

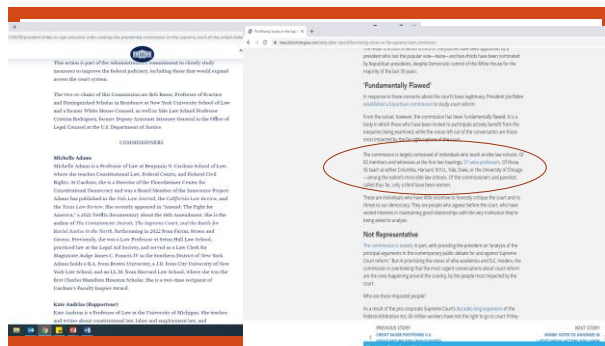


ADMINISTRATIVE LAW

WEEK TWO
Tuesday, Aug. 31, 2021
Professor Julia M. Glencer

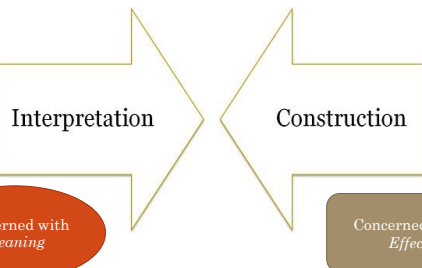
NOW TELL US ABOUT YOU . . .

1. Your name & status (2L, 3L, 2E, 3E, 4E)
2. Do you have any connection(s) to Admin Law?
 - ❖ Any Admin Law before law school? Military maybe?
 - ❖ Running into Admin Law in your current job?
 - ❖ Future job (job already "in the can," or one you may seek)?
 - ❖ Just want to understand this important topic?



AGENDA

- | | |
|-------------------|--|
| 6:00 to 6:30 | Overarching Points on the "Task" of Statutory Interpretation |
| 6:30 to 7:20 | Tips on Understanding the Legislative Process & the Theories of Statutory Interpretation |
| ----- Break ----- | |
| 7:30 to 8:00 | Review the <i>Tools</i> of Statutory Interpretation |
| 8:00 to 8:55 | Do 2 Exercises (<i>but we may just take 1 home . . .</i>) |
| 8:55 to 9:00 | Review prompt for Writing Exercise 1 |



OVERARCHING POINTS

Point 1 –

Statutory interpretation is a critical lawyering skill for ALL LAWYERS!

Every lawyer must have a basic understanding of, and ability to use, the statutory interpretation theories and tools.

- Central in Administrative Law *because* –
- Agencies are creatures of statute.
- Agency existence and authority is typically defined by statute, either in an organic act, an enabling act, or through the Administrative Procedure Act.

OVERARCHING POINTS

Point 2 –

Statutory interpretation is **NOT** the same as constitutional interpretation, although there *is* a good deal of overlay.

Why are they different?

- Different separation of powers concerns?
- Intent and intended longevity of the document itself?
 - Constitutions – are they “built to last”? Say the same for statutes?
 - Ever heard of a “super-statute”?

OVERARCHING POINTS

Point 3 –

To be *effective* with interpretation (whether constitutional or statutory), you must:

- have a sense of your *own* theoretical approach and how you would support it if challenged;

AND

- learn all you can about the *other* approaches so that you will be able to recognize, assess and refute them as needed.

OVERARCHING POINTS

Point 4 –

Much of this material is learned on your own (by reading) and in practice.

- We only have two class sessions to devote to this critical topic!
- ALWAYS be on the lookout for ways to enhance and exercise this skill.
- Know dedicated resources exist and resolve to find them.

OVERARCHING POINTS



Point 5 –

TONS of statutory interpretation occurs long before judges ever get involved (*if they ever get involved*).

- Individuals/entities (like (ERs)) making decision about behavior governed by statute.
- Lawyers counseling clients about behavior governing by statute.
- Prosecutors enforcing statutes.
- Admin agencies enforcing statutes or making related rules.

