
Overall Outline

- I. Methodology of Statutory Interpretation
 - A. Text First [textualist approved]
 - 1. Plain meaning
 - a) Usually can find ambiguity
 - 2. Canons of Construction
 - B. Ambiguous Text → Purpose of Statute [not-textualist approved]
 - 1. Legislative History
 - 2. Social Purpose
 - C. Similar Statutes
 - 1. Sometimes Congress will ‘xerox’ language from one statute to another
 - D.
- II. Lawyering Lessons
 - A. In the absence of clear precedent, lawyers read unspoken reasons into opinions to shape them to be useful.

Congressional Process and Title IX

- III. Operations of Congress – How a Bill Becomes a Law
 - A. Bill is written and tossed into the ‘hopper’ by a member
 - B. Bill is referred to Congressional committee
 - 1. Legal Backdrop
 - a) Art. I § 5 cl.2, US Constitution: each house of congress may “determine the rules of its proceedings”, including developing standing committees
 - b) Senate Rule XXV(1): Senate Committees are described, and their jurisdiction defined
 - (1) Senate Rule XXIV: Chairpeople and committee members are appointed by resolution.
 - c) House Rule X: Jurisdiction of house committees are defined
 - d) Legislative Reorganization Act of 1946: established basic committee process
 - C. Committee chair decides whether to schedule time for consideration of bill
 - 1. House: committee chair is obliged to refer the bill to the head of the relevant subcommittee
 - 2. No time scheduled → ‘pigeonholed’; died in committee
 - a) Pigeonholing in Practice
 - (1) House

(a) House Rule X(1): “all bills ... relating to subjects within the jurisdiction of any standing committee ... shall be referred to such committees...”

(b) Not voted on or voted down?

(2) Senate

(a) ???

b) How to Defeat a Pigeonhole Attempt in the House

(1) Discharge Petition

(a) Bill has sat in committee for 30 days

(b) 218 signatures – majority of house – must sign petition

(c) Printed in Cong. Record

(d) Any member can file a petition:

(i) within seven days of filing with the house AND

(ii) on the second or fourth Monday of the month

(e) Debatable for 20 mins, passes by majority vote

(f) Then considered under normal rules in House

(2) Suspension of the Rules

(a) House speaker recognizes member seeking suspension of the rules

(b) 2/3 majority of the house must approve

(c) NOT a plausible way to pry a bill from committee

(3) Special Rule

3. Don't want to kill the bill? → Three options

a) Hold a hearing

(1) Purpose:

(a) Create a public record – for political or interpretive reasons

(b) Mobilize affected constituencies

(c) Call witnesses from the executive branch

4. Bypassing the Rules Committee

a) Calendar Wednesday: Speaker calls on committee chairs in alphabetical order to force bills out to be debated on.

(1) Definition: A procedure in the House of Representatives during which each standing committees may bring up for consideration any bill that has been reported on the floor on or before the previous day. The procedure also limits debate for each subject matter to two hours.

5. Committee Jurisdiction: which committee gets a bill?

a) Two sources:

(1) Rules of House/Senate

(2) Precedents applying House Rule X developed w/ house parliamentarian

(a) 'weight of the bill' test

- b) Note: committee chairs will act to protect their turf
 - (1) Title IX: supporter who chaired judiciary committee insisted on removal of provision imposing duties on the Civil Rights Comm'n, which is a province of the Judiciary committee

6. Rules Committee

- a) Set rules for debate of the bill
- b) 3 types
 - (1) Open rule: members can offer amendments
 - (2) Modified closed rule: only certain types of amendments (e.g. germane ones; amendments to certain parts of the bill)
 - (3) Closed rule ('gag rule'): no amendments
- c) Passing a Special Rule for a bill
 - (1) Motion to consider Rules Cmte resolution
 - (a) Privileged: can interrupt others
 - (2) 1 hour debate parceled out by committee chair
 - (3) Floor manager moves previous question; rule is voted on
 - (a) Rarely defeated

7. Amendments

- a) Two degrees of amendment are allowed
- b) First degree:
 - (1) amendments to the bill itself – 4th vote
 - (a) 'substitute' amendments, which entirely replace amendments to the bill – 3rd vote
- c) Second degree
 - (1) Perfecting amendments: to previous amendments – 1st vote!
 - (2) Perfecting amendments of substitutes – 2nd vote
- d) Voting Order:
 - (1) Perfecting amdts. to pending amdts
 - (2) Substitute perfecting amendments replacing pending perfecting amendments of amendments
 - (3) Suibstitutes for pending amendments
 - (4) The amendment itself

D. Senate

- 1. Unlimited debate → cloture required to vote
- 2. Result: unanimous consent agreements used like special rules in the House to limit debate, amendments and so forth

IV. The Story of Title IX

A. Content:

- 1. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

- B. 1964: Congress Passes the Civil Rights Act
 - 1. Title VII – dealing with employment discrimination – is the only title to include “sex”
 - 2. Title VI – dealing with programs dealing with “federal financial assistance” – excluded sex but became the basis for Title IX
- C. 1970-1971: Congress Proposes and Defeats Title IX
 - 1. House
 - a) Introduction
 - (1) Title IX proposed as H.R. 16098 a part of the Omnibus Post-Secondary Education Act of 1970
 - (2) HR 16098 referred to the House Committee on Education and Labor
 - (3) House Committee on Ed/Labor sent it to the education subcommittee, chaired by Edith Green
 - (4) Rep. Green held hearings on gender discrimination in education
 - b) Hearings
 - (1) Supporters testified in favor
 - (2) Nixon officials were skeptical, but generally supportive
 - (3) The hearings are considered a landmark in American feminism
 - c) HR 16098 died in committee pigeonhole
 - 2. Senate
 - a) Birch Bayh proposes it as an amendment to the Education bill
 - b) Strom Thurmond asked if it would deny federal aid to the Citadel, then objected to its lack of germaneness when Bayh replied that it would
- D. 1972: Birth of Title IX
 - 1. House
 - a) Rules Committee: open rule
 - b) One amendment from 9 committee republicans was accepted
 - 2. Senate
 - a) Bayh re-offered the amendment to the 1972 education bill with an exception for vocational academies
 - b) Bentsen offered a perfecting amendment to exempt historically single-sex colleges
 - 3. Conference Committee: issues with busing elsewhere, but it survived because resubmission would kill it
- E. 1974: Title IX amended in Congress
 - 1. Specific exemption passed
 - 2. General delegation passed to Office of Civil Rights in Health, Education and Welfare (Now HHS)
 - 3. Requirement of regular reports imposed
- F. 1975: Regulations Enacted
 - 1. Unequal aggregate expenditures in sports “will not constitute noncompliance”
 - 2. 10 factor test for compliance
 - a) Include need to “effectively accommodate women’s interests and abilities”

G. 1979: Policy Interpretation passed

1. 3 part test for “effective accommodation”, with each part being a safe harbor

H. 1996: Clarification Letter defining interests and abilities

1. Removed safe harbor status from prongs 2 and 3 of the 3 part test

I. Judicial Interpretation of Title IX

1. Cohen v. Brown I (1st Circ. 1993): Policy interpretation is construed and given the force of law because the regulation receives *Chevron* deference – especially strong here because of the express delegation to the OCR. Brown can’t beat back the 3 part test.
2. Kelley v. Board of Trustees (7th Circ. 1994): Interpretation of regulations is enforced because its reasonable. [Cites *Martin*???

Textualism

V. Textualist Theories

A. Soft Plain Meaning Rule: The existence of apparent plain meaning is not dispositive without consideration of legislative deliberations and practical consequences.

B. New Textualism:

1. Basic Theory: The only object of statutory interpretation is to determine the meaning of the text and the only legitimate sources for this inquiry are text-based or text-linked.
 - a) Clear text → don’t consider anything else
 - b) Never consult legislative history
 - c) Consider Context, though
 - (1) Dictionaries (esp. contemporaneous to statute)
 - (2) Other provisions of the statute
 - (3) Similar provisions in related or borrowed statutes
2. Derives from Constitution Article I § 7: lawmaking is only by the full houses of Congress so lawmaking by subgroups violates the constitution.
 - a) “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it...”

VI. Caminetti v. United States (SCOTUS, 1917, Day)

A. Hold

1. Hold: Bringing a woman across state lines for the purpose of having her become a “concubine and mistress” is within the prohibition on interstate transport “for the purpose of prostitution or debauchery or for any other immoral purpose”
2. Dissent (Justice McKenna): Read the statute in light of the title and the legislative history

B. Hills Points

1. 3 possible meanings of “immoral purpose”

- a) Broadest: Any immoral Act (including gambling)
 - b) Middle: any immoral sexual purpose (Day's definition)
 - c) Narrowest: any commercialized sex act (McKenna's definition)
2. Decision uses eiusdem generis to find commonality among list of threesome and comes up with sex as the thing all three have in common
- a) BUT: commerce is also an option
 - b) Basic Principle of Textualism: all words must do some work.

3. Absurdity is the Gateway

- a) You can only look at the title, the whole legislation or legislative history to give meaning to the text IF you find absurdity
- b) And absurdity → ambiguity

VII. Green v. Bock Laundry (SCOTUS, 1989, Scalia):

A. Hold: According to the Federal Rules of Evidence, evidence of a prior felony is admissible if its probative value outweighs prejudice “to defendant”. This would “compel an odd result” in civil trials, so the text is read to read criminal defendant.

- 1. Scalia (conurrence):
 - a) Use of Legislative History is permissible: “I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption to verify that what seems to us an unthinkable disposition ... was indeed unthought of...”
- 2. Blackmun (dissent):
 - a) NOT Textualist
 - b) Until the legislature fixes the problem, read defendant as ‘all civil litigants’ and apply the probative/prejudicial balancing to all parties.
 - (1) Source: Rule 102, which says rules should be used to promote fairness

VIII. United States v. Marshall (7th Cir. 1990, Easterbrook):

- A. Hold: The plain text of a statute is clear and completely disconnecting LSD sentencing from the number of doses is not at all absurd.
 - 1. Textualism: without looking to policy consequences
 - 2. High test for absurdity: if a rational Congress could have thought of it, it's not absurd.
- B. Cummings (dissent): Looks to current legislation trying to remedy the problem, but not sure it's going to pass.
- C. Posner (dissent): “we must consider whether Congress might have had a reason for wanting to key the severity of punishment for selling LSD to the weight of the carrier rather than to the number of doses or to some reasonable proxy for dosage.”
 - 1. Pragmatism: ignore the text because it's absurd

Intentionalism

IX. Intentionalism Generally

A. Goal: find the legislative intent and use that to interpret a statute

B. Sources

1. Plain text
2. Legislative History and documents surrounding passage
3. Common knowledge of statute that was passed

X. Intentionalist Schools

A. Specific Intent: congress has directly considered a problem and declared its intention to deal with it through the legislation

1. E.g. consideration of exclusion of professionals in Holy Trinity Church, but never passing that amendment

B. Imaginative Reconstruction: what did the law maker mean by taking the position he did in the context

1. Try to figure out “from the mischiefs he had to meet and the remedy by which he sought to meet them” what he thought “with respect to the particular point in controversy”.

a) Roscoe Pound, *Spurious Interpretation*

2. Two step process

a) Pose a relevant hypothetical question

b) Figure out a group of legislators, necessary for the passage of the bill, to pose it to

3. United Steelworkers v. Weber: Title VII of the Civil Rights Act allows programs that specifically promote racial minorities. Title VII was a compromise between eastern liberals and Midwestern conservatives

a) Brennan (majority): asked hypothetical question to liberals, who were driving force behind the statute

(1) do you want voluntary preferences for an employer where 2% of the workforce is black?

b) Rehnquist (dissent): asked hypothetical question to Midwestern moderates

(1) Do you want any quotas in hiring at all?

