Statutory Interpretation and Regulation Outline

# The Legislative Process

* 1. How the Federal Legislative Process Works
     1. House Procedure
        1. Introduction- by Representative only
        2. Committee Referral- referred by Speaker to Committee
           1. Committee- can handle things only tangentially related to subject area/title of committee
        3. Subcommittee Referral
        4. Hearings- “show” testimony, experts. Public, source of leg history
        5. Mark-up- not public, changes to bill
        6. (After amendements, etc.) Rules Committee- form the rule for the floor debate
           1. Open: all germane amendments may be offered
           2. Closed: amendments limited
        7. Rule is voted up or down- if accepted, House 🡪Committee of the Whole
        8. Floor debate- amendments, etc.
           1. Voting on amendments is on unrecorded votes
           2. Back to Floor of House
        9. Vote on Bill
     2. Senate
        1. First Reading
        2. Second Reading
        3. Committee referral by Senate Parliamentarian (optional)
           1. NOTE no rules committee- unanimous consent instead
        4. Hearings
        5. Markup
        6. Referral to Floor
        7. Filibuster/Holds
        8. Cloture- 60 votes, formerly 67. 16 for petition
        9. Floor Debate
        10. Vote
     3. Conference- if the versions aren’t identical. Major players from each side and each House. Few bills die here.
     4. President
        1. Signs or Vetoes
        2. Veto override by 2/3 each house
     5. To Kill A Bill (Vetogates)
        1. (Sub)Committee referral- refer to people who sit on it or kill it
           1. To defeat:

Discharge Petition (maj of house members sign)

Calendar Wednesday (call up committees to ask whether they want to consider and bills)

3 members of comm call meeting

* + - 1. Amend it to be unpalatable (**poison pill amendment**)
      2. Almost any point in Senate due to filibuster
         1. Cloture
         2. Reconciliation Bill- only 51 votes, but limited application
      3. Conference committee
      4. Veto by Pres
         1. Override by votes
  1. Nomination of new Justices (Scalia’s passing)
     1. Pres nominates, senate confirms
     2. Executive calendar- lets things “jump line” in senate but still need a Unanimous Consent order to get things brought to floor.
        1. **Executive session**, contrasted with **legislative session**; cannot filibuster attempt to get a bill into executive session
     3. Can deal with things by getting nominees to hostile committee- politics is people
     4. Timeframe usually between 30 and 100 days
     5. Can pressure senators politically- arm-twist behind closed doors on funding etc.
     6. Pres cannot use brinksmanship to hold up process b/c of sworn oath to uphold laws of the land.
     7. Recess appts- rare, but Pres can directly appoint, nominee in such generally gets confirmed as a matter of principle. Last used by Eisenhower
     8. Blue sheets won’t help; not clear it applies to SC justices (veto from home state)
  2. Theories of Legislative Process
     1. Congress designed to work slowly, difficult to pass bills
     2. Today, things like vote-trading, logrolling, omnibus, riders are common
     3. **Formalists**- rigid adherence to lines of Constitutional Power
     4. **Functionalists**- concurrent power of as long as innovation is necessary
     5. **Purposivists**- enforce purpose of statute
     6. **Originalists**: enforce what framers/founders/enacters wanted
     7. Checks and Balances
     8. Congressional Competence and Capacity
        1. Problems of too many members and single intent
        2. Representation means many interest
  3. Delegation of Authority
     1. May delegate as long as there is an “intelligible” principle
     2. Congress is still primary lawmaking body in country
  4. **Congressional Control of Delegation**
     1. Appropriations power- can defund laws and agencies
        1. Funding writers- hired to find ways to do it
        2. Point of order-objection raised when something tries to repeal indirectly by defunding
     2. Appointment power- can block nominees
        1. Blue Sheet- home state senator can basically veto
        2. Acting people run agencies while this happens
     3. Detailed legislation- hypertechnical statute, but difficult to pass.
        1. Often where this is a breakdown of trust with agency
     4. Committee reports and legislative histories: give “hints” about things not in bill
     5. Legislative oversight and oversight hearings
     6. Legislative Veto- design agency to do only certain things, or have Congress oversee it. May not allow promulgation of rules, etc.
  5. **State Legislative Process- See “special class” materials** at end of outline

