LEGISLATION

PART 1: POLI SCI FOR DUMMIES

A Page 1—Introduction: Brown would have been unfulfilled but for the 1964 statute because the court was unwilling to fulfill the promise of Brown. Why is congress better suited for this job than the courts?

B Potential advantages of Legislative Process
i Often Congress is better at fact gathering.
ii Pool of judges is more homogeneous than that of legislators, and legislators are representing the people while judges aren't.
iii More people in the deliberative process
iv Primary function of legislature is to make laws, while courts have to address one specific case or controversy.

A Page 8—Amendments that sought to strengthen the bill (Rep. Sellers thought it was a weak bill)—amendments would have given EEOC “cease and desist” powers.

B Civil Rights Act as a basis for statutory interpretation
i Who is the person who you would think of as being the reliable person to speak for congress in terms of the intent of the law? Who is the reliable spokesperson? Seller is an outlier. The minority leader was pretty middle of the road. Bill McCullogh was sort of a swing vote
ii The point is that no one of the legislators speaks for the entire body, and so legislative intent is very complex and difficult to determine.
iii Where a law has been around a long time, is it legitimate for a judge to adopt a legislative intent that clearly the people who passed it didn't have. For example, look at the gender discrimination part of the Civil Rights Act that was a killer amendment. Supreme Court did this when they read a sexual harassment protection into this provision.

I The Legislative Decision-making Process

A The Idea of Deliberativeness
i More people discussing over a long time, and making sure laws aren't past in the heat of the moment.
ii Federalist number 51 (Madison) “In a republican government the legislative authority, necessarily, predominates. The remedy for this inconvenience is, to divide the legislature into different branches and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”
iii steps that slow legislative decision making and separate it from passions an immediate desires of independent legislators and constituencies
iv Intended as an anchor against change – protects the status quo from precipitous upset
v structured incentives to deliberatively put one officeholders ambitions in conflict with another office holders to reduce temptations of ambitious individuals

A The Constitutional Allocation of Power
i Bicameralism
a checks power of legislature (deliberativeness)
b conflict between two groups dilutes power (and is apparent in modern Congress)
c Why this choice? Why not require a 2/3 vote for all issues, but have only one house
d Differences between House and Senate
• Size? Affects power of individual and formalities of discussion
• Terms? Affect perceived freedom from campaigning
• Committees
  • Senate has 16 committees and 100 Senators? Senators have greater chance to be on a committee and more ability to influence a committee once appointed to it
  • House has 22 committees and 435 Representatives? Less likely to be on a particular committee, and less influence
• Leadership control—House more rigid, due to size constraints; Senators have more freedom to do what they want
• Policy Roles—House is specialist (division of labor allows Representatives to develop expertise; Senate has broader focus? better able to present individual policies as a package to the nation

e Immigration and Naturalization Service v. Chadha
• The legislative veto class from Con Law
• Court argues that legislative veto violates bicameralism and presentment provisions of Constitution.
• The Immigration and Naturalization Act did go through bicameralism
• Permissive reading
• Bicameralism IS good, but that doesn't necessarily mean that the court made the right decision here.
Powell theory of separation of powers has been ignored, but the majorities argument still stands. reviewed a statute that gave power for either House or Senate to override Attorney General’s decision to suspend deportation of a person amounted to a one house veto convienience and usefulness do not trump constitutionally “profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.” Critical question: Is the act legislative

- If legislative? Constitution says must be constitutional
- Delegation of power to AG is legislative? any attempt to undo must also be legislative Legislative veto invalid under presentment clause – need two houses and presidential presentment to be a valid law

Robertson v. Seattle Audubon Society

- Congress can change the law, they just can't direct what the court can do in a given case.
- Why not allow congress to enact these laws that only apply to one forest, or one brain dead woman?

Kline theory was that if Congress takes away the ability to have a case decided by any court, and that's wrong.

Presidential Veto

a Original purpose of the veto exists in case Congress does something unconstitutional. Although, back in these days, there wasn't a lot of judicial review.

b Obviously George I and Clinton didn't think all of the bills they vetoed were unconstitutional. So were they using the veto improperly? Well, there is an argument that its the courts job to strike down unconstitutional laws, not the presidents.

c So why should the president have a say?
- In appropriations arena, president isn't a representative of one little area.
- It really is the president being involved in the legislative process.

Pocket Veto—Barnes v. Kline

- Article I Sec 7—Normally if the president ignores a bill from Congress, it becomes law (after 10 days). However, if Congress, by its adjournment, prevents the return of the bill to them, then pocket veto is possible.
- Congress can appoint an agent (clerk or something) to receive the bill in their absence.
- Constitution doesn't have any time limit on override vote.
- The importance of the pocket veto is that, when it is available, Congress has to start all over (no override vote available)
- Intra-session pocket veto is impermissible. Wright v. United States

The Pocket Veto Case—at that time, the intersession lasted longer and agent system was less reliable so an intersession adjournment is enough to allow the pocket veto. The rationale of the pocket veto case is obsolete because we have a process set up for agency.

c originally reserved for unconstitutional bills, but later expanded to anything the pres. Disliked

f Pocket Veto – If the president fails to return a bill within ten days, excepting Sundays, it becomes law, “unless Congress by their Adjournment prevent its Return, in which Case, it shall not be a Law.”

- Pocket Veto Case (oldest)—Return to an agent doesn’t qualify b/c (1) delivery to an authorized agent would create uncertainty whether there was a timely return (2) there would be a substantial delay in determining Congress’s reaction to a veto

- Wright v. US
  - No pocket veto when 10th day fell during a 3-day adjournment of the Senate only, where organizations of the Senate continued and remained intact
  - To rule in favor of a pocket veto, must show that the president was unable to exercise his veto because of an adjournment
  - mere absence not enough if (a) there is an authorized agent and (b) there is no substantial delay

- Barnes v. Kline (most recent)—Given the appointment of an agent, the established Congressional rules for carry-over business, and the short duration of an adjornment? return is not prevented by an adjournment

Line Item Veto

a State constitutional level

- Sego v. Kirkpatrick—Executive can't substitute his judgment for how policies should be enacted by the legislature, even though he has the power constitutionally of the line item veto.

- State ex rel. Kleczka v. Conta
  - Governor changed it from a check of to something that came out of the taxes. The words he left behind were a stand alone law.
• The court says the governor had the authority to make that change in policy under the constitution.
• So basically, no checks on the governor.

b **Clinton v. New York**
• Court said that line item veto is impermissible under the constitution because it allows the president to alter
  a law after it has already become law.
• Breyer and Scalia disagree, and they are the two big admin guys.
• Formally oriented opinion on the majority's part. Scalia says its bad formalism.
• But this law is indistinguishable from some things have always been around.
• Kennedy concurrence calls it a threat to individual liberties because of the way the president could wield
  this power, and there wouldn't be much of a check on it.

c **Busch's new plan—Line Item Veto Act of 2006**
• Demonstrate election year resolve on election year spending . . . passing this is much easier than just
cutting spending.

d **Sego (NM)**—Attempt to defeat legislative will and defeat a legislative condition precedent fails

e **Kleczka (Wisconsin)**—Governor changed an optional $1 add-on on taxes for election costs into a $1 check-off.
Governor’s veto left a workable law? severable. Since governor’s veto power is co-extensive with
legislature’s power to enact? Veto works even though it changes policy

f The idea that line-item vetoes limit budgets is not very true. Governor/President typically use the line-item veto
to shape budget, without actually reducing it. Legislation tends to add additional projects it knows will be axed
g **Clinton v. NY**—Invalidated the line-item veto for federal laws. Bill permitted president to cancel parts of a bill
only if it (i) reduced the Federal budget deficit, (ii) didn’t impair any essential Government functions, and (iii)
didn’t harm the national interest.
• Distinguished use of line item veto from case where the president acts according to a bill that requires him
to lift suspension on import duties “whenever, and so often” as he should find that an importing country
imposed duties on the US that the president deemed to be “reciprocally unequal and unreasonable”
• Distinction lies in discretion. In line-item veto, president has discretion to do what he wants, where in duty
case, president is constrained – he has to do something if certain conditions are met (even if that
determination is done by the president).