C. General Intent/Purposivism

1. Look to the overall purpose of the statute

a) Question: what was the statute’s goal?

b) E.g. Holy Trinity Church: exclude eastern european laborers taking ‘american’ jobs

2. California Savings and Loan v. Guerra (SCOTUS, 1987, Marshall): Statute said pregnant women “must be treated the same for all employment-related purposes.” Giving women leave of extended absence did not violate the statute because the statute was passed for the purpose of benefitting female employees.

XI. Holy Trinity Church (SCOTUS, 1892, Brewer)

- A. Issue: Did the importation of a British protestant minister violate the Alien Contract Labor Act, which made it unlawful “in any way assist ... [the] migration of any alien ... into the US ... under contract... To perform labor or service of any kind in the United States.”
- B. Hold: the importation of the minister did not violate the Alien Contract Labor Act, because Congress couldn’t possibly have meant what it said.
- C. What Tools Did Brewer Use???
1. **Whole Legislation**: title of the act
 - a) Title: ‘An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States’
 - b) Interpreted “labor” as “manual labor” claiming common usage
 2. **Circumstances Surrounding Enactment**:
 - a) Common Knowledge
 - (1) statute was intended to prevent contract labor
 - b) Testimony/Petitions from Citizens:
 - c) Committee Reports
 - (1) Made the decision controversial then and now
 3. **Absurdity**: Congress simply couldn’t have enacted a law that excluded ministers because we are a ‘Christian nation’
- D. What would a textualist say about all of this?
1. In this case: operational text is clear, so Title, Common Knowledge, Leg. Hist. are invalid
 2. In General:
 - a) Reliance on Statute’s Title – permissible, IF the operative text is ambiguous
 - (1) Doesn’t circumvent Article I, b/c its voted on
 - b) Reliance on Common Knowledge – permissible IF operational text is ambiguous AND knowledge so common that a court could take “judicial notice” of the facts
 - (1) This prevents judicial discretion
 - (2) **judicial notice**. A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact
 - (a) e.g. The Great Depression started in 1929
 - c) Legislative History: **ALWAYS AND FOREVER IMPERMISSIBLE, EVEN WHEN TEXT IS UNCLEAR**
 - d) Absurdity: Permissible, even when the text is clear
 - (1) Since nobody uses words in an absurd way, absurdity is considered a typo
 - (2) Ex: Statute says “no dumping metal in the Hudson”
 - (a) Textualist is fine NOT applying that statute to the plane landing by heroic captain Chesley Burnett "Sully" Sullenberger III in the Hudson River
 - (3) Note: has to be considered obviously absurd.

- (a) HTC's application to a minister probably does not meet that standard

XII. Public Citizen v. US Department of Justice (SCOTUS, 1989, Brennan)

A. The Decision

1. Issue: Is the ABA committee that advises the president on judicial nominations a "committee, board, commission, council, conference Or other similar group ... established or utilized by the President or ... by one or more agencies in the interest of obtaining advice ..."?
2. Hold: No.
 - a) Brennan (majority): "regulation ... appears too sweeping to be read w/o qualification unless further investigation of intent confirms that reading."
 - b) Kennedy (conurrence): "in today's opinion, however, the court disregards the plain language of the statute not because its application would be patently absurd but rather because" it re-writes legislative history. Kennedy concurs b/c the statute violates core Article II powers.

B. Hills' Points on Public Citizen

1. The textualist case is strong for finding that the ABA committee is governed by the statute.
2. Brennan uses legislative history, but the discussion remains confusing
 - a) Costs of Legislative History
 - (1) Difficult to assemble and read
 - (2) Often doesn't clarify matters (as here)
3. **Absurdity Enlarged**:
 - a) *Holy Trinity Absurdity*: plainly obvious to everyone that the application would be absurd
 - b) *Public Citizen Absurdity*: it would be crazy in a different case to apply the law literally. (*reductio ad absurdum*)
 - (1) In this case, the President consulting a couple of folks at a diner would have to be covered by the statute
 - (2) Essentially a facial challenge to the law, not an as-applied challenge
 - (3) Public Citizen Absurdity is **DISVAVORED**. Hills thinks this kind of absurdity is impermissible
 - (4) Turns on the strength of the analogy
 - (a) Don't enforce no dumping in the Hudson b/c sully might crash a plane → very bad b/c analogy is attenuated
 - (b) Don't enforce against ABA b/c of diner consultation → slightly bad b/c less attenuated
4. Court uses avoidance canon to justify definition of "utilize" so as to avoid first amendment issues
5. **Legislative History**:
 - a) Rescue meaning of the actual text to see if Congress actually intended the 'absurdity' of using FACA to cover the ABA

- b) Textualists might think this is OK
 - (1) See Scalia in *Green v. Bock Laundry*

Textualism vs. Intentionalism: The Debate

XIII. Anti-Intentionalism

A. Cycling

1. Definition: the principle that any bill with two issues addressed in it can be beaten by at least one other position; $A > B > C > A$
2. Example

a)

	Group 1	Group 2	Group 3
1 st choice	A	B	C
2 nd choice	C	A	B
3 rd choice	B	C	A

b) $A > C > B > A$

(1) Steps

- (a) 1+2 band together so A can beat C
- (b) 2+3 band together so B can beat A
- (c) 1+3 band together so C can beat B

3. Bottom Line: any outcome is possible depending on how you vote.
 - a) Cycling implies non-transitive preferences, contradict a basic principle of rationality
 - b) Smart legislator can structure the voting so that any individual position will result
4. Implications of cycling
 - a) Just because Congress rejects a bill doesn't mean Congress disapproves the interpretation of the statute embodied in that bill
 - b) Congress simply cannot have a 'thought bubble' so there is no meaning to legislative intent
 - (1) Shepsle's point
 - (2)

B. Legislative Intent Is a Fiction – Shepsle ('Congress is a They Not an It')

1. Arrow's work on cycling indicates that public choice theories of legislative intent are flawed
2. Why did a majority prevail?

- a) Committee chairs have agenda setting power
 - b) Committee chairs have floor power
 - c) Conference committees significantly shape bills
3. Conclusion I: Only inference to be drawn from bill passing is that a majority in each house “revealed a preference for the bill over the status quo.”
- a) We do not know why.
 - b) We don’t know about choices with which Congress wasn’t confronted
4. Conclusion I → IGNORE LEGISLATIVE INTENT
- a) How resolve statutory incompleteness?
 - (1) Look to how private parties have interpreted a statute
 - (2) Take advantage of parts of statute that create structures for dispute resolution
 - (a) E.g. agency rulemaking under the APA
 - (3) Courts give meaning by “saying what the law is” through an implicit constitutional relationship with legislators
5. PLAIN MEANING vs JUDICIAL DISCRETION
- a) Plain Meaning: neither intention of legislature nor prediction of what legislature would think may play a role
 - (1) *Continental Can Company v. Chicago Truck Drivers* (7th Circuit, Easterbrook): “**the text of the statute and not the private intent of the legislators is the law.** Only the text survived the complex process for proposing, amending, adopting, and obtaining the President’s signature... it is **easy to announce intents and hard to enact laws**; the Constitution gives force only to what’s enacted.”
 - (2) This position forces legislature to complete statutes by writing super-duper clear ones
 - b) Judicial Discretion: ambiguity gives courts unfettered discretion to make decisions.
 - (1) This is a maximalist position, where plain meaning is minimalist
 - (2) Plain meaning requires that legislatures complete statutes; judicial discretion requires that courts complete the legislative process of statutory completion

C. Court Can Bend Statutes Using Intent – Judge Easterbrook

- 1. Five moves courts make to take control
 - a) Courts decide when a statute is ambiguous
 - b) Courts decide which hypothetical question to send to the legislature
 - c) Court has flexibility to decide who question is directed to
 - d) Court decides its answer is legitimate
 - (1) Even though its an “end run around the process”
 - e) Obfuscates the law
 - (1) “it is always possible to turn a rule into a vague standard by looking at intent”

2. Easterbrook's Objections

- a) Too much judicial discretion
 - (1) judges get to 'pick their friends' when deciding whose views to label as intent
- b) Majority sentiment might not be enactable
 - (1) See cycling
 - (2) Essentially, courts are asking Congress "opinion" about a bill that was never presented to it
- c) Empowers congressional outliers
 - (1) May not represent apathetic majority, but are motivated enough to make floor statements
 - (2) Courts can get intentionalism wrong
- d) Ignores constitutional procedures for enacting laws
 - (1) But: Easterbrook uses dictionaries that aren't endorsed by article II
 - (2) Even if courts get it right, it's impermissible
- e) "seems to obfuscate the law"
 - (1) Induces Congress to write sloppy laws and let the courts

XIV. Pro-Intentionalism

A. Weingast and Rodriguez, *Paradox of Expansionist Statutory Interpretations*

- 1. Two meanings of intent in legislative context
 - a) Simple intent: treating legislature as if it's one person with one thought
 - (1) Don't do this. It's silly
 - b) Sophisticated intent: look t what was necessary to get the legislation passed
 - (1) Presumably takes into account what was required to get the procedural rule passed structuring the order of votes
- 2. How Follow Sophisticated Intent?
 - a) Salvage evidence of what was necessary to make the deal from the record
 - b) Pay attention to statements that cost a representative something
 - (1) "costly signaling capacity"
- 3. Arguments in favor
 - a) Allows for careful, critical analysis of the legislative process
 - b) Allows judges to choose between contradictions in legislative history
 - c) Limits judicial discretion

Textual Canons ("Intrinsic Aids")

XV. Textual Canons Generally

- A. Gate Keepers: Intrinsic aids will determine ambiguity
- B. Canons can be used to create or eliminate ambiguity
 - 1. Under *Caminetti*, this serves as the gateway to extrinsic sources

C. Applications

1. Textualist: Should the canon apply given the text in front of us?
2. Non-Textualist: canons reinforce the purpose of the statute

XVI. *Ejusdem Generis* ('horses, donkeys or any other farm animal')

A. The principle that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.

B. Black's Definition:

1. A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.
 - a) For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animal, the general language or any other farm animal -- despite its seeming breadth -- would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.

