**RELAX!!**

Spring 2012

Reginald Hills – Administrative & Regulatory State – Attack Outline

**STATUTORY INTERPRETATION**

1. Does the text *specifically and plainly* resolve the dispute?
   1. Enforce Plain Text
2. Do we have: Pre-emption? CAIR? Specific > General?
   1. PLAIN STATEMENT RULE
      1. Does purpose or legislative history *plainly say* that we should do this crazy shit?
         1. If yes 🡪 Do it
         2. If no 🡪 Go to 4) Absurdity
3. Do textual canons give us a clean meaning of the statute?

|  |
| --- |
| Define the problem  Look at the statute  Determine agency interpreting  Determine agency enforcing  Determine level of deference |

* 1. If yes 🡪 Go to 4) Absurdity
  2. If no 🡪 Does purpose clear it up?
     1. If yes 🡪 That is your interpretation
     2. If no 🡪 LH?
        1. If yes 🡪 That is your interpretation
        2. If no 🡪 Other substantive canons

1. Do we have an absurdity?
   1. Does purpose clear it up without resort to LH?
      1. If yes 🡪 That is your interpretation
      2. If no 🡪 LH?
         1. If yes 🡪 That is your interpretation
         2. If no 🡪 Other substantive canons?

**AGENCY INTERPRETATION AND DEFERENCE**

1. Is there an agency with **properly delegated interpretive authority**? (Step 0)
   1. Ways to avoid this issue
      1. Which agency? 🡪 Flowchart of fact pattern
      2. Non-delegation problem? 🡪 (*Schecter Poultry*/*Whitman*)
      3. *Benzene*? 🡪 (*MCI/Brown & Williamson*) 🡪 Agency acting beyond its authority?
         1. Is this simply too big? Or might some agency get deference later?
   2. If yes 🡪 2) Proper delegation
   3. If no 🡪 5) No delegation
2. Did agency exercise delegation appropriately “with the force of law?” (Step 0.5)
   1. Formal procedures, binding rules, etc. (*Mead*)
   2. If yes 🡪 3) Chevron Step 1
   3. If no 🡪5) No delegation
3. Is the statute ambiguous on the precise question at issue? (*Chevron* Step 1) (Use Statutory Interpretation)
   1. If yes 🡪 Go to 4) Chevron Step 2
   2. If no 🡪 No deference!
4. Did agency avoid acting unreasonably? (*Chevron* Step 2)
   1. If yes 🡪 A&C review 🡪 deference
   2. If no 🡪 Maybe A&C review, either way Vacate and Remand
5. Did an agency without statutory authority interpret the statute even in an informal way?
   1. If yes 🡪 *Skiddy* deference?
      1. A&C review
   2. If no 🡪 Statutory Interpretation
6. **TEXTUALISM**
   1. **Generally**
      1. In Favor
         1. Text is ratified under Art I/§7
         2. Text is easy to ID
         3. Text has been debated
         4. Text is the product of political bargaining
         5. Text is neutral
      2. Against
         1. Shitty interpretation can end up in “grid-lock” zone of Congress 🡪 live on for a long time
            1. *Caminetti* – Mann act drafted intentionally vague to allow court to read-in an interpretation that Mann said wouldn’t be there on the floor
         2. May enforce textual mistakes or oversight 🡪 ignoring the law’s true purpose
         3. Textualism may have Congress focus on textual canons rather than their own sources
   2. **Canons**
      1. **Textual exclusionary rule** (*Caminetti*) – *Text meaning is plain* – Dictionary
         1. Purpose is foreclosed
         2. Parry with arguments against textualsim above
      2. **Ordinary meaning** – Laws are made by people, not robots 🡪 assumption in favor of ordinary meaning
         1. Canon Parry – Contrast *plain* and *ordinary* meaning (*Kline*)
         2. Metacanon Parry – Term of art (*Casey*), Contested social usage (*Kline*), Statute clearly seeks to Δ social norm (*Kline*), Advancing normative goal
      3. **In Pari Materia** – Clarify ambiguity with another statute that uses the same phrase
         1. Metacanon Parry – Past statute must precede this one (*North Haven*), Congress wasn’t considering the same issue when writing previous statue, Statute must be enacted in roughly the same period (*Casey*)
      4. **Noscitur a Sociis** – A word is known by the company it keeps
         1. Canon Parry – Alternate spirit 🡪 can choose any aspect of the associates (*Ali*)
         2. Metacanon Parry – Must be sufficient terms (*Ali*)
      5. **Ejusdem Generis** – Catch-all term following list should be interpreted in context
         1. Canon Parry – Rule against surplusage (Maintain the most meaning – *Ali*)
         2. Metacanon Parry – Must be sufficient terms/relevant common attribute (*Ali*)
      6. **Expressio Unius est Exclusio Alterius** – Expression of one excludes all others
         1. Metacanon Parry – May just be enunciating a strong background norm (*Silvers*)
      7. **Canon against Surplusage** – Every word and clause is given effect
      8. **Last Antecedent Rule** – Limiting/qualifying word/clause is referred to the next preceding antecedent
         1. Canon Parry – Ordinary usage, rules of punctuation, avoid awkwardness (*Hayes*)
      9. **Canon of Consistent Usage** – Use a word in the same way throughout statute (*Cline*)
   3. **Cases**
      1. *Caminetti v. US* – Dude nailed for driving w/ girlfriend across state lines (Mann)
         1. Holding: Textual exclusionary rule – Text is clear, purpose is foreclosed
      2. *Casey* – “attorney’s fees” defined by previous statute
      3. *Ali v. Federal Bureau of Prisons* – BOP loses Quran/prayer rug
         1. “Customs or excise or any other law enforcement officer” – EG needs more terms
      4. *McBoyle v. US* – Motor Vehicle Theft Act apply to planes?
         1. EU v. Lenity – Lenity needs to provide fair warning 🡪 no planes
      5. *US v. Hayes* – Previous violation of domestic violence, or domestic violence statute?
         1. Last antecedent rule v. Absurdity – DV statutes are only in 1/3 of states
      6. *Silvers v. Sony Pictures* – Writer not one of 6 exceptions allowing her to sue
         1. EU – not in the exception, not allowed to sue
7. **PURPOSIVISM**
   1. **Generally**
      1. In Favor
         1. Speaks to the actual intent of Congress rather than court’s belief
         2. Comes from people invested with the agency/law, these people’s understanding is what is voted on
         3. Can’t interpret ambiguous terms without looking beyond the text
      2. Against
         1. Overlooking/misconstruing statutory purposes – Choosing between purposes
            1. *Riggs* – testator intent vs. efficient probate, profit from wrong vs. punishing Δ twice for the same crime
         2. Making statutes murky – Where do you draw the line?
            1. *Riggs* – How wrong must you be? Murder? Libel? Be a dick?
            2. *HTC* – When is a job “labor?” Plumber? Lawyer? Journalist?
         3. Short-circuiting legislative process for resolving political conflicts about purpose
            1. There may have been hard-fought compromises in the legislature that are trampled when the court fails to capture them
            2. Judges tend to pick and choose between committee reports
            3. Short circuiting Art I/§7 process – These are not vetted sources
   2. **Sources**
      1. Title
      2. Findings & statement of purpose
      3. Mischief of the statute
         1. Should application just be limited to issue that gives rise to it?
      4. Society’s values
   3. **Cases**
      1. *Riggs v. Palmer* – Holding: Fundamental maxims trump plain text
         1. Δ should not profit from his wrong
         2. Found absurdity before breaking from text
      2. *Holy Trinity Church v. US* – Title of act/mischief of the act to solve absurdity
         1. Sketchy use of LH, read into purpose early on, unclear if this is an absurd result
   4. **Breaking from the Text – CITE CASES!**
      1. **Ambiguity** – Equally competing textual canons may (and do) indicate ambiguity
         1. *General Dynamics v. Cline* – Meaning of “Age” in age discrimination
            1. Just finding two meanings doesn’t cut it, find competing text canons
      2. **Absurdity** – Absurd application doesn’t fall within ordinary usage, the law is not a suicide pact
         1. Analysis
            1. No legislator could have intended this result (cost/benefit analysis)

