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Legislation and Regulation
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CHECKLIST OF ISSUES
(note: outline was created by Elhauge)

1. Text Meaning Clear? – **always start here**
   a. How determine?
      i. use dictionaries or personal experience?
      ii. which parts of dictionaries – primary v secondary meanings?
      iii. which dictionaries – regular v legal dictionaries?
      iv. use dictionaries or colloquial meaning?
         (1) if colloquial, consider how people commonly use item or picture word or rather how they commonly define a term?
      v. use dictionary/colloquial or specialized meanings?
         (1) act aims at specialized linguistic community?
         (2) legal term of art?
         (3) focus on meaning most likely held by
            (a) Congress? – since they're the writers
            (b) regulated audience? – since they are the ones it's applied to
            (c) advising lawyers? – few people read statutes, and lawyers are the people who tell people how to obey the statute
            (d) prior usage in statutes or court opinions?
         (4) how much consensus among relevant community is required? – if most people believe it's a certain way, it's probably that.
      vi. use meanings of words in isolation or in context of other words?
      vii. emphasize definitional section or operative section of statute?
      viii. use meaning of same word in other provisions?
      ix. Title of Act bears on meaning?
      x. Consider factual context? Different from legislative history? Tends toward leg. history, so this is limited among strict textualists
   b. Does textualism provide a theory for making above choices or prioritizing them? One theory recognizes that there is no inherent meaning in the text, so how do you decide what the linguistic community thinks.
      i. If no guiding theory, can textualism constrain interpretation?
      ii. If the theory turns on likely legislative intent, any different from purposivism?

2. Assuming Textual Meaning Clear, Do Exceptions for Absurdity or Scrivenor's Error Apply?

a. What is absurdity standard?

i. uncontemplated application?

ii. truly impossible legislature would want this application or just very unlikely? which is standard? how know? **why is this limited inquiry into likely legislative purpose better than pure purposivism**?

iii. impossible/very unlikely *any* legislature would want application or that *this* legislature would want application? Latter any different from pure purposivism? – how do we know?

iv. possible legislature would want over-inclusive rule even though application bad because standard of judicially-created exceptions is worse?

b. If exception applies, what follows?

i. At minimum read not to cover absurd cases

ii. Should also consider meaning unclear enough to go to nontextual sources?

c. common law codification of past absurdities?

i. self-defense, necessity exception

ii. toll statute of limitations for fraud

d. What is scrivenor's error standard? – they just wrote down the wrong thing – not absurdity. Inferred from the fact that it's leading to some crazy result. Some cases it's just that it is highly unlikely that they meant what it says and instead it's just a written error – you have to know what the likely purpose was in order ot know this.

i. is standard substantive irrationality or linguistic nonsense?

ii. obvious mistake in transcription?

e. If meaning of provision clear and no absurdity/scrivenor's error exception, consider purpose nonetheless?

i. textualists – no

ii. purposivists – yes (maybe only if contrary purpose is very clear)

iii. which is right approach? See below.

3. If textual meaning unclear, what is statutory purpose?

a. If only look at purpose if text unclear, how unclear does text have to be?

b. Sources **all judges** consider on purpose

i. rest of statutory text and structure indicates purpose?

ii. public or legislative history indicates what evil is being remedied? but does this tell us whether the statutory remedy was bigger or smaller than the evil?

c. consider legislative history on purpose?

i. **judges split**, but all justices have **some** skepticism that can vary with type of legislative history

ii. Arguments pro and con

(1) otherwise excluding relevant evidence? better than blind guesses about purposes or judge's own policy preferences?

(2) rule v standard – textualism a precise rule and purposivism a less precise standard that correlates better with goal?

(a) If so, which way does tradeoff cut?

(b) textualism no more precise, so purposivism gains information and is no less (maybe more) constraining?

(c) goal is not implementing legislative purpose but rather following textual meaning, so purposivism doesn't fit goal better?

(3) only text goes through bicameralism and presentment, but doesn't textualism also use extrinsic materials that didn't go through bicameralism and presentment?

(4) Using legislative history allows self-delegation of legislative powers to legislative subset in violation of Article I? Or do other legislators ratify by enactment?

(5) **Unreliable** because

(a) can only tell us what particular speaker(s) thought? Or do other legislators ratify by approving bill without objecting?