# Statutory Interpretation

* 1. Intro- **Holy Trinity Church v. U.S.** (p.305)
     1. Facts: Church wants to bring preacher to America. Statute bars encouragement or importation of “any person” by “any method whatsoever” to perform “labor or service” in the U.S. Also, there is a list of exceptions, but preachers not included.
     2. Holding: Court finds that the preacher is absolutely within the statute. Higher court finds that policy reasons and the legislative intent, plus meaning of “labor”, point to lower-class laborers, and that the preacher is ok.
  2. **Statutory Text** is always the lodestar!
     1. **Textualists** emphasize Text as reflecting meaning
     2. **Purposivists** emphasize statutory purpose
        1. Intent and purpose can differ; what Congress wanted at enactment v. what statute is about
     3. **New Textualists** emphasize text and disallow legislative history
  3. **Legislative Purpose** 
     1. **Faithful Agent Approach:** find the most accurate and full meaning of the statute that carries out Congress’ intent;
        1. most predominant approach; minimizes role of judiciary.
     2. Purpose v. Intent:
        1. **Purpose** is what statute aims to do- evil intended to ameliorate
        2. **Intent** is what is inside heads of legislators, may differ from purpose as time goes by.
     3. **Legislative History:**
        1. Persuasive/seductive: can always find own values; “looking out over the heads of the crowd and picking out your friends”
        2. **Last refuge of the statutory scoundels-** can be misapplied if you don’t have law on your side and want a way out
     4. **Legislative Silence**
        1. “blank slate” allows you to read anything into the law
        2. **Elephants don’t hide in mouseholes-** large changes don’t hide in a scrap of legislation; **silence must be read narrowly!**
     5. **“Test Cases”-** intended to get a law before the courts to be reviewed
     6. Criticism:
        1. Incoherent or undiscoverable intent for a collective
        2. Intent is irrelevant- the law says what it means
     7. **Holy Trinity***:* Purpose of banning manual laborers meant it should not apply to preacher.
     8. **Carminetti:** Man indicted under anti-trafficking act for bringing mistress to another state; dissent argues that purpose of the statute does not fit application
     9. **Spelunkian Explorers***:* Foster: Deterrence purpose is thwarted, so no point in applying statute.
        1. Keen: textualist; making hard decisions is unpopular, but we must highlight stupid language so that it might be fixed.
  4. **Legal Process School: “Purpose-driven statutory partnership”**
     1. Product of New Deal; use of expressly non-textual features like agency interpretation and governmental purpose
        1. Assumes rational gov’t and discoverable intent
        2. Supposed to stick to “meaning words will bear” (book)
        3. Treats court as more of a **partner** or helper than a faithful agent; “cooperate” with agencies/congress to make public power happen
        4. Once the dominant school, not anymore.
     2. Goal: give power to government addressing societal ills/ **achieve Congress’ goal**
     3. Hart Article: encourages focuses on general purpose, notes changes over time
     4. Eskridge, from book:
        1. Dynamic interpretation- endogenous metapolicies from policygiver, or exogenous ones from greater authority; may alter directives to interpreters.
     5. Examples: Stem cells problem: agencies can change direction over time
        1. Female juror cases: radically different approaches can find opposite intents and results.
     6. **Matter of Dana and Matter of Jacob***:* Adoption by unmarried couple and LGBT couple permitted under purpose of statute as interpreted by court
        1. Intents from hodgepodge amendments too unclear
        2. Cites humanitarian purpose of having parents who care about child, but from extratextual purposes
           1. Most, even legal process theorists, don’t go this far in stretching
        3. “Statutes must be strictly construed”- as opposed to common law
        4. Comes to good result- but also takes heat off legislature to fix things or pass them correctly in the first place
        5. **Constitutional Avoidance Doctrine:** use interpretations that don’t require Constitutional interpretation
  5. **Textualism and Plain Meaning**
     1. **Today, we always start with text.**
     2. Judges here act in subsidiary role, denying broad power mandate to make law
     3. **Reasons For:**
        1. Efficiency (but you can twist words and debate a long time still)
        2. Objectivity (but of course definitions can be subjective)
        3. Democratic Accountability (legislature must fix bad laws)
        4. Law ought to be understandable
           1. Gives tools of compliance to citizens
        5. Equal Protection, Due Process (don’t need lawyers to twist for you)
        6. Separation of Powers:court cannot make law; limits to interstitial rules only, reserving most for legislature
        7. Consistency
        8. Clarity
     4. **SCALIA**- represents “stopping with the text” but not all textualists go that far.
     5. **U.S. v. Locke***:* owner of land rights cannot retain them when statute demands filing “prior to Dec. 31st” & filed on Dec. 31; text is clear and cannot be changed or contravened.
        1. **Dates/deadlines cannot be changed** if set by Congress; are arbitrary**.**
        2. Legislative meaning is expressed by **clear words- ordinary, consistent, and accessible to the public.**
        3. **Equitable estoppel** defense worked on remand- but do not try this against feds most of the time.
        4. **Agency Confusion** doctrine- “Even the agency doesn’t know what the law means” or didn’t make it clear- but this only works once.
     6. **TVA v. Hill***:* Snail darter/dam case.
        1. *“*One sentence opinion” summary: *“****One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act”*** 
           1. If it says “any” and “all” actions taken out by agency must comply, then the dam can’t be closed, money spent or no.
        2. Taxpayer money spent v. clear directive to preserve genetic heritage at any cost; “irrational result”, but still permitted b/c law is clear.
        3. Dam later closed by Congressional overrides.
        4. Textualism “serves up chestnuts back to Congress to clean up their own mess**”**- **making legislature responsible** for the words they pass!
        5. Dissent: Appropriations argument; if Congress had a hearing excluding it from act and kept funding it, it’s okay to close dam.
        6. Note on Approprations: **repeal by implication** is heavily disfavored, esp. in appropriations legislation. **No substantive language allowed** in these.
           1. **Funding writers** get paid to “take shots” at disliked projects without running afoul of this rule
           2. **Salmon example:** no selling GMO fish until labeling developed nationwide; $150k given for whole process (not nearly enough)
        7. Rehnquist’s opinion: **Court has limited equitable powers, can balance own remedies.** Whether or not Congress can force injunction is still a q.
  6. **"New Textualism": no business with legislative intent**
     1. It is **the law that governs, not the intent of the lawmaker.**
     2. **Government of laws, not of men.**
     3. Separation of Powers and Judges as “only equipped to read law”
     4. Literalism and formalism can vary in degree. Scalia treated law as shield from government.
     5. “Honest but humbling” to law professionals- weak role, but that’s democratic
     6. Law is words- means it is **consistent, KNOWN, predictable, and accessible** (if plain meaning is considered)
     7. **Apparent plain meaning** must dictate interpretation; that which ordinary speaker of English would draw from text.
        1. Textualism should not be canonical either
        2. Legislative history rejected
           1. Intent is personal, law impersonal
           2. Legislative history is manipulated to impact judges
        3. Congress makes laws, not legislators
        4. “looking over the crowd and picking out your friends”
     8. Basic Process: Words -> other words -> entire provisions -> act -> other acts
     9. **Chisom v. Roemer***:* Majority holds that “representative” in law prohibiting vote dilution claims applies to state judge elections; Scalia dissents that judges are not “representatives” in the ordinary meaning of the word.
        1. Even majority uses no legislative history
        2. Democratic accountability—judges need to be insulated even if elected
        3. “**sleeping dog” canon**- “the dog did not bark, so the person was familiar to dog”/silence means no intent to make a major step; intent inferred from silence or lack of intent.
           1. Rejected by Scalia, but he uses the parallel “elephants don’t hide in mouseholes”
     10. **West University Hospital v. Casey***:* Majority uses Whole Code canon to conclude that “attorney’s fees” in civil rights cases does not include expert witness fees for nontestifying experts. Dissent complains this does not align with purpose of making P whole for cost of civil rights lawsuits (“violence to purpose”), notes that in Alysca and other similar cases, Congress overruled this interpretation.
         1. **Congressional override does not make a decision wrong;** the job is to interpret at time of case/enactment language as is, not what is done later by a later congress.
         2. **Stevens in dissent** also notes that **forcing Congress to revisit language** to better express intent **wastes time and resources.**
  7. **Pragmatism:** the “practical side” of things
     1. **U.S. v. Marshall***:* In LSD case, does blotter paper or other carrier count towards the weight? No one cites legislative history. Majority says yes; the pure/mixture distinction is only in the statute for PCP, so Congress must have intended to really charge on mixture for LSD; judicial notice used to say mixture includes the paper/gel/sugar, etc.
        1. **Judicial Notice:** when facts are known to court/obvious entered into record. (e.g. definition of tomato as known to judge)
        2. **Dissent** is pragmatist- would not charge people the weight of a plane to carry cocaine! The word “carrier” is not in the statute, and the dosage/charge numbers vary hugely from other drugs. What if you put LSD on a car or a watermelon?
           1. Cites rule of lenity- going outside court sources to make arbiter of values- trying to get his conclusion .
        3. Summary of tactics:
           1. Ordinary meaning
           2. Expert testimony, or here, lack thereof
           3. Constitutional avoidance
  8. Statutory Interpretation in State Courts
  9. Funnel of Abstraction: book model; academic but has some good points:
     1. START WITH THE TEXT (narrowest part of funnel)
     2. More specific args are more powerful
     3. Judges do tend to blend approaches
     4. There is a hierarchy of sources
        1. focused text > contextual
        2. unambiguous language > purpose (rare exceptions)
        3. Purpose > policy
     5. Can use cannons to harmonize different levels
     6. Book adds “chain v. cable”- use threads interwoven not a “weakest link”