OVERARCHING POINTS

Point 6 –

Statutory interpretation can seem like an endless “thrust & parry” of theories and tools until someone makes a decision about what the statute means.



OVERARCHING POINTS

Thrust

16. Every word and clause must be given effect.



Parry

If inadvertently inserted or if repugnant to the rest of the statute, [words or clauses] may be rejected as surplusage.

Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 404 (1949)

OVERARCHING POINTS

Point 7 –

You may come to the task of statutory interpretation with some background to draw upon.

- English majors?
- Political science majors?
- Those of you who have experience already working inside courts and administrative agencies?

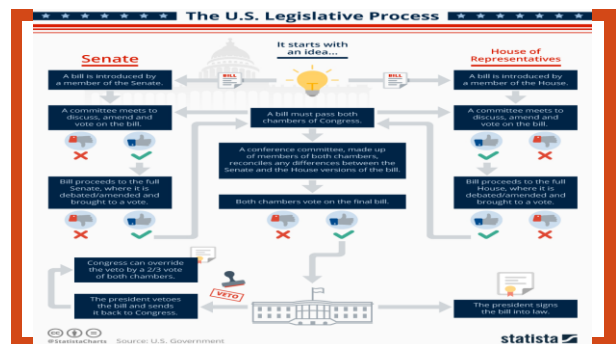
OVERARCHING POINTS

Point 8 –

Please don't get jaded about statutory interpretation! It is one of your most bread & butter skills. AND these case are all manner of FUN!



Legislative Process ("How a Bill Becomes a Law")



LEGISLATIVE PROCESS

- The process of enacting federal legislation “is complex – at times, *Byzantine*.”
- To be enacted, a bill must follow a *DAUNTING* path.

LEGISLATIVE PROCESS

- Detailed **RULES** govern every step of the process
 - Rules in the Constitution.
 - Rules made individually by the House and Senate.
- **Many things** influence the legislative process and *may* later play a role in statutory interpretation (or *maybe not*):
 - the various documents created in the legislative process,
 - the various influences on the legislative process.
 - the many and varied voices built into the legislative process.
- And while there *is* a textbook legislative process, the reality for any particular statute may be quite different.

LEGISLATIVE PROCESS

- The legislative process is *purposefully difficult*.
- “These protections, that considerable expense. By design they raise the decision costs associated with lawmaking, safeguarding liberty through a deliberate sacrifice of governmental efficiency. The federalists recognized as much. They knowledge that ‘this complicated check on legislation may be in some instances injurious as well as beneficial’ and that ‘the power of preventing that laws includes that of preventing good ones.’”

ADMIN. LAW at 177 (quoting John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 COLUM. L. REV. 673 (1997)).

LEGISLATIVE PROCESS



- The legislative process generates “legislative history,” which can become critically important (*or not*) in statutory interpretation.
- “Not all legislative history is created equal,” says Chief Justice Roberts.
- Some judges see a hierarchy of legislative history materials in terms of influence:

EXAMPLE:

“And referring back to the **Report of the Committee of the House** [this was a Senate Committee on Education & Labor], there appears this language: “It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate . . .”

Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892).

LEGISLATIVE PROCESS

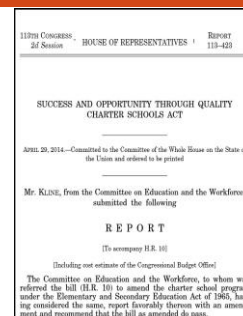
Understanding Committee Reports:

- Once introduced, a bill is referred to a congressional committee for further consideration.
- Each chamber has its own committees and each committee has jurisdiction over a certain subject matter.
- The leadership of each Chamber (House (Speaker of the House) and Senate (Senate Majority Leader) make the final referral decision to a committee.
- Once a bill has been referred to a committee that committee takes control.
 - Most often, the bill is referred to a specialized *subcommittee* for initial consideration.
- Once in committee, many things can happen to a bill . . .

