks. Based on the statutory language, the results, the purpose and intent of Congress.**
 - i. **Rehnquist:** too powerful of delegation, no intelligible principle so violates non-delegation doctrine. Issue is with "feasibility." Delegates too much of its policy power away.
 - Probably wouldn't be an issue now after American Trucking.
 - Plurality looks to this, and it becomes a canon of construction. It would be too much authority given to secretary.
 - j. **Dissent (marshall):**
 - Easy to understand what "feasible" means. Congress was clear here.
62. How agencies measure risks are going to differ
- a. Latent risks
- US Code: currently enforced US laws organized by subject
 If repealed or amended, it reflects the law with that amendment
 Private laws don't go into US code
 Organized by subject
 Statutes organized chronologically in a different supplement]
63. Presidential Controls
- a. President can requires that an agency take an action,
 - b. Removal power
 - c. Article II, section 3, clause 3, "President shall take care that he laws be faithfully executed"

- d. Can enhance accountability and efficacy of agency action through regulatory controls like the EO

64. **Presidential removal power**

- a. Executive branch agencies appear under the President and are run by officials who can be fired at will by the president
- b. Independent agencies are headed by those who serve fixed terms that expire in staggered years and are removable by the president only "for cause" or "good cause"
- c. President can remove agency heads
- d. Presidents can control agency heads in other ways without removal.
 - o Usually can get them to resign.
- e. President has the power for most agency heads (executive branch agencies) to remove them **at will**. Some independent regulatory agencies have more protections, and president can only remove them for cause.
- f. Reason for this :
 - o is that it might create negative publicity
 - o Press will jump on this
 - o Idea is that the administration might not be working properly. Also questionable why president all of a sudden doesn't want that head.
 - o Morale of the agency
 - o Go through a nominating, hearing process.
 - 1. This will be much harder the second time around.
 - o Threat might be enough
 - o Some might have their own constituencies that follow them

65. **Formal Presidential Controls**

a. Impoundment of appropriation funds

b. Executive orders

- o ***Order binding on executive branch agencies***
- o ***Isn't finding on someone outside the executive branch***
- o ***Doesn't cause any cause of action***
- o ***Applies only to the extent allowed by the law***
 - 1. ***Can't rescind or amend a statute***
- o ***A new president can revoke or amend any executive orders***

c. EO 12,866

- o Largely amends earlier executive orders
- o First executive order required **centralized review of agency action**
 - 1. All the agencies had to submit proposed regulations to OIRA from the OMB
 - a. Presidential office
 - 2. Required the agencies to submit cost-benefit analyses
- o **12,866 (1)(a):**
 - 1. Agencies should assess all costs and benefits
 - a. In certain cases, costs are not required. American Trucking.
 - a. Either can't consider costs at all, or can calculate but not use it as a basis for the standard.
- o **12,866**
 - 1. Most sections apply only to **informal rulemaking**
 - 2. **Not for independent regulatory agencies**
 - a. Ask them now to participate in the **planning**
 - b. Don't have to go through the OIRA review process
 - c. Considered to be more closely aligned with congress

- d. Can only be removed for cause
- e. Idea is that Congress might not want this
- 3. **Doesn't include formal rulemaking**
 - a. Quasi-judicial proceedings
 - b. Decision has to be made on the record.
- 4. Rule: similar to that in the APA. **Statement of general applicability and future effect (differs from APA bc it says OR rather than AND)**. Executive order is closer to our understanding.

d.12,998

- o Required an **annual plan** for their whole plan for the year
- e.Ex. OSHA
 - o Have to have some threshold risk before they can regulate.
 - o However, OSHA has to set the standard most protective of workplace safety.
 - o **Look to exactly what the statute requires and whether this is consistent with max net benefits.**
 - 1. **Ex. In OSHA's case, was to the extent feasible.**

f. Overall, just have to look at how the statute interacts with the executive order. Statutes don't always require the net benefits costs.

66. Path under executive order:

- a. Policy meeting with the VP
- b. Regulatory agenda
- c. Regulatory plan
 - o Significant regulatory action must give a cost-benefit analysis. Must focus on the needs and the alternatives. And Cost-benefit analysis. This would be when we first see the rule
 - 1. Significant regulatory action
 - a. Annual effect on the economy of \$100 M or more or adversely affect in a material way the economy, state governments, etc.
 - b. Create a serious inconsistency or otherwise interfere with action taken or planned to be taken by another agency
 - c. Materially alter the budgetary impact of entitlements, etc.
 - d. Raise novel legal or policy issues
 - 2.
 - o OIRA looks at the plan to ensure that it goes along with the President's agenda. If it doesn't, it gets sent back to the agencies and to the VP.

d. Meetings with the benefitted and the burdened. Agency must meet with those most affected.