Establish with reference to a well-defined principle

Reinstate text showing result was intended (*TVA v. Hill*)

Exception from statutory purpose (*Public Citizen*)

Exception from legislative history

Common social norm (*Holy Trinity Church*)

* + - * 1. DEFINE A NEW RULE
      1. Justification
         1. Legislators represent a cross-section of US, application offends common sense, must have been a failure of foresight
         2. Absurd results are not the product of legislative compromise
      2. Cases
         1. *US v. Kirby* – Arrest cop for interfering with mail (Absurdity ☺)

Cost-benefit reveals no legislator would want this result

Define an exception for cops from the rule when they arrest murderers

* + - * 1. *Public Citizen* – Executive consulting private groups (Absurdity ☹)

*Reducio ad absurdium* – Find another case that is absurd, so the whole law is absurd

* + 1. **Scrivener’s Error** – Norms of speech/text indicate someone fucked up
       1. Fixing the error (i.e. adding a comma) fixes the statute
       2. *US v. Locke* – “Prior to Dec. 31” interpreted: “On or before Dec. 30”

1. **INTENTIONALISM**
   1. **Types of Legislative History**
      1. **Committee reports**
         1. Committee chair, chosen by majority, is more likely to represent larger view of Congress
         2. Need to compromise between committee members
      2. **Sponsor’s statements**
         1. Knows more about the bill than anyone
         2. Doesn’t represent the majority, characterization of the bill before compromise
      3. **Member statements from the floor**
         1. Definitely doesn’t represent anyone’s views but their own, may have axe to grind
      4. **Successive versions of the bill** (*North Haven*)
         1. Significant changes might signal intent of Congress
         2. But does not show nuanced compromise
      5. **Testimony of private citizens**
   2. **Legislative Action**
      1. **Repeated rejection by floor vote**
      2. **Rejection by floor vote**
      3. **Rejection by committee**
   3. **Legislative Acquiescence – Statutory *Stare Decisis***
      1. **Analysis**
         1. Has the interpretation been around for a long time?
         2. Was it or another similar issue voted on?
         3. Was it voted on under different Congressional alignments?
         4. Was it a clean vote?
      2. **Adoption of a term already construed through *in pari materia***
         1. Re-enactment of an already interpreted statute
      3. **Rejection of an amendment to overrule after a judicial decision**
         1. Problem is that a proposed bill can be killed for many reasons
      4. **Passive acceptance of an interpretation** (*John R. Sand and Gravel*)
         1. Is Congress “electing” not to overturn a judicial interpretation?
         2. BUT: Remember gridlock zone – difficult to get bills through Congress
         3. Compare: *Flood v. Kuhn* – Baseball not subject to anti-trust
            1. Specific votes on other sports
            2. Reliance on this particular interpretation
   4. **Cases**
      1. *North Haven* – “No person” under Title IX. Sponsor statement and committee deleted limiting language
      2. *Flood v. Kuhn* – Baseball not subject to Sherman anti-trust, later statutes and votes don’t overturn
      3. *Blanchard v. Bergeron* – “Reasonable attorney’s fees” – Not Congress’s job to interpret the statute by pointing to cases in committee reports (Scalia concurrence)
         1. Violation of Art I/§7, etc. see above.
2. **LEGISLATIVE PROCESS**
   1. **House**
      1. **Rules Committee** – Make a “special rule” that governs a particular bill
         1. Open Rule – Subject to amendment tree
         2. Closed Rule – No floor amendments
         3. Modified Closed Rule – Limits number and type of amendments
         4. NOTE: Any rule can waive the germaneness requirement (different topic)
         5. Rule is debated per the 1-hour rule
      2. **Amendment Tree**
         1. Amendments are voted on in reverse order prior to the base bill
         2. Two Degrees Rule – No amendments to amendments to amendments
         3. 1st Degree amendments
            1. Motions to strike/insert 🡪 substitutions
         4. 2nd Degree amendments
            1. Strike/insert in 1st degree amendments
         5. Only 4 amendments can be pending at same time 🡪 offer amendment as 2nd degree to try to force a clean vote on it
         6. Take Home of Amendment Tree
            1. A House voting down a bill might not be voting down the base bill
            2. “Killer amendment” problem
            3. Voting down a bill does not indicate the opposite position is the intent