LEGISLATIVE PROCESS

Understanding Committee Reports (cont'd):

- Typical steps inside the committee:
 - **Hold hearings** to take testimony from experts or interested parties and gather other forms of evidence
 - **Hold markup sessions** where a bill is revised, amended, or otherwise prepared to be reported out of committee.
- Last step is a committee vote:
 - If approved, the committee will report the bill to the Chamber and a detailed **House or Senate Report** is prepared and sent with the bill.
 - This **Report** usually describes the bill & deliberations (sometimes accompanied by report of minority view).



LEGISLATIVE PROCESS

Conference Committee Reports:

- After a bill makes it to the floor and passes in the chamber where it was originally introduced, the bill is sent to the *other* chamber.
- In that *other* chamber, the process begins with referral to committee.
 - The language of the bill will often be changed in this committee inside this *other* chamber. If that happens, the bill must be sent back to its original chamber.
 - The original chamber may accept the amended language. But if it doesn't, the two versions of the bill must be *reconciled*.
- Each chamber designates members for a **conference committee** which has the responsibility of creating a **unified bill**.
- The conferees debate the two competing versions of the bill and any revisions until a majority of the **conference committee** reaches an agreement on the revised bill.
- The revised version is sent to each chamber for final approval along with a **conference committee report** describing the bill and any compromises that had been made.

TEACH THYSELF

- Your LRW Research Text, Sloan, Ch. 8.
- Your ALWD, Rules 15 (Legislation & Other Legislative Materials)
- Research guidance from Chuck Sprowls, DCLI

“There are some very good resources available on the internet. Here are a few mentioned in discussions with my colleagues.”

 1. Georgetown Legislative History Research Guide: https://guides.ll.georgetown.edu/legislative_history
 2. Library of Congress: Compiling a Federal Legislative History: A Beginner's Guide: <https://guides.loc.gov/legislative-history>
 3. There are some lessons in CALI that may be helpful:

Federal Legislative History Research - Compiled Legislative History: <https://www.cali.org/lesson/860>

How to Research Federal Legislative History <https://www.cali.org/lesson/575>

TEACH THYSELF

- Know there are research resources & tools specific to statutory interpretation.
- **For example:**
 - **Keynotes** specific to statutory interpretation (allows you to trace thru cases):
 - 361 STATUTES
 - 361 III Construction
 - 361 III(C) Clarity and Ambiguity; Multiple Meanings 89
 - 361 Key 1107 Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
 - 361 Key 1111 Plain language; plain, ordinary, common, or literal meaning
 - **Treatises:** 2 J. Sutherland, STATUTORY CONSTRUCTION § 5201 (3d F. Horack ed.1943).
 - **Dedicated Acts:** In PA, we have a “Statutory Construction Act”

- Subchapter B. Construction of Statutes*
- § 1921. Legislative Intent Controls
 - § 1922. Presumptions in Ascertaining Legislative Intent
 - § 1923. Grammar and Punctuation of Statutes
 - § 1924. Construction of Titles, Preambles, Provisos, Exceptions and Headings
 - § 1925. Constitutional Construction of Statutes
 - § 1926. Presumption Against Retroactive Effect
 - § 1927. Construction of Uniform Laws
 - § 1928. Rule of Strict and Liberal Construction
 - § 1929. Penalties NO Bar to Civil Remedies
 - § 1930. Penalties for Each Offense
 - § 1931. Intent to Defraud
 - § 1932. Statutes in Pari Materia
 - § 1933. Particular Controls General
 - § 1934. Irreconcilable Clauses in the Same Statute
 - § 1935. Irreconcilable Statutes Passed by Same General Assembly
 - § 1936. Irreconcilable Statutes Passed by Different General Assemblies
 - § 1937. References to Statutes and Regulations
 - § 1938. References to Public Bodies and Public Officers
 - § 1939. Use of Comments and Reports



Theories of Statutory Interpretation

STATUTORY INTERPRETATION

- Is there something TO INTERPRET?

