Legislation and the Regulatory State

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Grade: A-

**Notes**

**Bridge legislative supremacy with constitutional avoidance**

**Keep note of how the purposivists view Congress as generating imperfect work product**

* Explain your answer to him
* Grades the exams as a whole (can cross reference)
* Read with extraordinary care and then organize answers

**Legislation & The Regulatory State Outline**

1. **Legislation**
2. **Interpretation and Beyond**
3. Methods of Interpretation
   1. Intentionalism
      1. When confronted with ambiguity or a troubling outcome, the judge tries to figure out what the legislature would have specifically intended if it had confronted the particular interpretive question. Would look to transcripts before a law is enacted.
      2. How the legislature would have responded to the precise question at issue
   2. Purposivism
      1. Congress adopts legislation for a reason and courts should read specific statutory provisions to advance the legislation’s purpose or general aims, as derived from a variety of sources, including the context of enactment.
   3. Textualism
      1. Interpretation should strive to discern how reasonable people would understand the semantic import or usage of the precise statutory language and the structure of the statute.
      2. Going beyond the text to further some notion of Congressional intent or purpose is both illegitimate and unworkable in practice
   4. “No vehicles in the park” illustration
      1. intentionalist would look to a sponsor’s assurance of a worried colleague that the bill wasn’t intended to exclude bikes
      2. a purposivist would be more interested in what inspired enactment of the bill. If the legislature had been principally concerned with noise and pollution, a purposivist would be inclined to allow bicycles
      3. a textualist would look to how people ordinarily use the word “vehicle”, to the dictionary and to legal parlance
   5. Legislative Supremacy
      1. Each interpretative model is grounded in the principle of legislative supremacy—acts of Congress enjoy primacy as long as they are within constitutional bounds, and that judges must act as faithful agents
      2. Each method is concerned with “legislative intent” though they understand the phrase differently. Each is trying to enforce a decisions that they think is legitimately attributable to the legislature.
4. The Judge’s Role in Relation to Congress
   1. Independent – check & balance Congress
   2. Partner – collaborate with Congress to further the public good
   3. Faithful agent – follow Congress as its faithful agent
   4. “I believe banning strollers is a bad idea”
      1. independent
      2. partnership if it furthers the public good
      3. subordinate if the legislature gave the directive that judges decide what “vehicle” means in marginal cases
   5. Federalist 78 combines all three
      1. The essay is a defense of what would become Article III, Section I.
      2. Independent: checking the limitations of the CNSTN so that the legislature does not abuse its power, deterring Congress from passing unjust laws by mitigating their effects. Tenure and salary protection to ensure degree of independence.
      3. Partner: Not checking the power of Congress to pass the law directly but mitigating the effects of existing laws for the public good. Relies on assumption that judges can discern what is an unjust or partial law.
      4. Faithful agent: no active resolution whatsoever. No force or will.
   6. ***Marshall* (The LSD Case)(7th Cir. 1990)**
      1. Q: Does weight of the carrier (blotting paper) factor in the weights listed in the statute, which trigger statutory minimum sentencing?
      2. Held: Yes, because
         1. (1) Against using the weight of pure LSD only
            1. “Substance or mixture” must have some meaning; “detectable amount” is the opposite of “pure”; structural argument (PCP provision would have surplus if “mixture or substance” meant pure); Congress intended that “mixture” not be converted into an equivalent amount of pure LSD
         2. (2) For weight of LSD plus paper as a “mixture or substance”
            1. Ordinary meaning of “substance” and “mixture” combined with specialized usage in chemistry, colloquial meaning, LH, precedent
         3. “Odd results may occur”
      3. **Dissenting, Posner** assumes more of an independent or partner role
         1. The minima would be triggered by one dose in a glass of OJ but not by one dose in an empty glass
         2. Disproportionate to other, more serious drugs.
         3. Acknowledges that “substance and mixture” would have no referent under his analysis
         4. Independent
            1. “Well, what if anything can we judges do about this mess?”
            2. Moderating an unjust law
         5. Partner
            1. Contextual argument: Congress didn’t know that LSD is sold by the dose not by weight.
            2. Congress makes some mistakes and the judge is a partner who works with Congress to ensure that the result is not embarrassing for either Congress or the court
            3. Doesn’t say he would disregard a congressional mandate stipulating the use of the weight of the blotting paper
            4. **A bridge between partnership model and purposivism**
         6. Subordinate
            1. Just trying to carry out congress’ overall purpose despite being a little careless drafting the statute
      4. Critique of the dissent’s reasoning
         1. The realties of enforcement would never involve the OJ discrepancy
         2. Perhaps this law is designed to capture the little fish and leave the big fish to be caught by another law
         3. Maybe Congress intended to target LSD harshly
5. **Letter Versus Spirit of the Law**
6. Creating the letter of the law—the legislative process
   1. Article 1, Section 7: Bicameralism and Presentment
      1. “Before a bill can become law, it must pass both the House and the Senate (bicameralism) and sent to the president to sign or veto (presentment)”
         1. Involves different institutions with different election cycles, different constituencies and small state power
            1. Represented by the decision to give equal weight to all states irrespective of population size
      2. If president vetoes, must be supported by 2/3 supermajority of each house
      3. Justifications/Critiques
         1. Checks and balances
            1. Preventing either branch from abusing its power
            2. Encouraging abuse of power in blocking legislation
         2. Deliberation and “cooling off”
            1. Facilitates potential for public participation
   2. Congressional Rules of Procedure: Constitution dictates that each house can determine its own Rules of Proceeding
      1. Introduction of bills and referral to committees
      2. Committee consideration, conference committees
      3. Floor debate, voting including Senate filibusters and cloture rules and amendment, adjournment
      4. Reconciliation
   3. Effect: Statutes are hard to “make” 🡪 **status quo bias**
7. Classic Approach—spirit over letter: **Purposivism**
   1. As with the LSD OJ hypothetical, troubling consequences of the law generate challenges to textualism and sometimes the challenge happens within the subordinate model, by invoking the legislature’s intent or purpose
   2. Why might statutory text and purpose ever be at odds?
      1. Imperfect legislation at T1
         1. Mistake
         2. Information imbalance
         3. Time constraints
         4. Unforeseeable circumstances
      2. Imperfect amendment at T2
      3. Court’s imperfect interpretation of T1 text and purpose at T2 (hindsight bias)
         1. One way to legitimize the potential trade-offs inherent in this conundrum (cf. Riggs dissent) is to include the troubling results apparent at T2 or to simply accept an open partnership model of judiciary involvement
   3. **Riggs (NY 1889)(*The Murderer Inheritance Case*)**
      1. Q: Can murderer inherit from the will?
      2. The words of a statutes give the property to the murderer, but the purpose of the statute is to effect the final wishes of the testator
      3. Held: Murderer cannot inherit. The *intention* of the lawmakers could not have been to grant a murderer donee beneficiary rights. “If such a case had been present to their minds…”
      4. Intentionalist & Purposivist
      5. Philosophy: A thing within the intention of the statute is as much contained in the law as if it were in the letter. A thing in the letter but not in the intention is not contained in the law
      6. Dissent: Not within the power of the court to go beyond confines of statute, which does explicitly delineate when a will can be altered or revoked (fraud, duress or incapacity at the time the will was made 🡪 expressio). Consistent conformity of judicial performance required for the law to be legitimate and the legislature may have intended this.
   4. **Church of the Holy Trinity (1892)(*The Christian Nation Case*)**
      1. Q: Does the (foreign) Labor Act prohibit a contract made between an English rector and US corporation (church)?
      2. The Court starts with the “letter” of the act, which clearly prohibits the contract: “It shall be unlawful… for any … corporation… in any way assist or encourage the importation or migration of any aliens in the US… under contract of agreement… to perform labor or service of any kind in the US”
         1. Specific exceptions listed which do not include religious workers (expressio)
      3. **Held**: the contract is not in violation of the Act as Congress did not intend to preclude this type of contract
         1. Legal Process: judge assumes the legislature is made up of reasonable persons pursuing reasonable purposes reasonably
      4. Rational conjecture given drafting imperfections
      5. Relies on the title of the Act and the common understanding of “labor” to decide that “labor” applies to manual labor
      6. Contextual argument: enacted in response to the collapse of the manual labor market, **“the mischief”** to be avoided
         1. As ascertained by common knowledge, current events, LH and another judicial opinion
      7. LH: senate committee report (unlike Riggs which did not look to LH)
         1. Not representative to the views of the whole legislature but speaks to the issue at hand; an answer to the Legal Process inquiry
         2. “The current language should be read as manual labor”
      8. Societal Values
         1. “this is a religious people”
         2. Assumes judges can discern broad, deep values of American public
         3. And that legislators do not act contrary to them
      9. Words are instruments to convey a purpose to which the court must be loyal its interpretation
         1. American Trucking: “Even when plain meaning id not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words”
      10. **Faithful agent under purposivism but functionally similar to partnership model**
          1. “This is not the substitution of the will of the judge” just that the words are an imperfect representation of the will of the legislator
          2. Conceptually different from partnership model
      11. If general purpose governs, how much guidance for judges?
          1. What if someone murdered not the testator but primary heir?
          2. What if there are multiple purposes at conflict with each other?
   5. Would open partnership or reliance on formal amendment be preferable?
      1. If judges confined interpretation to the terms of the statute it would incentivize amendment and clearer drafting
      2. Or just accept an open partnership
8. Textualism Rises
   1. **Casey (1991)(*The Expert Fees Case*)**
      1. Q: Can expert testimony fees be shifted to the losing party pursuant to statute which permits the award of “reasonable attorney’s fees”?
      2. Held: No. The best evidence of the legislature’s purpose is the text itself and the text is CLEAR, given statutory and judicial usage, and does not envelope expert fees in reasonable attorney’s fees.
         1. Statutory usage: treated as distinct in other statutes—if “attorney’s fees” included both then this would create a redundancy in those statutes
         2. While courts may have relied on equitable doctrines to shift not only attorney’s fees but also expert fees, they never did so because they saw the latter as part of the former
         3. **Other sources of evidence may be used but only when there is ambiguity in the text.**
      3. Unambiguous meaning cannot be manipulated by legislative history
         1. Despite there being legislative history to show that this statute was enacted to reverse *Alyeska* and to encourage plaintiffs to bring civil rights claims, the best evidence of a statutes purpose is the text itself
         2. Unambiguous text cannot be expanded or contracted by the statements of individual legislators of committees during the court of the enactment process
      4. It is not the judge’s role to smooth over inconsistencies in policy
      5. Incentivizing consistency in the law
      6. Dissenting, Stevens
         1. Purpose of bill is to return courts to Pre-*Aleyska* practice of shifting fees in civil rights cases, including expert fees
         2. Congress is the master but we do the country a disservice when he needlessly ignore persuasive evidence of Congress’ actual purpose and require it to go back and do better whenever its work product suffers from an omission or inadvertent error
      7. **Both subscribe to legislative supremacy but disagree about how to best be a faithful agent to Congress**
   2. Different views of or focuses on the legislative process that accounts for inconsistency between plain meaning and intended purpose
      1. Purposivist – inadvertent legislative omission or failure of foresight
      2. Textualist – result of a process that necessarily involves compromises which must be preserved
   3. A statute has many layers of purpose and is therefore vulnerable to abstraction
   4. Scrivener’s Errors: **Amalgamated Transit Union (9th Cir. 2006)(*The Less is More Case*)**
      1. Mistakes in transcription: The statute created a waiting of period of 7 days before you could file an appeal without providing a maximum: “not less than 7 days”. Arguably meant to have been a deadline: “not more than 7 days”
      2. Judges are hesitant to apply the doctrine
      3. Intentionalism [?//]
      4. Purposivists:
         1. Legislative history indicates it was designed as a limit of within which an appeal could be filed
         2. “No logical purpose” to have a minimum but not maximum [debateable]
         3. Presence of other scrivener errors (or same error repeated)
         4. “no rational basis” for omitting a single day (Stevens)
      5. Textualists
         1. Legislative history cannot be used to directly contradict words of statute when unambiguous. It may be used to clarify ambiguous text.
         2. Litigators and lawyers have to be able to rely on the actual text
         3. Absurd results mitigated by FRCP
         4. Scalia: The scrivener’s error must be “clear to the reader” and “it will usually be pretty clear that the result produced by the error could not possibly be chalked up to a compromise”, i.e. the error must result to nonsense or meaninglessness. Easterbrook did not find nonsense present in *Less Is More Case*.
      6. Should it matter than Congress eventually amended to “not more than”?
         1. Sitting legislature is not necessarily the enacting legislature
      7. Is it disrespectful to Congress to keep holding their feet to the fire in reading scrivener’s errors literally when the cases get reserved?
         1. Not every policy gets Congressional attention
         2. Textualists may not care about flipping or being disrespectful—care about making the text reliable
      8. **Textualism and the Independent Model**
         1. If you’re going to hold congress’ feet to the fire, are you really being a subordinate?
         2. Judges imposing their idea of how they want to read statutes and how reliable statutes should be
   5. Textualism on the Rise
      1. (1) Respect difficult legislative process over judicial policymaking
         1. Normative claim that judges should be faithful agents not partners or independents
         2. Our democratic process depends on respecting the reality of policymaking
         3. Don’t want judges upsetting the bargaining process under the mistaken impression that the process is principled
      2. (2) Respect statutory text over legislative history
         1. The latter is unreliable as indicative of what the legislature really wanted
      3. (3) Arbitrary or interest group deal making often drives the process [HOW DOES THIS FIT IN?]
         1. Clear disconnect between 1 and 3
            1. Why do you want article III judges enforcing an arbitrary or behind closed doors system dominated by interest groups?
   6. Models for Politics [HOW DOES THIS FIT IN? A theory on there being or not being collective intent has to be in reference to a political model]
      1. Trustee – member deliberation and acting on conscience (e.g., war)
      2. Interest group – organizational power per capita (e.g., tariffs)
         1. Organizations have more power than individuals
         2. States, corporations, consumers, unions
         3. Mainstream voter probably doesn’t know how tariffs will affect them but companies and unions do and if mainstream voter knew, they probably would vote against while the organizations are voting for
      3. Median voter (e.g., flag burning)
         1. Mainstream preferences/values to the extent that they exist
      4. Party polarization – unified v. divide gov’t (e.g., health care)
         1. Avalanche of legislative activity when there is unified government
         2. When government is divided likely to see gridlock
         3. Hasn’t been worked in to statutory interpretation
   7. Absurdity Problems
      1. Absurdity Doctrine: Do not interpret statutes to yield absurd results.
      2. **Kirby (1868)(*The Arrested Mailman Case*)**
         1. Sheriff and posse, pursuant to a bench warrant, arrest mailman
         2. Q: Did said sheriff and posse, in effectuating the arrest, obstruct the mail in violation of the Act prohibiting knowing or willful obstruction of the mail or a mail carrier
         3. Held: No, when the results would be absurd then “the reason of the law in such cases should prevail over its letter”
         4. ∆’s did not intend to obstruct the mail or its carrier within the meaning of the statute
            1. A Textualist could arrive at the same result on a reading of “knowingly and willfully”
         5. To hold otherwise would be absurd since the ∆’s were acting lawfully and common sense dictates that the public inconvenience resulting from delayed mail is nothing compared to the “inconvenience” that would result if we allowed mail carriers to be immune from arrest for murder while on the job
      3. Even Textualists draw the line somewhere
         1. Legislative compromise may result in “awkward” consequences but they don’t totally reject the absurdity doctrine, confine it to political absurdity.
      4. How are judges supposed to test to absurdity?
         1. Standard: Common sense, “all laws should receive a sensible construction” given context
            1. Blood in the streets example
         2. Under the faithful agent model, a judge has to find absurdity in a political not a normative sense. Absurd that the legislature would produce an absurd result.
      5. How might models for politics affect the doctrine and examples?
         1. Interest group model of politics can yield weird results, so under this model a subordinate model judge would be unlikely to find political absurdity under this model
            1. Some weird interest group might want to protect federal servants from state prosecution while on the job
            2. Really hard to know what is absurd
         2. Median voter position: easy to see under this model that application of the statute as written would yield a politically absurd result
      6. Absurd consequences are unstable over time
         1. The barber opening the veins of a person having a fit to remove ill humors
      7. Incentivizing amendment
9. Purposivism Survives: Textually Constrained Purposivism or “The New Purposivism”
   1. Purposivism survives and coexists with textualism help resolve ambiguity. Purpose can be found in many sources (see *General Dynamics*)
   2. Identifying Statutory Goals: **General Dynamics (2004)(*The Age Discrimination Case*)**
      1. Using an understanding of legislative purpose to defend a relatively narrow interpretation of statutory text
      2. Facts: petitioner eliminated health benefits but made an exception for then-current workers who were 50 or older. Respondents were at least 40 (covered by Act) but under 50 (lost their benefits)
      3. Q: Does the Age Discrimination Act forbid favoring the old over the young? Held: No.
         1. Text: Discriminate against “any individual…because of such individual’s age”
      4. Majority relies on purpose + text
      5. (1) Purpose arguments for limiting “age” to “old age”
         1. Semi-conflicted LH
            1. Agency report, hearings, etc. v. a floor colloquy (Latter rejected in face of rest of evidence relied on by majority)
            2. Testimony focused on stereotypes about older people; why sometimes it might be legitimate to fire or decide not to hire an older person
         2. Social History
            1. actual practices engaged in out there in society
            2. the “mischief” – the social problems
            3. Congress was aware of fact that people talking about and experiences age discrimination as discrimination against the old in favor of the young
         3. Text itself: enumerated purposes, age minimum of the protected class, contrast with Title VII [Congress wanted this act to be treated differently than Title VII]
      6. (2) Textual arguments – whether “age” is clearly “number of years”
         1. Dictionary usage – includes both, though old age is secondary
         2. Colloquial usage – competing illustrations
         3. Consistent use – indicates BFOQ defense would be incoherent
            1. If true, outcome driven by purposivism reason trumping text
         4. Surround words – contexts of “discriminate” v. “qualification”
      7. Dissenting, Thomas (Samaha loves this dissent)
         1. Clear meaning does not restrict only to discrimination against older people
         2. Consistent use 🡪 majority’s meaning of “age” would render one of the statute’s affirmative defense incoherent
            1. You discriminated against me because I’m old
            2. Defense: old age is a bona fide occupational qualification
            3. Makes no sense – you will never need the defense

A surplus

Leaves the defense with no application

* + - * 1. Devastating under the consistent use canon
      1. Majority response: age has multiple meanings and can mean different things within the statute based on surrounding words
    1. Contrast with Holy Trinity and Casey dissent (the Old Purposivism)
       1. HT: both rely on purpose but the courts describe what they are doing incredibly differently
          1. Holy Trinity “spirit trumps text”
          2. Here, locates textual ambiguity 🡪 then goes in purpose
       2. Casey dissent: Both looking for general purpose but different conceptions of why
          1. Stevens: congress isn’t always careful and we will disrespect them if we don’t look for their general policy and tidy up inconsistencies with it
          2. In no place does Souter imply that Congress was careless
          3. Rather, relies on an underlying coherence in policy
  1. Why might both purposivism and textualism survive?
     1. Different opinions on the bench
     2. Strong form of textualism can build reliance on the US Code without having to rely on other sources
     3. On the flipside, you end with some absurd or indefensible results which serves as a check on textualism
     4. The quandary then becomes how to determine what is an absurd or indefensible result and the resulting question of how many mistakes the judiciary is going to make and how is it going to effect the democratic process
  2. Purposivism survives – coexisting with textualism
     1. Purpose used to help resolve ambiguity
     2. Purpose may be found in many sources, *see General Dynamics*
     3. Judges then must decide how far to pursie these purposes…
  3. Making statutes work
     1. **Abramski (2014)(*The Straw Purchaser Case*)**
     2. Using an understanding of legislative purpose—and “statutory context” more generally—to defend a relatively broad and flexible interpretation of statutory text
     3. Facts: Abramski bought his uncle a gun. His uncle could have bought it himself but Abramski was able to get a discount. He checked and signed ATF form, which asked if he was the actual transferee/buyer of the firearm, elaborated the meaning of “actual buyer” and indicated that a false answer was a federal crime
     4. Statute prohibits some false statements “with respect to any fact material to the lawfulness of the sale . . . of such firearm . . . .” 18 U.S.C. §922(a)(6). Which sales are unlawful? *E.g.*, a “dealer shall not transfer a firearm to any other person . . . unless . . . the transferor has verified the identity of the transferee,” §922(t)(1)(C)