# Canons of Statutory Interpretation:

* 1. In General: **tools, not rules!**
     1. Collection of common law adages and mental constructs
     2. Appendix 6 lists TONS
     3. Questions to consider
        1. Are canons law? What kind?
        2. Do the rules change by interpreter?
        3. To what extent can legislature control this?
        4. Do some statutes deserve special rules?
  2. **Textual Cannons**: “mechanics” and things independent of substantive subject matter
     1. **3 Horsemen of Stat Interp:** Noscitur a sociis, Ejusdem generis, Expression unis
        1. Aka **“semantic canons”**
     2. **\*\*Plain Meaning Axiom:** assume legislature used terms given their ordinary meaning- **baseline** for all interpretation
        1. **Ordinary/prototypical meaning:** standardized, common
        2. **Technical meaning**
        3. **Evolutionary meaning:** “when” and changes over time
        4. **Statutory meaning:** Congress can define stuff
        5. **Common Law Meaning:** if not elsewhere defined, presumed
           1. *Nix v. Heddon:* Definition of tomato decided on plain meaning and judicial notice. It’s a veggie.
     3. **\*\*Noscitur a sociis:** “known by its associates”, a general word may be defined by the surrounding words in a list. (must have list with communality)
     4. **\*\*Ejusdem Generis:** “of the same kind”a list of terms with concrete meanings ending with a “of any sort” or “all other” bucket-list term; allows you to narrow that last term by meaning of the other words
        1. Need list with a commonality, or no application
        2. Note some judges are picky- if not last bucket term, use noscitur
     5. **\*\*Expressio Unis** (aka Inclusio Unis): expression/inclusion of one thing indicates exclusion of everything else.
        1. Some skepticism on this one- Congress doesn’t always contemplate what’s not going in statute.
        2. Special bite w/statute that lists rule and exceptions; anything not on the exceptions list is included in rule. (heavy weight given to this)
        3. Example: Holy Trinity: if lecturers, singers, and painters are exceptions, preachers are included.
     6. **Grammatical Canons**: usually get less weight, just to buttress
        1. **Last Antecedent Rule:** last descriptive term applies only to last word in list. (yellow shoes with flowers example)
           1. Can be overridden by punctuation canon
           2. **Disabled worker case***:* woman who could only be elevator operator not disabled b/c “must exist in national economy’ applies for work availability in second clause, not in first clause dealing with what the worker can perform.
        2. **Punctuation Canon:** look to it, but it’s WEAK indicia. Words win over it.
        3. **And/Or-** *or* is disjunctive; *and* is requirement for both
        4. **May/shall-** may is permissive, shall mandatory
        5. **Gender and plurality** are inclusive of other (he, she, etc.)
        6. **\*\*Rule against absurdities** (aka Golden Rule): special weight on principle that Congress and legislatures did not intend for language to reach absurd results- if a result that is absurd is reached on the face of statute, more flexible interpretation is permitted.
           1. **NO MANIFEST ABSURDITIES**
        7. **\*\*Scrivener’s error:** not same as ^ but related; court can correct obvious errors/typos or disregard plain errors in statute.
           1. Dropped provisions, typos, wrong terms, fail to harmonize
           2. VERY NARROW, unlike Rule against absurdities
  3. **Whole Act Rule:** interpret statutes so that the statue is internally consistent
     1. Presumption of coherency; note “Christmas tree” drafting that adds/subtracts
     2. Don’t contradict or eliminate other parts by interpretation
     3. **Titles:**  weak indicia today; used to be ignored. Means nothing if plain text clear.
     4. **Preamble/Purpose Statement:** similar to title, only if plain meaning unclear
        1. Greater historical use
     5. **Provisos:** “exceptions” with “provided that” language
        1. Often construed narrowly
        2. Classical form: X may Y, provided that…
        3. Today, often redrafted as thresholds, minima, or maxima. “For all Q above R, X may Y….”
     6. **Rule against Surplusage:** aka rule against redundancies, assume each term has meaning, nothing is meaningless or redundant.
     7. **Principle of Consistent Usage:** Congress intended to give each term the same meaning each time
        1. Esp. applies today, w/definitions in statutes
        2. IMPORTANT. But do note it is a presumption and there are examples to the contrary- this is not inviolate.
        3. Book adds “**meaningful variation”** corollary; changes mean something
     8. **Anti-Derogation rule:** similar to consistency rule- interpret provisions so that they do not conflict with or operate against other provisions in statute.
     9. **Yates v.****US***:* “tangible object” evidence destruction did not cover destruction of fish. (uses many canons along the way)
     10. **Babbit v. Sweet Home***:* In ESA case, majority consults legislative history, dictionary, and broad purpose to rule that incidental modification to habitat is covered under “harm” as part of defining “take.”
         1. Dissent, working from Blackstone norms on property, consults noscitur, dictionaries, Whole Act, criminal implications, other legislative history to conclude that “take” is active and does not include incidental harm.
         2. Canons cited: ordinary meaning, whole act, dictionaries, surplusage, against derogation, rejection of rule of lenity, noscitur, expressio unis, common law meaning
         3. O’Connor’s concurrence: Common law causation is important; must be proximate cause to be responsible (she is most cited today)
         4. Congress later amended to prevent shoot/shovel/shut up
     11. Book adds “**political equilibrium**” canon- deferring to agency’s preferred interp
  4. **Substantive Cannons:**
     1. General Info
        1. NOT value-neutral; represent substantive decisions; “judicial thumb on the scale”; more controversial
        2. General canon- remedial statutes construed more strictly, used less
        3. QUESTIONS:
           1. Are these laws? No clear answer
           2. Can Congress instruct courts on these? Some places abolish rule of lenity.
           3. Do some canons matter more and why?
     2. **Presumption Against Retroactive Laws:** unless Congress explicitly states that a law applies retroactively, it does not.
        1. Prohibition in Const. of ex post facto laws is only for criminal
     3. **Presumption of Judicial Review:** if a statute lacks language specifying which courts can hear which challenges and how, then silence = permission for court to review
     4. **Canon Against Derogation of Sovereignty**: presumption that USA is exempted from statutes unless explicitly included; essentially = sovereign immunity
     5. **Presumption that Congress won’t withdraw judicial remedies**: IF you can sue statutorily, can also do so under common law unless statute says otherwise
        1. Statute does not rule out other remedies
     6. **Presumption Against extraterritorial application:** Congress does not intend to prohibit anything outside the borders of the USA.
        1. Issue for oil/mining worker treatment outside USA, torture
     7. **Presumption that Congress does not withdraw the court’s equitable discretion**: if court is allowed to impose penalties via damages, it does not lose the power to issue injunctions as well
        1. **Pushback doctrine**- allows court to choose relief regardless of what Congress says.
     8. **Presumption that Fed regulation won’t intrude into traditional state responsibilities**: softer version of federalism clear statement rule
     9. **Presumption that Congress doesn’t intend to pass statutes that violate international law:** narrows laws sometimes to not conflict with international instruments, even if those instruments are less effective
     10. **Presumption that Congress doesn’t intend to pass statutes that violate treaty obligations:** similar to above, not as treaties self-execute, and some need statutes
         1. Weak presumption (can counter explicitly)
         2. Congress doesn’t rewrite to overwrite treaties
     11. Other presumptions
         1. **Against derogations of the president’s traditional powers**
         2. American indian rights
         3. **Strict construction of public grants**
     12. **Rule of Lenity:** when ambiguous, criminal statutes are to be construed strictly, in favor of the accused (**ISSUE: when do we get to it/reach it?)** 
         1. Reflects constitutional issues about D’s rights; **fair notice**!
         2. Don’t want judges to simply fill in elements that are ambiguous, since we want statutory crimes and not common law crimes
         3. **Muscarello v. US***:* Case where man drove to drug deal with gun in locked glove compartment; statute bans “carry” of firearms with respect to “during and in relation to [criminal acts]”.
            1. Majority looks to newspapers, dictionaries to determine the meaning of carry as NOT limited to person

