LEGISLATION OUTLINE – SPRING 2010 – PROFESSOR SILBAUGH

INDEX

I. INTRODUCTION TO THE LEGISLATIVE PROCESS……..3
A. HOW A BILL BECOMES A LAW.....**3**
B. A FIRST LOOK AT STATUTORY INTERPRETATION……**6**
C. THEORIES OF LEGISLATIVE PROCESS……..**8**
D. PRECEDENT…….....**9**
E. DIALOGUE BETWEEN CONGRESS AND COURT……....**12**
F. SINGLE-SUBJECT RULE AND OTHER PROCESS ADJUSTMENTS……....**13**

II. THEORIES OF STATUTORY INTERPRETATION……14

A. BACKGROUND – 3 THEORIES……**14**
B. INTENTIONALISM……**15**
C. LEGAL PROCESS – PURPOSIVISM……**18**
D. "PLAIN MEANING" – TEXTUALISM……..**22**
E. TEXTUALISM……..**24**
*Application – Coyote Tail Rewards Act……..**27**
F. LAW AS EQUILIBRIUM……**28**
G. RENT-SEEKING AND PUBLIC CHOICE THEORY……**29**

III. DOCTRINES OF STATUTORY INTERPRETATION……...31

CANONS OF INTERPRETATION
A. TEXTUAL CANONS……...**31**
B. SUBSTANTIVE CANONS……..**35**
1. Constitutional Avoidance [**p. 36**]
2. Rule of Lenity [**p. 38**]
3. Federalism [**p. 39**]
4. Llewellyn on the Canons [**p. 41**]
EXTRINSIC AIDS
C. COMMON LAW BACKGROUND……**43**
D. LEGISLATIVE BACKGROUND……...**44**
1. History/Background Circumstances [**p. 46**]
2. Committee Reports [**p. 46**]
3. Statements by Sponsors or Drafters of Legislation [**p. 49**]
4. Legislative Deliberation: Hearings, Floor Debates, Rejected Proposals and Dogs that Didn't Bark [**p. 50**]

E. POST-ENACTMENT LEGISLATIVE BEHAVIOR……...**51**
F. LEGISLATIVE INACTION……**54**
G. OTHER STATUTES……**56**
1. In Pari Materia [**p. 56**]
2. Borrowed or Modeled Statutes [**p. 57**]
3. Rule Against Implied Repeals [**p. 58**]
H. AGENCY INTERPRETATIONS……**59**

I. INTRODUCTION TO THE LEGISLATIVE PROCESS

A. HOW A BILL BECOMES A LAW (The Civil Rights Act of 1964)

1) Background to Statutes and Statutory Interpretation.
   a) **Article I** of the Constitution gives law-**making power to the legislative branch**.
      i) Statutes = Public Law.
      ii) Common Law = Private Law.
      iii) Change from CL to statutory law in the late 19th Cent.
         (1) Now, almost everything is codified.
         (2) Expansion of agencies [eg. EPA, EEOC] = Enforce and interpret statutes.
   b) How a bill gets passed.
      i) Legislative calendars.
      ii) Political parties. [generally form by issue.]
      iii) **Vetogates**. = Opportunities to kill a bill. Emanate from constitutional provisions, rules formally adopted by legislative body. [Some formal, some more informal "folkways"]
         (1) Not referring it to committee.
         (2) Killed in committee.
         (3) Subcommittee.
            (a) Why so many? Presumption against legislation.
            (b) **Anti-Democratic**?
            (c) or… Allows people to **deliberate better**.
      iv) Compromise and decisionmaking.
         (1) The final product is often the result of lots of compromises!
      v) **Floor Debate**.
         (1) No mark-ups. **Aimed more at the constituents**, not attys.
         (2) "Cheap talk" aimed at the media.
      vi) Legitimacy: diff. source of authority than the CL.
      vii) Drafting.
         (1) Changes language. Clarifies?

2) **House and Senate**.
   a) House has the Rules Committee.
      i) Recommends expedited consideration of important bills.
      ii) Also has separate **Committees**, with Committee Chairs [by seniority.]
         (1) Committee chairs influence composition of a bill.
         (2) Intensity of Interests.
         (3) Meant to have **experts** in each Committee.
         (4) Committees give us **technical mark-ups**, clues as to what they were thinking.

(5) However, there is lots of distortion, as there are lots of "special interests."
(a) = **Rent-seeking**. Unrepresentative.

b) **Committee Reports are considered the <u>best</u> evidence of Legislative History**. Committee makes mark-ups, then sends the bill to the floor. Also makes a report about the details of the Committee's considerations and dissents.
c) Senate has the Judiciary Committee.
d) **Filibuster** = endless debate in the Senate.
   i) Wear people out, and the force them to vote a certain way.
   ii) Can end this with cloture [2/3rds vote for ending, or 67 votes.]
      (1) Cloture = Motion to bring to a close debate on a bill.
e) A bill does not become law until both chambers agree to **identical legislative language**, and then must be signed by the President.
f) Three important aspects of congressional decisionmaking occur during floor consideration:
   i) Debate.
   ii) Amendment.
   iii) Vote.
g) Amendments.
   i) Perfecting? Or killer Amendments?
   ii) Reflect compromises.
   iii) "Amendment Trees."
      (1) Limited. Must have strategy for filling these up.
      (2) Must resolve initial amendment before making a new one.

3) Background to the **Civil Rights Act of 1964**.
   a) Following *Brown*, public accommodations were still not integrating.
      i) Schools were still segregated, restaurants wouldn't serve blacks, Jim Crow laws still existed.
   b) President Kennedy came up will bill to target: [Only legislators can actually introduce bills, NOT the President.] Role of President = Agenda Setter.
      i) Title II – public accommodation in public facilities.
      ii) Title III – school desegregation.
      iii) Title V – expanded power of civil rights commission.
      iv) Title VI – No discrimination if you receive federal funds.
      v) Title VII – Equal Employment.
         (1) Establishes the EEOC to monitor enforcement on federal contractors [otherwise, doesn't reach private employers.]
         (2) Here's where they added the term "sex" as one way of discriminating.
         (3) Was originally added by Smith to kill the bill!
   c) Passage in the House.

i) Starts with Judiciary Committee. [subcommittee]
ii) Then goes to Rules Committee.
(1) Sets debate procedures, can kill bills here too.
(2) 3 procedures to circumvent:
(a) Discharge petition.
(b) Calendar Wed.
(c) Schedule meeting to hear bill.

d) Passage in the Senate.
i) Dealt with the House-passed bill, not the original Kennedy bill.

e) Congress tends to use the move of "strengthening the bill just to kill it."
i) Also: Start strong, then gradually make the bill weaker.

f) Importance for **Legislative History**.
i) House actually marked up bill.

4) Civil Rights Act of 1964, Title VII.
a) Prohibits job discrimination on the basis of race, sex [*added to kill the bill*], religion, or national origin. [**§703(a)(1-2)**]
i) Definitions of "employer," "state." No definition of "discrimination."
(1) Specific exceptions to employer category.
(2) Specific exemptions on when to exclude.
ii) Defense of discrimination when it is a "bona fide occupational qualification" reasonably necessary… **[Race cannot be a BFOQ!]**

b) **EEOC** [agency] is in charge of implementing.
i) Created by Congress.
ii) Can collect data, gets employers' info.
iii) Only for public employers!!
iv) File a claim here first. EEOC determines whether there has been a violation.
v) If above doesn't work, then individual can file suit [see *Griggs*]

5) ***Griggs v. Duke Power Company (4th Cir., 1970):*** Diploma and test requirement to promotion. African American workers brought claim, alleging this violates Title VII.
a) EEOC: Tests are unlawful.
i) **Majority**: Tests are **lawful**, under Title VII.
(1) EEOC said they were lawful… but don't need to follow agency interpretation when there is contrary compelling legislative history.
(2) The Tower Amendment [**§703h**] is at issue here, and its interaction with §703(a).
(a) Does Title VII prohibit qualifying tests that tend to deprive one group??
(b) Court says no, not prohibited: **Legislative History**.
(i) Case [Motorola] said that tests were prohibited.
1. Tower then made his initial Amendment.
2. "Professionally developed" = too broad.

3. Tower then made 2nd revised Amendment.
(ii) Look to published legislative debate.
(iii)Clark and Case [experts on Title VII] say tests are allowed.
(c) Sobeloff says tests would go against §703(a)(2)…

ii) **Dissent**: Should defer to EEOC interpretation here.
(1) Practices that are fair in form but discriminatory in substance = violate Title VII.

iii) Supreme Court later went with the dissent here, and said the tests were unlawful.
(1) Disparate impact here on minority workers is a form of discrimination.

b) Evaluating *Griggs*.
i) Technical Issues: How to read §703(a) and (h)?
ii) Normative Issues: Differences in majority and dissent:
(1) Differences in reading §703(h),
(2) Different visions of racial justice,
(3) Different degrees of deference to the EEOC, and
(4) Different visions of the role of courts in implementing Title VII.

B. A FIRST LOOK AT STATUTORY INTERPRETATION (*Weber*)

1) Background to *Weber*: Affirmative Action programs.
a) Companies faced losing govt. contracts and quotas if their hiring practices did not produce enough diversity in the workplace.
b) Does this mean that govt. can lawfully, under §703, allow affirmative action programs?

2) ***United Steel Workers of America v. Weber (U.S., 1979):*** United Steel Workers made affirmative action plan to produce more diversity in company. Set aside certain % of programs for blacks. White worker, Weber, sues under § 703(a) and (d).
a) Does Title VII allow employers to enact programs [af. action] that make up for past discrimination?
i) Majority (**Brennan**): This plan does not violate Title VII.
(1) Interaction of §§ 703(a), (d) and (j).
(2) Brennan takes the **purposivist** approach.
(a) Doesn't rely on the text/plain meaning.
(i) "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." [*Holy Trinity*….]
(b) Must read Title VII against the background of its legislative history and historical context. Cites the House Report.
(c) Purpose: Open up opportunities for blacks, don't regulate private businesses too much [can experiment with affirmative action.]

(d) §703(j): Focuses on the word "requires." Doesn't require quotas… but permits them?
(i) Expressio unius pops up here.

ii) Concurrence (**Blackmun**): Additional considerations, **practical and equitable**, partially perceived by Congress, support the court's opinion here.
(1) Dynamic Interpretation.
(2) Problem with looking at just intent: Things change.

iii) Dissent (**Rehnquist**) takes the **Textualist, Intentionalist** approach.
(1) Looks to Minority Report, other material that supports the idea that this affirmative action plan goes against Congressional intent.
(a) This bill came about through bargaining and compromise.
(2) §703(d): Unambiguous text that says no program that discriminates.
(3) Also looks to the Judiciary Committee minority report ["**loser's history**"?]
(a) How important is it to look at reports from the losing side?

b) Legislative Sources cited:
i) Statutory Text.
(1) "Discrimination."
(a) No definition in the Act.
(b) Merely distinguish… or more negative?

ii) Legislative History.
(1) House and Senate committee reports, debates.

iii) Legislative Facts.
(1) Background, history, social conditions.

iv) Canons of Interpretation.

v) Different political theories about: Separation of powers, democracy, meaning/communication, of Article I, of judges, of interpretation, gap-filling.

c) Intent v. Purpose, as applied here.
i) **Intent:** What did legislatures mean the answer to this Q to be.

ii) **Purpose:** Intent a phony inquiry, they didn't mean it to be anything b/c they didn't contemplate, so find what direction they were headed more broadly and make this fit.
(1) Answer the question most consistent with the statute.
(2) Statute was aimed to help Af. Americans.
(3) Wanted to avoid undue regulation of private businesses.

iii) **Spirit:** Avoid result completely at variance with purpose.