1. Q: Does the statute criminalize a false answer indicated that you are the “actual transferee/buyer when you are a straw purchaser?
   * + 1. ∆: I could have bought the gun for myself anyway.
2. **Majority – uses general purpose and effects, structure, history.**
3. ? Was the text itself ambiguous, or did the majority create ambiguity?
   * + 1. Reliance on ordinary usage
          1. Dissent: If I tell my song to go buy milk and eggs no one would say that the store sells the milk and eggs to me
          2. Majority: if I send my brother to the Apple store with money and instructions to purchase in iPhone, then take immediate and sole possession of that device, am I the person who have bought the phone or is he? Nothing in ordinary English usage compels an answer either way 🡪 ambiguity
4. ? Would the statute be “meaningless” or not “work” otherwise?
   * + 1. The majority identifies twin goals behind the information gathering requirements: keeping guns out of the hands of criminals and assisting law enforcement authorities in investigating serious crimes
       2. Dissent: the statute wouldn’t be meaningless as compared to a complete lack of statute.
       3. To answer this question you have to know what the purpose is—so the answer depends on how you characterize the purpose
5. ? Are these gun laws the product of compromise?
   * + 1. Both sides agree that they are.
6. ? Can you imagine the compromise being defendant’s view? *Cf.* §922(d)
   * + 1. Yes
       2. Before 1969 there was no federal statute so Congress has stepped in a little on the secondary market
       3. 922(d) prohibits a licensed dealer from selling a gun to anyone it has reasonable cause to believe if a prohibited buyer but gifting remains lawful
7. ? If yes, why would the majority read the statute more broadly?
   * + 1. Imaginable does but mean the best answer
       2. Purposivisim steps in to help you pick the best answer *with evidence*
       3. The majority says that the purpose evidence resolves an ambiguity
       4. Not that the purpose supersedes plain language
       5. Comporting with *General Dynamics*
8. Beyond Faithful Agents?
   1. **Dynamic statutory interpretation**
      1. Within textualism, the same old meaning might yield new results. *Cf.* *Welosky* (Mass. 1931) (p73) (refusing to use a statute this way).
         1. For example: Statute pegs jury duty to who is qualified to vote. A statute that dictates a speed limit that is determined by amount of snow fall
         2. Specific intent of legislature at time of enactment could not have been to include women in the term “person”, given it was in reference to those who were eligible to vote
      2. Beyond this, a faithful agent arguably might update old meaning. Eskridge (1994) (p74) (consider change in law, facts, values).
         1. Eksridge argues that the right judicial role in statutory interpretation is that of a relational agent—carrying out the general goals and specific orders over time. Accounting for changed circumstances in light of a general intent in such a way that may at times conflict with the plain import or specific intention of the original directive
         2. Subordinate to the legislature
   2. **Judicial partnership and collaboration**
   3. List some tradeoffs and empirical questions to make a confident choice across models
      1. How do you know what is a clear directive from Congress?
      2. Ability to establish consistency and stability
      3. Under which model is stability more achievable?
      4. Predictability?
      5. Litigation and legislation costs
      6. Slow process creates better laws
      7. How does politics run in this country?
   4. ? Is partnership merely theoretical? …
   5. **McQuiggin (2013)(*The Habeas Case*)(5-4)(possible example of PARTNER model)**
      1. Federal habeas is a field which offers a possible contrast to the trends toward textualism
      2. 11 years after conclusion of state proceedings and 6 years after the collection of the affidavits
      3. Since 1996, AEDPA, 1-year limitation from final judgment or “date on which the factual predicate of the claim…could have been discovered through the exercise of due diligence”
      4. No one thinks the latter more lenient standard is triggered here
      5. Q: can the time bar be overcome by a convincing showing of innocence?
      6. Majority – an “equitable exception based on “actual innocence”
      7. **Textual problems**
         1. There is no such clause
         2. Other explicit exceptions (additional evidence) are present they just don’t include this actual innocence exception – *expressio unius*
         3. Plus innocence clauses are in other provisions of the habeas statute although they are harder to survive
      8. **Precedent** – majority’s heavy reliance on pre- and post-AEDPA cases involving procedural default doctrine and equitable tolling, *Holland* (2010).
         1. Assume legislature operates against a background of judicial practice and are therefore aware of court’s **precedent**
         2. We have created exceptions and the statute doesn’t address them
      9. **Clear statement rule** – preserving “traditional equitable discretion.”
      10. **Purpose** – brief references to judicial management and federalism.
          1. The federal statute limitations v. state statute of limitations
          2. The miscarriage of justice equitable exception applies to state procedural rules, including filing deadlines.
          3. The State’s reading that this exception does not apply to Federal procedural rules
          4. “It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring structure enforcement of federal procedural rules than procedural rules established and enforced by the States"
          5. **If these purposivist arguments aren’t convincing, it’s more partner than purposivist**
             1. **Counter:** McQuiggin refers to congressional intent and what AEDPA supposedly seeks to do; perhaps Congress legislated against an accepted background of judicial creativity
      11. ? What model(s) and method(s) best fit the majority and dissent?
          1. Majority’s heavy reliance on judicial precedent. The *kind of evidence* used suggests a partnership and makes it inherently less purposivist than some of the cases we have seen before
9. **Textualism Elaborated**
10. Ordinary or specialized meaning:
    1. **Nix (1893)(*The Tomato as Vegetable Case)***
       1. Π suing NY port collector for tax on tomatoes. Tariff Act covers vegetables but not fruit.
       2. Ordinary Meaning
          1. Dictionary meaning
          2. Colloquial meaning
             1. Common usage = vegetable (served at dinner)
       3. Specialized Meaning
          1. No trade meaning.
          2. Specialized (botanical) usage = fruit
       4. Correct answer to “fruit or vegetable” depends on the context and community
       5. So who is the statute’s audience? Here, it would be regulated parties (vegetable traders). If there had been a specialized trade meaning, that would have likely trumped.
       6. The target audience will not always be obvious. The court has dealt with this by starting from a presumption that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.
          1. Why? Making the law accessible to the common man so that he may rely on the US Code
       7. The presumption could be an example of the
          1. Subordinate model: the Court interpreting what it thinks Congress thinks its role is (the voice of the electorate)
          2. Partnership model: the Court imposing how it thinks Congress should operate
       8. The selection of the preference for ordinary meaning is a normative call. How is that different from a canon favoring narrow tax statutes.
       9. Rule: Presume ordinary meaning for undefined words. *Nix* (1893). But generally follow terms of art. *Morissette* (1952) (p110).
    2. **Moskal (1990)(*The Odometer Fraud Case*)**
       1. Q: Does “falsely made” include genuine vehicle titles that list fraudulent mileage?
       2. CL meaning: forgery
       3. Majority posits evidence for a plurality of definitions at CL
          1. Ordinary meaning includes titles with false information
          2. Courts have treated the phrase to include such
          3. Courts have treated “forged” to include such
          4. ALR
       4. To equate “falsely made” with “forged” would violate canon that each word be given meaning—cannon against surplusage. Also relies on canon of consistent usage.
       5. Given plurality of definitions, pick the one that accords best with the statutory purpose to prohibit introduction of falsely made documents regardless of how they were made
          1. Purpose can prevail over presumption of specialized meaning (in this case, CL meaning)
       6. Why not always follow the legal term of art?
          1. Normative assumption that we want a statute to be accessible to an ordinary person
       7. Dissent
          1. Dictionary definitions and a string cite of cases demonstrating an established CL meaning
       8. Same exact debate about how broad Congress’ general purpose is: did mean to target false documents regardless of how they were made or did mean to target forged documents?
11. Dictionary or colloquial meaning
    1. **Smith (1993)(*The Gun-Drugs Swap Case*)**
       1. Q: Does exchanging a gun for drugs constitute “use” of a firearm “during and in relation to a drug trafficking crime”.
       2. Held: Yes. Court following what it thinks is the ordinary meaning.
       3. No specialized meaning. Fight about different ordinary meanings.
       4. Colloquial
          1. Majority: “He used the gun to buy drugs”
          2. Dissent: “Use of a firearm” is the more relevant and pertinent colloquial meaning
       5. Dictionary, Law Dictionary and Precedent
          1. Broad definitions of use
       6. Structural argument: use as in non-weapon use appears elsewhere in statute
       7. Purpose
       8. Rule of Lenity – what is the threshold for clarity? How do you know when there is ambiguity or not? Room for judicial discretion
       9. Dissent: Use informed by words around it; “firearm” 🡪 it’s intended purpose (i.e. a weapon, not currency)
          1. Structural argument
          2. Canon against surplusage – there has to be a meaningful dichotomy between “use” and “carry”
       10. What other canon could you look at to try to get information to resolve this case?
           1. Purpose—address the dangerous drugs plus guns combo, allegedly
           2. Does adding this variable increase or reduce discretion?
       11. Connection with *Nix*; are they consistent?
12. **Legislative History**
    1. LH associated with intentionalism, but other methodologies may use it
    2. Looking for a good constraint on judges and agencies that reflects the collective intent of Congress.
    3. Use of LH by the Court has changed
       1. Early – disapproved but “public history of the times” okay
       2. 1940s-1980s – peaked after the new deal
       3. 1990s – today – declined without disappearing
    4. What might explain the rise of LH?
       1. Congressional recordkeeping [??]
       2. Congressional preference for drafting [??]
       3. Judicial appointments
       4. Judicial preference for constraint
       5. Judicial idea of collective intent (think about how people interpret personal letters or email)
    5. The weight afforded LH varied by type (this hierarchy survives to the extent LH is still used)
       1. Committee reports = most weight
       2. Sponsor statements = nearly as weighty
       3. Other Member statements = little weight
       4. Hearing testimony = little weight
       5. Amendment history = variable [??]
       6. Ratification at T2 = some weight
       7. Acquiescence at T2 = less weight
    6. Post-New Deal use:
       1. ***Justified as a constraint on judicial discretion that reflects the intent of Congress and respects congressional delegation***
    7. **Train (1976)(*The Radioactive Materials Case*)(2 Acts, 2 Agencies)(8-0)**
       1. Q: Are nuclear materials “pollutants” within the meaning of the FWPCA (Clean Water Act)? If so, the EPA can regulate their discharge into waterways despite the fact that the Atomic Energy Act and the AEC already regulate the discharge of certain nuclear materials. The EPA excluded said radioactive materials in its regulations.
          1. AEA – The Atomic Energy Act
             1. Licenses covering 3 types of radioactive material from nuclear power plants, **with AEC administering and adopting** standards it “may deem necessary or desirable… to protect health…”
             2. From nuclear power plant
          2. FWPCA – The Clean Water Act
             1. Permits for water discharge of “pollutants,” defined to include “radioactive materials,” 33 U.S.C. §1362(6) (with exceptions) **with EPA or a State administering and adopting** regulations.
             2. Into water
       2. Held: The EPA properly excluded those radioactive materials covered by the AEA. Consistent with both statutes.
       3. Rule: Reliance on plain meaning can be insufficient to determine the actual legislative intent of Congress, which must be dispositive.
          1. Use of LH despite unambiguous language.
          2. Intentionalism
       4. Without reliance on LH 🡪 inevitably overlap
          1. Those radioactive materials are covered by the ordinary and specialized meanings of “radioactive materials”
          2. FWCP enumerates exceptions to “pollutants” and does not list radioactive materials (expressio)
       5. Statutory definition of “pollutants” includes radioactive materials.
          1. “Radioactive materials” becomes a specialized term—those radioactive materials not covered by the AEA. [??]
       6. LH relied upon
          1. **Committee Report** – on point House report plus stable bill text
          2. **Colloquy** – a primary drafter and a Senate committee chair, debateably on point
             1. Will these sources reflect the specific intent of all Members?
             2. Could Congress have delegated power to these Members?

Congress created the committee which delegated to staffers

* + - 1. **Defeated amendment** – state authority over nuclear plant waste
         1. How helpful is this source?
      2. **Conference Committee** – report plus ranking member explanation
    1. Justifications for reliance on LH [that Textualists will attack]
       1. **Reflect Intent**
       2. **Respect Delegation**
    2. Does this LH increase or decrease judicial discretion?
    3. Why might you want double coverage by two agencies?
       1. Stricter regulations under FWPCA’s delegation to the states
       2. Added process, two agencies – “no nukes”
       3. Different statutes
          1. AEA – cares about health and nuclear production
          2. FWPCA – health and the environment
       4. Agencies build up reputations and thereby attract certain types of people
    4. Would deference to the EPA be better?
       1. Hints of *Chevron*
  1. **Will adding more sources tend to reduce or increase judicial discretion?**
     1. If you are looking out over sources and picking your friends, then potentially increases discretion
        1. Requires the assumption that the judge is looking for friends
        2. Requires there to be discretion among the choices, which requires something more than just adding sources
           1. A willful judge can do a lot with one source
        3. And that there is more than one source, that they vary
     2. A hierarchy of sources introduces a formula for restricting discretion
     3. Assume a source may point in one of two directions or be unclear (-1,0,1)
     4. As we add sources, the chances of a tie fall
        1. All else being equal (quality, legitimacy, etc.)
     5. The textualist critique of LH must therefore rest on some other logic than adding sources increases judicial discretion
     6. One approach: Vermeule notes that taking on new information is costly and should therefore be avoided as much as possible
  2. Textualist Critique of LH (a direct response to the justifications)
     1. (1) LH can be unclear and costly to check – or judges pick their friends
     2. (2) Can be unreliable on intent – or collective intent is a fiction (at least with respect to the issues that are being litigated)
        1. Unreliable as to collective subjective intent
           1. A free agent could insert something into the report, though they will likely get disciplined
        2. Collective subject intent just isn’t a discernable thing
           1. Agenda control, etc.
           2. The weighing of a series of options—there is not one intent among 100s of legislators
           3. Intentionalists just have the wrong idea
     3. (3) Congress might not have delegated – or should not be allowed
        1. Unreliability is not the issue here. It’s an empiric claim that delegation can hijacked and a normative position that delegation is improper
        2. Constitutional claim
        3. The latter is not really a subordinate agent model
        4. Stevens: since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress
        5. Scalia: Article 1 Section 7 vests all legislative powers into the Congress. If legislation consists of forming an “intent” rather than adopting a text (a proposition in itself that Scalia challenges), Congress cannot leave the formation of that intent to a small band of its number, but must, as the CNSTN says, for an intent of the Congress.
           1. Response Article 1 Section 5: power of Congress to make its own rules
           2. Necessary and Proper Clause
  3. **The Reasonable Attorney’s Fees Case: *Blanchard v. Bergeron* (1989)**
     1. Q: Does a pre-existing fee agreement (such as a 40% contingency fee) serve as a cap on an award of “reasonable attorney’s fees”? ∆ arguing that “reasonable attorney’s fees” could not surpass an agreed upon amount.
     2. Held: No, it serves as one factor but is not dispositive.
     3. Majority relies on LH. Committee reports mention the *Johnson* 12-factor test, which does treat a prior agreement as a cap, but Congress did not embrace this aspect of the test as based on the Senate Report.
        1. Which references three District Court Cases as “correctly applying” *Johnson* test
           1. *Stanford Daily v. Zurcher*: contingent fee agreement as a factor but not dispositive
           2. *Davis v. County of Los Angeles*: permitted fee award to public interest firm which would otherwise have been entitled to no fee
           3. *Swann v. Charlotte-Mecklenburg*: reasonable fees should be granted regardless of pre-existing fee arrangement
     4. Scalia, concurrence
        1. Challenging LH as a good constraint that indicates the intent and respects the delegation process within Congress
           1. **There is no subjective collective intent**
           2. **It is unconstitutional for Congress to delegate**
        2. “Congress is elected to enact statutes rather than point to cases…”
           1. Is this the position of a subordinate faithful agent?
           2. Defining Congress’ role and if that definition doesn’t match that of Congress’ role then this isn’t a subordinate faithful agent
           3. Independent – trying to determine the proper role of the judge and of congress in our society under the constitution
        3. Senate report = single committee in a single house NOT the action of Congress as a whole
           1. Anyone familiar with reports is “well aware” that it’s the staffers or a lawyer/lobbyist

References were inserted by a staff member to influence judicial construction and now it’s law

* + - * 1. Relying on committee reports violates the constitution of the United States

Independent model

Checking the constitutional limits on how congress can delegate

* + - 1. Not reflective of collective intent
         1. Few members of Congress actually read either report even if reports were published before the vote (which is not always the case)
         2. Fewer members went off and researched the cases references let alone contemplated them as trumping *Johnson* because of dictum v. holding
         3. (Yet this critique would also apply to dictionaries, canons, etc.)
      2. Incompatible with judicial responsibility to assure reasoned, consistent and effective application of statutes
    1. Deeper concern about collective intent
       1. Is there such a thing as a subjective collective intent?
          1. If the committee report doesn’t even explicitly deal with this issue of the cap, it seems fanciful that the majority of Congress all had in their head the same notion of what to do in this situation
       2. Unlikely that they you are going to have majorities that think of the issue and then agree on it
       3. Agenda control makes it impossible to ever really know what congress preferred. No way of telling which policy has the majority support because it just depends on which policies are compared. Depends on who controls the agenda as he decides who compares what to what (Condorcet’s Paradox).
  1. **The Trucking Pension Case: *Continental Can Company, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union* (1990)**
     1. Nuanced on LH
     2. Statutory exemption if “substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry.” 29 U.S.C. §1383(d)(2).
     3. Q: Does “substantially all” mean majority or more than a majority within Section 1383(d)(2)?
        1. 50.1% (majority) or 85% (meaning of “substantially all” in tax setting)
     4. LH included conflicting sponsor statements, one after enactment
        1. Sen. Durenberger inserts commentary into the record post-enactment saying that the amendment originated in the senate and the senate meant 50.1%
     5. **Held (Easterbrook):** Adopts 85% test over 50.1%, marginalizing LH.
     6. **Reflect intent:** a language theory, but also distinguishes among LH (i.e. respects the LH hierarchy)
        1. Words have no natural, inherent meaning
        2. There is an objective meaning for language based on convention and no individual gets to control the meaning based on what is in their head
           1. Privately held, un-communicated meaning do not influence a reader’s beliefs
           2. Did anyone besides Sen. Durenberger use idiosyncratic meaning? No.
        3. What about the email theory? “I want to know what the author meant.”
           1. Here, the “author” is the collaboration of 100s of legislators
        4. What about LH as a private language for Congress?
           1. Colloquial usage and dictionary are more readily available, cheaper and reflective the normative position that the law should be accessible to and understandable to the common man
        5. Scalia: “Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does is fanciful”
     7. **Respect delegation:** circumvention of formal amendment process
        1. **Article I powers are non-delegable**. Congress cannot enact an intent, which is later filled in by a small band of its members. “The Constitution gives force only to what is enacted”
           1. Is this the position of a faithful agent? Or an independent actor interpreting the CNSTN?
        2. Only the law that is passed is the will of the majority—LH is illegitimate because it hasn’t gone through the bicameralism and presentment process
        3. LH is a unique extrinsic source because it is generated by legislative actors. It can be used to insert meanings that would not have passed the Article I process
           1. Empirical claim from Scalia that the more we use it the more unreliable it becomes. Legislators, lobbyists, lawyers start to pick up on how it can be manipulated.
        4. Efforts to change the meaning of the text without changing the text itself
           1. If you wanted 50.1% to be enacted, should have wrote that and see if it passes the process of compromise
     8. But dictionaries aren’t enacted… is it perhaps a better argument that LH can be misleading about bill meaning.
        1. This addresses the reflecting intent justification for use of LH but does it address the respect for delegation concern?
     9. Dialogue between Dole and Armstrong
        1. The committee report isn’t law and we should constrain ourselves to communicating legislative intent in the enact law itself
     10. Judicial Decision Costs
         1. Since it’s all speculation about which method is more accurate or more representative, go with textualist approach since LH is expensive and time consuming
  2. Contemporary treatment
     1. Clear statutory text trumps LH, see Exxon
        1. Demoted but not eliminated
     2. Skeptical treatment of LH regardless
     3. What might explain these changes? Combination of ordinary politics, constitutional system and ideas
        1. Internal dynamics of the Supreme Court
           1. Appointments
           2. Scalia and Thomas hardline on LH
           3. Actual influence of LH might be more prevalent and other justices just being polite to Scalia and Thomas
        2. New judges brought new ideas
           1. Collective subject intent as a phantom
           2. The wrong idea for a statute
           3. Concerns about free agents
           4. Constitutional concerns
     4. **Exxon Mobil Corp. v. Allapattah Services, Inc*.* (*The Class Action Jurisdiction Case*)(2005)(5-4; AMK, AS, CT, WHR, DHS)**
        1. A federal class action solely on diversity jx, with only some members >$75000. The Court had denied such supplemental jx in diversity class actions, *Zahn* (1973), and in federal question cases, too, *Finley* (1989).
        2. A statute (1990) flipped *Finley*, everyone agrees, but what about *Zahn*?
        3. **Held:** (1) text and structure clearly flip *Zahn* so LH can be ignored and (2) regardless, LH in this case illustrates our “worst fears” …
        4. Methodology: 1367 is not ambiguous therefore no room for legislative history even if it shows that Congress did not intend to overrule *Zahn*
           1. LH can be used to introduce ambiguity
        5. Constraint and clarity concerns
           1. LH in this case was murky and contradictory

A committee report and a subcommittee not appointed by congress or comprised of congressmen

If you prioritize the committee report, the contradiction isn’t so disruptive…

* + - * 1. This speaks to the “LH as collective intent” justification—mixed signals
        2. Trying to determine which is indicative of collective subjective intent is hopeless
      1. Circumvention of Article I and Cooking Concerns
         1. Judicial reliance on LH like committee reports, which are not subject to Article I process may give unrepresentative committee members—or worse, unelected staffers and lobbyists—both the power and the incentive to attempt to manipulate LH to secure results they were unable to achieve otherwise
         2. Majority reads Reading the law professors as admitting that they couldn’t get it into the bill and then got their friend to add it in later
         3. Deliberate attempt to amend a statute through a committee report
      2. Samaha thinks this court is looking at LH pretty skeptically when they say their “worst fears” about LH are confirmed
      3. Dissent (Stevens, Breyer)
         1. Ambiguity is in the eye of the beholder
         2. We are more constrained when accountable to all reliable evidence of legislative intent
    1. How do you define “ambiguity”?
       1. Kennedy treats as a binary but isn’t it more of a continuum?
       2. Is the rule in place just to remind courts to look at the text first?
       3. Ambiguity vs. vagueness
          1. If vagueness is intentional, then perhaps Congress affirmatively wishes to confer upon the interpreter (the judiciary) the discretion to work out the proper application to a particular circumstance. But if that is true, then use of LH to narrow the broad standard might be viewed as contradicting the statute. But, then didn’t the statute mandate the discretion to narrow it thusly?
    2. Which kinds of LH to favor?
       1. Ones that come at the heart of the process
       2. The interaction between ardent supporters and pivotal legislators to distinguish cheap talk from real signals of the bill’s intended meaning
       3. Both of the above give least weight to act’s opponents
    3. Uses of LH: There is arguably a difference between relying on LH as an authoritative source of legislative intent and relying on it as a source of evidence for acts about the world.
       1. Easterbrook: “Clarity depends on context, which LH may illuminate”
          1. Looking for the rules of language they used not for the contents of their heads as to ascertain applicable meaning

But don’t you have to know the context first to know if there is ambiguity in this historical view of language manner?

