

Leg Reg Outline

9/03-04 Textualists=Positivists-follow the letter of the law, to do otherwise leads to unpredictability. Judges start doing what they think leg "should" have don't-slippery slope.

Legislative supremacy. Judges are legislature's faithful agent and nothing more.

Puposivists-Judges should look at general aims of Legislature and try to follow its intent (general aim). Judges should follow letter of law usually. When this leads to absurd or even unreasonable results contrary to intent of legislation is question Judges should look beyond words to the spirit of the law.

Courts can look to all of the following when trying to determine legislative intent (if this is possible) 1.Statute's Title 2.Mischief the statute is remedying 3.Legislative history 4.Societal Values 5.Overall Structure created by statutory scheme 6.find purpose of provision by looking at statute as a whole 7.statute's relationship to other similar statutes. Church of the Holy Trinity v. US

1. Court will adopt interpretation that does not lead to ABSURD results. Kirby (mailman)
2. Courts start with the presumption that the ordinary meaning, not the specialized meaning, is correct, especially if statute written for ordinary people. Nix v. Hedden
3. Perhaps LH can be used to provide info about the specialized meaning of terms rather than for congressional intent. Textualists may be more willing to do this. Corning Glass works v Brennan
4. T-LH can be used when the plain meaning of the statute leads to truly absurd results. Arbitrary results due to legislative compromise. When statute's language is clear the court is bound absent absurd results. Public Citizen v US DOJ.
 - a. BUT WHAT QUALIFIES AS ABSURD? Majority suggests that identification of absurd applications that are not before the court allowed court to more generally conclude that the statute cannot be read literally.
5. **New Textualism**-Follow the text of the statute even if doing so would lead to results clearly against congress's intent in the LH. THE TEXT is the law not LH WVUH v Casey
6. P-look at the mischief congress was trying to resolve when determining congress's intent and when defining a word. Here use of firearm=using gun in bartering. Smith v. US.
7. T-to use an item means for its intended purpose. A cane is used to walk not hang Smith v US Scalia in Dissent.
8. **9/11, 16** New textualists-LH should not be used because it has not gone through bicameralism and presentment. It also lacks probative value. Not all members of Congress read committee reports let alone cases listed in reports. Further, com members self select and interest groups have a lot of influence on committees Blanchard v Bergeron (Scalia in Concurrence).
9. T-Use of CR leads to delegation of authority and vicariously to the judicial branch, judicial activism. Com. Members can use CR to get around article III section 7 Continental Car Co. v. Chicago Truck Drivers.
10. New Synthesis-when text is clear there is no need to look any further, kind of Exxon. Kennedy tepid in his opinion. He still cites LH to show that LH is ambiguous.

11. P-LH history constrains judges when text is ambiguous. They have to stick to what congress intended. It can be a tool like a dictionary. There is a hierarchy to LH. CR > subcommittee reports Exxon Mobile.
12. Probative value of LH depends on how you view legislative process.

9/17 Semantic Canon-how particular linguistic constructions are interpreted (Latin names)
Substantive Canons construe statutes to avoid disfavored results

McBoyle v. US-many different land transports followed by "any motor vehicle"—applies to land not air

Esjudem Generis Canon-list of specific terms with similar characteristics followed by broad catch all—catch all should only apply to other items with that similar characteristic.

Rule of Lenity-construe ambiguities in criminal statute in favor of D.

Gustafson v. Allroyd Company, Inc.

Noscitur A Sociis Canon-a word is known by the company it keeps. When the statute says, "A, B, C, and D," and the question is what meaning the ordinarily broad term B has, we say that A, C, and D share a certain property, and the meaning of B has that property as well but is constrained by it.

Presumption that same word/phrase has same meaning in different sections of same statute-

Presumption that each word in statute has meaning/presumption against surplus language

Silvers v. Sony Pictures-222

Expressio Unius Canon-the explicit inclusion of certain things is the exclusion of all other things.

- critique-this is not how people think/communicate. Would require Congress to think of Bce.

Maj. 1.Text 2.Canon 3.LH-Canons allow clarity without using LH

Dis. 1.Text 2.LH 3.Canon-canon used to show what congress intended. LH does a better job of this.

Llewellyn-for every canon there is an equal and opposite counter canon. Listing of some things may include others v. expression unius canon.

critique-usually there is a common sense feel as to which canon should apply.

People v. Smith-253

Esjudem Generis-all weapons listed are stabbing and conceable so dangerous wpn=wpn that is used for stabbing or can be concealed. M1 rifle neither so not dangerous wpn according to this statute.

Crit-Congress intended dangerous weapons to mean dangerous weapons.

Crit-How do you define which of the shared characteristics limits? All can injure

Circuit City v. Adams-seaman, railroad workers, and any other worker. Other worker=transportation

critique-look to LH first. Could apply another canon resulting in opposite result.

9/23 Substantive Canons-often clear statement rules.

The Constitutional Avoidance Canon-Ashwander Rules-Justice Brandeis

1. Avoid far reaching results that come from dealing with const.
2. cases dealt with on statutory grounds are easier to fix if court gets it wrong
3. Avoid conflict between court and congress
4. protect/preserve const.

Priority Rule (4)-if you can decide a case without dealing with const. issue, do.

Interpretation Rule (7)-if statute has 2 possible interpretations. (A) would seem better but it raises const. iss. (B) is a possible interpretation and raises no issue. Court should choose B.

NLRB v. Catholic Bishop-natural reading of statute leads to lay teachers at Catholic Schools.

Raises 1st amendment issues.