A different rule of procedure may produce a different result

* 1. **Senate**
     1. No germaneness requirement
        1. Vote of cloture (60 votes) will close off additional amendments
     2. **Unanimous Consent Agreement**
        1. Party leaders agree in advance to the terms
        2. Similar function to House Special Rule
  2. **Conference committee** – Can undo the work of either house, must get up-or-down vote
  3. **Enrolled Bill Rule** – Speaker of House, Leader of Senate and President sign a bill creating an *irrebuttable* presumption of bicameralism and presentment
     1. *Marshall v. Field* – 2 versions of tariff passes, Π says no bicameralism
        1. Holding: Law was signed so voting won’t be questioned
     2. *Clinton v. NYC* – Line-item veto 🡪 non-delegation problem to Prez. (not Art I/§7)
     3. *Munoz v. Florez* – Revenue bill originated in Senate, not House 🡪 violation of Constitution, Court steps in
        1. Compare *Marshall v. Field* – this is procedural, but not “deeply” procedural
     4. **Deem and Pass** – “Self-executing Rule” – a vote on the special rule of the House that deems the senate bill passed if they approve the special rule of the House
  4. **Notes**
     1. Bill can get pigeon-holed in committee just because the chair doesn’t like it
     2. Rules committee doesn’t represent the majority of Congress
     3. Gridlock zone – President only needs 1/3 of government to suggest an interpretation that won’t be overridden
     4. **Cycling** – Unstable majorities, or rules on unrelated issues voted on together can kill a bill

1. **SUBSTANTIVE CANONS**
   1. **Rule of Lenity** – Weak
      1. Ambiguous criminal statutes are construed in favor of Δ
      2. Forces Congress to pay attention by letting off some criminals
      3. *US v. Bass* – Felons who “receive, possess, or transport in commerce” a gun
         1. Last antecedent would have “in commerce” only modify transport 🡪 Lenity has it modify all terms
      4. *Skilling v. US* – Enron CEO conspiracy to commit wire fraud.
         1. Holding: Absurd to criminalize every act of dishonesty over the phone 🡪 Lenity keeps it only to receive bribes or kickbacks provided by non-deceived 3rd party
   2. **Anti-retroactivity** – Without clear statement, Court assumes Congress meant to impose new liabilities prospectively (*TVA v. Hill* – Dissent)
      1. Based on *ex post facto*, Takings clause, Bill of attainder, DPC
   3. **Canon Against Implied Repeal**
      1. Very low ambiguity/trumps text
      2. If text is not absolutely clear, presumption is against repeal of older laws
      3. *Morton v. Mancari* – Does Equal Employment Opportunity Act repeal older statutes giving Indians preference in hiring/promotion with Bureau of Indian Affairs?
         1. **Specific Trumps the General** – Specific earlier act trumps a general later one since Congress most likely didn’t consider the issue in detail the second time
            1. NOTE: If the later statute is the specific one, it carves out an exception (*TVA v. Hill*)
            2. Analysis

Determine the purpose of each statute

Does the implementation of one frustrate the purpose of the other?

* 1. **Other Canons**
     1. **Anti-derogation canon** – Statute shouldn’t be read to directly deviate from common law without clear statement (*Riggs*)

1. **FEDERALISM**
   1. **Constitutional Doctrines**
      1. **Policy**
         1. Responsiveness – Decentralization is more responsive to local issues
         2. Participation – Closer to the people that care about the laws that are written
         3. Innovation, Competition, Vertical division of power
         4. ASK: Is this an issue that require nuance such that the local government should be taking care of it, or that local concerns should override national concerns?
      2. **Reserved Powers** – Congress’ laws must always touch an enumerated power
         1. Necessary and Proper – *McCulloch* – Rational basis test – extreme deference to Congress about what is necessary and proper
         2. Commerce Clause – Rational basis, but Congress cannot regulate non-economic activities (*Lopez*)
      3. **State Autonomy**
         1. Anti-Commandeering Doctrine – Congress can’t mandate a state law
            1. *NY v. US* - Struck down law to mandate state to take over radioactive waste
         2. Generally applicable laws – Federal law that regulated both state and private citizens is generally applicable and doesn’t violate federalism (*Garcia*)
         3. Constitutional Avoidance Canon – Construe law so it doesn’t violate Constitution
            1. Minimal ambiguity
      4. **Plain Statement Rule**
         1. Congress must be clear when preempting historically state powers (trumps text)
         2. “Fuzzy Zone” – Areas of law that are *traditionally state matters*, or where *attitudes are regionally diverse* such that there is no national consensus
         3. *Gregory v. Ashcroft* – Are “judges” included in the Age Discrimination act?
            1. State law dictated mandatory retirement age, ADEA law had enumerated exceptions and it was unclear whether judges fit into the exceptions
   2. **Preemption**
      1. **Analysis**
         1. The facts of the lawsuit have nothing to do with this so ignore them you idiot
         2. Step 1: Determine scope/purpose of state & federal law 🡪 do they overlap?
         3. Step 2: Is there an *Express Preemption Clause*?
            1. Step 2a: Write down the pre-emption clause, underline the relationship (ID the relationship 🡪 “based on,” “respect to,” “related to”)

Statutory interpretation

Do facts provide some means of interpreting the verb? (*Chevron/Auer*)

What is the *purpose* of the federal law? 🡪 Narrow? Broad?

* + - * 1. Step 2b: Is federal purpose unclear? 🡪 See Anti-Preemption Canon
        2. Step 2c: Does state law specifically target the federal topic? 🡪 Discrimination

“Based on”

This is very *narrow* interpretation

* + - * 1. Step 2d: Does state law effect implementation of federal law? 🡪 Effects

“Related to”

This is a *broad* interpretation 🡪 kick into implied reasoning below

* + - 1. Step 3: Did Congress have the *purpose* of preempting the state law?
         1. Step 3a: Is it impossible to comply with both laws?
         2. Step 3b: Does state law frustrate the purpose of the federal law?
         3. Step 3c: Did the federal law have the purpose of occupying the field?

Is there a special need for uniformity?

Federal scheme so comprehensive there is no room for state?