How does this square with Kennedy ruling out LH unless there is ambiguity on the face

* + - 1. Terms of art
      2. To identify the mischief (p181)
         1. Backup research
      3. To help determine the existence of an absurdity
    1. Why might LH survive as evidence of mischief and terms of art?
       1. Backing up with other sources
       2. Pragmatic –trying to get votes
       3. Principled
          1. Supplemental evidence to confirm
          2. Strong Textualists probably wouldn’t use LH in this way
       4. Confirming that which exists outside the beltway
       5. As opposed to tipping the hat to Congress
    2. How about using only on-point committee reports?As a mend-it-don’t-end-it compromise
       1. Other ways of confining use of LH that have their vices and virtues
       2. Cheaper—less contextualizing of debates
       3. What about tiebreakers?
       4. If you think LH is valuable, you’re throwing out valuable information
       5. Restricts finding your friends in the crowd
       6. But Committee might not be represented or properly delegated
       7. And up the value of being able to control the content of the committee report
          1. Lobbyists, staffers, etc.
       8. But focusing the attention in this way; would specify exactly where policing needs to take place. Focuses bad and good actors

1. **Canons of Construction**
   1. Canons present factors and arguments, not really a formula or code
   2. Be able to contrast and compare (1) semantic canons, (2) substantive canons (3) arbitrary canons
      1. Semantic: generalizations about how the English language works
         1. Form of textual analysis
      2. Substantive
         1. Judge-made principles, grounded in commitment to certain systemic values rather than empirical beliefs about actual congressional intent
         2. Rule of lenity
      3. Arbitrary
         1. Not supported by how language works/is used nor founded on a valued principle.
         2. Still, can be useful for breaking ties and closing cases
   3. Example: **McBoyle(1931)(*The Stolen Airplane Case*)**
      1. National Motor Vehicle Theft Act §3 (1919) barred certain interstate transport of a stolen “motor vehicle,” which, under §3, “shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.”
      2. Q: Does word “vehicle” in phrase “any other self-propelled vehicle not designed for running on rails” include an airplane?
      3. Held: An airplane is not such a vehicle, so defendant is not covered.
      4. Government relies on dictionary and purpose
         1. Dictionary
            1. Words imbedded in the phrase
            2. “any other” sounds inclusive
            3. “self-propelled”
            4. a general rule with an exception

“not designed for running on rails”

*expressio unius*

* + - 1. Purpose
         1. Interested in interstate theft because states wouldn’t have jurisdiction. An aircraft is probably the easiest of these vehicles to accomplish the identified mischief.
    1. Support for the holding
       1. Ordinary meaning – if we pick colloquial over dictionary
          1. In everyday speech, vehicle calls to mind on land even though the dictionary definition is broader
          2. *Smith* “use of a firearm”, Tomato case
       2. LH – silence on airplanes, pre-airplane state statutes
       3. Canons
          1. (1*) ejusdem generis* for residual terms (semantic)

“of the same type”; the theme of the list is land vehicles

* + - * 1. (2) lenity (substantive)

Criminal statutes should be clear and should not be construed against the defendant if the statute could plausibly be read as not covering defendant’s conduct

* + 1. For *ejusdem generis*, how about “even-wheeled” vehicles?
       1. *Ejusdem generis* does not tell you how to get the pattern. Within the canon, there is more than one pattern that can be identified.
       2. Have to inform the theme with tools outside the canon
          1. Ordinary meaning
          2. Purpose
          3. Another canon (absurdity)
          4. Consistent use across statutes
       3. If LH worries you as potentially increasing judicial discretion, then you should be equally worried here [??]
  1. Canons are criticized as vague and conflicting. But to what degree?
     1. Constraint from common sense (“look before you leap” v. “Those who hesitate are lost”)?
        1. Informed by purpose—goal of preserving life
     2. Presumptive rules with principled exceptions?
        1. Not outright conflict
        2. *Expressio unius*: inclusion of one implies exclusion of others (broad rule with exceptions); cf. *McQuiggin* (habeas limitations)
     3. Hierarchy of canons and other sources?
        1. Can you identify when a canon is appropriate and hierarchically situated compared to other sources like LH?
        2. Specific over general: our discussion of statute titles in *Holy Trinity*
  2. Specific over general
     1. Our discussion of statute titles in *Holy Trinity.*
     2. ??
  3. *Expressio unius*
     1. Inclusion of one implies exclusion of others, *see Holy Trinity.* (broad rule with exceptions); *cf. McQuiggin* (habeas limitations).
     2. Always remember that *expressio* can run in two conflicting directions
     3. **Silvers v. Sony Pictures Entertainment, Inc. (*The Copyright Claims Assignee Case*)(2005)(en banc)**
        1. An employer assigned a screenwriter the right to sue in this case.
        2. Copyright Act (1976): “The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.” §501(b); *see also id.* §106 (listing “exclusive rights”).
        3. Q: Can an assignee who holds an accrued claim sue for copyright infringement?
        4. Held: A mere claims assignee cannot sue.
           1. The plain meaning of the statute, as informed by *expressio unius*, only gives standing to legal or beneficial owners of exclusive rights
           2. These two type of ownership listed at the exclusion of others
        5. Buttressed by purpose: Congress trying to carefully circumscribe who can sue for infringement
           1. Supported by inclusion of a durational limit—owner can sue for infringement committed only while in ownership of the exclusive right in question
        6. List of exclusive rights, which does not include the right to sue for an accrued claim
           1. *expressio unius* in assuming this list of 6 is exlcusive
        7. Majority prioritizes the canon over LH
        8. Dissent
           1. Dissent: we don’t use *expressio* unless statute is unclear in light of LH
           2. Statute is ambiguous because it does not address whether assignees of accrued claims may sue 🡪 include LH.

Dissent relying on silence as an indicator of ambiguity

Neat, cheap trick: “Congress knew about to make the statute more clear”

But this could apply in almost every case…. Obviously, if Congress has thought of it, Congress could have resolved the issue

* + - * 1. Quote from drafters: Purpose was so expand who can sue so as to protect modern ownership rights, which are divisible
        2. Clear congressional intent, as evidenced by LH, trumps canon of construction
        3. Congress was enacting against a backdrop of 1909 Act granted standing to sue only to “proprietor” of entire copyright, but courts nevertheless allowed assignees of an accrued cause of action of copyright infringement to sue for infringement of their property rights

Assumes Congress knew this backdrop and added no explicit language to change that practice

Parallel to *The Nicotine Case*

* + - * 1. Section 201(d)

Explicit provision allowing owners to transfer parts of rights

So can’t an owner transfer the right to sue? Ambiguity.

But 201(d)(2) rebuts this with another *expressio* argument

Coupled with LH, makes sense that this is a divided opinion

* + 1. SCOTUS: canon only has force when the items expressed are members of an ‘associated group or series”, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence”
    2. *Expressio unius* sometimes contradicts the speech patterns of ordinary people
       1. Grocery store example
    3. If we don’t have evidence that the canon reflects people’s usage, is expression defended as a policy preference?
       1. Keep an open mind about the value of arbitrariness
       2. Arbitrary but useful because it helps close cases that are hard
       3. Saves cost of digging through precedent and LH
       4. And Congress can always work around it
       5. No need to depart from the subordinate model by relying on judicial preferences for legal consistency over time or how judge’s see language as working
    4. **Place:** Appears to be lexically superior to LH
    5. **Strength:** a presumption subject to context
  1. Consistent use
     1. Presume term has the same meaning in the same statute, see *Marshall*, and other statutes on the same subject, see *Casey*
     2. Is the canon supported by evidence of people’s usage? Is it a policy favoring semantic coherence? Is it a policy to keep statutes small? Is it **arbitrary**?
     3. If it’s not supported by people’s use, then it’s hard to make a case for it being semantic.
     4. Is this policy favoring semantic coherence?
        1. What if there is a judicial policy that statutory text be semantically coherent?
        2. Independent of what congress wants
        3. Court’s job to make sense not nonsense out of the US Code
        4. One word will have consistent meaning within a statute and even across different titles within the US Code
        5. Makes it easier for outsiders to understand what the law expects of them
        6. And additional benefit of incentivizing Congress
        7. *Casey* case has this idea
        8. Doesn’t have to be a faithful agent idea, but then the canon is misclassified as a semantic canon
        9. Has to be justified as something other than a faithful agent since there is nothing in the Constitution granting this process
     5. **Gustafson v. Alloyd Company, Inc. (*The Secondary Security Sales Case*) (1995)(5-4 Thomas, Scalia, Ginsburg, Breyer)**
        1. P alleged materially misstated earnings in the k, sued for rescission. Being covered by the Act allows specifically for rescission (rather than damages).
        2. Securities Act (1933) covers “by means of a prospectus or oral communication,” §12(2), and “[w]hen used in this subchapter, unless the context otherwise requires . . . [t]he term ‘prospectus’ means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security,” §2(10).
        3. Q: Does a private contract fall under the meaning of prospectus in the statute?
        4. **Held:** This contract is not a §12 “prospectus.”
        5. Consistent Meaning
           1. Narrow meaning in section 10, which limits prospectus to items containing all the information that would be provided on a registration statement, i.e. a public offering document
           2. This isn’t a definitional section and the plaintiff did not allege a violation under section 10
           3. However, section 10 defines what a prospectus cannot be if consistency is to be maintained
        6. Anti-redundancy
           1. Alloyd uses definitional Section 2(10) to argue that contract falls under “communication”
           2. Broad definition of communication would render redundant “notice, circular, advertisement”

But doesn’t the narrow meaning too?

Types of communication to the public

What about letter?

* + - 1. *Noscitur a sociis*
         1. Documents of wide dissemination
         2. Theme of the enumeration
         3. But “letter” breaks down the pattern…
      2. Thomas, dissenting
         1. Majority is employing a backward reading

Start with part at issue 12(2) and then go to definitional section 2(10)

Section 2(10): makes room for different understandings of the term

“unless the context otherwise requires”

Don’t start with 10

* + - * 1. *Noscitur a* *sociis*

Does not require that the first word of a list, being narrower, limit the breadth of everything that follows

Also, only to be used in case of ambiguity (according to Thomas)

Fundamental disagreement about when it is appropriate to use the canon

Majority treats is as a method within a textual analysis

* + - * 1. Anti-Redundancy

“Communication, written or…” is a catchall phrase and therefore not redundant

Meant to scoop up anything Congress forgot to include in its definition (p221)

* + - * 1. Against Surplus

Under the dissent’s reading, the words that come before “communication” would not only be redundant but a surplus, as they would not inform the meaning of communication

Both readings yield redundancy but the other words under the majority’s reading help the majority arrive at the meaning of communication

* + - * 1. Consistency: “The Whole Act Rule”

Concedes that section 10 use of term is narrower

But argues that Congress indicated intent to employ different usages

2(10) defines prospectus as including confirmation slips, which majority does not claim could be included in section 10 definition

Section 2’s preface establishes its meaning as a default to be used only if “context doesn’t not otherwise dictate’

* + - 1. Ginsburg, dissenting
         1. Backward reading

Start with definitions in 2(1)

* + - * 1. Items listed in definitional section are common in private and secondary sales

Limited meaning in section 10

* + 1. In pari material – “on the same subject canon”
       1. Consistency in meaning of a term used across statutes on the same subject
       2. Hard to tell if this is legislative reality
       3. Judicial role of ensuring legal consistency over time
  1. Surrounding words
     1. Presume a term draws meaning from words around it, see *General Dynamics,* McBoyle – *noscitur a sociis* (“known by its associates”), See *Gustafson*; *ejusdem generis* (“of the same kind” for residuals)
     2. Is *Noscitur a* *sociis* supported by evidence of usage? If not, is it a canon favoring keeping statutes small?
        1. About broad v. narrow
        2. Favors narrow
        3. Whereas, superfluity canon encourages different meaning and therefore may broaden scope 🡪 tension, not necessarily conflict. Just two different presumptions that need more information to decide when one applies (need a tie breaker).
  2. Against surplusage
     1. If possible, give meaning to every word – presume no superfluous or redundant words, see *Moskal*, *Gustafson*
     2. Superfluous language v. redundant word
        1. Give each word meaning
        2. And try to make each word have its own meaning
     3. Is there a good justification for the anti-surplus canon? Does it comport with how ordinary people use language? How Congress uses language?
        1. To know this, you would need evidence of subjective intent when communicating…
        2. Courts don’t have this empirical evidence so they can’t defend as a semantic justification
     4. Setting an arbitrary standard
        1. There might be a better among several policies justifying it but the judges aren’t defending use on the ground of any of them
        2. Just let congress know (judicial consistency)—it’s just that any canon would satisfy this justification
     5. Acting worse than arbitrarily?
        1. Thomas dissent in *Gustafson*: I doubt the majority would read in so narrow and peculiar a fashion most other statutes, particularly one intended to restrict causes of action in securities cases
  3. Slide about how frequently these canons are actually used by drafters
     1. Can the judiciary’s reliance on them be justified under a faithful agent model given these numbers?
  4. Constitutional Avoidance
     1. *Ashwander* (1936) (Brandeis, J., concurring)
     2. **(1) Sequence:** prioritize dispositive non-constitutional issues
     3. **(2) Canons:** re-connect constitutional issues!
        1. **Classical:** if fairly possible, avoid meaning that is unconstitutional
           1. Doing constitutional law and deciding that it would be unconstitutional on the merits and then say the statute doesn’t actually say that
           2. Avoiding a judgment of constitutional invalidity but constitutional law is not being avoided in and of itself
        2. **Modern:** if fairly possible, avoid meaning raising a serious doubt
           1. Can choose a less plausible statutory construction so long as it raises a serious constitutional doubt
           2. Avoids eschewing on the merits
     4. Why might classical constitutional avoidance be unimportant?
        1. You don’t save any costs of constitutional reasoning
        2. Same result as if court had rendered the statute constitutionally invalid for Congress or supporters of the outcome
     5. Why might modern constitutional avoidance be controversial? [??]
        1. debatable whether Congress prefers it to gambling on the merits
           1. you don’t go all the way to the merits
        2. debatable whether it shows restraint or passive aggression
        3. debatable whether courts should try to improve Congress
        4. worries about quality and complexity
           1. more complex, higher drafting costs, etc.
           2. might yield low quality constitutional analysis
     6. Substantive canon justifications
        1. This is a judicial exercise in modesty when it comes to constitutional law
           1. Might help the sequencing rule
           2. But doesn’t this actually increase the domain of constitutional law but in a less well thought out way? [??]
        2. This improves the operations of Congress when it comes to constitutional issues
           1. Not subordinate model
           2. If they aren’t reaching the merits, what basis do judges have for “improving” the operation of Congress?
           3. The guidance may not be specific
           4. Making it more costly to draft to get constitutional review

Without saying the constitutional requires this extra cost

* + - * 1. Not pure form statutory interpretation nor constitutional law
    1. **The Church School Unionization Case (1979)**
       1. Unions for lay teachers at Catholic high schools petitioned the NLRB. Schools not saying the whole statute is unconstitutional, just as applied to them. NLRB ruled that the statute applied to these teachers
       2. Q: Did NLRB have jxdn to make that decision?
       3. NLRA (1935, 1947, 1974) §8 makes it an “unfair labor practice” for an employer to interfere with union rights, and §2 defines “employer.”
       4. **Held:** Avoid deciding whether an as-applied constitutional challenge would succeed by interpreting “employer” narrowly. : Teachers in religious schools do not fall within the jurisdiction of the Board and therefore the constitutional question does not need to be decided.
       5. The schools allege that unionization is not in their religion, essentially
       6. Phase One: Would the grant of jurisdiction raise serious constitutional questions? Would it present a “significant risk” that the First Amendment would be infringed?
          1. The court looks to precedent involving government funding of schools and transfers a concern about entangling government preferences and religion from that area to the collective bargaining situation
          2. Court doesn’t have to decide if this entanglement would reach constitutional issue level
          3. Rather, a narrow inquiry into whether the exercise of jurisdiction presents a significant risk that the First Amendment would be infringed
          4. The teacher/church relationship is different than the teacher/employer relationship in non-religious schools 🡪grant of jxdn would present a significant risk that the FA would be infringes
          5. NOT ACTUALLY REACHING THE MERITS OF THE CONSTITUTIONAL CHALLENGE
       7. Phase Two: If so, is there a way to read the statute as not granting said jurisdiction?
          1. LH silent on church schools (this is 1979 hay day of LH)
          2. Amendment excluded nonprofit hospitals
          3. Legislative deliberations which seemed to lean against applying Jx to nonprofits in general
          4. 1974 amendment which removed exemption for nonprofit hospitals
          5. Majority brings up to refute Boards’ assertion that this reflects tacit approval for Jx over religious school teachers
          6. Uses the absence of an affirmative intention to cover teachers in religious schools to find a way to read the act as not conferring Jx, no need to turn to the constitutional issue
       8. For the majority, what is the canon’s location?
          1. Where do they start? They start with asking whether the grant of jurisdiction raise serious constitutional questions?
          2. Immediately turning to Constitutional avoidance canon—higher on the hierarchy
       9. What about its strength? [??]
          1. Majority: no clear expression of affirmative intent from Congress

Not demanding that it be in the statute

LH

* + - 1. Dissent
         1. Disagrees a bit on location (expressio first) but not denying it’s high on hierarchy
         2. Both agree on use of LH but not on the implications of the LH here
         3. The plain language, LH and precedent all point to exercise of Jx

The requirement of an affirmative intention is unrealistic

* + - * 1. Expressio unius

“all employers” except 8 enumerated exceptions

* + - * 1. Majority is relying on a canon to essentially amend the statute and thereby to avoid deciding the constitutional issue

Releasing a break on constraint of the judicial role

Stepping beyond faithful agent

* + - * 1. “It is irresponsible to avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent”
      1. PIE CHART ON SLIDE
      2. Is there a persuasive textual argument for so limiting “employer”?
         1. There’s actually a strong textual argument for not limiting “employer”
         2. The definition with the 8 enumerated exceptions
      3. ? Did the dissent disagree on those points? On the implication of LH?
      4. ? If LH matters less in 2015, what effect on the canon’s location and strength?
         1. **s**till suggests top tier, and now LH seems unavailable for rebuttal
         2. still shows a strong version, but many cases use weaker versions …
         3. Majority: I need a clear intention of Congress before I look to constitutional question and I can rely on LH to look at intention
         4. More avoidance since lost a tool to determine Congressional intent and no effect on hierarchical position (still top tier)
         5. Still shows a strong version, but many cases use weaker versions…
         6. If you can’t use LH to flip the presumption, then you really do need clear statements which isn’t realistic
         7. Stick with Brandeis formulation as more reliable
      5. Empirical Evidence
         1. 53% of the time when raised, has no influence
  1. Preemption
     1. What if both state and federal government occupy authority in the same area?
        1. Coexist
        2. Federal law trumps
     2. Supremacy clause: federal law trumps state law that is “to the Contrary” A6 §2
        1. As long as the federal government is acting pursuant to a legitimate source of constitutional authority, federal law may preempt state law
     3. Express Preemption (*Cipollone*)
        1. Uncontroversial
        2. Explicit provision in the federal statute declaring that certain categories of state law are preempted followed by examination of the state law to see if it falls within the categories
     4. Implied Preemption (*Rice*)
        1. More controversial because the courts are inferring destruction of state law without explicit language of Congress
        2. Conflict/impossibility
           1. Irreconcilable conflict such that it would be “impossible” to comply with both
           2. $X federal fine for no warning on E-cigs + state fine for that warning
        3. Obstacle
           1. State law frustrates the purpose of federal law
           2. The sate law is such an obstacle to the achievement of the federal law’s objectives that it is preempted
           3. $X federal grant for making E-cigs + $X state tax for that conduct
        4. Field
           1. Federal regulation is so pervasive and comprehensive that the federal government has implicitly occupied the field, preempting any state or local regulation in the substantive area
           2. Can be seen as a type of obstacle
           3. $X federal grant for making E-cigs + $X state grant for that conduct
     5. **Canon:** presume no preemption and demand clear evidence of intent to preempt, at least within the states’ traditional police powers
        1. When Congress legislates in a field the States have traditionally occupied, the historic police powers the States not to be superseded by the Federal Act unless that was the clear and manifest purpose of congress (*Rice*)
     6. **Rice (1947)(*The Grain Warehouse Case*)(7-2)(IMPLIED preemption)**
     7. Example of what is sufficient to overcome the presumption in the instance of implied preemption
     8. P-warehouse sued to stop D-customer’s complaint in a state agency. Plaintiffs operate grain warehouses, under license from the Secretary of Agriculture pursuant to the United State Warehouse Act. Defendants are their customers and filed a complaint with the IL Commerce Commission, charging various violations of IL state laws administered by the Commission. Plaintiffs arguing that the US Warehouse Act preempts the IL Commission’s authority to regulate in this area
     9. Question: What powers does IL have to regulate warehouses given the presence of the USWA?
        1. Does it have any power to?
        2. Does it only have power to do so to the extent it doesn’t collide with the Act or its policy?
     10. **Held:** The presumption against implied preemption is overcome, … relying on statutory text and LH to infer a policy behind the 1931 Act.
         1. Comparing and contrasting old version with the more aggressive, amended statute and inferring that Congress meant to keep states out
         2. Commission has no authority since history of Act suggests giving it authority would be contrary to federal policy of the Act
     11. Original USWA
         1. Section 29: not to be read as conflicting with any State laws relating to warehouses
         2. Section 6: required licensee to provide a bond to secure compliance with both state and federal law standards
     12. Amended USWA
         1. Section 29: “the power, jurisdiction, and authority conferred upon the Secretary of Agriculture shall be exclusive with respect to all persons securing a license so long as said license remains in effect”
            1. Authorized to cooperate with state officials but secretary exclusive jurisdiction over licensee under the Act
         2. Section 6: removed compliance with state law
     13. Dissenting, Frankfurter
         1. Uncomfortable that the presumption is overcome by (1) implied preemption and the (2) doesn’t see as an impossibility preemption
         2. Nullifying a network of state laws that don’t even directly conflict with the licensing power of the Secretary
         3. Federalism requires that unless there is express preemption or “an unmistakable conflict” between the state and federal laws, the state’s authority over matters that intimately concern it must be preserved
         4. “So long as full scope can be given to the amendatory legislation without undermining non-conflicting state laws, nothing but the clearest expression should persuades us that the federal Act wipes out State fixation of rates and other State requirements deeply rooted in their laws”
     14. Why allow implied preemption, given so many express provisions generally?
         1. Sometimes the absence of express language is a result of compromise as a reflection of Congressional intent
         2. In the instance of conflict preemption, is it plausible that Congress’ intent would not support preemption of state law when it conflicts with federal law? Would be absurd otherwise.
         3. But what about obstacle and field? Do they support the same inference of Congressional intent? Less so….
     15. Why allow a presumption against it?
         1. Trying to calibrate
         2. Usually defended as a substantive canon with mildly pro-federalism policy in a balancing act
         3. The policy actually has to effect a correct balance in light of the constitutionally mandated outcome—which is that federal law trumps when there is “contrary to”
     16. **Cipollone (1992)(*The Cigarette Warning Case*)(4-3-2)**
     17. P-smoker and spouse sued D-manufacturers on state common law claims (*e.g.*, failure to warn, breach of warranty, fraud). D argues preemption.
     18. **Federal Cigarette Labeling and Advertising Act (1965)** §5(a)–(b) preemption provision refers to “No statement shall be required” on packaging or in advertising other than the packaging requirement imposed by the Act
         1. Majority: these do not preempt state common law claims so preemption argument has to be based on 1969 amendment
     19. **Public Health Cigarette Smoking Act (1969)** §5(b) now refers to “requirement[s] or prohibition[s] . . . imposed under State law.”
         1. Canon against surplus requires that prohibitions adds something, suggests that it is broader
         2. But does it include state common law claims? The broadening does not explicitly deal with sources of state law
            1. This is the conflict
     20. Q: Does the Federal Cigarette Labeling and Advertising Act preempt state common law claims? Is a State common law duty, as opposed to a positive enactment, a “requirement or prohibition…imposed under State law”?
     21. **Held:** A fractured Court on some issues, so what counts as the law?
         1. Parts with majority support plus narrowest ground for judgment
            1. The more factors a judge needs to arrive at an answer, the more narrow the grounds
         2. Parts with majority support
         3. (1) express preemption provision kills implied preemption
         4. (2) presumption against preemption applies to the express provision
            1. Sends a weird message to congress: by writing a preemption provision, you might end up with less preemption if you are not clear than if you’d said nothing and the court had supplied implied preemption
     22. Stevens (7, 3 JJ): presumption, some claims preempted (ad warn)
         1. Statutory text and LH (amendment) clearly includes CL duties
            1. LH—senate version of the bill replaced “state statute” with “state law”
         2. Therefore, presumption against preemption requires only that the Court resolve against preemption any ambiguity regarding whether a particular common law duty operates “with respect to the advertisement or promotion of cigarettes”
     23. Blackmun (3 JJ): presumption, no claims preempted
         1. Also invokes the canon to read the express preemption provision narrowly
         2. The phrase “requirement or prohibition” is itself ambiguous and therefore the presumption against preemption requires the Court to read that phrase as including only positive enactment
            1. Dictionary meaning doesn’t resolve ambiguity
            2. Also relies on LH and makes an intentionalist argument that Congress wouldn’t leave the π’s with no comparable remedy
     24. Scalia (2 JJ): no presumption, all claims preempted
         1. The existence of express preemption forecloses applicability of the canon
            1. He views the canon as a specific expression of the commonplace admonition that judges should be reluctant to read things into a statute that aren’t explicit in the text
            2. I.e. that in implied preemption, judges should eschew a finding of implied preemption unless such preemption is extraordinarily clear
         2. The presumption against preemption which calls for a narrow reading dissolves when there is conclusive evidence of intentional express preemption
            1. Does it make sense to allow implied preemption but then in the instance of express preemption force it to be construed narrowly?
         3. “The statute that says anything about pre-emption must say everything; and it must do so with great exactitude as any ambiguity concerning its scope will be read in favor of preserving state power”
            1. Incentivizing Congress to say nothing
  2. Lenity: ambiguity in criminal statutes favors defendants
     1. *Smith*, *Moskal*, *Abramski*
     2. **United States v. Bass (*The Firearms in Commerce Case*)(1971)(7-2)**
     3. Title VII Section 1202(a): A person convicted of a felon who “receives, possesses or transports in commerce or affecting commence” any firearm shall be fined 10K or imprisoned up to 2 years or both
     4. Question is whether possessions and receipts of firearms have to have a connection with interstate commerce to fall under the statute
        1. Or does the connection to interstate commerce apply only to “transports”
        2. Defendant was a convicted felon and possessed 2 different firearms on two different occasions
     5. Holding that the statute is ambiguous in this respect, rejects inclusive reading that the connection to interstate transport only applies to “transports”, because the statute is criminal and reading broadly would infringe on an area of state authority
     6. When does lenity kick in? Last.
        1. “After “seizing every thing from which aid can be derived,” we are left with an ambiguous statute
     7. How strong after it kicks in?
        1. Super strong. It points in one direction (the ∆’s). Powerful tiebreaker.
     8. Is the test for ambiguity itself unclear? If so, what effect on judges?
     9. How ambiguous is this statute, without considering lenity?
        1. ordinary meaning
        2. last antecedent canon
        3. structure/redundancy with §922(g)-(h) on receive & transport
        4. purpose/odd results
        5. legislative history
     10. Why use lenity? As a lexically inferior tiebreaker?
     11. Arguments that complement the presumption
         1. Natural construction of the language
            1. Colloquial usage—could apply to all three
         2. “Curious reach” argument—suggestion of absurdity doctrine
            1. Under the government’s reading the statute would legally allow transportations not connected to commerce but forbid any and all possessions and receipts, including those unconnected to commerce
            2. Makes little sense given that most transportations involve a possession or receipt
     12. Arguments that the presumption (and the above conventional legal counter-arguments) defeats

