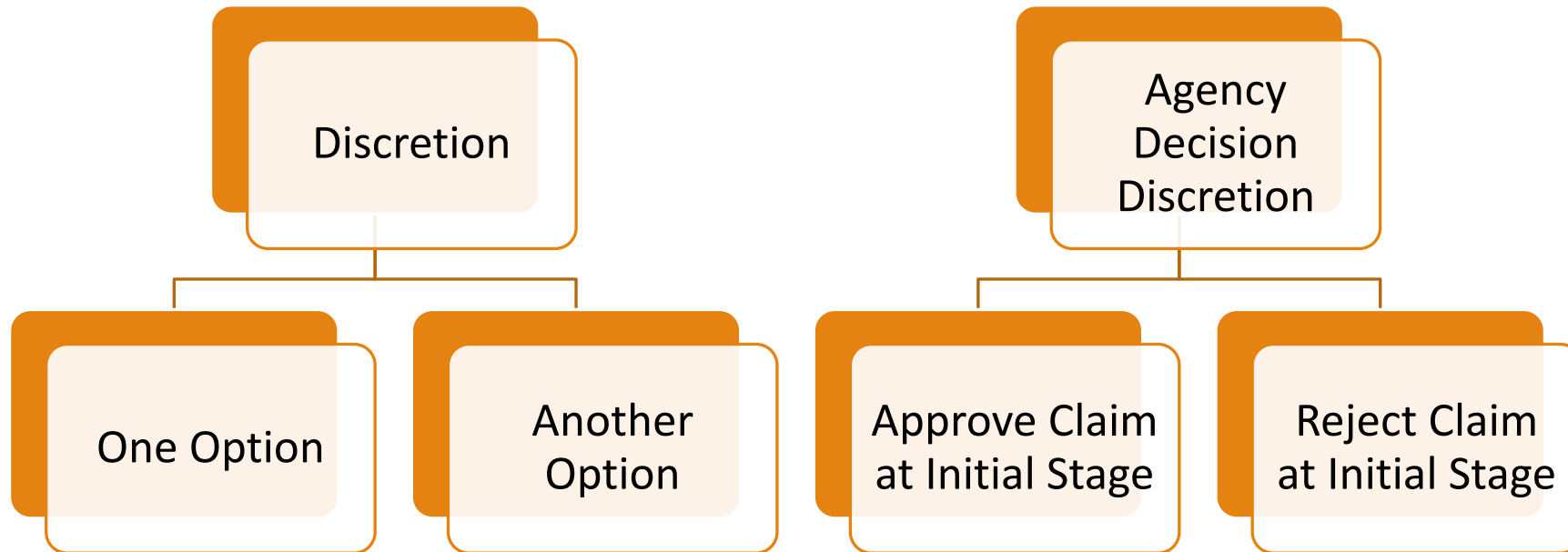


Chapter 3. Agency Discretion

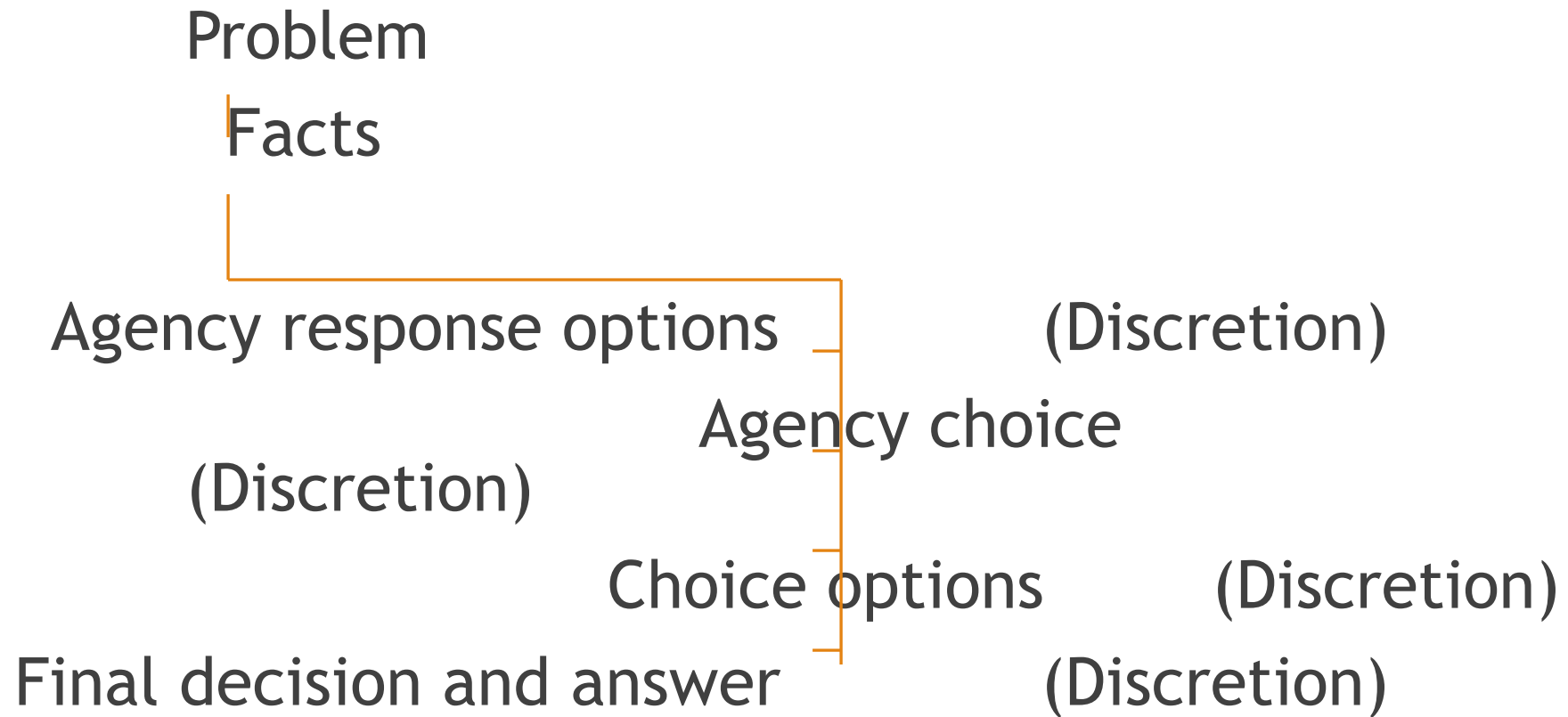
In this chapter, you will learn:

- Why agencies have discretion
- When agencies use discretion
- The effect of discretionary choices
- The dangers of discretion
- The safeguards legislatures create
- The impact of past practices on discretion
- How discretion may be abused
- How abuses of discretion may be appealed
- The deference given by courts to agency discretion