C. THEORIES OF LEGISLATIVE PROCESS

1) Different Theories on how the legislative process works.
   a) *Descriptive Theories = Theories of how process actually works.
   b) *Normative Theories = Theories of how process should work.
      i) *Note: Interpretation of the events preceding the enactment of the Tower Amendment varies depending on the **interpreter's descriptive and normative assumptions about the 1964 Congressional process**.

2) **Interest Group/Pluralism Theories**.
   a) Focuses on the influence and behavior of organized groups in the political process.
      i) Small groups organize together for political action.
      ii) **Goal = Minorities come together**.
         (1) **Resolve conflicting** wants of **factions** [= groups that are united with common purpose against other groups] and to channel them in socially productive ways.
         (2) Interest group politics results in **pluralism** [= spreading of political power across many political actors.]
      iii) **What they like: Bargaining, Negotiation**.
         (1) No such thing as a "majority." All sets of differently-interested minorities.
         (2) Bargaining takes place among numerical minority groups on non-common issues.
         (3) Legislators care more about pleasing intense preferences of minorities.
         (4) Large groups offer: Purposive benefits [ideological, issue-oriented driven: NRA, Sierra Club] and Solidary benefits [social rewards: AAA].
      iv) Modern:
         (1) Interest-Group Liberalism.
            (a) Competing interests are usually balanced by other groups, and small minorities generally lose to broader groups.
         (2) Realist Pluralism.
            (a) Pluralism only serves the interests of the upper-class citizenry.
         (3) **"Free-riders":**
            (a) Interest groups will not readily form b/c free riders, who obtain the benefits of a new law without sharing the burdens discourage potential group members from acting.
         (4) **"Log-rolling":**
            (a) Interest groups, who interests do not necessarily conflict with other groups, will compromise with each other before competing with each other.

3) **Proceduralist Theories**.
   a) Focuses on the procedures by which a bill becomes a law.
      i) Want to constrain the effects of factions.
      ii) **Goal = Avoid Tyranny of the Majority**.
         (1) Checks and Balances by the House of Representatives and the Senate.
      iii) **What they like: Deliberation and Vetogates**.
         (1) **Madisonian = Deliberative Value of Process**. Must control factions.
         (2) Liberal Theory = Legislation should be hard to do.
            (a) Libertarianism, free markets… = anti-Govt. Regulation.

(b) Proceduralism ensures that improper laws don't go through.
(c) But what about the good laws??
(3) Republican Theory = Deliberation improves the end product.
(a) Shapes public deliberation on proposals so they better serve the public good.
iv) Rationale: Congress is designed to produce well-deliberated laws.
(1) Concern that majorities trample minorities.
(2) Vetogates: Avoid hasty bills, avoid supermajority from getting away with its bills.
v) Counter: Sometimes, deliberation hurts.
(1) Positive social changes?
(2) Vetogates don't always produce better deliberation.

4) **Institutional Theories**.
a) Center on the relationships among various political institutions and the effects of broad governmental structures on policy.

5) Why does the Legislative Process matter?
a) Deliberation/Arguing.
b) Bargaining/Compromise.
c) Congress as one individual with a "single purpose"?
i) Idea of bargaining refutes this. **Many people/many intentions**.
ii) Deliberation might lead to a convergence toward a common purpose.
d) Most members in Congress have no ideological views on issues.
i) Can vote one way or another… vote trading or vote selling. Voters can make alliances.
ii) Deliberation can change minds.

D. PRECEDENT

1) Background to stare decisis.
a) **Vertical coherence** = Interpretation is coherent with authoritative sources situated in the **past**: the original intent of the enacting legislature, previous administrative or judicial precedents interpreting the statute, and traditional or customary norms.
i) Very **formalistic**. Pre-Legal Realism.
ii) Values:
(1) Formal legitimacy.
(2) Rule of law. "We're finding law, not making it."
(3) Predictability, stability.
b) **Horizontal coherence** = Interpretation is **consistent with the rest of the law today**. Look to the statute's contemporary purposes, other statutes now in effect and their statutory policies, and current values (even judge's personal values.)
i) **Legal Realist** approach. Reject strict formalism.
ii) Values:
(1) Functional legitimacy.

(2) Efficiency.
(3) Efficacy with the present.
(4) Idea that vertical sources are manipulable.

c) Stare Decisis.
   i) **Doctrine requires that courts treat prior decisions as presumptively correct**.
   ii) Generally must follow precedent unless it is clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions and that more good than harm would come by departing from precedent.
      (1) Enough judicial restraint?
   iii) *Brandeis-Levi* Rule: **Statutory decisions** should have **more stare decisis deference**… otherwise this is merely common law action.
      (1) Other ideas of deference:
         (a) Constitutional precedents = Not rigidly binding, since Congress cannot correct errors.
         (b) Common law precedents = Presumption of correctness, b/c of vertical coherence, settled private law expectation.
         (c) Statutory precedents = Super-strong presumption of correctness.
            (i) Authority of statute comes from the legislature.
            (ii) Concern with reliance, retroactivity.

2) ***Flood v. Kuhn (U.S., 1972):*** Baseball player, Flood, didn't want to be traded for particular team. Brought an antitrust suit against Baseball Commission. Statute = **Sherman Anti-trust Act** [deals with anti-competitive practices].
   a) Lowers courts said no suit, prior S.C. precedents held baseball immune from antitrust suits.
   b) Majority (**Blackmun**): Uphold precedents, baseball is immune from antitrust suits.
      i) Importance of stare decisis. = **"Super-strong" presumption against overruling statutory precedents**. Statutory precedents can't be revisited.
         (1) *Federal Baseball Club*: **Baseball is not interstate commerce**, so not within the scope of federal antitrust laws.
         (2) Now, baseball = interstate commerce… however, still exempt.
         (3) Up to the legislature to change this. **Congressional silence/inaction** means they approve of court's decision.
            (a) Whether Congress did or did not act doesn't matter… as long as Congress **can** act.
            (b) Which Congress are we looking for? Of the past [Act enactment]? Or current?
         (4) **Retroactivity** concerns. **Reliance** concerns.
            (a) We want to find law, not make law.
   c) Dissent (**Douglas**): Changing times, changing views of baseball.
      i) Congress has had other inactions.
      ii) **Inaction ≠ Acceptance!!**

d) Dissent (**Marshall**): Better approach here would be to reject stare decisis.
   i) Baseball players are too few to enact legislation.
e) *Note: Curt Flood Act of 1998: Applies major league baseball to antitrust laws.
f) **Stare decisis: Factors to Consider.**
   i) Heightened precedential force of statutory stare decisis.
   ii) Longstanding nature of the precedent.
   iii) The practicability of implementing the precedent.
   iv) The well-settledness of the precedent.
   v) The nature of the reliance interests surrounding the precedent.
   vi) The embeddedness of the precedent. (eg. in antitrust law)
      (1) Court in *Monell v. Dept. of Social Services (1978)* overruled prior precedent.
         (a) **Clearly erroneous precedent.**
         (b) **Stare decisis… of prior cases [before precedent at issue.]**
         (c) **Congressional Nonacquiescence.**
         (d) **Dynamic Statutory Scheme.**
g) Rehnquist court: Less stare decisis in anti-trust cases.

3) ***Johnson v. Transportation Agency, Santa Clara (U.S., 1987):*** Defendant promulgated affirmative action plan. Allowed consideration of sex as a factor in promotion. Male employee, who didn't get promoted, brought Title VII suit. §703(j) again, as in *Weber*.
   a) District Court and EEOC said this was a violation of Title VII.
   b) Ct. of Appeals and Court here said it does not violate Title VII, following *Weber*.
      i) Majority (**Brennan**): Plan doesn't have quotas, sex is just a factor for consideration. = **Super-strong stare decisis.**
         (1) Importance of stare decisis: ***Weber* decision**.
         (2) **Congressional acquiescence** here again… no change in statute.
            (a) **Congress has ratified Weber.**
            (b) Not one bill proposed to change this.
      ii) Concurrence (**Stevens**): Will follow *Weber* even if he doesn't agree with it.
      iii) Concurrence (**O'Connor**): Need to show a prima facie case of discrimination.
      iv) Dissent (**Scalia**): Should limit *Weber* to application to private employers… not public employers [as here.]
         (1) **Textualist argument**. Against "legislative intent."
         (2) Congressional acquiescence could just mean it doesn't know how to change, isn't aware of the need, is indifferent.
            (a) Vetogate problem.
            (b) Poor, white men don't have political power… to change the laws.
         (3) **Against stare decisis** here.
            (a) Civil rights statute.
               (i) **Civil rights cases generally get less stare decisis force**.

1. Should narrowly construe civil rights statutes because of public interest group persuasion.

(b) *Weber* goes against Court's past Title VII decisions.
(c) *Weber* was a recent decision.
(d) Beyond a doubt that *Weber* was wrongly decided.

c) Legislative History:
   i) **Legislative inaction**.
      (1) Brennan: Means it agrees with interpretation. Scalia: Factions, interest groups, unaware, etc.
   ii) **Congressional intent** in putting "sex" in Title VII: Meant to kill the bill!
   iii) How to interpret this insertion?
      (1) Pluralist: 2 groups came together, no single purpose.
      (2) Spirit of Statute: Congress acts as one body, one purpose.

E. DIALOGUE BETWEEN CONGRESS AND COURT

1) Congress can fix inaccurate statutory interpretations?
   a) ***Wards Cove Packing Co. v. Atonio (1989):*** Disparate impact in hiring of canary jobs and office jobs.
      i) Court: Plaintiff needs to make a prima facie case by showing:
         (1) Statistical disparity;
         (2) the statistical disparity can be linked to specific employment practices;
         (3) that those practices do not have a substantial business justification.
      ii) 5 other cases **read Title VII narrowly** during the same Supreme Court term.
      iii) Became harder for plaintiffs to prove discrimination.
      iv) These cases discouraged employers from adopting af. action plans.
   b) Congressional response.
      i) **Civil Rights Act of 1991**.
         (1) Meant to **overrule all 6 cases**.
         (2) President said this went too far.
         (3) 1991 bill eventually passed… came back to pre-*Wards Cove* caselaw of business necessity.
         (4) Made phony legislative history = Strategic! Know of its role in the courts.

