### Legislation & Regulation

### Statutory Interpretation

#### Textualism

1. There are three sources of textualism – the first two, intuition and dictionaries, are admissible under judicial notice. The third is evidence
2. A word’s ordinary meaning is preferred in statutory interpretation (*Nix v. Hedden* – tomato as a fruit)
   1. How do SCOTUS justices know what the “ordinary” meaning of a word is?
   2. Why not use alternate solutions; i.e.; taxpayer wins unless clearly wrong, or agency can decide?
   3. Is a word’s ordinary meaning the *exclusive* definition in statutory interpretation? (*Smith v. U.S.* – “use a firearm” implies “as a weapon”, or as an instrument of trade?)
3. Does anything other than textualism make sense for a multi-member legislative body?
4. A statutory scheme that offends widely and deeply held social values can be interpreted to reflect legislative intent (*U.S. v. Kirby* – Sherriff charged with delaying mail carrier by arresting him)
   1. How can textualism be squared with the absurd results doctrine? Do ordinary meanings never create absurd results?
      1. Is it possible to prove that the text of a statute is not what the legislature intended? (*Cernauskas* – All laws are repealed) Doesn’t this look away from the statute’s text and to the legislator’s intent?
   2. Absurdity doctrine is for a slip of the mind; scrivener’s errors are a slip of the pen
      1. The fact that Congress might have been clearer doesn’t permit courts to redraft statutes to do what Congress failed to do (*U.S. v. Locke* – mining claim expired on December 30)
         1. Legislative supremacy limits courts’ ability to correct absurdity and/or errors
5. Textualism increases reliance on canons of construction

#### Purposivism

1. Purposivism reflects the ultimate goal of the legislature in passing a statute
   1. Intentionalism stops short of purposivism, in that it implements the legislature’s proximate intent
2. General argument for intentionalism is the because a word’s ordinary meaning can be ambiguous, the speaker’s intent is the only way to affirmatively determine meaning

#### Legislative History

1. The plain meaning trumps absent ambiguity or an absurd result (*Caminetti*)
   1. Largely represents current SCOTUS jurisprudence; can be considered presumptive textualism
2. Court reversed course in *American Trucking*, saying it will not exclude any aid to interpret statues
3. Hierarchy of legislative history is:
   1. Committee Reports
      1. Does this create a perverse incentive to leave a statute ambiguous but clarify in reports?
      2. What if the committee’s rationale isn’t shared by legislature?
   2. Floor/sponsor statements
      1. Bulleted statements were not actually made on the floor
      2. A sponsor’s private meaning, expressed in a bulleted statement, do not influence the readers’ beliefs, and therefore cannot be considered valid history (*Continental Can* – definition of “substantially all”)
   3. Hearings
   4. Post-enactment history
      1. Falling out of favor, since the legislative process may restrict alteration, even though the court’s interpretation is incorrect
4. Critiques of legislative history include:
   1. Reliability – Does the legislative history actually reflect legislators’ understanding?
      1. Is it reasonable to expect legislators to understand all bills voted on? (*Blanchard v. Bergeron* – committee report embraced one aspect of a precedent, but not another)
   2. Formality – Legislative history is not procedurally significant

#### Canons of Construction

1. The order in which canons of construction are applied matters (*Smith v. U.S.* – gun for drugs trade, where rule of lenity was invoked last, therefore ineffectual)
2. Semantic Canons:
   1. Ejusdem Generis – A catchall term at the end of a list has a definition similar to previous listed terms (*McBoyle v. U.S.* – “Vehicle” does not include airplane)
      1. What shared characteristic of the listed terms limits the catchall term?
   2. Expresio Unius – When a statute explicitly expresses something, others are implicitly excluded
   3. Noscitur A Sociis – A word is known by its “friends”, or those surrounding it in context
3. Substantive Canons:
   1. Rule of Lenity – Criminal law should be clear (*McBoyle v. U.S.*, *People v. Smith* – concealed weapons law did not address
   2. Canon Against Surplusage – All terms in a statute contribute meaning
      1. Is this a realistic expectation for Congress?
   3. Constitutional Avoidance – Courts should, if possible, avoid passing on constitutional questions