C. IF disjunctive ('or') in phrase → DON'T USE

1. "the phrase [any officer of customs or excise or any other law enforcement officer] is disjunctive with one specific and one general category, not a list of specific items separated by commas and followed by a general or collective term."
 - a) Thomas in *Ali v. Federal Bureau of Prisons*

XVII. *Noscitur a sociis* ("it is known by its associates")

- A. the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.
- B. Distinguished from *Ejusdem Generis* because there is no 'or any other X' clause; the issue is that one of the items in the list is ambiguous
- C. To limit: word does no work if defined as synonymous (or nearly synonymous) with its associates ['harm' in *Sweet Home*]

XVIII. *Expressio Unius Est Exclusio Alterius*

- A. Everything not enumerated is excluded when a statute expressly enumerates a detailed list of anything (items, exceptions, etc.)
- B. "Negative pregnant" – meaning that an omission (negative) is 'pregnant' with meaning
- C. Threshold Issue: TWO ways to use this canon
 1. clarifying a departure from a general baseline
 - a) 'you can stay out until midnight, kids' adds an implicit 'only' to the sentence because without the implicit exclusion of all other times, your whole sentence is a waste of words
 2. Responding to a specific activity against a background norm
 - a) 'don't kick your sister, sonny' does not authorize sonny to choke her because the instruction was issued against the background of a general anti-violence norm

- b) Morton v. Mancari (SCOTUS, 1974): Court declines to apply canon to list of exceptions to Equal Employment Act, holding that the BIA is covered by an exception, even though it was listed. This was because of a background policy of increasing Indian sovereignty

D. Cases!

- 1. Silvers v. Sony Pictures: List of parties who could sue for copyright infringement implicitly excluded others. Two additional considerations
 - a) Creature of statute: No useful common law principles to apply, so canons have added weight.
 - b) Carefully circumscribed: congress time-limited valid suits, so the right to sue was carefully circumscribed.

XIX. Ordinary Language Canon

- A. Words are taken in their ordinary meaning unless they are technical terms or words of art.
 - 1. Nix v. Hedden (SCOTUS, 1893): Tomatoes are a vegetable for the purposes of customs identification because common meaning and practical usage (eaten in salad, not as dessert) of tomatoes indicates they are a vegetable.
- B. Meaning of statutory language should be tied to its meaning during the time it was enacted
 - 1. Saint Francis College v. Al-Khazraji (SCOTUS, 1987): An 1866 statute referred to “white citizens”. The court ruled that it did NOT cover the Arab plaintiff because at the time of enactment, Arabs weren’t considered white.
 - a) Court turned to:
 - (1) Period dictionaries
 - (2) Period encyclopedias
 - (3) Legislative history (mentioning a panoply of races)

XX. Anti-Derogation Rule

- A. Basic rule: don’t interpret one provision of a statute to implicitly minimize or ‘derogate’ another provision.
 - 1. Robinson v. Shell Oil (SCOTUS, 1997): “Employees” in the Civil Rights Act can’t just mean “current employees” because the act makes reference to “reinstatement” of employees. Holding the former would ‘derogate’ the word reinstatement.

XXI. Last Antecedent Rule

- A. Basic Rule: An interpretative principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing.
 - 1. Ex: “Texas courts, New Mexico courts, and New York courts in the federal system”, federal system modifies ONLY New York Courts.
- B. Comma rule: when the last antecedent is comma-d, it applies to the whole bracket
 - 1. If there is a comma after New York courts, it applies to the whole thing

C. Semicolon rule: semicolons are a hard break.

1. "Arizona courts; New Mexico courts, and New York Courts, in the federal system"

a) In the federal system modifies New York and New Mexico **NOT** Arizona.

D. US v. Hayes (4th Cir. 2007):

1. Statute: Statute prohibits firearm possession for someone convicted of an "offense" that has A) is a "misdemeanor under state law...;" and B) has, as an element, "the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse... of the victim."

2. Hold: Applying the last antecedent rule, "former spouse" modifies all of the .

a) **Not sure about this**

XXII. Rule Against Surplusage

A. Basic Rule: Every word and clause must be given effect.

XXIII. Ali v. Federal Bureau of Prisons (SCOTUS, 2008, Thomas)

A. Hold: A prison official is covered by "any officer of customs or excise or any other law enforcement officer."

B. Thomas' Approach to Textual Canons

1. *Ejusdem Generis* doesn't apply.

a) the phrase is disjunctive

b) the phrase has a general category and specific category;

c) no list of specific items

d) unclear what the common thread is

2. *Noscitur a Sociis* doesn't apply

a) Citations all had clearer contexts

b) No suggestion that customs and excise officers were the only focus of the provision

3. Rule against superfluities

a) "any officer" does work because Congress intended to remove doubt that customs/excise officers were included

(1) Either "any other officer" or "customs or excise" must die, so Thomas chooses the latter.

b) Alternative phrasing that would've captured rejected meaning: "any other law enforcement officer acting in a customs or excise capacity"

4. Result: There is no ambiguity in the statute's text and structure

5. Thomas' Mistakes

a) Wasted Words

(1) Kennedy reading: one part of statute (customs and excise) does little work

(2) Thomas reading: one part of statute (any other officer) does NO work

b) IF Thomas is right that we have to lose language, why isn't the statute ambiguous?

(1) Counterargument: violation of a canon doesn't necessitate ambiguity

C. Kennedy's Dissent

1. Applying Ejusdem Generis

a) This is textbook ejusdem generis, which need not be applied to a laundry list

b) For Thomas' meaning, Congress would've written: "any law enforcement officer, including officers of customs and excise"

c) Commonality: enforce revenue laws and conduct border searches

Substantive Canons

XXIV. Lenity Canon

A. Basic Rule: Two rational interpretations of criminal statute → interpret to favor the defendant

1. Higher level of ambiguity required to trigger than legislative history or other extrinsic sources

2. Lenity is a **last resort**

B. Lenity and Textualism

1. Scalia likes Lenity as a form of nondelegation

2. Textualists use lenity as a default rule to strip courts of discretion, which is a major goal

C. 'Lenity Plus' Requirement?

1. Lenity in McNally vs. Smith

a) McNally may be lenity PLUS federalism

(1) Federalism: dictate how state/local governments discipline their officers

D. Lenity Case Study: "Using" Firearms

1. Statute: Punishment is upped for if you "use or carry a firearm" "during and in relation to any crime of violence or drug trafficking"

2. Smith v. United States (SCOTUS, 1993, O'Connor)

a) Hold: Defendant "used" a MAC-10 by bartering it for cocaine.

(1) Relying on plain or ordinary meaning

(2) If Congress intended to read "use as a weapon" into "use" it would've said so.

(3) Lenity only applies where "after seizing everything from which aid can be derived the court is left with an ambiguous statute"

(4) O'Connor looks to common knowledge statutory purpose of keeping guns away from drug deals

b) Dissent (Scalia)

(1) O'Connor misconstrues ordinary meaning of "use"

(a) When someone asks if you "use" a cane, s/he isn't asking if you have one on display in the hall; s/he wants to know if you *walk* with a cane

(2) Even if you prefer O'Connor's reading, Scalia's is reasonable enough to require lenity here.

3. Bailey v. United States (SCOTUS, 1995):

a) Hold: possession of an unloaded gun in the trunk is "mere possession," a term which often appears in criminal statutes.

4. Watson v. United States (SCOTUS, 2007, Souter):

a) Hold: Defendant did not 'use' a gun by receiving it in exchange for prescription drugs.

b) Ordinary usage, again: a kid uses an apple to trade it for a candy bar, but has not used the candy bar according to ordinary usage

E. McNally v. United States (SCOTUS, 1987):

1. Hold: Depriving citizens of Kentucky of intangible rights is not a "scheme or artifice to defraud".

a) Court invokes Lenity

b) Avoidance: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read [the statute] as limited..."

2. You've gotten to ambiguity through legislative history, which is only supposed to be used if text is ambiguous.

3. Lack of notice is justification for use of the lenity principle

XXV. Avoidance Canon

A. Basic Rule: Don't decide on constitutional grounds unless you have to.

1. Brandeis: "when the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

a) *Crowell v. Benson* (SCOTUS, 1932)

2. 3 reasons for Canon

a) Absence of clear constitutional authorization for judicial review

b) "countermajoritarian difficulty" of unelected judges invalidating the acts of democratically elected legislatures

c) Remedies are cumbersome

(1) Court overruling self

(2) Changing the constitution

B. Ambiguity and Seriousness

1. How Much Ambiguity is Required to Trigger?
 - a) *Catholic Bishop*: general terms (employers, not schools) + no indication that congress intended to confront the serious issue.
 - (1) Non-explicit confrontation of serious constitutional issue
 2. How Serious Must the Constitutional Issue Be?
 - a) *Catholic Bishop*: if a statute that is fine on its face might raise a challenge if applied, that is sufficiently serious
 - b) Settled Law → NOT a serious constitutional issue
 3. Sliding Scale: The clearer the statute is, the more serious the constitutional issue must be to trigger the avoidance canon
- C. Purpose of Avoidance Canon
1. Cautious: tie breaker between two equally plausible interpretations.
 - a) Where one raises a constitutional question, choose the other
 2. *Catholic Bishop*: Force Congress to acknowledge they're courting constitutional issues.
 - a) If they are courting constitutional issues but don't say it, courts will distort the statute to read the 'courting' out!!!
 - b) Can be in statute OR legislative history
- D. Problems with Avoidance
1. Inconsistent with textualism
 - a) **HOW???** **VIOLENTLY MIS-CONSTRUE TXT TO AVOID?**
 2. Inconsistent with purposivism b/c not seeking Congressional intent
 3. No real analysis of constitutional issue → sloppy constitutional analysis effectively written in to statute
 - a) Brennan dissent in *Catholic Bishop*: by swerving wide around free exercise, you are benefiting catholic schools enough that you might violate the establishment clause
- E. Benefits of Avoidance
1. You get Congress interpreting the constitution
- F. *NLRB v. Catholic Bishop* (SCOTUS, 1979, Burger):
1. Hold: The NLRB might need to construe Catholic doctrine if catholic school teachers unionize. To avoid the Free Exercise questions inherent in the NLRB's potential construal, the NLRB does not have jurisdiction over catholic school teachers.
 2. Plain statement rule controls.
 3. Rules Emerging from Decision
 - a) Plain Statement Rule: If Congress writes a statute that could conflict with the constitution, they've gotta say it in the statute or in crystal clear legislative history
 - b) Fairly Possible Rule (Brennan dissent): Avoidance of constitutional question is preferred if such an interpretation of the statute is "fairly possible"
 - (1) *Machinists v. Street*; *Crowell v. Benson*

(2) This rule is better because it “acts as a brake against wholesale judicial dismemberment of congressional enactments.”

c) Charming Betsy Avoidance: If there is a constitutional problem, do the full constitutional analysis, then interpret the statute as constitutional, if possible.

G. *Gregory v. Ashcroft* (SCOTUS, 1991, O’Connor)

1. Hold: Judges are “employees on a policymaking level,” which means they are not covered by the Age Discrimination in Employment Act, and can be forced to retire at 70. Since the statute doesn’t plainly protect judges AND such protection would raise a potential constitutional issue (federalism!), the judges are covered by the exception.

a) O’Connor: this is an “odd way for Congress to exclude judges; a plain statement that judges are not ‘employees’ would seem the most efficient phrasing.”