Strong Version (Catholic Bishop Majority): The constitutional avoidance canon functions like a plain statement rule; even if the text is pretty unambiguous, unless there's an affirmative indication that Congress wanted to push the boundaries another reading will prevail.

Weak Version (Catholic Bishop Dissent): The canon is ONLY triggered by statutory ambiguity, when the weaker of two plausible readings of the statute is the non-constitutionally troubling reading. This statute not ambiguous. Classical Avoidance Canon-only avoid when reading leads to something that is likely unconst. Modern Avoidance canon-just need to show serious constitutional doubt to be able to use canon.

9/24 Abrogation of state SI-Federalism very important and SI is part of fed. so it needs protecting

Atascadero State Hospital v. Scanlon-Strong Canon-clear statement req.-court read statute so as to avoid abrogation of state AI even though abrogation would be constitutional.

critique-Political Safeguards-States are protected by constitution . Court should not protect state absent constitutional reason for so doing.

Response-PS insufficient. Plus, congress wants to protect states so they would make a clear statement if they wanted to abrogate state SI. Clear Statement Rule now applied even absent a const. issue.

Gregory v. Ashcroft-if there is a possible reading that avoids encroaching on federalism use that reading even if it is not the best reading-weak rule.

REASONS to preserve strong, autonomous state govts. PG 312

9/25 Federal Preemption of State Law

Types of Implied Preemption

1. Conflict prmpction- impossible to follow both state and fed law. fed law preempts.
2. Obstacle Prem.-enforcement of state law would be obstacle to fed law's purpose
3. field preem-Fed. reg. so broad court can assume reg. is meant to regulate the entire field.

Presumption Against Preemption

Implied Preemption-Rice v. Santa Fe-power of state will not be preempted by fed. law unless clear and manifest purpose of Congress. Presumption overcome by LH. Weaker than presumption against infringing on state SI because NO CLEAR STATEMENT REQ. Dissent-Presumption should be stronger

Cipollone v. Liggett-319-**Express Preemption**. If ambiguous, choose interpretation of statute that does not result in fed law encroaching on state law.

Dissent-Scalia-presumption against preemption means court should be reluctant to imply anything that is not explicitly stated. Textualist.
How can we require clear statement rule with express preemption when we accept implied preemption?

Steven's Response-expressio unius-once congress decides to preempt, everything that they want preempted should be stated.

Scalia-So implied preemption is broader than express? This is crazy.

Liberal-pro P. Conservative=Pro D

State sovereign immunity cases are generally plaintiffs seeking enforcement of federal law against states, and so in these cases the "states' rights" and "antiplaintiff" tendencies of judges run together.

Preemption cases are usually plaintiffs seeking to use state law against another party, and so judges "states' rights" and "anti-plaintiff" tendencies run in opposite directions .

9/30 Kennedy-different canons operate differently. (1)Some used to pick a definition between 2 definitions of an ambiguous statute (constitutional avoidance canon). (2) Others about reading limitations into a broad text when the absence of the limitation would lead to an absurd result or would affect internal affairs of foreign flag vessel

10/01 Constitutionality of Delegation

Is what congress delegation leg power?

Ag.-Separation of Powers, passing legislation is difficult for a reason (bicameralism and presentment).

For-vesting clause (Article 1, §1) does not forbid it. Necessary and Proper clause-if congress did not delegate it would not be able to get anything done. Delegation goes through bicam. and presentment.

Formalist-certain powers inherently legislative and others executive

Functionalist-System of checks and balances to create good govt. Doesn't matter if it is leg or exec. power only if it supports constitutional purpose.

Hampton--Intelligible Principle Rule-congress can delegate as long as it gives agency an intelligible principle by which agency is guided

10/02 Yakus-Congress only needs to lay down basic conditions. Administrator can have broad discretion as long as admin fulfills congress's intent.

Whitman v. American Trucking-Broad view of intelligible principle. “just and reasonable” is a sufficient int. prin.

Scalia/Maj-courts basically never second guess congress. Congress can delegate exec. power not leg.

Stevens-this is a delegation of leg. power but that is constitutional-Functionalist. Court unable to distinguish between the two sometimes and const. does not limit ability to delegate leg power.

Nondelegation doctrine dead since 1935, but court has deep concerns about congress delegating too much power. This anxiety has emerged as a canon of statutory interpretation.

Idus. Union Dept. v. American Petrol-Benzene case-read statute narrowly so as to avoid delegation of power to seriously harm the economy unless there is a clear statement. Feels like a canon. **Presumption against extremely worrisome delegation**

10/07 Chadha-legislative veto ruled unconstitutional. It does not go through bicam and presentment. Congress cannot circumvent Article 1, § 7 by self delegating. If congress wanted to constrain agency it should have written constraints into the statute. No check on one house leg. veto. Better to have checked but inefficient or clumsy govt.

Dissent-crazy that congress can must delegate all or no power. It can hold on to some and delegate some. Leg veto is not a bill so no bicameralism and presentment req.

Other forms of Congressional Control over agencies

1. attach rider to appropriations bill limiting what \$ can be spent on
2. Members of congress with influence over agency's budget has a lot of power over agency
3. Oversight committees
4. Threat of amending delegating statute
5. Congress still writes non binding leg vetoes into statutes as a signal to agency.
6. Congressional review act-rules created by agency do not go into effect for 60 days. During this time congress has opportunity to pass resolution of disapproval. If passed by both houses and signed by pres, rule dies. This is just an expedited form of bicameralism and presentment.

10/08 Appointments Clause-Article II

Principal Officers-appointed by pres with advice and consent of Senate

Inferior Officers-appointed by Pres or by heads of department or by courts of law.