(b) no reason to think other legislators' aware? Or more likely to be aware of legislative history than text?

(c) **judges can manipulate**? Any more likely than manipulating sources on textualism?

(6) Incoherent concept because there is no collective legislative intent?

(a) true that often, especially given legislative structure?

(b) Is there any more likely to be collectively held textual meaning?

(c) Are we looking for collective intent/meaning or what was most likely enactable?

(7) Above arguments inconsistent with textualist willingness to look to legislative history on following issues?

(a) specialized meaning being used

(b) apparent absurdity meant? Did they intend it?

(c) evil being remedied

(d) many same issues being raised

(e) but would be odd to consider some evidence on a & c and not this evidence, and fact that *some* legislators wanted result could suffice to defeat absurdity

iii. Depends on type of legislative history?

(1) Bill Changes Adopted and Rejected illuminating?

(a) useful if don't know reasons? If the reasons aren't there, then it could just be some odd political compromise

(b) rejections at least tell us what wasn't enactable?

(2) Committee Reports

(a) If meant X, should have put it in text? – fear that they are just hiding stuff – because most people don't know what's in the committee report

(b) Other legislators unaware of committee report? Compared to awareness of text?

(c) Committees outliers?

(d) given gatekeeping powers, rejections at least tell us what wasn't enactable?

(3) Sponsor statements

(a) other legislators aware? came too late?

(b) sponsor is gung ho outlier?

(c) tell us what construction needed to get votes?

(4) Floor Statements

(a) knowledgeable?

(b) less likely other legislators aware?

(c) less confident in motivation to get votes?

(5) Hearing statements – is used by textualists to know what the meaning need was

(a) if committee members agreed, would have put it in report?

(b) less likely other legislators aware?

(6) Subsequent Legislative Action or Inaction

(a) mere inaction that could reflect inertia, committee block, cloture rule, etc.?

(b) Re-enactment or amendment without changing prevailing construction that has brought to its attention?

(i) courts use because tells us enacting legislative preferences or current ones?

(ii) which should courts consider more important?

(c) Other legislative action that signals current legislative preferences.

iv. Depends on degree of unclarity of other evidence on meaning/ purpose?

v. Depends on probative value of particular piece of legislative history? – if it's directly on point it's more likely to be used

d. Consider what purpose reasonable legislature would have?

i. only if all other evidence and canons etc. give out?

ii. any different from judges using own policy preferences?

e. Even if know general purpose, does that tell us whether

i. the legislative bargain compromised that purpose to get statute?

ii. does the answer turn on the level of generality?

iii. Does this cut for textualism or for using legislative history?

f. If circumstances have changed, so that legislative purpose would be better effectuated by an interpretation of unclear term that differs from what legislature most likely thought term meant, which should courts use?

4. Use Linguistic canons?
   a. Go to meaning, so apply to determine if meaning unclear? Or tiebreakers so use only if meaning and purpose unclear? Debate about the stage at where it comes in
      i. turns on whether think more reliable than legislative history?
   b. Use **expressio unius** (listing some things covered by rule/exception implicitly excludes other possibilities) or instead opposite canon that listing some things may include other similar ones? (infer by analogy)
      i. premise depends on background assumption?
      ii. if so, just hidden purposivism?
   c. Use canon against superfluous language or instead **noscitur a sociis** (word known by associates)?
      i. if former, is premise of nonrepetition realistic?
      ii. if latter, how know which **shared characteristic among list** to use? does that decision require hidden purposivism?
   d. Use **ejusdem generis** (of the same type) canon that **specific language limits general language to applications of same kind** or instead canon that more general language can indicate purpose to broaden statute beyond specific applications?
      i. if former, how know which shared characteristic among list to use?
      ii. does that decision require hidden purposivism?
   e. How choose between canons and counter-canons or prioritize among them?
      i. choice turns on best empirical assumptions about linguistic usage?
      ii. or choice reflects normative leaning for results that
         (1) are most likely to fit legislative preferences, or
         (2) where legislative preferences are unclear, are most likely to elicit legislative preferences?

5. Use substantive canons?
   a. Use only if meaning unclear or if both meaning and purpose unclear?
   b. Canon **against constitutional invalidity**? Congress would not try to pass an invalid statute
   c. Canon **against constitutional doubts**? Avoid interpretation that would result in serious constitutional doubts
      i. how much unclarity needed?
         (1) unless statute explicitly to contrary?
         (2) or only when ambiguous?
      ii. how much constitutional doubt needed?
         (1) serious issues?