A **Constitutionalized Enactment Procedures**

i **State Procedural rules—introduction**

a States, unlike the fed, frequently have limitations in their constitutions limiting how their legislatures can
legislate
b This includes one-subject provisions
c Congress has freedom to add riders that most state legislatures don’t have
d Fear of laws being “smuggled” in larger bills against public wishes
e Danger of rule is that it affects efficiency of legislative compromise and causes invalidation of valid laws on
technical grounds

ii **The enrolled bill in the states**

a Enrolled bill doctrine creates a presumption in favor of legislation that has been certified by the leaders of both
houses of congress.
b Journal Entry Rule—allows a court to consider evidence in the legislative journal to determine the validity of a
statute
c Extrinsic Evidence Rule—accords the enrolled bill a prima facie presumption of validity but allows attack by
any clear, satisfactory, and convincing evidence to the contrary.
d **Tuck v. Blackmon** (Mississippi)—Legislator sued for an injunction to stop a bill from being enacted after she
failed to have the conference reports read aloud per a Senate rule

• “Only after heightened consideration and under exigent circumstances will judicial authority to regulate the
internal actions of the Legislature be exercised”
• Due to separation of powers, courts should refrain from unnecessarily interfering with legislative internal
rules
• Courts should not declare legislative rules unconstitutional unless those rules are “manifestly beyond the
Senate’s constitutional ability”
• “The duty of the courts begins with the completed act of the legislature”
• Courts typically allow the legislature the ability to decide its own rules, since legislature is coequal, and
legislative rules only apply to legislators
• However, courts have power to act when an interpretation is “grossly unreasonable” and the “legislative
process has suffered substantial harm”
e **D&W Auto Supply**
Kentucky Constitution stated “Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the member elected to each house”

An appropriations bill “passed” by a vote of 48-43 in the 100 member senate (3 short of the 51 majority needed by Constitution).

Enrolled bill doctrine stated “a court may not look behind such a a bill, enrolled and certified by the appropriate officers, to determine if there are any defects.”

Pros of Enrolled Bill doctrine
- enrolled bills are “Records” at common law, and not subject to attack
- courts and legislature or coequal, so courts must engage in every presumption in favor of the legislature
- at time of enactment, legislative record-keeping was so inadequate, that final bills were required to have final weight
- Theories of convenience discouraged requiring the legislature to preserve its records and feared expanding complex litigation

Cons
- Artificial presumptions, especially conclusive ones, are not favored
- produces results that do no accord with facts or Constitution
- Conducive to fraud and forgery and other wrongdoings
- Modern automatic and electronic record keeping eliminates an original justification
- Disregards court’s primary duty to seek truth and provide remedy for wrongs committed by any branch of the government

Extrinsic Evidence Rule is favored – creates a prima facie presumption that an enrolled bill is valid, but such presumption may be overcome by clear, satisfactory evidence establishing that constitutional requirements have not been met

Three Typical Approaches enrolled bills
1. Enrolled Bill Doctrine
   - Conclusive Presumption
   - Relies on Separation of powers
   - Encourages validity of statutes so people can rely on laws (but not necessarily rely on the fact that they were constitutionally adopted)
2. Journal Entry Rule
   - Prima facie assumption of validity
   - Permits only evidence from the legislative journals to be admitted to rebut this assumption (unless there is sufficient legal evidence of fraud or that the legislature enacted a bill after it had ceased to legally be the legislature)
3. Extrinsic Evidence Rule
   - Prima facie assumption of validity
   - Any attack by clear, satisfactory, and convincing evidence is permitted to show that the constitutional requirements have not been met
   - Criticism: encourages inconvenience and mischief, since even the most important bills “hinge for all time upon equivocal memoranda and the frail recollection and veracity of man”

Field v. Clark--Does the origination clause make any sense?
- If the bill originates in the house, any provision of the bill can come into being in either house.
- So who the hell cares?
- Sure, there is the idea to give the House more power over $ because they are closer to the people, but both houses have to sign off on the bill in the end, so its kind of pointless.
- There is only one case that has ever struck down a federal law under this clause. That involved a house revenue amendment to a senate criminal bill.
- So this was not one of the framers great contributions
- Act as signed was not the same as the act that was voted on, as it appeared in the journals
- Constitution mandates that only acts passed by Congress are law
- However, court found that evil of making every bill subject to endless second guessing was greater than the remote possibility that the Speaker, President of the Senate, and President would all conspire to pass a law that was unsupported by Congress

United States v. Munoz-Flores
- In reality its pretty hard to see how the court can reconcile this with Field
• Doesn't overrule Field, but the majority claims they are responsible for constitutional challenges and that the “disrespect to other branches” argument is stupid, because the court's whole damn job is to check out the constitutionality of laws.
• The upshot is that the house and senate not passing the same bill isn't justiciable, but the bill coming from the wrong house is justiciable. Its pretty ridiculous.
• Evaluated whether an act was passed in violation of the origination clause which requires bills for raising revenue originate in the House
• Attempted to determine whether it raised a nonjusticable political question by seeing if it fit into one of six categories
  • Commitment to another branch by Constitution
  • Lack of judicially discoverable and manageable standards
  • Impossibility of making decision without determining an underlying policy question
  • Impossibility of deciding without undue lack of respect to another branch
  • Unusual need to adhere to an already made political question
  • Potential to embarrass government by having different branches make multifarious pronouncements on one question

i Single-subject and Germaneness Rules
 a Department of Education v. Lewis
  • FL constitution has a provision saying that appropriations bills can't have non-appropriations content in them.
  • The bill in question banned funding for any educational institutions that advocate sexual relations between persons not married to each other.
  • One of the reasons for these provisions is to prevent legislators from having to vote on an unwelcome provision to get a welcome one. Is this a good idea/something a constitution should do? The deals will still be made, just in 3 different bills instead of 1, although it will be more difficult. Also, there might be some concerns about appropriations bills being must pass bills.
  • So could/should we have a federal provision that required each bill to be single subject with a clearly understandable name?
  • The single subject rule assumes logrolling is bad. But some people say logrolling is awesome.
  • FL Constitution provides that appropriation bills have only one subject
    • cannot change laws other than one at hand
    • qualifications and restrictions must apply directly to the case at hand
  • Proviso that prevented funds from being applied to post secondary schools that provided assistance or facilitates for groups that advocate of recommending sexual relations outside of marriage? invalid

b Arangold Corp. v. Zehnder
  • Here in the state budget bill, there were over 20 different laws amended.
  • The court here defines single subject very leniently
  • Single subject is satisfied if there is a natural and logical connection to the subject
  • subject is interpreted broadly in favor of upholding
  • each provision does not need to connect directly to other provisions, but it must be connected to main subject

A Internal Parliamentary Rules
 i Metzenbaum v. Federal Energy Regulatory Commission
  a There have been some constitutional rights that have been infringed upon by a failure of the House to follow the House rules. In this case, the Court will get involved. Yellin covered this. HUAC was supposed to consider damaged reputation under the House rules, and they didn't, and the Court said that wasn't ok.
  b So here why can't the court find that the House's not following their own rules makes the law invalid? This court gets out of dealing with it by saying that its a PQD issue.
  c We don't want the House telling the Court how to conduct their business, so we don't want the Court telling the House how to run their business.
  d But someone needs to check the House!
  e Administrative law says that once an agency adopts a rule that rule is law and it is enforceable. The classic example is Nixon firing Special Prosecutor Cox for reasons other than misconduct.
  f What is the reason for applying the PQD? Well, the Court would be telling the House what the House meant when they enacted the House Rule.
  g The rule in this case was written into a statute. Should the Court be able to enforce a rule that is written into a statute? Well, here the statute had a specific provision giving either house the ability to change the rules at any time. This is common.
There is no practicable judicial remedy as a practical matter.

Prime ingredient of a nonjusticable political question is a textually demonstratable constitutional commitment of the issue to a coordinate branch of government.

Constitution clearly empowers each house to form their own rules.

Nonjusticable, although intervention may be appropriate where rights of persons other than members of Congress are violated.

Entrenched Rules and the Filibuster

Nuclear Option—threat that the house would amend its rules on the spot with a simple majority to say that for judicial appointments that there would only be a simple majority necessary for cloture.

Filibuster Purposes—Allows full consideration of the issue (although normally this isn't the REAL reason)

Liberals have the same desire/incentive(maybe even right) to block conservative judges that Conservatives had before to block liberal judges. And the Dems overcame filibuster the old fashioned way.

Republicans are dumb. Someday the Dems will be in charge again.

Is it good that the minority can prevent something the majority wants?

Rappaport talks about the quasi-nuclear option that changed the rules from 2/3 to 60 for cloture, but this is different from completely doing away with the idea of the filibuster.