Ambiguous
(and thus in need of interpretation)

Unambiguous
(and therefore simply in need of enforcement)

- Pay attention to how *this* is diagnosed.

STATUTORY INTERPRETATION

Three Theories

- Textualism
- Purposivism
- Pragmatic & Dynamic
- Is there a Fourth?
 - The Chief Justice Roberts' Blend

Tools

- Dictionaries
- Custom & Usage
- Statutory Structure
- Legislative History
- Canons of Construction
 - Linguistic
 - Substantive
 - The Absurdity Doctrine

THREE THEORIES



Textualism: Focuses on *words* of the statute

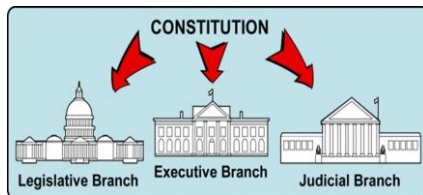


Purposivism: Focuses on the *purpose* of the statute



Pragmatic & Dynamic Interpretation: Focuses on the *practical consequences* of the various interpretations of the statute

Do You Understand the Separation of Powers Doctrine?



Is Congress an “it” or a “they”?



THEORY: TEXTUALISM



- Statutes are made up of WORDS!
- Basic position: Interpreters must seek to determine and to abide by the “public meaning” of the *enacted* text.
- Why does text matter so much?

• Why does text matter so much?

- Because it respects the legislature's role acting as a singular entity & prevents unelected federal judges from “legislating from the bench” to promote their own policies over the elected branches.
- Requires legislators to take responsibility for their acts/words.
- But *do* legislators pay close attention to language?
 - *Maybe they should?!?*
- Does language capture intent? (Always? Ever?)
 - *Maybe that's a necessary fiction?!?*
- Should a judge adhere to textualism even if the result is one that conflicts with a *discernable* legislative purpose?
 - *Would a textualist even ask that?!?*

THEORY: TEXTUALISM

- Is it the court's duty to remedy Congress' mistake or oversight?
- "This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. . . . We do so **not because that precise accommodative meaning is what the lawmakers must have had in mind** (how could an earlier Congress know what a later Congress would enact?), **but because it is our role to make sense rather than nonsense out of the *corpus juris***. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation

W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100-101 (1991).

"While the Constitution diffuses power the better to secure liberty, it also contemplates the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

THEORY: PURPOSIVISM

- This theory encourages judges to adopt an interpretation that respects the legislative purpose or reason for enacting the statute.
- Prioritizes the "intent" of the legislature.
- This theory does not necessarily ignore the text, but query whether purpose needs to be examined *always* or just when the text is *ambiguous*?

THEORY: PURPOSIVISM

- Does this theory assume that Congress is not able to capture its intent in clear language, such that we have to look for in elsewhere?
- Can one really discern purpose when legislation is drafted by so many different people with so many different agendas and intentions?
- What items should judges examine to discern intent?

"The reason of the law . . . [must] sometimes prevail over its letter.

The common sense of man approves the judgment . . . that the Bolognian law which enacted that 'whosoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person [who] fell down in the street."



THEORY: PRAGMATIC & DYNAMIC

- Focuses on the practical consequences that follow a given interpretation – whether the interpretation is based on a text or purpose.
- Said to involve a "heightened concern with consequences" and a "disposition to ground policy judgments in facts and consequences" rather than in "conceptualisms, generalities, pieties, and slogans."
- Tied to a belief that statutory interpretation should respond to changes in societal, political, and legal context.
- *Akin to Constitutional interpretation but this is a different setting.*

THEORY: PRAGMATIC & DYNAMIC

- Is this a usurpation of Congress's role if statutes are updated by unelected judges?
- Does this theory *really* elevate the courts above the other branches?
 - *Law schools are often knocked for fostering comfort with that elevation . . .*
- Is this a needed approach for outdated statutes in a time of gridlock?

Justice GORSUCH delivered the opinion of the Court.

"Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act . . . There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. **Today, we must decide whether an employer can fire someone simply for being homosexual or transgender.** The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. **Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.**"

"Those who adopted the Civil Rights Act [in 1964] might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the *express terms of a statute* give us one answer and extra-textual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Bostock v. Clayton Cty., 140 S. Ct. 1731, 1734-37 (June 15, 2020).

THREE THEORIES



Textualism:

W. Va. v. Hosp. v. Casey (U.S. 1991) (expert fees)
TVA v. Hill (U.S. 1978) (snail darter)



Purposivism:

Ch. Holy Trinity v. U.S. (U.S. 1892) (imported pastor)
King v. Burwell (U.S. 2015) (tax credits in states w/ federal exchange)



Pragmatic & Dynamic Interpretation:

Hively v. Icy Tech Comm. Coll. (U.S. 2017) ("Updating" Title VII to include sexual orientation)

NEW THEORY: CHIEF JUSTICE ROBERTS' BLEND?



NEW THEORY: JUSTICE ROBERTS' BLEND?

"The Affordable Care Act contains more than a few examples of **inartful drafting**. (To cite just one, the Act creates three separate Section 1563s. . .) . . . Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process." . . . And Congress passed much of the Act using a complicated budgetary procedure known as "reconciliation." . . . **As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation. . . . Anyway, we 'must do our best . . .'**"

King v. Burwell, 576 U.S. 473, 491–92 (2015) (Roberts, C.J., authoring majority opinion).

BREAK TO 7:30 p.m.



Tools of Statutory Interpretation

OVERARCHING POINTS . . .

- It is one thing to realize you are *facing* an interpretative issue. You also need the **TOOLS** to be ARGUE/RESOLVE it.
- Being able to use the tools persuasively takes time/experience.
- Judge who embrace certain interpretative *theories* tend to RELY more heavily on or to SHUN certain **TOOLS**.
- But then again, these **TOOLS** are *very* malleable.



STATUTORY INTERPRETATION

Three Theories

- Textualism
- Purposivism
- Pragmatic & Dynamic
- Is there a Fourth?
 - The Justice Roberts' Blend?

Tools

- Dictionaries
- Custom & Usage
- Statutory Structure
- Canons of Construction
 - *Linguistic**
 - *Substantive*
 - *The Absurdity Doctrine*
- Legislative History

TOOL: Dictionaries



- Rise in the use of dictionaries as an interpretive tool (tied to rise in Textualism).
- For many judges, dictionary is default source (aid or evidence?)
- Can become a "battle of the dictionaries" (*a Webster's for a Merriam's?*)
- Always a question of date (*dictionaries in use at the time of drafting?*)
- Little consideration of the wisdom of using this tool or its inherent manipulability.

TOOL: Dictionaries



- Use of dictionaries based on some seemingly unquestioned assumptions:
 - that dictionaries reveal the ordinary meaning of words
 - that dictionaries are neutral
 - that judges have the authority to make subjective decisions about which dictionary & which definition

United States Code Annotated
Title 29: Labor
Chapter 23: Worker Adjustment and Retraining Notification (Refs & Annots)

29 U.S.C.A. § 2101

§ 2101. Definitions; exclusions from definition of loss of employment

Currentness

(a) Definitions

As used in this chapter--

(1) the term "employer" means any business enterprise that employs--

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

Other terms in Sec. 210:

- Plant closing
- Mass layoff
- Representative
- Affected employees
- Employment loss
- Unit of local government
- Part-time employee

United States Code Annotated
Title 42: The Public Health and Welfare
Chapter 48: Community Services Programs
Subchapter I: Community Economic Development (Refs & Annots)

42 U.S.C.A. § 9801

§ 9801. Statement of purpose

Currentness

The purpose of this subchapter is to encourage the development of special programs by which the residents of urban and rural low-income areas may, through self-help and mobilization of the community at large, with appropriate Federal assistance, improve the quality of their economic and social participation in community life in such a way as to contribute to the elimination of poverty and the establishment of permanent economic and social benefits.