Canons of surplusage/ consistency with previous interpretations of use are used here- would be redundant to use “carry” only to mean person here since there is also “uses” which implies on person

REJECTS rule of lenity; argues that there is **no ambiguity** reflecting a need for lenity to resolve; must be “grievously ambiguous to use”- rule as TIEBREAKER

* + - * 1. RBG, Scalia and other dissenters: using other press, and arguing that the split in the court shows ambiguity; also, rule should be invoked on ANY AMBIGUITY for policy reasons
    1. **Doctrine of Constitutional Avoidance**
       1. If a statute’s text can support multiple interpretations, but one raises constitutional concerns, court should choose the one that doesn’t raise the constitutional concerns
       2. Common and widespread rule; two versions:
          1. If there is a constitutional problem, use it (**Classic)**

Justification: avoiding dicta and advisory opinions

Deeper and narrower review

* + - * 1. If there is a serious constitutional doubt/it might raise a problem, use it (**Modern)**

Avoid unnecessary holdings

More power for court

* + - 1. As with lenity, you **need ambiguity to use**
      2. Justifications:
         1. History/separation of powers
         2. Efficiency (fewer constitutional decisions)
         3. Trying to honor Congress’ intent to (presumably) pass only constitutional laws (But this presumption’s not always accurate)
         4. Judges’ policy: an “ought” policy that judges prefer to follow
      3. Book adds: use **passive virtues** like mootness/ripeness/standing to get rid of these cases w/o constitutional resolution as well.
      4. **Skilling v. US**: Head of Enron indicted under 1343-3146 wire fraud, including “deprivation of honest services.”
         1. SC had previously tried to narrow wire fraud, so Congress passed Honest Services.
         2. SC feels that there are two interpretations:

Honest services = bribes and kickbacks as violation

General interpretation, conduct unrestricted

This might be too vague or overbroad, so it might be unconstitutional

* + - * 1. RBG thus limits to bribes and kickbacks under modern doctrine
        2. Dissent, Scalia: there is no ambiguity about bribes and kickbacks to trigger avoidance; those words not in statute! (can’t make a path or interp to be able to use the canon)
      1. **Sebelius***:* Healthcare! This is classic-const-avoidance; interpreting under the CC would be unconstitutional, so we interpret as tax.
         1. Is CC stuff dicta? Holding ultimately depends on tax (but it shows how/why we get there and use the canon)
         2. Modern rule gives more discretion and also avoids this sort of dicta issue

Dicta useful for later opinions (Seeds)

* + - 1. **Wiretapping/AUMF/FISA***:*
         1. FISA bans wiretapping w/o warrant, AUMF authorizes broad force
         2. Many canons- anti-tap scholars argue:

**More specific statute (**FISA**) trumps more general (**AUMF**)**

**Repeals by implication disfavored** so AUMF does not repeal FISA

**No elephants in mouseholes-** if AUMF to make such a wiretap program, it would authorize specifically!

* + - * 1. DOJ argues:

Inherent constitutional authority of President

Preamble of AUMF

**LATER statute takes precedence** over FISA

**Constitutional Avoidance:** FISA limitation of pres powers could be a constitutional issue on separation of powers, so avoidance requires deference

However, there could also be 4A problems with deferring and allowing tapping, so constitutional avoidance cuts both ways here.

* + - 1. **Severability:** can have explicit severability clauses or court can “do surgery”—removing part of a statute but leaving the rest
         1. Presumption of saving statutes instead of striking
         2. **Leaves something congress never passed.**

Intent/faithful agent might not be preserved

* + 1. **Clear Statement Rule for Federalism**
       1. **Federalism Clear Statement Rule:** given the fundamental division of authorities between federal and state, if Congress wishes to pass legislation that intrudes into the core functions of the states, must do so in clear, express language.
       2. Previously covered by presumptions, but this is a stronger version
       3. **Gregory v. Ashcroft, ADEA CASE***:*
          1. Missouri State Constitution has judge mandatory retirement age; ADEA forbids age discrimination and, as amended, applies to states. Exceptions to ADA include “employees on policymaking level” and elected officials/aides thereof/ immediate advisors
          2. **O’Connor for majority:** federalism means preemption of state must be clear; introduces and then relies upon the federalism clear statement rule.
          3. **Possible alternate routes:**

Judges are on policymaking level!

C avoidance: one interpretation says congress can tell states how to pick officials, other doesn’t. Go with the way that does not and we are done.

* + - * 1. **White’s dissent:** textually, judges are on policymaking level; no need for a new principle

**Noscitur** might suggest that policymaking level means elected people, but the **surplusage** rule cuts against that, as does “meaningful variation” corollary.

Use definitions in statutes and preserve judicial economy rather than making a new foundation.

* + - 1. The **clear statement MUST BE IN THE OPERATIVE PROVISONS of the statute itself!** NOT in legislative history.
      2. **MUST HAVE AMBIGUITY TO USE,** just like lenity and avoidance.
      3. **Congress knows it does exist,** just not by that name. (federal delegation of programs with optional $ reflects this, since they cannot force states)
    1. **Predictability/Coherence Canons:**
       1. Give consistency and predictability to law- integral for justice and operation of society.
       2. Some of the **oldest canons-** consistency as a separate value in itself
       3. Canons may act as time-savers; narrow acceptable range of answers
       4. Common Law Terms: includes flexibility of common law terms in the statutory law
       5. **Reenactment Canon:** if judges have interpreted a law and Congress re-enacts that law, Congress has implicitly accepted the interpretation.
          1. “could have changed but did not”
       6. **Borrowed Statute Rule:** If one state passes a statute w/ language identical to another statute, presumed that they borrow legislative intent and judicial decisions of the statute as well.
          1. “understood framework comes with the statute”
       7. **Rejected Proposal Rule:** if an amendment is rejected by Congress, court will not adopt interpretation/construction reflected in that amendment or other proposal
       8. **Presumption Against Implied Repeals:** later conflicting statues are not intended to repeal earlier statutes unless it is either inescapable or explicit.
          1. May lead to adoption of “stretch” interpretations
       9. ***In Pari Materia:*** interpret statutes on similar matters in the same way.
       10. **Consistency with Common Law Canon:** statutes adopted against background of common law is presumed to be consistent with CL.
       11. **Case: Bob Jones v. US:**
           1. 501(c)(3) and 170 language- tax-exempt nonprofits and charitable giving in tax code- and racial discrimination
           2. Majority:

Charitable is a CL term, mutable; from 170 we see the organization must be considered “Charitable” and not just education to be able to get money

Public policy- we move past racism

**Congressional Acquiescence:** Congress did not enact anything, but neither did it overturn- acceptance presumed

**Disfavored canon**

Summary: inform reading of 501c3 by 170. **Whole act doctrine, in pari materia.**

* + - * 1. **Dissent:**

Bad doctrine but good policy

501(i) shows that clubs cannot discriminate racially and qualify; thus we have expressio unis problem- congress could have explicitly forbidden discrimination

Actual plain language is met

* + - * 1. Takeway:

**When common law terms apply, they change over time; when Congress intends for term to evolve, you can update statues by looking at common law terms**

Common law terms: trust, charitable, fiduciary, etc.

* + - 1. Book Adds:
         1. **Stare decisis**- weight on previous interp- as canon
         2. **Horizontal coherence-** fitting with surroundings/social atmosphere or policy
         3. **Vertical coherence- stare decisis**

# Use of Legislative History in Interpretation

# **Statutory History**

* + 1. How a proposed text of a bill changes at each point until it is law.
    2. **ACCEPTED BY EVERYONE including textualists**
       1. Textualists use it to inform meaning of words (changes, removals, etc.)
    3. NO floor debates or hearing minutes required
  1. **Legislative History** – hierarchy of most to less persuasive
     1. Conference Reports (but often short, only for changes)
     2. Committee reports
        1. Latest in time
        2. From committes w/ **primary JX on closest subject matters**
     3. Statements by **drafters**
     4. Statements by **sponsors**
     5. Statements by **supporters/opponents**
     6. Post-enactment statements
     7. **Scripted colloquies:** 
        1. reading from a script in debate, even after the vote or at a point where it influences nothing- planting seeds for interpretation in record
     8. Added materials/scripted stuff added to congressional record
  2. Signing statements- always political- debate about how persuasive they are.
  3. Other things in leg. Hist:
     1. **Hearing transcripts:** very scripted and partisan and get less att’n
        1. Somewhere in middle of hierarchy above
     2. Mark-ups: done behind closed doors; “zone of unknown”, typically no record, little att’n in stat reg (but that’s changing)
     3. Omnibus bills and prepackaged legislation – can’t read leg hist well
  4. **Office of Legal Policy Memo***-* Reagan admin: NO BINDING AUTHORITY.

|  |  |
| --- | --- |
| ***Why no Legislative History?*** [OLP Memo] | Counterarguments [solicitor general response] |
| Start with Text- clearer and accessible | Text is a mess |
| Bicameralism/presentment | Bicameralism is for law; legislative history is not law, informs law |
| Judicial discipline (leg hist = picking out your friends) | Judicial discipline includes choosing policy and canons when things are ambiguous- always some policy involved |
| Separation of Powers | Separation of powers – court may =/= court MUST. Other parties, like agencies, interpret too! |
| Impractical (pre internet, hard to get) | Computers revolutionize research |

* 1. **Public Citizen v. D.O. J***:* ABA FACA Case: Federal Advisory Committees act imposes requirements for committees “utilized” by pres; ABA vetting before people chosen as judges. Majority- ABA seems to fall w/in text but “utilize” is too broad to be read plainly
     1. **Brennan** is purposivist and pragmatist in reading- uses leg. history.
        1. **History of failed bills and current bill to inform “utilize”** as well
           1. Conclusion: FACA does not cover.
     2. Concurrence- Judgement is right but FACA does cover ABA. Instead judgement b/c it is unconstitutional to interfere with President’s exercise of appt powers.
     3. Scalia not taking part in case

# Regulatory Practice and Agencies

# Intro to Agencies

* 1. **Agency: § 551 APA**: “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does NOT include—
     1. Congress, courts, territory gov’ts, DC gov’t (p.1063)
  2. **Rule:** whole or part of a particular agency statement of general or particular applicability and future and future effect designed to implement, interpret or prescribe law and policy or describing [agency stuff]. **APA** p.1064
  3. **Independent and Executive Agencies**
     1. **Executive:** at beck and call of president
        1. **One political appointee at top**
        2. May be required to file lawsuits that DoJ or other opening
     2. **Independent:** not made/controlled directly by pres
        1. **May be required to be bipartisan**
        2. Often multiple commissioners reappointed on staggered schedule
        3. Can sometimes file own lawsuits
  4. Ways to get around agency restriction – **czar** appointees

# Agency Rules and Rulemaking:

* 1. **Rule**: see above for definition; actual implementation by agency of statutory directive.
     1. Usually promulgated in **CFR**- **Code of Federal Regulations**
        1. Some orders, guidances, adjudications, interpretative rules are not rules
  2. **Administrative Procedure Act (APA)** provides process
     1. But recall that it’s not the whole body of law- **other state and Fed statutes on topic can change process**
  3. **Formal and Informal Rulemaking:** 
     1. **Formal:** adversarial proceeding, like a trial- parties advocating to get an **order** 
        1. **Orders** then form a body of law/become regulations post-trial
        2. Agencies may be mandated to use this process, but vast majority today is informal (agencies prefer that)
     2. **Informal**: **Notice and Comment Rulemaking**
        1. **Announcement of Proposed Rule (ANPR)**
           1. Early warning that agency is planning, specifies topic
           2. Outlines possible approach, may put out call for data
        2. **Proposed Rule (PR)**
           1. State what rule is, what purpose, what info relied on
           2. Detailed rules may have technical addendum that, along with rules, is printed in **Federal Register**
        3. **Notice and Comment**
           1. 90 day period-comments outside window need no response
        4. **Drafting of Final Rule (FR)**
           1. Final rule published in fed register,
           2. often a period of days before it takes effect
  4. Navigating Informal Rulemaking:
     1. Earlier is better for advocates
     2. Keep ear to ground and subscribe to important publications
  5. **Judicial Review of Agency Rules:** 
     1. If the rule not properly promulgated (enforcement action on guidance), can sue
        1. Agencies do have legitimate emergency direct-rule procedures
     2. Premised on **FINALITY** of rule
     3. Must have **standing**  to sue agency
     4. Responses to comments must be on the record. Judicial review only goes to **administrative record**, no discovery and other witnesses allowed.
     5. **Vermont Yankee*: Court cannot substantively add to APA process!***
        1. Courts thus sneak changes in under “interpretation” of n-and-c
     6. Other statutes that might provide bases for review:
        1. **Regulatory Flexibility Act-** requires close look at cost.
        2. **Unfunded Mandates Reform Act-** Cannot force states to do things without paying in some circ, forces analysis of cost to states and private parties for rule
        3. **Congressional Review Act:** 60 day hold on any agency rule, mandates submission to Congress so it may veto by joint resolution
           1. Joint resolutions for this **NOT subject to filibuster**
           2. **Pres must sign resolutions-** veto can stop this act.
        4. **Executive Order 12866-** provides for many staples of agency process including OMB/OIRA review, cost/benefit analysis
           1. *Prison Rape example*
        5. **Other trapdoor- substantive statues** can have provisions that change rulemaking
  6. Presidential Control of Rulemaking Though Office of Management & Budget
     1. Promulgated by **Executive Order 12866:**
        1. Every agency has political appointee in charge of rule proposals (to give clearance before rules get proposed)
        2. Every rule goes to OMB for review
           1. Unless independent agency
           2. Unless under **$100 million dollars** in effect, process reserved for significant rules
     2. Circular A-4- OMB Cost-Benefit Process
        1. Overall approach- presumption against rules until shown useful
           1. Alternate approaches for info sol’n, etc., not just command and control.
        2. Cost/Benefits Process:
           1. Quantify Costs and Benefits