If the Senate is going to be constrained by rules, is the 60 vote requirement one that they should be bound by?

One theory is that Checks and balances does not mean the minority has a constitutional right to check the majority.

Constitution only lists 7 areas where a supermajority is required in either house -- does not include busting a filibuster.

Constitution allows each house to “determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 2/3, expel a member”

Skaggs—Appellants argued that a leg rule that required that tax increases be approved by 3/5 vote violated constitutional principles of majority rule. Court found that ability to change the rules with simple majority indicated there was no damage (just need two votes to raise taxes with less than 60%.

Committees

Tend to be unrepresentative of the group as a whole (selection bias attracts people who have a particularly strong interest, regardless of whether this interest is shared by Congress as whole.

Allows for specialization and the development of expertise

If something is approved ? no danger. Entire legislature has to vote to approve before it is law

Bigger danger is the ability to block legislation that they are unfavorable towards.

The Alternative of Direct Democracy

St. Paul Citizens for Human Rights v. City Council of St. Paul

There was a human rights law. There was then an initiative to strike out some portion dealing with parochial schools and a part dealing with gay rights.

P sued saying that the initiative was an improper way to repeal.

The plaintiffs were suggesting that an initiative was only for something new, and that you needed a referendum to change something already on the books. They couldn't do a referendum because they had missed the time-limit.

Is there a reason to limit direct democracy? Well, neither the people nor the legislature pay a whole lot of attention to anything.

Second issue: Is this initiative a violation of the single subject rule? The court says no, because they both relate to the St Paul Human Rights Ordinance.

The court should hesitate to single-subject-rule-out because it violates direct democracy.

Problems with direct democracy?

Special interest capture—small group hijacks the process. But doesn't this happen in the legislature, too. But money has a lot of influence as to what gets on the ballot—signature campaigns are expensive, as are advertising campaigns. On the other hand, you have to compare that with the role of PACs and campaign funding in the legislature.

Initiatives are too difficult for the public to understand, so inferior product will be passed. But we are an information rich society.

Applying academic readability formulas shows that these are readable at the 18th grade level.

But there is a value to representative democracy such that a legislator is more likely to see the bigger picture.

Legislatures get to shape the measure, where as drafting problems of initiatives can't be fixed.

Emotionally charged issues in the heat of the moment—you have this on both levels, though.
f Voter isn't accountable for his vote in the way that a legislator is.
g What about things like term-limits—of course the political class doesn't like these types of things, but the people do.
h What about the tyranny of the majority? By definition, the general electorate is going to reflect the will of the majority. The legislature, on the other hand, will be more attentive to the rights/interests of minorities. Accountability leads to less oppressive measures in some cases (but think about national security measures or gay rights measures). Legislative process is also systemically likelier to be accommodative of minorities because minorities have the opportunity to face legislators directly.
i Could initiatives/referendums be unconstitutional under the guarantee clause? Courts aren't receptive to this.

I The Legislator as a Representative
A The Meaning of Representation
   i Wright
      a If the rep is asking the agency to do something they can't really legally do, then there is a problem.
      b A rep is responsible to all his constituents equally.
   i Keating 5 Case
      a Keating had connections to 4 of the 5 senators, and the 5th was on the banking committee, so theoretically he had connections to all five.
      b So is it ok to advocate for individuals that could not vote for you.
      c Thompson rejects the idea that everything is crooked. But is there a satisfactory way of saying that the actions in the Keating case cross the line?
      d Evenhandedness option? The decision whether to intervene should not be based on benefits accruing to the member or the member's family. Thompson assumes that evenhandedness was followed for his argument.
      e Generality, autonomy, and publicity are the three standards Thompson sets, and the senators didn't meet any of these standards.
         • Publicity makes sense because intervention should not be so clandestine that the member and the agency cannot be held accountable should the action later be called into question. Should the appearance of impropriety be enough to claim wrongdoing? Is a gut reaction enough? Well, it relates back to the other two standards
         • Autonomy requires that reps act for the right reasons. Thompson claims that if there is any sort of criminal investigation going on that its improper for the senator to get involved.
         • Generality—demands need to apply to all citizens equally, rather than applying undue pressure in one particular case.
      f Only legal standard is “avoid conduct that reflects poorly on the senate.” But what the Keating senators were doing was similar to what senators do all the time when they meet with agencies.
      g So the senate ethics committee's response was fairly mild.
   i ABA Recommended Guidelines Regarding Congressional Constituent Service
      a Section D says that congressmen should refrain from asking agencies to consider factors that are not permissible under the statutes that govern their programs (asking them to do something they can't legally do is obviously bad).
      b Section F says that congressmen should avoid advocating a constituent's position before an agency without knowledge of its merits. (should be proportional to the involvement, though)
   i Trustee v. delegate theories--trustee is entitled to make his own decisions (people elect a wise man and trust his judgment. Delegate is more constrained – seeks to be voice of the people and work for what they want, regardless of his own opinions

A Qualifications for Office
   i Voting Qualifications and the House Rules: Michel v. Anderson
      a Dems attempted to give territorial/DC reps voting rights in the Committee of the Whole. The Republicans sued.
      b The rule gave the territorial reps the right to vote in the committee of the whole. The rule had a re-vote provision.
      c The committee of the whole is the entire house, just they are technically not sitting as the House. The reason this device exists is to get around the rigid rules and to allow for more free and open debate without a lot of complications.
      d Re-vote provision means that if the vote is so close that the delegates make a difference, then the committee will take a re-vote without the delegates voting. So for all practical purposes they aren't really voting at all.
      e There is some sort of power in being able to log-roll with the real members of the house.
      f This is a good compromise. The territories don't get all the rights of states, but they get more than just being a lame old observer.
      g For a long time delegates had votes in other committees, way back to the western territories having votes
William Henry Harrison was a delegate of a western territory and was a chairman of a committee!

Giving them a vote in committee of the whole isn't all that different from giving them votes in other committees.

This rule of course disappeared within a week of Newt taking control.

Granted Puerto Rico representative ability to vote in Committee of the Whole

Protested by other reps. on grounds that their voice was lessened

Found that this use did not overreach previous powers which allowed delegates of territories to serve on committees

**Exclusion and Expulsion**

- **Powell v. McCormack**
  - He was excluded, not expelled. Exclusion is where he's not even allowed to take his seat, while expulsion is where he's kicked out after taking his seat.
  - The court said they couldn't do this, because Powell met the constitutional requirements for age, citizenship, and residency. The court says these requisites are the only requirements to be seated.
  - So this case says a felon should be seated if elected.
  - Each house can punish its members with 2/3 majority (this is what is required for expulsion).
  - House argued that for all practical purposes they had expelled, not excluded Powell.
  - Court can't assume expulsion and exclusion votes would turn out the same, because House doubts it can expel for acts during a different Congress.
  - Bob Packwood case—accused of multiple acts of sexual harassment. He denied it and was re-elected.
  - Then it came out that he actually was a sexual harasser. Do we want to say “too bad, it all happened in a different term.” Argument was made in the Senate rules committee that his election was a nullity because he lied during the campaign. But all senators are accused of lying during campaigns!
  - Social choice theory—you can change people's choices by changing the order the choices are given. This means in the legislature the power to set the agenda is very important. Decisions in the House or Senate are not just simple bilateral choices—there are many options, and the order of those options makes an impact on what measure will ultimately be adopted.
  - To what extent can the court protect a district or court's right to be represented by whoever they want? Do they have to be disorderly to be expelled, or do you just need a 2/3 majority.
  - The congress has an interest in maintaining its institutional integrity. Article 1 Sec 5 Clause 2 is where they draw their power to punish.
  - If first amendment problems can block expulsion, then why can't equal protection grounds do the same?
  - In 89th Congress, Powell was suspected of fraud and other bad acts. He was excluded from 90th Congress, even after being elected by his constituency. Alleged that he could only be excluded on issues of age, citizenship, or residency – those areas specifically mandated by Constitution. Other side argued that his exclusion had been approved by more than 2/3 vote, so even if not allowed to exclude, should count as a constitutional expulsion. Court ruled that exclusion was unconstitutional, and if the legislature wanted to expel, they had to vote to do that explicitly

- **Bond v. Floyd**
  - Jullian Bond refused to take loyalty oath and was thus expelled by GA legislature
  - court intervened on first amendment grounds.
  - There were totally race issues here as well.