(1) BUT WE USE THE AVOIDANCE CANON ANYWAY!!!

b) White (dissent): no need to use the avoidance canon b/c there isn’t ambiguity; judges are plainly covered by the statute

Extrinsic Aids

XXVI. *Whole Act Canon*

A. Basic Rule: A provision that may seem ambiguous in isolation can be clarified by the remainder of the statutory scheme.

1. Two possible ways (non-exclusive?)

a) Same terminology used elsewhere makes the meaning clear.

(1) *Sorenson v. Secretary of Treasury*

b) Only one possible meanings works substantively with the rest of the law.

(1) *Pilot Life Ins. Co. v. Dedeaux*

B. Preamble – permissible if clarifies

1. *Sutton v. United Airlines* (SCOTUS, 1999): Severely nearsighted pilots and others with correctible problems were not disabled under the ADA, because the preamble stated that 43 million people in the US were disabled, and the number covered by the pilots’ definition would be far larger than that.

a) Statutory Def of disabled: “physical or mental impairment that substantially limits one or more ... major life activities”

2. See also: ***Holy Trinity Church!!***

XXVII. *Pari Materia*

A. Basic Rule: With similar terms in statutes, construe the later statute in light of the earlier one.

1. Black’s Law Dict.: statutes that are in pari materia may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.

B. North Haven Board of Ed v. Bell (SCOTUS, 1982): Title IX of the Girly-Bill is based off Title VI of the Civil Rights Act, but the latter act didn't include an exception for employment. Therefore, interpreting an employment exception into the ambiguous Title IX is impermissible

XXVIII. Canon Against Implied Repeal

A. Exception to general rule that a later statute trumps an earlier one

B. Basic Rule: Ambiguity + no sign of intent to overrule → a later statute should NOT be read to repeal an earlier statute.

1. Factors for use of canon (non-exhaustive)

a) No evidence that Congress knew of the inconsistency

b) Longstanding policy

(1) Esp useful if favored in other interps, like implicit exemptions from exec orders

2. BUT: don't apply if partial or total repeal is evident from the plain meaning

C. Morton v. Mancari (SCOTUS, 1974):

1. Held: Preferences for Indian hiring at the BIA enacted in 1934 survived the enactment of the Equal Employment Act prohibiting discrimination in hiring, because of:

a) the canon against implied repeal,

b) Congress' subsequent enactment of further Indian preference laws

c) Previous treatment of Indian preference as an exception to Exec. Orders on employment

d) Expressio unius (for exceptions in EEA statute) rebutted by background policy of Indian sovereignty

XXIX. Specific Over General

A. Basic Rule: specific statutes should be applied over general ones

1. Basis: avoid wasted words in the code; applying the general would waste all the words of the specific statute

XXX. Legislative Inaction

A. Three Types of Inaction

1. "Pure" silence: Congress does nothing to endorse or condemn some administrative decision.

a) Weak basis for inferring Congressional thought

b) Serves as a basis for *stare decisis*

2. "Negative" Inaction: Congress rejects action that would overturn a judicial decision.

a) Negative inaction → courts will reject interpretations of laws that urge meaning similar to the rejected meaning.

(1) *Blue Chip Stamps v. Manor Drug Stores (SCOTUS, 1975)*

b) Problem: small number of congressfolk can prevent a change to the status quo through committee operations, filibuster, etc.

c) Two types

(1) Dies in committee

(2) Dies in full house of congress

3. Re-Enactive Inaction: Congress re-enacts a bill without overturning judicial/agency interpretation of it.

a) *Lorillard v. Pons* (SCOTUS, 1978)

B. *Stare Decisis* and Inaction

1. Long acquiescence is especially probative for a court's getting it right

a) *John R. Sand and Gravel v. US* (SCOTUS, 2008): *Stare Decisis* has a special force in statutory interpretation, because Congress can change what the court has done. Long acquiescence to an interpretation is especially probative.

2. Long acquiescence + failed attempt to change law → dispositive?

a) *Flood v. Kuhn* (SCOTUS, 1972): Major league baseball remained exempt from anti-trust laws – despite their application to all other professional sports – because more than 50 bills have been introduced in Congress on the issue, but none have reworked the interpretation.

C. TARP and Inaction

1. Legislation: Treasury may purchase “troubled assets” from a “financial institution.”

a) Troubled Assets:

(1) “residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages ... the purchase of which the secretary determines promotes financial market stability”

(2) “any other financial instrument ... the purchase of which is necessary to promote financial stability.”

b) Financial Institution

(1) “any institution including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States.”

2. Legislative History:

a) Frank and Dingell chat on the house floor about car companies' financial subsidiaries' extension of traditional car loans and home equity loans used to purchase

b) The SecTreas claimed at a hearing that the bill didn't give him the legal authority to buy debt from the auto companies.

3. The auto bailout bill passed the House but was filibustered in the Senate; Republicans refused to drop their objections in part because the White House assured them that they would use TARP money if the auto bailout failed.

4. Ultimately, the auto companies were bailed out in two ways: first, by using money to buy their debt, and second by injecting capital into their financial services arms

5. Inferences from Inaction

a) Consideration and rejection of auto bailout is PROBABLY NOT a rejection of using TARP to bailout the automakers.

- (1) Southerners w/ foreign auto interests to protect were told that TARP would be used, which explains their vote against the bailout
- (2) Discussion hadn't been around for long, so TARP for auto bailouts wasn't salient (prominent)

Preemption

XXXI. Preemption Generally

- A. Basic Rule: When state and federal law conflict, a judge must apply federal over state law, assuming that Congress has Article I authority to enact the law in the first place.
- B. Essential Inquiry: The court needs to find whether and to what extent the language, comprehensiveness etc. of a federal law indicates a purpose to preempt some range of state laws.
 - 1. 2 part question
 - a) Does the federal law have the purpose of eliminating some state law?
 - b) Does the state law fit the category of laws intended to be preempted?
- C. Presumption Against Preemption
 - 1. Ambiguous purpose to statute → Congress hasn't made a judgment → DON'T PREEMPT!
 - a) Rice v. Santa Fe Elevator (SCOTUS, 1947): "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the states."
 - 2. Greatest force when Congress regulates remote from interstate commerce
 - 3. Ordinary transactions → unpredictable
- D. History of Preemption
 - 1. Hills Memo pp. 1-7

XXXII. Express Preemption

- A. Definition: Congress prohibits a state law in the terms of the statute.
 - 1. Ex: Employee Retirement and Income Security Act (ERISA)
 - a) "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]"
 - 2. Key Question: is a law "related to" "based on" or otherwise bear statutory connection to an area of policy making?
- B. Two Poles of Express Preemption
 - 1. **Minimalist**: State law is acceptable if it doesn't single out federal topic for distinctive treatment

a) De Buono v. NYSA-ILA (SCOTUS, 1997): No preemption of state hospital tax because imposing that cost on the hospital did not “relate to” the hospital’s ERISA retirement plan.

(a) Discrimination Based Test: if the state law does not single out a federally protected interest for especially disadvantageous treatment, it isn’t “related to”

2. **Maximalist**: general state laws can invade federally protected area IF significant disruption to some federal interest.

a) Egelhoff v. Egelhoff (SCOTUS, 2001): State law immediately revoking a spouse’s life insurance benefits after a divorce was preempted by ERISA, which had no such ban. The state law could not be enforced because it “implicates an area of core ERISA concern.”

(1) Additional arg: ERISA’s goal is uniform administrative scheme, but the plans can’t be subject to different legal obligations in different states.

3. How to Distinguish?

a) Tough Call – no legally predictable standards

b) Morales v. Trans World Airlines (SCOTUS, 1992): Texas consumer protection statute is preempted from enforcement against TWA for deceptive fare advertising because it “related to rates,” under the Airline Deregulation Act of 1978.

(1) Lying about advertising is “related to” rates.

c) Rowe v. NH Motor Transport Ass’n (SCOTUS, 2008): FAA preemption clause preempted a Maine health law imposing requirements on shipping cigarettes because the federal statute contained a clause prohibiting the state from writing a law “related to a price, route, or service of any motor carrier.”

(1) “the state law is not general, it does not affect truckers solely in their capacity as members of the general public, the impact is significant and the connection with trucking is not tenuous ... the state statutes aim directly at the carriage of goods.”

XXXIII. Implied Preemption

A. Basic rule: federal statute does not have a preemption clause, but conflicts with the state statute in one of three ways.

B. Impossibility (Conflict) Preemption: if it is impossible to comply with both the state and federal law simultaneously

1. Ex: Feds require min. speed of 65, state has max speed of 55.

C. Frustration of Purpose (Conflict) Preemption: Enforcing the state law would frustrate the purpose of a federal law, **even if the party could comply with both laws.**

1. Ex: FDCA is to encourage safe drugs, but state juries deem an FDCA approved drug unsafe and award damages.

2. Steps

- a) Attribute a purpose to the legislation (USING CONSTRUCTION)
 - b) Enforce preemption if it conflicts with the state law
- 3. Critical Issue: determine the purpose of the federal law!!!
 - a) Does it impose a floor or a floor and a ceiling?
 - b) Do state laws address topics of issues that the federal statute makes exclusively federal?
- D. Field Preemption: the Court presumes that a federal interest is so dominant, that there is no way a state could possibly regulate in the area.
 - 1. Cite: *Rice v. Santa Fe Elevator* (SCOTUS, 1947)
 - 2. How tell if federal interest is dominant?
 - a) Judicial assessment of special need for uniform national regulation
 - (1) Ex: immigration, foreign policy, international and interstate shipping, disputes risking diplomatic conflict
 - b) Existence of detailed federal regulatory system that seems to preclude additional regulation
 - 3. How Invoke?
 - a) Define the field
 - (1) Similar to ‘purpose’ under frustration of purpose
 - (2)
 - 4. *City of Burbank v. Lockheed* (SCOTUS, 1973): FAA flight pattern regulations preempt local noise regulations.
 - 5. *Miezin v. Midwest Express Air* (WI App., 2005): state law requiring flight attendant announcements is preempted by Federal law requiring warnings.
 - 6. *Wardair Canada v. Florida Dept. of Revenue* (SCOTUS, 1986): FAA does not preempt state taxation of aviation fuel, because it’s a taxation case not an aviation case.

XXXIV. *Riegel v. Medtronic* (SCOTUS, 2008, Scalia):

- A. Hold: State tort law is preempted by the Medical Device Amendments “different from, or in addition to any requirement” of the act if it “relates to the safety or effectiveness of the device.” New York State tort law claims were preempted by the act because they were “requirements”.
- B. Scalia’s Majority
 - 1. Tort law imposes a requirement, because one purpose of tort law is to change behavior
 - 2. Key Test: Is the purpose of the law trying to change that which federal law wanted to leave unchanged?
 - 3. Purpose of provision was to strike down California’s premarket review, but Scalia doesn’t care and focuses on the text
 - 4. Clarity of text → NO ambiguity → ignore common knowledge, legislative history, presumption against preemption
- C. Stevens’ Concurrence

1. Text is clear → even though it's at odds with the statutory purpose, we've gotta enforce the law.

a) *Oncale v. Sundowner Offshore Services* (SCOTUS, 1998)

D. Ginsberg's dissent

1. Congress didn't intend this!
2. Presumption against preemption!
3. Court allows for damages based on violation of FDA statute, but what if the statute sucks?