1. Natural construction of the language

* + - * 1. Government argues that lack of comma after “transports” suggests intention to qualify only the last antecedent
        2. Court says grammarians are undecided
      1. Defendant’s reading would make this part of statute redundant with Title IV of the same Act
         1. “To ship or transport any firearm or ammunition in interstate or foreign commerce… (or) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”
         2. Court deems them complimentary Furthermore, Court concludes that redundancy results under either reading
      2. LH (supports government reading)
         1. Senator Long, speaking on the floor, described the evils that the statute was designed to address (assassinations/threats to business that would affect commerce), which would be most furthered under the government’s broad reading which prohibits any possession/receipt by specified class of persons
         2. Meager, not crystal clear or explicit
    1. After examining text, presumptions and LH concludes the statute is AMBIGUOUS
    2. Dissent
       1. No ambiguity
       2. The plain meaning, punctuation and structure of the clause mean that all possessions and receipts by felons prohibited
    3. Justifications
       1. Fair warning that common person can understand (Holmes)
          1. Holmes concedes no criminal is going to be looking at the law
          2. Holmes address the audience as “the world” though—victims need to be able to understand the law to know when they are being victimized
          3. Ambiguity is only determined after full exercise in statutory interpretation, which a criminal definitely will never do
       2. Given seriousness of criminal penalties, only the legislature should define criminal activity—court doesn’t want to risk criminalizing something in the case of ambiguity
          1. Non delegation policy
          2. Incentives
       3. Congress has not “plainly and unmistakably” criminalized the defendant’s activity in this case
       4. Federal-state balance
          1. The government reading renders traditionally local criminal conduct a matter for federal enforcement
          2. Absent a clear statement from Congress, the court avoids such a reading
       5. This is an old canon—Congress legislates against its backdrop (prescriptive)
  1. Retroactivity: Presumption against retroactive civil liability
     1. **Landgraf v. USI Film Prods. (*The Damages Case*)(1994)**
        1. Damages provision enacted after allegedly unlawful harassment: 1991 Congress amended a civil rights statute to authorize recover of compensatory and punitive damages for certain kinds of employment discrimination. **Held:** an employee cannot take advantage of these statutory amendments in a lawsuit where the alleged harassment happened before the amendment’s effective date.
        2. Presumption that Congress intends to impose new civil liability only prospectively
        3. Expectations are not sufficient to trigger the presumption, though
           1. Casino hypo, expected to foresee that the law will change
        4. There is little in the Constitution that judges read as prohibiting retroactive civil liability, but presumption based on constitutional values
           1. Due process notice
           2. Article 1, Section 10, Clause 1

Prohibits States from passing retroactive legislation impairing the “Obligations of Contracts”

* + - * 1. Fifth amendment takings clause
        2. Prohibitions on the “Bills of Attainder”—prohibits legislature from singling out disfavored persons and meting out summary punishment for past conduct
        3. Ex post facto clause prohibits retroactivity of penal legislation
      1. Critique: Constitution doesn’t establish a norm but concrete areas in which retroactivity is inappropriate
         1. Incentives
      2. Responses
         1. Can’t let retroactive liability be used as a means of retribution against unpopular groups or individuals in legislature’s response to political pressures
         2. This is an old canon—Congress legislates against its backdrop (prescriptive)
      3. Benefits of retroactivity
         1. Response to emergencies, correction of mistakes, prevention of circumvention of a new statute, giving law a comprehensive effect
         2. The presumption just ensures that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness
    1. Retroactivity Handout
       1. Landgraf court definition of retroactivity: “The court must ask whether the new provision attaches new legal consequences to events completed before its enactment”
       2. When to use the canon. “When a case omplciates a federal stattue enacted after the events in suit, then…”
          1. 1. Is there a clear directive re: retroactivity. If yes, follow it
          2. 2. If no, determine whether the statute would have retroactive effect
          3. 3. If it would, the presumption dictates that it would not govern absent clear congressional intent favoring such a result

1. IMPORT THE LEXICAL ORDERING GRAPH
2. **Samaha, On Law’s Tie Breakers**
   1. The inclusion of more than two variables (-1,0,1) decreases the chances of a tie. The more you add, the more the chances go down
   2. The inclusion of a lexically inferior tiebreaker dramatically drops the chances of a tie (33% chance to 11%) and if the tiebreaker is a single value variable (like lenity) it removes the chances of a tie. Clears cases.
   3. Increased certainty
3. **Administration**
4. The Administrative State
5. Agencies as Rulemakers and adjudicators
   1. Agencies essentially exercise all 3 governmental functions assigned to Congress, President and judiciary—rulemaking, enforcement, adjudication
   2. Article 1 Section 8 Commerce power + Court cases + third party acceptances
   3. Article 1 Section 7 + internal rules and practices of Congress + politics = 1934 Act
   4. The statute just delegates authority and communicates what congress is worried about
   5. SEC exercises authority delegated by the Act to adopt a regulation that it enforces against alleged violators and interprets in decisions
      1. Valid agency regulations have the force and effect of law.
6. Separation of powers arguments
   1. Explanation: ancient text applies to high-stakes modern problems
   2. Simple objections: strict separation with simple concepts (p351)
   3. Deeper objections: bits of text, inference toward principle, history
      1. (1) Vesting and blending clause, plus *expressio*
         1. Ex: the president’s veto power indicative of blending or as an exception that calls for the application of *expressio*
         2. P344-45
      2. (2) Separating clauses (e.g. selection, removal, incompatibility) as implying separation and checking in general, to achieve liberty
         1. Purpose
      3. (3) Federalist Papers etc. to reinforce such principle(s)
         1. Federalist 51 and 48 p346-7
         2. Gwyn’s purposes
         3. Locke
            1. Sharp separation of powers
            2. Independent power of the crown to go ahead and do the same thing as the legislature under certain circumstances without any authorization
      4. 1 and 2 are actually in tension, as the first relies on strict enumeration of specific elements, but the second implies a broader theme
      5. Someone has arbitrarily picked out the separation clauses as the norm with the blending clauses as the exception but could be reversed
      6. Also, applying *expressio* reasoning to the exceptions but inferring broad themes that can extend into other areas from the separation clauses, is arbitrarily selecting different methods for reading different parts
7. Responses to the separation of power arguments
   1. Necessary and Proper Clause—Congress can invoke the assistance of an agency to help execute its power
   2. No explicit separation of powers clause in the US Constitution
      1. Unlike the constitution of the Commonwealth of MA
      2. Before the ratification of US Constitution, so there was a model for how to explicitly separate
   3. Even accepting the logic of the above, strict separation would make government unfeasible
8. Samaha’s responses (from slide)
   1. No separation of powers clause – a necessary and proper clause
   2. Separating clauses might trigger expressio
   3. Blending clauses can be built into a principle (e.g., presidential veto, appointments, impeachment, VP’s role in Senate)
   4. Other history (e.g., division of labor, balance of power, good law)
      1. Efficiency and efficacy of government
   5. Other methods (e.g., tradition, defer (court deferring to other branches in hard cases), precedent, “functionalism” (try not develop specific rules from the Constitution and to allow multiple ways to effectuate the broader principles and purposes of the Constitution))
   6. What role for judicial review?
      1. Should judges get out of the way in face of hard Constitutional cases?
9. **Delegation of Rulemaking Power to Agencies**
10. Virtues & Vices
    1. Virtues
       1. Specialized knowledge of agencies (expertise)
          1. Why only the executive branch?
          2. Congress has committees and they hire staff members for committees who have specialized knowledge
          3. Congress could build specialized knowledge in-house
       2. Article 1 Section 7 hard to navigate (clarity, speed, flexibility)
          1. Ability to create clear rules
             1. Congress don’t have the time to think of as many contingencies as a specialized agency might
             2. This is good for the average citizen, right? They can better follow the law with clear directives
             3. Downside: clear rules are clumsy

55 MPH is easy to understand but not the optimal speed limit most of the time

* + 1. Speed, flexibility
       1. Downside: removes stability
  1. Some people trust the presidential power and agencies are answerable to the president’s oversight, and he is elected (presidential power)
  2. This all depends on the agency’s relative ability to do the above
  3. Vices
     1. Less democratic
     2. Allows congress to chicken out and not be accountable
        1. Depends on your view of congress
        2. But the delegation itself goes through Congress so the members are answerable—this argument assumes that people will bet tricked
           1. DELEGATION goes through the Article 1 Section 7 process
     3. Hard to take back delegation?
        1. To get rid of delegated power you have to go through the Article 1 Section 7 process all over again
        2. Keep in mind the president’s veto—why would the president not impede the retracting of power of oversight he has been given?
        3. But people know this and know that they have to think carefully upfront
           1. Back to the argument that the reasons delegation don’t get taken back because they are good
     4. If Article 1 Section 7 slows down the making of laws maybe that’s good (stability)

1. The **Nondelegation Doctrine** – judges enter the scene wielding conlaw
2. Our Constitution has no “Nondelegation Clause.”
3. Judges tell us Congress cannot delegate its “legislative power.”
4. Yet the Court has upheld delegations of quite vague rulemaking power, with two old exceptions, *see Schechter* (1935); *Panama* (1935).
5. Doctrine calls for an “intelligible principle” and a recurring claim is agencies are then exercising “executive power.” *Hampton* (1928) …
6. **J.W. Hampton, Jr. $ Co. v. United States (*The Equalizing Tariff Case*)(1928)**
   1. The statute fixes an initial tax price on barium dioxide but also lays out a general rule that tariffs be equalized, i.e. the tariff for the good be adjusted relative to the difference in costs and advantages between foreign and domestic producers. The statute delegates the fixing of these duties to the President and the investigation of supporting data to the United State Tariff Commission
      1. Congress may have imperfect data—not a specialized body with respect to foreign v. domestic production
      2. Fluctuations—Congress doesn’t have the resources to monitor this and adjust in a timely fashion
   2. Court acknowledges the General Purpose: to ensure that domestic producers are on equal footing in the US markets
   3. Challenge: That this is a delegation of the legislative power to the president and therefore unconstitutional under Article 1 Section 1
   4. Practical concern that nothing would get done, that Congress would actually be impeded from exercising its Commerce Clause authority, if forbidden to delegate in this manner
      1. Parallel drawn to the Interstate Commerce Commission’s fixing of rates, which was affirmed in Interstate Commerce Commission v. Goodrich Transit Co.
   5. Rule: **THE INTELLIGIBLE PRINCIPLE TEST**
      1. Congress described with “clearness: its policy and plan, then authorized an official to “carry out its policy
      2. “If congress shall lay down by legislative act **an intelligible principle** to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power”
   6. Held (Taft, C.J): Valid delegation, but limits delegation. Congress laid down a general rule to vary customs according to changing conditions of production at home and abroad (i.e. an intelligible principle) and it may authorize the Chief Executive to carry out this purpose
   7. Once an intelligible principle has been located, the claim is that the agency is exercising executive powers of implementation
   8. Animated by the assumption that courts can draw a meaningful line between an agency’s implementation of a policy decision made by Congress and an agency’s exercise of delegated legislative power—seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes
   9. If in the IP proffered, Congress does not provide a constraint on use of the variables it names to be considered, it increases agency discretion
7. Authority behind the non-delegation doctrine
   1. Constitution’s general commitment to separation of powers
   2. Article I Vesting Clause
      1. “all legislative power”, the other two vesting clauses don’t include “all”
      2. Counter: Necessary and Proper Clause, exclusive vesting for not imply a limit on transfer, agencies not actually exercising legislative power (law execution ≠ law making)
   3. Bicameralism and presentment
      1. Preventing Congress from circumventing the Article 1 Section 7 process
      2. Canon of structural interpretation: “the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort t any other mode of executing the power or of enforcing the right”
      3. Counter: since delegation itself goes through bicameralism and presentment, improper delegations will be filtered out
   4. Historical Practice
      1. Delegation since the beginning of the Republic
      2. SCOTUS has consistently articulated a constitutional concern yet consistently upheld delegations
   5. Remains the governing doctrinal formulation for distinguishing legitimate from illegitimate delegation but the court has relied on it ***twice*** (*Shector*, *Panama*)(1935)
   6. **Schechter Poultry (*The Sick Chicken Case*)(1935)**
      1. Under section 3 of National Industrial Recovery Act, the president was authorized to approve “codes of fair competition”—production and price controls submitted by industry representatives—and once approved it became binding federal law, and any firm in the relevant industry that did not comply with the code could be prosecuted and sanctioned. As a condition of approval, POTUS was allowed to impose conditions “for the protection of consumers, competitors, employees, and others” and “in furtherance of the public interest” was allowed to provide exceptions to and exemptions from the provisions in his discretion deemed necessary to effectuate the policy of the Act. President has to find [1] the trade groups “impose no inequitable restrictions on admission . . .” and [2] the code is not designed “to promote monopolies” and “will tend to effectuate the policy” of Title I.
      2. “Live Poultry Code”, promulgated under Section 3 of the NIRA, approved by the president
         1. Established “fair competition” code for the poultry industry, including wage and hours regulations
      3. Challenge: Petitioners, allegedly in violation of the code, arguing that the code was adopted under an unconstitutional delegation of legislative power
      4. Q: Is “fair competition” within the context of the statute an intelligible principle?
      5. Held: unconstitutional delegation of legislative power but limits on judicial review (by listing which factors make this unconstitutional)
      6. Majority: “Fair competition” has neither common law limitations on its meaning nor is really constrained by Section 1, which states as the Act’s purposes several broad aims, which may contradict each other
         1. *Adding variables without a hierarchy or a prescribed formulas for how to reconcile them when they are in conflict*
         2. “Fair competition” can be read to include not just eliminating unfair practices but imposing positive law standards of what is fair competition
      7. Giving the president broad authority over US industry too far a transfer of policymaking discretion
         1. NIRA provides for the creation of administrative agencies, but gives no sanction beyond the will of the President
         2. Concurrence “a roving commission to inquire into evils and upon discovery correct them”
         3. Essentially conferring to the president the authority congress exercises under the Commerce Clause
      8. **Limits on Judicial Review (Which of these are relevant to the IP?)**
         1. Vagueness: Can’t tell what the law means when it wants a code of fair competition even with these findings
         2. Broad
            1. Not just about one industry but about all industry and agriculture
            2. Even broader than in Federal Trade Commission Act (because “fair” rather than “unfair” allows for positive law enactments rather than just restrictions)
            3. *Schechter* concerned about both vagueness and breadth but the former really speaks to the Intelligible Principle—the point is that the court added factors to narrow the applicability of the doctrine
         3. No administrative process
            1. No procedural safeguards to compensate for the un-definition of “fair competition”
            2. POTUS may create agencies but he isn’t even required to
            3. As contrasted with The Federal Trade Commission Act, which included a previously undefined expression “unfair methods of competition”
            4. But implemented an administrative process, including the creation of a commission, provisions for formal complaints, for notice and hearing, for judicial review, etc.
         4. Industry Role
            1. Formal route for interest groups to be involved
         5. Concern about capture—the industry representatives making proposals which, if approved, become law, but congress would never delegate them
      9. The inclusion of the factors to consider on judicial review has weakened the doctrine.
   7. We can’t know which of these factors was outcome determinative
      1. Multiple factors and no obvious formula for how to use them
      2. Use these standards to distinguish cases, like distinguish Hampton
      3. The court itself distinguishes the Federal Trade Commission, which has a procedure set out in the statute and no pipeline
8. The Doctrine’s Demise?
   1. What might explain the doctrine’s decline or demise?
      1. (1) judicial appointments and politics – again
      2. (2) bad idea – an experiment that judges believe went wrong
         1. (a) the Constitution has no non-delegation principle
         2. (b) judges are incompetent to enforce the principle
   2. What is the court’s explanation?
      1. “In short, we have “almost never felt qualified go second-guess Congress regarding the permissible degree of policy judgment can be left to those executing or applying the law”” *Whitman*
   3. Thomas dissent in *Association of American Railroads*: Reluctance to second-guess Congress on the permissible degree is understandable, but our mistake lies in assuming that any degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct
   4. **Whitman v. American Trucking (2001)(*The Air Quality Case*)(9-0 on the result)**
   5. Clean Air Act §109 directs EPA to set and revise NAAQS, “allowing an adequate margin of safety, . . . requisite to protect the public health.”
   6. Here for non-threshold pollutants (there is not threshold below which there is no risk, only at 0 is there no risk) – ozone and particulate matter
      1. Shouldn’t the standard be 0 not .08ppm?
   7. Judges ask whether Congress provided an “intelligible principle.”
   8. **Held:** Valid, the Act has an intelligible principle.
   9. **Precedent:** “well within,” despite no determinate test for how much.
   10. Suggestion that the non-delegation doctrine must be functional or a phantom
       1. Even though the agency did not go through the article 1 section 7 and even though it was just following a directive from Congress, it is regardless functionally exercising legislative power
       2. The agency is functionally exercising legislative power
   11. Is Schechter distinguishable or is that case bad law?
       1. Probably similarly vague: “public health” “fair competition”
       2. Less broad though
          1. Only regulatory tool is setting air quality standards unlike under the NIRA which authorized a broader scope of conduct that could be regulated
          2. Scalia points this out explicitly: “it is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred”
       3. Industry pipeline less present—relying on scientific standards
       4. Agency administrative process present
   12. Conceptions of the Power the Agency is Exercising
       1. Majority: a form of policymaking discretion that is inherent in the executive power
       2. Stevens/Souter: this is legislative power and the Vesting Clauses do not limit the authority of either recipient of power to delegate authority to others
       3. Thomas: the delegation to the EPA might be unconstitutional not because it lacked an intelligible principle, but because too broad
   13. Why not demand more guidance form Congress?
       1. If we knockout EPA then judges have to interpret the statute and take up essentially that delegation
       2. At which point does it just become delegation to the judicial branch
       3. Who is going to have the discretion? A judge or an agency? Judges uncomfortable having this discretion
   14. **Judicially manageable standards**
       1. Isn’t it easy to define legislative and executive power, given time? If you had more cases you could define the hazy principle into a more defined rule
       2. Judges lack the will to make this effort to hem in the modern agency state
       3. How about denying all agency regulations the force of law?
       4. Thomas’s suggestion—get away from IP but come up with someone else
       5. Why not have the agency set a standard with its expertise and the have the judiciary review it?
       6. For every case the judge doesn’t follow the agency’s standard, then the judge is going to be subject to the delegation of legislative power concerns
       7. Judges don’t want to get into it
       8. Balancing act between who is assuming the delegated power
   15. Notes
       1. Court implicitly reaffirmed that it would not enforce a meaningful non-delegation principle
       2. Too hard to draw the line between legitimately conferred discretion and discretion that becomes an illegitimate delegation of legislative power
          1. The line between lawmaking and interpretation
       3. Sunstein
          1. The substitution of delegation to agencies with delegation to the judiciary
          2. “We might even say that the judicial enforcement of the conventional doctrine would violate the conventional doctrine—since it could not be enforced without delegating, without clear standards, a high degree of discretionary lawmaking authority to the judiciary
       4. What about when Congress enacts a vague statute for the federal courts to fill in in the common law fashion? Antitrust and employment discrimination. Legitimate or not? And how does this implicate delegation to an agency?
       5. Functionalism
          1. Without delegation, Congress cannot exercise it’s Commerce Power to the full extent contemplated by the Constitution
          2. What about bicameralism and presentment though?
          3. Capture by interest groups
             1. Concern that delegation to an agency makes the policymaking process more vulnerable to capture by interest groups that Article 1 Section 7 was designed to avoid
9. A canon of narrow construction?
   1. Construe delegations narrowly to avoid serious nondel. concerns?
   2. **American Petroleum Institute (1980) (*The Benzene Case*)** **(3-1-1-1-4 fracture)**
      1. **OSH Act §6(b)(5)** directs the Secretary of Labor, “in promulgating standards dealing with toxic materials . . . ,” to set a standard that “most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . . .”
      2. **OSHA standard** limited worker benzene exposure to 1 ppm of air based on (1) asserted cancer risk at 10 ppm and no proven threshold plus (2) technological and economic feasibility.
      3. Industry argued for cost-benefit analysis (CBA) instead. What result?
      4. **Plurality:** Without deciding on CBA, invokes §3(8) and requires the Secretary to find a “significant risk” before issuing any standard …
         1. Basically saying: can only regulate when there is a significant risk
      5. As defined as? As derived from?
         1. Vague: “It is the Agency’s responsibility to determine, in the first instance, what it considers to be a ‘significant’ risk. Some risks are plainly acceptable and others are plainly unacceptable. …. [OSHA] has no duty to calculate the exact probability of harm … [or] to support its finding that a significant risk exists with anything approaching scientific certainty….” 448 U.S. at 655 (plurality opinion).
         2. Using a non-obvious interpretation of the statute based on the word “Safety” in §3(8)
            1. Dissent: Plurality is relying on a section that is general with respect to workplace standards—which suggests the canon is actually doing a lot of work. Section 6(b)(5) is more specific because it deals with the class of toxic materials
      6. Without being sure there really is a constitutional problem they are reading creatively to avoid a constitutional problem that may not be there
      7. Using the canon to make the statute more specific—doing congress’ job for it
      8. Courts may read statutes narrowly to avoid non-delegation concerns. Like: oh, look! You’re actually already constrained in this particular way
10. **Congressional Influence on Agencies**
11. Congress has wide discretion to delegate authority to agencies for potentially expert, speedy, flexible adoption of clear legal rules.
12. Concerns linger about accountability, arbitrariness, constitutionality, *etc.*, reflected in *American Petroleum* (1980) (plurality)
13. How may Congress reduce such concerns?
    1. careful delegation in the first place
    2. influence agency power thereafter: can always rely on A1 §7 process to reign in or remove agency’s power. But it’s slow and has to pass POTUS veto.
       1. committee oversight
          1. Committee or a committee chair can write to the agency head and express displeasure
          2. Hearings
             1. Can invite or demand, can subpoena witnesses
          3. Committees are specialized so they are more knowledgeable
       2. A1 §7 amendments (status quo bias, *cf.* REINS Act)
          1. Status quo bias here encourages carefulness upfront
       3. A1 §7 appropriations (status quo often is “sunset”)
          1. Annual basis, the funding has a sunset and that means that if there is not new Article 1 Section 7 action then the funding becomes zero
          2. The status quo is “no more money”, which makes these budgets easier to become law than, say, a positive statute with a policy change
             1. Some agencies not funded by Congress
             2. Some statutes have sunset clauses as well
       4. A2 §2 appointments (ex ante screening of officers)
          1. Senate confirmation required for some officials
       5. A2 §4 removal by impeachment (status quo bias in A1 §3)
       6. “hold hostage” other legislation and appointments
          1. Using power in one sphere to influence the goings on in another
          2. Attorney general confirmation example
       7. legislative vetoes? …
14. Legislative Vetoes: **Immigration and Naturalization Service v. Chadha (*The Deportation Case*)(1983)(6-1-1 on this constitutional question)**
    1. *Chadha* has had no demonstrable effect—see above for all the other ways Congress can exert its influence. But could be a good exam scenario since the first part of the statute is basically an intelligible principle question though not here challenged.
    2. Under the Immigration and Nationality Act, people can apply to have deportation suspended
    3. “The AG may, in his discretion, suspend deportation…” for certain categories of aliens whose deportation “in the opinion of the AG would result in extreme hardship”
    4. AG must report any suspensions of deportation
    5. Section 224(c): unless either the Senate or the House passes a resolution, the AG’s choice to suspend will go through
    6. Immigrant applied to the AG for suspension of deportation under “extreme hardship” prong and the House vetoed under 224(c).
    7. Q: whether the action of one House of Congress violates strictures of the CNSTN?
    8. Plurality: Congress exceeded the scope of its CNSTN’L prescribed authority
    9. **Exclusivity of A1 §7 for exercise of the legislative power** (p410)
       1. Formalist
          1. Text and careful drafting inferences
             1. The labeling (Madison) in the presentment clause to ensure presentment was not circumvent-able
          2. Framers narrowly defined when and how Houses may act alone
             1. 4 specific iterations, expressio argument
          3. function and purpose (*e.g.*, checking, deliberation, public spirit)
          4. “The prescription for legislative action in A1 §7 represents the Framer’s decision that the legislative power of the Federal Government be exercised in accord with **a single, finely wrought and exhaustively considered procedure**” [KNOW THIS PHRASE]
       2. Functionalist/Purposivist
          1. Based on constitutional functions and purposes
          2. Like being careful rather than speedy
          3. Checking mechanism
          4. Promote deliberation
          5. Promote public spirited laws
          6. Linking these up to the broad concept of separation of powers
    10. What is the best textual or functional response, given delegation?
        1. Functional—well run government requires the veto and the veto works practically the same as the Article 1 Section 7 process
           1. 3 players still must agree to change
           2. The value of distributing power across 3 branches is preserved
           3. The stark difference is that here silence = consent
              1. Very different from positive enactment
              2. Action is not the same as inaction
           4. Debatable what the baseline is—Chadha being deported or the AG’s discretion that it should be suspended
        2. Textual—how does White deal with the textual argument
           1. The veto was authorized by the article 1 section 7 process
           2. Necessary and Proper clause
           3. Can you run the expressio argument the other way? [IMPORTANT TECHNIQUE]
              1. Clause 3 of article 1 section 7
              2. This is a carefully drafted section and it doesn't apply as the veto is not something “to which the Concurrence of the Senate and House of Representatives may be necessary”
    11. What is a better reply that “prefer democracy over efficiency”?
        1. Balance of Power
           1. Dissent: preserves the ultimate authority in the legislature
           2. No one can determine a specific, precise division of power that is “correct”
           3. Smart move on the dissent’s to locate and identify the separation of powers here at play, because the majority can’t point to an optimal division of power
           4. Congress didn’t have to delegate in the first place—this is a compromise
        2. Self-delegation
           1. While the statute passed article 1 section 7, going forward one house now gets to retain power over the outcome without going through that process
           2. Does that one house have the constitutional power to do this?
           3. Self-delegation to a component of Congress
           4. Distinction from non delegation cases
    12. Does the court then hold that use of LH is invalidated as a kind of self-delegation?
        1. No
        2. The LH history indicates self-delegation that occurred prior to the article 1 section 7 process (committees, etc.)
    13. Is the Court’s use of originalist history the same thing as LH?
        1. A form of LH for the Constitution
    14. **Categorization as “legislative” of what the House did**. The plurality says that the House is exercising legislative power in the veto, but that the AG is exercising executive power…
        1. House:
           1. Each branch presumed to be acting in its own sphere
           2. Altering legal rights of people outside the legislature
           3. The only other way to force the AG to deport Chadha would be to enact, amend or repeal—substituting for congressional action of a private bill
        2. AG:His authority is confined to the terms of the statute that created it
           1. Subject to check by the terms of the statute, judicial review and the power of Congress to modify or revoke
           2. **Delegation has passed the Article 1 Section 7 process—the House’s veto has not so it is subject to neither the constitutional checks on legislative power nor the checks on executive power above**
        3. ? How do these factors apply to delegation of rulemaking?
           1. Factor 1: presume executive acting in executive sphere
           2. Factor 2: altering the rights of individuals. EPA certainly doing that by setting air quality standard
           3. Factor 3: substitution for a private regulation. Could be.
           4. Factors 2 and 3 seem to point against delegation of rulemaking power.
           5. Since the court exonerates delegation of rulemaking power, must be relying on Factor 1
        4. ? So is rulemaking suddenly “executive” when the AG does it?
           1. Carrying out the directives of Congress
        5. ? If one House blocks suspension, why is that “legislative”?
           1. It doesn’t seem to be… since it’s not Congress
           2. Why can’t the House do this?
           3. If we have to rely on Factors 1 and 2 then we have a problem since it implicates delegation of rulemaking
           4. So what we need to know is: What are the powers of the House?
              1. The expression argument 4 express exceptions for when one house can act alone