CREDIT(S)

(Pub.L. 97-35, Title VI, § 612, Aug. 13, 1981, 95 Stat. 489.)

WESTLAW EDGE

United States Code Annotated
Title 7: Agriculture (Refs & Annots)
Chapter 35: Agricultural Adjustment Act of 1938
Subchapter I: Loans, Party Payments, Consumer Safeguards, Marketing Quotas, and Marketing Certificates (Refs & Annots)
Part D: Wheat Marketing Allocation

7 U.S.C.A. § 1379a

§ 1379a. Legislative findings

Currentness

Wheat, in addition to being a basic food, is one of the great export crops of American agriculture and its production for domestic consumption and for export is necessary to the maintenance of a sound national economy and to the general welfare. The movement of wheat from producer to consumer, in the form of the commodity or any of the products thereof, is preponderantly in interstate and foreign commerce. Unreasonably low prices of wheat to producers impair their purchasing power for nonagriculture products and place them in a position of serious disparity with other industrial groups. The conditions affecting the production of wheat are such that without Federal assistance, producers cannot effectively prevent disastrously low prices for wheat. It is necessary, in order to assist wheat producers in obtaining fair prices, to regulate the price of wheat used for domestic food and for exports in the manner provided in this part.

CREDIT(S)

TOOL: Dictionaries

"Founding-era dictionaries define the word "recess," much as we do today, simply as "a period of cessation from usual work." 13 THE OXFORD ENGLISH DICTIONARY 322–323 (2d ed. 1989) (hereinafter OED) (citing 18th- and 19th-century sources for that definition of "recess"); 2 N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("[r]emission or suspension of business or procedure"); 2 S. Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 1602–1603 (4th ed. 1773) (hereinafter Johnson) (same)."

-*NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (emphasis added).



TANIGUCHI

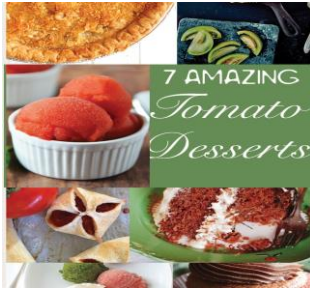


- Did you agree with **Justice Alito in the majority**, that a "translator" is NOT included in the word "interpreter"?
- Did you agree with **Justice Ginsberg, in the dissent**, that "translator" IS (of course) WITHIN the ordinary understanding of "interpreter"?

TOOL: Custom & Usage



- Recognition that words can take on a certain meaning that differs from ordinary meaning, usually inside a trade or industry, and that such meaning should govern.
- Often, specialized statutes/acts will contain definitions to make this clear.
- Sometimes evidence will be offered on this very "custom & usage" point.
- **Questions:**
 - Does Congress know of these meanings? [often punt to admin agencies]
 - Might the individuals/entities operating within the trade know more about the history and evolution of these meanings? [admin agencies DO know a great deal more than the generalist Congress]



TOOL: Canons of Construction

- **Absurdity Doctrine:** Avoid attributing a meaning that creates an absurd result (because Congress wouldn't want that).
- **Substantive Canons:** Rules that favor certain interpretations over others, usually for policy reasons.
- **Linguistic Canons:** Rules that reflect conventions about how we understand the English language.

TOOL: Canons of Construction

- **Linguistic Canons:** "reflect linguistic conventions about how the English language is generally used and understood."
- Not meant as an absolute and can be overcome by other "indicia of meaning."
- **Examples:**
 - *Noscitur a sociis*
 - *The whole act rule of consistency*
 - *Series qualifier canon*



TOOL: Canons of Construction

- But English and writing conventions change as society changes.
- Always a question whether Congress drafts with these in mind.
- Some say these are too numerous, too able to be manipulated, and/or judges have learned how to simply use these for their own purposes.



Tangible object?
Evidence of fraud?

"Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

18 U.S.C. § 1519

... if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, . . . such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years."