**Term Limits (Members of Congress)**—**U.S. Term Limits, Inc. v. Thornton**

- Should a state be able to create term limits for their national legislatures?
- The state claims they are just limiting ballot access, and if these people run a write in, that's fine.
- But the court says that this is obviously the state adding an extra qualification for office, which is impermissible under the constitution.
- Dissent says that term limits are good because they level the playing field. Also, the people of Arkansas elected their state legislature to make decisions like this for them.
- Court thinks the state should follow the national standard for a national legislature.
- So basically states can't limit terms for Congressmen

**Term Limits (state legislators)**—**Bates v. Jones**

- Prop 140 enacted lifetime term limits. The court ultimately upheld the term limits because they are important to protect against incumbent advantage
- Is there an implicit right to vote for whoever you want in the first amendment?
- Probably constitutional.
- Passed their heyday, though.

**Politics of Term Limits**
When trying to run for a 3rd term, Teddy Roosevelt was nearly assassinated by a guy who felt strongly about there not being 3rd terms for presidents.

Does the “fresh ideas” anti-incumbent idea really stand up.

What about accountability?

What about the benefits of experience?

I Safeguards Against Corruption and Undue Influence

A Campaign Finance Regulation

i Contribution and Expenditure Limitations

a Buckley v. Valeo (Part 1)

- Can't give more than $1000 to a campaign, and can't spend more than $1000 yourself on the campaign.
- Court strikes down expenditure limits, but not contribution limits.
- Large donation to a candidate can contribute to corruption.
- If you are controlling the effects of the expenditure from start to finish, you are always in control, whereas if you just send money into Talent you don't have that control. You are just saying “hey, i'm a Talent supporter” whether you spend $4 or $4,000,000.
- On the government interest side, if you give to Talent, he will know you support him, whereas if you are giving money to anti-stem cell groups you aren't necessarily supporting Talent.
- So if you are going to say one of the holdings was wrong, which one was it?

A Lobbying

i United States v. Harriss

a Requirements under “Federal Regulation of Lobbying Act”
  - Person must have solicited, collected, or received contributions
  - Limits to those who lobby through direct and personal contact
    - but what about section 307 b “to influence, directly or indirectly, the passage or defeat of any legislation . . .”
    - Congress wants to reach people who start huge letter writing campaigns, but the court doesn't want to deal with them.
    - The court says “directly or indirectly” means directly. The court gets the definition of direct communications from the implications of the word lobbying which does not appear in the operative provisions of the act.
    - Maybe this is the court trying to save the act from a vagueness complaint.
  - one of the main purposes must be to influence the passage or defeat of legislation by Congress
b Did the court need to use such a narrow reading of the legislation? To save part of the legislation.
c Why do we want this sort of law at all? It is based on some notion that just knowing what the moneyed interests are spending to get their views heard in Congress is a legitimate public interest.
d What is required to be disclosed it quite limited.
e There is a generalist populous fear of lobbying, and so there is a desire to have them report at least something.
f Should grass roots lobbying be regulated?

A Bribery Etc.

i United States v. Agnew

a If you buy what Agnew says, was he guilty of bribery?
b Here it was a potentially lawful contribution IF you believe Agnew.
c What Green was doing looks a lot like regular campaign contributions . . . that's why its hard to use bribery laws in cases like this.

i McCormick v. United States

a Use the Hobbs Act in order to prosecute a state official for extortion
b Asked foreign doctors for campaign contribution after he had supported bill allowing foreign doctors to practice while waiting for licenses.
c Court holds that there needs to be quid pro quo, and there is not here.
d Dissent says subtle extortion is just as wrong and express extortion, while majority requires explicit extortion

i People v. Brandtetter

a Gives Rep. Note saying that if he votes for the ERA she'll help in his campaign and donate $1,000 to his campaign. She also told him to vote his conscience.
b Meanwhile Whorebag Schlafly gets away with the same damn thing.
PART 2: STATUTORY INTERPRETATION

I Underlying Themes
   A Text v. Legislative Intent
      i Textualism
         a United States v. Locke
            • Statute tells people that they must file a report on their mineral claims prior to December 31 each year.
            • Plaintiffs filed on December 31. That wasn't good enough.
            • The statute says “on” and the court changes this to “or”. Ah Ha!!!
            • What if there was a statute that proscribed what happened if you filed “after December 31”?
            • What if Locke came in at 9PM on December 30. The office is closed. Is that legal?
            • Part of this could be Marshall's bias as a former practitioner
         b State v. Hill
            • Lewd telephone call statute is changed to include threats. Does that mean that to be a lewd call it has to be a threat, just because they use the word “and”? Of course not.
            • Why would you want to honor the intentions of the legislature instead of what the statute really says?
            • Another way is to say that people speak like slobs so legislation is written sloppily
         c In re Sinclair
            • Easterbrook says statutes are law, not evidence of law—supply-side economics example
      i Plain Meaning
         a Caminetti v. United States
            • Mann Act Case—going with girlfriend to Reno gets prosecuted under white-slavery act
            • Court says that the meaning is plain and ridiculous results won't occur, so interpret via plain meaning
            • “the language being plain and not leading to absurd or wholly impracticable consequences the sole evidence of the ultimate legislative intent”
            • Plain meaning analysis looks at one provision, doesn't see ambiguity, and thus will not look at other evidence, even the title of the act
            • Plain meaning excludes certain data from any consideration whatsoever
         b Murphy Article
            • criticizes plain meaning
            • embraces contrary position
            • “When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'”
         c Schauer Article
            • Gives a sophisticated argument for relying on literal meaning
            • Convenience argument—if you are willing to just decide a case on the basis of the text, its EASIER!
            • Why spend a lot of time on really dull cases when you can get to the interesting stuff? Marshall and Scalia can't agree on Affirmative Action, but they can agree that December 31 isn't before December 31st.
      d There are many situations under which literalism is considered just fine
         i Avoidance of Absurd Results
            a Clinton v. City of New York--There is no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons. Acceptance of the Government's reading would produce an absurd and unjust result which Congress could not have intended.
            b Poisson—Arkansas state where all laws were repealed
   A Broadening the Concept of Intent: Legislative Purpose
      i Baker—Law forbidding buying drinks for jurors also covers celebratory cigars
      ii Richardson—bike is more of a machine than a carriage, so law saying towns have to keep their roads in safe condition for carriages doesn't cover bikes
      iii Hart & Sacks—586
         a Statutory Interpretation requires examining 4 things:
            • (1) what was the common law before the making of the act
            • (2) what was the mischief and defect for which the common law did not provide
            • (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth
            • (4) The true reason for the remedy
      i Holy Trinity—Law banned paying for aliens to come over to work. Congress couldn't have intended for this to apply to pastors. Looked at the title of the act, the evil they were trying to remedy, the circumstances surrounding...
the appeal to Congress, & the reports of the committees. Also can't impute a purpose or action against religion to legislation.

ii Public Citizen—Whether the standing committee on the Federal Judiciary of the ABA was subject to the FACA which imposes disclosure and open meetings requirements on federal advisory committees. The plain meaning of "utilize" did not bring the committee under the statute.

A Ambiguities in the Concept of Legislative Will

i Optimistic v. Pessimistic Views of the Legislature

a Posner's Two Part approach:
   • (1) judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him (imaginative reconstruction);
   • (2) Must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand

b Dimension Financial—Where Congress, rather than defining a "bank" subject to regulation under Bank Holding Company Act section [12 U.S.C.A. § 1841(c)] as an institution that offers the functional equivalent of banking services, defined with specificity certain transactions that constitute banking, the Federal Reserve Board could not by regulation, on basis of argument that it fell within the Act's "plain purpose" of regulating institutions "functionally equivalent" to banks, define "banks" to include institutions offering customers negotiable order of withdrawal accounts and money market instruments.

i Static v. Evolving Approaches to “Intent”

a Fyfe—A statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. Statutes are to be construed as intended to be understood when passed.

b Maxwell—statutes framed in general terms apply to new cases that arise, and to new subjects that are created from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage.

c St. Francis—Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely b/c of their ancestry or ethnic characteristics, even if that doesn't gel w/the scientific definition of race.

d Shaare Tefila—Held that Jews could sue white defendants under 42 USC 1982 b/c at the time the statute was enacted they were considered a different race.

e Other cases on statutory evolution—Faxing is not telephoning; a 911 call is not a statement; the Navajo nation is a territory.

f Smith v. Wade—Punitive damages are available in a proper case under § 1983. While there is little in the legislative history of § 1 of the Civil Rights Act of 1871 (from which § 1983 is derived) concerning the damages recoverable for the tort liability created by the statute, the availability of punitive damages was accepted as settled law by nearly all state and federal courts at the time of enactment. Moreover, this Court has rested decisions on related issues on the premise that punitive damages are available under § 1983. Pp. 1628-1631.