e. OIRA will send proposed rule back with guidance about the president's priorities. OIRA can also meet with outside parties.

f. Outside parties can meet with OIRA

- o Good and bad about this.
- o Meetings and communications must be disclosed. Communications put into a log. This puts in some transparency. OIRA doesn't always follow this. Doesn't matter since there is NO CAUSE OF ACTION.

g. Conflicts

- o Resolved by President or VP
- o President can't break the law. Have to look to whether his actions conflict with the statute.

h. APA

- o No requirement that agency disclose communication

67. Sierra Club

- a. Facts: Clean air act had a modified proceeding. EDF challenges that none of these comments post-comment period should not have taken place and influence the EPA's decision. The final rule was therefore invalid.
 - Comments: nothing in the statute prohibited it. Had to post relevant comments, but not irrelevant ones.
- b. Holding:
 - Oral communication that the EPA deems of central relevance as its fact basis for the rule must be docketed.
 - Sort of like VT Yankee because agency must close its basis for its final decision.
 - Meetings: court found that congress knew about these comments and would have been explicit about not allowing them.
 - In addition, the agency has to base its rule on the facts in the record.
 - Ex. Might not work since they can cite **to some other basis in the record**. However, even if there are other alternatives, the choice of the agency might not be enough to merit the decision, but was about politics
 - Any data used **in making the decision** must be disclosed
 - Most agencies can limit their discretion on their own.
 - Agency won't cite some political basis, has to be **some other basis**. If they can't, the rule will fail.
- c. President v. congressional input
 - One particular area v. nation
 - Constitutionally bound

68. Congressional Control of Agency Action

- a. Appropriations, new legislation, oversight hearing, etc.**
- b. Congress much more removed from day-to-day of agencies**
 - **See removal coming**
 - **Not as secret as with president**
 - **Very slow, and not as accurate**

69. Reasons why congressional oversight not that threatening

- a. Presidential veto
- b. Usually can't get enough support
- c. Reelection
- d. Congress is slow
- e. Highly dependent on the status quo

70. Congress's act somewhere in between House and Senate preferences

71. Agency implements the act closer to the status quo

- a. Agency drift**
- b. One house usually will be more indifferent
- c. Thus, the agency may have the legal authority to depart from the preferences of Congress
- d. Have to rely on judicial review

72. Legislative veto

- a. Arose since agencies gained more powers in the 1930s
- b. Executive branch agreed with it because it allowed executive branch more authority, such as in reorganization of the executive branch
- c. Consumer groups against this
- d. Positive and laying over??

73. INS v. Chadha

- a. Facts: student visa expired. Was deportable. Had no place to go. Subject to House action after Secretary grants permanent resident. House granted a resolution against this with no real explanation. "no hardship"
- b. 9th Circuit: found that it violated adjudicatory and executive functions. Carter had an executive order.

- c. Holding: This is a legislative act that **Doesn't go through the legislative process**. Violates bicameralism and presentiment.
 - Legislative Act: Is a legislative act because there is a presumption that Congress exercises legislative function. Alters rights and duties. Constitution provides for four instances where one branch can act alone. This supplants legislative delegation to AG.
 - **Maj. Argues House exercising a "quasi-legislative" power**
 1. Due process/delegating issues
 2. Attorney General Delegation
 - a. Bound by the statute and judicial review
 - b. So OK for legislative power be exercised by the AG
- d. **Powell: finds that this is adjudication**
- e. Hard to define within a separation of powers
- f. **Kennedy [viewed as executive or judicial]**
 - Judicial: Either correcting misapplication of law
 - Executive: Sharing administration of statute with executive
 - Judicial: Changing the substantive rights under the law
- g. Strike down all legislative vetoes. Mostly affects legislative functions
- 74. Congressional Response to *INS v. Chadha*
 - a. Congress kept making legislative vetoes. Threat to agency
 - b. *Congressional Review Act*
 - Major rules must be presented to Congress 60 day before taking effect
 - Congress can pass a joint resolution signed by the president. 43,000 rules. Only acted on 1.
- 75. **Police Patrols**
 - a. Tools that require Congress to monitor agency itself
 - Policy patrols
 1. Oversight hearings
 2. Confirmation hearing
 - a. Extract concessions from new head
- 76. **Fire alarms**
 - a. Constituents can monitor agency action and alert Congress themselves
 - b. Legislature prefers this because its less costly
 - c. Fire alarms
 - Notice and comment rulemaking
 - Individuals can sue the agency
 1. Judicial review provisions
- 77. **Removing executive officials**
 - a. Impeachment in Constitution
 - b. Through Statutory procedures
 - c. Nominated and confirmed by the senate
 - Maybe indicates the reverse is true too?
 - d. At will?
- 78. **Court**
 - a. Largely settled on idea that Congress can establish in statute as they wish with certain limitations
 - b. Recent case: Only can have one layer of for cause removal protection.
- 79. **Bowsher Case**
 - a. Comptroller general
 - Responsibility to audit financial statements
 - Nominated by president from list of 3 that speaker gives him
 - Can only be removed for certain causes
 - Only removed through a certain procedure through joint resolution of Congress
 - Balanced budget act