* + - 1. Step 4: WHEN IT IS NOT CLEAR THAT STATE LAW SHOULD BE PREEMPTED 🡪 **GREGORY PLAIN STATEMENT** AND MOVE ON
    1. **Express Preemption**
       1. Anti-Preemption – Given 2+ equally plausible interpretations, choose the non-preempting one
          1. *Altria* – Clause 🡪 No requirements/prohibitions “based on” smoking. State law against deceptive advertising not preempted. (See also Discrimination)
       2. Discrimination Theory – State law preempted if it specifically targets the Fed law
          1. *DeBuono* – State law did not “relate to” ERISA because it was *generally applicable*
       3. Effects Theory – State law preempted if it effects Fed law implementation
          1. *Engelhoff* – State probate law preempted because it “relates to” disposition of insurance benefits under ERISA employee benefit plan
          2. *Morales* – TX consumer protection law preempted because it “relates to” rates, routes, or services” of airlines (Airline Deregulation Act)
          3. *Reigel* – NY product liability common law preempted because it “relates to” safety and effectiveness of catheters (Medical Device Act)
       4. Market Participant Exception – Federal law construed not to interfere with state purchasing decisions (State acting similar to private citizen)
          1. Counterintuitive – The more *ad hoc* the state action, the more it fits here
          2. *Engine Mfs. Ass’n* – Fleet gas mileage requirement preempted, BUT indication that state government can purchase cars however they want
          3. *Gould* – Preempted WI statute barring firms that violate NLRA 3x from selling to the state
          4. *Boston Harbor* – Mass state allowed to require all union workers for harbor clean-up
    2. **Implied Preemption**
       1. Impossibility – Compliance with state and federal law is impossible
          1. Extremely high standard 🡪 this never happens
          2. *Wyeth v. Levine* – Δ was able to unilaterally change drug label then seek approval later 🡪 not impossible to avoid tort liability & conform to fed law
       2. Frustration of Purpose – State law frustrates the purpose of the federal law
          1. Analysis

Determine the *purpose* of the federal law

Look @ legislative history and other purposive sources

Does state law impose the type of burden federal wanted to preempt?

Ask

Does the federal law set the *floor*?

Does the federal law set the *ceiling*?

Does the federal law set the *floor and the ceiling*?

* + - * 1. *Geier v. Honda* – preempted state products liability law that would require Δ to install airbags when purpose of federal law was to have both airbags and auto-seat belts
        2. *Williamson v. Mazda* – state law not preempted because federal law mandated *minimum* 2-pt belts in rear middle while state law required 3-pt
      1. Field – federal interest is so dominant that there is no room for state law
         1. Analysis – Determine the purpose of the federal law

Is there a special need for national uniformity?

Is there a detailed, comprehensive regulatory scheme?

Consider: Immigration, Foreign policy, International/interstate shipping

* + - * 1. *City of Burbank v. Lockheed Air Terminal* – FAA regulation of flight patterns preempts state noise prohibitions

1. **CONGRESS/PRESIDENT CONTROL OVER EXECUTION OF LAWS**
   1. **Generally**

|  |  |  |
| --- | --- | --- |
|  | Ex Ante | Ex Post |
| Control Over Interpretation | Congress – Non-delegation  Legislative standards (*Schecter*, *American Trucking*, *Benzene*) | Congress  ~~Legislative veto~~ (*Chadha*) |
| President  Executive Orders (*Youngstown*) | President  Overrule executive officials (*Youngstown*) |
| Control Over Interpreter | Congress  Confirmation of non-inferior officers (*Buckley*) | Congress  Impeachment (2/3 vote)  ~~Firing personnel~~ (*Bowsher*) |
| President  President appoints **all** non-inferior WACOS | President  Removal  (*Meyers*, *Humphrey’s*, *Morrison*, *PICAOB*) |

* 1. **Congress Control of Interpretation/Interpreter – Non-Delegation**
     1. **Analysis**
        1. Delegation requires an intelligible principle(*JR Hampton*)
           1. Procedural Limits – Adjudications and the like
           2. Discretion – Statute specifies discretional criteria
           3. Jurisdiction – Spatial as well as theoretical
        2. Standard delegation has limited jurisdiction/process but unlimited discretion (*Whitman*) 🡪 Acceptable delegation requires two of the three categories (*Yakus*)
        3. *Benzene* Clear statement
           1. Agency proposes an unusual or extremely costly interpretation
           2. Some aspect of the delegation is ambiguous (“reasonably appropriate” etc.)
           3. Borderline absurdity 🡪 interpretation might outlaw an industry
           4. *Benzene* – If Congress intended an extreme outcome it requires a *clear statement*
     2. **Examples**
        1. *Schecter Poultry* – Struck down – Act delegates power to set fair competition codes
           1. Procedure: No limit, no quasi-judicial procedure, due process concerns
           2. Discretion: Anything that is “fair and just”
           3. Jurisdiction: All commercial and industrial activities
        2. *Whitman* – Upheld – Clean Air Act delegation to EPA to set air quality standards
           1. Procedure: Tightly controlled procedure – NCEA 🡪 OAQOS 🡪 CASAC 🡪 comment and rulemaking
           2. Discretion: “Adequate margin of safety to protect public health”
           3. Jurisdiction: Limited to certain pollutants
     3. **Benzene Canon**
        1. OSHA decision to limit benzene in air to minimum technologically feasible
        2. Intelligible principle
           1. Procedure: Statute 🡪 NIOSH (Research) 🡪 Secretary
           2. Jurisdiction: Occupational Health and Safety
           3. Discretion: (1) most adequately assure, (2) to the extent feasible, (3) on the best available evidence, (4) *no* employee shall have a *material* impairment
        3. Majority – Threshold finding that greater exposure presents a *significant* risk is necessary
        4. Concurring – *Cost justified* determination required, Congress should be the ones making these types of big decisions
        5. *Kent v. Dulles* – Refusing to grant passports to commies implicates Due Process and invokes *Benzene* canon
  2. **Congress Control of Interpretation/Interpreter – Chadha/Bowsher/Buckley**
     1. *INS v. Chadha* – Legislative veto of AG recommended exceptions to deportation
        1. **Rule** – Congress can only enact legislation through Art I/§7 unless dealing with internal matters of Congress
           1. Enrolled Bill Rule vs. Constitutional Issue
           2. Passing a bill by positive vote ≠ Passing by silence
        2. **Analysis**
           1. Does what Congress is doing affect private rights?

Is this just an internal Congressional issue?