Buckley-Unconstitutional for congress to nominate officers to serve in exec. branch

Congress does try to limit appointment power of Pres with partisan balance requirements.

Removal Power

Perkins-Congress can limit power of removal of inferior officers if the limit does not give congress say/power.

Myers v. US-178-statute states postmasters can be removed by pres only with consent of Senate.

Maj.-unconstitutional. **Take care clause of article II**-Pres shall take care that the laws be faithfully executed. Pres needs full removal power to do this. This is aggrandizement not encroachment. Further, postmaster is a principal officer. Removal Power is Pres's only tool to control agencies. Congress has many other tools.

1. CAN'T RESTRICT PRESIDENT IN REMOVING PRINCIPLE OFFICER EXERCISING PURELY EXECUTIVE POWER
2. CONGRESS CAN'T AGRANDIZING ITSELF

Critique-**Article I § 8 Clause 18 Necessary and Proper** clause gives congress power to limit removal. Great Power includes lesser-congress has power to create an agency so congress should have power to limit agency members' removal.

Holding-congress cannot involve itself in President's removal of **principle** officers.

Humphrey's Executor v. US-Limits President's power of removal to "for cause" removals. Court-FTC is an independent agency that is "quasi legislative and judicial". Thus, distinguishable from Myers. Can limit pres's removal power for quasi leg/judicial agencies. Further, this is an example of encroachment not aggrandizement. Congress does not get power.

Critique-Delegation of quasi leg functions is a delegation of leg power and that is unconstitutional. (Stevens would argue it is constitutional-functionalism-this is a minority view)

Humphrey unofficially overturned Myers because you can argue that almost any agency performs some quasi legislative functions.

Could argue that they are distinguishable because Myers was aggrandizement and Humphrey was encroachment. This is not what the court does. Would still have problem of how much encroachment is okay.

10/09 Morrison v. Olson-Independent Counsel has full authority to do all AG can do. IC can be removed by AG only for cause.

If IC principal, this would be unconstitutional because only the Pres with consent of Senate can remove.

Majority-IC inferior because 1. subject to removal by higher executive officer 2. has limited duties 3. limited in jurisdiction (can only investigate high ranking execs) 4. tenure limited.

Dissent, Scalia-Inferior=being subordinate. IC is independent so not subordinate and, thus, not an inferior officer. Congress can only delegate exec power if the pres has complete power of removal.

Edmond-applied Morrison 4 factor test and found officer to be inferior solely on the basis of #1. Other 3 were not satisfied, but the officer being subordinate was sufficient. Scalia got his way.

Morrison- Removal-Court no longer going to look at if agency exercises exec power or quasi leg/jud power. Court going to look at aggrandizement vs. encroachment.

How much encroachment is too much? If it unduly trammels on power of pres it is unconstitutional. If it does not, it is constitutional. In this case, it does not unduly trammel. Limit on removal constitutional.

- How much encroachment is too much? How do you tell if it unduly trammels?
 - Look at the type of function. If more legislative or judicial, it is more likely that the officer's functions are central to executive branch so encroachment okay

- Does it impede the President's duty to "Take Care" that the laws are executed?

Critique-Encroachment test founded on no rule other than I know it when I see it. Congress can use IC to harass Pres because Pres has no control over IC. This destroys the separation of powers.

10/14 Appointment and removal power most important executive control tool but it is limited

Other forms of control

1. Executive Review of Agency rules prior to enactment-reactive
12866 Sec. 1 Reg Philosophy-CBA with non-quantifiable costs/benefits.
Sec 4 Planning mechanism-agency req to explain how its planned reg relates to Pres's philosophy.
Sec. 6-Regulatory review process. Major regs submitted to OIRA with CBA
Sec. 7-Pres has authority to resolve conflicts between agencies or between agency and OIRA.

Arguments for 12866-1. Good Govt. Coordination, cohesion, focus on bigger picture.

2. Democratic accountability-Pres responsible for agencies. Agency heads not elected
Arguments against 12866 1. Non-quantifiable benefits do not count enough

2. President not representative of US. Either too left or too right. Agencies being independent protects against regulation swinging too far away from majority view of US.

3. Agencies are experts in their fields, the pres and OIRA are not.

Is 12866 legal? 1. Presentation of info legal. Article II §2 Opinions clause.

3. OMB's authority to provide feedback legal because feedback is not binding.
What about in respect to independent agencies? Presidents have declined to apply these orders to independent agencies.

1. APA

- a. Formal Rulemaking-§§556, 557—requires a ton of resources (change peanut content in PB from 87 to 90% took 9 yrs and 7,000+ pg transcript)
 - i. Only triggered if delegating statute contains words “on the record” and “after a hearing,” or something very similar. Florida East Coast (very rare)
 1. Court concerned with overproceduralization because one reason for delegating is efficiency.
 - ii. Agency's interpretation of statute irrelevant in deciding formal v. informal
- b. Informal Rulemaking §553 notice and comment
 - i. 3 requirements- (b) notice, (c) opportunity for interested parties to comment, and (c) concise statement of basis and purpose for rule
 1. Why-Int. Parties provide expert info to agency and provide a check on the agency and reqs. make agency's actions more transparent.
 2. What
 - a. Notice-Agency must provide data on which agency basing its decision. Parties can't comment meaningfully if

they do not know how agency reached its conclusion. Nova Scotia

i. Exception-internal studies dealing with ancillary issue produced in response to comments need not be disclosed. Ryabacheck

ii. But new 3rd party studies dealing with main issue must be disclosed. Ober

b. Concise statement must respond to significant comments. Nova Scotia

ii. When is 2nd round of n & c required as result of changing final rule from proposed rule as result of original notice and comment?