Virtual statistical life- a way to eval cost of human life. Agencies vary wildly in standards for life cost

Dignity, religious values, future generations, nonfungible goods – all must be **quantified**

* + 1. **Results of Review**
       1. **Return Letter:**  C/B analysis does not meet standards, returned to agency; can go back and forth multiple times over years
       2. **Prompt Letter:** RARE! Costs far less than benefits- agency prompted t undertake regulatory activity (may happen with safety rules)
       3. **Review Letter:** **simply state outcomes**
    2. **Congress can forbid cost-benefit analysis for rules or specify process requirements for statutes.**
    3. **Prison Rape Elimination Act**
       1. Known for ridiculous inflation of benefits by labelling each incident $200-400k.
       2. Rules promulgated were **procedural**, less effective and easier to specify
    4. **DoD hormone therapy example***:* was under $100 million by cost analysis so did not get analyzed.
  1. **Congressional Review of Agency Action –** see way earlier
  2. **Judicial Review of Agency Rules**
     1. Presumption of Judicial Review
     2. **Standard: arbitrary, capricious or otherwise not in accordance with law = must be struck down. APA §706.** 
        1. Congress may preclude this-
           1. APA bans for that kind of statute,
           2. banned in statute in more particular context,
           3. matter committed to agency discretion
     3. APA does NOT create right of action, must sue under other statute
     4. **Court’s review is deferential** b/c court lacks expertise to determine from millions of pages of testimony. AGENCY RECORD ONLY!
        1. **Avoids substantive decisions in favor of procedural ones.**
     5. **US v. Nova Scotia Food Products Corporation: No post hoc records- must have contemporaneous record**, and record must contain all of what agency relied on.
        1. CANNOT fill in by affidavits
        2. Case details: Agency had info sent in about species-specific options but did not respond to it- time/temp/salinity regulations liquefied the fish and made it nonsaleable.
           1. FDA could NOT simply claim later that they relied on own expertise- can make decisions that way but **must be in record.**
           2. Agency has duty to look at info in record and explain why they responded as they did
     6. **APA section 703- must provide concise general statement** of explanation/reasoning, this is not same as 706.
     7. **Remand to agency** generally results in same ruling w/better record
     8. **Agency must respond to comments but not EVERY comment.**
        1. Can consolidate comments with similar thematic issues
        2. Low bar for response- a paragraph might do
     9. **Motor Vehicles Ass’n v. State Farm*:*** famous car airbag and automatic seatbelt rule case; after many admin changes, newest admin wants to strike Section 208 regulation requiring either auto restraints or seatbelts.
        1. Relies on study that says the auto seatbelts were not effective b/c could be detached.
        2. Agency threw out entire rule instead of making sensible modification
        3. 9-0 against agency; they did not provide rationale at all!
        4. **5 justices on grounds that they did not explain why they disregarded the study; 4 on grounds that agency must be reasonable.**
        5. **Agency must justify decision; must be facially feasible/technically correct.**
     10. **Business Roundtable v. SEC***:* Proxy elections regulation dealing with shareholder elections; court strikes down rules. Judge Douglas Ginsberg writes for court.
         1. Court “went into guts” of rule- **substituted own judgement for agency’s- not good, not approved of.**

# Agency Adjudication

* 1. **Agency Adjudication:** formal and informal; leads to **order**
     1. Formal: very detailed process. **DOES NOT TAKE ARB/CAP- SUBSTANTIAL EVIDENCE is formal adjudication standard.**
        1. Substance of adjudication/ complaint
        2. Formal notice required
        3. Evidence, oral and written, may be presented
        4. Rebuttal and cross examination permitted
        5. Agency arbitration/decisionmaker should be neutral or somewhat independent
        6. **“On the record after an opportunity for agency hearing”-** magic words to trigger formal being required
     2. Informal: Agency may craft process- limited by Constitutional due process. A great deal of discretion for agency overall, much preferred.
        1. **Goldberg v. Kelley***:* welfare benefits are property, due process hearing required before deprivation- rooted in Constitution and not APA
           1. **Agency process fluctuates based on circumstances**
           2. this particular case requires evidentiary hearing
           3. Minimum due process for liberty/property:

1) notice

2) right to be heard in person & to cross-examine witnesses

3) right to representation by counsel

4) reasoned decision by impartial decisionmaker.

* + - 1. *Mathews v. Eldridge:* SS benefits balancing case- see below
  1. Due Process requirements
     1. **Mathews v. Eldridge***:* disability benefits removed after questionnaire and phone call process. Can appeal deprivation.
        1. **Balancing Test applied:**
           1. What is the **private interest** at stake?
           2. What is the **risk of mistake** and what protection will additional process offer?
           3. What is the **government’s interest, including cost?**
        2. Greater interests = more process needed.
        3. Court found that process was ok- gave notice, costs of hearings would be high to public, and other help programs available to alleviate burden on private interest from deprivation of benefits.
     2. Book justifications for value of extra process-:
        1. Reduction in error cost
        2. Dignitary interests
        3. Legitimacy and social stability
     3. **Agency process need not be judicial! Courts are not a gold standard, agency can mix and match**.
     4. *FCC Cases:* 
        1. **Golden Globes:**FCC unhappy with broadcaster’s over Bono’s “fucking great” statement. Three possible ways to get it- obscene, profane, indecent.
           1. **Obscene***:* term of art, most egregious use of speech- Miller v US- not this case.
           2. **Indecent-** 2 factors:

**Sex/excretory**

**Patently offensive**, which has 3 factors:

Explicit and graphic

Dwelling/repetition

Designed to shock or titillate

* + - * 1. **Profane [skipped for lack of time in class]**
        2. *Pacifica,* SC carlin case, left fleeting expletive as open Q- FCC wants them indecent now. FCC’s policy change permitted, without much legal wrangling since it is a policy decision.

*No fines!* b/c no fair notice.