1. Certain maximum amount for congress for automatic reductions. Calculated based on the statute. OMB gives their calculations plus CBO. Provided to comptroller.

b. Holding: Majority

- *Executive power since he has to use his judgment and interpret the law*
- *But also was agent of legislature since they can remove him with a joint resolution*
- *An agent Can't have both power to legislate and executive power. Thus, unconstitutional for Congress to hold the power of removal over him.*
- *Congress can't retain power to remove executive agents except through impeachment process*

80. **Both cases say that Congress can't retain control once it delegates**

- a. Reasons why: don't want legislative control. Not public control. Not transparent.
- b. Want Congress to make the hard choices since it is responsive to the people
- c. Separation of powers Doesn't apply to the agencies
 - Less of a threat than having Congress accumulate the powers

81. **Judicial review of policy choices of agencies**

- a. Arbitrary and capricious review

Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.

- a. Facts: not enough to have traffic laws. A lot of deaths. One way: engineer new roads. Other approach to modify cars themselves.
- b. Product of a variety of social movements. Wanted to create power in administrator responsible to the president. Nader's role
- c. Statute: National Traffic and Motor Vehicle Safety Act. Sec. of transportation to set motor vehicle safety standards.
- d. Final rule rescinds passive restraints rule
 - Passive restraints: air bags and automatic seatbelts
- e. Found that the industry was switching to seatbelts. Air bags no longer installed. Found that automatic seatbelts would not be effective. Cost benefit analysis. Issue about public sentiment.
- f. State farm challenges this. Make money in the gap before data catches up
- g. Is it reviewable: organic act in this case say so. Same with the APA
- h. Use same arbitrary and capricious standard from the APA section 706 (2)(a)
 - "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"
- i. Reasons for : Cost associated with the recession by lives.
- j. Reason against: recession doesn't impose burdens on people
- k. Holding:
- l. **Baseline is the existing regime to measure the standard against. Here, this is the regulation, along with the market effects.**
- m. Agency wants it to be rational and based on standards. Court finds that it must also include a rational connection between the facts found and choice made. A+C.
 - **Look to data and whether conclusions from data make sense/plausibility.**
 - **Look to factors Congress wanted them to consider./purpose**
 - **Important aspects of the problem or alternatives**
 - **Connection between data and conclusions**
 - **Explain change.**
- n. Court cannot make this up on its own. Court can substitute their own reasoning for lower courts, but not for agencies.
- o. When court strikes down a rule
 - Can look for a new rule, can try to get new reason for the rule,
- p. NHTSA says we can't rely on the studies because the people who bought them wanted the safety features.

- q. Holding Found that agency should have considered or provided an explanation for no seatbelts. Can't just deny a study then make a rule without any other reasoning.
 - For example, didn't consider inertia.
 - Have to come up with some explanation
 - r. Airbags:
 - Arbitrary and capricious because NHTSA didn't consider or discuss this. They had discussed this before, so the court found that this was an important alternative that they must discuss now.
 - s. Dissent:
 - Admits some change
 - Airbags are effective
 - No finding about inertia in automatic seatbelts
 - 1. Going too far with inertia. Court is coming up with this on its own. Subtle distinction since the Court was coming up with its own view. NHTSA didn't think this was important.
 - Bottom line : if agency finds something important, has to state why it is no longer important.
82. Hypo:
- a. Goes against what Congress said it should consider
 - b. Can't just consider politics. Have to consider purpose of the act and HOW POLICY ACHIEVES PURPOSE OF THE ACT.
83. Don't mention presidential purposes.
- a. If there are two acts, have to execute both, but could find certain actions unnecessary since they're taken in other acts
 - President can't cancel the statute.
84. **FCC v. Fox**
- a. Facts: doesn't involve a rulemaking. Adjudication proceeding
 - . FCC policy of only enforcing repetitive occurrences of non-literal expletives. Prompted by Pacifica decision (found policy constitutionally valid. Two members said not deciding for isolated incidents of offensive words)
 - 1. FCC found non-repetitive fleeting expletives can be used
 - 2. They find that any use inherently has a sexual connotation. Found that leniency would lead to greater use .no notice of the policy, so first few uses not fined.
 - b. Holding: No heightened standard of review for changes in policy. **Just need a reasoned explanation where they are aware that they are changing their position and a reasoned explanation for the new position. Don't need to explain why it's new position is better.**
 - **Does have to explain new factual findings if there is a serious reliance interest,**
 - Majority finds that it has discussed why they're choosing the new rule.
 - c. Dissent: argues that other broadcasters won't be able to afford new technology.
85. **State Farm**
- a. Rule Arbitrary and capricious to rescind the requirement because the agency had not addressed several factors that they found important before.
86. **FCC v. Fox continued**
- a. Majority: agency must show
 - **Aware of the changing position**
 - **Good reason for new policy**
 - b. Enough that agency believes it's better, which is evidenced by changing position
 - c. Exceptions:
 - **If contradicting prior factual findings,**
 - **Have engendered serious reliance interests**
 - **Then had to explain why it's better**

d. Dissent:

- **Reasons for changing policy**
- **Have to look at status quo**
- **Justify change from this**

e. Kennedy:

- Finds that they should explain their reasoning for change
- Doesn't join response to dissent
- He thinks that in this case they met this requirement.
- Issue with the Constitutional question is
 1. **Not changing mind based on facts, but based on a constitutional interpretation**

f. Didn't answer constitutional question-found unconstitutional later

87. Judicial review of Agency actions:

a. Procedural requirements

- **Vermont Yankee**

b. Arbitrary and capricious review

- **Rational question**
- **Overlap between this and Chevron.**

1. **Some lower court use the two approaches in the same case**

c. Whether agency correctly interpreted the law

88. **Chevron Two Step**

a. Did Congress directly speak to the precise question?

b. Was the agency's interpretation reasonable?

89. Shifts authority to agencies

90. **Chevron Step Zero**

91. *US v. Mead*

a. Facts: Harmonized Tariff Schedule. Gives Secretary of Treasury power to make rules for rate of duties. Provides for tariff ruling letters that set tariffs for imports. Binding on the party involved, may be cited as authority in other transactions for identical articles, but can be revoked at any time. Not subject to notice and comment. Issued by different ports of entry.

b. Test:

1. only when Congress delegates authority to the agency generally to make rules carrying the force of law and

2. Did agency use authority to interpret statute

a. Formal rulemaking and notice and comment rulemaking will work.

i. *Fosters fairness and deliberation.*

ii. *More reasonable, rational response.*

1. **Like Congress**

iii. **Generally applicable rules**

1. **Affects many people**

iv. **Ultimately signed by head of agency**

1. **More accountability**

- b. Here, they are given the authority. However, rule letters were not products of notice and comment rulemaking. Just didn't use this power.
 - i. Issue so many each year
- c. Can still get Skidmore deference
- d. Scalia:
 - i. Create a lot of confusion
 - ii. Wants a clearer rule
 - iii. Agency can't evolve
 - 1. Court determines now whether agency can decide interpretation not whether it was reasonable
 - 2. Stare decisis
 - iv. Also now a presumption that agency doesn't have deference.
 - v. No connection between formality of proceeding and power to resolve questions of law.
 - 1. Ex. Trial court v. courts of appeals.
 - vi. Agency can choose to use informal rulemaking. Now, they will always use informal rulemaking.
- e. Grand X Case
 - i. Finds that no precedent unless the court specifically held only one way to interpret statute. Allows for potential for agency to shift.
 - ii. Ex. If they go through notice and comment rulemaking

92. **Barnhart v. Walton**

- a. Disability
 - i. "inability to engage in any gainful activity by reason of any medical or mental impairment which can be expected to last for...not less than 12 months." SSA interprets this to mean inability for 12 months. Also, find that expected to last means that it must last for 12 months. Looks back in time.
 - ii. Arguments for both sides
- b. Two steps:
 - i. Did give the power, but did not use it
- c. Lists factors
 - i. **interstitial nature of the question**
 - ii. **, the related expertise of the agency,**
 - iii. **importance of the question to administration of the statute,**
 - iv. **complexity of the statute**
 - v. **careful consideration the Agency has given.**
- d. *Look to whether it is the kind of decision they expect it to make, as long as they make careful consideration of the issue, gets deference.* Look to how long they interpreted it this way, etc.
- e. Mead might lose this on careful consideration
- f. Certain questions so obvious based on these factors, even without notice and comment rulemaking

93. **Skidmore Test**

- a. Before APA, still relevant
- b. Firefighters. Look to whether fire halls constitute time off or part of working hours.
- c. Take into account the administrator's view. Sometimes can be work, other times it might not.

- d. Administrator finds that the inactivity did not count as working time. In this case, they slept and ate, which is probably excluded. Other time is probably included.
- e. Court still retains interpretive authority
- f. Factors:
 - i. **thoroughness in the consideration, validity of reasoning, consistency,**
 - ii. **Any factors that give power to persuade court**
- g. Courts should take them more seriously into account
- h. Other factors can be taken into account.
 - i. **Ex. *Expertise, complexity of regime, possibly get back to Chevron deference.***