1. New round not triggered if changes are (a) “logical outgrowth” and “in character with” the original proposal, and if (b) interested parties had rsble notice that they will be affected and had opportunity to present their views. Chocolate Manufacturers (court interpreting 553 to require more than the plain text suggest. Anxiety about over delegation. Change from choc milk being exempted to being included NOT a logical outgrowth)

2. If comments interested parties would make on changed rule no different than the comments they made on original rule, new round not triggered. BASEF

a. This creates incentive for interested parties to disclose all relevant information rather than withholding some.

3. Agency must be allowed to change proposal based on info received without triggering. Otherwise, agency has incentive to not make changes even if they would be beneficial because new round requires resources.

c. Alternative to Rulemaking--**Adjudication**

i. Reviewing court considers only justifications offered by agency originally in the rule/order. Chenery I

ii. Agency can announce and apply general principles, even if they look a lot like rules, in orders issued through adjudication. Chenery II. (agency acting like a court, applying set statutory req. to new circumstances).

1. Informal rulemaking has been proceduralized to the point that court is once again concerned with overproceduralization.

iii. Limit-rule announced in adjudication cannot have purely prospective effect. Wyman-Gordon.

d. Alternative to Rulemaking-**Interpretive Rules and General Statement of Policy**

i. **Exceptions**-553(b)(B)-agency need not go through 553 rulemaking if it would be “impracticable(emergency situations, usually temporary), unnecessary (trivial=no controversy whatsoever), or contrary to public interest(price control regulation).”

ii. 553(b)(A)-g.s.o.p.

1. Cannot have the “force of law” or be legally binding i.e., doc. does not give agency power to punish if doc. is violated, it has no binding effect on parties, absent the doc. the agency still could have done what it did. Pacific Gas (priority of gas recipients during shortage)
2. Absent technical force of law, GSOP still might be deemed a substantive rule-secondary analysis.
 - a. If statement it removes flexibility from agency, binding on agency. Chamber of Commerce (decreased chance of inspection if comply)
 - b. If it punishes compliance by rewarding compliance, effect on parties. Chamber of Commerce.
 - c. If it has retrospective effect. Id.
3. Courts give less deference to G.S.O.P than rules. Pacific Gas.
- iii. Interpretive Rules §553(b)(A)-how A interprets ambiguous statute/reg. We want agency to announce how it interprets for predictability’s sake.
 1. “Force of Law” Test like with GSOP, but, unlike with GSOP, with interpretive rules analysis also ends with force of law test.
 - a. Absent IR could agency still act as it did?
 - b. Did agency publish IR in code of fed. reg.?
 - c. Does IR effectively amend prior legislative rule?
 - i. If answer to any question yes, it is rule and not an IR. American Mining Congress (Chest X-ray=diagnosis)
 - ii. IR cannot be based on purely arbitrary choice. Hoctor (8 foot fence req.) For arbitrary choices affected parties need the opportunity to comment.
 1. AMC underlying statute specific. Hoctor statute so broad that even central decisions will be interpretive. So maybe, central decisions must go through 553 N and C
 2. We have Notice and comment rulemaking process to ensure that arbitrary decisions are not made.
 3. We have IRs to provide clarification
 - iii. If court decides IR is not an IR, it checks if it can be classified as GSOP by doing Chamber analysis
2. Delegation review. Congress can delegate but courts have anxiety about it. So, it has adopted methods to control delegated law making power.
 - a. Presumption to read statute narrowly if broad reading has problematic delegation.
 - b. Mechanisms of control-appointment/removal power, legislative veto, WH oversight.

- c. Procedural Controls-balance worries about underproceduralization and overproceduralization. Want agencies to be efficient but also not unchecked.
- 3. Judicial Review of Agency Action-§706(2)(A) Arbitrary and Capricious Standard
 - a. Review should be searching and careful and look for “a clear error in judgment.” Court cannot “substitute its judgment for that of the agency.” - Overton Park.
 - b. Three approaches presented in Ethyl Corp.
 - i. Wright/Leventhal
 - 1. Presumption that agency’s actions valid.
 - 2. Examine evidentiary record as a whole to see if agency action rsble
 - 3. Judges competent enough to do this
 - ii. Bazelon
 - 1. Judges incompetent to review technical record and they are biased
 - 2. Evaluate procedures agency followed. Did procedures ensure reasoned decision making? (Satisfying the APA procedural requirements may not be enough) If no then inadequate so remand.
 - iii. Wilkey
 - 1. Each logical step the agency makes must be reasonable. Look at the chain of events. Each link must be well reasoned and rsbly supported.
 - 2. Courts cannot fill in missing logical steps. Chenery I
 - c. SCOTUS rejects Bazelon procedural approach in Vermont Yankee. Rehnquist concerned about **overproceduralization** causing informal rulemaking to lose its advantages by becoming more like formal rulemaking. Also concerned that judges will engage in “Monday morning quarterbacking.”
 - i. Bowman-Court can’t supply a rational of support not provided by agency originally, but the court should uphold decision of **less than ideal clarity** if the court can infer agency’s reasoning based on the record. (Somewhat rejects Wilkey’s position in Ethyl Corp.)
 - ii. BUT, courts can indirectly require more procedures by:
 - 1. Creating a more detailed record of informal adjudication: Overton Park: The Court found that the record for review was inadequate, even though it was an informal adjudication. This obviously incentivizes agencies to make a bigger record in these informal adjudications.
 - 2. Beefing up the notice and comment requirements: Chocolate Manufacturers and Nova Scotia Foods.
 - 3. Consistent with Vermont Yankee, then, courts can "interpret" the procedural requirements in the APA and in organic statutes to include much broader provisions than perhaps a natural reading of those statutes would require. This means that, while Vermont Yankee does hold that courts cannot directly mandate additional procedures, they have NOT gotten out of the business of influencing agency proceduralization.