F. SINGLE-SUBJECT RULE AND OTHER PROCESS ADJUSTMENTS

1) Background: State procedures adapted to Process Difficulties.
   a) State Constitutions.
      i) Are generally more susceptible to amendments than the federal Constitution.
      ii) Are more susceptible to Process Concerns.
      iii) More open to the idea of structuring lawmaking, geared toward the public interest.
   b) **Process Concerns?**
      i) **Rent-seeking** by private groups at the public's expense. = When small group tries to extract benefit at the public good's expense.
      ii) **Log-rolling** = The pairing of inconsistent subjects to unite minority factions into a majority for passage.
         (1) The individual provisions would not pass on their own "merits"… not enough votes.
         (2) However, isn't there satisfaction among the groups with the political system?
      iii) Hostage votes. [will not vote for your act unless you vote for mine.]
   c) **Process Solutions.**
      i) Legislative Immunities: Can't prosecute legislator for what he/she did as a legislor.
      ii) Line Item Veto.
         (1) Just take out words, numbers, letters in a statute.
         (2) Governor generally does this… but is usually barred from creating brand new legislation.
      iii) Substantive Constitutional Requirements.
         (1) **Generality requirements**.
            (a) Public process requirement: Serve public, over private, interests.
            (b) Rules against special legislation. Some states are specific, some are more general.
            (c) Uniformity. Laws must be uniform, laws must apply the same across the state [no community favoritism]
         (2) **Single-subject rule**.
            (a) 42 states have adopted this, which **limits bills to one subject**.
               (i) Generally, the subject has to be in the title of the bill.
            (b) Meant to get rid of log-rolling.
            (c) Remedies for failure to make single-subject: Get rid of inconsistent provision… or get rid of entire bill!
            (d) Exceptions:
               (i) Appropriation bills [some states.]

2) ***Department of Education v. Lewis (Fl, 1982):*** Had single-subject rule in FL Constitution, that limited appropriations bills. Bill passed that seemed to regulate marriage. [no funding for

university that lets a group advocate sex between non-married people]

a) Court: This appropriations bill is invalid.
   i) Applied *Brown v. Firestone* requirements for appropriation bills:
      (1) If a provision in an appropriations bill changes existing law on any subject other than appropriations, it is invalid.
      (2) A qualification or restriction must directly and rationally relate to the purpose of the appropriation to which it applies.
b) The test of single-subject: **Can this provision pass on its own?** If not, then doesn't meet single-subject requirement. Here, no, part of overall.

II. THEORIES OF STATUTORY INTERPRETATION

A. BACKGROUND – 3 THEORIES

1) Statutory Interpretation: How to Approach?
   a) Any conflict between the legislative will and the judicial will must be resolved in favor of the former.
   b) Statutory interpretation in the hard cases involves substantial judicial discretion and political judgment.

2) Three Dominant Approaches:
   a) **Intentionalism** [dominant until the 1930s, still relevant].
      i) **Find and follow the intent of the statute's drafters**.
         (1) How would the initial drafters answer the question at hand?
      ii) Archeological examination.
   b) **Purposivism** [strong during the 1930s to 1980s, still relevant].
      i) **Apply the interpretation that best carries out the statute's purpose**.
         (1) What was the drafters' overall purpose?
      ii) Some examples: Legal Process, Hart & Sacks, Legal Realism movement.
   c) **Textualism** [strong 1980s to present].
      i) **Apply the "plain meaning" of the statute/text**.
      ii) Meant to constrain judges.
   d) **<u>*Note: Courts are not bound to follow a particular method of interpretation!</u>** Only bound by specific holdings.

*****Distinguish their applications when text is ambiguous and when it is not ambiguous but it leads to absurd or unintended results. *****

- <u>Also: Consider the difference between ambiguous text and clear text with an absurd or bad result.</u>

3) Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law
   a) **The Mischief Rule.** What was the mischief for which the common law did not provide?
      i) What was the CL before?
      ii) What was the mischief?
      iii) What remedy did the legislature come up with?
         (1) *Heydon's Case (1584).*
   b) **The Golden Rule.** Take the statute as a whole, and find the ordinary signification…. unless it produces an inconsistent or absurd result.
      i) A judge can depart from the plain meaning to avoid an absurd result. [Even Scalia would do this!]
      ii) Eg. "No person may sleep in the train station."
      iii) Absurd = So against common sense that Congress couldn't have possibly meant it.
   c) **The Literal Rule.** Take the plain meaning of the statute.
      i) Judges should not be concerned with whether statutes is unwise, unjust, mischievous. Don't even care if the result is absurd.
   d) **A Second Breath of Fresh Air**. Must end up trusting common sense in the end, as we can't explicitly state every purpose/thought in a statute.

B. INTENTIONALISM

1) ***Rector, Holy Trinity Church v. United States (U.S., 1892):*** Law made it unlawful to assist or encourage the importation or migration of any alien to perform "service or labor of any kind." Plaintiff hired pastor to come in from England. In violation?
   a) Court: Plaintiff did not violate law.
      i) **"It is a familiar rule, that 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."** [This is quoted a lot, when the text doesn't give us the "right" answer!!]
      ii) Text seems to prohibit this kind of hiring.
         (1) Plain meaning of "labor" includes pastor.
         (2) Exceptions to laborers: Did not list "pastor"….
            (a) = Expresio unius?
            (b) Or… could argue that pastor is a lot like those exceptions, should be included there.
         (3) Textualists would argue that if text and intent don't match up, it's up to the legislature to fix… not judges.
            (a) Counter: Judges should fill in the gaps, as legislature can't foresee everything.
      iii) Use of **Legislative History to figure out intent/purpose**.
         (1) Congressional intent here was to target manual labor, not all kinds of "labor and service."
         (2) Senate Committee Report: Wanted to put in the word "manual" before labor/service.
            (a) However… isn't their inaction telling?

(3) Intent v. Purpose here.
(a) Intent: What would the legislature have said about ministers?
(b) Purpose: What is the overall goal of the statute?
iv) Can use the title and the structure of the statute to figure out purpose.
v) Application of the **Mischief Rule**: Remedy here was to prevent companies from hiring cheap labor from overseas. Application of the Golden Rule?
vi) Also argues for the "Christian Nation" idea here.

2) Why do we care about Intent?
a) First off, whose intent are we looking for?
i) Makers?
ii) Legislative Body?
iii) What about drunk Congressmen/Congressman with gun to the head?
(1) Is the text still valid in this case?
b) **Intent is relevant when text is unclear**.
i) Consider: "All recreation programs may use the property up to the bank by the river."
(1) What "bank"? Look to legislative intent, to figure out which definition of "bank" they meant.
c) **Possible <u>Sources</u> of Intent**.
i) Title.
ii) Language and statute structure choices.
iii) Legislative purpose.
iv) Canons of construction.
v) Extrinsic materials.
vi) Facts of the case.

3) Purpose v. Intent.
a) **Intent** = More specific. Eg. "Buy me some soupmeat" means that the speaker intends for you to buy soupmeat, nothing else.
i) Why did the legislatures choose the words that they chose? What is the statutory scheme they intended?
ii) **<u>If text is clear, then go with the text!! Only if ambiguous can you look elsewhere.</u>**
b) **Purpose** = More general. Eg. "Buy me some soupmeat" means that the speaker's purpose is for the kids to be healthy and well-nourished.
i) If there is only bad soupmeat at the market.
(1) Intentionalist: Speaker intended you to buy soupmeat.
(2) Purposivist: Speaker intended you to buy something healthy.
(a) Which is more faithful to the speaker??
ii) Eg. "No parking this side Tuesdays 1pm-5pm."
(1) Mischief: To prevent cars from parking there when the street sweeper goes by.
(2) What if the street sweeper came by at 4pm… can park later?

(a) Purpose = Street sweeper. Mischief rule invites you to look at purpose.
(b) Intent = No parking between 1 and 5pm.

iii) Eg. "All vegetables to be served in school lunches shall be purchased from local farmers at the Boston farmer's market.
(1) Vegetables are sold out/rotten. Can you buy them at the Cambridge market??

4) Applying Intentionalism.
   a) *Caminetti v. United States (1917):* Immoral purpose. Ct. said it fit with plain meaning.
      i) Dissent: Look to title to discover the legislative intent. [White Slave Traffic Act]
   b) Specific v. General Intent.
      i) Should first look to see if there is clear evidence of the legislature's actual [specific] intent. If not, then get to general intent [general goal of the law].
   c) **Imaginative Reconstruction**.
      i) Generally, legislatures haven't thought about the question a statute is asking of them.
      ii) Interpreter puts herself in the position of the enacting legislature, looks to history and assumptions about what that legislature would have wanted.
      iii) How would the legislature have answered this question?
      iv) Eg. *Fishgold v. Sullivan Drydock (1946):* Veterans included in layoffs?
         (1) Must look to the Congress at the time it was enacted… not now [favor veterans.]
      v) Criticism:
         (1) This is more "imaginative" than "reconstructive."

5) **Critiques of Intentionalism**.
   a) Roscoe Pound and "**Spurious Interpretation**."
      i) When plain meaning or textualism doesn't sufficiently fulfill this, can look to intent:
         (1) Try to find out directly what the law-maker meant by assuming his position.
         (2) Reach the intent indirectly… assume the law-maker thought as we do on general questions of morals, policy and fair dealing. **Which interpretation appeals most to our sense of right and justice? This is not interpretation… it is more of a revision**. If you're looking at <u>policy goals</u>, you shouldn't call it interpretation!
            (a) = Spurious interpretation. Is a fiction.
               (i) Pros: Cases should be decided in accord with the moral sense of the community.
               (ii) Cons: 1. Tends to bring law into disrepute; 2. Subjects the courts to political pressure; 3. Reintroduces the personal element into judicial administration.
      ii) True Interpretation is discovering the rule the lawmaker intended. [Purposivism?]
   b) Max Radin.
      i) Did all legislators really agree on one meaning?
      ii) Government of Laws, not men.
         (1) The only power legislature has is to pass text. It is the text that governs, not the people who wrote it.

iii) How can legislature interpret something that doesn't cross their minds?
iv) **Problem of "collective intent."**
(1) How can a collective body have a coherent intent?
(a) Is indeterminate. [can't find it]
(b) Is incoherent. [no such things as collective intention]
(c) Is an inadequate restraint on judges. [*imaginative* reconstruction]