But “sole power” in actual text of these exceptions does not come into the article 1 section 7 process so the expressio could be flipped

* + - * 1. Still, a textual way to differentiate the executive branch
        2. Vesting Clause

Does not refer to the House

* + - * 1. Take Care Clause

Does not refer to the Senate

* + - 1. House is differently constituted than the executive branch textually
    1. ? Are private bills unconstitutional exercises of “judicial” power?
  1. White, dissenting
     1. The veto is a useful tool for ensuring accountability of agency delegation
     2. The veto isn’t making new law—authorized by a statute and limited to addressing specific agency power—so it not passing the article 1 section 7 process is not unconstitutional
        1. The presentment clauses apply to bills not duly enacted law
     3. Necessary and Proper Clause
        1. Framers expansive about Congress lawmaking power
     4. **The AG is exercising legislative power** 
        1. **How can you be ok with the delegation of power to the AG but not with the House checking the limits of that delegation?**
     5. Framers were concerned about checking changes to the status quo and under the statute all 3 must approve for there to be a change in the status quo

1. Problems with self-delegation—makes *Chadha* special given its strained logic
   1. If you enact and implement the law, it removes a check element to ensure equitable administration
   2. Incentives less clear lawmaking since all discretion would go to the lawmakers
2. If you loved legislative vetoes, what would you do after Chadha?
   1. Congress still includes them and did not strip them all
   2. Congress didn’t need these—other mechanisms to get what they want—these vetoes just communicate Congress’ level of care
3. Other Mechanisms
   1. Delegation of the power to propose rather than adopt regulations
   2. CRA—agency must submit a major rule Congress 60 days before it goes into effect p422
   3. Appropriations
      1. Riders—controls where the money is spent and therefore curtails disfavored activities
         1. More likely to become law
      2. Influence of budget-controlling members
      3. Control over the degree of enforcement
      4. Mismatch between goals and funding may undermine democratic accountability
   4. Hearings, Investigations, Audits, Etc.
      1. Threat of oversight
      2. Correlation between congressional oversight and agency policy change but could be the result of public dissatisfaction or major policy failure
4. **Appointment and Removal of Agency Personnel**
5. Among the mechanisms of Congressional influence over agencies, but there are constitutional limits – we will focus on these ideas …
6. **Appointment:** A2 §2 has procedures for appointing “Officers.”
   1. *Buckley* (1976) held them exclusive. But “Officer” remained vague, and *Morrison* (1988) later added factors to define “inferior” officers. *Edmond* (1997) indicated a shift in focus to “supervision.”
7. **Removal:** No “Removal Clause,” except impeachment.
   1. *Myers* (1926) indicated removal is part of the President’s exclusive executive power. But then *Humphrey’s Executor* (1935) upheld a statutory limit on removal by the President, facilitating the rise of “independent agencies.” *Morrison* (1988) reinforced congressional discretion to design agencies, even for some criminal prosecutions. *Free Enterprise Fund* (2010) invalidated a novel two-tier limit.
8. Appointments clause exclusivity.
9. **Buckley v. Valeo (*The FEC case*)(1976)**
   1. Constitutional challenges to amendments of two statutes
   2. The statues limit campaign donations and spending as well as require reporting of large donations and establish the FEC to enforce compliance
   3. Question: given how it’s 6 voting members are appointed, can the FEC constitutionally exercise the power granted to it?
   4. How the voting members of the commission are selected
      1. Two appointed by the President pro tempore of the Senate
      2. Two appointed by the Speaker of the House
      3. Two appointed by the President
      4. Very collaborative—checks and balances
   5. FEC’s responsibilities/functions include
      1. Report keeping, disclosure of information and investigation
      2. Rulemaking/adjudicative power
         1. Make rules necessary for the carrying out of the Act’s objectives
         2. Can render advisory opinions
         3. Can authorize campaign expenditures that exceed the statutory limit
      3. Direct, wide ranging enforcement power
         1. Can institute civil action for injunctive or other relief
         2. Can make a finding that a person failed to file a require report which would limit their ability to run for a year
   6. Appointments Clause
      1. POTUS, with advice and consent of the senate, appoints Officers of the US “not herein otherwise provided for”
      2. “but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments”
      3. **Exclusivity of A2 §2 for officers**: it is divided into two specific classes of appointments with specific protocol for each
         1. Neither the Speaker nor the President pro tempore come into the language for either class
         2. “Heads of Department” in conjunction with “Courts of Law” suggests that it was referring to executive branch, which rules out the president pro tempore of the and the speaker
      4. Covers all appointments—*expressio*
      5. Best legal arguments against exclusivity:
         1. What if the Appointments clause is a floor?
         2. The enhanced checks and balances is in the spirit of the separation of powers (Functional argument)
         3. “Separation of powers isn’t just a broad principle, it’s woven into the document so look at the document”
            1. Look at how separation of powers was implemented in the Constitution
         4. “Herein” might apply to the Constitution as a whole not the Appointments Clause
            1. In this case, the senate and house can appoint their own officers
   7. **Categorization as (partly) officers, not mere employees**
   8. The FEC members are at LEAST “inferior Officers”
      1. **officers:** “exercising significant authority pursuant to the laws”– here, enforcement power *beyond* info collection and investigation
         1. Establishes a **“significant authority” test** for distinguishing between officers and federal employees
         2. vague standard + concrete example
      2. **inferior officers (subcategory):** *e.g.*, postmasters, court clerks
      3. **employees:** “lesser functionaries subordinate” (p430 n162)
      4. **congressional staffers:** “in aid of” Congress’s functions (pp432-33)
   9. **Holding:** most of the powers conferred by the Act can only be exercises by “officers of the US” appointed in conformity with Appointments Clause and therefore cannot be exercised by the Commission as presently constructed
      1. The information finding and reporting function are ok since committees do that anyway
      2. But the enforcement mechanism of bringing suit is purely executive
      3. And the rulemaking bit, while more legislative/judicial, doesn't operate merely in of congressional authority to legislate/is too close to enforcement of the public law
   10. Court shifts to its own precedent—love relying on their own cases
10. Presidential removal power: held part of the president’s A2 executive power
    1. **Myers v. United States (*The Fired Postmaster Case*)(1926) (6-3) (resisting Congress again, this time by Taft)**
       1. Act of 1876 indicates President may appoint and remove postmasters only with advice and consent of the Senate; otherwise a 4-year term. Myers was removed without Senate consent and he sued for back pay
       2. **President has unrestricted power to remove 1st class postmasters** (p442), officers appointed with Senate advice and consent (pp435-36)
       3. **text** including as A2 Vesting and Take Care Clauses (p439)
          1. Article II vests executive power in POTUS
          2. The Take Care clause
             1. Madison and associates used this to bolster argument for full removal power
             2. President need to have subordinate agents to carry out the Take Care Clause responsibility
             3. Response: is Take Care clause a duty or a power? “Shall”.
             4. Either way, the power to be executed is the law that congress made and part of that law is that senate has to consent to the removal
          3. ? What about Appointments, Impeachments, Necessary & Proper?
             1. Appointments Clause: blends POTUS and senate power, blending the two powers. Maybe removal should be the same. The Federalist papers indicate this was intended
             2. N&P: Congress gets tot design how the powers are carried out—legislative and executive
             3. Apply expressio to impeachment clauses—carefully provides removal procedures, this specific process for removal should apply to all removals
             4. Could be unconstitutional on these grounds
       4. **purpose,** **function, principle –** strong executive with removal power, which is supported by a pro-separation canon (pp439, 441)
          1. Presumption against blending powers except where the Constitution expressly does so. Removal certainly isn’t legislative or judicial, says majority
          2. POTUS in a better position to know who needs to be removed and why
          3. POTUS needs to be able to remove people who suck who are his subordinates—the meaning of “executive power” as informed by function and purpose
       5. **originalist history** including English practice *v.* U.S. States (p440)
          1. Meaning at the time – British understanding of “executive” included both
       6. **liquidation & tradition,** including the Decision of 1789 (pp437, 441)
    2. ? How might Congress react? Might Presidents prefer removal limits?
       1. Congress might be less willing to delegate or lessen the degree the amount of discretion that it grants
       2. President might prefer removal limits to ensure maximum delegation by Congress since it puts more discretion in the executive
          1. FTC directive against unfair practices, which is a broad delegation
          2. Congress could have enumerated examples
          3. No examples = more discretion for POTUS
          4. POTUS might prefer statutory limits on removal that he can negotiate around
11. Independent Agencies
    1. Justifications for Independent Agencies
       1. **good government –** expertise, rules, speed, politically insulated
          1. The agency is supposed to provide specialized expertise, which is different from the value judgments and ideology inherent in politics
       2. **political compromise –** may bundle with delegation [??]
    2. What can make agencies “independent” in practice?
       1. **removal rules**
       2. **other design –** funding, tenure, partisan balance, convention, *etc.*
    3. Note – actual “independence” requires more than removal limits (Samaha feels strongly about this)
       1. A series of design choices
       2. Focus on removal only is missing the bigger picture on independence
       3. If courts are really going to try to police the balance of powers, going to have to focus on more than removal—is that an appropriate task for the court?
    4. **Humphrey’s Executor v. United States (*The Fired Commissioner Case*)(1935)(9-0)**
    5. Some of the judges on *Myers* bench voting in this unanimous decision
    6. Commissioner nominated under Hoover and removed by Roosevelt without cause due to a policy disagreement
    7. Section 1 of the statute “may be removed by the President for inefficiency, neglect of duty or malfeasance in office”
       1. This is a MODEL REMOVAL provision
    8. Question 1: Does the FTCA limit removal power of POTUS?
       1. Yes.
       2. Language of the act, legislative reports and the general purposes as reflected in the debates = intent to create a body of experts who shall gain experience by length of service
       3. Wanted its judgment to be independent, not subject to the will of the president
          1. The agency is supposed to provide specialized expertise, which is different from the value judgments and ideology inherent in politics
          2. But just because you’ve restricted removal, doesn't mean industry capture can’t occur through Congressional control over agency policymaking
    9. Questions 2: If yes, is this limitation unconstitutional?
       1. No.
       2. Distinguishes *Myers*, which had a limited holding, on the basis that the post master was a purely executive aid whereas the FTC commissioner is quasi-legislative and quasi-judicial
          1. The FTC is a legislative/judicial aid
          2. Section 6: powers to make investigations and report to Congress
          3. Section 7: makes commission master in chancery in equity causes
       3. If POTUS had unlimited removal in this instance he would have that power over all civil officers besides the judiciary as stipulated in the Constitution
    10. Holding
        1. Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause shall *depend upon the character of the office*
           1. **purely executive** (e.g., postmasters)
              1. *Myers* distinguished as “purely executive” officers
           2. **quasi-legislative** (e.g., FTCA §6 investigations, reports, cf. *Buckley*)
           3. **quasi-judicial** (e.g., FTCA §7 remedy recommendations with JR)
    11. The framework did change for this analysis but the court didn’t tell us what counts as purely executive
    12. ? Is this doctrine consistent with our delegation cases on rulemaking?
        1. The rulemaking authority characterized as EXECUTIVE
        2. Not consistent with Humphrey categories from a doctrinal framework perspective
        3. Not consistent with *Chadha* Factor of presuming everyone is acting in their sphere
    13. ? If not consistent doctrinally, how about practically?
        1. A limit of presidential power and a grant of power to agency—these consistent?
        2. Yes, both saying: what Congress says goes
        3. Giving the agency more power
    14. ? Practically, how independent are agencies like the FTC?
    15. What if the President orders an antitrust suit filed or dropped, but a commissioner refuses. Does such insubordination allow removal?
        1. Order would have to be lawful/within the discretion of the agency
        2. First, you want to look at the statute and interpret it
           1. Part of president’s power is to interpret the law
        3. Is there a good argument for constitutional avoidance?
        4. Might be possible to read “neglect of duty” to include this kind of insubordination
    16. Notes
        1. Remedy was back pay not reinstatement
        2. **Court more comfortable with congress encroaching on president’s power rather than aggrandizing its own**
        3. Old school New Deal justifications
           1. Technocrat experts outside of politics
        4. Not politically neutral today
        5. Capture theory
           1. Special interest groups can target agencies better. Agencies depend on regulated community for information, political support and future jobs
        6. Democratic accountability
        7. Balancing power of regulatory policy between Congress and President
           1. Vesting clause concerns
           2. Capture issue—influence of legislators and committees over agencies, not answering to national constituency
    17. **Morrison v. Olson (*The Independent Counsel Case*)(1988)(7-1!)(no Congressional role in removal again)**
    18. Facts: There was a dispute between congress and the president which involved document requests. Olson allegedly made false or misleading testimony to the House Judiciary Committee which then informed the AG who sought appointment of IC from Special Division
    19. Olson is challenging the constitutionality of the independent counsel provisions of the statute
    20. Ethics in Government Act (1978) authorized Independent Counsels to investigate high officials suspected of crimes, insulated from President:
        1. (1) Appointment by D.C. Circuit Special Division, if the AG makes a finding of “reasonable grounds” for further investigation.
        2. (2) Removal by the AG “only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such [IC’s] duties.”
    21. **(1) Appointment:** IC **=** “inferior Officer” despite some discretion
        1. **removable** by AG (power in another official)
        2. **duties** **–** investigation and prosecution, not policy
           1. Cabined authority; she can exercise full investigative/prosecutorial power of DOJ but only for certain federal crimes and for certain federal officials
           2. No policymaking or administrative authority
        3. **jurisdiction** **–** only some official targets, set by Special Division as informed by AG
        4. **tenure** **–** until investigation is complete no cap on time but her job is over when she completes the task she was appointed for
        5. Precedential examples of inferior officers: supervisors of elections, US commissioners, special prosecutor
    22. ? Where do these factors come from?
        1. Made up but related to the idea of comparing rank in a hierarchical ordering
        2. How truly independent or insulated are they?
        3. Trying to locate significance of the office
    23. ? This test is still good law after *Edmond* (1997).
    24. **(2) Removal:**  doesn’t “interfere impermissibly” with President duties. Instead of classifying as purely executive or quasi-legislative, etc. the question is “whether the removal restrictions are of such a nature that they impede the President’s ability to perform his Constitutional duty and the functions of the officials in question must be analyzed in that light”
        1. ***Humphrey’s* categories** **–** concededly executive here
        2. **Function’s importance** **–** limited duties, jurisdiction, tenure
        3. **President’s control –** AG may remove for “good cause” (hypo\*)
        4. **Congress’s reasons –** impartial investigation
    25. The president being able to remove at will an independent counsel is not essential to proper execution of his article II powers and duties
    26. Nor are the “good cause” provisions an impermissible burden on the president’s power to control or supervise the independent counsel as an executive official
        1. This removal provision: what does “good cause” mean?
           1. P482; some indication of what good cause means to this court and it informs the constitutional decision: “not competently performing duties in a manner that comports with the provisions of the Act”
           2. Suggestive that under the majority, the President could remove on the grounds of not complying with president’s understanding of what the law requires
           3. Distinguish from *HE*—where the basis is just the president disagreeing with the officer
12. ? Can we simplify and ask if Congress is “aggrandizing”? No
    1. *HE, Morrison* – encroachment, upheld
    2. *Myer, Chadha* – aggrandizement, struck down
    3. *Free Enterprise* destroys the pattern
13. \* Hypo: Is it constitutionally permissible under the statute for the president to tell the AG to fire IC for a policy difference?
    1. 1) Is the order lawful?
    2. 2) Assuming the order is lawful (POTUS thinks there is cause, POTUS thinks the IC has gotten the law wrong), does this court’s reading of the statute allow for this?
    3. 3) What about constitutional avoidance? There would have to be serious doubt about the constitutionality
14. **Morrison, Dissent (Scalia alone)**
    1. Analytical posture: start with the principle of the separation of powers as it informed the constitution (starts with MA Consitution), specifically the Appointments and Vesting Clauses
       1. Vesting: ALL executive power is vested in POTUS
    2. **principle** **–** strong unitary executive by separation *and* balance
       1. Starting with a principle of separation before the text of the CNSTN, built on smaller pieces of text, Federalist papers and history
       2. Starting with a principle of equilibrium – the president balancing out the legislature’s power
       3. Limiting the removal power is infringing on the constitutional grant of *all* executive power in the president
       4. Furthermore, the AG’s discretion in appointment is severely confined
       5. Furthermore, in between appointment and removal, the IC is exercising executive function and is not subordinate to the president
    3. **doctrine** **–** rules over standards, against the Court’s use of factors
       1. No limit on this new framework; no defined standard
       2. Variables with no formula
       3. If it’s just a multi-factor balancing test it’s not predictable and it’s not really law, according to Scalia
       4. Position on rules over standards (speed limit of 55 MPH vs. standard of drive reasonably under the circumstances)
       5. Scalia wants: (1) is the function executive? (2) does it deprive POTUS of exclusive control?
    4. **function** **–** consequences for government
       1. An argument that responds to the functionalist claims in defense of practicality
       2. No check on the judiciary’s discretion on appointment—they have tenure and salary protection (A3 process) which not true of the AG who is there at the pleasure of the president
       3. Concern also about the target of these investigations
          1. Taking away the home court advantage/expectation
          2. Increasing Congress’ power because they can now threaten
          3. It is not an ordinary prosecutorial function to be presented with one target and potential of violation of federal laws—a dangerous myopia, which could lead to too much aggressive prosecution
             1. Tradeoffs in everyday prosecution are not present in this focused mission
             2. But is this a constitutional violation? Is this a decision that judge gets to make?
    5. ? Is the principle constitutional and judicially enforceable?
       1. The dissent’s ideas become problematic when: Converting those ideas into a firm grounding for the constitution and calling judges the right person to promulgate these rules that everyone must follow
       2. This is a debatable issue and the virtue of the majority’s decision is that the judges are just one of voices
    6. ? Are simple doctrinal rules better than vague standards?
       1. Sometimes.
       2. Good rules are very hard to formulate up front with limited information and easier to apply
       3. Standards are easy to generate upfront but then tougher to apply
    7. ? Does the Act’s sunset support the dissent or majority?
       1. Congress ultimately decided not to renew it
       2. Is this a bipartisan commitment to locking down information?
       3. ICs were also resource intensive
       4. Because *Morrison* backed off, the legislative decision to call ICs quits was able to be made
    8. ? Is the dissent’s view starting to prevail? …
    9. ***Edmond***
       1. Purported to apply the Morrison framework but gave dispositive weight to the first of the four factors
       2. Q: Are the CGCCA judges inferior officers?
       3. Under statutes, appointed by Secretary of Transport
       4. Held, Yes, Inferior
       5. Scalia
       6. 1. Don’t have limited tenure in the Morrison sense of a job expiring upon completion
       7. 2. Not limited in jxdn—not constrained to adjudicate only cases involving certain individuals’ offenses specified in advance
       8. 3. Could not be said to perform limited duties
       9. 4. But subject to supervision by a higher-ranking executive branch official below POTUS
       10. Souter: being supervised is necessary but not sufficient to be a n inferior officer
15. Drawing a Line
16. **Free Enterprise Fund v. PCAOB(*The Accounting Board Case*)(2010) (5-4)**
17. (1) SEC removal by P if inefficiency, neglect, malfeasance (stipulation).
18. (2) Board removal by SEC if “willfully violated” the Act, board rules, or securities laws, “willfully abused the authority of that member,” or “without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule . . . .” §7217(d)(3).
19. **Held:** “We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President”
20. Congress may not impose this removal limit on the President …
21. Doctrine
    1. Isolation of Article II and Take Care Clause (note different starting point from Morrison dissent)
    2. **Executive power:** The court says the Board is performing executive function, reconciling with the non-delegation cases conception of carrying out directives from Congress
    3. **This novel two-tier limit** violates A2 and separation of powers
22. The effect of this dual lawyer
    1. The president cannot old the Commission fully accountable for the Board’s conduct…. They are only responsible for their own determination of the Act’s rigorous good-cause standard… And even if POTUS disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute “inefficiency, neglect of duty, or malfeasance in office”
23. Contrary to Vesting Clause and removes ability to carry out Take Care clause
24. Removes democratic accountability
    1. The president answers to the people but cannot control the Board
25. Only presidential oversight can balance legislative power
26. ? How different is this doctrine from *Morrison*’s factors?
    1. It’s different but it’s applicability is narrow—the novelty of the two layers
    2. They don’t even say that all two tier layers—just his one