### Constitutional Background

#### The Non-Delegation Doctrine

1. The Constitution’s non-delegation provision addresses problems with extra-legislative law-making: 1) Accountability, 2) Transparency and 3) Democratic Deliberation
   1. Is it possible for Congress to delegate such that the delegation *amounts* to a grant of legislative authority? Vermeule says no
      1. *Marshall Field v. Clark* dictum says yes, but only if the grant is too broad
   2. *J.W. Hampton* argues that if Congress lays down an intelligible principle to which an agency must adhere, there is no violation of the non-delegation doctrine
      1. Effect is to ensure that Congress makes big, difficult value decisions
         1. Congress made the initial decision to delegate decision-making authority – can there ever be a non-delegation problem?
      2. Intelligible principle can be quite vague; “requisite” is enough in *American Trucking*
         1. Is this really an intelligible principle, or is the court reserving the power to invalidate a truly over-broad statute later?
         2. Courts generally shouldn’t second-guess Congress regarding how much policy judgment agencies should be able to exercise
         3. This doctrine and scope of the grant of authority are on a sliding scale; the broader the scope, the more scrutiny will be given to the intelligible principle
   3. The Court strikes down a delegation to a consortium of private groups because the delegation was overly-broad, and the delegation was to a private party (*Schechter Poultry*)
      1. The private party issue is one of due process, not non-delegation

#### Appointment

1. Anyone with “significant authority” is an Officer that must Presidentially appointed (*Buckley v. Valeo*)
   1. Reflects reality of separation of powers by restricting Congress’ ability to appoint officers
   2. However, inferior officers may be appointed by Congress, bypassing Senate approval
      1. In *Morrison v. Olson*, court focused on these factors to determine if an officer is inferior: 1) Subject to removal, 2) Limited in function, jurisdiction, and duration
         1. Scalia argues that being subordinate to another officer is the most critical inquiry; to be an inferior officer, one’s work must be directed at some level by a principal, Presidentially-appointed officer (wins in *Edmond v. U.S.*)

#### Removal

1. *Myers* implemented the unitary executive model; President may remove Officers at his discretion
   1. Limited in cases of officers with quasi-judicial functions to limit interference in individual cases
   2. Also creates an exception for career employees, but not political appointees
2. *Humphrey’s Executor* abandons *Myers* in favor of the civil service model, where officers have for-cause tenure protection; limits *Myers* to purely executive officers
   1. *Morrison v. Olson,* however, holds that as long as the President’s ability to faithfully execute the laws is not impeded, executive officers can be independent from the President
      1. Opposite holding of *Humphrey’s*, finding that for cause removal does not infringe on President’s removal powers
         1. Double for-cause removal does infringe on the President’s removal powers (*PCAOB*)
            1. Dissent points out that the President’s inability to remove the first layer of officers makes the second layer’s existence irrelevant
      2. Scalia argues that because there is purely executive power being vested in an individual who is not the President, it is necessarily unconstitutional
   2. Creates modern independent agencies that perform quasi-legislative and quasi-judicial functions
   3. Might infringe on non-delegation doctrine, where modern agencies have rulemaking power