A Beyond Intent

i Dworkin—All proposition of law are interpretive of legal history. Interpretation is an ongoing process of creating new and evolving meaning from text.

ii Maltz—W/in constitutional limits the legislature has authority to prescribe rules of law that, until changed legislatively, bind other government actors w/in the system. Dworkin is wrong and you can't have a morally coherent set of laws, and Dworkins approach shows utter disregard for legislative supremacy.

iii Weber—A thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.

I Tools of Interpretation

A Statutory Words

i Linguistic Cannons

a (1) Grammatical Rules

b (2) Referential and Qualifying Words—generally only apply to the last antecedent, unless this is in conflict with the apparent legislative intent

c (3) Conjunctive and Disjunctive Connectors

d (4) Mandatory versus Discretionary Language

e (5) Difference between Singular and Plural—very rarely actually used

i Are Cannons Worthwhile at All?

a Are they useless? How are the helpful at all if they can lend themselves to such manipulation? If you list three
things you probably don't mean a fourth. So in those circumstances the presumption about legislative intent probably is correct. So it might be useful to have a label for that kind of reasoning. The cannons MIGHT be helpful in guiding lawyers in counseling positions in determining what outcomes will be before the fact. But every cannon has a counter cannon! And many of the cannons are regularly over-ridden. But some of them are pretty hard to override.

b Llewellyn actually wants a broad contextual look in a situation, not a strict adherence to one specific cannon or another. De-mystify the supposed rule nature of cannons. There are no easy answers. He's part of the legal realism movement. There are no simple rules. The judge does what he/she wants, and then justifies it with cannons.

c You can use cannons as rationalizations. They can be tie-breakers for judges to resolve a dispute in a simple way everyone can agree on without everyone having to comb through the legislative history and requiring the justices/judges to all agree on broad social policy.

d Maybe at times a cannon can be like a folk-saying and allow you to articulate a position without having any good rationale at all based on the cannon itself. They aren't probative, they are just a way of explaining yourself.

A Legislative History

i General issues of Legitimacy

a Coco Brothers, Inc. v. Pierce

- Reads the term “exclusive jurisdiction” to mean exclusive of the board of contract appeals, but not to the exclusion of the district court. They base this on legislative history.
- So should you go with legislative history even where it seems to contradict the plain language of the statute? Should the statement in the committee report carry weight like it does with this court?
- Also, is legislative history so inherently unreliable that you shouldn't count on it at all?
- Sloppiness argument has been a continuing theme in this discussion.
- What about the argument that dependence of legislative history will lead to a weaker legislative branch? Individual actors will covertly and stealthily change the meaning that is/was intended by the full body.
- Even when the legislative history reflects the legislative intent it leads to sloppiness and treating the legislative history as if it were a part of the law, and calls the credibility of the legislature into question.

i Committee Reports

a Commissioner of Internal Revenue v. Bilder

- Guy tries to get his rent in FL deducted as a health care expense because his doctor told him he had to move to warm climate.
- These types of bills used to be deductible.
- However, in the committee report it is very explicit that they don't intend for these types of expenses to be deductible. But they use the same language as the used before to cover these types of payments.
- The debate on legislative history is stated in absolutists terms because you don't have the underlying data to make very solid case by case judgments.

b Pierce v. Underwood

- Later committee report tries to say that the 9th Circuit got the issue right, and Scalia says “you've gotta be kidding me. Sorry, but no.”

c Blanchard v. Bergeron

- Majority pays attention to committee report that cites a few cases as being the right interpretation.
- Scalia says he agrees in judgment, but this legislative history is bullshit. Its not Congress's job to pour over district court opinions, and some clerk citing some random case should not be compelling.
- Unless its signed off on my members, why pay attention to legislative history

d Bank One Chicago, NA v. Midwest Bank & Trust Co.

- Stevens argues that legislators rely on specialists in the committees to help them decide how to vote on things they don't care about, so the court should look to the committee—practical view
- Scalia says, “The law is what the law says.” (emphasis in original)
- Scalia says we CAN'T constitutionally follow the wills of a few Congressmen, and if we are going to look to legislative intent we must look at the intent of the legislature as a whole. Some committees are not in sync with the full chamber. Ag committee is made up of legislators from Ag states. And those people do not represent the interests of the whole congress!

i Statements by Sponsors and Other Individuals

a Statements by sponsors are given deference because they are most knowledgeable about the legislation and their opinions are relied upon by other legislators. However, they might have incentives to distort the legislative history through planned colloquies.

b Garcia v. United States
• Whether the language “any money, or other property of the United States” in Section 2114 includes flash money used by a secret service agent involved in a counterfeiting investigation.
• Court said that the language of the statute was clear and that it obviously applied to more than the postal workers who were initially covered under the statute. This is despite the comment of one member of Congress who said it was supposed to apply in postal matters. They argue that the committee reports say nothing about limiting the law to postal matters.
• Dissent says the origin of the statute was for postal matters, and gives credit to Dobbins statement because he was on the committee and it was a relatively minor piece of legislation that no one else was going to talk about. The change was to allow prosecution of people taking money from postal workers, and not just mail.
• The dissent also says that the penalties are on their side, and under the majority's decision there would be a 20 year sentence for stealing a government hammer.
• The floor manager has every incentive to state things in a way that will reflect the desires of the legislature in general to get them to vote for the bill.

**Montana Wilderness I**
• RR and government argue that the Alaska Lands Act gives the RR an easement.
• Does the text alone support an Alaska only interpretation, or a nationwide interpretation?
  • The act defines public lands only as lands situated in Alaska. This takes care of subsection b.
  • Subsection a is what deals with the “National Forest System.” This read in isolation would mean nationwide. However, when read in conjunction with subsection b the court feels that it should be Alaska only.
  • *In pari materia*—should be read in the context of the whole act.
• Legislative history
  • for such a big change to be made (it to apply to more than just Alaska) you would expect it to be mentioned in the legislative history.
  • The broad interpretation would also amend the Wilderness Act by implication.
  • Udal amendment to clarify that the statute only applies to AK was never adopted. But this is minimally probative, b/c there are many reasons an amendment was not adopted. It could be because they thought the amendment wasn't even necessary.
  • There are letters to the atty general from senators that say it is supposed to be applied nationwide. This correspondence took place while the legislation was pending. They were chairmen of the subcommittees responsible for the bill.
  • People's short term objectives effect what they say on the floor.
  • “Dog did not bark.”

**Post-enactment Legislative History**

**Montana Wilderness II**
• committee talking about Colorado Wilderness Act interpreted the Alaska Act as applying nationwide.
• Court takes that committee report into account and changes their mind from the previous *Montana Wilderness* decision.

**Reasonable uses of Legislative History**

**Avoiding an absurd result**
• if collaterally absurd consequences, manifestly contrary to common reason arise out of statutes, those statutes are, with regard to those collateral consequences, void
• Judges permitted to examine the legislative history to determine if the results truly are unforeseen (the issue really is collateral)
• Before concluding that an acts is absurd, that no good reason supported it, and declaring the application void, the court should first check the history to determine if the drafters had some special purpose in mind
• Least controversial use, even Scalia is down

**Drafting error**
• Even where result is not absurd
• Especially where there is evidence that the statute moves away from common practice
• Ex: A statute imposed federal criminal penalties for any person who “possesses any false, forged, or counterfeit coin, with intent to defraud.” ? used false Krugerrands, which are only valid currency in SA. History showed that this statute, after 150 years, was separated from the clause of the original statute that governed possession and making of counterfeit coins. Original statute was limited to false coins currently in use in the US. This limiting language was extended to the making of the coins, but not the possession. History indicated that this restructuring was intended for solely organizational purposes. Ct. ruled drafting
Specialized meaning--explaining meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in the statute’s enactment

Identifying a reasonable purpose

- The purpose a word serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase
- Allows courts to take advantage of the work done by Congress, who in the process of passing the bill, become an informed community. This expertise is likely to aid in the production of a more workable statute.
- Increases the likelihood that the law will do what the legislature (and those who relied on the legislature) reasonably expected it to

Choosing among reasonable interpretations of a politically controversial statute

- A statute that evokes strong political support and opposition in Congress can include language that is unclear or silent on an important issue
- Causes critics the greatest concern, as it creates the greatest likelihood that testimony will be raised to the level of the statutory language
- Allowing legislators to signal their intent is more efficient, since the more general tone of the history allows compromises to be made
- Allowing the vaguer language allows the court to tailor relief in a way that’s most appropriate for the case at hand, while statutory rules would have to be binding
- Disallowing courts to look at leg history in these cases would also be unfair, since Congress expected it to be a part of the interpretation when it was enacted

Criticisms of the Use of Legislative History

Lack of utility

- Often more vague than the statute to be interpreted
- Weak argument, since leg history that is vague in a case is of low probative value due to its vagueness (not merely because it’s leg history)
- Different when applied to SC than other Federal courts. Many SC cases reflect political controversy where the opposing sides “leave no leg history stone unturned in their efforts to influence subsequent judicial interpretations. Other courts typically have cases where there is confusion unrelated to political controversy, and leg history is often of great usefulness.