(2) nonfrivolous?

iii. apply before or after evidence of purpose?

iv. canon reflects likely legislative preferences? if so

(1) should not be a clear statement rule

(2) should apply canon after evidence of purpose

v. reflects independent normative view?

(1) legitimate to impose if no actual constitutional invalidity?

(2) legitimate to enforce otherwise unenforceable constitutional norms?

(3) legitimate to elicit legislative preferences?

d. Canons **against interpretations that interfere with state autonomy**

i. how unclear does statute have to be? Depends on whether interpretation

(1) abrogates state sovereign immunity – clear statement rule that applies unless explicit text on states

(2) regulates core state governmental functions – canon applies unless clear meaning to contrary

(3) preempts state law – canon applies only if statute ambiguous after examining text and legislative history

(a) use to interpret express preemption clause

(b) use for presumption against implied preemption, which is implied if

(i) state law conflicts with federal law or is obstacle to federal policy

(ii) federal law intended to occupy the field

(c) does express preemption clause preclude implied preemption? Even if an actual conflict exists?

ii. canon reflects likely legislative preferences?

(1) not if clear statement rule or trumps best reading of purpose

(2) but if other purpose evidence ambiguous, probably

iii. canon reflects constitutional doubts? no real doubt

iv. reflects underenforced constitutional norm?

(1) for state sovereign immunity – 11th Amendment not explicit and 14th Amendment cuts other way.

(2) for regulation of core state governmental function, could justify by enforcement of unenforced 10th Amendment norm, especially because 10th amendment remedy is the national political process?

(3) for preemption, took weak to really enforce a constitutional norm

v. reflects federalism values - but other values favor strong central govt?

vi. reflects goal of increasing deliberation?

(1) legitimate for judges to impose more deliberation for certain topics?

(2) do canons actually increase deliberation?

e. Rule of lenity?

i. meaning/purpose sufficiently unclear? ambiguous or really no idea.

ii. in deciding on what level of unclarity to require, what do underlying policies fo rule suggest?

(1) reflects likely legislative preference? should it be a rule of severity or moderation instead? – if there's ambiguity in the statute, lenity says to pick the least severe, but if we have to guess it's likely they would have wanted the most severe result for criminals. But should you just choose the middle one? Is it really plausible that legislators generally prefer to be *lenient* on criminals?

(2) reflects desire for fair warning?

(a) likely criminal reading statute or cases?

(b) need warning for inherently wrongful conduct?

(c) couldn't fair warning be provided by applying narrow interpretation only retroactively?

(3) reflects desire for legislature to define crimes? But is that sound reason to deviate from what legislature most likely meant?

(4) reflects fact defendants underrepresented? how know proper level of representation to have for criminal conduct?

(5) reflects preference-eliciting goal because prosecutors more likely to get legislative correction if interpretation wrong?

f. Canon in favor of taxpayer or canon against tax exemptions?

i. depends on which is more likely to elicit legislative reaction?

g. Canon against retroactive application?

i. reflects likely legislative preferences given inability to change past behavior and normal desire not to upset reliance?

ii. reflects difficulty of determining just how retroactive legislature would want to be?

h. Canon against interpreting federal statutes to violate international law? Subcanons:

i. don't interpret to apply to international conduct unless substantial foreseeable US effects

ii. don't apply to cases where foreign interests clearly outweigh US interests

(1) subsubcanon: don't apply to cases where statutory application would affect internal affairs of ship

iii. apply canon only in cases where applying federal statute would violate international law or if many applications would?

i. Canon against implied repeal?

j. Canon that specific trumps general?

k. How prioritize among substantive canons? – which one should be used?