    3. Morrison was a functionalist balancing test designed to determine whether the control in question was essential to him exercising his powers Factors the Morrison Court considers in deciding whether a removal restriction “unduly trammels” on POTUS’ executive authority
       1. Type of function—the HE categories are no longer dispositive but they are still weighed
          1. Don’t really look although kind of… a lot of law enforcement duties actually
       2. Degree of authority
          1. Over the enter industry
       3. The removal restriction did not “impermissibly burden the President’s power to control and supervise the independent counsel”
          1. Yes it does according to majority
27. ? Is *Humphrey’s* rejected?
    1. Never explicitly overruled, distinguished
    2. HE imputed into it’s standard of cause for removal, attributed to Presidential oversight of the SEC here, “free[dom] from executive control”
    3. So even if SEC had plenary power to remove Board members would the president have any more power to oversee the Board?
    4. Is the court signaling that the for-cause removal in HE in fact leaves the president with sufficient leeway to hold an independent agency accountable for its policy decisions or those of its staff? What is left of HE?
28. Did the court reinterpret the FTC removal limit? [??]
    1. This court thinks about the HE standard differently than the HE courts, potentially
    2. HE emphasized how much independence the agency would have
    3. Trying to protect presidential oversight of the Board via Take Care clause
    4. Does not mean the majority has changed its view on what is removable under the HE standard…
    5. Because it behooves this court to read the HE standard narrowly
29. ? Can we reconcile cases by testing for Congress aggrandizement? No, the pattern has broken down.
30. ? What if SEC may remove members “at will”? For “good cause”?
    1. What if SEC may remove members “at will”? For “good cause?
    2. At will: removes the two tier system and so different result
    3. Good cause: HE and now good cause as interpreted by Morrison, which includes the president being able to say fire this person I disagreement on law under the statute
       1. Not an unusually restrictive second tier
       2. Now what?
       3. Instinct is to go back to Morrison, but it is a second tier…
       4. Majority does here emphasize how strange and restrictive the second tier is here
       5. No knowing what the court will do in the next case
31. ? Is good-cause protection for rank-and-file civil servants invalid?
    1. A “novel two-tier limit” is what the holding addressed. What was novel?
       1. The second tier
       2. The stringent novel standard p500
       3. These are not the two tiers for civil servants
32. ? Why focus on removal given SEC oversight on so much else?
    1. Suspiciously trivial… why are they getting so worked over something of limited application?
    2. Especially since the Board is so restricted under SEC oversight….
33. If the court in its myopia gets all hung up on removal, they aren’t going to do much for presidential power
    1. Real Independence requires more thank removal
    2. Not much impact on the balance in the system
    3. Need a broader intervention if they want to balance these powers
    4. Free Enterprise seems to open the door, but we don’t know what is going to happen next
34. Hiring and firing people certainly can influence agency behavior to an extent, but why might these tools fail the President?
    1. Power theory: beyond personnel
       1. Internal culture, who controls the budget? what is the law for what the agency can and can’t do? What kind of people is that going to attract?
    2. Appointment: ex ante screening (screening before the fact), compromise
       1. Interest in appointing technically competent folk and in rewarding supporters/constituencies may induce appointments of people whose regulatory preferences diverge from POTUS’
       2. Senate rejections of nominees are rare, but senate has substantial influence on policy preferences of presidential appointees nonetheless
       3. Policy preferences may shift after appointment—lobbyists in the field they regulate, etc.
       4. Imperfect information on how that person is going to do that job
       5. Needs senate confirmation
       6. Compromise over qualities too. Have to have technical expertise even if you have the president’s values in heart and vice versa.
       7. New senate cloture rule for cutting off debates (60 votes): The president should perhaps feel a little less wary of firing people since replacing would be easier
       8. A2 Section 2 recess appointments and *NLRB v. Noel Canning* (2014) (any vacancy during any “recess” but not if in “session” every 3 days)—a senate more friendly to POTUS might open recess appointments
    3. Removal: statutory limits, bad publicity (involved in firing), replacements
       1. Blunt instrument
       2. If you fire someone and you want the job done (not always the case), who is going to replace the person you fire? Remember senate confirmation.
35. **Presidential Oversight of Agencies**
36. The President’s other oversight tools include targeted directives and trying to structure the agency rulemaking process:
37. CBA and OIRA
    1. Reagan – EO 12291
       1. Submission of proposals for all major regulations to OIRA complete with CBA
          1. Net benefits must exceed costs
       2. Submission of a yearly plan for consistency with POTUS regulatory philosophy and priorities
    2. Clinton - **E.O. 12866 on OIRA Review**
       1. Made OMB review process more transparent - Publication
       2. Relaxed the requirement that agencies could adopt new regulations only if the net benefits outweighed the costs
          1. Benefits have to “justify” the costs
       3. Instructed agencies to consider non-quantifiable factors
          1. “benefits” now include economic, environmental, public health and safety
          2. Must also consider distributive impacts and equity
       4. The yearly plan requirement applies to independent too
       5. If OIRA administrator thinks there is an inconsistency with POTUS priorities, VP can request further consideration or inter-agency coordination
       6. OIRA can decide what counts as “significant regulatory action”
          1. Section 3(f) defines it p519
          2. And then the agency has to categorize and OIRA can disagree and notify the agency within 10 days
       7. Section 7: disputes between agencies or an agency and OMB resolved by POTUS
    3. **Definition of independent agency**: “ ‘[I]ndependent regulatory agency’ means the Board of Governors of the Federal Reserve System, … the Federal Trade Commission, … the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, … the Securities and Exchange Commission, … and any other similar agency designated by statute as a Federal independent regulatory agency or commission.” 44 U.S.C. § 3502(5)
    4. Advantages
       1. Improve quality of regulation
          1. Ensure regulations are cost-justified
          2. Holds agencies to a standard of reliable data
          3. Ensuring coordination across different programs, warning when there is conflict (potentially cost-saving as well helpful for effecting regulatory goal)
       2. Increase democratic accountability
          1. Tying regulation to the values of the elected president
       3. Agencies are focused on their goal—the centralized review balances a series of worthy goals—“balanced regulatory decisions”
          1. Claim that agencies overregulate
          2. OIRA review has actually not chilled quantity of regulations though maybe quality
       4. Shifting influence over agency policy away from congressional oversight committees, dominated by special interest groups and unrepresentative
          1. Empirical debate over whether committee members are preference outliers or represent the preferences of the parent chamber reasonably well
       5. President has broader national view
    5. Critique [of Reagan’s 🡪 Clinton included more transparency]
       1. Ultimate decisions in the hands of OMB personnel who are neither competent in the substantive areas nor accountable to congress or the electorate
          1. Constraints on POTUS’ time
          2. 40 person staff at OIRA
          3. Don’t have the staff to develop expertise
          4. But maybe the agency personnel who have the expertise have the wrong values… What kind of people does the EPA attract?
       2. Structure of OMB reviews—status quo bias because delays caused by the review involve significant costs and may cause agencies to play it safe by adopting more modest regulations
          1. Delays/inaction paid for with the health and safety of the American people
          2. Reduction in quantity of activity
          3. But increase in quality?
       3. Furthermore, who defines the values that get factored into CBA? If you disagree with POTUS’ values or ranking of values then you want the agency to have less oversight
       4. [For Reagan] Less democratic accountability: shifting those decisions from the more transparent and participatory agency rulemaking process to the secretive OMB review
          1. WH review might undermine democratic accountability
          2. EPA officials bound by an administrative procedure and subject to media attention in a way that WH involvement is not
          3. EPA officials gather more public input and receive more public scrutiny
          4. Even if POTUS is more responsive to pubic preferences, argument that bureaucratic insulation alleviates countermajoritarian problems inherent in bureaucratic policymaking
             1. Average divergence between president and median voter generally greater than zero. Sharing the power with partially insulated, politically unresponsive bureaucracy tends to reduce the variance in policy outcomes
             2. Tempers variance in policy outcomes
    6. ? What triggers OIRA review?
       1. Independent agency: E.O.12866 § 4 applies. you only need to submit yearly plan.
          1. If OIRA admin thinks there is inconsistency w POTUS policies or in conflict with another agency, then the VP can request further consideration or inter-agency coordination
       2. Agency: the above or you submit review of regulatory
          1. “significant regulatory actions” submitted in timely fashion dictated by OIRA admin
          2. can return for further consideration with part of EO referenced to show whether there is an inconsistency
          3. review “significant” action (E.O.12866 §§3(f), 6(a)(3))
          4. Section 3 “likely” standard
             1. 100 million or all these vague standards
          5. Or if OIRA itself deems it a significant action
    7. ? What if a statute requires “feasible rules”?
       1. In addition to adhering to APA and “other applicable law”… E.O.12866 § 6(a)(3))
       2. The EO says: to the extent compatible with statute, comply with these CBA standards
       3. Must comply with both
       4. And still must do the review even if the statute says no CBA
       5. Generating delay, care, thinking and information from CBA even if it’s not supposed to do CBA
    8. **Cost-Benefit Analysis**
       1. Principles (E.O.12866 §1; E.O.13563 §1)
       2. What does Obama’s EO 13563 change in CBA?
          1. Adds human dignity
       3. How does CBA work in practice? *The Nuclear Waste Tanks Hypothetical*
          1. Proposal One: change location
             1. C = 30M, B = 3m fewer people get nausea for one day
          2. Proposal Two: change thickness
          3. C = 300M, B = 3m fewer people get nausea for one day
       4. Which is better?
          1. If you want to crush industry then C is a benefit
          2. **Always informed by a value set**
          3. A value system always informs a consequences a benefit or a cost
       5. How much is it worth to someone to avoid nausea for a day?
          1. Government actually polls this
          2. Individual people’s subjective value should matter
          3. How people feel about things matters
       6. How much is the proxy?
          1. Nausea medication
       7. What is the cost of the alternative?
       8. Trying to get a common metric for the consequence of policy
          1. To make consequences commensurate and then be able to put them together
       9. How do you value in monetary terms a health benefit?
          1. Could use a point system
       10. **If you don’t have comparable values in some system, then the fear is that regulators will just make it up**
           1. **Disciplining policy analysis, but it’s imperfect**
       11. Which of these proposals triggers OIRA review?
           1. Proposal 2
           2. Or really both—cost of people not going to work, value of nausea, etc.
              1. Doesn't have to just be the loss that is over 100M, could be the benefit
           3. Plus a dozen more bases for triggering review
       12. What if, instead of a new rule, EPA changes enforcement behavior?
       13. **Introducing variables without a formula for how to use them = discretion, which could be good or bad**
       14. The alternatives to CBA are less clear
           1. Basing decisions on un-quantified terms creates less clarity
38. Presidential Directives
    1. Instigating regulation (or non-regulation) rather than merely checking
    2. Is there authority?
       1. Not much case law
       2. *Sierra Club* (DC Circuit)
          1. P537
          2. Courts job is to ensure that any EPA rule has the requisite factual support
          3. Not the role of the courts to police the political presence of presidential influence
       3. *Peck* (DC Circuit)
          1. Seems to imply that presidential directives pose no legal difficulties so long as they do not direct the agency to disregard statutory criteria or otherwise act unlawfully
    3. Does it matter if there is legal authority?
       1. POTUS can certainly legally express what he would like
       2. Loyalty, commitment, budgetary influence, legislative influence, appointments, removal—pre-existing and political checks and balances
       3. Resistance to/criticism of a directive has political cost on POTUS
       4. But would a commissioner of an independent agency’s refusal to comply with a presidential directive constitute “good cause” for removal? Maybe if but only if the president has the lawful authority to direct agency action, in which case the legality matters
39. **Regulation of the Regulatory Process**
40. Overview: The APA
    1. Trying to strike a balance between reaping the benefits of broad delegation—fleiible, expert decision-making insulated from the distorting influence of day-to-day partisan politics—while avoiding the perceived danger of arbitrary, abusive government by unelected and unaccountable bureaucrats
    2. And SCOTUS, as we have seen has shown little inclination to rein in such delegations directly through a more aggressive version of constitutional non-delegation doctrine
    3. The APA was developed to help manage this tension by creating **default rules** for federal agencies to follow when making, interpreting and applying regulations
       1. Compromise of procedure and judicial review
    4. Default **–** 5 U.S.C. §559
       1. Explicitly states that the APA is a default—it doesn’t repeal any other statutory requirements
       2. Explicitly states that no future statutes should be read as amending the APA unless said statutes expressly state soz
    5. Procedure **–** 5 U.S.C. §§553-558, depending on action categories
    6. Categories
       1. Formal rulemaking: adversarial hearing presided over by ALJ, elaborate public hearing, final rule must be supported by the record, §§556-557
       2. **Informal rulemaking: notice-and-comment rulemaking, §553**
          1. Public notice of proposed rule by publishing in *Federal Register*
             1. Must include: “(1) a statement of the time, place and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved” §553(b)
          2. Provide the public with an opportunity to comment:
             1. “Shall give interested persons an opportunity to participate in the rue making through submission of written data, views or arguments with or without opportunity to oral presentation” §553(c)
          3. Publish an explanation of the rule
             1. “Incorporation in the rules adopted a concise and general statement of their basis and support”
       3. Formal adjudication §§554, 556-557
          1. Adversarial hearing usually with opportunity for oral presentation
       4. Informal adjudication
          1. No specific provision
          2. §555, §706 apply to all agency matters and there are other procedural limitations in other statutes, the agency’s own regulations, and CNSTN.
    7. (1) Rule or order?
       1. Rulemaking 🡪 rule
       2. Adjudication 🡪 order
       3. The APA essentially defines adjudication as anything other than rulemaking.
       4. The APA defines **a rule** as “an agency statement of general or particular applicability and **future effect** designed to implement, interpret or prescribe law or policy” §551(4)
       5. The distinction is not between general v. particular application; *the distinction between rule and order is between future-oriented and concerning events in the past*
       6. Courts almost always accept an agency characterization of its own action
    8. (2) Formal or informal?
       1. Formal: on record after hearing, §553(c); §554(a); informal: §553Rulemaking: Section 553 states that rulemaking is governed by formal procedures if the agency rule in question is “required by statute to be made on the record after opportunity for an agency hearing” §553(c)
       2. These are somewhat magic words. When they are used 🡪 formal rulemaking.
       3. Silence 🡪 informal rulemaking
41. Peanut Butter
    1. An Example of how laborious the process may be
    2. Should judges be dictating the choice of procedure?
42. **Informal rulemaking under APA §553 – and ossification**
    1. Judicial elaboration of (1) notice, (2) comment, and (3) explanation.
    2. Courts have invoked the purpose and structure of the APA to interpret the notice and explanation provisions to require more than an initial reading of the terms may suggest
    3. **United States v. Nova Scotia Food Products Corp*.* (*The Smoked Whitefish Case*)(1977)(2nd Cir.)**
       1. Concerns were raised about botulism in fish. The FDCA prohibits sale of “adulterated” food.
       2. FDA used §553 rule making and, later, a whitefish processor defended an FDA enforcement action by challenging the agency’s final rule:
       3. **FDA improperly relied upon undisclosed evidence** in promulgating the regulation, which was not supported by the record
          1. Studies on fish botulism relied on but not identified before the comment period.
          2. They were publicly available, but that did not amount to sufficient notice that these were the studies the agency was relying on.
          3. This would be a CHEAP fix
       4. **Address comments, adequately explain response**
          1. Comments on commercial feasibility & species-based alternative (“vital” issues)
             1. Commentary received from intervener, National Fisheries Institute, that suggested employing a species by species set of standards as an alternative
             2. Commentary by Institute and by Bureau of Commercial Fisheries that the regulation would cripple the whitefish industry
          2. Court wants to see that “major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did”
          3. More COSTLY demand
       5. **Rule: the agency decision has to be based on the record**
       6. But the result of this judicial standard is **not “concise” or “general**”
       7. Is there a **statutory basis** for these judicial demands?
          1. There is nothing in 553 that requires disclosure of the evidentiary basis for a rule!
             1. A “description of the subjects and issues involved” is one option
             2. Expressio argument: Why would the statute stipulate providing the legal authority basis not the evidentiary basis if it meant to include both?
          2. **The court is employing a purposivist, structuralist methodology that borders on partnership model (cf. *Habeas Case*)**
          3. Reading 553(b) in conjunction with the “opportunity” requirement and importing standard into the former to make the latter meaningful
          4. Judicial review provision, 706(2)(a) of APA
             1. To police arbitrary decisions
             2. Inadequacy of comment in turn leads in the direction of arbitrary decision making
       8. What if a party had submitted the studies in the comment period?
          1. The concern that a proceeding might never end if such a submission required a reply ad infinitum
          2. Footnote 15: “Here, the exposure of the scientific research relief on simply would have required a single round of comment”
          3. Don’t have to restart the process of you get more info from the comment period
       9. What if comments included “I hate whitefish“ and “I hate FDA”?
          1. Obligated to respond to comments that raise questions of “cogent materiality”
       10. What if FDA’s statement said, “Where the effects are uncertain, we prefer economic risks to industry over health risks to humans”?
           1. Court says the FDA “totally failed to respond” to the issue of commercial infeasibility and the species by species alternatives
           2. The court wasn’t actually silent on the species by species alternative
              1. (1) It said that appropriate species-by-species TTS requirements had not yet been demonstrated (2) that its proposed regulations “are the safest now known” for preventing botulism; and (3) that it was important to establish new regulations “without further delay”
           3. So this would presumably be insufficient but This could be a very narrow ruling due to this mistake
              1. Samaha thinks this is a messy opinion
           4. Courts concerned with agencies using boilerplate
    4. **Straightjacketing agencies** in a uniform procedural requirement in a way the statute does not authorize to minimize the risk of arbitrary and capricious review, which is authorized by the statute
       1. The court may be getting it backward
    5. Why
       1. Concern about broad delegation
       2. Broad policymaking power without a real procedural check if read narrowly
    6. Practical consequences
       1. Procedural attacks may be outcome driven
       2. Allows interest groups with more resources to have greater effect
       3. Ossification—costly, cumbersome and lawyer-driven
    7. E-rulemaking
       1. Lower costs of participation
       2. Possibly mitigating the bias of resource imbalances
       3. Notice-and-spam concern
       4. Concern that comments about values will get pushed under the rug in favor of empirical comments
    8. **As procedure increases, how might agencies and parties respond?**
       1. To write long, detailed, verbose, redundant statements
       2. Not “concise and general” statements [PARTNERSHIP MODEL]
       3. *Not all bad though since it is potentially increasing the quality of the decision making but also potentially defeating the purpose for which Congress delegated in the first place—to create a flexible, efficient process*
       4. But certainly increasing the decision costs, whether for regulation or deregulation
       5. Or they might **look for lower cost alternatives**….
       6. Like generation of rules through adjudication and policy statements
    9. Piling on the procedural requirement, yet lenient about never finding the formal rulemaking triggered
43. Rules Via Adjudication (Possible Alternative to APA Rule Making)
    1. When and under what circumstances may an agency announce a new general pricnople in the context of issuing an order in a specific case?
    2. ***Chenery I***
       1. **Rule:** A court reviewing an agency action will consider only the basis for that action proffered by the agency in the rule or order at issue; agencies may not offer additional ad hoc justifications during litigation
    3. **SEC v. Chenery Corp. (1947) (*Chenery II; The Utility Reorgzanization Case*) (4-1-2) (APA did not apply)**
       1. Public Utility Holding Co. Act (1935) required companies to submit reorganization plans and SEC to adjudicate under a standard of “fair and equitable to the persons affected,” *etc.* SEC declared a “rule” during this adjudication and applied it to this company.
          1. Rule was that management company couldn't trade while in the process of proposing a reorganization plan. Not illegal but created a conflict of interest (management represents stockholders during reorganization process)
          2. In the present instance, it requires a surrender of common stock purchased prior to the agency decision
             1. the amended plan (without the surrender of stock) would be “detrimental to the public interest or the interest of investors contrary to 7(d)(6) and 7(e)
             2. would result in “unfair or unequitable distribution of voting power” in the meaning of 7(e)
       2. Court upheld the rule
       3. Objections:
          1. **(1) procedure for the rule was adjudication**
          2. ? What force and effect for the rule in the future (agency, courts)?
             1. As foreseen by the agency within the agency: it will apply it like law