Constitutional arguments

- According to the Const, the only thing that is a law is what has passed by a majority in both houses and been signed by the president. Leg history does not, therefore, using leg history to influence interpretation is unconstitutionally raising it to the level of statute.
- Const vests leg power in elected representatives, not lobbyists or staffers. Yet, these unelected officials often are the authors of leg history
- Both arguments overstate their claim. Leg history is not raised to level of law. Rather it is used to interpret the law. These criticisms would also have to apply to use of dictionaries, common practice, or congressional lexicographers (none of which are considered suspect)
- The workings of Congress are complex and bureaucratic, and there is nothing unconstitutional about allowing a representative to delegate to staffers
- There is no guarantee that the statute is any more reflective of direct influence of the legislator, since his or her involvement is a function of the importance of the substantive procedural or political issues, not the category of the text

The problem of congressional “intent”

- Influence of staffers indicates that the document doesn’t even reflect the inner workings of one representative’s mind, and certainly not Congress as a whole
- Public choice theory says that legislation simply reflect the conflicting interactions of interest groups? the resulting law sometimes reflects their private selfish interests and sometimes no interest
- This misunderstands the term intent. A better definition is more like purpose than motive.
- We understand group purpose in day to day life. EX: a law school raises tuition to build a new library; a basketball team executes plays to run out the clock; a tank corps feints to draw the enemy’s troops away from the main front. Does it matter if some faculty members voted to please the dean rather than build the library? That some basketball players execute the plays out of habit without understanding the strategy? That the only person who understands the intricacies of the tank corps’s feint is a low-ranking intelligence officer?
- The public choice theory underestimates the extent to which legislators consider the public interest, and
tends to paint them as pure rent-seeking bodies

- Legislative intent is a tool that judges use to build a coherent and consistent body of statutory law. Does this tool lose all effectiveness even if the reasonable legislator is a purely fantastic construct?

d Experience elsewhere
- Early US history does not provide an appropriate comparison, due to the relative simplicity of legislation then
- Other countries often have a more homogenous group of judicial decision makers who are charged with determining statutory interpretations or have developed other means to fairly interpret statutes

e Availability
- Critics argue that leg history makes it more difficult to understand statutes, since the citizens have to look at leg history in addition to the statute
- Fails to take into account the fact that leg history is used to interpret unclear statutes, not muddy clear ones.
- Leg history is then an aid, and certainly more intelligible to the average citizen than canons of interpretation.

i Institutional Reasons Against Change
a The alternative--Development of canons
- canons are often contradictory (Llewellyn)
- origins and continued justification for many canons is uncertain in many cases.
- by what authority can courts add modern canons and what legitimacy will they have?
- why are canons any more helpful or useful for the average person than leg history? Especially given the origins of canons in eighteenth century land law

A Interpretation in Light of Other Statutes
i Similar Statutes
a Cartledge—In order for federal court to be "expressly authorized" by Act of Congress to grant an injunction to stay proceedings in a state court, for purposes of the Anti-Injunction Act, it is not necessary that the congressional enactment contain a specific reference to the Anti-Injunction Act, nor need it explicitly sanction injunctions against state proceedings; the test is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding
b Strauss—Static view of statutory law is premised on the elements of government work being isolated from another, while the alternative is to have them all working together. Courts are tending toward static.
i Borrowed Statutes—Zerbe—where constitutional claim was not thoroughly briefed by appellant, court would employ presumption of validity of legislative enactments and rule that party challenging constitutionality of statute had not met burden of overcoming presumption
ii Statutes in Conflict—Radzanower—a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. Fact that 2 statutes produced different results when applied to the same factual situation does not necessarily warrant finding that the statutes are in irreconcilable conflict and that the law later enacted has been repealed by implication.
iii Conflicts Between Authorization and Appropriations Statutes—no amendment proposing general legislation can get tacked on to an appropriations bill.

A Administrative Interpretations
i Chevron—
a When court reviews agency's construction of statute which it administers, court is confronted with two questions: whether Congress has directly spoken on precise question at issue; if statute is silent or ambiguous with respect to specific issue, question for court is whether agency's answer is based on permissible construction of statute.
b Judiciary is final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.
c Court need not conclude that agency's construction of statute which it administered was only one it permissibly could have adopted to uphold construction, or even reading the court would have reached if question initially had arisen in judicial proceeding.
d Where legislative delegation to agency on particular question is implicit rather than explicit, court may not substitute its own construction of statutory provision for reasonable interpretation made by administrator of agency.
e Considerable weight should be accorded to executive department's construction of statutory scheme it is entrusted to administer.
i Cardoza-Fonseca—Agency interpretation of statutory provision which conflicts with agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.
Brand X—

a If statute is ambiguous, and implementing agency's construction is reasonable, *Chevron* requires federal court to accept agency's construction of statute, even if agency's reading differs from what court believes is best statutory interpretation.

b *Chevron's* framework applied to review of Federal Communications Commission's (FCC) ruling that cable companies providing broadband Internet access did not provide "telecommunications service" and therefore were not subject to mandatory regulation under Title II of Communications Act; FCC issued its ruling in exercise of its authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act. Communications Act of 1934, §§ 1, 3(46), 201(b), 47 U.S.C.A. §§ 151, 153(46), 201(b).

c Agency inconsistency is not basis for declining to analyze agency's interpretation under *Chevron* framework, rather, unexplained inconsistency is, at most, a reason for holding interpretation to be arbitrary and capricious change from agency practice under Administrative Procedure Act (APA); if agency adequately explains reasons for reversal of policy, change is not invalidating, since whole point of *Chevron* is to leave discretion provided by ambiguities of statute with implementing agency. 5 U.S.C.A. § 706(2)(A).

d Court's prior judicial construction of statute trumps agency construction otherwise entitled to *Chevron* deference only if prior court decision holds that its construction follows from unambiguous terms of statute and thus leaves no room for agency discretion.

e Court of Appeals' prior judicial construction of Communications Act did not trump Federal Communications Commission's (FCC) interpretation of definition of "telecommunications service," which was otherwise entitled to *Chevron* deference, since prior decision did not hold that Act unambiguously required court's construction. Communications Act of 1934, § 3(46), 47 U.S.C.A. § 153(46).

f Under *Chevron* framework, court first asks whether statute's plain terms directly address precise question at issue; if statute is ambiguous on the point, court defers to agency's interpretation so long as construction is reasonable policy choice for agency to make.

Brown & Williamson

a Although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

b When reviewing administrative agency's construction of a statute that it administers, reviewing court must first ask whether Congress has directly spoken to the precise question at issue, and, if Congress has done so, the inquiry is at an end, and the court must give effect to the unambiguously expressed intent of Congress, but, if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.

c Words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

d Court must interpret statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.

e The meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

A Substantive Canons

i Introduction—Examples of Cannons of construction that involve specific policy preferences

a presumption against congressional diminishment of American Indian Rights

b presumption that Congress does not intend to pass statutes which violate international law

c presumption that Congress will not withdraw all remedies or judicial avenues of relief when it recognizes a statutory right.

d Presumption that Congress does not intend that federal regulation unnecessarily intrude into traditional state responsibilities (any more than is necessary to subserve national objectives).

e Presumption that Congress will not withdraw the courts traditional equitable discretion.

i Rule of Lenity

a Laws whose purpose is to punish must be construed strictly.

b This started in England for humanitarian reasons b/c there were so many capital offenses

c Principles of fair warning, including void for vagueness doctrine supports this approach.

d Problem is serious wrong-doers getting the benefit of strict construction and criminal statutes are supposed to be remedial in nature

i Avoidance of constitutional issues—Court tries to avoid constitutional issues if they can

ii Contemporary substantive canons

a The cannon of statutory interpretation requiring a court to give effect to each word if possible is sometimes
offset by the canon that permits a ct. to reject words and surplusage if inadvertently inserted or if repugnant to
the rest of the statutes. This canon has particular force where the surplus words consist simply of a numerical
cross-reference in a parenthetical.

b Statute must be construed so that every word has some operative effect.