- iii. No Tension between Vermont and Overton.
 - 1. Overton requires agency to take steps to allow court to see that decision was based on the relevant factors. To require more than this is prohibited by Vermont Yankee
- d. Modern Hard Look Review-State Farm (reaffirms and expands Overton)
 - i. Deferential Standard=presumption of correctness
 - ii. “The agency must examine the relevant data and articulate a satisfactory explanation for its action including a **'rational connection** between the facts found and the choice made.”
 - iii. Rehnquist says in dissent that change in administration supports the agency’s decision to change its mind.
 - iv. 706(2)(A) creates a status quo bias, not an anti-regulatory bias
 - v. Three forms of arbitrary and capricious action mentioned in State Farm
 - 1. When agency has “entirely failed to consider an important aspect of the problem.” 9-0 unanimous support of SCOTUS
 - a. Same issue as in Nova Scotia.
 - b. Rule of thumb-agency only must respond to public comments that make sig. objections or propose concrete and rsble alternatives.
 - c. How much must agency say? More than boilerplate response. Agency must proffer a reasoned response. NRDC v. U.S. NRC.
 - 2. When agency relies on “factors which congress has not intended it to consider.”
 - a. Agency must justify its rule based on the set objectives listed by congress in the delegating statute, if delegating statute does so. Dole,
 - b. Agency’s “reasons for action or inaction must conform to the authorizing statute.” MA v. EPA.
 - 3. When agency has “offered an explanation for its decision that runs counter to the evidence before the agency, or is [] implausible.” 5-4 SCOTUS.
 - vi. Critiques of Hard Look-
 - 1. It leads to ossification by making rulemaking harder (Pierce).
 - a. Response-ossification is a good thing. It acts as a deterrence in cases where the judicially imposed explanation costs outweigh a rule’s expected benefit. (Stephenson)
 - 2. Increasing the indeterminacy of review allows judges to seek their own preferred outcomes with less of a reputational cost (Seidenfeld)

Review of Delegation Problem

1. We like agencies because they are experts, they are somewhat insulated politically, and they can act more efficiently
 - a. BUT-worried about loss of democratic accountability and administrative arbitrariness.
 - b. Nonetheless, Court allows a lot of delegation
2. But there are strategies to control delegation
 - a. Legislative and Presidential Controls-veto, appointment/removal
 - i. Balance Problem-we like agencies to be insulated but we want them to be accountable.
 - ii. Separation of Powers Problem-who controls agency, Pres or Congress?
 - b. Procedural Constraints-§553 notice and comment rulemaking and exceptions
 - i. Concerns over underproceduralization so Court read 553 to require more than clear reading suggests.
 1. But then we have concerns about overproceduralization.
 - c. Judicial Review
 - i. Judicial Review under 706(2)(A)-needed even if just as a psychological check. Bet we delegated to agency for a reason and courts aren't experts. Very nervous about courts replacing agency's will with its will
 - ii. Judicial Review of whether or not agency action consistent with the delegating statute. Focus on statute's text. Focus of the rest of the class

Judicial Review of Agency Statutory Interpretation

1. Hearst (newsboys): Distinguishing Between Questions of Law and Questions of Fact
 - a. Questions of Law: On "pure" questions of law like whether the NLRA tracks the common law definition of "employer," the Court gives NO DEFERENCE to the agency. Court reviews De Novo.
 - b. Questions of Fact/Mixed Questions: On mixed questions or questions of fact, the Court DEFERS to the Agency (on the grounds that Congress gave the NLRB the authority to decide these complicated, fact-sensitive questions)
 - i. Court upholds agency's decision as long as it is reasonable
2. Skidmore (fireman): What Do We Do With Interpretations by Agency Officials
 - a. Pure questions of law like can waiting time=working time reviewed DE NOVO by courts
 - b. Mixed questions of law and fact-did this particular waiting time=working time
 - i. If we followed Hearst, we'd defer to the Agency.
 1. But here we don't have a formal adjudication like we had in Hearst. We have guidelines from the administrator given in an amicus brief. The agency decision in Hearst had lots of procedural safeguards that are absent here. Also, the *Administrator's decisions did not have the force of law*. If court were to defer to Admin, it would give him the force of law which congress didn't want him to hav.
 2. Thus, "we consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Power to persuade