* + - 1. **FCC v. Fox***, 2009:* second case where FCC goes after Fox for fleeing expletives; court holds that **agency has no higher burden of proof when changing its mind*-*** just usual APA 706.
         1. Dissent: should be higher standard- must explain why no longer relying on facts/policy/findings from first time around. What’s different this time?
         2. *The Simple life* prada purse case; majority finds “first-blow” profanity explanation about protecting children from fleeting expletives now justifies the policy change.
      2. **FCC v. Fox II:** *2012.* process for FCC trying to go after Fox was too informal; need more notice as to actions taking place.
         1. Can still regulate speech, just need to give **notice**.
         2. New *Golden Globes* profanity standard is ok, but as-applied to Fox to enforce it this fast even without fines is not ok.

Fox can lose advertisers/be damaged by the finding against it even w/o the fines. Similarly, 7 seconds of fleeting nudity on ABC should not result in indecency fine b/c fair notice.

* 1. Agency Adjudication vs. Rulemaking; Informal Guidance
     1. APA section 701: if **statutes preclude judicial review** or **agency actions is committed to agency discretion by law,** it is not reviewable
        1. Latter is for when standards for review would not be clear- fairly narrow exception.
     2. APA § 553( b ) (3) (a): **interpretive rules and guidances are not reviewable**
     3. APA section 704: only **FINAL actions are reviewable**
     4. APA section 706: standard of review to be used by court
     5. “**final is flexible”**- agencies have used draft rules for 20 years before.
     6. Agencies can also work by issuing **guidances**:
        1. Bulletins, memo, website, amicus briefs, press releases, letters to industry, interpretive rules or memos, etc.
           1. These can be done informally and can **vanish if agency no longer wants them to apply.**
           2. They count and you should consult them for compliance

But they’re not law.

* + - 1. Draft rules and guidances can be used to harmonize while still drafting
      2. **Cannot enforce guidances or draft rules via litigation**, BUT you can use discretion guided by those documents to do the same thing.
         1. “I’m simply using my discretion to enforce this, but I am guided by the nonbinding guidance”
    1. **Citizens to Preserve Overton Park v. Volpe***:* 1971 (pre chevron!) highway case where secretary of transportation was supposed to choose not to go through parks with highways unless it is best and only route. Secretary handwaves a highway decision through.
       1. **Presumption of reviewability of agency action applies**
       2. **NO ex post facto rationalization**- there was no record here and there needed to be a contemporaneous one
       3. **Arb/cap 706 applies** to everything that’s not formal adjudication, including this
       4. Case ended in remand (book says TC, class to agency), today the highway is a dead end. Remand is not always a toothless remedy!
    2. Notes from book- rule is **legislative** and not guidance if-
       1. w/o it, no legal basis for enforcement
       2. rule is published in code of federal regulations
       3. explicitly invoked leg authority to pass
       4. rule effectively amends prior leg rule
    3. Agencies can do quasi-legislative things from this ^ list or else to trigger more skidmore deference even if they do not get Chevron

# Agency Inaction

* 1. **Heckler v. Chaney***:* opponents of death penalty seek to slow executions by challenging use of drug as off-label and thus illegal. FDA declines to prosecute that; agency wins as it has discretion to decide not to prosecute.
     1. Rehnquist creates **presumption against review of inaction decisions** from whole cloth; it weighs against APA 701. Echoes of prosecutorial discretion.
     2. Comprehensive document made, statutory standards, attempts at enforcement- then it is reviewable.
  2. Agencies want to do as much as possible without triggering n-and-c or rulemaking.
  3. Inaction is diffuse, no coercive power, and agency must make choice about where to allocate resources- makes sense NOT to review.

# Judicial Deference to Agency Interpretations – SEE FLOWCHART AS WELL

* 1. ***Skidmore***
     1. The case itself: firefighters want to get paid for volunteering after hours when they mostly chill out; FLSA case; agency submits amicus brief, court then comes up with standard for “weight” to give to agency views and make decision. (employer wins- agency brief suggested flexible sol’n)
     2. **Skidmore Deference test:** Judge decides best interpretation of the question, and decides how much weight is to be given to agency view based on factors:
        1. **Consistency** with past decisions
        2. **Thoroughness**  of decision
        3. **Validity in reasoning/reasonability**
        4. **Power to Persuade \*** derived from other 3
        5. See p.859 for more factors that courts tried to put into Skidmore later.
     3. **Agency interpretations under Skidmore are not binding**
        1. Post-mead, this is a “baseline” deference test
     4. **Administrative weight-** interpret to max extent of agency reach but w/ flexible exemptions.
     5. **Agency interpretations here-** for statutes- scope/validity of actions being reviewed
     6. **Skidmore-** judge decides, soft baseline weighing/balancing
  2. **Chevron** – for **AGENCY INTERPRETATONS** of **STATUES**.
     1. Clear air act bubbling-concept case about Single Source and permits. Agency wins at SC level.
     2. **The Test: Two steps**
        1. **Step 1: Did Congress address it? Do that.**
        2. **Step 2: If not,** congress failed to speak for whatever reason, **then agency prevails if reasonable**
     3. THIS IS NOT THE EXPRESS DELEGATION TEST!!!!
     4. In the case itself, the agency won in step 2- 80-90% of time we reach step 2, agency does win there. 50/50 in step 1- so the challenge is getting to 2.
     5. Chevron keeps **control in hands of agency,** establishes **“space”/zone of options**
     6. **Chevron v. Skidmore**
        1. Radical change in judicial review- power to agency
        2. Congress is arbiter of interpretation, deciding who interprets
        3. Scalia notes that **chevron qs are all JX’al at some level- agency can get deference for qs on own JX**
     7. **Stevens** justifies this by accountability reasons- agencies more accountable to people via pres, can change course later, more democratic.
        1. **Skidmore leads to ossification and stare decisis**
        2. **Agencies more competent on specialist matters**
     8. **Mayo Foundation v. US**: medical resident case-Chevron applied to show residents aren’t students for tax rsns.
     9. **Reasons why Chevron Favored;**
        1. Bright, clear rule
        2. Binary- all or nothing
        3. Foundational doctrine of looking to Congress
        4. Agency Expertise
  3. **Auer Deference:** super-strong deference for agency on own rules, but disfavored now
  4. Mead and Current Cases Before the U.S. Supreme Court
     1. FDA v. Brown & Williamson Tobacco: Chevron Step 1 case; FDA had not claimed JX over tobacco, wants JX. Court tries to avoid drug, device, combination device that shows FDA should have tobacco JX; instead O’Connor applies Chevron and sees that in Step 1 Congress did not intend JX.
        1. Congress rejected total banning; FDA could not find tobacco unsafe yet sell it – thus congress did not intend JX
        2. **Major Questions Rule: Silence or ambiguity cannot delegate major questions/important qs to agency.** Scalia’s formulation- elephants in mouseholes
     2. **Mead:** Customs day-planner case- is it a diary or a notebook? Mead wins, gets lower tariff (diary?). 10-15k similar regs/yr from 46 offices.
        1. **The Test:** POWER + EXERCISE
           1. **Did Congress give the agency the power to make binding rules with the force of law?**
           2. **Did the agency exercise that power in the making of this rule?**