It can cite the rule

It becomes precedent and establishes the standard

* + - * 1. As foreseen by the agency within the courts: once it’s a rule, the court cannot question the underlying wisdom

While the court need not be bound to the rule as if it was precedent, the court will ordinarily defer

* + - 1. ? Was the procedure chosen more informal or formal?
         1. Formal in terms of rights of participation
         2. Fact of participation rights of the public utility companies, actually generates a reasoning for the rule. They adopt the rule to prevent these players from abusing information they might garner in the reorganization process
      2. ? Any limits on agency choice of adjudication to make a rule?
         1. Court lists specific examples of when adjudication but be appropriate but then also says that the choice is one that lies primarily in the informed discretion of the administrative agency
         2. Examples: reasonably unforeseeable circumstances, problems that have to solved despite the absence of a rule (urgency?), lack of experience to warrant a hard and fast rule, a problem so specialized/varying in nature as to be impossible of capture within the boundaries of a general rule
      3. **(2) retroactivity of the rule, in some sense**
      4. ? In what sense, exactly **–** different from a common law court?
         1. Majority says that all rules are of first instance have a degree of retroactivity to the case at hand (analogy to CL)
         2. The purchase of stock occurred before
         3. The remedy that SEC wants: exchange the stock at cost plus accrued dividends—unwinding the effects of the transaction
         4. As weighed against the mischief of a result that is contrary to the statute
         5. Landgraf and the canon of retroactivity—expectations are not enough

Casino hypothetical: can’t build a casino and expect a new law against gambling doesn’t apply to you

You have to foresee and effect the fact that the law changes

* + - * 1. Court softens the retroactive objection by referring to the statute “fair and equitable” and the related duty of the SEC to ensure the statutory standard

What’s new is the agency’s specification of what the statute requires

Sort of like Footnote 19 in Chevron (in my mind)

* + - * 1. Five (vague) factors for assessing legality of a retroactive action

Whethere the case is one of first impression

Whether the new rule is an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law

The extent to which the party against whom the new rule is applied relied on the former rule

The degree of the burden which a retroactive order imposes on a party

The statutory interest in applying a new rule despite the reliance of a party on the old standard

* + - 1. ? What trade-offs are involved with this approach?
         1. Adjudication has its own set of procedures, but they are more well suited for applying law to facts not to ensuring good general policy decisions
         2. Adjudication involves inviting input from broad range of interested parties, but notice and comment rulemaking designed to elicit input from broad range of constituencies and affected interest groups—more general, holisitic view
         3. General policy considerations may be more transparent to Congress and affected groups re: what is at stake
         4. If the agency must conduct formal adjudication anyway—no added procedure for actual rulemaking
      2. ? Any limits on enforcing new agency rules in adjudication?
         1. The examples of when adjudication is appropriate (but then also broad discretion)
         2. The five factors confining retroactivity
    1. Functionalist argument for allowing rules to be generated through adjudication
       1. Confining the agency to rigid requirement of general rule making would make the administrative process inflexible and incapable of dealing with many of the specialized problems that arise
       2. Gradual case by case might lead to formulation of better rules
       3. The filling in of interstices of the Act should be performed as much as possible through quasi-legislative promulgation of rules
       4. Unforeseeable problems will arise though and agency needs to have the option to deal with them on a case-by-case basis and needs to have the discretion to choose when to do so
    2. Scope of judicial review
       1. The wisdom of the principle is none of our concern
       2. **Our duty is at an end when it becomes evident that the SEC’s action is based on substantial evidence and is consistent with the authority granted by Congress**
    3. ? SEC chose a high-cost procedure **–** any cheaper option? …

1. Policy statements (Possible Alternative to APA Rule Making)
   1. Expressly exempted from notice and comment process, §553(b)(A)
   2. How do we distinguish between an agency rule and an agency policy statement?
   3. **PG&E (*The Natural Gas Shortage Case*) (D.C. Cir. 1974)(now FERC)**
      1. Natural Gas Act (1938) barred “unreasonable difference in . . . service” *etc.* and granted FPC authority to evaluate pipeline company curtailment plans. FPC issued Order 467 without §553 procedures, outlining prioritized curtailment measures.
         1. Households get priority over contracted industry
         2. (GREAT EXAMPLE OF LACK OF INDUSTRY CAPTURE)
         3. the wrath of the median voter’s political power
      2. Q: Is Order a substantive rule or a statement of policy?
      3. Held: Statement of policy.
      4. ? How does the court distinguish substantive rules/policy statements?
         1. **substantive rule:** “force of law” in subsequent proceedings
         2. **policy statement:** does not establish a “binding norm”
         3. Statement of policy announces what agency hopes to implement in future rulemaking or adjudication.
         4. There is opportunity for exceptions, flexibility of application, opportunity to hear challenges
         5. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. Can’t simply cite the policy and move on.
            1. If the commission wants to reject a curtailment plan that does not conform with the Order’s policy, must justify why in the individual adjudication at issue the propose curtailment was “unjust” or unreasonable” within the meaning of the Natural Gas Act
      5. **SOP is entitled to less deference on the merits—because it’s not a substantive rule [i.e. can question the underlying wisdom??] QUESTION**
      6. **The commission could simply have issued nothing then decided each case ad hoc under a secret policy rather than one made open to manage expectations**
      7. Samaha thinks this is an elegant case (unlike *Nova Scotia*), because it doesn’t straightjacket the agency into a particular procedure (and potentially drive them into silence) but it calibrates making flexibility available with varying degrees of deference in judicial review
      8. **Factors (p637-40)**
         * 1. Agency labels – easy for court’s to police
           2. inflexible rules

within the agency, hard for courts to really know whether or not the exceptional circumstances are actually being thoughtfully entertained within the agency

* + - * 1. behavioral effects

“wholesale cancellations” vs. a less immediate, direct effect

* + 1. ? If the court had held Order 467 required §553 procedure, what next?
       1. Might opt just not to announce anything at all
    2. ? Can courts police this line? What else might courts consider?
       1. How does the court know what the effect of the rule is within the agency?
          1. If the agency says it’s rearguing this every time and then cut and pastes it in every response
          2. Is that a binding norm? is that it citing a precedent or are they actually entertaining arguments back and forth? Had to tell.
       2. Within courts, can obviously police
          1. Going to give less deference on the merits to SOP’s
    3. ? Is the DHS memorandum (on deportation) a substantive rule or a policy statement?
       1. “This is just guidance”
       2. Looks flexible—although for the agency itself or for the officers on the ground?
       3. The impermanency of the policy itself undercuts the effects on behavior

1. Inaction
   1. What does the APA say about action and inaction?
      1. 551(13) agency action is defined to include “failure to act” p894
      2. 701(b)(2) p904
      3. Section 706(1)-(2)(A): opens up the judiciary for this challenge
      4. Section 701(a) bar: (1) statutes preclude, (2) agency discretion by law
   2. ***Heckler* (1985)(The Lethal Injection Case)(Rehnquist, 9-0 on judgment)**
      1. Prisoners demanded FDA investigate and enforce FDA against drugs used for lethal injection as “misbranded” and not “safe and effective”. The prisoners are not making constitutional claims
      2. Argument from FDA: judicial review is barred because the **APA 701** limits judicial review
      3. How the court deals with APA 701(A)(1)?
         1. **(**1) Presumption in favor of review unless clear legislative intent to restrict judicial review, p35
            1. Cf. *Overton* as example of a lack of clear legislative intent to restrict judicial review
            2. The statute does not speak to judicial review in which case the presumption is not rebutted
      4. How does the court deal with APA 701(A)(2)?
         1. (2) Review unless the statute is drawn in such broad terms that in a given case there is no law to apply, *cf. Overton* (1971)
            1. No standard to define whether an agency acted within its discretion
            2. The statute directs the agency to investigate and identity regualrsions that “ought to be modified, streamlined or repealed”
            3. This is a vague standard
      5. ? If this test is satisfied, has Congress violated the Constitution?
         1. Is there an intelligible principle if the agency has discretion by law?
         2. Connect to non-delegation cases
         3. Distinguish on basis of this being non-enforcement
         4. Maybe there is a separate tradition…
      6. ? What does this test have to do with an action/inaction distinction?
         1. Nothing
         2. *Not until later that the court imposes a special standard for non-enforcement*
      7. **Presumption against judicial review for agency refusals to investigate or enforce,**
         1. *Cf. Dunlop* (1975): example of statutory language that was sufficient to rebut the presumption against judicial review for refusals to investigate or enforce
         2. The statute specifically dictated that the if a complaint is filed “the secretary shall investigate and, if he finds probably cause, enforce”
      8. How to overcome the presumption
         1. Yes, just a presumption that can be overcome by adequate statutory standards, cf. *Dunlop*
         2. Footnote 4 possible exceptions to the presumption: agency refusal based on belief that it lacks jxdn, agency consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities
      9. ? Is the Court’s opinion textualist? Simply pro-death penalty?
         1. While there are textualist aspects of the opinion, the presumption itself seems to be in violation of the text of the APA and more in reliance on tradition—partnership model
         2. Can’t be simply pro-death penalty with Marshall agreeing
      10. ? Can we say FDA “acted” because it announced a decision?
          1. The court still treats the FDA’s announcement of its decision as a category of inaction
      11. The distinction between inaction and action
          1. The majority says that action is more likely to implicate individual liberty and property rights—both Marshall and Samaha disagree
          2. Action may be more likely to be costly, but that’s a different consideration
          3. Combining tradition of not requiring enforcement to the hilt even when there is resources with the moral philosophy that acting and hurting someone is worse than not acting and letting someone get hurt
      12. ? So why wasn’t FDA’s decision reviewable?
          1. Why were the statutes deficient to flip the presumption?
          2. Expressio argument on page 38
          3. But the court says that the language only applies when a violation has already been established
      13. Hard to try a line between what is action and what is inaction definitively.
2. Limits of judicially imposed procedure
   1. **Vermont Yankee (1985)(*The Nuclear Power Plant Case*)(Rehnquist, 7-0)**
      1. Vermont Yankee is trying to get licenses to operate a nuclear plant. At licensing proceedings, The Natural Resources Defense Council (NRDC) objects to the granting of said license, based on concerns for environmental effects.
      2. The Atomic Energy Commission shifts to notice and comment rulemaking and includes a public hearing (not required), giving out is Environmental Survey beforehand.
      3. The procedural objection, based on concern for the technical adequacy of the Survey is—why didn’t you do a full formal adjudicatory procedure? With discovery, cross examination, etc.
      4. **Held: DC Cir. Wrongly required procedure beyond the APA.**
      5. What are the best reasons for the DC Circuit’s approach to 553?
         1. Section 559 of the APA says that the provisions of the chapter are not be construed as limiting or repealing requirements “otherwise required by law”, which could be read to include the CL
            1. 1) APA 559 ("otherwise required by law") can be interpreted to include common law traditions
            2. 2) There is precedent to support a common law tradition of judges adding and a tradition of judges refusing to add additional procedural requirements
            3. 3) The Court in VY is opting for the former based on concern about judicial expertise in highly complex, technical questions? With an added concern for bias being able to fly under the radar when packaged as a procedural requirement
         2. PARTNERSHIP MODEL
      6. Why would an agency shift to 553?
         1. Because they don’t want to be cross examined and discovery for nefarious reasons
         2. The agency did decide to quantify environmental risks
         3. Easy way to invite broader participate than a licensing proceeding
      7. Was the agency’s decision against discovery subject to review?
         1. Deciding not to do discovery is inaction, no?
      8. Is Nova Scotia bad law?
         1. Nova Scotia and its procedural innovations have not been over ruled.
         2. There is an inherent tension, because the requirement that an agency rule promulgate through 533 notice and comment rulemaking be based on the record is a requirement that is not in 553 itself
         3. However, it is distinguishable because the Nova Scotia opinion is a purposivist reading of the “opportunity to comment” requirement of 553
         4. This purposivist reading of 553 is not overruled but the broader approach in Nova Scotia seems to be precluded by VY
      9. Remanded for review on its record (*Chenery I*)
         1. Isn’t this the kind of over proceduralization that the court was admonishing earlier in the opinion?
         2. Performance v. design standards
         3. Tension to the extent that the court is requiring a record
         4. But not telling the agency how to generate the record
         5. Example
            1. Buying a car you want there to a gas efficiency of 50 miles to the gallon: performance standard
            2. How you get to that standard would be the design standard
         6. Nova scotia as a design standard imposition (but see above for how to distinguish)
         7. And most of VY is a performance standard but will still at the very least incentivize the creation of a record by relying on *Chenery I* and therein lies the remaining tension
         8. Doesn’t resolve the tension but gets rid of much of it
3. **Judicial Review of Agency Decisions**
4. Arbitrary and capricious: APA §706(2)(A)
   1. The “arbitrary and capricious” standard is empowering for courts, because it allows for invalidation of an action when there isn’t a specific statutory or constitutional provision forbidding that action
   2. A vital check on agency arbitrariness
   3. Reaffirmation/expansion of *Overton*’s **hard look review**…
   4. **State Farm (*The Airbags Case*)(1983)(9-0/5-4) – Reasoned Decision Making**
      1. Under a 1966 statute, an agency used §553 informal rule making to establish a safety standard in 1978, and then revoke part of it in 1981.
      2. **Q:** Did the NHTSA act arbitrarily or capriciously in revoking the requirement in Standard 208 that vehicles produced after 1982 be equipped with passive restraints?
      3. **Held:** Yes. Remanded to the agency for further consideration or amendment to accord with present analysis.
      4. **What the Agency Did Wrong**
         1. Failed to consider an alternative (e.g., airbag mandate) (9-0)
            1. Not dictating that the agency consider all policy alternatives, which might be a violation of *Vermont Yankee*
         2. Agency inadequately explained safety benefit estimate
            1. Doesn’t account for the fact that inertia (which the agency itself previously cited) favors passive belts over manual belts or the effect they may have on occasional users
            2. The court is NOT second-guessing the agency’s empirical judgment. It is simply requiring the agency to address a theory it itself espoused
      5. **Rule:** A&C review requires an agency to examine relevant data and articulate a satisfactory explanation for its action, including a rational connection to the facts found and the choice made. The reviewing court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.
         1. **Examples of what would fail** A&C review:
            1. reliance on factors Congress did not intend the agency to consider
            2. failure to consider an important aspect of the problem
            3. explanation counter to the evidence before it, or so implausible it cannot be attributed to difference in view or product of agency expertise
      6. ? Isn’t this over-proceduralization barred by *Vermont Yankee*?
         1. This is more a performance than design standard
         2. Though the minor tension of requiring a record remains…
         3. Judges are making an effort to articulate but not straightjacketing the agency within a particular method
         4. 553 already requires an explanation—“a concise general statement of their basis and support”
      7. ? Isn’t review of rule revocations barred by *Heckler*?
         1. Heckler is about an agency’s decision not to bring *an enforcement action* not an agency’s decision not to promulgate a rule.
            1. *Heckler*: presumptively unreviewable
         2. Even though “action” in 706(2)(A) includes inaction, most courts have held that judicial review of an agency’s decision not to initiate rulemaking proceedings is more deferential than review of an agency’s decision to adopt a new rule. “extremely limited, highly deferential” version of a&c review 🡪 a court will “overturn an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency” (p727)
         3. But this case is about rescission, about the removal of a regulation
            1. Not a decision about whether or not to promulgate a rule in the first place
      8. ? Does a&c doctrine nonetheless favor the status quo?
         1. Yes, “while the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard… the direction in which an agency chooses to move does not alter the standard of judicial review established by law”
      9. ? How about change in administration as the reason for new agency policy …
         1. In conjunction with the standard within the rule + the examples of failure…
         2. If the statute does not rule it out, that is fine and potentially good. But the agency has to make the argument under Chenery I (Samaha)
            1. State Farm does not resolve this issue because the agency didn’t defend on these grounds
      10. What if the effect of the passive belts is truly uncertain?
          1. Court allows for that
          2. Agency just has to address this theory of inertia that agency itself promulgated
          3. And may have to keep researching if court thinks it stops at an unreasonable point. Agency has to provide a reasoned explanation for its stopping point.
          4. A statute itself could always account for what to do with uncertainty—“always err on the side of safety”
      11. Justifications: generates better agency decision making
          1. Incentivizes thorough, careful consideration
          2. 🡪broader participation by agency staff members
          3. reduces cognitive biases like tunnel vision and overconfidence
          4. mitigates ability of parochial interest groups to influence agency
          5. incentivizes agencies to take public comment seriously
          6. forces agencies to present their analyses and conclusions in a form that courts and the general public can understand
      12. Critiques
          1. bad decisions
             1. Judges lack the technical expertise to make these evaluations
             2. Treat trivial omissions as important defects
          2. Judge can import his policy
          3. Formal reasons imported after the fact by lawyers—the hard look review does not generate better agency decisions
             1. Obscuring rather than clarifying the true basis for administrative decision making
          4. Could incentivize agencies to make rules through case by case adjudication
5. Statutory interpretation by agencies
   1. Chevron Deference
   2. If you survive Step One, you win 90% of the time. Not much work is done in Step Two
   3. ***Chevron* (1984)(Stevens, 6-0) – Deference Within a Domain**
      1. Clean Air Act (1970 as amended in 1977) **–** *e.g.*, in nonattainment States (states that failed to reach the emission standard), “new or modified major stationary sources” must comply with the lowest achievable emission rate for such a source
         1. if new and modified had to get the technically least harmless
         2. but if you don’t update then no requirement triggered
      2. Legal question of what counts as a source
         1. Every piece of equipment
         2. A whole facility or a firm
      3. EPA interpretation **–** 1980 rule rejected the plant-wide bubble concept, but 1981 rule defined “stationary source” to allow States to use it
         1. Policy reasons:
            1. Triggering a high tech requirement every time you replace one piece of equipment, then does not allow for moderate, middle ground changes which might be less costly even though not a huge change in environment
            2. Basically: either stay or old or update completely to highest level—knocking out any moderate rules
            3. Also knocking out the moderate option of increasing pollution of one equipment and dramatically offsetting that by decreasing for other equipment
      4. Replaces the multifactor approach with a categorical two-step
      5. **(1) Whether Congress has directly spoken to the precise question at issue**
         1. If Congress has, then Congress’ intent must be given effect by the court and the agency
         2. How do judges tell? Footnote 9: “employing traditional tools of statutory construction”
      6. **(2) If the statute is silent or ambiguous with respect to the specific issue, the question for these court is whether the agency’s answer is based on a permissible/reasonable construction of the statute**
         1. Even if it is not what the court would have found
         2. How do courts do this?
            1. Duplicative of a&c, which would be redundant
            2. Or as informed by the organic statute, but isn’t that step one?
            3. All the action is in step one
      7. Held: (1) EPA first noted that the definitional issue was not squarely addressed in the statute or LH (2) The implementation of the “bubble” concept is reasonable in light of the statute’s goals
         1. To balance economic growth with reasonable further progress to assure attainment of air quality standards by a specific date
         2. To allow states greater flexibility for economic growth than under the previous EPA standard (which was the “point source” approach)
      8. Chevron court itself relied on statutory language and **legislative history**
         1. At the time, LH was popular – what effect if judges exclude?
            1. Increase the frequency of deference
            2. Removing a factor by which to ascertain if there is meaning
            3. By taking a variable away, increasing the chances of a tie

Assuming all else equal

* + - * 1. But if there is no procedure for how to use variable then who knows…

If you think the text is clear then LH can introduce uncertainty but overall under certain conditions, the addition of a variable will tend to decrease deference

* 1. Legal Authority for this test
     1. *Marbury*: the judiciary has the responsibility to say what the law is
     2. APA: the courts have the duty to interpret statutory provisions
     3. (1) Constitutional law allows Congress to delegate to an agency the authority to make discretionary policy decisions so long as supplies an intelligible principle
     4. (2) Chevron equates statutory silence or ambiguity with explicit delegation
     5. The court’s duties under Marbury and APA then are satisfied by the court in delegation cases by determining that the agency acted within the scope of the authority delegated to it by Congress. **The premise is that filling in gaps is policy effectuation.**
     6. Chevron is saying what the law is – that the law requires deference sometimes
  2. N.B.: Chevron test does not require that agencies demonstrate that they used a valid interpretive method**—a contrast with *State Farm*, where the “how” is important**
  3. **Policy for *Chevron***
     1. Reasonable Legislature would want courts to treat ambiguity as express delegation to agency because the latter has **superior expertise**, etc.
        1. Response: but this is about interpretation not just policy and judges know more about the law and statutory interpretation
        2. But even assuming the above, if interpretation involves LH in context people in the agency have been dealing with this statute in the legislature for longer than the judge
     2. Democratic accountability
        1. Democratic process favors policymaking by more accountable agencies, therefore, ambiguity is presumed to reflect a delegation of primary decision making authority to the agency unless the act unmistakably precludes such deference—constitutionally inspired clear statement rule
        2. Judges have tenure and salary protection; no consituencies
     3. Separation of powers
        1. Requires equating explicit delegation with implicit delegation
        2. Inferring delegation
  4. Is Chevron consistent with **textualism**?
     1. Chevron deference not clearly in APA
     2. Chevron is easier to justify on purposivist and partnership justification
  5. **BTW, what if EPA never initiated a pro-bubble rule making? [WHAT HAPPENS WHEN AN AGENCY FAILS TO PROMULGATE A RULE?]**
     1. If someone walks into a court saying: Agency failed to initiate a pro-bubble rulemaking…
     2. 706(1): a&c review for agency action unlawfully withheld
     3. Then have to look to the underlying statute
     4. If there is a clear underlying directive, then court might
     5. Heckler inaction
        1. Although Heckler distinguishable because that was about refusing to enforce vs. refusing to promulgate
     6. p727-728: Courts distinguish failure to promulgate a rule from Heckler but courts so deferential
        1. Even though “action” in 706(2)(A) includes inaction, most courts have held that judicial review of an agency’s decision not to initiate rulemaking proceedings is more deferential than review of an agency’s decision to adopt a new rule.
        2. “Extremely limited, highly deferential” version of a&c review 🡪 a court will “overturn an agency’s decision not to initiate a rulemaking only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency”
        3. Have to be a strong indication
        4. Even though APA told us not to worry about action/inaction distinction
        5. Wah-wahhhh….
  6. **Standard of [ARB AND CAPRICIOUS] Review for an Change in Agency Policy**
     1. P730 Fox case
     2. No real heightened standard
     3. Maybe a little extra explanation if, for example, the new policy relies on factual findings that contradict the prior policy. “It would be arbitrary or capricious to ignore such matters”
     4. Basically, the State Farm rule standard that acknowledges the change
  7. **Adequately clear statutory meaning:** 
     1. When is the relevant statutory language silent or ambiguous? That is, when has or has not “Congress directly spoken to the precise question at issue”?
     2. Footnote 9 of Chevron instructs the court to employ the “traditional tools of statutory construction” in order to determine whether “Congress has an intention on the precision question at issue”
        1. If judges use all those tools, won’t the statute always be clear?
           1. Judges will always give an answer but that is not the same as a clearly correct answer
           2. Use of all the tools doesn’t mean you would always find THE answer just an answer and chevron says that when you in situation of un-clarity, judges get out of the way someone is better equipped to navigate this space—so “truly clear” not just “what a judge would do”
        2. *Chevron* as the civil version of the Rule of Lenity case-clearing tiebreaker
        3. Or: could give less weight to (or exclude) some clarifying tools
           1. On the modern doctrine, only use of LH and general purpose when exhausted first tier of tools
           2. But now when you throw in an agency, could substitute deference for the second tier
           3. But we have to be sure that this is what the SCOTUS is telling us to do in terms of which tools to use. Remember *Chevron* itself uses LH
           4. What is the court doing when it circles back to Chevron deference after creating the lexical ordering of tools
     3. The text as the constraint
     4. **MCI (1994) (*The Long-Distance Rates Case*)**
     5. USC 203(a) requires communications common carriers to file tariffs with the FCC and 203(b) authorizes the FCC to “modify” any requirement of 203.
     6. Q: Can the FCC make the tariff-filing requirement optional for all non-dominant long-distance carriers (i.e. all except AT&T) as a valid exercise of its modification authority?
        1. N.B. this is not an arbitrary or capricious choice on the part of the agency. But you could **pass a&c**, have a great policy but have it NOT be square with what congress wanted.
     7. **Held**: “modify” *clearly* means moderate change, and this FCC rule is not a moderate change
     8. Scalia: Statute is clear 🡪 FCC is not entitled to *Chevron* deference
        1. Ordinary Meaning (and application to the FCC rule)
           1. Dictionary definition of “modify” is to make a moderate change; has connotation of increment or limitation

One definition in one dictionary used by petitioners contradicts its other listed meanings and other meanings in most other dictionaries

Substance of the attack on Webster: they take common error as proper use, but isn’t this indicative of a colloquial meaning? And doesn’t common usage determine what is ordinary usage?