* + - * 1. Is this outside Art. I/§7 procedures?
        2. Fix it

Require Art. I/§7

Recommendation becomes law automatically without Art. I/§7 action

* + 1. *Bowsher v. Synar* – Comptroller fired outside of Art. I impeachment
       1. **Rule** – Congress can only remove *executive* officials by Art. I impeachment
          1. Corollary – Congress can’t give executive duties to people they can remove
    2. *Buckley v. Valeo* – FEC has members appointed outside of WACOS
       1. **Rule** – *Non-Inferior* *Executive* officials can only be appointed by President WACOS, can’t endow legislative appointees executive power either
       2. **Rule** – Congress can’t appoint inferiors, but can vest in President alone, in the Courts of Law, or in the Heads of Departments (Art II/§2)
    3. **Analysis**
       1. Does the official control the rights and powers of people outside the legislative branch? 🡪 File lawsuits? (*Bowsher*/*Buckley*)
       2. Can the person unilaterally control actions of the *President*, *executive branch*, or *private citizens*? (*Bowsher*)
       3. Is the person taking action pursuant to standards expressed in the law? (*Bowsher*)
       4. Fix it
          1. Congress could actually just remove the office altogether then re-instate it
          2. Congress can act through Art. I impeachment
          3. Appropriations – Congress can control the purse

Rider saying you can only spend money in certain ways

* + - * 1. Hearings/investigations/audits – Congress can be dicks
  1. **Presidential Removal Power**
     1. **Analysis**
        1. **Threshold** – Are the officers executive?
           1. *Bowsher*/*Buckley* – Control private citizens? File law suits?
        2. **Non-inferior officer**? (*Morrison*)
           1. Answerable to a higher executive branch official? (*Edmond* – Sufficient)
           2. Can only perform limited tasks/specific duties?
           3. Limited jurisdiction?
           4. Limited tenure?
        3. **Rule** – All non-inferior officers must SATPOP (*Meyers*)
           1. **BUT!** – Does the official enforce the law cabined by statutory standards/rules? (FTC, SEC, FCC, etc.) (*Humphrey’s Executor*)

Can be an independent officer 🡪 Only fired by President for cause

These officers are supervised by the courts

* + - 1. **BUT!** – If inferior, limitations are ok unless: Would limiting removal power unduly burden the President’s ability to execute the law? (*Morrison*)
         1. Functional – Accountability

These people act in the President’s name?

Efficiency problem in carrying out the laws?

* + - * 1. Conflict of interest – is it the President that is being investigated?
        2. Can be removed by higher official? Limited duties? Limited jurisdiction?
      1. **Rule** – There should be a clear and effective chain of command between the President and his subordinates (*PICAOB*)
         1. Does this situation interfere with a chain of command to have a high political official who is SATPOP getting vetoed by someone that isn’t?

Can’t unduly interfere with the President by messing with the chain of command

* + - * 1. President must be able to determine if “for cause” has been met
        2. If “for cause” inferior, their superior must SATPOP
      1. **Policy** – Accountability is the overriding concern
         1. President can’t be responsible for people he can’t control
         2. Political accountability
         3. Congress could “fasten” incompetent people to the President
         4. Efficiency – President must be able to manage efficiently
         5. Dispersion of responsibility?
         6. Interfering or impeding the chain of command?
    1. *Meyers v. US* – President removes postmaster general cause he was a dick
       1. Note: Inferior officers or employees need not be SATPOP
    2. *Humphrey’s Executor v. US* – FTC commissioner 🡪 independent officials
       1. Insulation for quasi-judicial officials
    3. *Morrison v. Olson* – Independent counsel can only be fired by AG for cause
       1. Insulation if it does not unduly interfere with the President
  1. **Presidential Control of Interpretation through Executive Orders/Directives**
     1. ***Youngstown*** *Sheet & Tube v. Sawyer* – START WITH Z1, TRY Z3, KICK TO Z2
        1. **Rule** – President can only issue an order when he is able to indicate a law he is executing
        2. **Analysis**
           1. President must have the power to do what he’s doing

President must be exercising an Art.II/§2 power

Require written opinions of principal officers

Treaties

Commander/diplomat in chief

Appointments – SC Justices, Non-inferior WACOS, or vested from senate

Grant pardons outside of impeachment

Power to regulate persons/property must generally come from the statute

*Expresio unius* vs. implied delegation by ambiguity or influence through SATPOPs

Inferred from Art.II/§3 🡪 Take care the laws are faithfully executed

Determine if agency decision is consistent w/ statute 🡪 overrule?

“Gloss of history” – Twilight zone

* + - 1. **Zone 1** – Express/implied authorization 🡪 President is executing the statute
         1. Is this limited by non-delegation?
         2. Is President acting in line with the statute? (i.e. if the agency did the same shit would it be ok?)

Presidential *Auer* deference (Interpretation of regulation)

Presidential *Chevron* deference (Interpretation of statute)

Presidential direction of discretion (President forcing an agency to act – subject to the statute’s limitations)

* + - * 1. Policy

Effective government

Democratic accountability

* + - 1. **Zone 3** – President acting directly against the statute
         1. Get to Z3

Private rights are at stake

If justification is pretext (*Liberty Mutual*)

* + - * 1. Must be clearly an Art II power (non-defeasible 🡪 *Meyers*)

Art II/§3 – “Take care the laws are faithfully executed”

* + - 1. **Zone 2** – Zone of Twilight – Statute is entirely silent regarding President (Presidential Default power)
         1. Analysis

Manager-in-chief or diplomat-in-chief – Constitution/”Gloss of history?”

Need for speed or detail

Reconciling agency clashes/interagency statutory battles (*Allbaugh*)

Public property (*Midwest Oil*) or government personnel (*Neagle*)

NOTE: Find similarities to preemption here

Should there be a presumption against preemption?