### Rulemaking & Adjudication

1. Rules have advantages over adjudicatory decisions
   1. Better notice to potential violators
   2. Eliminates the problem of strategic delay of compliance
   3. Prevents litigation on the correctness of precedent
      1. Rules bind the *agency* unless changed by the rule
2. There are matters of public right that do not need to be adjudicated by Article III courts (*Crowell v. Benson* – Fisherman’s Worker’s Compensation adjudicated by a commissioner)
   1. Fundamental and “jurisdictional” facts (facts that determine whether a statute is applicable) are different. If jurisdictional facts are at issue, an Article III court is the proper forum
      1. Tries to lay a boundary line between administrative state and Constitutional structures
      2. Emphasis is placed on the fact that judicial review was permissible
         1. Agency determinations allow more effective shaping of policies
         2. Does judicial review matter?
            1. Is there a rubber stamp problem, especially if deference is paid to the agency’s decision?
            2. The legislature can delegate authority to others – Efficiency
            3. Independent agencies are the *product* of separation of powers (all three branches cooperated to provide the agency their initial power)
            4. Presence/lack of electoral accountability (is this an effective tool?)
3. Agencies are allowed to perform prosecutorial and judicial decisions concomitantly, as long as the procedures used conform to both the APA and the Constitution (*Wong Yang Sung v. McGath*)
   1. §554 restricts ex parte contact, subordinates acting as a judge in a superior’s case, and having employees participate in different functions in substantially similar cases
4. The grounds upon which the agency based its decision must be found in the record (no post-hoc rationalization) (*SEC v. Chenery*)
   1. Adequate agency explanation is the currency with which an agency purchases *Chevron* deference
   2. Only holds for adjudicatory decisions, but a similar requirement will be imposed on rule-making procedures under notice-and-comment rulemaking under the APA
   3. Agencies are presumed to have adjudicatory authority (*SEC v. Chenery II*)
      1. Agencies are also presumed to have rule-making authority (*National Petroleum* – Octane rating on gas pumps)
      2. This means that agencies may determine which procedural safeguards they will use; as long as the decision is reasonable and the statute is ambiguous, courts will defer to the agency’s judgment (*Dominion Energy*)

#### Due Process

1. Oral argument is a procedural protection that must be granted before a taking is justified (*Londoner v. Denver*)
   1. Why is oral argument necessary? – It’s harder to ignore and promotes accountability
   2. Limited in *Bi-Metallic*, where a broad statement that impacts a narrowly defined set of individuals did not require a hearing – in other words, rulemaking instead of adjudication
      1. Legislative process is equivalent to due process in rule-making procedures
         1. Constitutional due process is a floor, not a ceiling, since statutes (in particular, the APA), can require more
   3. Confirmed in *Southern Railway v. Virginia*, which also re-states that administrators cannot perform identical tasks to legislatures
      1. Concerned with creation of an evidentiary record to facilitate judicial review?
   4. The government may perform the cost-benefit analysis in ill-defined emergency cases
      1. Courts move too slowly to address time-sensitive situations, so legislature may act
      2. Property loss is compensable post hoc, reducing importance of pre-seizure hearing
2. There is a two-step process within the due process inquiry:
   1. Whether due process applies at all? (impacted by whether interest is in liberty or property)
      1. A property entitlement created by statute can fall into three traps
         1. A statute that creates a legitimate expectation *can* limit procedural due process (*Arnett v. Kennedy* – the substantive right granted was subject to the statute’s, and not the Constitution’s, procedural guarantees – “bitter with the sweet”)
            1. Overruled by *Loudermill* – Congress cannot rewrite Constitutional procedural safeguards when defining an entitlement
         2. Since the Constitution doesn’t create property, a state may avoid due process concerns by refusing to provide an entitlement (*State Colleges v. Roth* – one-year employment contract that did not provide for renewal did not create a legitimate expectation amounting to property)
            1. A tradition of not firing employees except in special situations may create a ‘reasonable expectation’, amounting to property protected by due process (*Perry v. Sindermann*)
         3. The interest’s weight is irrelevant to determining if due process applies at all (only relevant in the 2nd inquiry)
   2. How much/what process is due?
      1. What triggers these inquiries? Need? (see “brutal harm” – *Goldberg v. Kelly* – welfare benefits ended without hearing) A statutory grant? (see Reich’s argument concerning new property)
         1. Why does *Goldberg* come out differently than *Londoner*? Is there a distinction between ‘takings’ and refusal to grant benefits? Between privileges and rights?
      2. *Matthews v. Eldridge* introduces a balancing test to determine how much process is due
         1. The private interest to be affected (*Goldberg*’s brutal harm)
         2. The risk of an incorrect result under the procedures used and added benefit of additional procedure
         3. The cost of an additional procedural requirement
            1. This ends up looking very similar to Hand’s B >< PL formula from Tort
         4. Should the court be asking “What procedures *should* be due,” or whether the agency’s system is reasonable?
         5. The Court uses the *Matthews* factors in *Walters v. NARS* – veterans exposed to radiation may not pay attorneys more than $10 to represent them at hearings
            1. Both *Matthews* and *Walters* reflects the Court’s preference to defer to the agency’s interpretation, especially in situations where the agency is supposed to aid claimants
            2. If agency can provide a cogent explanation for their procedural safeguards, courts will likely defer to the agency’s judgment, even though *Loudermill* splits substance from procedure

