

Admin ATTACK Outline – Hills – Spring 2009

Tools and the Deference They Receive

- I. Statute
 - A. Traditional tools of interpretation
 - B. NO Chevron, unless there has been some action by an agency to interpret
 - 1. Not reg → probably fail *Mead 2*.
- II. Formal Rule/Notice and Comment Rule
 - A. Chevron
- III. Policy Interpretation
 - A. Auer
 - B. Check to make sure the Reg passes Chevron
- IV. Interpretive Letter or other informality
 - A. Auer
- V. Agency Factfinding
 - A. Universal Camera/State Farm
- VI. Executive Order
 - A. 4 questions

Statutory Interpretation

- VII. Finding Ambiguity
 - A. Clear text → you're done [*Caminetti*]
 - 1. Limitations:
 - a) outside the purpose of a statute [*Guerra* (the pregnancy case)]
 - b) use tools of interpretation to create ambiguity [*Brown and Williamson*]
 - c) Absurdity [*Holy Trinity Church, Bock Laundry*]
 - d) Might create absurd result in hypothetical situation [*Public Citizen*]
 - B. Ambiguous Text → tools of interpretation
 - 1. Limitations:
 - a) careful balancing of textual canons to show no ambiguity [*MCI v. ATT*]
 - b) show how textual canons don't apply, then use plain meaning [*Ali*]
 - 2. Hierarchy of Interpretation
 - a) Textual canons
 - b) Extrinsic aids
 - c) Legislative History

- VIII. Finding Absurdity

A. Absurdity → use tools of interpretation to find sensible meaning, minimizing loss of words

B. Types

1. Textualist Absurdity: “defendant” in rules of evidence makes no sense for civil trial → add ‘criminal’ [*Bock Laundry*, Scalia]
2. Purposivist Absurdity: Importation of alien for labor can’t mean minister b/c we’re a Christian nation → use whole act, legislative history [*Holy Trinity Church*]
3. Out there Absurdity: application in statute might be absurd in some situations [*Public Citizen*]
4. NOT Absurd: literal text doesn’t tie sentence to number of LSD hits [*Marshall*, Easterbrook]

IX. Textual Canons [p. 12]

A. *Ejusdem Generis* (“or any other XYZ”) → use list to give meaning to general term

1. Limit: or + specific category + general category → don’t apply [*Alij*]

B. *Noscitur a Sociis* → determine meaning by surrounding words in a list

1. Limit: word ‘does no work’ if nearly synonymous with its associates [‘harm’ in *Sweet Home*]

C. *Expressio Unius*: saying ‘A’ → meaning ‘A not b, c, d...’

1. EU + departure from background norm: read ‘only’ (“you can stay out until midnight”)
2. EU + confluence w/ background norm: rest of the norm still applies (“don’t kick your sister”)

D. Ordinary language meaning should be used [*Nix*, tomato = vegetable]

1. Limits

- a) Terms of art
- b) Meaning at the time [*al-Kharadji*]

E. Anti Derogation Rule: don’t interpret one word to implicitly minimize another [*Robinson*]

F. Last Antecedent Rule: modifier applies to immediately preceding noun ONLY

1. TX courts, NM courts, and NY courts in the federal system → Fed applies to NY
2. Comma rule: TX courts, NM courts, and NY courts₂ in the federal system → Fed applies to ALL
3. Semicolon → HARD BREAK [*Hayes*]
 - a) TX courts; NM courts, and NY courts, in the federal system → Fed applies to NY and NM

G. Rule Against Surplusage: every word must do some work

X. Extrinsic Aids [p. 19]

A. Whole Act Canon: turn to the rest of the statute

1. Same term elsewhere clarifies [*Sorenson*]
2. Only one meaning works w/ rest of law [*Dedeaux*]
3. Preamble permissible, if it clarifies [*Sutton*, nearsighted pilots + the ADA]

B. *Pari Materia*: read a term in a later statute in light of an earlier one.

C. Canon Against Implied Repeal: ambiguity + no sign of override intent → NO override

D. Specific statutes over General

- E. Inferring thought through inaction
 - 1. Pure silence → tough to infer anything
 - 2. Rejects bill that would accomplish meaning urged → rejected interpretation disfavored [*Blue Chip Stamps*]
 - 3. Congress re-enacts after decision w/o overturning → favor interp [*Pons*]

XI. Substantive Canons [p. 16]

- A. Lenity Rule: Ambiguity after exhausting all tools + ‘something else’ = interpret to favor defendant [*McNally*]
- B. Constitutional Avoidance Canon: avoid constitutional bases for decision
 - 1. Sliding scale btw. Const. seriousness and statutory ambiguity: more serious → less ambiguity needed to trigger
- C. Federalism avoidance canon: don’t burden federalism if you can avoid it [*Gregory*]
 - 1. Presumption against preemption: construe federal and state statutes together if possible