Notice and comment- yep

Guidances –usually nope

* + - 1. If yes to both, Chevron, else Skidmore
         1. Formal and transparent process = more likely Congress wanted to grant power to bind, deference appropriate
         2. Guidances can occasionally get Chevron even after this- if they publish with record like a rule
      2. Scalia’s dissent:
         1. Practical effect of terrible confusion
         2. N-and-C inflation is coming
         3. Double ossification- if they say “no power given” then it’s Skidmore ossification + the extra layer
    1. Extra deference nonsense:
       1. **Deference rare for rules preempting State law**
       2. **Auer is on the way out- SC shopping for case**
       3. **Congress can now turn deference on and off**
          1. Now post-mead, Congress controls Chevron- justifications narrowed to just congressional intent

1. Special Class notes (last section)
   1. Katzmann (2nd Circuit CJ): Start with text and only abandon textualism when things are ambiguous
      1. Consider the congress that passed it- mission to be faithful
   2. Busby and Rosenthal
      1. The record is trash (except the amendment history and removals)
      2. If the words are sufficient, we are done- plain language first!
         1. FAIR NOTICE purpose!
      3. TX Code Construction act governs in TX
      4. Presumptions- you read K before signing, Congress knows of common law, legislators not amending past caselaw, Congress minds the canons and every word and comma is consequential
      5. Courts bind at different levels- TC on parties, appeals on TCs, SC broadest binding
         1. Different arguments thus appropriate; keep sweeping policy out of TC
         2. TC: focus on facts, words, and what the court should do
      6. Rosenthal: seek pragmatic/practical textualism or purposivism
      7. Higher courts set the direction for lower ones on interpretation.
   3. Texas Legislative Process
      1. Five Functions of a lawyer:
         1. Wise counselor to all manner of man in the varied crisis of their lives when they most need disinterested advice
         2. A SKILLED ADVOCATE
         3. DO HIS PART TO IMPROVE THE PROFESSION, THE COURTS, AND THE LAW
         4. ACT AS AN INTELLIGENT, UNSELFISH LEADER OF PUBLIC OPINION
         5. TO ANSWER THE CALL OF PUBLIC SERVICE WHEN IT COMES
      2. Steps in Legislative Process
         1. HAVE A BILL
            1. TX Legislative Council- “elves” of drafting,

Publish Drafting manual

* + - 1. INTRO/REFER
         1. Rules of procedure for TX Leg- TCRP/TRAP, Article 3 of TX const.

Chair’s rulings become precedents as well (recorded in house journal)

Chair rotates between people

* + - * 1. No ruling on substantive constitutional qs
        2. Only one committee/final decision maker is presiding office
        3. Bill goes from owner 🡪 clerk 🡪 committee
      1. COMM. ACTION
         1. Weighing bill, testimony if needed, makes changes
         2. Differences from feds:

Time compression, limitations on changes

Rules regarding hearings vary

* + - 1. CALENDAR
         1. MAJ. DIFF. WITH FEDS

NO FUNCTIONAL EQUIVALENT OF FED CHAMBERS OPERATION ON CALENDARING b/c members do so in TX

SPECIAL RULES ARE RARE (BUDGET AND SUNSET)

HOUSES DIVIDE METHODS OF ACTION ON CONTESTED AND LOCAL AND UNCONTESTED

“2/3RD RULE” AND HOUSE CALENDARS COMMITTEE

* + - * 1. Very quick process of members voting on what to calendar/hear
      1. FLOOR ACTION
         1. Considering passage, making final votes
         2. Differences from feds:

Allowable debate and amendments

More last-min amendments

Time, place, manner less structured

* + - 1. 2ND CHAMBER RINSE &REPEAT
      2. RECONCILE (IF NEEDED)
         1. Concur
         2. Conference
         3. Let bill die or strip amendments/don’t reconcile
      3. EXECUTIVE ACTION
         1. Veto and override slightly different in Texas
    1. The odds:
       1. 20-25% pass
       2. 182 actors, 140 days
       3. About 3.2% vetoed
    2. TEXAS STATUTES ARE LOCATED IN ONE OF THREE PLACES:
       1. SESSION LAWS;
          1. “temp file” of laws not codified
          2. Most will be codified in next cleanup bill/interim
       2. TEXAS CIVIL STATUTES; AND
          1. Major codifications in 1925, 1963
       3. 1 0F 27 CODES
    3. TX Code Construction Act
       1. May be applied whether or not there is ambiguity
       2. Allows legislative history
       3. Uniform Construction of Uniform Acts- for UCC etc.- interpret to make uniform w/ law of states to enact it
    4. TX Legislative history- disagreements on value

DUE PROCESS INCLUDES COUNSEL  
APA guidance is 553 not 705

• If the administrative agency loses at the trial level, the agency can’t appeal its loss w/o agreement of the Solicitor General (DOJ official). If the agency wants to file an amicus brief w/ a court of appeals or w/ the Supreme Court, in most cases, the agency must persuade the SG to file it. Thus, the agency needs the cooperation of the Office of the Solicitor General. If the lawyers in that office disagree w/ the agency’s interpretation of the law, then the agency won’t be able to defend its rule, order, or interpretation in court.

Office of Management and Budget Circular A-4 to Heads of Executive Departments and Establishments Regulatory Analysis (2003, page 724)

• Cost-benefit analysis is important.

○ Start with quantifiable factors

○ If a factor is not quantifiable, analyst is not limited to economic consideration but should determine how important the non-quantified benefits or costs may be in the context of the overall analysis.

§ Threshold analysis: "How small could the value of the non-quantified benefits be or how large would the value of the non-quantifies costs need to be before the rule would yield zero net benefits?

• A good regulatory analysis should include:

○ A statement of the need for the proposed action,

○ An examination of alternative approaches, AND

○ An evaluation of the benefits and costs--quantitative and qualitative--of the proposed action and the main alternatives identified by the analysis.

• Include a no-action baseline in cost-benefit analysis.

• Seek out the opinions of those who will be affected by the regulation and those with special knowledge of the regulatory issue.

• EO 12866: "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."

○ Agency must identify the problem it seeks to address and assess the significance of that problem.

• Show that regulation is needed at the federal level

• There is a presumption against economic regulation (i.e. higher burden of proof)

• Alternative regulatory actions to consider:

○ Different choices defined by statue

○ Different enforcement methods

○ Degrees of stringency

○ Different requirements for different sized firms

○ Different requirements for geographic regions

○ End result standards rather than design or means standards

○ Market-oriented approaches (fees, penalties, subsidies, etc.) rather than direct controls

○ Fixing inadequate info issue through measures to improve the availability of information

§ Mandatory or voluntary standardized testing or rating

§ Labeling requirements

§ Direct provision of information (gov't publications, etc.)