I Special Problems of Interpretation
A Implied Causes of Action
   i Borak
   a When a fed statute makes an act unlawful the extent and nature of the legal consequences of that condemnation
   are federal questions and the answers are to be derived from the statute and the federal policy adopted.
   b Fed Cts should adjust their remedies so as to grant necessary relief where federally secured rights are invaded.
   c Where rights have been invaded and a federal statute provides for a general right to sue for such invasion, fed
c ts may use any available remedy to make good the wrong done.
   d The power to enforce implies the power to make effective the right of recovery afforded by the Act. And that
   power implies the power to utilize any of the procedures or actions normally available to the litigant according
   to the exigencies of the particular case.
   i Cort test—for determining whether a private remedy is implicit in a statute not expressly providing one
   a Is the P “one of the class for whose especial benefit the statute was enacted? (does the statute create a federal
   right in favor of the P?)
   b Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
   c Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the P?
   d Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so
   that it would be inappropriate to infer a cause of action based solely on federal law?

   i Cannon v. Univ. of Chicago—woman was not allowed to participate in a medical education program that got federal
funds. Brought a title 9 claim. Title 9 does not expressly authorize a private cause of action.
   a Threshold question under Cort is whether the statute was enacted for the benefit of a special class of which the
P is a member. That question is answered by looking to the language of the statute itself. That is the case here.
   b Second step is a look at legislative history.
   c Third, a private remedy should not be implied if it would rustrate the underlying purpose of the legislative
scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the
statutory purpose, the Ct. is decidedly receptive to its implication under the statute.
   d Fourth inquiry is whether implying a federal remedy is inappropriate b/c the subject matter involves an area
basically of concern to the states.
   e Powell dissent: Congress alone has the responsibility for determining jurisdiction of lower federal courts.
Cort allows the Ct. to assume policymaking authority vested by the constitution in the legislative branch.

   i Thompson v. Thompson
   a Father brought action in which he sought declaratory and injunctive relief under Parental Kidnapping
Prevention Act with respect to conflicting state child custody decrees. The United States District Court for the
Central District of California, A. Andrew Hauk, J., dismissed complaint and father appealed. The Ninth Circuit
Court of Appeals, 798 F.2d 1547, affirmed. Upon grant of certiorari, the Supreme Court, Justice Marshall,
held that the Parental Kidnapping Prevention Act did not create implied cause of action in federal court to
determine which of two conflicting state custody decrees is valid.
   b The PKPA does not provide an implied cause of action in federal court to determine which of two conflicting
state custody decisions is valid. The context in which the PKPA was enacted—the existence of jurisdictional
deadlocks among the States in custody cases and a nationwide problem of interstate parental kidnapping—
suggests that Congress’ principal aim was to extend the requirements of the Full Faith and Credit Clause to
child custody determinations, and not to create an entirely new cause of action. The language and placement of
the Act reinforce this conclusion, in that the Act is an addendum to, and is therefore clearly intended to have the
same operative effect as, the federal full faith and credit statute, the Act’s heading is "Full faith and credit given
to child custody determinations," and, unlike statutes that explicitly confer a right on a specified class of
persons, the Act is addressed to States and to state courts.
   c Moreover, in discussing the congressional rejection of a competing legislative proposal that would have
extended the district courts’ diversity jurisdiction to custody decree enforcement actions, the PKPA’s legislative
history provides an unusually clear indication that Congress did not intend the federal courts to play the
enforcement role. The fact that the cause of action petitioner seeks to infer is narrower than the congressionally
rejected alternative is not controlling, since the federal courts would still be entangled in traditional state-law
questions that they have little expertise to resolve. The argument that failure to infer a cause of action would
render the PKPA nugatory is also not persuasive, since it is based on the unacceptable presumption that the
States are either unable or unwilling to enforce the Act's provisions, and since ultimate review remains
available in this Court for truly intractable deadlocks.
d  Parental Kidnapping Prevention Act did not provide implied cause of action in federal court for determination as to which of two conflicting state custody decrees is valid; rather, context, language and history of Act demonstrated that Act was intended to have same operative effect as full faith and credit statute for child custody determinations.

A  Retroactivity

i  Landgraf v. USI Film Products

a  Issue: Whether the addition of compensatory and punitive damages to Title VII under the 1991 Civil Rts Act is retroactive? No.

b  In 1990 a bill that was specifically retroactive was vetoed by the president because it was retroactive, and Congress didn't have enough votes to override.

c  First, does the statutory text manifest an intent that the 1991 act to be applied retroactively? Given the importance of the question, Congress probably wouldn't say yes just through a negative inference.

d  Originally this bill had explicit retroactivity provisions but the compromise omitted those provisions. The legislative history shows now evidence that the Members believed that an agreement had been struck on the issue.

e  A court is to apply the law in effect at the time it renders its decision, but retroactivity is not favored in the law.

f  Presumption against retroactivity goes way back. People should be able to know what the law is and behave accordingly. Also, legislatures could use retroactivity to punish unpopular groups.

g  Requiring evidence of Congressional intent ensures that Congress has determined that the benefits of retroactivity outweigh the disruption/unfairness.

h  Story's definition of retroactive: every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deem retrospective.

i  Question is whether the new provision attaches new legal consequences to events completed before its enactment.

i  Rivers v. Roadway Express

a  P sued because they were denied disciplinary procedures based on race. Trial court dismissed because 1981 did not cover actions after contract formation. Then, during appeal, 1981 was amended to allow such actions. The appellate court held that the earlier interpretation of the law applied.

b  The court holds that although a restorative nature of an amendment may be relevant to whether Congress intended a new statute to govern past conduct, but we the court cannot presume an intent to act retroactively. There must be clear evidence of such intent, and that evidence is not present here.

c  Statutes operate prospectively while judicial decisions operate retrospectively.

i  Martin v. Hadix

a  PLRA limits attorneys fees for prisoner lawsuits. Court finds that the law limits attorney's fees with respect to postjudgment monitoring services performed after its effective date, but does not limit fees for postjudgment monitoring performed before the effective date.

b  In Glover female prisoners sued because they were not given the vocational and educational opportunities male prisoners were given, and that they had been denied their right of access to the courts. Court found for them, and that they were entitled to attorney's fees. The court also held they were entitled to the market rate for post-judgment monitoring. The PLRA rate is only a little more than half the market rate.

c  First look to see if legislature addressed the temporal reach of the statute.

d  Question of retroactivity demands a common sense, functional judgment as to whether the new provision attaches new legal consequences to events completed before its enactment.

e  Take into account

   •  fair notice
   •  reasonable reliance
   •  settled expectations

f  Compare with Bradley that didn't trigger presumption against retroactivity because they were only talking about a procedural change. But the federal court had that authority all along, which isn't the case here.

g  Whole court agrees previously incurred costs should stay at high rate.

h  There is not enough authority to know whether retroactivity would be an issue in the case of “good news” changes in the law. Some argue no, b/c the whole purpose of presumption against retroactivity is to protect reliance interests.

i  Scalia partial dissent

   •  The decision of which retroactivity event to choose should turn upon which activity the statute was intended to regulate.
   •  Here, that event is doing the work offered, not the decision to take the case.
   •  If you pick the right event, you have an obvious answer and don't need to look at policy arguments.
j  Ginsberg partial dissent
   • Should only apply in cases started after effective date. When lawyer takes the case is the retroactivity event.
   • However, theoretically they could pull out . . . the ABA rule is permissive

A  Effective Dates and Adequate Notice
   i  If Congress doesn't say when an Act goes into effect, it does when president signs, when time expires for veto, or when veto is over come. If President signs, the date/time he puts on his signature is considered controlling.

ii  In re Grant's Estate
   a  Guy died at 11:55 AM on December 21, and Act was signed on December 21 that would raise the inheritance tax, but it didn't have a time on it.
   b  Does the law apply to the guy's estate?
   c  There is a legal fiction that a law is considered to go into effect when the day it is signed starts, claiming that the day is an indivisible unit. This rule is disregarded where its application would unjustly impair personal or property rights, in which case the hour is the important time.
   d  The only evidence says the act was signed by the Governor after noon, so it was after the guy died and does not apply.

i  Cases on Timely Notice of Statutes
   a  United States v. Casson
      • Guy committed burglary after stiffer law went into effect, but before it was publicized.
      • Court says it still applies because
         • (1) the terms of the law had been widely publicized in advance and
         • (2) Casson had not shown that if he had tried between 3:05 and 10:00 to find out the status of the bill, he would have been unsuccessful.
   b  Texaco v. Short
      • Statute required that you file a claim within two years of enactment to keep your unused mineral rights. People who lost their rights claimed inadequate notice, and the Court disagreed.
      • Persons owning property within the state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.