6. Defer to agency interpretation?
   a. Defer under *Chevron*?
      i. Defer if meaning unclear or only if both meaning and purpose unclear?
         (1) Cases split on whether to examine legislative history before *Chevron*
         (2) How unclear does meaning/purpose have to be?
         (3) If traditional tools conflict, does court have to defer to agency if some of them support agency interpretation? Or courts still exercise judgment about best application of traditional tools?
         (4) Agency interpretation can overturn past judicial interpretation if statute is sufficiently unclear. *Brand X.*
      ii. Agency made a reasonable policy choice?
         (1) reasonable means just within bounds of statutory ambiguity?
         (2) policy choice requires a choice based on policy or political grounds rather than based on same methodology judges use?
   b. Does agency decision has the force of law? The *Mead* exception.
      i. What has the force of law?
         (1) Notice and comment rulemaking or adjudication
         (2) Other general agency decisions by top officials made before imposed on regulated community.
         (3) Issue not coercive force, but whether action has force of general lawmaking
      ii. Why should formality and generality of decisionmaking matter?
         (1) creates opportunity for political input and oversight
   c. Does the extraordinary case exception apply? The *B&W* excepton.
      i. Does this mean the case is really important?
         (1) consistent with deference in many important cases?
         (2) if deference good, why not even better in important cases?
      ii. Does this mean a big change from the past?
         (1) But is this consistent with deference in cases where big changes made?
         (2) Doesn't *Chevron* allow, even celebrate, the ability of agencies to change positions with changing facts or political preferences?
      iii. Does this mean agency interpretation conflicts with legislative preferences in recent enactments or other evidence that interpretation not enactable?
   d. Does *Chevron* apply before or after other canons of construction?

i. canon of constitutional avoidance does trump

(1) should it?

(a) if reflects independent normative view that can trump direct evidence of legislative preferences, then should trump indirect evidence provided by agency interpretation?

(b) if reflects prediction of likely legislative preference, then should defer because agency decision may be better predictor?

(2) does agency interpretation increase the degree of constitutional doubts necessary for canon of avoidance?

ii. law unclear on other canons – what does theory for those canons and *Chevron* suggest?

(1) if clear statement rules to enforce norms against legislative preferences, they should trump?

(2) if go to meaning, then other canons should trump?

(3) if other canons go to enacting legislative preferences, then should *Chevron* should trump because it reflects current legislative preferences or should other canon trump because *Chevron* reflects prediction of enacting legislative preferences?

(4) if substantive canons that are just tie-breakers when cannot figure out legislative preferences, then *Chevron* should trump

(a) Not clear if Court defers to agency on whether a statute preempts state law

(b) But Court does defer to agency interpretation of substantive provision even though that may affect the degree of preemption that results if the statute is preempting

e. If no *Chevron* deference, defer under *Skidmore*?

i. agency demonstrated expertise with

(1) thoroughness and validity of reasoning?

(a) does this amount to deference at all?

(2) consistency with earlier and later pronouncements?

(a) should that matter? Only if facts or expert theory didn’t change over time.

ii. should turn on how technical the issue is?

f. In deciding when to apply *Chevron* deference, which way do underlying arguments on rationale cut?

i. likely legislative preference to delegate interpretive issues to agency?

(1) conflicts with APA §706 provision that courts “shall decide all relevant questions of law [and] interpret statutory provisions”? or is applying *Chevron* deciding the relevant question of law?

(2) plausible generally? if thing good policy and figure Congress likes good policy

(3) would suggest should apply after consider evidence on purpose

ii. reflects agency expertise?

(1) fits all the exceptions?

(2) would suggest *Skidmore* deference and checking to see if expertise was applied?

iii. reflects desire for national uniformity?

(1) why then does USSCT defer?

(2) fits exceptions?

iv. political accountability?

(1) but to whom are agencies politically accountable?

(a) not enacting legislature – no longer around

(b) to mix of President and Congress

(2) agency thus likely to reflect current legislative preferences?

(a) more consistent with demand for agency policy choice?

(b) more consistent with exceptions?

7. Does statutory delegation to agency violate the nondelegation doctrine?

a. Meets four factors present in *Schecter Poultry?*

i. Statute provides no intelligible principle?

ii. Delegation very broad?

iii. Lack normal administrative processes?

iv. Involved financially interested parties?

b. Are all four factors necessary?

i. If "reasonable" or "public interest" or "requisite" suffice, does that mean lack of intelligible principles not enough for doctrine?

ii. Why should breadth be measured by one statute rather than by all legislative delegations to all agencies?

iii. Is lack of intelligible principles and broad delegation enough without other factors?