C. LEGAL PROCESS - PURPOSIVISM

1) Background to **Legal Process**: Enter Legal Realism.
a) 2 Basic Commitments:
i) **Realism over Formalism**.
(1) "Law-is-policy" = Laws are not from nature or customs, but are instruments used by policymakers to achieve a purpose.
ii) **Institutional Architecture**.
(1) Law is the product of institutions setting policy questions. Legislatures and agencies are preferred over judges. Prudential constraints appropriate. Some institutions are good at some things, some at others. = Constrained Legal Realism.
b) **Hart & Sacks' Legal Process Idea.** [Justice Foster idea below]
i) Respect the position of the legislature as the chief policy-maker in the system.
(1) Courts should also accept the agency's interpretation of a statute, if it is consistent with the statute's purpose.
ii) **Law is the doing of something, so it has <u>purpose or objective</u>**. Interpret with the policy in mind!
iii) **Should assume the legislature was made up of reasonable persons pursuing reasonable purposes reasonably**.
(1) Imaginative reconstruction works: Ask what the reasonable legislator would think about the problem.
iv) Meaning depends on context. Language is a social institution.
v) Purpose inquiries are faithful because they are reason-based.
vi) The **"Hart & Sacks Test":**
(1) Figure out the statutory purpose by posing scenarios beginning with the "core" of the statutory policy and radiating out with variations. [only what the language will bear.]
(a) Is your situation similar or different from the core?
(i) Eg.: Criminal penalties for a person who "personate[s] any person entitled to vote at such election."
(ii) Whiteley charged with impersonating dead person.
1. Core = Someone impersonating an alive person, and voting as if he were the person.
2. Figure out the purpose from the various cores.

c) Lon Fuller and the "Speluncean Explorers."
   i) Cave explorers who killed one of their own to survive.
   ii) Statute in question: "Whoever shall willfully take the life of another shall be punished by death."
      (1) 5 judges: Different views.
         (a) Truepenny = Letter of the law is clear, must convict. Leave it to executive clemency.
         (b) Foster [Breyer] = Go behind the words of the text to find legislative intent. [**Purposivism**]
            (i) Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its <u>evident purpose</u>.
            (ii) "A man may break the letter of the law without breaking the law itself."
            (iii) What would the reasonable legislator have intended in this case?
         (c) Tatting = Many purposes…
         (d) Keen [Scalia] = Strict construction of the text. [**Textualism/Plain Meaning**]
            (i) Obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to personal desires or individual conceptions of justice.
            (ii) Legal and moral views shouldn't be confused here.
            (iii) It's better to apply the strict text, then have the legislature amend it if necessary.
         (e) Handy [Posner] = Legal Realism/Pragmatism.
            (i) Consider the political and social context of the law. What is the practical ("common sense") answer here?
            (ii) People are ruled by people, not by concepts.
               1. Go with the public opinion on this one.

2) **Legislative "Mistakes."**
   a) In the Legal Process school, if you knew legislators made a mistake, can correct it b/c you are partners.
      i) Basically, you're going against the strict statutory text… but it's ok!
   b) ***Shine v. Shine (1st Cir., 1986):*** Wife and husband got divorced. He was court ordered to pay wife. He then declared bankruptcy. Is this dischargeable debt?
      i) Statute = no discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, **in connection with** a separation agreement, divorce decree, or property settlement agreement."
      ii) Court: Look to purpose… meant to provide an exception for spouse/child support payments. = Nondischargeable debt.
         (1) Not part of the separation agreement/etc… support was court ordered.
         (2) House version: Didn't intend limitation.
         (3) Senate version: Had "or" before in connection. Again, never meant to limit.
            (a) **= Drafting error**. [Golden Rule?] **Doesn't fit with legislative purpose, so will amend the text to make it "correct."**

c) ***Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services*:** Appeals had to be made "not less than 7 days after entry of the order."
   i) Did they mean not more than 7 days??
   ii) Court "fixed" the language here.

d) ***US v. Locke (1985):*** Had to file papers to retain mining rights "prior to December 31." Plaintiffs filed on Dec. 31. Papers were denied.
   i) Court affirmed denial: Statute is clear.
      (1) Deadlines are always arbitrary, but also always literal. **It's hard to be a purposivist with deadlines!**
      (2) Agencies wrote their guidelines as "on or before December 30"… This suggests that statute was not written with plain language.

e) *Note: Drafting mistakes are very common!

3) **Changed Circumstances**.
   a) Interpret a statute to keep it coherent with current public norms.
   b) Dynamism.
      i) Hart & Sacks: Focus on overall purpose allows for evolution of the meaning of a statute.
         (1) Statutes should be construed in new ways when there are new circumstances that Congress would not have been able to foresee. [eg. female jurors example.]
      ii) William **Eskridge: Dynamic Statutory Interpretation.**
         (1) Dynamic statutory interpretation is built into the system.
            (a) **This is the best use of purposivism, b/c circumstances do change**. Changes that the legislature would not have been able to foresee.
         (2) Interpretations will change if the social, legal, and constitutional context changes so as to affect important original assumptions. Principal-agent idea.
            (a) **<u>Changes in social context</u>.** Can act in a way consistent with the speaker's general intent, even if not consistent with specific intent/plain meaning.
               (i) Eg. the soupmeat example: Availability, allergies.
            (b) **<u>New legal rules and policies</u>.** One of the statutes is given narrowing interpretation to accommodate the policies of a later statute.
               (i) Eg. the soupmeat: Later directive to avoid cholesterol is in conflict with the original fetch soupmeat directive.
            (c) **<u>New meta-policies</u>**. Endogenous (from principle) and Exogenous (from outside.)
               (i) Eg. Scarcity of soupmeat in town.
         (3) "Bundled Assumptions" = Eg. in *Weber*, enacting Congress believed that colorblind practices would lead to equality. Actual integration purpose should be preferred b/c it is required by precedent (*Griggs*) and most constituent with larger Constitutional discourse (*Bakke*).

   c) ***In the Matter of Jacob (NY Ct. of Appeals, 1995):*** Two cases of adoption: Cohabiting bf of child's mother moved for adoption, and cohabiting girlfriend of child's mother moved for adoption. Both denied, as not within statute. Statute also took away natural's parents rights after adoption.
      i) Court: Look to purpose of statute. = Create a stable family.
         (1) Changed circumstances: GLBT families openly parenting.

(2) **New circumstances sometimes nullify bundled assumptions made by legislature**. [eg. gays are criminals.]
(3) The legislature couldn't have intended to rule out this kind of adoption.
(a) Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results.

d) ***Li v. Yellow Cab of California (CA, 1975):*** 1872 CA Civil code had codified the rule of contributory negligence,
i) Court: Should be reinterpreted to codify comparative negligence, in line with the modern trend in other states.
(1) Purpose = One whose negligence harms another should be responsible… however, one whose negligence causes her own injury should not cast responsibility on others.
(2) Changed circumstances: Shift from contributory negligence to statutory comparative negligence [in a lot of states.]
(3) This is not the interpretation the legislature contemplated.
(a) But the words allow it!
(b) Overturn past interpretation.

e) Note on State Courts.
i) They have common-law making authority, unlike federal courts.
ii) Tend to interpret civil codes that are broader/more general… = more common law making.

f) Eg. "Female jurors" case: Legislature didn't contemplate that women would be allowed to vote when they wrote statute about who can serve on the jury, then the 19th Amendment was passed…. does this mean women can't serve on jury?
i) Did Congress intend for all possible electors to be able to serve on a jury?
ii) What is the link between electors and jury candidates?
(1) Changed circumstances: Did the right to vote grant these qualifications to women?
(2) New meta-policies: Conflict between later law and previous law. U.S. Constitution v. IL Constitution.

4) **Coherence with Public Norms.**
a) Court is saying that it is a better result to go against the text.
b) ***Public Citizen v. United States Department of Justice (U.S. 1989):*** Disclosure and open meeting requirements on a federal "advisory committee." Advisory Committee = any committee established or utilized by the President […] in the interest of obtaining advice or recommendations for the Pres. Does the Federal Judiciary of the ABA apply?
i) Court: Look to legislative history, not the strict text. = Purposivism.
(1) "Utilized" meant something different…
(2) Idea that the **faithful agent looks at everything, to try to get the best answer.**
(a) *Holy Trinity* reasoning.
ii) Concurrence applies the Golden Rule: Only look to leg. history if strict textualism would lead to an absurd result [which apparently it does here.]
c) ***State of NJ v. 1979 Pontiac Trans Am (NJ, 1985):*** Kid drove dad's car while drunk, stole a piece of another's car. Car was confiscated, per forfeiture statute.

i) Court: No forfeiture here, look to purpose, and other statutes.
(1) NJ courts have required that forfeiture statutes be strictly construed in a manner as favorable to the person whose property is being seized as possible.
(2) 2 kinds of property subject to forfeiture:
(a) Prima facie contraband.
(b) Other property, such as that used in furtherance of an unlawful activity.
(i) Dad seems to have consented to use of vehicle here.
(3) Knowledge is relevant to forfeitures: "Innocent owner."

d) Are the above cases examples of "spurious interpretation"?

e) In defense of Coherence-based Interpretation.
i) Lon Fuller and the "**Repeatedly Retold Anecdote**."
(1) Story slowly changes… and coherence is the value. **Not complete verbatim re-telling.**
ii) Ronald Dworkin and the "**Chain Novel**."
(1) Best answer in light of past: Each author [judge] contributes something new, but must be consistent with past chapters [decisions].
(a) Not an intention-bound approach: Which author's intention would you be looking for??
(2) Judge's role is that of a creative partner continuing to develop, in what he believes is the best way, the statutory scheme that Congress began.

5) **Criticisms** of Legal Process.
a) 1960s: Govt. seen as problematic.
b) Hutchison: Hart & Sacks-type judges make unarticulated value choices in the guise of neutral decisions. [Eg. Holy Trinity: "Christian Nation" idea.
i) If law is understood in terms of purposes, spirits, and collective intents, the citizenry might lose faith in the externality of law.
c) Appeal of Formalism:
i) Separation of Powers.
ii) Judicial competence tends toward Plain Meaning.
(1) Judges are just better looking at the text than at gathering info from the world.
iii) Notice.
(1) To non-legal people, the rule of law is the statutory language. [Scalia's argument/ Populist Notion.]
d) The Burger Court moved to textualism as a response to Legal Process concerns.

D. "PLAIN MEANING" [TEXTUALISM]

1) *Note: *TVA* and *Griffin* are different that Scalia's version of textualism.

2) ***TVA v. Hill (U.S., 1978):*** Endangered Species Act authorized Sect. of Interior to declare a species "endangered" and authorize special protections for it. Endangered species [snail darter] was found in a river. TVA had been authorized to start a dam project there. Environmentalists wanted injunction to stop dam project.
a) **Court** (Burger): Go with injunction, fits with plain meaning and intent of statute.

i) **Looks to legislative history** [appropriate source to him, wouldn't be to Scalia] **to support the plain meaning of text.**
(1) = Intentionalism.
(2) Congressional intent = Halt and reverse the trend of species extinction, <u>whatever the cost</u>.
ii) Doctrine disfavoring repeals by implication applies when the subsequent legislation is an appropriations measure.

b) **Dissent** (Powell): Court here ignores years of Congressional intent in favor of dam project.
i) Absurd result…? **Clear text w/ absurd result.**

c) Is this case consistent with the Legal Process Theory of legislators acting reasonably?
i) How reasonable is it to have this Endangered Species Act, yet still continue to pay for dam project?
ii) However, case is consistent b/c legislative intent still matters.