Preemption (p.22)

XII. Express preemption: Statute includes clause laying out those to be preempted

- A. Minimalist: don’t preempt if the statute doesn’t single out the federally protected interest [*De Buono*]
- B. Maximalist: disruption of federal interest → preemption [*Egelhoff*]

XIII. Implied Preemption: NO preemption clause

- A. Impossibility preemption: can’t carry out both laws simultaneously
- B. Frustration of purpose preemption: enforcing the state law would frustrate the purpose of a federal law, even if you can comply with both
 - 1. Attribute a purpose to federal law using statutory construction
 - a) Floor vs ceiling?
 - b) Address exclusively federal issues?
 - 2. Strike down IF conflicts w/ state law
- C. Field Preemption: dominant federal interest → no way a state could regulate [*City of Burbank*]
 - 1. You must define the field (ex: immigration, foreign policy)

Congress’ Supervision of Agencies (p. 27)

XIV. Nondelegation doctrine:

- A. Unconfined institution + unconfined jurisdiction + unconfined discretion → strike down law [Schechter Poultry]
 - B. Mostly used as an avoidance canon [Benzene]
- XV. Legislative veto: Not allowed UNLESS Congress nullifies in Art. I compliant way [Chadha]
- XVI. Congress can't remove executive officers [Bowsher]

President's Supervision of Agencies (p. 30)

- XVII. Presidential firings
- A. President can fire executive officers performing executive functions [Myers]
 - B. President cannot fire member of independent regulatory agency; firing power depends on the character of the office [Humphrey's Executor]

- XVIII. Youngstown Framework
- A. President can act in:
 1. Core Article II powers
 2. Express/implied grant of power
 3. Twilight Zone
 - B. President CANNOT act in:
 1. Express/implied restriction
 2. Non-delegation doctrine areas

- XIX. Executive Orders
- A. 4 questions
 1. Is it authorized by statute/Constitution?
 - a) Effects based: create effects desired by statute?
 - b) Purpose based: does it share statute's purpose?
 2. Is it prohibited by non-delegation?
 3. Is it prohibited by another statute, express or implied?
 4. If a prohibition, does it violate article II powers?

Judicial Review of Factfinding (p. 41)

- XX. Not Insubstantial Evidence Test: if the agency has not insubstantial evidence on its side in formal procedures, a factual finding is justified, even if the other side has more evidence.
- A. Defer to ALJ on issues of credibility, but not inferences drawn from facts [Universal Camera]
 - B. Apply when:
 1. Formal agency action under 556/557
 2. Informal adjudication + statute calls for "substantial evidence"
 3. Technical expertise of agency → super deferential

Arbitrary and Capricious Review (p. 42)

XXI. Hard Look doctrine: courts must ensure agencies took a hard look at the problem

A. Overton/State Farm combined framework

1. Did the agency rely on the relevant stuff?
 - a) Relevant stuff is VAGUE
2. Did it FAIL to consider the relevant stuff?
3. Explanation of reason can't be counter to evidence
4. Explanation can't be so silly as to lead us to question expertise

Deference to Agencies (p. 43)

XXII. Agency interpreting its own regulation → be very deferential [*Auer*]

A. After all, they can just change it

B. EXCEPTIONS:

1. Just parroting the statute [*Gonzales*]
2. Rule imposes a penalty [*General Electric v. EPA*]

XXIII. Informal, Nonbinding Guidance → deferential if persuasive [*Skidmore*]

XXIV. Agency issuing regulation based on statute → Chevron!

A. Step Zero: Is the delegation to the appropriate agency acting with the force of law?

1. Appropriate Agency:

- a) Totality of the circumstances test for Congressional intent [*Mead 1*]
- b) Try to allow agency to act efficiently if delegation happened [*Martin*]
- c) Multiple agencies → you have to construe the part that was meant for you [*Gonzales*]

2. Force of Law:

- a) *Mead 2*/Barnhart/Christensen: sufficient formality ('force of law')
 - (1) Agency expertise
 - (2) Importance to statute
 - (3) Complexity
 - (4) How carefully did they look?

B. Step 1: Is the statute ambiguous on the precise question raised by the interpretation?

1. Use your tools, fool.

- a) But not all of them [*Cardozo Fonseca*]
- b) Probably not legislative history

C. Step 2: Did the Agency get the law right?

1. Perhaps you can bring in legislative history here?

D. Make sure the state didn't act arbitrarily and capriciously under State Farm!