XXXV. *Altria Group v. Good* (SCOTUS, 2008):

A. Hold: State deceptive trade laws are not preempted by a Federal cigarette advertising law because "neither [of the statute's purposes] would be served by limiting the States' authority to prohibit deceptive statements in cigarette advertising."

1. Fraud law suit does NOT impose a "requirement or prohibition based on smoking and health ... imposed under state law with respect to the advertising or promotion of ... cigarettes"

B. Stevens

1. Law isn't based on smoking/health, it's based on fraud
2. "relating to" (*Riegel* language) is broader than "based on"
3. Altria plaintiffs weren't attacking the core function of the statute (medical info on packages)
4. Purpose based test: if the purpose of the lawsuit is to strike at the federal law's purpose, it's struck down.

C. Thomas (dissent)

1. Effects based test: since this ruling would have the effect of forcing the cigarette company to alter its advertising and the federal law was aimed at the same, it should be preempted.
 - a) Hills: Incidental effects are NEVER enough to justify preemption, so some effects based tests will fail

XXXVI. *Wyeth v. Levine* (SCOTUS, 2009, Stevens)

A. Hold: The Food Drug and Cosmetic Act (FDCA) did not preempt a state tort lawsuit that declared an FDA-approved drug label unsafe. Congress modified the medical devices part of the act to add an express preemption clause, but did not do so for drug labeling, so it can be said to endorse continuing state lawsuits in the area.

B. Stevens Majority

1. Impossibility preemption argument (that Wyeth couldn't alter the label) relies on a flawed reading of the statute
2. B/c Congress' "purpose is the ultimate touchstone in any preemption case" we need to look to their purpose
3. FDA tried to show conflict of purposes, but it was in the preamble to a regulation and reversed a long-held view

- a) Agencies can't slip controversial text in without going through notice and comment (cites *Mead*)

C. Alito dissent

- 1. FDA very specifically considered the IV push and decided it was safe

Agencies Generally

XXXVII. Types of Regulation and Justifications

A. Market Failures

1. Monopoly power

- a) Basic Policy: Prevent exercise of economic power by a natural monopolist who can raise profits by raising prices or cutting output.

b) Goals

- (1) allocative efficiency,
- (2) avoid waste of capital by paying monopolistic prices

2. Imperfect Information

- a) Prevent consumers being misled when legal remedies are expensive or impractical
- b) Explain complex information
- c) Market fails to furnish needed information

3. Collective Action problems

- a) Individually rational behavior → public harm

4. Reduce "Externalities"

- a) Bargaining costs are high; they need reduction

B. Less Secure Economic Rationales

1. Control windfall profits from sudden commodity price increases

- a) b/c they don't reflect skill

2. Eliminate Excessive Competition

- a) Industries with large fixed costs and cyclical demand (e.g. agriculture)
- b) Prevent for predatory pricing
 - (1) Large company lowers prices to drive competitors out of business, then raises them again

3. Alleviate Scarcity

C. Regulatory Tools

- 1. Cost-of service ratemaking: set utility rates according to the cost of service, allowing for some profit
- 2. Standard-setting
- 3. Allocation: historically based price setting
- 4. Screening/Licensing
- 5. Fees/Taxes

6. Provision of Information
7. Subsidies
8. Standard setting through moral suasion

XXXVIII. History of Agencies

A. Pp. 13-29 of the book

Political Supervision of Agencies By Congress

XXXIX. Non-Delegation Doctrine

A. Basic Policy: There are limitations to Congress' power to delegate authorities to agencies.

1. General Notes

- a) Rarely used
- b) Might be used as avoidance, e.g. construing statutory delegations to avoid running afoul of the doctrine
- c) Source of the nondelegation doctrine: Art. I §1
 - (1) "all legislative powers shall be vested in a Congress" → add an ONLY before congress
- d) Dueling purposes: [See *Benzene*]
 - (1) Rehnquist: Congress should make difficult policy choices
 - (2) Stevens: courts need measuring stick to constrain bureaucratic state

2. Benzene Canon: Where fairly possible, statutes will be construed to avoid serious nondelegation questions.

- a) Subspecies of avoidance

3. State of the Doctrine

- a) Unlimited jurisdiction + unlimited time + unlimited discretion (no 'intelligible principle') → **strike down** for nondelegation [*Schechter*]
- b) Violation of one w/o violation of others → **OK** [*American Trucking*]
- c) Construe to avoid these problems [*Benzene*]
- d) **Hole**: violation of two above principles, but not third?

B. Three possible meanings for 'delegation' (non-exhaustive)

1. Congress cannot transfer its legislative powers to any other institution
 - a) Noncontroversial
 - b) Consistent w/ #'s 2 and 3
2. Statute → impermissible delegation IF:
 - a) Scope is too broad
 - b) Executive has too much discretion
 - (1) THIS is typical view
3. Congress may delegate what it pleases through statute; grantee is exercising executive (not legislative) power if within the bounds of the statute
 - a) Essentially kills non-delegation doctrine

C. Early Views of Non-Delegation Doctrine

1. The Brig Aurora (SCOTUS, 1813, Marshall): Permissible for statute to condition tariff rates on a finding by the president.
2. Wayman v. Southard (SCOTUS, 1825, Marshall): Congress can delegate “powers the legislature may rightfully exercise itself” but NOT “powers which are strictly and exclusively legislative.”
3. State ex rel. RR Comm’n v. Chicago RR (MN S. Ct, 1888): State railroad commission is permissible delegation under the MN Constitution b/c it confers “an authority to discretion to be exercised under and in pursuance of the law” NOT “power to make the law.”
4. Field v. Clark (SCOTUS, 1892): Per *Aurora*, a tariff conditioned on executive finding is permissible, BUT a statutory grant of authority that gives the president excessive delegation is forbidden.
5. US v. Grimaud (SCOTUS, 1911): Delegation to Ag Sec to issue regulations protecting forests was permissible delegation b/c it gave the secretary the “power to fill up the details.”
6. JW Hampton v. United States (SCOTUS, 1928): Statute giving president power to change tariff duties whenever necessary to equalize costs of production in the US and the target country was permissible.

D. The Doctrine Lives -- Only Twice!!!

1. Panama Refining Co. v. Ryan (SCOTUS, 1935): National Industrial Recovery Act §9(c) was unconstitutional because it did not provide a standard governing when the President could prohibit shipping of items in interstate commerce.
2. Schechter Poultry v. United States (SCOTUS, 1935): §3 of the NIRA is unconstitutional because, without standards other than general legislative aims, it imposes no limits on how the president may make the law using codes of competition. **THUS, unconstitutional delegation**
 - a) Cardozo (concurrence)
 - (1) Negative functions (preventing unfair competition) → OK
 - (2) Positive functions (doing something to help the industry enacted by president and trade orgs) → “delegation running riot” → **NOT OK**
 - b) Reasoning and Holes?
 - (1) Policy basis:
 - (a) unlimited discretion to president
 - (b) private industry, not government officials made up codes
 - (2) Three limits failed
 - (a) Institution receiving delegation must be confined
 - (b) Jurisdiction must be confined
 - (c) Discretion must be confined
 - (3) Holes:
 - (a) No mention of whether limits are necessary or sufficient conditions for failures.

E. Modern Uses of the Non-Delegation Doctrine

1. *Amalgamated Meat Cutters v. Connally* (DDC, 1971): The Economic Stabilization Act (wage/price controls) was construed to read in requirements of fairness and avoidance of inequity, to **AVOID** an unconstitutional delegation.
 - a) Intelligible principle for reg → limits discretion
 - b) Time limited → limits jurisdiction
 - c) Institution is government board → limited institution
2. *AFL-CIO v. American Petroleum Institute – Benzene Case* (SCOTUS, 1980, Stevens): The Labor Secretary must make a threshold determination that a toxic substance poses a significant health risk before issuing a rule to regulate it under the Occupational Health and Safety Act.
 - a) Stevens (majority)
 - (1) No clear mandate in the legislation for sweeping delegation of power → statute might be unconstitutional under *Schechter* if read the way the govt wanted.
 - (2) Again, **Nondelegation as avoidance.**
 - b) Powell (concur):
 - (1) Facts of the case showed that the current standard was fine b/c evidence failed to show “substantial” finding of risk
 - (2) The statute requires the agency to take economic costs into account b/c it used the phrases “reasonably necessary” and “feasible”
 - c) Rehnquist (concur):
 - (1) Congress improperly delegated.
 - (2) It should regulate and take the heat
 - d) Marshall (dissent):
 - (1) Nothing in the text or legislative history indicate the majority’s interpretation of “reasonably necessary or appropriate” is correct
 - (2) Court can’t substitute its own views for the Secretary’s
3. *Whitman v. American Trucking* (SCOTUS, 2001, Scalia): Statute requiring an “adequate” margin of safety based on the statute’s criteria was within the nondelegation limits.
 - a) Thomas (concurrence): If parties addressed the text of the constitution, Thomas would be willing to revisit nondelegation on originalist grounds.
 - b) Stevens (concurrence): we’re basically using the “intelligible principle” standard and allowing agencies to exercise legislative power. Let’s say so.
 - c) **End of Nondelegation as Avoidance?**
 - (1) Repudiates *Amalgamated Meat Cutters* → unconstitutional delegation cannot be “saved” by narrow constructions
 - (2) “We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute...”
 - d) Hills: unlimited discretion but a narrow jurisdiction is not a violation of nondelegation.

XL. Legislative Veto

- A. Basic Rule: No legislative vetoes are allowed.
- B. Definition: a provision in a statute that allows provisions to take effect only if Congress doesn't nullify them in X period of time
 - 1. Three elements
 - a) Statutory delegation of power
 - b) Exercise of that power
 - c) Reserved power for Congress to nullify
- C. INS v. Chadha (SCOTUS, 1983, Burger): Legislative vetoes by one house violate bicameralism (Constitution Art. I §§ 1, 7) and requirement that executive be presented w/ bills to sign.
 - 1. White (dissent):
 - a) Court should have decided on the basis of separation of powers
 - b) "If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand article I as forbidding Congress from also reserving a check on legislative power for itself."
- D. Congressional Review Mechanism (5 USC 801): Requires regulations be not vetoed by joint resolution of Congress.