3. Problem with Hearst/Skidmore Qol, Qof/MQoLandF framework
 - a. Packard It comes very close after Hearst and has what look like similar questions (are these foremen supervisors or employees, and the NLRB decided they were employees.) The Court agreed with the Board, but gave it no deference, saying that this was a "naked question of law." DOES THIS MAKE ANY SENSE? NO! So the Court seems like it's just getting around the Hearst/Skidmore framework by playing around with the definitions of "naked" questions of law and "mixed" questions of law and fact.
 - i. Maybe Court treats this differently because the agency has been inconsistent in its interpretation over time and the impact of deeming foreman to be employees is a bigger deal than deeming newsvendors.
4. Chevron-Modern Framework for Judicial Review of Agency Interpretations
 - a. **On Exam discuss what would happen under de novo review and under Chevron**
 - b. Chevron Step 1
 - i. "Using the traditional tools of statutory construction," decide if Congress has spoken to the precise question at issue.
 1. If yes, apply congressional intent regardless of agency's interpretation
 2. If no, go to step 2
 - c. Step 2
 - i. Uphold agency's interpretation of the statutory ambiguity as long as it is reasonable.
 - d. **Presumption that congress implicitly delegated to agency power to interpret ambiguities-Legal Fiction.**
 - i. This creates conflict with the tools of statutory construction that rely on presumed congressional intent. Avoidance canon, presumption against preemption.
 - ii. Reasons for presumption same as for delegation-experts, more accountable than court, efficiency (agency has to resolve a ton of ambiguities, if only Court has power to do this, nothing would get done).
 - e. Critiques of Chevron
 - i. Chevron is the "counter Marbury." It gives too much power to Exec. Erodes system of checks and balances.
 - ii. Courts are experts at interpreting statutes, so court should resolve ambiguities.
 - iii. Court IS LESS accountable for a REASON. We want politically insulated people to interpret the law.
 - iv. Standard Reasons We Hate Agency
 1. We aren't deferring to agency expertise here, we're deferring to agency politics but without any checks at all.
 2. Allowing Agencies to just change interpretations with administrations really presses our rule of law and arbitrariness concerns with agencies.
 3. *NOTE* The political responsiveness argument against agencies doesn't really work here; courts are less politically responsive than agencies.
 - f. Chevron + State Farm=odd result. Lots of deference for on legal questions, and little on factual.
5. Applying Chevron. When has congress sufficiently spoken, which tools can be used?
 - a. Textualism/Purposivism in Chevron cases: MCI v. AT&T (the "modify" case)

- i. Textualists (Scalia's majority opinion)
 - 1. Relying on tools of statutory construction such as dictionaries, the structure of the statute, and perhaps Benzene and friends' hesitancy to recognize immense delegations to agencies, the textualists conclude that "modify" cannot include the authority to eliminate the rate filing requirement for 40% of the industry.
 - 2. Scalia says the purpose of rule 203 is the rate filing req. To get rid of this is not a modification. Benzene (Stevens makes similar argument)
 - a. Both sides define the purpose to support their desired result.
 - 3. Thus, the case is resolved at Chevron Step 1 --Congress spoke clearly.
- ii. Purposivism (Stevens's dissent)
 - 1. Although taking a noble stab at the textual question, Stevens argues that the purposes of the statute (to ensure fairly priced phone service) show that the FCC had broad power to act flexibly in changing circumstances.
 - 2. Chevron argument: If the FCC's interpretation is at least a plausible one, Chevron should kick in and require deference to the Agency.
- iii. Relationship between Textualism and Chevron Being a textualist does not mean being an anti-Chevronite: Justice Scalia loves Chevron because he doesn't think that courts should be deciding policy, which is all that's left after Congress has failed to specify a solution.
 - 1. Textualists may be less likely to find ambiguity at Step 1 This empirical hypothesis is the subject of debate, but at least at the SCOTUS level Scalia does indeed find more definiteness at Step 1 than Stevens.
- iv. LH-majority view is that LH is a secondary tool of statutory construction that cannot be used in Chevron cases.
 - 1. Stevens argues LH is a primary tool. He used LH in Chevron
- b. Chevron and Semantic Canons/Terms of Art Sweet Home ("take" endangered species)
 - i. Pro-Special Meaning trumping Pro-Special Meaning trumping Chevron deference (Scalia -dissent)
 - 1. The word "take" has a long and venerable history in the law, a meaning which is only slightly expanded by the definition section of the Act.
 - 2. The Noscitur Canon requires that "take" be construed to follow the other words, which much more clearly mean actively getting an animal.
 - 3. The Presumption against Surplusage applies in that, if we view "harm" as the Agency does, the other words in the definition are redundant.
 - 4. Since "take" has a special meaning in the law, the statute is unambiguous (thus deserving no Chevron deference) and the Agency's interpretation is unreasonable.
 - ii. Pro-Chevron trumping Special Meaning (Stevens -majority)
 - 1. Statutory argument
 - a. "Take" may have had a special meaning at common law, but the inclusion of a definition section trumps that common law meaning.
 - b. Interpreting "harm" the way Scalia does makes it lose its own independent meaning (persistent tension between the noscitur canon and the canon against surplusage.)
 - c. Purpose of act is to protect threatened wildlife.

- d. Uses other parts of statute to show his definition is correct. Agency can issue permits to allow otherwise prohibited incidental takings.
- 2. Chevron argument
 - a. Look, the Agency can play for the tie or even for a close loss --if the statute is ambiguous, that's all we need, and we shouldn't go canvassing about for days trying to find the "clear" meaning.
 - b. Remember, semantic canons are a way of resolving ambiguity; the presence of ambiguity is a necessary condition of resolving ambiguity.
 - i. RESPONSE: We shouldn't just throw up our hands on the first pass with the traditional tools.
- c. Structure, Context, and History of Statute in Chevron Analysis. The Question: Can arguments from the structure of the statute trump the apparent reasonableness of an agency's interpretation?
 - i. Brown & Williamson
 - 1. majority answers with a resounding yes. Though from the text it might sound like the FTCA gives the FDA jurisdiction over cigarettes, if that were the case, cigarettes would have to be banned from the market entirely because they are not "safe and effective," as other parts of the statute require. Since we know that Congress in 1938 did not intend to ban cigarettes, we know that Congress did not intend to give jurisdiction over cigarettes to the FDA.
 - a. The Court decides that the inferences from this structure are so strong as to resolve the issue at Chevron Step 1.
 - b. Critical Response
 - i. The Agency thinks the "safe and effective" provisions of the statute allow it to consider the health consequences of removing a product, so it feels a complete ban would not be necessary (destroying the reductio). The FDA deserves Chevron deference on this point.
 - ii. If step 1 requires this much work, looking at other statutes, and going against the plain reading of the text, then Chevron step 2 deference should apply.
 - 2. The Question: Can arguments from regulatory history and subsequent legislation be used to determine the meaning of the statute in question?
 - a. Brown & Williamson's majority argue (though less forcefully) that it can. FDA repeatedly stated that it did not have jurisdiction. Relying on this rejection Congress enacted independent statutes to regulate tobacco.
 - b. Further, Congress considered and rejected amending FDCA to give FDA jurisdiction over tobacco.
 - c. This all supports that FDA does not have jurisdiction
 - d. Critical Response
 - i. How can later events determine the meaning of the 1938 statute?
 - ii. FDA also considered amending FDCA to explicitly strip FDA of jurisdiction over tobacco
 - iii. FDA changing its mind is not a factor. State Farm Rehnquist' dissent
 - iv. Here again the statute/post enactment congressional action is ambiguous, so Chevron step 2 deference should apply