Should there be a market participant exception? (*Allbaugh*)

* + - 1. **Example**
         1. *In re Negel* – US Marshall protects Justice Field – Power to protect the government (right, duty, obligation growing out of the Constitution) through Art. II/§3 “execution” clause
         2. *Midwest Oil* – President withdrew land from the Placer Act

President executing traditional powers which need plain clear statement

Can’t read agency delegation to squeeze out the President’s power

* + - * 1. *Belmont* – Executive agreement to release funds of nationalized soviet company

President acting under constitution as diplomat (Constitutional delegation)

Not trampling private rights of citizens

* + - * 1. *Liberty Mutual* – Nexus – Must be nexus between executive act and the delegation in the statute
        2. *Executive Order 12866*

No publishing in Fed. Register when rule fails Cost-Benefit Analysis

Two arguments

Art II power to require opinion of heads of departments

Presidential plain statement rule – President can add requirements in addition to those of the statute

Limitation – Statutory deadline

* + 1. **Presidential Market Participant Exception**
       1. Can’t exercise if forcing company to do something specifically allowed by statute (*Chamber of Commerce v. Reich*)
          1. Does the statute grant a right?
          2. Does the statute impliedly/expressly repeal the procurement act? 🡪 does statute prevent a bona fide purchasing decision?
    2. **Prosecutorial Discretion**
       1. Policy
          1. Statutes don’t specify the order or timing of prosecution
          2. Limited resources
          3. Congress can limit through detailed laws, but cannot prosecute individuals
          4. **NOTE** – Once the agency has decided to act, they must follow the details of the statute!
       2. Private Cause of Action – Balancing prosecutorial discretion
          1. *Cort v. Ash* – Citizen suits

Was the statute enacted for a class that Π is a member of?

*Blessing v. Freestone* – Title-IV-D

Was the legislative intent to make a private remedy?

*Cannon v. University of Chicago* – Enforcing Title IX

Implication of that remedy is consistent with statutory purpose?

Is this simply an area of concern for the US?

* + - * 1. No private citizen can sue prosecutor to bring action against 3rd party
        2. Sue executives for non-criminal acts

*Heckler v. Chaney* – Death penalty drug mislabeling

Agency inaction is not reviewable under APA

* + - 1. Does the statute limit agency discretion?

1. **ADMINISTRATIVE PROCEDURES ACT**
   1. **Generally**

|  |  |  |
| --- | --- | --- |
|  | Formal | Informal |
| Orders (§551(6-7)) | §556-7, §554(a) | ? |
| Rules (§551(4-5)) | §553(c), §556, §557 | §553 |

* + 1. Quasi-constitutional - §559 – Doesn’t limit/repeal additional requirements imposed by statute. Subsequent statutes don’t supersede or modify this without clear statement
  1. **Adjudication or Rulemaking?**
     1. Adjudication – §551(6) – Order means the whole or a part of a final disposition, whether affirmative/negative/injunctive/declaratory, of an agency in a matter other than a rulemaking but *including licensing*
     2. Rulemaking – §551(4) – Rule means the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement/interpret/prescribe law or policy or describing the organization/procedure/practice requirements of an agency and includes approval or prescription of future of rates/wages/corporate or financial structures or reorganizations thereof/prices/facilities/appliances/services or allowances therefor or of costs or accounting or practices bearing on any of this shit
  2. **Formal or Informal?**
     1. §553(c) – When **rules** are required by statute to be made on the record after opportunity for an agency hearing, §556-7 count (formal rulemaking)
        1. *Florida East Coast Railway* – “After hearing” and “give consideration” insufficient to invoke formal rulemaking 🡪 not “on the record”
        2. Strong presumption for informal rulemaking without “on the record after opportunity for an agency hearing” (§553(c)) language
     2. §554(a) – Every **adjudication** required by statute requiring determination on the record after opportunity to be heard 🡪 formal
        1. *Louisville/Nashville RR* – “After hearing” triggers formal adjudication
        2. *Londoner/Bi-Metallic* – There are greater Due Process concerns w/ adjudication
           1. Effecting less people makes it more adjudicative
           2. More “legislative” indicates more “rule-like”
     3. *Matthews v. Eldridge*
        1. Private interest effected
        2. Risk of erroneous deprivation
        3. Value of additional safeguards, and government interest in including administrative burdens of additional safeguards
     4. Policy
        1. Is Π suing over a future entitlement?
        2. Are we depriving Π of a current right?
        3. Can this be solved through adjudication/order procedure?
        4. Has Δ done something in reliance of current law?
        5. Apply *Matthews*!
  3. **Informal Rulemaking**
     1. **Generally**
        1. §553(b) – General notice of proposed rule
           1. §553(b)(3) – Either the *terms or substance* of the proposed rule or a *description of the subjects and issues* involved
           2. §553(b)(3)(B) – Except when agency for good cause finds notice and public procedure impracticable, unnecessary, or contrary to the public interest
        2. §553(c) – After *notice and opportunity to submit comment*, agency considers relevant factors and incorporates in the rules adopted a concise general statement of their basis and purpose.
     2. **Terms or Substance – Substance and Issues Involved**
        1. Analysis
           1. Agency *must disclose* during notice and comment:

Key study/data relied upon for rulemaking (*Nova Scotia*)

Non-obvious public info (*Chamber of Commerce*)

* + - * 1. Agency *does not have to* do a new round of notice and comment if

Agency generates new studies in response to comments (*Rybachek*)

Agency makes a rule in response to comments that is not necessarily the precise rule suggested by the commenter (*BASF*)

* + - * 1. Was notice and comment adequate?

Comments are meaningful and on point?

Sufficient record to provide judicial review?

* + - * 1. Is the final rule a *logical outgrowth* of the proposed rule? (*Chocolate Manufacturers*)
      1. *Nova Scotia* – Rule that would require fish processing that would destroy the fish
         1. Rule – Agency must disclose a study relied upon for rulemaking
      2. *BASF* – Pesticide categories 🡪 collapse into 1 rather than make more as suggested by comments
      3. *Chocolate Manufacturers* – Proposed rule on sugary cereal, final rule band chocolate milk from subsidy program thing
         1. Logical Outgrowth Test
      4. *Overton Park v. Volpe* – Lack of physical record may result in subpoena of agency
  1. **Arbitrary and Capricious Review (§706(2)(A) / §706(2)(E))**
     1. **Generally**
        1. §706(2)(A) – Set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accord with law
        2. §706(2)(E) – Set aside agency action found to be unsupported by substantial evidence in adjudications
        3. §555(e) – Can petition for agency action, they can turn you down but must give grounds
     2. **Analysis**
        1. Was the agency decision based on the relevant factors? (*State Farm*)
           1. **Consider statutory criteria**
           2. Did the agency make a comment or prior action that must be addressed?
           3. Has agency addressed all important issues?

Does a rule “jump out” of the proposed rule or comments?

Address comments that are legally relevant? From powerful sources?