#### APA Procedures

1. Organic statutes can be read to require one of four set of procedural requirements under the APA:

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| --- | --- | --- |
|  | On the record after opportunity for hearing (Formal) | Informal |
| **Rulemaking** | §§553, 556-57 | §553 (notice-and-comment) |
| **Adjudication** | §§554, 556-57 | Almost no APA procedures |

* 1. APA adjudication is defined as anything that is not rulemaking

1. Agencies may make rules, then perform adjudications adverse to parties without affording opportunity to challenge that rule (*FPC v. Texaco*)
   1. Supported by efficiency arguments – encourages rule making
   2. *Heckler v. Campbell* (Social Security grid system) similarly upholds an agency’s right to make generalized statements about rules that may not be challenged in individual adjudications
2. The words “On the record after opportunity for hearing” are critical to force agencies to engage in formal rulemaking (*U.S. v. Florida East Coast Railway*)
   1. Dissent argues that rate-making is not an activity that should be undertaken without formal hearing procedures
   2. Even agencies engaged in notice-and-comment rulemaking must create a record that permits meaningful commentary from interested parties (*U.S. v. Nova Scotia* – smoked whitefish (2nd Cir))
   3. This is part of the D.C. Circuit and other appellate circuit’s attempts to limit the discretionary authority of administrative agencies, in spite of prodding from the Supreme Court
      1. Adds ‘paper hearing’ requirement, ‘logical outgrowth rule’, and requirement of a record to facilitate judicial review to notice-and-comment rulemaking
         1. Principle of the logical outgrowth rule is that the agency can change the answer, but not the question asked in soliciting comments (*Long Island Care at Home*)
            1. How general is the question? Does this promote uncertainty?
      2. Courts try to proceduralize informal rulemaking through paper hearings, hybrid rule-making and hard look review
         1. Hybrid rulemaking is struck down in *Vermont Yankee* - §553 is generally a ceiling on procedural requirements – there is no middle ground between informal and formal rulemaking
3. There are several exceptions to notice-and-comment requirements in informal rulemaking
   1. Interpretive Rules
      1. Interpretive rules clarify or explain existing law, and do not have the full force and effect of law (*American Hospital Association v. Bowen*)
         1. What about an interpretive rule that doesn’t have the full force and effect of legal process – in other words, a de facto law without actually being a law? (*Community Nutrition Institute* – adulterated corn action levels)
         2. Interpretive rules must be reasonably related to a specific statutory provision (*Hoctor v. U.S. Dept. of Ag.* – 8 foot fence not related to “structurally sound”)
   2. General policy statements
      1. General policy statements do not bind the agency; it does not impose any rights or obligations and allows for continued exercise of discretion
   3. Organizational rules and procedures
      1. This exemption covers actions that don’t alter the rights of parties, but simply the manner in which parties present themselves to the agency
         1. If actions substantially affects the right of those over whom the agency exercises authority, notice-and-comment is required (*Air Transport*)
   4. Good-cause (Emergency)

### Chevron

1. Before Chevron, agency expertise allowed them to decided questions of fact (putting aside jurisdictional facts) (*Crowell v. Benson*). Next, *NLRB v. Hearst* presents a mixed question of law and fact (who is an employee). As long as the Board’s determination has warrant in the record and a reasonable basis in law, it wins
   1. *Skidmore* presents factors to determine if agency’s interpretation merits deference: Thoroughness of consideration, reasoning’s validity and consistency with earlier decisions
2. *Chevron* works by arguing that Congress has delegated interpretive power to the agency; we would prefer agencies make the decision rather than courts (due to political accountability and agency expertise)
   1. This gets around APA §706, which gives courts the authority to review agency decisions