3. Majority's 3rd arg-This is a big issue (tobacco=big\$), so legal fiction of presumption that congress implicitly delegated disappears. No way congress would delegate this kind of authority without saying anything. MCI, Benzene, Packard (significance of question relevant)
 - a. Critical Response
 - i. This is a big deal, so expertise factor even more important
 - ii. Further, this erodes purpose of Chevron. Step back towards the multifactor test
- d. Chevron and the Constitutional Avoidance Canon
 - i. DeBartolo (trying to get patrons to stop shopping at a mall with a retailer labor dispute)
 1. The Court does not think that the NLRB's interpretation is plainly contrary to the meaning of the statutory text. Ordinarily this would trigger Chevron deference.
 2. BUT, NLRB's interpretation raises serious constitutional question, so if there is another reasonable interpretation that would avoid con issue the court will adopt it
 - a. Avoidance canon can be used during step 1. It is a primary tool
 - b. Avoidance canon trumps Chevron.
 - c. SO-if agency's interpretation raises serious con question, the court shows NO DEFERENCE.
 3. If congress wants to test limits of con, it must say so explicitly
 - ii. Refusing to use the constitutional avoidance canon at Step 1
 1. Rust v. Sullivan (No fed fund for programs that talk about abortion)
 - a. Majority-Rehnquist-Statute ambiguous and secretary's interpretation is reasonable, so defer to agency
 - i. NO serious con issue. There is con right to abortion but no to receive federal funds to support one.
 - b. Dissent-At the very least there is a serious con issue here. Just like Debartolo, if there is a rsble interp that avoids con. issue we should adopt it. no deference
 - iii. Takeaways
 1. Avoidance canon always takes precedent over Chevron.
 - a. BUT some con issues are not serious enough to trigger avoidance canon.
 - i. So what qualifies as serious enough?
- e. Chevron and State Autonomy-Presumption against preemption in Avoidance canon's clothes
 - i. SWANCC- the Army Corps cannot interpret "navigable waters" to mean any body of water used by migratory birds in order to assert jurisdiction)
 1. Majority- Rehnquist-Statute is ambiguous, but no Chevron deference.
 - a. Why
 - i. Court tries to argue no deference on Avoidance Canon grounds, but this is weak.
 - ii. So court invokes PaP-presume congress did not intend to delegate power to alter traditional Federal State Balance

2. Stevens dissents. His and Rehnquist's positions flipped from Rust. Rust-R for Chevron, here against it. S-against Chevron, here for it. Political views more important than anything else?
- ii. Medtronic-not very helpful because agency's interpretation was that statute doesn't preempt. So strong language in favor of PaP and Chevron
- iii. Smiley-Scope of preemption vs. the decision to preempt
 1. If what the agency is doing is just stating its view on the meaning of a substantive statutory provision which may have pre-emptive consequences, Chevron deference applies. Defer when agency is only deciding the scope of express pre.
 - a. Why?
 - i. This is just a question about what the statute means, not a question about preemption itself.
 - ii. If you interpreted the presumption against preemption otherwise, it would swallow Chevron whole --every agency interpretation of every statutory term would have to be as narrow as possible to avoid preemption.
 - b. Critique
 - i. In the preemption cases (particularly Cipollone), Scalia fought and lost something like this battle. In Cipollone, the question was what a "requirement" was, not the meaning of a preemption clause. There the Court held that the scope of interpretations was narrowed by the presumption against preemption --why not here?
 - ii. The distinction between interpreting a preemption provision and a "substantive" provision is pretty dubious when there is a whole body of implicit preemption doctrine.
 2. Agency deciding whether or not a provision of fed law preempts state law.
 - a. Smiley silent on what to do here. Circuits are split on what to do.
 - b. MA v. USDOT-Agency interp. unrsble. FURTHER,

PaP>Chevron

 - i. Why?
 1. The constitutional values of federalism's balance between state and federal powers makes it a big deal when Congress does something like this, so let's make Congress do it.
 2. We should be reluctant to impute to Congress the desire to delegate this power to agencies because of its importance.
 3. Agencies aren't likely to fully internalize the costs to state powers.
 4. Agency expertise is unlikely on the issues preemption raises.
 5. Agencies have incentives to increase their jurisdiction.
 - c. Brannan-Chevron>PaP
 - i. Why?
 1. Enforcement of state law here would be an obstacle to the goal of the fed law-uniformity in regulating debt collection.
 2. The agency's expertise in interpreting the statute