XLI. Congress' Removal of Executive Officers

- A. Basic Rule:
 - 1. Congress can't remove executive officers
 - 2. Someone who Congress CAN remove CANNOT exercise executive powers.
- B. Bowsher v. Synar (SCOTUS, 1986, Burger): Congress may not reserve the power to remove an officer charged with executing the laws (save by impeachment). Therefore, the Comptroller General may not be entrusted with executive powers b/c Congress has authority to remove him.
 - 1. Policy justifications
 - a) Congress cannot control an agency that has the typical powers of an executive branch agency like adjudicating disputes or issuing rules.
 - b) Based on *Chadha's* bicameralism and presentment.
- C. President CAN fire, though

Political Supervision of Agencies by the President

XLII. Presidential Removal of Executive Officers

- A. Basic Rule: President has plenary power to remove all officers and inferior officers
 - 1. Principles from Cases:
 - a) Under no circumstances may Congress give itself a role in the removal of an officer or inferior officer [*Bowsher*]

b) President might be able to limit the removal power if it provides a good justification

(1) Adjudicatory function

B. Myers v. United States (SCOTUS, 1926): Statute limiting president's power to fire non-inferior officers (postmaster in this case) is unconstitutional.

1. Inferior officers → those defined by president

2. Non-inferior officers → those defined by Congress

3. Potential limit: "duties so peculiarly and specifically committed to the discretion" of the officer that firing would revise the statutory duty (e.g. quasi-judicial)

C. Humphrey's Executor v. US (SCOTUS, 1935): Whether the President can remove an officer over Congress' objection "will depend on the character of the office"

1. Myers distinguished

a) Myers could be fired b/c he was an executive officer performing executive functions

b) FTC was created by Congress

D. Weiner v. US (SCOTUS, 1958): President may not remove member of adjudicatory body b/c he wants his own appointees on the commission.

1. Underlying policy: look to nature of function Congress invested

a) Independent agencies:

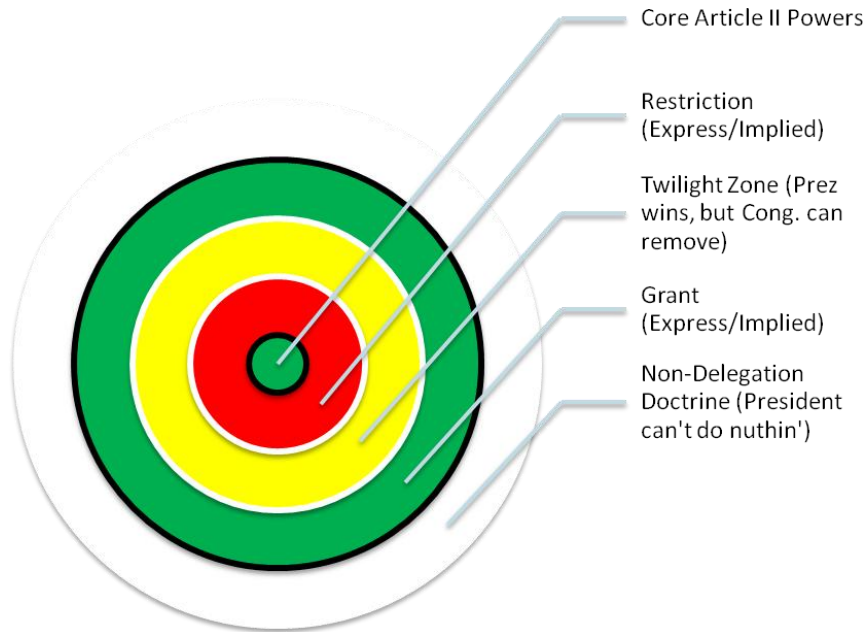
(1) Quasi-judicial

(2) Quasi-legislative

(3) Other prohibitions in authorizing statute

XLIII. President's Power Over Implementation (*Youngstown* and the Donut O' Power)

A. The Donut O' Power



B. When Can a President Initiate Policy?

1. **Basic Rule:** In between the core Article II powers and the non-delegation doctrine, Congress decides how much power the President may possess.
2. ***Youngstown Sheet and Tube v. Sawyer* (SCOTUS, 1952):**
 - a) **Hold:** President did not have power to seize steel mills because several statutes had considered the intersection of labor disputes and national security, but none conferred the power.
 - b) Black/Douglas: no statute → unlawful
 - c) Clark/Burton: Article II powers might be enough in an emergency IF Congress hadn't thought of the issue and legislated on it.
 - d) Jackson (Influential)
 - (1) Acting pursuant to express authority → strongest
 - (2) Action contradicting authority → weakest
 - (a) As in this case
 - (3) Neither → zone of twilight → "enable, if not invite" cong. Legislation
 - (a) Sometimes referred to as default Article II powers
 - e) Frankfurter: Art. II oath to uphold constitution → emergency situations where Prez could create new legal obligations in the public interest even absent express or implied authority.

f) Vinson (dissent): No express cong prohibition + reasonable step to secure general objectives + history of similar actions → emergency seizures were within Article II powers

3. Earlier Domestic Emergency Cases – All Twilight Zone Cases

a) In Re Neagle (SCOTUS, 1890): President's duty to ensure faithful execution of the laws → inherent executive power to protect SCOTUS judge from killer w/ US Marshal.

b) In Re Debs (SCOTUS, 1895): Executive (Prez through AG) had the power to enjoin Debs from communicating with striking Pullman workers because the strike threatened interstate commerce, even though Congress didn't authorize the action.

c) United States v. Midwest Oil Co. (SCOTUS, 1915): President had power to withdraw lands from Federal oil exploration despite express statute to the contrary for two reasons:

(1) Time of international tension and oil reserves needed protecting

(2) Congress hadn't yet had time to reconsider the policy

4. Other Domestic Powers Cases

a) Dames & Moore v. Regan (SCOTUS, 1981): President had power to settle international claims by executive order b/c he had always done so as a means of furthering US foreign relations.

5. President Acting Pursuant to Statutory Authority

a) 3 USC §301: Any authority delegated to the president can be sub-delegated to an executive official subject to Senate confirmation.

b) Marbury v. Madison (SCOTUS, 1803): Writ of *mandamus* was allowed to sue out an appointment from the executive branch pursuant to a statutory requirement.

c) Kendall v. United States (SCOTUS, 1838): The president may not forbid the execution of certain laws under the guise of executing them.

C. Presidential Use of Executive Orders

1. Basic Definition: directions to the whole or a part of the bureaucracy concerning the organization and conduct of their business

a) Can nevertheless have effects on private parties

b) Can be used in situations where legislation would be appropriate

2. EO 10,006: sets out procedures for executive orders

3. **4 Questions to ask of Any EO:**

a) Is it authorized by either a statute or the Constitution?

(1) 2 ways to look at whether EO is within statute

(a) Effects-based: does the EO create the effect the statute was trying to create?

(i) BUT: requires empirical evaluation, which courts don't like

(b) Purpose-based: does it have the purpose statute wanted?

- (2) Statutory delegation can be express OR implied
- b) Does the non-delegation doctrine prohibit it?
- c) Is it prohibited by some other statute?
 - (1) Express
 - (2) Implied
- d) Is a statutory prohibition prohibited by article II?

D. Executive Orders and the Issuance of Regulations

1. Executive Order 12,291 (Reagan):

- a) Requirements before promulgating a new regulation
 - (1) Based on adequate information
 - (2) Potential benefits must outweigh potential costs
 - (3) Maximize net benefits
 - (4) Choose the alternative with the least net cost
- b) Decisionmaking for Rules Costing More Than \$100 million
 - (1) Regulatory impact analysis
 - (a) Description of benefits
 - (b) Description of potential costs
 - (c) Determination of net benefits
 - (d) Description of rejected alternative approaches
- c) Judicial Review
 - (1) Just intended for internal management
 - (2) Not creating a law!!!

2. Executive Order 12,498 (Reagan):

- a) Agency heads must submit a regulatory plan for the year
- b) OMB director must review the plans to ensure consistency with the Administration's goals
- c) OMB director may return for reconsideration a rule that is "materially different" from those described in the administration's regulatory program

E. Executive Orders and the Courts

- 1. Executive orders don't confer private right of action.
 - a) *Manhattan-Bronx Postal Union v. Gronouski* (SCTUS, 1966)
- 2. President lacks inherent power to create judicially enforceable government obligations without congressional authorization
 - a) *In re Surface Mining Regulation Legislation* (DC Circ., 1980)
- 3. *Chamber of Commerce v. Reich* (DC Cir. 1996):
 - a) Hold: President's EO (under the procurement act) claiming that the federal government won't do business with any contractor replacing lawfully striking workers was inconsistent with the National Labor Relations Act.
 - (1) Two Canons → NLRA is binding law:
 - (a) Implied repeal: procurement act came after NLRA, but didn't expressly repeal it.

- (b) Specific over general: the NLRA is about labor law, but the procurement act is about all government procurement
- (2) Two types of NLRA preemption, floor and ceiling → thunder dome of competition
 - (a) *Garmon* pre-emption (floor): no state/local regulations that where NLRA says it's an unfair labor practice.
 - (b) *Machinists* pre-emption (ceiling): no regulation where Congress left unregulated
- b) President's EO is effectively regulation → barred under *Machinists* preemption
- c) Holes in the Opinion
 - (1) Odd policy: treats president like a state.
 - (a) Makes sense to prevent states from mucking around in federal land to preserve uniformity, but the president's actions are federal and will ensure uniformity
 - (2) Definition in order meant it might apply to the whole contracting organization, not just the feds → alternative reason for holding
 - (a) But this is DICTA

4. *AFL-CIO v. Allbaugh* (DC Cir. 2002):

- a) Hold: EO neither preventing nor requiring contractors from entering into a Project Labor Agreement is within Article II powers and not preempted by the NLRA.
 - (1) EO constitutes proprietary action, not regulation, and therefore doesn't fall within either *Garmon* or *Machinists* preemption (see above.)
 - (2) Distinguishes *Chamber of Commerce* b/c of the dicta at the end
- b) Saved by the fact that the EO acknowledges it's void if there is some other clause/statute
 - (1) Knows that it's soft core (twilight zone/implied statutory grant) powers

Administrative Procedure Act

XLIV. Adjudication and Rulemaking

A. Two Threshold Questions:

- 1. Is the Agency action Rulemaking or Adjudication?
 - a) Rulemaking: "agency process for formulating, amending or repealing an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy"
 - (1) See §551(4) for detailed list

b) Adjudication: “agency process for formulating a final disposition” of something other than rulemaking, including licensing.

(1) Form Can be:

(a) Affirmative

(b) Injunctive

(c) declaratory in form of an agency matter

c) Licensing → adjudication

(1) Definition: agency process to give/take away/otherwise modify a permit or other form of permission.

(2) See p. 946 for lists.