3) ***Griffin v. Oceanic Contractors, Inc. (U.S., 1982):*** Griffin was a pipeline welder, got injured on the job. Sued to recover for expenses, and to recover earned wages.
a) Statute = "Every master who refuses or neglects to make payments in the manner […] without sufficient cause shall pay to the seaman a sum equal to two days' pay **for each and every day during which payment is delayed** beyond the respective periods."
b) **Majority**: Under the plain meaning of statute, must pay wages for any day after which payment is delayed.
i) Text is the best evidence of intent.
(1) The **plain meaning matches up with legislative intent** [look back to amendments, and the elimination of 10-day ceiling and judicial discretion.]
ii) Reject the idea that the wages are merely compensatory… purpose of statute is to prevent arbitrary refusals to pay wages, and to induce prompt payment. [<u>deterrence</u>]
iii) Absurd result/windfall?? This is ok, it is a deterrence statute.
(1) Is this encouraging employees to drag their cases out?
(2) However, there is a power imbalance between employer and employee.

c) **Dissent** (Stevens): Congressional intent doesn't support the court's conclusion here.
i) *Holy Trinity* cited again.
ii) Also: "without sufficient cause" is only for the unemployment period…not after.
(1) There is precedent supporting this idea… court here is overturning precedent.
iii) Faults the majority for **being too "literal."**
(1) Does this mean that the text would mean what the majority says it means??
iv) Legislative history:
(1) Should have been more of it if they really wanted to change the discretion/10-day max. period.

d) Court here: With absurd result, and clear evidence of intent, go with intent and purpose.
i) *Scalia [+ new textualists] doesn't buy: Only plain meaning of unambiguous text… whereas you do intentionalism and purposivism of ambiguous text.

4) **Plain meaning interpretation is practiced more in state courts**: Dearth of legislative history materials available for state statutes and more restraint practiced by state judges.

E. TEXTUALISM

1) Background: Goals and Varieties of Textualism.
   a) What are the goals of Interpretation? [Look back to 3 theories on pg. 14]
      i) **Intentionalism**.
         (1) *Holy Trinity*: All sources are fair game.
         (2) TVA as intentionalist case?
      ii) **Purposivism**.
         (1) Can have a restricted or a wide pool of sources.
         (2) Soupmeat hypo w/ healthy food as purpose.
      iii) **Textualism**.
         (1) Nondelegation of decisionmaking.
         (2) Required by structure of Article I and Article III.
   b) **<u>Varieties of Textualism</u>**.
      i) **Old "Plain Meaning" Rule**.
         (1) If the text is plain in its meaning, you cannot consult Legislative History, but if it is ambiguous, LH is a fine source of interpretation.
      ii) **Burger Court** (*TVA, Griffin*). [New "Plain Meaning" Rule?]
         (1) More of an intentionalist approach.
         (2) Statutory plain meaning is presumptively correct, but use Legislative History to confirm and occasionally override text.
      iii) **Scalia's "New Textualism."**
         (1) **Ordinary or reasonable meaning** – find the best and most coherent textual meaning from close textual analysis [not necessarily the literal meaning], even from ambiguous text – it's a word puzzle with a best answer. Look to the text to ambiguous statutes, don't consult LH.
         (2) Courts shouldn't look to Legislative History at all when interpreting statutes.
         (3) Derive the plain meaning from the "Whole Code/Whole Act."
   c) **Scalia's New Textualism** explained.
      i) [Easterbrook goes along with this too.]
      ii) "Men may intend what they will [legislative intent], but it is only the laws that they enact which bind us [textualism]." = **Text, not intent, governs.**
         (1) Judges must be constrained by the legislature's will.
         (2) Committees don't have the power/legitimacy to make laws.
         (3) Criticizes Hart & Sacks, and the court in *Holy Trinity*… "The text is the law, and it is the text which must be observed."
         (4) Intent is too subjective.
            (a) Even if intent did matter [he thinks it doesn't], we have no reliable way of getting it.
      iii) **Plain meaning** = What the ordinary speaker of the English language [w/ no legal background] would draw from the statutory text. This is the only legitimate source for interpretation.

(1) Can consult dictionaries.
(2) Can also look to other parts of the statute: "Whole act coherency."

iv) **Judges should almost never consult, and never rely on, the legislative history** of a statute.
(1) Legislative history is too malleable/corruptible ["looking out to the crowd and picking out your friends."]
(2) **Notice/vagueness** issues.
(a) We want the people to know what the law is… what do they think the statute means??
(3) Encourages the legislature to draft more carefully.
(4) Want to **avoid judicial discretion!**
(5) Legitimacy and accuracy of the sources.

v) *Note: Scalia gets this from the Constitutional idea that only text is authoritative, and from Article I.

2) New Textualism Cases.
a) [*Note: The textualism in this case appears in the dissent.]
Chisom v. Roemer (U.S., 1991): Process for electing judges in Louisiana: single- and multi-member districts. Class of African Americans brought suit, challenging that this caused voter dilution, in violation of the Voting Rights Act. Statute: "violation is established […] if election is not equally open to participation by members […] if members have less opportunity than other members to elect **representatives** of their choice."
i) Issue: Whether judges count as "representatives" within the statute.
ii) Majority (White): Judges are included as representatives under the act.
(1) Rejects LULAC (prior case) division of rights in the statute: Right to elect [not applicable to judicial officers] and right to participate in the political process… This is <u>one right.</u>
(2) Legislative History:
(a) "Representatives" replaced the word "legislators"… "representatives" should be read to describe the winners of representative, popular elections (includes elected judges.)
(b) Have applied judges under a different section of the act. [Whole Act Rule.]
iii) Dissent (**Scalia**): Should look to the **"ordinary meaning" of the statute**… not look for Congressional intent or other legislative history, as the majority does.
(1) Look to the **ordinary meaning**, then ask whether there is any indication in the text or structure [not legislative history!] that something other than ordinary meaning was meant.
(2) Under **the ordinary meaning of "representative,"** the ordinary reader/Congressional person **would not have applied this to judges**.
(a) Representative = Bound to the public/public opinion.
(3) "Candidates" might be better here…
(a) It is used elsewhere in the Act. [Whole Act Textualism.]
iv) *Note: Who is the "ordinary person" to whom this statute is addressed? Regular person… or the people implementing this district requirement?

b) ***West VA University Hospitals v. Casey (1991):*** §1988 and "reasonable attorneys fees."
   i) Court (Scalia): These fees do not include expert fees.
      (1) **Textualist approach** here. It is not up to the Courts to decide what Congress *would have said* on an issue.
      (2) Look to other places in the statute, where experts are explicitly mentioned. [**Whole Code Approach**.]
         (a) All you need to look at is the text… it has sole authority.
   ii) Dissent: Should look to legislative history.

c) ***Zuni Public School District No. 89 v. Department of Education (2007):*** Federal Impact Aid Act: Complicated statute that dealt with financial aid to schools, and limiting states from giving less aid when federal aid was available. Some exception for 95th percentile and 5th percentile. New Mexico school districts challenged the Department of Education's method of calculating top and bottom 5% [Argued that it should be the number, not based on the population.]
   i) Court (Breyer): Department's method is permissible. [**Purposivism**]
      (1) Method is consistent with the statute's purpose.
      (2) Text does not exclude this interpretation, as 5% is ambiguous.
      (3) Deference to agency interpretations.
   ii) Concurrence (Stevens): Can start with the legislative history here.
   iii) Dissent (**Scalia**): **Textualist approach**: Look to ordinary meaning of 5%, in this context.
      (1) Why is majority starting with the legislative history and not the text??
   iv) Dispute here is **whether the text is ambiguous**.
      (1) Breyer: It is ambiguous, look to LH.
      (2) Scalia: Clear text = clear ordinary meaning.

d) [*Note: This case actually shows even Scalia abandoning strict textualism, due to absurd result] ***Green v. Bock Laundry Machine Company (U.S., 1989):*** Prisoner had his arm cut off while working at a car wash. Bring up [plaintiffs'] past crimes?
   i) Statute here is a rule of evidence. only if….crime was punishable by death or 1+ yrs imprisonment and *the court determines that the probative value of admitting this evidence outweighs its prejudicial effects to the defendant*, or crime involved dishonesty or false statement.
   ii) Court here: Goes against the strict text, says this evidence rule applies only against criminal defendants. Affirms inclusion of this evidence.
      (1) A literal reading of statute would seem to prejudice civil plaintiffs, as their past behavior would always have to be allowed.
         (a) = Constitutional issue? [5th Amendment's DPC.]
      (2) Look to legislative history to figure out what §609(a) was supposed to mean.
         (a) Conference reports indicate that 609(a)'s textual limitation of the prejudicial balance to criminal defendants resulted from deliberation, not oversight.
   iii) Concurrence (Scalia): Should decide the meaning by: 1) most in accord with context and ordinary usage [most likely to have been understood by the Congress that voted on the words, and by the citizens subject to it]; 2) the meaning that is most compatible

with the surrounding body of law into which the provision must be integrated [compatibility that the Congress always had in mind.]
(1) Unintended Congressional absurdity here justifies departures from the ordinary meaning.
(2) His textualism is more about constraining judges [Article I] than about sticking to the text at all times.
(a) Wants to do "the least violence" to the text here.
(3) Whole Code point again: Look for meaning that is most compatible with the surrounding body of law.

iv) Dissent (Blackmun): There is too much varied LH here.
(1) Court focuses on the Committee Reports… and not what the House and Senate said.
(2) Court should balance the risk of prejudice to either party.

v) Note: This statute was later re-written to say "**criminal** defendants."

3) **Criticisms of New Textualism.**
a) Separates law and democracy.
i) Legislators were trying to solve a social problem – their intent feeds legitimacy.
b) Dictionary shopping.
i) There is no "one meaning," as Scalia seems to believe.
ii) Who is writing these dictionaries, and do these definitions really reflect what the "ordinary person" would have thought the text meant?
c) Who is the "ordinary person"?

Current views of statutory interpretation: Neither imaginative reconstruction nor objective intent, but instead is an effort to carry out the ongoing institutional projects along the lines laid out in the public presentations of those institutional actors charged with developing the original statute. = Institutional legislative history.

- Start with the statutory text. Use dictionaries? [Which one?]
- Consistency of usage with other parts of the statute.
- Still look at contextual evidence, and the public law background.
- *Most judges still look to legislative history!!
- Precedents.
- Consequences?