#### Chevron Step 0

1. A predicate for *Chevron* is a delegation of interpretive authority. *Chevron* deference is appropriate in formal and informal rulemaking, and formal adjudication (also good-cause exceptions to informal rulemaking)
   1. A totality of the circumstances approach is appropriate in informal adjudication (*Mead*)
      1. *Mead* lays out a spectrum of deference, from no deference to *Skidmore* to *Chevron*
      2. *Long Island Care at Home* goes one step further, and says that the *Skidmore* factors help to determine if *Chevron* is applicable at all
      3. We thus fall into the black hole; *Skidmore* determines if *Chevron* applies, and if it does not, the *Skidmore* factors are again analyzed to determine how much deference, if any, the agency receives. This is what happened in *Gonzales v. Oregon*
   2. Totality of the circumstances also applies to interpretive rules that did not go through notice-and-comment

#### Chevron Step 1

1. The first question Chevron asks is whether or not Congress has already spoken to the precise question at issue. If the statute is unambiguous, and the agency’s interpretation does not comport, no *Chevron* deference (*Babbitt v. Sweet Home* – definition of ‘take’)
   1. Scalia dissents, arguing that the meaning of ‘take’ is clear; there is only one correct interpretation, rather than Stevens’ range of reasonableness
2. The Court has created a non-delegation doctrine within *Chevron*, (not Constitutional, but statutory), essentially arguing that certain questions are so important Congress would not have delegated them to the agency in such an indirect manner. (*MCI v. AT&T*)
   1. Is this idea consistent with the overall purpose of *Chevron*, agency delegation? Or is it consistent, since it implies that Congress is a better decision-maker than agencies?
   2. A similar idea is invoked in *FDA v. Brown & Williamson*
      1. Breyer argues in dissent that such a canon is unnecessary, since the Presidential administration will be accountable for agency decisions regardless
   3. *Chevron* and the major question doctrine pull in the same way in *Mass. v. EPA*, but the agency loses anyway. The majority may have wanted to force EPA to exercise professional judgment
      1. Both *Mass v. EPA* and *FDA* involved jurisdictional questions. However, in *City of Arlington*, the Court kills distinctions between jurisdictional and other *Chevron* questions
   4. Agencies may give different interpretations to identical words in a statute (*Duke Energy*)
      1. Silence is not conclusive either, but agencies still must provide interpretations so the court can exercise judicial review (*Negusie v. Holder*)

#### Chevron Step 2

1. There is dispute as to what step 2’s inquiry is; if the agency’s interpretation contradicts congressional will (in which case, isn’t step 2 simply step 1?), or similar to the “arbitrary and capricious” standard?
2. The agency wins if it’s reasonable; *not* the only possible interpretation, or the best one (*Entergy Corp.*)
   1. *Entergy* is another case fundamentally about how silence is interpreted; does silence implicitly proscribe unmentioned conduct?
   2. Similarly, a court’s prior judicial construction of a statute controls an agency’s interpretation only if the court found that their construction was *the only possible* interpretation, leaving no room for agency decision (*Brand X*)
      1. Scalia shows his faith in single, uniquely correct interpretations, and is uncomfortable with agencies disagreeing with courts’ incorrectly phrased interpretations

### Arbitrary & Capricious

1. Hard look review forces agencies to make a record to facilitate judicial review, even in informal agency proceedings (*Overton Park)*
   1. *Overton Park* seems to set up a multistep process: *Chevron* 1, *Chevron* 2, and arbitrariness review
      1. There is a limited remedy for arbitrariness review; usually limited to remand. Public justification seems to be the driving concern
   2. Elements of arbitrariness review include:
      1. Did agency consider relevant statutory factors?
      2. Did agency consider reasonable policy alternatives?
         1. Failure to do so was reason the agency’s decision was overturned in *State Farm*
         2. Is *State Farm* a technocratic approach that limits agency’s ability to change policies as a result of a change in Presidential administration?
      3. Substantive facts behind the agency’s rationale
         1. If facts are uncertain or unknowable, is it reasonable to force agency to provide reasons for a policy change? No! (*FCC v. Fox*)
      4. Did the agency make any clear errors of judgment?
   3. One of the major rationales for limited arbitrariness review is anti-ossification; courts want to make it easy for agencies to make new policy judgments in light of new information
   4. The current state of the law is that agencies must consider reasonable policy alternatives when initially forming policies, but *not* when that policy changes
      1. Isn’t this backwards?