* + - 1. Was there clear error in judgment? (*State Farm*)
         1. Person changing status quo bears burden of proof (*§556(d)*)
         2. No post hoc rationalizations 🡪 explanations on the record (*State Farm*)
      2. Burden is not higher than previous for a change in agency position (*Fox*)
         1. A change in administration is adequate reason to change agency position
         2. Must still attack findings of fact, and address reliance on previous position
      3. *Fox* Dissent – Independent agency is not very politically accountable
    1. **Cases**
       1. *State Farm* – Auto-seat belts and Airbags rule
          1. NOTE: Agency inaction is unreviewable (*Heckler*), but there is a difference between failure to act and acting to allow something (Discretion hypo)
       2. *Fox Television* – Cussing on TV
          1. Burden of proof for an agency change in policy is no greater than previous positions, but agency must meet previous standard

Must still attack findings of fact, and address reliance on previous position

* + - * 1. Still (1) consider relevant factors and (2) no clear error

1. **AGENCY INTERPRETATION – DEFERENCE**
   1. **Generally**
      1. §706 indicates that courts should decide all matters of law
      2. §706(2)(E) – agency fact finding should be upheld if there is substantial evidence on the record
      3. *Hearst* – Are newsies “employees” or independent contractors?
         1. Question of law – Should “employee” be defined by tort law? 🡪 Court
         2. Question of law and fact – Are newsies “employees” as defined by the statute? 🡪 Agency
   2. **Skidmore Deference**
      1. Deference to an agency suggestion (amicus brief, not based on delegation, etc.) based on “power of persuasion”
      2. Analysis
         1. Agency expertise in this area?
         2. Is the agency persuasive?
         3. Has the agency been consistent?
         4. Seen more than one case?
         5. Is the agency talking about something delegated to someone else?
      3. Determine what is a mixed question of law and fact
         1. Fact Continuum
            1. More facts 🡪 more mixed.
            2. How big a piece of the world are we considering?
            3. What is the level of abstraction?
   3. **Chevron Deference** – How much interpretive authority does agency get w/out grant from Congress?
      1. **Step -1** – Consider ways to not have to deal with this shit
         1. Non-delegation? (*Schecter Poultry*/*Whitman*)
            1. *Benzene* – Is this agency the right agency? (*Gonzales*)
         2. *MCI*/*Brown & Williamson* – Infer Congress didn’t delegate on this issue
            1. Congress didn’t intend to delegate huge policy choices (*Benzene*)
      2. **Step 0** – Is an agency entrusted to administer the statute? If so/not, which agency?
         1. No agency has primary responsibility 🡪 No deference/*Skiddy* (*Florida East Coast RW/Mead/Crandon*)
         2. One agency has authority 🡪 *Chevron*
         3. 2 Agencies are both mentioned in the same statute (*Gonzales*)
            1. Statutory interpretation to determine who is the designated interpreter
            2. Authority to act (*Skiddy/Auer*) ≠ Authority to interpret (*Marten*)
         4. 2 Statutes enforced by 2 agencies but applying to the same conduct (*Train*)
            1. Which is lead statute? (CAIR/Specific > General/etc.)

Who’s statute is controlling on this issue?

* + 1. **Step 0.5** – *Chevron* deference only when Congress delegates authority to make rules carrying the force of law. (*Mead*)
       1. Use APA procedures?
       2. Procedural formality? Did the agency act in the manner specified by statute?
       3. Binding decision? 🡪 Binding on whom?
    2. **Step 1** – Has Congress (the statute) spoken to the precise question at issue? Or is the statute *ambiguous* about the precise question at issue?
       1. Ambiguity is interpreted as an implied delegation of Congress
       2. Use textual canons, tools of statutory construction, etc. to define ambiguity
       3. Does the statute’s purpose clarify its meaning? (*MCI*)
       4. CRITICAL: A “Step 1” decision means text is unambiguous and cannot be changed later (*Sweet Home*)
       5. See cases 🡪 *Benzene* might kick in for particularly novel or outlandish agency interpretations BUT Chevron indicates that this might be allowed because agencies have political accountability
    3. **Step 2** – If ambiguous to the precise question at issue, is the agency’s interpretation reasonable and permissible?
       1. Essentially 706(2)(A) A&C review
          1. Was the agency’s decision the product of reasoned decision-making?
       2. LH kicks in here, if counter to the agency, agency should address it
          1. NOTE: LH would allow a single committee chair to oust the president
    4. **Policy**
       1. If statute is truly silent, it is better for the politically accountable agency to interpret it because it becomes a policy choice
       2. Creates uniformity (avoids circuit splits)
       3. Constitutional avoidance canon – Executive should be in charge of filling this gap
       4. President/agency power is always constrained to the extent the statute is clear
    5. **Cases**
       1. *Chevron v. NRDC* – Bubble vs. Point source interpretation of “building, structure, facility, or installation”
       2. *MCI v. ATT* – FCC rule that dominant carrier only has to file rates
          1. Is the agency “modifying” the requirement? 🡪 Large change in regulatory mechanism runs close to the limit of the interpretation 🡪 *Benzene*
       3. *Sweet Home* – Definition of “take” WRT endangered species
          1. Term of art vs. Defined by statute 🡪 *Noscitur* v. *Surplussage* (*Ali*/*Caminetti*)
          2. NOTE: Huge difference between costs and benefits might implicate *Benzene* but does not in this case
       4. *Brown and Williamson* – FDA changes long held position WRT regulating cigarettes as “drugs” 🡪 Do they “alter the structure or function of the human body?”
          1. Statutory interpretation in the face of further legislation from Congress, and long held interpretation involving an important industry 🡪 *Benzene*/*Flood v. Kuhn* 🡪 Implied Congressional acquiescence
       5. *Mead* – Statute empowers agency to issue ruling letters
          1. Binding WRT person issued to but not on anyone else even if they ship the same stuff
          2. Holding: No deference because agency ruling letter did not use a minimum level of deliberation/formality
          3. Rule – Informal agency actions don’t get deference when they lack procedure and don’t otherwise have the “binding effect of law”