Application of Statutory Interpretation – Coyote Tail Rewards Act

1) Statute = "To aid Wyoming farmers, for a period of ten years beginning on January 1, 2005, and ending on the last day of December 2014, the state of Wyoming shall pay to any licensed hunter in the state of Wyoming a reward of $200 for each coyote tail surrendered to the State Fish and Wildlife Bureau. Entitlement to this reward shall extend only to hunters licensed within Wyoming."
a) Olivia turned over a coyote tail and got rewarded. Then decided to breed coyote and turn over their tails to get more money.
b) Can she be fined? Is she within the statute?
c) 3 Interpretations Available:

i) Textualist. = Would likely decide for Olivia.
   (1) Text is clear. Gives reward to all WY licensed hunters who turn over coyote tails.
ii) Intentionalist. = Would probably decide for the state, though this could go either way.
   (1) Intent: Payment system for people who turn over coyote tails. Can examine what they intended by "coyote tails," but bound by this text.
   (2) Statutory scheme? [relationship between social problem and statutory solution.]
      (a) = Subsidy. Pay out money.
      (b) Private police force.
      (c) This scheme was chosen for a reason!!
         (i) Intent to provide money for the turn-over of coyote tails.
   (3) Need an absurd result to leave the text.
      (a) Is it really absurd for her to get this money?
iii) Purposivist. = Would likely decide for the state.
   (1) Outer-edge purposivism: Correcting a result that would lead not to absurd results, but bad results.

F. LAW AS EQUILIBRIUM

1) **Economic Theories of Statutory Interpretation**.
   a) **Assume that individuals are rational actors** who seek to maximize their utilities through reasonable actions.
   b) ***Ex post decisionmaking*** = When judges create rules and standards that are fair in a particular case… but may have social costs in the future.
   c) ***Ex ante decisionmaking*** [economists prefer this] = When judges make rules after evaluating **whether this rule will be good for the average case** and whether it provides proper incentives for the citizenry.
      i) Stop with the legislatures. Only way to encourage legislatures to draft good statutes is to not fix them when there is a bad result.
   d) Idea that **statutes are the result of rent-seeking**.
      i) Either:
         (1) Guard against rent-seeking by enforcing public purpose…. or…
         (2) Enforce the deal that was struck.
   e) **Cost-Benefit Approach**.

2) ***United States v. Marshall (7th Cir., 1990):*** Marshall and others were convicted of selling LSD. Statute proscribed minimum sentences for certain amount of grams of "mixtures or substances containing a detectable amount of LSD." Does this refer to overall weight or just the weight of the LSD?
   a) Court (**Easterbrook**): This refers to the **weight of the overall mixture** [eg. blotter paper + LSD.]
      i) **New Textualist opinion**. [Easterbrook is like Scalia]
         (1) "Mixture": What is its <u>ordinary meaning</u>?
            (a) Something that can't be separated.
            (b) Look to what other judges have found… have found that paper is a mixture.
         (2) Language here is unambiguous… want to restrain judges.

(3) **Whole Act Rule**: Relationship to other drugs:
(a) Only PCP has explicitly been singled out for "pure" v. "mixture."

b) Dissent (**Cummings**): Look to Sentencing Commission guidelines.
i) Look to other case, which found that blotter paper was NOT a mixture.

c) Dissent (**Posner**): Not much legislative history about whether the weight of the carrier is taken into account.
i) Not constrained by the text here, more about what is rational here.
ii) Scrivener's Error? Maybe Congress didn't realize how LSD was sold?
iii) **Legal Pragmatism:** Justice in the particular case. Must have some sort of rationality.
(1) **<u>Reason and rationality are key!</u>** Look for the BEST result.
(2) Concern with consequences.
iv) *Ex Ante justification:* Statutes must be carried out in a fair way, for the legitimacy of the overall justice system.

G. RENT-SEEKING AND PUBLIC CHOICE THEORY

1) Public Choice Theory = Applications of Economic Principles to actions by the state.
a) Two approaches to rent-seeking:
i) Attribute certain purposes to the statutes, and fill in the gaps accordingly.
ii) Treat the statute as a contract and implement the bargain as a faithful agent.

Laws typed by Public Choice Theory:

1. Distributed Benefit and Distributed Costs Eg. Street cleaning. Court's Answer: Leave it alone.	**2. Distributed Benefit and Concentrated Costs** Eg. Outlaw wetland development. Also: Estate tax. Court's Answer: Someone with the concentrated cost has an incentive to work that enforcement agency. ["agency capture"] Keep an eye on that.
3. Concentrated Benefit and Distributed Costs [=Rent-seeking] Eg. Corn subsidy. We all pay for one person to get the benefit. Court's Answer: Courts can construe narrowly and hold law to its public-regarding fig leaf. - Can view this as a rent-seeking legislation.	**4. Concentrated Benefit and Concentrated Cost** Eg. Cap on malpractice damages. Court's Answer: Leave it alone.

The "Funnel of Abstraction":

Authoritative Weight……Equitable Cogency
Words of Statute…Specific Leg. Intent…Imaginative Recon…Leg. Purpose… Precedent App… "Best Answer"

CONCLUSION – REVIEW OF METHODS OF INTERPRETATION:

No one theory has dominated. No one theory is best at everything, in every case.
*****MUST TAKE INTO ACCOUNT ALL THEORIES OF INTERPRETATION WHEN MAKING ARGUMENTS!!*****

1) Focus on Language.
   a) Intentionalist would look to the language to find the legislative intent.
   b) Textualist cares about the ordinary meaning of the language.

2) Interpreter's Capacity.
   a) Decisions are made by fallible institutions:
      i) Courts [could be wrong]; Legislatures [busy]; Agencies.

3) Dynamic Effects: Branch Interaction.
   a) **Pro Rule-Bound Interpretation**.
      i) Can accept even absurd results.
      ii) Discipline legislatures.
      iii) Remove possibility of judicial error.
   b) **Anti Rule-Bound Interpretation**.
      i) Should step in and correct bad results.
      ii) Less costly to change it now.
      iii) Purposivism/Pragmatism.

4) Judicial Coordination.
   a) Multi-member courts make it difficult for the textualists, or for anyone, to send any particular message to the legislature.

5) Constitutional Compliance.
   a) Textualists claim Constitutional grounding in Article I, §7.
      i) Proper role for Article III judges.
   b) Intentionalists claims Constitutional grounding in Article I, §7: promoting a representative democracy.

6) Justice…. Reliance?
   a) Pragmatists/Purposivists seem to produce the more just results.
   b) Textualists claim to be the most reliable.

III. DOCTRINES OF STATUTORY INTERPRETATION

CANONS OF INTERPRETATION

Background:

1) Rules, presumptions and canons of statutory interpretation enable interpreters to draw inferences from the language, format and subject matter of the statutes.
   a) **Textual canons** = Set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the statute.
   b) **Substantive canons** = Based upon substantive principles or policies drawn from the common law, other statutes or the Constitution.
   c) **Reference canons** = Where the common law, other statutes, legislative history and agency interpretations might be consulted to figure out what the statute means.

A. TEXTUAL CANONS

Plain Meaning: Follow the plain meaning of the statutory text, unless it produces an absurd result or suggests a scrivener's error.

1) Maxims of Word-Meaning and Associations.

a) **Ordinary Meaning**.
   i) Words are generally used:
      (1) In their "ordinary" or prototypical sense.
         (a) Can look to dictionaries of the time for older statutes.
      (2) Sometimes also in a technical sense.
         (a) When a statute deals with a technical, specialized subject.
      (3) Sometimes also in their accumulated meaning through prior court decisions.
   ii) Which meaning to use, Ordinary or Technical?
      (1) *Zuni:* 5th %.... ordinary meaning in dissent. Majority seems to look at accumulated meaning.
      (2) *Nix v. Hedden (1893):* Is a tomato a fruit or vegetable. Technically a fruit… but go with ordinary meaning, how ppl use it/understand it = A vegetable.
         (a) **Depends on who the statute is being applied to!!** In *Nix*, the importers will be affected, so we ask what they think the meaning of the word is.
         (b) **If the statute is directed at an agency, more likely to take the technical meaning.**
      (3) *Marshall:* Ordinary meaning of "mixture."

(4) *Chisom:* "Representative" = more technical meaning in majority, more ordinary meaning in dissent. Accumulated meaning.
(5) *Holy Trinity:* "Labor" = manual labor.
(6) *Weber:* "discriminate" = ordinary meaning of negatively affecting one side or meaning just to differentiate?

b) **Noscitur a Sociis and Ejusdem Generis.**
   i) **Noscitur a Sociis** = A thing is known by its associates. When trying to figure out the meaning of an ambiguous term, consider the words grouped with it.
   ii) **Ejusdem Generis** = When words of a particular or specific meaning are followed by general words, **the general words are construed to apply only to persons or conditions of the same general kind as those specifically mentioned**.
      (1) See: *Heathman v. Giles:* Prosecutor not included under statute based on the other titles of law enforcement personnel. Prosecutors not within the same class.
      (2) See: *Jarecki:* Tex benefit for income "resulting from exploration, discovery, or prospecting." Not just any old discovery, must be from specific type of discovery.
      (3) See: *Hodgerney:* No placing of "dirt, rubbish, wood, timber, or material of any kind" tending to obstruct the streets…. doesn't refer to cars!
   iii) *Note: Don't use this canon if the statute evidences a meaning contrary to the presumptions!
   iv) Also might be trumped by the rule against redundancies.
   v) What's the point of listing specifics if you've got a catch-all at the end?
      (1) Don't want to be too limited. Or you could get hit with an expresio unius argument.

c) ***Expresio** [or inclusio] **unius** est exclusio alterius* = **Expression** [or inclusion] **of one thing indicates exclusion of the other.**
   i) This canon assumes that the legislature thinks of every possible scenario.
      (1) Often doesn't, just simply forgets!
      (2) See: *Holy Trinity:* Specific exemptions listed. Exclusive? Apparently not.
      (3) See: *Tate v. Ogg:* "Any horse, mule, cattle, hog, sheep, or goat." So.. turkeys are ok?
         (a) Tells the legislatures that if they want turkeys included, they need to put a catch-all at the end.
      (4) See: *Lindh:* Anti-terrorism law applies limited appeal to death cases, says nothing about non-death cases.
   ii) Courts can refuse to apply this canon if they think it will lead to a result Congress didn't intend. [If context suggests list is not exhaustive.]

2) **<u>Grammar Cannons.</u>**
   a) **Punctuation Rules**.
      i) This one is rarely controlling.
      ii) More of a last-ditch alternative aid to interpretation.
         (1) Looks to comma placements, semi-colons, etc.

(2) See: *Tyrrell v. NY:* Semi-colon placement separated the two clauses and guided this interpretation.

b) Referential and Qualifying Words: **The Last Antecedent Rule**.
   i) Referential and qualifying words or phrases **refer only to the last antecedent**, unless contrary to legislative intent.
      (1) Can always be trumped by punctuation or an "across the board rule" that applies the referential to the entire phrase.
      (2) See: anyone who "*knowingly* transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document." What does knowingly refer to?
         (a) Courts have interpreted this both ways.
         (b) [What would the MPC say? Opposite!]

c) The "and" v. "or" Rule.
   i) With "or" can have either one. With "and" need both of the terms listed.
      (1) "or" – terms have different meanings and different significance.
      (2) ***When you've got a "without",** eg. "Government can seize real property used in a crime unless owner shows the criminal activity was "committed or omitted without the knowledge or consent of that owner." **Or = And**.
         (a) Owner here would need to show lack of knowledge AND lack of consent.

d) May v. Shall.
   i) When there's a "shall," less open to discretion on the part of the actor.

e) Singular/Plural, He/She.
   i) Courts don't really care about these. Singular = plural.

f) **The Golden Rule**.
   i) = Follow the ordinary meaning, ordinary grammar, unless it leads to an absurd result, in which case the language may be modified or varied to avoid this result, but no further.
      (1) Absurd results are the only exception to plain meaning.
      (2) See: Bock Laundry: Defendant couldn't have possibly just meant defendant.
   ii) Courts can generally also revise scrivener's errors.