And congressional staffers don’t use dictionaries so the “common”, erroneous meaning could have been intended (faithful agent)

If you want to be more **independent**, set up a standard of proper use or reliable meaning

* + - * 1. Starting to look less clear… and yet they did not defer
      1. Colloquial Meaning
         1. The French Revolution “word in sentence” example
      2. Contemporaneous Meaning (time of enactment)
         1. The meaning in 1934
         2. The weird Webster dictionary didn’t even exist yet and the narrow definition of “modify” was the only one around
      3. Structural Inference (on presence of exceptions)
         1. The only listed exception to the modification power is that the FCC cannot extend the waiting period for tariff revisions
         2. Is it conceivable that a statute is indifferent to FCCs power to eliminate the tariff-filing requirement entirely for all but one firm but is very strict about the waiting time requirement for tariff revisions? (Also belongs under Congressional Intent)
      4. Importance within the statute (part of structural inference)
         1. Rate filing is the premise of the Act; much of the remainder of the subchapter is premised of tariff-filing requirements
         2. Parallel to *judicial precedent on Interstate Commerce Act*: rate filing was the primary means of preventing unreasonable and discriminatory charges

The tariff-filing requirement is the heart the of act

* + - * 1. This of parallel reminds of me textualist project of generating consistency through the law. But is this kind of consistency—going beyond consistency of terms to consistency of primacy—too far?
      1. Nondelegation canon
         1. It is highly unlikely that Congress would leave the determination of whether an industry will be entirely or substantially rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to “modify” rate-filing requirements
         2. Relying on a **substantive canon—yet treated lexically superior to General Purpose**
         3. Is it arbitrary? No real policy judgment just closes cases?

But this is what chevron does! It closes cases.

* + - * 1. Kind of contradicts implied delegation, which drives the *Chevron* doctrine
        2. Set up a non-delegation canon which is in tension with an implied delegation theory in the first place
        3. LOOKING SUBSTANTIVE
        4. Cross section with non-delegation doctrine: perhaps Scalia’s argument is best understood as: when an agency interpretation entails a substantially broader delegation of power to the agency, ordinary Chevron deference should not apply
      1. FCC goes beyond the meaning of the statute 🡪 **no deference** 🡪 FCC’s permissive de-tariffing justified only if it makes a less than radical or fundamental policy change in the Act’s tariff-filing requirement
    1. Stevens, dissenting: the FCC’s reading is reasonable 🡪 deference
       1. General Purpose
          1. Communications industry has an unusually dynamic character and Congress intended to confer the FCC with the power of flexibility to respond to the dynamism in furtherance of the broader goal of preventing unreasonable/discriminatory rates
          2. The sections in question address themselves to the problems of monopoly, which is no longer present
          3. Congress conferred broad authority to FCC in other areas of the Act
          4. The heart of the act isn’t the rate requirements. The rate requirements are one means to the end of ensuring reasonable/non-discriminatory rates.
       2. Cannon against surplus
          1. 203(b)(2) “any requirement” – has to confer some discretion to modify requirement of tariff reporting

anti surplusage: footnote 2 p784

* + - 1. Structural Inference
         1. 203(c): allows for exception to requirement of tariff reporting if that exception was otherwise provided by or under this Act”
         2. FCC’s modification authority explicitly allowed for “particular” circumstances or “general” orders—broad delegation
         3. The one exception is a limit on stiffening regulatory impositions on carriers not on relaxing them

Isn’t there also an expressio argument to be made here?

* + - 1. Ordinary meaning
         1. “modify” dictionary: a change that leaves the general purpose and effect of the subject matter intact
      2. Contemporaneous Meaning
         1. Black’s Law 1933
         2. Webster’s 1934 (last of the footnote p785): “to reduce in extent or degree” which corresponds with the single exception
      3. Colloquial Meaning (a kind of ordinary meaning)
         1. Example: the huge breakup of AT&T was deemed a “modification”
      4. Q: Is Scalia making an intentionalist argument and Stevens making a purposivist argument?
    1. Would reliance on general purpose create or reduce uncertainty?
       1. GP doesn’t point one way so it depends on the context and the other variable
       2. From the dissent’s perspective, adding clarity because it’s pointing in the direction as the dissent’s other tools (like a dictionary definition of “modify” that includes keeping general purpose)
       3. Majority is excluding General purpose which would introduce uncertainty given their definition of modify
       4. They aren’t disrupting the dissent’s view of GP, they box it out as a policy determination
       5. Refusing to create un-clarity by throwing in general purpose
    2. The majority in MCI uses the substantive canon of nondelegation at Step One so why not LH?
       1. If the court is going to include a substantive canon like non-delegation in step one then they why LH?
       2. And Chevron step 1 is to see if Congress spoke to the specific issue…
       3. Chevron itself looked at LH and it didn't see anything on point
          1. LH made the court more confident that there were competing goals behind the statute
       4. So why is there a debate even?
       5. LH is not considered by some to be a part of the ordinary tools of statutory construction within the meaning of footnote 9
       6. The result of this is not necessarily going to yield to less deference to agencies. LH is just as likely to introduce uncertainty
          1. Unless there is this other agenda (nondelegation)
    3. MCI Notes
       1. Textualists, who find that meaning of the statute is apparent from its text more often such as Scalia, thereby find Chevron triggered less often (this does not apply to all textualists)
       2. Is the inclusion of other factors, such as LH, going to increase or decrease the likelihood of finding ambiguity?
          1. Introduction of another variable tends to confine but if there is no formula then may broaden discretion
          2. So if courts only look to LH when the text is ambiguous, would tend to reduce rather than expand the scope of deference p788
       3. Scalia thinks that when employing the tools of statutory construction a judge can usually ascertain a clear signal about statutory meaning, but this is arguable less likely when trying to find specific congressional intent in the statutory language calls for administrative judgment such as what is “feasible” or “probable”
          1. If most judges defer at Scalia rate, does that incentivize Congress to create ambiguity?
       4. Is a court’s discernment of congressional intent as accurate as an agency’s?
          1. Specialized agencies are closer to the statute, its LH and its original purpose that generalist judge’s
          2. In which case the statutory construction analysis in MCI might seem at odds with the spirit of Chevron
          3. Alternatively, isn’t it vital that courts use wide range of tools in order to ascertain whether the statute has a clear meaning before allowing the agency to do what it wants?—separation of powers
    4. ***Chevron* and LH**
       1. Two Contested Approaches
          1. First look to the text. If ambiguous, look to LH. If LH does not clearly resolve the ambiguity, defer to the agency OR
          2. First look to text. If ambiguous, defer to the agency. Look to LH only if there is no agency interpretation
       2. Remains uncertain whether LH can foreclose an agency’s reasonable interpretation of an otherwise ambiguous text—i.e. whether it can be a tie-breaker
       3. Congressional staffers reported that a central purpose in drafting LH is to shape the way agencies interpret statutes. Should courts prioritize LH over deference to agency as this would be more consistent with congressional intent? Or is this even more of a reason to refrain from using LH to limit agency discretion based on congress using LH to circumvent Article I section 7?
          1. Q: but the result is equally not democratically accountable right? Neither in this case are answering directly to a constituency. Congress getting policy through LH v. agency using its discretion to promulgate policy. Might as well collaborate then.
  1. *Chevron* endorsed “traditional tools” of interpretation at Step 1, and tools beyond dictionaries get used **–** *MCI* (1994), *B&W* (2000), other cases add constitutional avoidance, retroactivity
     1. These are **substantive** canons… so are all tools allowed at Step One?
        1. N.B.: CNSTN avoidance as a way to accept a less plausible reading of the statute
     2. But the doctrine collapses if it means “what a judge would do”
        1. (1) Exclude tools **–** *e.g.*, LH for some judges, scope of preemption
           1. don’t have a strong history of judges excluding tools
           2. presumption of narrow preemption excluded at step one [??]
           3. some judges exclude LH all the time – and the question is now how judges are adjusting their tool set in the Chevron context
           4. MCI wants us to exclude general purpose but B&W doesn’t
           5. No real answer
        2. (2) Truly clear meaning
           1. relying on judges to keep in their head between what they think is the right answer and backing off because it’s not adequately clear
  2. Note as judges begin to weave in other justifications for *Chevron* deference besides implicit delegation
     1. Judges’ view of where they belong in the political system and why
     2. Independent, partner or subordinate?
  3. What factors might affect the chances of deference?
     1. Conventional legal arguments like the non-delegation canon, which is supported by Constitutional arguments or is critiqued for lacking them
     2. Choice of methodology like Textualism
     3. Ideology
        1. Judicial policy preference
        2. Partisanship
  4. Empirical Data
     1. Rate of agency position being validated in cases that invoked Chevron by justice (the point of this is that legal arguments not just policy are driving decisions)
        1. Every justice is over 50% and 6 are over 66%
     2. But there is variance – why? Why the gap between Scalia and Breyer?
        1. Still, there could be 70% agreement between Scalia and Breyer
        2. Not a matter of how many variables you’re working with since textualists have plenty of variables
        3. Breyer does add general purpose
        4. Certitude could be a factor
  5. What about between Breyer and Stevens? Both general purposivists. Why?
     1. Their positions on the administrative state
     2. Their certitude
  6. Variance among liberal and non-liberal agency decisions. Both Stevens and Thomas have a 40% swing
     1. Policy preferences, sure
     2. But Thomas doesn’t think agency rules should have the force and effect of law
     3. **A CNSTN view** of the administrative state—pro- or de-regulation based on legal arguments for delegation
     4. Why not 100% swings? Law, my friends.
  7. What happens when the votes get added up?
     1. The big swings might cancel each other out and then the agency hinges on the people not swinging (Kennedy and O’Connor), which is might be tipped by quality of legal arguments
  8. Too big to defer?
     1. **Food and Drug Administration v. Brown & Williamson Tobacco Corp. (2000)(*The Nicotine Case*)(5-4)(“This is hardly an ordinary case”, p810)**
        1. FDCA (1914, 1938) defines “drugs” as “articles (other than food) intended to affect the structure or any function of the body.” §321(g).
        2. FDA regs found nicotine a drug, limited sales and advertising to kids through notice and comment rulemaking (700K comments)
        3. Simple argument for deference: ordinary meaning and general purpose
           1. Just look at the ordinary meaning—industry intended sold nicotine for the pharmacological effects of mood stabilization, etc. and nicotine fits the definition of “drug” within the act
           2. General purpose argument: Purpose of FDCA is to protect the public health
        4. The majority doesn’t deny this. But it opts for a complex argument against deference – whole FDCA plus other statutes
           1. (1) The FDA’s consistent denial jxdn. Based on that background, Congress did some other legislating on the regulation of tobacco specifically. Ex: Cippollone case

SPECIFIC OVER GENERAL CANON

* + - * 1. (2) When the majority does talk about the FDCA, it focuses on FDCA provisions on “safety”

According to the majority, the determination of safety by looking at the aggregate effects and consumer response

Agency: it would be worse for the public health to ban completely

Majority: FDA not allowed to consider the remedy, just the product

But isn’t the FDA’s logic the same in the case of allowing methodone on the market?

* + - * 1. All this argument isn’t about the operative statute. Reaching out to historical context, including LH, that undergirds other statutes that then suggests the FDA should not have jxdn over tobacco products despite the ordinary meaning of the FDCA
        2. (3) Nondelegation for major policy issues
        3. How do judges test this? How do they determine importance? cf. MCI (1994)
        4. **Three metrics that determine if non-delegation is triggered under Too Big To Fail**

Economic significance of the policy choice (compare AFCA)

Political salience of the issues

Majority saying these ought to be judged by Congress (but here, the Court, really)

Especially in the context of the oblique way it would be conferring such delegation

Importance to the statutory scheme itself (*MCI*)

Three metrics

* + - 1. Remember that Chevron allows for changes in administrative policy—so allowing it means allowing potential future instability
    1. Note: Congress did enact in 2009 a law that effectively adopted all the FDA measures
       1. Forced some work from Congress
       2. But we did have to wait 9 years for it
  1. Affordable Care Act Subsidies – Chevron Deference?
     1. (1) Evaluate the clarity
        1. using ordinary meaning, in context, structural analysis, canons
        2. arguments on both sides
     2. (2) Seems like there is ambiguity then… but this legislation triggers at least some of the three metrics of policy significance big enough to trigger nondelegation concerns
  2. Chevron’s domain
  3. Before *Chevron*, courts use multiple factors to decide the degree of deference – this old era has not been revived.
  4. But *Mead* (2001) says some agency interpretations are ineligible for deference – and *Skidmore* (1944) is alive for those situations
  5. Limit: when implied delegation doesn’t make sense
  6. ***Christensen*** excluded interpretations contained in policy statements, agency manuals, and enforcement guidelines
     1. Lines up with *PG&E*
  7. Notice and comment rulemaking and formal adjudications have the force and effect of law so there is no real question when Congress has explicitly conferred the authority to promulgate formal rules
  8. **Mead (2001)(*The Customs Letters Case*)(8-1)**
     1. Before *Chevron*, courts used multiple factors to decide the degree of deference. This old era has not been revived.
     2. But *Mead* (2001) says some agency interpretations are ineligible for deference and *Skidmore* (1944) is alive for those situations.
     3. Any customs office, including HQ, may issue ruling letters. Mead is challenging a reclassification of its day planners, which resulted in a transition from no tariff to a 4% tariff. Q: Is this changed interpretation of the HTSUS categories eligible for *Chevron* deference?
        1. Pull in other tax case
     4. A statute requires Customs to fix classifications and rates of duty for imports, and a Treasury regulation authorizes Customs ruling letters.
     5. **Rule**
        1. An agency interpretation only gets *Chevron* deference “when it appears that Congress delegated **authority** **to make rules** carrying the **force of law**, and that the agency interpretation claiming deference was promulgated in exercise of that authority”
        2. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking or by some other indication a comparable congressional intent
           1. Express congressional authorization to engage in the process of rulemaking or adjudication—highly indicative but not dispostive
     6. **Ask if Congress explicitly or implicitly delegated authority to make rules carrying the force of law (and the agency used this authority).**
     7. Using which factors -- and how do they apply here?
        1. **procedure –** character of the decision process (*e.g.*, §553)
        2. **force of law –** character of the decision (*e.g.*, precedent)
     8. Vermont Yankee and PG&E preclude the Court from prescribing specific **procedure.** But it by clinching deference on **authority to make** the court uses procedure to indicate whether congress intended to implicitly defer
        1. Character of the decision process
           1. More formal procedure 🡪 better quality rule (e.g. 553) 🡪 more likely congress intended to implicitly defer on the issue
           2. But NOT DISPOSITIVE
        2. Review by CIT without deference was a considered factor
        3. 46 different Customs offices issue 10-15K rulings per year, although this letter was disseminated from HQ
     9. **Force and effect of law**
        1. Character of the Decisions
           1. The effect of the ruling *is* going to be binding—more than on just the individual shipment
           2. The Court says, okay, but the binding effect **on third parties** is limited.

After the transaction that gives it birth, may only be applied to transactions involving identical articles or articles described identically

* + - * 1. Binding only on the specific product sample (could be multiple transactions) and identically described products (make sure this is right). **Regulations instruct third parties not to rely.**
        2. “Subject to revocation without notice to any person except the person to whom the letter was addressed”
        3. Stated function is to provide “advice and guidance as to the interpretation of the Customs and related laws with respect to a specific Customs transaction”
    1. Statute = HTSUS, which describes “binding rulings” but defines a “ruling letter”
       1. “Represents the official position” of Customs on a particular transaction
       2. Binding on Customs personnel until modified or revoked
       3. May be cited in disposition of transactions involving the same circumstances
    2. “binding ruling” – definition of “ruling” in footnote
    3. What if the 1993 letter were eligible for Chevron deference, what result?
       1. Chevron Step One
       2. Chevron Step Two
       3. Too big to defer three metrics to see if non-delegation is triggered
       4. Agency likely would have prevailed
    4. So why isn’t Mead eligible for Chevron deference?
    5. **Held:** a tariff classification has no claim to *Chevron* deference, because there is no indication that Congress intended such a ruling to carry the force of law. But entitled to **Skidmore** respect according to persuasiveness
    6. Congress didn’t intend to delegate authority that would allow customs letters to have the force and effect of law. Court looks to:
       1. Terms
          1. “binding rulings” doesn’t mean binding in the legislative sense of binding more than the parties to the ruling [QUESTION: what about private bills? *Chadha*)
          2. statute’s direction to “disseminate” information to generate “uniformity” suggests rulings have precedential value, but that alone is insufficient to trigger *Chevron* deference

interpretive rules sometimes function as precedents and they do not get deference

* + - 1. Agency Practice
         1. Customs does not “generally” engage in notice and comment rulemaking when issuing rulings… [QUESTION: does it ever? Then what? that one ruling gets deference? Incentives]
         2. Treated as conclusive only between the importer and Customs—not binding on third parties [QUESTION: what about private bills? *Chadha*)
         3. 46 different Customs offices issue 10-15K rulings per year
    1. ***Skidmore*** 
       1. Acknowledging that agency’s have expertise, broader investigations and information 🡪 respect proportional to its “power to persuade”
       2. Factors: agency’s consistency, formality and relative expertness
          1. The breadth of the agency’s policymaking or adjudicatory power
          2. The formality of the rule: legislative rules v. guidance documents
          3. Consistency of the interpretation
          4. How longstanding it was
          5. Technicality of the subject matter
          6. Implicit consistency with Congressional intent—no modifications of the statute resulting
    2. Is Skidmore deference different from reading a lawyer’s brief?
       1. Read the agency’s interpretation as you would a lawyer’s brief and be persuaded to the extent that you are persuaded
       2. What is different?
          1. Consistency over time: a lawyer’s consistency would never factor
          2. Relative expertness
       3. This is nuance, this is sophistication
    3. How is the court going to deal with the variety of ways law invests agencies with power of discretion and discretionary action?
       1. Scalia wants a bright line
       2. Majority wants to tailor deference to variety
    4. Why is the Court developing doctrine in this way?
       1. The pay me now, pay me later approach
       2. Tailoring deference to the various ways in which agencies take action and exercise discretion
       3. Finely adjusting deference to any procedural formalities or lack thereof
       4. And part of the majority’s point is that there is such variety in how congress creates agencies and how they work
       5. So why not just throw out Chevron all together? Judicial resources
          1. Personal take: judges don’t want to make the policy decisions but they want to be able to trust agency policy decisions
       6. Within a structure, there are multiple variables
    5. Scalia, dissenting
       1. He liked Chevron because it was a rule and treated congressional intent element as a legal fiction
       2. Scalia saw *Chevron* as establishing an across-the-board presumption that ambiguities in agency-administered statutes are legally equivalent to congressional delegations of authority to the agency
          1. Hints of separation powers—Congress didn’t want to entrust discretion to the judiciary but to the executive branch
       3. Look at Nots below and at the book
    6. Notes
       1. Majority and the dissent view the underlying presumption about congressional intent in Chevron differently
          1. Majority: the presumption applies only when the “agency’s generally conferred authority and other statutory circumstances” make it apparent that “Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law”

I.e. there is a Chevron step zero to determine whether there is implicit delegation, which is required to trigger *Chevron* in the absence of express delegation

* + - * 1. Scalia saw *Chevron* as establishing an across-the-board presumption that ambiguities in agency-administered statutes are legally equivalent to congressional delegations of authority to the agency

Hints of separation powers—Congress didn’t want to entrust discretion to the judiciary but to the executive branch

* + - * 1. But Scalia views the presumption as a legal fiction
      1. Debate about the relative merits of **rules v. standards**
      2. Why the emphasis on procedural formality?
         1. Majority thinks it is indicative of congressional intent
         2. Even if it’s not, might it be a good proxy for congressional intent to delegate to the agency?
      3. When is an Agency Interpretation “Authoritative”?
         1. Majority: when there are enough indicators that congress intended to delegate interpretive authority in the particular context
         2. Scalia: once the agency’s leadership has endorsed the interpretation

*Chenery I* complications since in this case the endorsement is *post hoc*

Possible retroactivity concerns?

* + - 1. *Brand X* and Scalia’s ossification concern
         1. Judicial construction of a statute administered by an agency is merely provisional; as long as the underlying statutory term is ambiguous, the courts should uphold an agency’s alternative interpretation notwithstanding the prior judicial constructions
         2. Basically, preserves flexibility

1. **Can we do better?**