A  Severability and Other Judicial Remedies for Unconstitutional Legislation--990
   i  Immigration and Naturalization Service v. Chadha
      a  Issue is if the part of the law that provides for the one house veto is found unconstitutional whether it can be severed, or whether the whole law is unconstitutional.
      b  Invalid portions of a statute are to be severed “unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.”
      c  Here, the legislature specifically endorsed severance.
      d  The legislative history is not sufficient to rebut presumption of severance because there is insufficient evidence
      e  Also, what remains after severance is fully operable as law.
      f  Its only non-severable if they wouldn't have enacted the legislation without the unconstitutional provision.
      g  If there hadn't been a severability clause, severance happens unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not.
      h  Rehnquist and White Dissent
         • A severability clause does not resolve the issue. The determination of the intent of the law makers will rarely be resolved by these clauses.
         • The legislative history does not show a congressional intent toward severance.

i  EEOC v. CBS
   2d Cir. Decision; 5th Cir. Disagrees
   a  Does the presence of a one house veto clause invalidate the authority of the EEOC to enforce the ADEA?
   b  Congress gave power to president to reorganize executive agencies, and it had a legislative veto provision. The president moved ADEA to EEOC. Chadha then renders legislative veto unconstitutional.
   c  Ct. of Appeals holds that the unconstitutional veto provision is not severable and that congress has not ratified the transfer of authority to the EEOC, so the EEOC's authority to prosecute ADEA actions will cease.
   d  Chadha invalidated every single use of the legislative veto.
   e  Severability is an issue of legislative intent.
      • To hold the veto provision severable would confer upon the statute a positive operation beyond the legislative intent.
      • The actual Act was a compromise, and legislative history shows a lack of severable intent. The one-house veto portion of the bill was a vital part of the compromise.
   f  Presumption is overcome because legislative history says that the legislative veto was a vital part of the law.
   g  Although Congress may ratify otherwise unauthorized actions, to do so its ratifying legislation must recognize
that the actions involved were unauthorized when taken and must also expressly ratify those actions in clear and unequivocal language. Acquiescence or non-action is not enough.

- But does this logic work where the only defect is the lack of bicam/presentment, and by going through the legislative process those concerns are addressed.

h Court stays the judgment in order to give Congress time to act
i Congress soon after passed legislation expressly ratifying all past reorganization plans and revised the reorganization process to conform with Chadha.

i Severability clauses often just get thrown in w/out any debate. That's why its not determinative. Its only a weak presumption of legislative intent.

ii Califano, Sec. Of Helath, Educ. & Welfare v. Wescott
   a Case about welfare provision that required the FATHER be unemployed.
   b Lower Court Held:
      - Constitutionality of 407 cannot be sustained on the theory that although it incorporates a gender distinction, it does not discriminate against women as a class because it affects family units rather than individuals
      - Doesn't survive as being substantially related to important government objective. It does not provide for needy children or reduce the incentive for fathers to desert.
   c Underinclusion allows two remedies
      - nullity
      - extension of coverage
   d Extension is proper for federal benefits statutes.
      - Equitable considerations support.
   e Form of extension is real case (should be be mother or father, or should it be primary provider?)
      - Breadwinner interpretation would have the effect of terminating benefits to many families receiving them.
      - Breadwinner interpretation would involve a restructuring of the act, and the Court should not take this on lightly. The term “principle-bread-winner” is novel to the AFDC scheme, where as replacing father with a gender neutral term is not.
      - Breadwinner would be cheaper, but that's not determinative here, as the United States argues for the other interpretation.
   f Court affirms lower court.
   g Dissent (in part) argues that in choosing between nullity or extension, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole, and in doing so, nullity is the proper choice here. Its not for the courts to rewrite the statute.
   h Congress ultimately changed the law and used the breadwinner approach.

A Stare Decisis
   i Patterson v. McLean Credit Union
      a Sup. Ct. asked if Runyun should be overturned, and decided that it shouldn't.
         - Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision
         - it is a basic self-governing principle within the Judicial branch to prevent decisions based on arbitrary discretion.
         - Departure requires a special justification. This burden is even greater in questions of statutory construction because legislative power is implicated.
         - The primary reason to overturn stare decisis is that there has been an intervening development of the law, through either the growth of judicial doctrine or Congressional action.
         - Another reason to overrule is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion from an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.
         - Sometimes precedent becomes more vulnerable as it becomes outdated and after being “tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.”
      b Brennan/Marshall/Blackmun/Stevens opinion
         - Should not be reconsidering Runyun because
            - It was properly decided
            - Congress has ratified the Court's earlier interpretation.
   i Flood v. Kuhn
      a Flood claimed that the reserve clause in his contract with the Cardinals was a violation of antitrust laws because it prevented him from contracting with the team of his choice. Lower courts denied relief based on Sup. Ct. precedents holding baseball immune from the antitrust laws.
      b Earlier court has held that baseball isn't interstate commerce because the travel of teams is merely incidental, not essential.
c House committee report supported the use of reserve clauses
d Reasons to continue to uphold Federal Baseball and its progeny
   • Congressional awareness for three decades of the Court's stance coupled with Congressional inaction
   • The fact that baseball was left alone to develop for that period upon the understanding that the reserve
     system was not subject to existing federal antitrust laws
   • A reluctance to overrule with a consequent retroactive effect
   • A professed desire that any needed remedy be provided by legislation rather than by court decree.
e Later the court wouldn't apply this precedent to other sports or theatre groups—only Professional Baseball is
   covered. Dissents said there is no difference between football and baseball, so stare decisis require that all be
   covered.
f After all of this, the Court says
   • Baseball is engaged in interstate commerce
   • Exemption from antitrust laws is an exception and an anomaly
   • This anomaly has survived a bunch of cases dealing directly with it as well as the court's expanding view
     of interstate commerce because of stare decisis
   • Other sports aren't exempt
   • Radio and TV increased coverage and revenues, but nothing changed
   • Remedial legislation has been introduced many times, but never passed, and this has been deemed to be
     something more than silence and passivity.
   • To prevent the retroactivity problems, a prospective legislative remedy is preferable.
   • The slate with regard to baseball is not clean, and hasn't been for a long time.
g In the end, the Court upholds the antitrust exemption for Baseball.
h Douglas and Brennan dissent
   • Changing view of interstate commerce combined with changes in baseball are enough to overturn the
     "derelict" precedent.
   • Congress hasn't broadly exempted sports from antitrust legislation.
   • Congress's silence should not prevent the Court from fixing its own mistakes.
i Marshall and Brennan Dissent
   • The 600 baseball players are isolated
   • Not all that big of a legislative concern
   • When our errors deny substantial federal rights, like the right to compete freely and effectively to the best
     of one's ability and guaranteed by the antitrust laws, we must admit our error and correct it.
   • We could issue a prospective ruling.
j Congress finally eliminated the anti-trust exemption for major league baseball, but only for matters involving
   labor relations. Issues involving the minor leagues and major league expansion still enjoy the exemption.
i State courts are even more emphatic that statutory constructions should not be overturned.

A Suggestions for Analyzing Statutory Construction Problems
i At the outset state the issue of construction you intend to address
ii Organize your discussion around the tools being used, , and address both their weight here and in general.
   a the precise language being construed (start with this, then go with best to worse argument, or least to most
     controversial/deference to legislature)
   b surrounding statutory language
   c legislative history, inferred purposes of the legislation
   d administrative interpretations
   e any applicable canons of construction
i Don't organize around theoreticals like textualism, positivism, etc.