Notice/Participation/binding on agency 🡪 consistency is critical

* 1. **Auer Deference**
     1. **Rule** – Agency interpretation of a regulation is given deference
     2. **Analysis**
        1. What is the agency action?
           1. Amicus (*Auer*), Enforcement action (*Marten*), Interpretive rule (*Gonzales*)
        2. Is the regulation maker also the interpreter (*Marten*)?
        3. Parroting statute? Large gap/no specificity between regulation/interpretation?
           1. NO DEFERENCE!! (*Gonzales*)
        4. See Policy section for more reasoning action…
     3. *Auer*
        1. Statute: FLSA – “Professional”
        2. Agency Rule: Department of Labor – “Salary Basis Test”
        3. Interpretation: Amicus Brief – “Practical Test”
           1. It is highly unlikely that cops in high up salary positions would ever have pay docked
     4. *Marten* – OSH Reviewing court holding Administrator cites incorrect rule
        1. Statute: OSH Act – “Material Impairment”
        2. Rule: (g)(3): Training, (g)(4): Leakage
        3. Interpretation: Administrator enforcement action 🡪 (g)(3) covers “fit” of mask
     5. *Gonzales* – LIMITATION TO AUER DEFERENCE
        1. Statute: Controlled substance act – “inconsistent with public interest”
        2. Rule: “Prescriptions must serve legitimate medical purpose”
        3. Interpretive rule: Assisting suicide is not legitimate medical purpose
           1. NOTE: This is just trying to circumvent N&C rulemaking
        4. Reasoning
           1. Rule was merely parroting statutory language (weak)
           2. Allows agency to skip N&C rulemaking
           3. There can’t be a huge gap between original rule and interpretation

Must be some specificity between the two

*Benzene* – Outlandish interpretation

* + - 1. Rule – If the agency rule is vague and the interpretation is outlandish 🡪 no deference
    1. **Policy**
       1. Not *post hoc* rationalization – Agency has no dog in this fight (*Auer*)
       2. Agency is free to Δ opinion any time 🡪 follow opinion unless it defies text, etc. (*Auer*)
          1. BUT this is dangerously close to rulemaking outside of APA (*Gonzales*)
       3. This is a violation of separation of power – rulmaker interprets the rule
          1. BUT Rulemaker has greatest expertise (*Marten*) 🡪 *Skiddy* Deference

BUT If rationale is politically driven (A&C?), no deference (*Marten*/*Gonzales*)

* + - 1. Rulemaker is more “in tune” with purpose
         1. BUT What if regulation was written 40y ago?
      2. Idea that New Deal agencies should violate separation of powers 🡪 Need for speed/efficiency 🡪 Subject to 706(2)(A) review

1. **PRE-WRITTEN SECTIONS**
   1. **Ordinary meaning/Plain Text**
      1. Words should be taken to mean what they ordinarily mean. The law is written by people, and people assume (as they should) that when they write using words that have plain meaning, they will be interpreted to have such meanings and thus the use of a dictionary will guide our interpretation.
   2. **Legislative Process**
      1. There is no way to know what Congress *would have done*. This is because what Congress *does* is so very heavily controlled by the particular special rule of procedure that is invoked for each Congressional action. The particular special rule of procedure will dictate the order and number of amendments being considered which will have a dramatic effect on the outcome irrespective of what the base bill was. To consider what Congress “would have done” without consideration of such a procedural rule is foolhardy since any particular base bill or amendment may be easily defeated through manipulation of voting order in the special rule.
   3. **Absurdity**
      1. An outcome this absurd is unlikely to represent any sort of legislative compromise such that, under any circumstance, a bill making it to the floor of Congress addressing specifically this issue would be passed unanimously. In situations such as this, the probability of a judge missing the true meaning of the statute are improbably low and thus we can be confident that we are capturing the true meaning of Congress
      2. Judges may overindulge in the freedom of absurdity. We see in *HTC* that, despite the fact that Congress and everyone else may agree that a particular interpretation is intended, that does not necessarily justify letting Congress off the hook. Interpreting true meaning in the face of absurdity puts the court in danger of running afoul of the perils of purposivism.
   4. **Legislative History**
      1. Legislative history presents a risky endeavor because it is nearly always incomprehensibly murky and always presents the risk of judicial misuse and misinterpretation resulting in theoretically new interpretations that were never ratified under Art. I/§7 procedures. The *MCI* majority would indicate that LH should not be used merely in the face of (even a million dictionaries) conflicting textual sources as they can be weighed against each other. The use of LH would require an ambiguity that truly cannot be resolved through any means and LH would then kick in to reinstate the true meaning of the text. [INSERT FACTS ABOUT HOW LH DOESN’T REPRESENT MEDIAN MEMBER’S VIEWS AND HOW PROCEDURAL RULES SHAPE CONGRESS’S DECISION]
      2. Even though LH is open to abuses, and lacks Art I/§7 legitimacy, the majority of the Court and even the occasional textualist has accepted LH to resolve ambiguities
   5. **Preemption**
      1. **Express**
         1. Like in *Altria*, if the state lawsuit goes after a purpose that is so fundamentally different from the mischief conceived of in the federal statute, the state statute may be saved
   6. **Non-Delegation** – Even though the Constitution appears to embrace a non-delegation doctrine, cases like *American Trucking* indicate to us that only the most extreme delegations of authority (as in *Schecter Poultry*) are going to be thrown out through judicial review.
   7. **Discretion** – Normally, an agency decision to exercise discretion such that it chooses not to act is not reviewable by the court. *Heckler v. Cheney*. However this relies on a conceptualization of the statute that presumes this discretion is delegated to the agency. If, on the other hand, the agency is acting by Order, it may be reviewable because §551 of the APA indicates that refusals to act are orders, and orders are reviewable under 706(2)(E). Furthermore, in *Cheney*, the court suggests that an agency abdicating its authority under the guise of discretion is entitled to no such insulation from review. If the organic statute indicates that the agency should act, even in the face of countervailing state law, the agency must do so or face review by the court. [Insert statutory interpretation making your point]
   8. **Presidential Power – Youngstown**
      1. Zone 2
         1. In *in re Neagle* and *Midwest Oil* the president is dealing only with people and property that are of concern to the federal government whereas in *Youngstown*, you had the president stepping in affecting the private rights of citizens. In the second instance, absent a specific delegation of Congress, the President is not acting upon any Constitutional grant, nor acting as the executor in chief of any federal interest.
   9. **Chevron**
      1. In B&W we have something like Congressional estoppel. The FDA had consistently held the interpretation that they were not able to regulate cigarettes. In response, Congress enacted legislation to regulate them. The result of this is that if Congress wants the FDA to be able to regulate tobacco, and thereby impliedly repeal this subsequent legislation, Congress must do so in a plain and clear manner.