(1) Sliding scale test where degree of acceptable discretion turns on breadth of authority

(2) But Court says almost never qualified to second-guess Congress on permissible degree of agency policy judgment

(3) "almost never" means other than in cases where 3rd and 4th factors present?

iv. Why should administrative process matter?

(1) Does it alter legislative nature of action?

(2) Or just provide substitute protections to political accountability?

v. Why should involvement of financially interested parties matter?

(1) Does it alter legislative nature of action?
(2) What's wrong with policy of allowing self-regulation?
(3) More worries about bias?
(4) More worries about lack of Congressional control because lack appropriations control over private parties?

c. Even if delegation not unconstitutional, use canon of constitutional doubts to interpret against broad delegations lacking intelligible principles?
i. helps enforce underenforced constitutional norm against delegation of legislative powers
ii. but if point of doctrine is that legislature should articulate the intelligible principle, shouldn't construe to allow legislature to avoid that duty?

d. In applying these principles, how to underlying rationales for allowing and limiting delegation cut?
i. Prodelegation
(1) agency expertise and experience
(2) agency time to fill in details and update
(3) agency insulation from political dysfunctionalities
(4) realistic alternative is delegating to courts
ii. legislation supposed to be
(1) based on political judgment
(2) slow and hard
(3) subject to political influences

8. Are Congressional efforts to control agency action unconstitutional?

a. Is Congress trying to exercise a legislative veto over agency action without going through bicameralism and presentment?
i. if Congress could delegate to agency subject to veto by others, why can't it do so subject to veto by itself?
ii. if decision is legislative when Congress is involved, why isn't it legislative when the agency decides it?
iii. is this legislative self-aggrandizement or restoring the original balance of power before legislative delegations to agencies allowed?
(1) depends on whether think agencies already responsive to both President and Congress given other methods of control
iv. could Congress adopt internal rules providing that each House consents to agency/Presidential proposals on topic X, and thus effectively create a legislative veto that satisfies bicameralism and presentment?

b. Is Congress vesting executive power in agents it can remove?
i. unconstitutional even if removal limited to cause and has done only through bicameralism and presentment
ii. still alters balance enough to constitute legislative self-aggrandizement?s

9. Has Congress unconstitutionally interfered with Presidential appointment or removal power?

a. Appointments

i. Does the statute try to appoint principal officers other than through Presidential nomination and Senate confirmation?

ii. Does the statute try to appoint inferior officers other than through nomination and confirmation, or through appointment by President, courts, or department heads?

iii. is it a "principal" or "inferior" officer?

(1) has a superior who can remove her? necessary but not sufficient? e.g. Solicitor General.

(2) limited duties, jurisdiction, and tenure?

iv. is it an officer at all? significant enough authority not to deem mere employee?

v. But can limit set of people from which appointments can be made

(1) ok to require bipartisan appointments?

(2) some limit on how much can narrow that set?

b. Removals

i. Statute limiting removals unduly interferes with Presidential ability to faithfully execute laws? How can tell whether interference is undue?

ii. Congress involved itself in removal? Especially disfavored.

iii. Congress impermissibly limited removal of purely executive principal officer?

(1) limiting removal of inferior officers allowed if their appointment was not by President but by a department head

iv. Congress permissibly limited removal of quasi-legislative or quasi-adjudicative officer?

v. Above factors suggesting doctrine more motivated by minimizing legislative self-aggrandizement that would alter balance of power than in preventing Congress from insulating agencies from all political branches when that doesn't alter the balance of power.

vi. Is there any clear constitutional text on removal power?

vii. Does the constitutional power require a separation of powers or balance of powers?

viii. Does the history of First Congress, English Crown, or state and colonial governmental practice provide any clear rules on removal?

ix. Given broad delegations now allowed to agencies, should any original constitutional understanding of executive removal power be

(1) broadened to achieve accountability and coordination?

(2) narrowed to avoid exacerbating the concentration of power created by broad delegations?

(3) unchanged because changed circumstances cannot change original meaning of removal power?

x. Might the President want to commit to limited removal to get broad delegations to agencies? E.g. Federal Reserve.

xi. Assuming removal is limited to cause, would it constitute cause that the agent refused to obey instructions of the President?

(1) would seem to turn on whether purpose of limited removal was to make the agency independent of political influence

xii. If serious constitutional doubts, interpret statute to minimize any limits on Presidential removal power?