2. Does the Statute Require a “Record” after a “Hearing”?

	Hearing/Record Required	No Hearing/Record
Rulemaking	Formal Rulemaking 553 (a,b, d, e) 556 557	Notice and Comment Rulemaking 553
Adjudication	Formal Adjudication 554 556 557	Informal Adjudication (No APA)

B. Formal Adjudication

1. Trigger language: “on the record” after a “hearing”

a) Courts often interpret statute as providing for formal adjudication if:

(1) Imposing a sanction/liability

(2) Constitutional understanding of need for hearing

2. Cases

a) Seacost Anti-Pollution League v. Costle (1st Cir., 1978): The Clean Water Act’s requirement of “public hearing” but not “on the record” must lead to APA formal adjudication procedures applied when a power plant applied for initial licensing.

b) Wong Yang Sung v. McGrath (SCOTUS, 1950): Due process required an adjudicatory hearing in the case of deportation.

c) Chemical Waste Management v. EPA (DC Cir. 1989): Formal hearing not needed on EPA orders requiring specific parties to cleanup hazardous waste. EPA regulations interpreting a statute were given deference.

d) Penobscot Air Services v. FAA (1st Cir. 1999): Chevron deference was accorded to the FAA’s regulations interpreting provisions of its act that denied a wronged agency the right to a hearing for an airports alleged violation by helping a competitor.

- e) Citizens Awareness Network v. US (1st Cir. 2004): Chevron + statute → deference to reasonable interpretation of an ambiguous statute in re hearing procedures.
- f) Armstrong v. Commodity Futures Trading Cmm'n (3rd Cir. 1993): Affirming the ALJ, only saying the ruling is “substantially correct” violated the “statement of findings” requirement under the APA.

C. Formal Rulemaking

- 1. Generally required in rate-setting
- 2. No due process hearing inferences required, unlike adjudication [*Florida East Coast*]
- 3. Florida East Coast R'way v. US (SCOTUS, 1973): “After hearing” requirement for regulations in statute was not a requirement that the agency allow oral arguments in its rulemaking proceedings and that the hearing requirement had been met.
 - a) The Court distinguished between administrative rulemaking and administrative adjudications.
 - b) No effort to single out a particular railroad → agency made legislative type judgment as opposed to an adjudication.

D. Informal Rulemaking (Notice and Comment)

- 1. Intended to be similar to legislative hearings
 - a) Substantial evidence review in APA §706(2)(e) does not apply [*CA Citizens Band Assn v. US*]

E. Informal Adjudication

- 1. No procedures
- 2. Be ready to police this under the arbitrary and capricious standard
- 3. *Overton Park!!!!*

XLV. Administrative Procedures Act

A. Important Definitions under the APA

- 1. Agency: authority of the Govt of the US, whether subject to review
 - a) EXCEPTIONS!!
 - (1) Congress
 - (2) Courts
 - (3) Territorial govts (e.g. Puerto Rico)
 - (4) DC
 - (5) Entities, otherwise agencies, party to the dispute
 - (6) Courts martial/military
- 2. Sanction: nasty thing. No surprises (p. 946)
- 3. Relief:
 - a) Grant of money, assistance, license, authority, exemption privilege or remedy
 - b) Recognition thereof
 - c) Taking an action on the application of someone who would benefit from it

B. Rulemaking under the APA (5 USC §553)

- 1. Notice (b)

- a) Published in the Fed Reg OR personal service
 - b) Include:
 - (1) Time/place/nature of rulemaking proceedings
 - (2) Legal authority for rule
 - (3) Terms/substance of rule/issue
 - c) Exception to notice requirements
 - (1) Interpretive rules/general statements of policy/internal rules
 - (2) Good cause finding of
 - (a) Unnecessary
 - (b) Impractical
 - (c) Not in public interest
2. Comment (c)
- a) Definition: opportunity to participate through submission of written data, views or (arguments “with or without oral presentation”)
 - (1) Note: oral bit applies only to arguments per comma rule
 - b) When adopting rule, agency shall put statement of basis and purpose in record
 - c) EXCEPTION: Does not apply for formal rulemaking
3. Publication (d): 30 days before effective date UNLESS
- a) Exemption-granting
 - b) Interpretive rule/policy statement
 - c) Provided by the agency for good cause; published with rule
4. Interested persons (e) can petition for issuance/amendment/repeal of a rule

C. Adjudication Under the APA (§554)

- 1. Notice for involved parties (b)
 - a) Time/place/nature
 - b) Legal authority/jurisdiction
 - c) Facts and law
- 2. Interested Parties Rights (c):
 - a) Submission and consideration of facts/arguments IF time and circumstances permit
 - b) Hearing in accordance with formality provisiosn
- 3. Presiding Officer (d):
 - a) Decision maker shall be the person who received the evidence UNLESS no longer available
 - b) Officer MAY NOT
 - (1) Consult a person or party on a fact absent notice/opportunity to participate
 - (2) Be professionally subordinate to an investigator or prosecutor
 - c) Investigator MAY NOT
 - (1) Recommend or advise in the decision/review UNLESS

- (a) Initial license application
- (b) Validity of rates or other public utility stuff
- (c) Don't get c
- d) Agency "in its sound discretion" may issue a declaratory order to terminate a controversy (§ e)

D. Formality Under the APA (§§ 556, 557):

1. Taking of Evidence (556 b):
 - a) Conducted by agency, members of body who compose, OR an ALJ
 - b) Gives way to other statutes, if they're on point
 - c) Must be "conducted in an impartial manner"
 - d) Two ways to be disqualified
 - (1) Self-inflicted (at any time)
 - (2) Filing in good faith affidavit of "personal bias or other disqualification" → agency shall determine the matters
 - (a) Becomes part of the record → universal camera review!
2. Presiders' powers → judgelike (556 c)
 - a) Powers MUST be:
 - (1) Subject to published rules of agency
 - (2) within its powers
 - b) Powers
 - (1) Administer oaths; subpoenas rule on proof, receive evidence; take depositions; regulate a hearing; hold conferences w/ parties; encourage alternative dispute resolution; require attendance of a representative w/ bargaining authority; dispose of procedural requests AND "take other action authorized by agency rules consistent with this subchapter"
 - (a) Apply *ejusdem* to this list?
3. Evidence/Burden of Proof (556 d)
 - a) Burden of proof → proponent of rule/order
 - b) Excluding evidence: Agency shall develop policy to exclude IF irrelevant, immaterial or unduly repetitious
 - c) Imposing sanction → look at whole record
 - d) Party's rights
 - (1) Present case/defense by oral or documentary evidence
 - (2) Submit rebuttal evidence
 - (3) Conduct cross examination required for "full and true disclosure of facts"
 - e) Rulemaking OR licensing → written-only form is acceptable IF no prejudice
 - (1) Note: not "unduly" prejudiced; must be NO prejudice.
4. Final Record/Facts Not in Record (556 e)

- a) Testimony transcript + exhibits + papers + requests = “exclusive record for decision”
 - b) Must be public
 - c) Decision rests on material fact not in record → party MUST be given timely opportunity to show it’s wrong
5. Initial Decision (557 b)
- a) Presiding employee → initially decides UNLESS rule requires entire record to be certified to agency
 - (1) This decision is then attributed to agency UNLESS timely:
 - (a) Appeal
 - (b) Review on motion
 - (2) During this appeal: ALL powers are the same as in initial decision EXCEPT agency may limit the issues on notice/by rule
 - b) Agency must decide BUT didn’t preside
 - (1) Presiding/qualified employee → recommend decision
 - (a) Exception: initial licenses
 - (i) Agency may issue tentative decision OR
 - (ii) Omitted altogether IF timely execution of function “imperatively and unavoidably” so requires
6. Parties’ Rights Before Initial Decision (557 c)
- a) Reasonable opportunity to submit:
 - (1) Proposed findings/conclusions
 - (2) Exceptions to decisions
 - (3) Supporting reasons for 1 or 2
7. Decisions shall include (557 c)
- a) Findings + conclusions + basis for findings/conclusions for all material issues of fact/law/discretion
 - b) The content of the decision (rule/order/sanction/relief OR denial thereof)
8. Ex Parte Communication (557 d)
- a) Definition: A communication between counsel and the court when opposing counsel is not present.
 - b) Knowing violation + to extent consistent w/ (justice, underlying statute’s policy) → sufficient grounds for adverse decision to baddie party
 - c) NO Ex Parte Communications
 - (1) interested person + outside the agency → NO ex parte communication
 - (2) member of body comprising agency + reasonably be expected to be involved → no ex parte communication
 - d) Consequences of Making an Ex Parte Communication
 - (1) Party MUST place on the public record:
 - (a) All written communications
 - (b) Memoranda detailing oral communications

- (c) all responses (written, or memos of oral)
- e) Consequences of receiving an ex parte communication
 - (1) Presider MAY require a showing why claim shouldn't be dismissed or otherwise adversely affected TO THE EXTENT CONSISTENT w/
 - (a) Interests of justice
 - (b) Policy of underlying statutes
- f) Can't use this provision to withhold information from Congress

E. Scope of Judicial Review (§706)

- 1. Law, statutory interp., meaning/applicability of terms → Reviewing court
- 2. Powers of Reviewing Court
 - a) Compel agency action IF unlawfully withheld/unreasonably delayed
 - b) Hold unlawful acts that are:
 - (1) Arbitrary and capricious et al.

Judicial Review of Agency Fact Finding

XLVI. The “Not Insubstantial Evidence” Rule

- A. Basic Policy: If the agency has some not insubstantial evidence on its side in formal (556/557) procedures, a factual finding is justified, **even if the other side has more evidence.**
 - 1. Court doesn't weigh the evidence
 - 2. Whole record must be considered
 - a) If a reasonable person could come to that conclusion after looking at the whole record,
 - 3. Usually remedied through vacate and remand
- B. ALJ → deference from agency on credibility NOT inferences therefrom [*Universal Camera*]
- C. When it applies
 - 1. Formal agency actions under 556/557
 - 2. Informal adjudications + action under statute w/ judicial review applying “substantial evidence”
 - 3. Technical expertise of agency → extra-super-specially deferential
- D. NLRB v. Universal Camera (SCOTUS, 1951): Courts must consider the whole record when applying the “not insubstantial” evidence rule, so the NLRB's dismissal of their own examiner's evidence to make a factual inference was impermissible (i.e. based on insubstantial evidence).
- E. Minor Cases
 - 1. APA §556(d) → preponderance of the evidence standard for agency hearings, unless statute says differently [*Steadman v. SEC*]
 - 2. APA → proponent of a rule or order has burden of both Production and Persuasion [*OWCP v. Greenwich Collieries*]

Judicial Review of Agency Discretion (Arbitrary and Capricious Review)

XLVII. Hard Look Doctrine and Arbitrary/Capricious Review

A. Basic Policy: Courts must ensure that agencies have taken a hard look at the problem and made a reasoned exercise of discretion.

1. Procedural Hard Look: have agencies considered alternatives, responded to counterarguments, etc.
 - a) More common
 - b) Typically remedied by remand
2. Substantive Hard Look: did they get it right?
 - a) Perhaps more likely when an agency is focused on one area of the law with the potential to ignore countervailing concerns [*Overton Park*]
 - (1) Ex: highway administration making decision with environmental consequences

B. Overton Park v. Volpe (SCOTUS, 1971, Marshall): Justifications of an informal rulemaking decision within the transportation secretary's discretionary authority cannot be established by "post-hoc rationalizations." The case was remanded for a whole record review.