3) **<u>The Whole Act Rule.</u>**

a) Interpret each section in context of the whole enactment.
   i) The critical assumption here is Coherence.
      (1) Presume that the legislature drafted this document as internally consistent with its use of language and the way the provisions work together.
      (2) However, legislatures often draft statutes in response to interest groups.
      (3) Also, how can you have any sort of coherence with big omnibus reconciliation bills??
      (4) **<u>The Whole Act Rule tends to be criticized b/c it doesn't reflect how Congress actually operates.</u>**

b) **Title**.
   i) Not decisive on its own, but can be helpful in cases of ambiguity.
   ii) Do NOT defeat the plain meaning.

c) **Preamble and Purpose Clauses**.
   i) Preambles sometimes have legislative purpose.

ii) Helpful in cases of ambiguity.
iii) However, this like the others, won't override the statutory directives if they're clear.
(1) See: Sutton v. United Airlines: Is myopia a disability? No, as preamble has # of disabled Americans. Too small if myopia were included.
iv) Purpose statements might also just be the product of special interests… so must be careful.

d) **Provisos**.
i) Start with "provided that…"
ii) Restrict the effect of statutes, provide exceptions to general rules.

e) **The Rule to Avoid Redundancies**.
i) A construction which would leave without effect any part of the language of a statute will normally be rejected.
(1) We don't want to think of legislatures as being redundant!
(2) See: *Western Union Telegraph:* Not just tangible items, otherwise "subjects" would be redundant.
ii) *The rule against redundancy is more at odds with the legislative drafting process than most of the other whole act rules… Words and phrases are often added to statutes at the last minute.

f) Presumption of Consistent Usage – and of Meaningful Variation.
i) It's reasonable to assume that the same meaning is imposed by the use of the same expression in every part of the Act.
ii) A changing of wording denotes a change in meaning.
(1) However, this is less useful when statutes are written at different times.
iii) Generally think it's intentional when Congress includes or omits a particular term in one part of a statute compared to another.

g) Rule Against Interpreting a Provision in Derogation of Other Provisions.
i) Want to avoid derogating in the following ways:
(1) Operational conflict. [Can't follow 1 w/o violating the other]
(2) Philosophical tension. [Assumption 1 doesn't fit assumption 2]
(3) Structural derogation.

4) Example: "No Vehicles in the Park."
a) Does it apply to the following:
i) Skateboards?
ii) Baby carriages?
iii) Tricycles?
b) Proviso seems to qualify bicycles… extend to others?
c) Intent/Purpose: Safety concerns.
d) Textualist might say that applying this to baby carriages would be an absurd result.

5) ***Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon (U.S., 1995):*** Endangered Species Act §9(a)(1): "…it shall be unlawful for any person to… **take** any such species." **Take later defined to mean "harass, <u>harm</u>, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."** Agency Regulation: Sect. included habitat modification and degradation under "harm."

a) Court (**Stevens**): The Secretary's definition of "harm" was ok here. [Note: the majority focuses on "harm" The dissent focuses on "take."]
   i) Harm meaning:
      (1) **Ordinary meaning, against redundancy**. All in favor of this Sect. definition.
   ii) **Whole Act Rule**:
      (1) 1982 Amendment: Permit procedures.
         (a) Understood to allow deliberate as well as indirect takings.
         (b) Congress appears to have accepted Agency interpretations.
      (2) Don't just take the single term on its face, look to overall statute.
   iii) Congressional intent is ambiguous, so defer to Sect.'s reasonable interpretation.
      (1) *Note: This is the *Chevron* **"deference to agencies if their interpretation is not arbitrary or capricious" principle**.
      (2) Agency Interpretation = Accumulated meaning.
   iv) Uses Anti-Derogation canon.
   v) Language that was struck originally… well, this definition here is more narrow so it's ok. Scalia counters that the opposite is true, that they didn't intend for modification to be there at all.

b) Dissent (**Scalia**): **Ordinary meaning** is clear - "Take" is a term of art that describes intentional and direct actions toward animals.
   i) **Noscitur a sociis:** Look at the definition, at the words around "harm." All imply some affirmative conduct directed at animals.
   ii) **Expresio unius:** Congress explicitly barred habitat modification in other part of Act.
   iii) We've got unambiguous text here… no need for legislative history!
   iv) Also uses Anti-Derogation canon.

6) *Sorenson v. Secretary of Treasury:* Those who owed child support payments had their tax overpayments go to the state first.
   a) Earned-income credit = overpayment??
   b) Court: Yes, according to Whole Act Rule.
      i) This bill was one of those omnibus reconciliation bills though…
   c) Dissent: This goes against other Congressional policies!

B. SUBSTANTIVE CANONS

INTRODUCTION – 3 SUBSTANTIVE CANONS WE WILL LOOK AT:

1) **Rule of Lenity.**
   a) Read ambiguous criminal statutes in favor of the defendant.
   b) Law with purpose to punish must be construed strictly.
2) **Constitutional Avoidance.**
   a) Construe the statute to avoid substantial constitutional questions.
3) **Federalism.**
   a) Construe the statute so as not to encroach on the states.
   b) Construe so as not to pre-empt state law.

Substantive Policies that the Court will presume Congress intends to incorporate into statutes.

STRICT V. LIBERAL CONSTRUCTION

1) **Liberally construe the following**:
   a) Civil Rights statutes.
   b) Remedial statutes.
   c) Securities.
   d) Antitrust.
      i) Apply these statutes expansively to new situations.
2) **Strictly construe the following**:
   a) Criminal law [Rule of Lenity].
   b) Constitutional avoidance.
   c) Statutes that are in derogation of sovereignty.
      i) = Sovereign immunity for the states.
   d) Public grant statutes.
      i) = Construe in favor of the Government.
   e) Revenue? [not really…]
      i) Tax laws strictly construed against the state, in favor of taxpayer.
         (1) Not really applied now!!

3) How to use:
   a) Strict Construction = prototypical meanings only.
   b) How courts treat Substantive Canons:
      i) As mere tiebreakers.
      ii) As presumptions, but rebuttable with other evidence.
      iii) As Clear statement requirements. [presumption must be clearly rebutted in the text.]

1. Constitutional Avoidance

1) Background – Why this canon?
   a) Courts construe criminal penalty statutes narrowly to avoid questioning the statute's constitutionality.
   b) Courts also **interpret non-penal statutes restrictively to avoid constitutional problems.**
   c) **Justifications for the Canon of Constitutional Avoidance**:
      i) Represents **legislative intent**.
         (1) Assume that the legislature is acting reasonably and wouldn't draft something that is unconstitutional.
         (2) Avoid a legislative gap.
      ii) Gives **effect to under-enforced constitutional norms**.
         (1) Eg. Immigration law, labor law.
      iii) **Passive virtues of the court**.
         (1) Want to avoid making bad constitutional decisions, that would be binding.

(2) Court wants to avoid using its power, and wants to **create inter-branch dialogue**.
(3) Don't want to say to Congress: Hey, your entire statute is unconstitutional… More like, Congress you may have some problems but it's still constitutional!

d) **Problems:**
   i) **Judicial Activism:** Leads to judges legislating when they don't like a law?
   ii) **Unpredictability** of application.

2) Constitutional Avoidance Cases.
   a) ***US v. Witkovich (U.S., 1957):*** Witkovich was charged under Immigration and Nationality Act provision, for failing to provide adequate information after he had an outstanding deportation notice. Said the questions were either impermissible under statute, or if permissible, then unconstitutional.
      i) Court: Dept. Questions weren't allowed under statute.
         (1) Although the plain meaning of the words might allow such question, court goes against this.
         (2) **Go with restrictive meaning of statute b/c a broader raises constitutional issues.** [5th Amendment, DPC issues against self-incrimination.]
         (3) When doubts of constitutionality are raised, the court will first ascertain whether a construction of the statute is fairly possible by which the constitutionality questions may be avoided.
      ii) Dissent: Go with plain meaning. No constitutional problems.
   b) ***National Labor Relations Board v. Catholic Bishop of Chicago (U.S., 1979):*** NLRB exercised jurisdiction over 2 Catholic high schools, to get them to start bargaining with teachers. Jurisdiction was only inappropriate is school was "completely religious." Does the exercise of jurisdiction here violate the 1st Amendment?
      i) Court (**Burger**): No jurisdiction for NLRB, want to avoid the 1st Amendment issue.
         (1) Again, **want to avoid the constitutional question of whether this violates the 1st Amendment, so we'll construe it strictly.** [1st Amendment issue: Bargaining with unions? Possibly entanglement.]
         (2) Legislative History: No clear congressional intent about church-run schools, so Congress probably didn't mean for them to be included.
      ii) Dissent (**Brennan**): Bad use of canon here.
         (1) Expresio unius: 8 exceptions are explicitly mentioned… church-run schools aren't one of them.
         (2) Proposed amendment about church-run schools didn't pass.
         (3) So… congressional intent is pretty clear = Covers all employers but those explicitly excluded.
         (4) Also: Prior case involved application of this statute to the Associated Press… which raises another 1st Amendment issue!

3) Ways of Framing the Constitutional Avoidance Canon.
   a) *Charming Betsy (1804):* When one interpretation of an ambiguous statute would be unconstitutional, choose another one that passes.
   b) ***Delaware & Hudson (1909):*** **When one interpretation would raise serious constitutional problems, choose the one that would not.**
      i) = Dominant Approach now.

ii) Also: *Crowell v. Benson:* Even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

c) *McCulloch (1963):* When one interpretation presents constitutional difficulties, do not impose it unless there has been an affirmative indication from Congress that it is required ("the affirmative intention from Congress clearly expressed.")

2. The Rule of Lenity

1) Background – Why this canon?
   a) The idea of constitutionality is here too: **Need fair notice of whether you have violated a criminal law or not.**
   b) The laws that have a purpose to punish must be construed strictly.
   c) **Justifications for Canon of the Rule of Lenity:**
      i) **Fair Notice**.
         (1) Notice that you've committed a crime. This is more important in cases of malum prohibitum that malum in se.
         (2) See: *McBoyle v. US:* Is an airplane a "motor vehicle"? No!
         (3) Emphasis on mens rea as a presumptive requirement for prosecution.
      ii) Equitable to **construe against the drafter**.
         (1) The government wrote the statute here, and is also enforcing the statute! [Eg. It's always State v. Defendant.]
         (2) If Govt. has all that power, want to give some lee-way to the defendant.
      iii) **Separation of Powers.**
         (1) The moral condemnation inherent in crimes must come from the legislature, and not from the courts.
         (2) Courts shouldn't go beyond the text of the statute.
      iv) Civil Libertarians seem to support the Rule of Lenity. Pragmatists seem to be against it.
   d) **Problems:**
      i) Lots of states [28] have rejected it. Some explicitly [in their Penal Codes], some implicitly.
      ii) Unpredictable.
      iii) Courts go with the government interpretation of a statute more than with the Rule of Lenity.