- "rule of the last antecedent" (used by majority)
- "series qualifier canon" (used by dissent)



Lockhart v. United States, 136 S. Ct. 958 (2016).

Parallel Structure

Example (non-parallel structure):

The defendant testified that, on the day of the murder, he was at home alone washing his car, he mowed his lawn, and his dog needed a bath so he gave her one.

Parallel Structure

The defendant testified that, on the day of the murder, he was at home alone

Component parts:

- washing his car,
- he mowed his lawn,
- his dog needed a bath so he gave her one.

Parallel Structure

Example (proper parallel structure):

The defendant testified that, on the day of the murder, he was at home alone washing his car, mowing his lawn and bathing his dog.

Parallel Structure

- **Proper parallel structure is good grammar, but so much more:**
 - Improves readability and allows faster reading
 - Enhances the reader's understanding of logical relationships
 - Enhances persuasiveness
 - Promotes assessment by the writer of the strength of her own logical reasoning as she writes
 - Are the ideas captured in the component parts actually working together towards a larger concept *or* has the writer tried to force what are truly dissimilar ideas together?

TOOL: Canons of Construction



- Empirical study: 137 congressional counsels who draft legislation (2013)
- Ironically –
 - they use the ones courts *cite less often* (including *expressio unius*).
 - *they didn't use* the ones courts *DO* use (including rule against superfluities, whole act rule, use of dictionaries).
- They identified the difficulty of using some of these canons for political or institutional reasons.
- Study's conclusion: These findings call into question the justification for these linguistic canons – namely that they reflect *how* Congress drafts and that because Congress is aware of these rules and that they helpful “faithful agent judges” effectuate Congressional intent.

TOOL: Statutory Structure

- Meaning of a statute can be discerned (in whole or in part) from “structure” – its own or the surrounding structure of the act in which it sits, or the title in which it is placed.
- One goal of statutory interpretation is to avoid having parts of the same act in tension with each other. Why? Because acts are passed as a whole.
- *In pari materia* concept expands this to acts in the same subject matter.
- Strong structural focus in Taniguchi & King

TOOL: Statutory Structure



- Blend of textualism and purposivism that recognizes Congress' true state? In-artful drafters with a plan?

TOOL: Legislative History

- Includes records of congressional debates, committee reports, and any other documents generated during the legislative process.
- Value of legislative history as guide to meaning is in the "eye of the beholder" & depends on one's vision of Congress.
- Pure textualists shun the use of legislative history.
- Others find it useful to a point (recall the hierarchy of value)
- Often offered as "further support" of a chosen interpretation (as in Babbitt).

TOOL: Legislative History

- Arguably permits end run around bicameralism [*does it really?*]
- Is Congress an "it" or a "they"?
- Knowing courts use legislative history, do legislators "stack" it?
- Problem with lawyer & judicial "cherry-picking;"
- There is subjectivity inherent in retelling the story of a bill's journey through Congress.
- Judges can come to opposite conclusions from same history.
- "Further support" but is it actually reverse manufacturing?



EXERCISE 1

Brainstorming: The Case of the Negligently Placed Mail



THE SITUATION . . .

- Plaintiff was injured after she tripped over a package that had been mailed to her and negligently placed by the postman on her doorsteps where she would not see it.
- Plaintiff filed her Complaint in the United States District Court for the Western District of Pennsylvania (but a judge has not yet been assigned).
- U.S. Postal Service filed a motion to dismiss the case on the grounds that it has sovereign immunity from suit.

THE QUESTION . . .

Would the Postal Service's motion to dismiss be granted?

Prediction . . .

• **Think about what you would want to know to make this prediction.**

- What **arguments** can you envision either side making?
- What **research** you might wish to conduct?
 - Identify *issues* or *policy* concerns to research
 - Identify *resources* you might wish to use
- What other information might you wish to know?
 - Facts?
 - What else?



But remember:
We're here to think about
statutory interpretation! Think
in terms of the Theories and the
Tools we just reviewed!