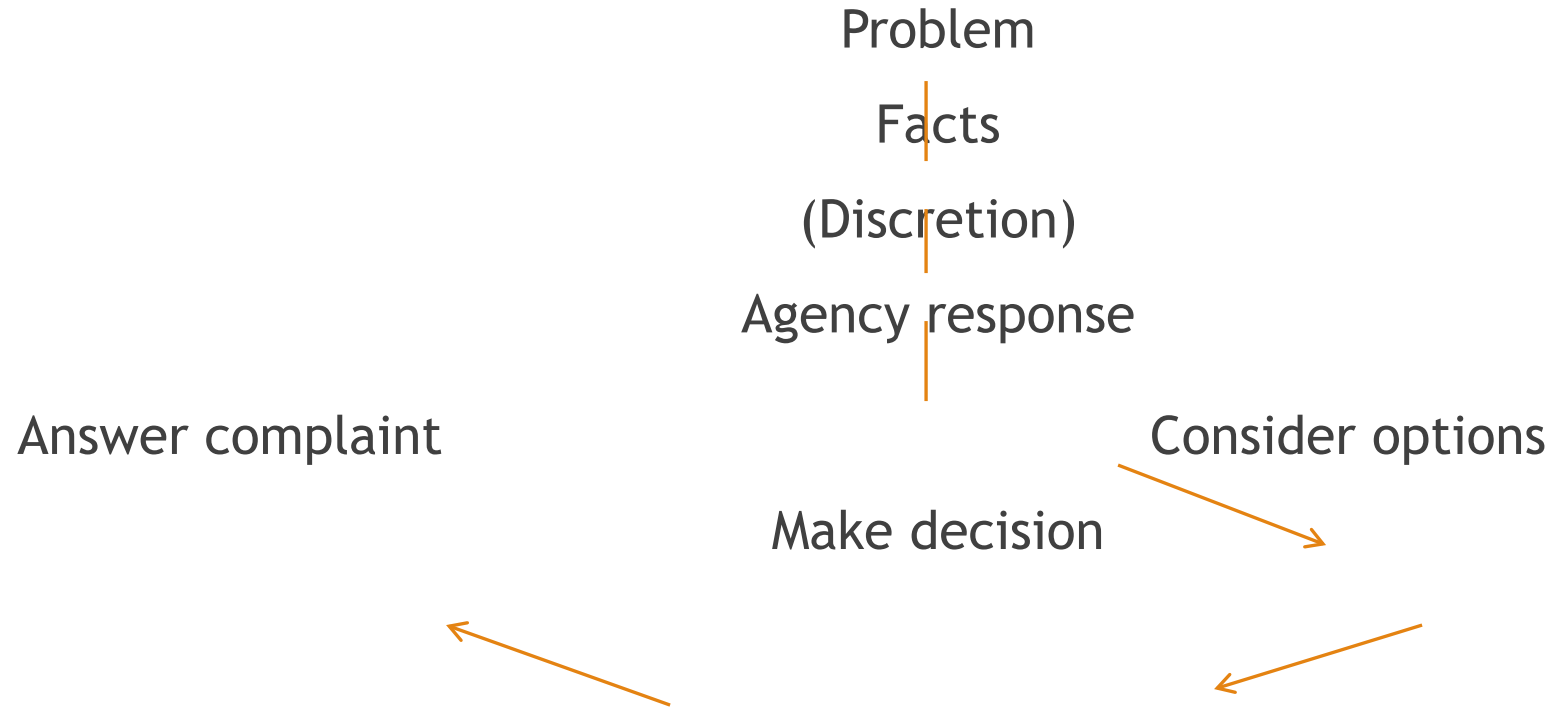
Discretion



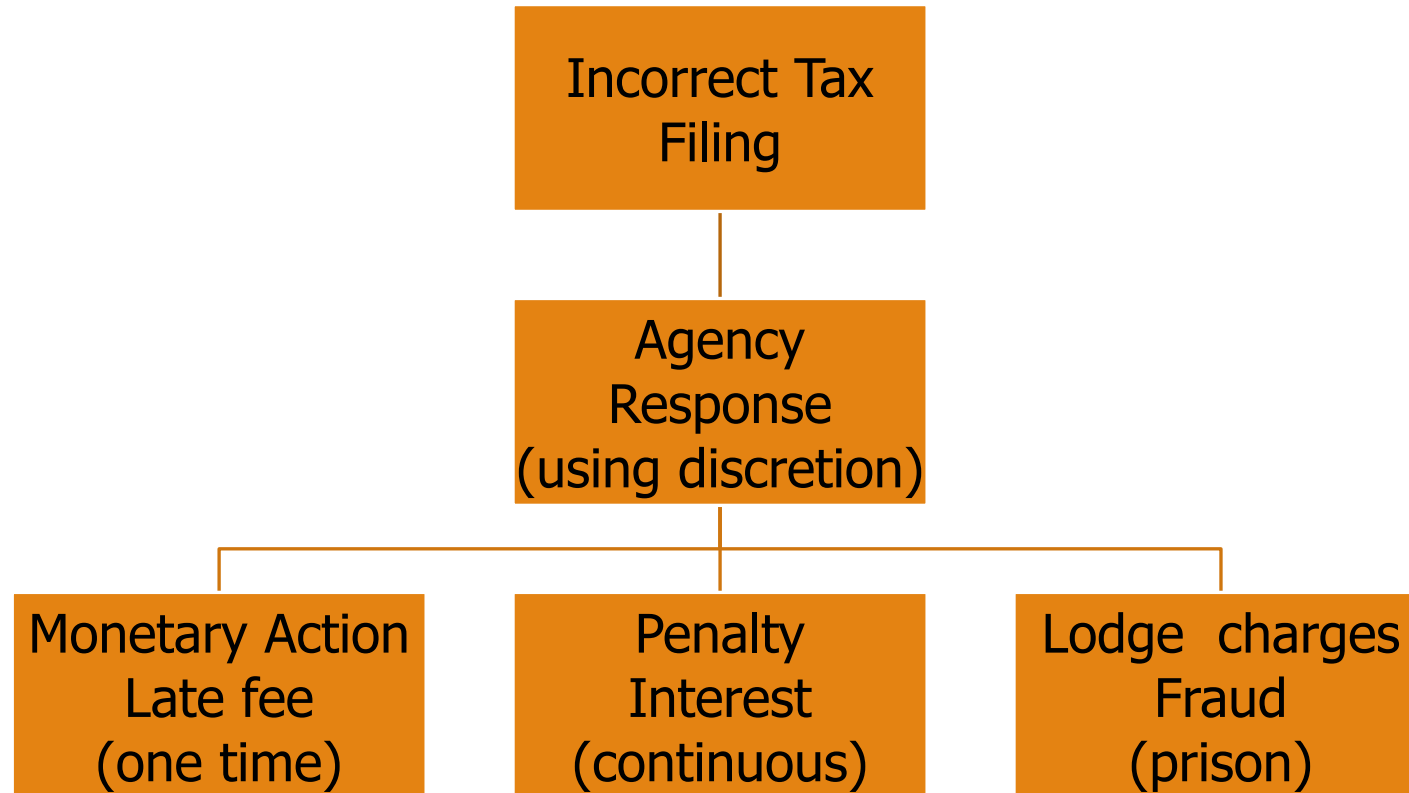
Agency Discretion



Agency Discretion— Another View



IRS – Discretionary Decisions



Effect of Reasonableness on Past Practice

Frequency of Similar Decisions

Expert Decisions

Predictability
Establishment of

Criteria & Norms

Reasonableness and
Fair Treatment



Judicial Deference to Agency Discretion

Administrative agencies are, in most cases, to be given deference even when they use discretion to interpret statutes.

A statute only needs to be interpreted if it is ambiguous, so no deference is given to an agency's decision that conflicts with a clear and definite statute.

Exactly when an agency is entitled to deference and the extent of that deference is an evolving matter.

Judicial Deference to Agency Discretion

Skidmore v Swift & Co., 323 U.S. 134 (1944) factors:

- thoroughness evident in its consideration, the validity of its reasoning,
- consistency with earlier and later pronouncements, and
- “all those factors which give it power to persuade.” However, the Court announced

Judicial Deference to Agency Discretion

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

A full deference standard requiring a court to affirm any reasonable agency interpretation even if the court believes there are more reasonable interpretations.

Chevron deference is fairly clear-cut and easy to apply.

Judicial Deference to Agency Discretion

- *U.S. v. Mead*, 533 U.S. 218 (2001):
 - The vast differences in tasks given to agencies warranted more than one standard of deference.
 - *Chevron* did not totally supplant *Skidmore*, but rather applies when Congress intended to have agency action hold the force of law, for example, enacting regulations.
 - *Skidmore* deference applies to non-force-of-law actions

Harpooned Sharks for Chapter 3: One Shark Harpooned!

But . . . One of the sharks ate a large fish with a hook in it, causing that shark's passing. Therefore, cross out more two sharks.