3. Agencies are politically accountable enough not to worry about them trampling state rights and powers.
 4. We're talking about ambiguous statutes here --in the non-agency context it might be better to presume against preemption, but here there's a better organization to determine what Congress wanted, the Agency.
- iv. So what is the right answer? The courts have not provided it.
1. Do we really want to presume that Congress implicitly delegated the authority to push the limits of the constitution or to preempt state law.
 - a. Maybe the Chevron legal fiction doesn't, or shouldn't, apply here.
 2. But perhaps PaP is different from the avoidance canon. Yes agencies aren't situated to rule on the constitution but they are well situated to make evaluative judgments on whether a state law frustrates the goals of fed law.
 - a. No, agencies are not! The Courts are. Further, we can't allow agency to circumvent the political safeguards of federalism.
6. **Limits on Chevron**
- a. When Does Chevron Apply? United States v. Mead Corp. (the "day planner" case)
 - i. Does an ambiguous statute and a reasonable agency Interpretation = automatic Chevron deference? NO. (Strange, Chevron looked like it said it did...)
 1. Why not?
 - a. The Chevron fiction: Chevron is based on a presumption of congressional intent --when Congress delegates broad powers to agencies, it also intends for them to be the primary interpreters of their enabling statutes.
 - b. However, in some cases the Chevron fiction is simply untenable; that is, there may be circumstances in which Congress didn't intend for ambiguities to be resolved by the agency. **Chevron Step ZERO**
 - c. **Court must first ask does it make sense to apply Chevron fiction here.**
 - d. How do we know when Congress "intended" there to be Chevron deference?
 - i. "Good indicators" that deference is appropriate
 1. Congress gave the agency power to engage in notice and comment rulemaking and formal adjudication, and the agency's interpretation was promulgated through those procedures. **Neither necessary nor sufficient, but very good indicator**
 2. Whether a "relatively formal" process was undertaken in promulgating the interpretation
 3. Do the agency's actions have the force of law?
 - a. (This is a tough argument in Mead because they did for parties involved.)
 4. How does the agency itself treat the interpretation?
 - a. Does the interpretation bind third parties?
 - b. Does the interpretation come from a centralized decision maker?
 - c. Does the interpretation bind the particular party if the agency later changes its mind?

- e. If not Chevron deference, then what?
 - i. Skidmore deference!
 - 1. What the crap is Skidmore deference: "There is room at least to raise a Skidmore claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case ... A classification ruling in this situation may therefore at least seek a respect proportional to its 'power to persuade.' Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight."
 - ii. Critiquing Mead and Saving Chevron? (Scalia's Dissent)
 - 1. Theoretical Critique
 - a. The background presumption of Chevron --that Congress wants agencies to fill statutory gaps --has been reversed to one where the Agency has to show that Congress intended agency, rather than the courts, to fill the gaps.
 - i. This critique has bite where the Agency cannot show congressional intent but would have gotten deference under Chevron because of the presumption.)
 - b. There is no necessary connection between congressional delegation of procedural power and intent about who should resolve ambiguities.
 - i. E.g., courts review questions of law de novo despite the heavy procedures employed by trial courts.
 - 2. Practical Critique
 - a. Protracted Confusion --Mead gives little guidance about when Chevron will apply and when it won't, not to mention the confusing Skidmore standard.
 - b. Ossification of Statutory Law --Under Chevron, an agency can change from one reasonable interpretation to another. But once a court under Skidmore has determined what the statute means, it is unlawful for an agency to change its opinion
 - i. (A subsequent SCOTUS Brand X case removed this troubling feature, but in a way that Justice Scalia disliked --he wanted an overturning of Mead.)
 - c. Artificial and Large Increase in Informal Rulemaking --Under Mead, agencies will be forced to go the "safe harbor" of informal rulemaking because formal adjudication is often too expensive and the other kinds of activities are not safe from Mead review.
 - i. RESPONSE-This is good not bad. Also, pay me now or pay me later.
 - iii. Scalia's Position: Whenever an agency "authoritatively" interprets its statute, that interpretation should be analyzed under the regular Chevron framework.
 - iv. Mead hypotheticals

1. Mead gives strong preference to interpretations which are promulgated by agency who (1) was given authority by congress to create binding rules through informal rulemaking, and (2) the rule in question went through this process. Are both necessary? **Both Are Necessary**
 - a. Congressional authority to make rules BUT interpretation not done through notice and comment?
 - i. Argument for NO Chevron deference:
 1. "Mead seems to say as clearly as it says anything that this general presumption [i.e., Chevron] only applies if the agency has actually used the formal procedures."
 - ii. (Weaker) Counterargument for Chevron deference:
 1. You can argue that Congress's authorization to agency to make binding rules with the force of law acts as a proxy for congressional trust.
 - b. NO congressional authority BUT interpretation done through formal proceedings according to Agency's internally promulgated regulations
 - i. Probably no Chevron deference
 1. Argument for NO Chevron deference:
 - a. If the whole point of looking at procedures is to get at congressional intent, then Congress in this example (under the Mead framework) did NOT intend deference.
 2. Argument for Chevron deference:
 - a. The actual use of procedural formalities is what's important -- that's what effects the quality of decisionmaking, which is what we are concerned about.
- v. Is Mead a Good Thing or a Bad Thing?
 1. Good
 - a. Procedures are good at reining in all the problematic features of agencies.
 - b. The broad variety of agency activities requires a broader variety of judicial review than the simple on/off of Chevron deference.
 - c. Chevron gave too much power to agencies, so Mead checks some of that power in cases where it is more likely to be abused.
 2. Bad
 - a. Rules are better than standards, so Rules are better than standards, so Chevron is better than Mead + Skidmore
 - b. Agency expertise still applies in these situations where the Agency hasn't used a Mead-approved procedure --does the Court know better than the Agency what a "diary" is?