10. Are Presidential efforts to control agencies illegal?

a. Presidential negative check via OIRA Violates statutory delegation to agency? probably not because

i. Agency just required to provide OIRA with information on costs and benefits. President has explicit constitutional authority to require opinions from executive department heads.

ii. President and OIRA just inform agency of their views.

iii. President will resolve conflict between OIRA and agency "if permitted by law"

iv. Might be closer call if OIRA were extended to independent agencies because supposed to be insulated but had not been and probably that would be ok too if no Presidential veto

b. Presidential affirmative direction violates statutory delegation to agency?

i. Constitution gives President this power as part of power to faithfully execute laws?

ii. Default rule favors interpreting delegations not to prevent Presidential directive authority unless Congress indicates otherwise?

(1) setting up independent commission with limited Presidential removal power enough to indicate otherwise?

11. Has the Agency complied with APA's procedural requirements?

a. Is formal rulemaking required?

i. only if statute provides for agency decision that is both on record and after hearing – rare

ii. if is required, must use trial like procedure to make rules

b. Met requirements for informal (notice-and-comment) rulemaking?

i. Notice disclosed details of proposal and informational basis?

ii. Changed rule from original proposal enough to require re-notice?

iii. Provided detailed explanation for rule that responds to all significant comments?

c. Exception to rulemaking procedures applies?

i. administrative adjudication – generally agency can adopt rules via adjudication rather than through rulemaking

(1) maybe not if decision is purely prospective? but want to encourage unfair retroactive decisions?

(2) maybe not if decision is unfairly retroactive?

(a) had prior rule that said the opposite?

(b) others relied on prior rule or being held liable for complyng with it?

ii. Other exceptions to notice-and-comment rulemaking procedures [NOT ON EXAM BECAUSE NOT COVERED IN ASSIGNED READING]

(1) "general statements of policy"
(2) "interpretative rules" .
(3) Military or Foreign Affairs.
(4) Internal Agency Rules
(5) Impracticable, unnecessary or contrary to public interest.

12. Was the Agency Decision making Arbitrary or Capricious?

a. Not arbitrary or capricious for agency to decline to adopt procedures not required by statute, constitution or regulations (with possible extremely rare exceptions). *Vermont Yankee.*

b. Agency decision satisfies hard look review?

i. considered relevant facts/factors?

(1) can't rely on factors Congress didn't want or ignore factors it did specify

(2) can't "entirely fail" to consider "important aspect" of problem

(a) important enough?

(i) someone made a significant comment?

(ii) was alternative suggested by prior agency proposal or regulation?

(b) how much consideration?

(i) easy case is no consideration

(ii) tough issues when inadequate analysis or evidence

(iii) usually evaded by saying failed to consider argument X or evidence Y

ii. rationally connected them to its decision?

(1) cannot have explanation that runs counter to evidence or is implausible

(2) must explain data that is available and if information is uncertain must justify refusal to search for additional evidence

(3) in practice, often means missing an argument about evidence or reason for not gathering evidence, so can say agency failed to consider that argument or reason.

iii. Because can always demand more arguments and data, must be some pragmatic limits. In assessing then, consider extent to which application of hard look review is so aggressive that it might

(1) deter or block regulatory change?

(2) might permit judges to block changes they don't favor on policy grounds and on which they lack expertise?

(3) prevent political branches from implementing a political philosophy that favors regulation or nonregulation in cases of empirical uncertainty?

iv. On other hand, consider whether unduly lax review might prevent hard look review from

(1) reducing agency overconfidence bias or tunnel vision

(2) Broadening agency participation in process

(3) Making public participation more meaningful

(4) Making interest group capture harder

c. Agency decision being impermissibly defended based on grounds not assessed in agency proceeding?

d. Agency not subject to hard look review because engaged in inaction rather than action?

i. action defined by change of status quo not absence of regulation

ii. little review of inaction unless plain failure to follow Congressional direction

Non-checklist parts :

Textualism – going with the text says

Cases: *Holy Trinity* – court looks at the text and decides that obviously the pastor should be banned from immigrating

Purposivist – looking to what the legislature wanted

Cases: *West VA Univ Hospitals v. Casey, Cwealth v. Welosky*

Absurdity: something so absurd it's impossible the legislature would have wanted that – *US v. Kirby* – mail carrier case

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