1. Litigation affidavits → post-hoc rationalizations

C. Overton Park Framework

1. Scope of authority: construe the statute to find whether it was granted?
 - a) Include *Chevron* deference
2. Relevant factors: did the agency consider the right things?
 - a) Look to the governing statute
 - b) Broad statute → looser requirement for factors [*PBGC v. LTV*]
 - (1) Ex: policies "under this title" → lots of law to think about
 - c) Rationale → inadequate IF unrelated to statute [*National Coalition Against Misuse of Pesticides v. Thomas*]
 - (1) Ex: basing decision on economic interests of trading partners when the statute requires protection of public health
3. Arbitrary and Capricious: did the agency abuse its discretion?
 - a) Acting directly contrary to purpose of statute → irrational and arbitrary [*Community Nutrition Institute v. Bergland*]
 - (1) Allowing junk foods as "nutritious" b/c one nutrient was added
 - b) Retroactive application of a new interpretation of an old reg → arbitrary and capricious [*Microcomputer Technology Institute v. Reilly*]
 - c) Misstatement of conditions as premise for rule → arbitrary [*US Air Tour Assn v. FAA*]

D. Motor Vehicle Manufacturers Assn v. State Farm (SCOTUS, 1983, White):

1. Hold: Rescinding an auto safety regulation (detachable seatbelt OR airbag) without considering a requirement of airbag only scheme was arbitrary and capricious.
 - a) Rehnquist (dissent): Change in political ideology is a perfectly sensible reason to rethink a regulation.
 - b) Background: car companies all chose detachable seatbelts, b/c they're cheaper, but nobody chose to wear them, so the rule was imposing costs but making a negligible difference in safety.
2. Agency changing its mind → State Farm is the dominant decision.
 - a) A regulatory change (even in the absence of changed circumstances/cumulative experience/judicial criticism) CAN survive judicial review IF accompanied by rational explanation. [*Assn of Civilian Techs v. FLRA*]
 - b) Discretion is unfettered at the outset (*Chevron*) but an irrational departure from settled discretion could be arbitrary and capricious. [*INS v. Yang*]
3. "Danger signals" of no engagement in reasoned decision-making → searching review [*Greater Boston Television v. FCC*]
4. Overton/State Farm Combined framework
 - a) Four questions:
 - (1) Did the agency rely on relevant stuff?
 - (2) Did it FAIL to consider relevant stuff?
 - (3) Explanation of reason can't be counter evidence
 - (4) Explanation can't be so silly as to lead us to question expertise
 - b) Burden → changing the status quo
5. What's a relevant factor?
 - a) Look to statute to determine relevant factors
 - b) comments and detailed responses may provide a safe harbor
 - c) this is vague, though

Judicial Review of Agency Legal Interpretations (Auer, Skidmore and Chevron)

XLVIII. Agency Interpreting Its Own Regulations [*Auer* Deference]

A. *Auer v. Robbins* (SCOTUS, 1997, Scalia):

1. Basic Rule: Give agency lots of deference interpreting its own regulations unless plainly erroneous or inconsistent with the regulation.
 - a) Justification: agencies can write regs as broadly as they like as long as its within the statute, so smacking down their interpretations would only lead them to rewrite regs.
 - b) NO level of formality necessary

2. Auer and the APA: if regulation is within statute, you must exhaust APA remedies before a court will conduct an 'arbitrary and capricious' review
 - a) Petition for Rulemaking [§553(e)]
 - b) Be denied, with reasons [§555 (e)]
 - c) Reviewed by courts under A+C standard [§702, 706]
3. Two Exceptions
 - a) Absent prior notice of interpretation to a company, agency interp. gets no deference when imposing a penalty [*General Electric v. EPA*]
 - (1) Justification: company couldn't have known their conduct was illegal
 - b) No deference if rule merely parrots the statute [*Gonzales v. Oregon*]
 - (1) Justification: NOT ALLOWED to circumvent informal notice and comment procedures
4. Additional Possible ways to limit
 - a) Violation of separation of powers norms; writers don't get to interpret
 - b) Limit to clear regulations?
 - (1) Auer Creates incentive for vague regulations → BAD
 - c) Import Skidmore limits (persuasiveness) into doctrine
 - (1) Argue that, like Skidmore, Auer is based on expertise
5. President and Auer Deference
 - a) There is an avoidance-based canon that says, absent specific delegation to an agency office, the president retains power to interpret regulations as well

XLIX. Agency Providing Nonbinding Guidance [*Skidmore* Deference]

A. *Skidmore v. Swift* (SCOTUS, 1944, Jackson):

1. Hold: Agency findings in their area of expertise, while not necessarily controlling, are a proper source to resort to, depending on thoroughness, validity of reasoning, consistency, and "power to persuade."
 - a) Justification:
 - (1) **Expertise**: Agency knows more about the details of this stuff than courts
 - (a) Contrast w/ Chevron: expertise, not delegation
 - (i) *Skidmore*: expert on driving says you were speeding
 - (ii) *Chevron*: I'm the cop with the badge (authority), you were speeding
 - (2) **Facts Not Law**: Very narrow legal issues look like factual issues\
 - (3) **Consistency**: don't want different courts coming out different ways on identical issues
 - b) Circumstances: deciding whether employees waiting in a firehouse where there only requirement was to answer alarms constituted "work time" under a labor statute.
2. Ways to Limit
 - a) Try and argue that issue is too broad to apply Skidmore

- b) Note limitation to power to persuade, and claim the agency interp. is unpersuasive

L. Chevron Deference

A. Basic Policy: Construe ambiguity in the statute as an implied delegation of authority to the agency, and give its interpretation deference.

1. Step Zero: Which agency did Congress intend to interpret the statute?
2. Step One: Is there an ambiguity in the statute?
3. Step Two: Is the agency interpretation “permissible” or “reasonable”
 - a) Essentially, “arbitrary and capricious” review [*State Farm*]

B. Key Issues

1. How ambiguous must a statute be to trigger use of the canon?
2. Is the court deferring because the statute *specifically* granted discretion or because the statute is *ambiguous* [p. 241]
 - a) Ambiguous → interpretation through regulation is TOUGH TO CHANGE
 - b) Specific → easier to change b/c of Congress’ intent

C. Chevron v. NRDC (SCOTUS, 1984, Stevens):

1. Hold: Ambiguity in text and legislative history → deference to Agency’s reasonable interpretation of the ambiguity
2. Justifications
 - a) Policy battles should be waged with agencies
 - (1) courts are poorly positioned to adjudge these claims
 - (2) decisions should be politically accountable
 - b) Based on delegated authority
 - (1) Contrast w/ Skidmore: delegation, not expertise
 - (a) *Skidmore*: expert on driving says you were speeding
 - (b) *Chevron*: I’m the cop with the badge (authority), you were speeding
3. Paradox: APA §706 says courts are supposed to fill the gaps, but Stevens says these are basically policy battles
4. Stevens vs. Scalia on Chevron’s Rationale
 - a) Stevens: democratically accountable policymaker will fill the gaps
 - b) Scalia: Keep it simple, remove judicial discretion
 - (1) If congress doesn’t like it they can change it
 - c) Third way: shift power within agencies away from council’s office towards those with substantive expertise

D. INS v. Cardoza Fonseca (SCOTUS, 1987, Stevens): INS interpretation that two statutes that “threat to life/freedom” and “well founded fear” were the same standard got no deference. Statutory interpretation is left to the courts, and statute wasn’t ambiguous.

1. Scalia: exhausting all statutory tools would make Chevron a “doctrine of desperation”

- E. Young v. Community Nutrition (SCOTUS, 1986): Requiring HHS secretary to “promulgate regulations limiting [bad stuff] to such extent as he finds necessary for the protection of public health” was ambiguous enough to trigger Chevron.
1. Interpretation: “as he finds necessary” allowed secretary to do what he wanted
 2. Even though secretary declined to regulate aflatoxin, a “concededly deleterious” substance
 3. Stevens: Statute wasn’t ambiguous.
- F. Christensen v. Harris County (SCOTUS, 2000): interpretation letter → *Skidmore* deference
1. Justification: informality?
- G. United States v. Mead (SCOTUS, 2001, Souter):
1. **Hold**: Agency interpretation of a statutory provision gets Chevron deference WHEN:
 - a) **Mead 1**: Congress delegated authority to the agency
 - (1) Barnhart: Totality of the circumstances test for implicit congressional delegation
 - b) **Mead 2**: Agency was acting in the statutorily specified way, with sufficient formality
 - (1) Sufficiently formal factors in informal interpretive rules → Chevron def. [*Barnhart* factors]
 - (a) Size of the gap in the nature of legal question
 - (b) Expertise of agency
 - (c) Importance to administration of the statute
 - (d) Complexity of administration
 - (e) How careful the agency has considered
 - (2) Failure under Mead 2 → *Skidmore*, baby!
 2. Basic Rule: ambiguous delegation clause → sufficiently formal actions have force of law
 - a) What does formal mean? It’s unclear!!!
 - b) Easy Cases: acting under the APA → Chevron deference
 - c) Hard Cases: not acting under the APA
 - (1) Opinion letter in *Christiansen* wasn’t enough
- H. Martin v. OSHRC (SCOTUS, 1991, Marshall): When there is a conflict within an agency over an issue of interpretation, there is a rebuttable presumption that Congress intended to unify interpretive and rulemaking functions within an agency, even if a statute calls for an administrative judiciary.
1. Hold: defer to the secretary of OSHA over the review commission when interpreting the OSH Act.
 2. Legislative history → rebut the presumption.
 3. Justification
 - a) Enough formality at the rule and comment stage, no need for additional checks by having multiple power centers within the agency
- I. Gonzales v. Oregon (SCOTUS, 2006): Where multiple agencies are involved in interpreting a statute, you have to interpret the part of the statute that Congress intended you to interpret

AND you have to do it in a procedurally acceptable way – in this case, applying a five factor test to construe “public interest” set out in the statute.

1. Essentially an application of *Martin*.
2. No force of law in interp rule → no Chevron deference (fails step zero)

LI. Chevron Step One: Is the Statute Ambiguous?

A. *Babbitt v. Sweet Home* (SCOTUS, 1995): you can look beyond clear text to other parts of the statute, definitions and purpose to find ambiguity.

1. Hold: Chevron deference accorded to EPA b/c “harm” in definition of “take” was ambiguous as to whether it covered habitat destruction.

B. *MCI v. ATT* (SCOTUS, 1994, Scalia): Only definition of “modify a tariff” that supported a wholesale removal as “modification” was in a dictionary written after the statute was passed. No ambiguity → no deference.

1. Additional justification: no Chevron deference for such a weighty issue.

C. *FDA v. Brown and Williamson* (SCOTUS, 2000, O’Connor): Cigarettes are “not articles intended to affect the structure or any function of the body”. FDA’s decades long position of no jurisdiction + Congress’ legislation around that inaction → no changing your mind.

1. Breyer et al: Um, dudette, the text is clear.
2. Key issue: of the two elements (long position; congressional legislation) are they individually necessary or sufficient?

LII. Chevron and Stare Decisis

A. *Brand X*: If an agency construes a statute before an agency, the agency interpretation still holds over the old statute.