2) Rule of Lenity [or not] Case.
   a) ***People v. Davis (CA, 1997):*** Davis was convicted of crimes before, 2 juvie and 1 adult. Do the juvenile crimes count for sentencing purposes [3-strikes law]?
      i) Lower court: No, the juvenile convictions don't count. [Lenity]
         (1) Needed an "express finding of fitness" to be in the juvenile court.
      ii) **Court** here: **Yes, count these juvenile convictions under the 3-strikes law**.
         (1) Go with the prosecutor and saying that the "finding to be fit" is implicit.
      iii) **Dissent:** Argues for the Rule of Lenity.
         (1) Why have the fitness provision if it doesn't mean anything? [Avoid redundancy.]

(2) "the juvenile was found to be fit" Found implies some active finding. [Plain meaning.]
(3) Prosecutor can file petition stating juvenile is not fit for juvenile court.
(a) If he files this, the presumption is that individual is NOT fit [aka should be tried as an adult].

b) Why **no Rule of Lenity here?**
i) This is a **sentencing statute**, not one about defining a crime.
ii) Sentencing statutes are meant to be harsh.

c) *Note: CA court has a provision in their Penal Code against the Rule of Lenity.

3) Yablon: Maybe lenity only applies to limited circumstances.
a) Avoid criminalizing ordinary day-to-day conduct.
b) **Prevent prosecutors from exercising excessive discretion**.
i) See the rule more when prosecutor is trying to stretch the statute.
c) Help rationalize statutory schemes.
d) *Don't count on lenity though… it's hard to overcome prosecutorial push.
i) Eg. 18 u.s.c. 924(c)(1): Harsher penalty if weapon was used during a crime. Court didn't apply Rule of Lenity to person who traded gun for drugs.

4) Idea of **Severability**.
a) **Even if one part of a statute is unconstitutional, the rest of the statute can still be upheld.**
b) Presumption in favor of severability, unless it is evident that the legislature would not have enacted the statute without the severed provision.

3. Federalism

1) Background – Why this canon?
a) **Justifications for Canon of Federalism**
i) Don't want to encroach on states' rights.
ii) Don't want to pre-empt state law.
iii) **10th Amendment and 11th Amendment** [though more or less truisms] are there. Overall **structure of the Constitution** supports idea of **separation of state and federal powers.**
(1) 10th Amendment: Powers not granted to the federal government or prohibited to the states by the U.S. Constitution are reserved to the states or to the people.
(2) 11th Amendment: Citizens shouldn't sue states in federal court.

b) Federal Powers:
i) Commerce Clause powers.
ii) 14th Amendment, §5 powers.
iii) Spending powers.

2) Federalism cases.
   a) Background to *Gregory*.
      i) *Pennhurst (1981):* Clear statement of conditions for spending clause legislation.
      ii) *Wirtz (1968):* FLSA min. wage applies to state hospitals.
      iii) *National League (1976):* Reverse *Wirtz*.
      iv) *Garcia (1985):* Reverse *National League*.
   b) ***Gregory v. Ashcroft (U.S., 1991):*** It was a violation for an employer covered by the Age Discrimination in Employment Act (ADEA) to set a mandatory retirement age for employees over 40. Per *Garcia*, state and local govts. were covered under this federal act. Missouri had mandatory retirement age of 70 yrs for state judges. Violation of ADEA?
      i) **Under *Garcia*, a Constitutional challenge would fail, as the ADEA can be applied against the states, per Commerce powers. All that is left is an *as applied* challenge.**
      ii) Majority (**O'Connor**): Go with the lower courts, **judges are not "employees" under the Act**.
         (1) "Employee" was defined in the act, **excluded** those who were elected to public office, or staff there, or **any appointee on the policymaking level** or an immediate advisor…"
            (a) Judges are "appointees on the policymaking level"? Well… sort of.
            (b) There is no clear Congressional intent for judges to be included under this Act.
         (2) Concern with federalism and state autonomy. O'Connor doesn't want the federal govt. to interfere with state functions like retirement ages… but is bound by the *Garcia* precedent that allows the Fed. to use its Commerce power to apply regulations to state employers.
            (a) **When there is a federalism issue, court requires a <u>Clear/Plain Statement Rule</u> = Need a clear statement from Congress that it wants to infringe on core state functions, out of respect for the 10th Amendment.**
               (i) **<u>This is not a Constitutional Canon, this is a canon of statutory construction.</u>**
               (ii) It's not enough that there's a clear statement that the ADEA applies to states.
               (iii) Need to state specifically who it applies to – aka that it applies to state judges. = From mere presumption to <u>"super-strong clear statement rule"???</u>
      iii) Concurrence (**White**): The reasoning here seems to go against *Garcia*.
         (1) Previous cases have applied the Plain Statement Rule only to determine whether a federal statute reaches the states in the first place [Waste cases]… not the precise details of a statute that already applies.
         (2) The **burden on Congress here is too high**: Must specifically list every single person/item its statute applies to now?
         (3) If Congress is acting under its 14th Amendment §5 powers, then this federalism argument doesn't matter, as Congress can enforce the 14th Amendment.
         (4) **Can avoid all of this by simple statutory construction!**
      iv) *Note: How does this case work with *Chisom*, which applied the Voting Rights Act to judges?

(1) Only **elected judges in *Chisom***.

v) Why is Scalia with the majority?
(1) He'll vote for federalism so that he can get a textualist vote.
(2) **How constraining is textualism here, when you make substantive lawmaking with the federalism canon?**

4. Llewellyn on the Canons

1) **Karl Llewellyn's Theory on the Canons**.
a) He pairs opposing canons on various issues to demonstrate how **canons will not always lead to one appropriate interpretation of a statute**.
i) Pairs:
(1) 2 = Statutes in derogation of the common law will not be extended by construction; Such acts will be liberally construed if their nature is remedial.
(2) 12 = If the language is plain and unambiguous it must be given effect; Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.
(3) 20 = Expression of one thing excludes another; The language may fairly comprehend many different cases where some only are expressly mentioned by way of example.
(4) 23 = Qualifying or limiting words or clauses are to be referred to the next preceding antecedent; Not when evident sense and meaning require a different construction.
ii) Opposing canons can get opposing answers to statutory interpretation.
iii) Just **reminds us that the canons aren't law, they are just tools to find the law.**
b) Part of the **Legal Realist** movement.
i) Against Formalism.
ii) Nothing turns on the canons.
c) Counter:
i) Yes there are different canons, but the one you pick depends on the situation.
ii) A different result doesn't mean you should abandon canons all together.

2) **Other Schools of Thought and the Canons.**
a) **Legal Process**.
i) Hart & Sacks defend the canons: Meaning depends on context. The canons can give the meaning in a particular context.
b) **Law and Economics**.
i) Posner believes the canons misapprehend the legislative process.
(1) Statutes are generally the result of deals, compromises. Are intentionally ambiguous because they are drafted in advance of the problems of interpretation.
ii) Ex ante approach: Does the legal process work better with this set of rules, or with another set of rules, or with no rules at all?
(1) Ex ante ideological = you can tell what party is benefitting on the face of the canon [eg. states, defendants, armed services, etc.]
iii) Canons leave the decisionmaking to Congress.

c) **Pragmatism**.
   i) Canons are just one way of thinking about statutory interpretation.
d) **Normative**.
   i) Sunstein: Argues that there should be canons to protect public values.
   ii) Canons promote legal stability.
e) **Textualist**.
   i) Scalia: Canons are necessary for good textualism (?)

CONCLUSION ON CANONS

1) In state courts, the canons frame the debate.
   a) Non-substantive canons help to frame the debate but rarely decide a case.
2) Textual canons are neutral aids to help discern plain meaning.
3) Substantive canons are less neutral.

EXTRINSIC AIDS

Background:

1) **Extrinsic Aids** = Sources outside of the text of the statute being interpreted.
   a) **Common Law.**
   b) **Legislative History.**
   c) **Post-Enactment Legislative Behavior.**
   d) **Other Statutes.**
2) *Note: Difference between **Sources** [*Text, Common Law, Canons, Other Statutes, Legislative History, Post-Enactment Leg. Behavior, Agency Interpretations*] and **Criteria** [*Intent, Purpose, Text*].
   a) Criteria is the theoretical question…. "What am I trying to do when I interpret the situation?"
   b) Sources: How will I get the answer to my questions… what tools can I use?
3) When to allow in Extrinsic Aids?
   a) Traditional Rule: Extrinsic aids shouldn't be used if the statute has a "plain meaning."
   b) New Textualists: Can allow in CL and other statutes. NO LEGISLATIVE HISTORY OR POST-ENACTMENT LEGISLATIVE BEHAVIOR.

C. COMMON LAW BACKGROUND

1) When to use the Common Law as a method of interpretation.
   a) **Traditional Rule**: **Statutes in derogation of the common law were to be narrowly construed.**
      i) Any deviation from CL rules needed special justification.
      ii) CL was authority delegated to judges by the sovereign, to decide cases and make law.
      iii) CL draws on natural rights, the "best answer," and is anti-democratic.
   b) **Modern:** Statutes have pretty much taken over the CL.
      i) Use the common law when the legislature enacts a **statute with words that have established CL meanings**.
         (1) Eg. "fraud" has a particular CL meaning.
      ii) Can be used as "gap-fillers" for issues unaddressed by the statute.
      iii) Can used for statutes that address CL areas [eg. contracts, tort, property.]
      iv) Generally import the Common Law to **old and briefly phrased statutes**. Statutes that are vague and **address social problems**.
         (a) Eg. The Sherman Anti-Trust Act.
         (b) Eg. The Civil Rights Act of 1871.
         (c) Eg. Taft-Hartley Act.
         (d) Where legislative history delegates to courts [House Report for Foreign Sovereign Immunities Act exception for commercial activity.]
   c) Which Common Law to look at?
      i) The time of enactment. ….or…..Evolving CL.

2) Practice Problem: **42 u.s.c. §1983**.
   a) §1983 establishes a remedial right for plaintiffs to bring suits against those who have deprived them of their Constitutional rights.
   b) Doe is arrested for breach of peace. Claims a violation of his 1st Amendment rights.
   c) Judge claims judicial immunity.
      i) CL gave judges judicial immunity against suits arising out of their judicial duties.
   d) Does points to history of §1983 – meant to apply to state judges.
      i) Congress did not intend for CL idea to carry through.
      ii) However, this was about criminal liability.
   e) Court then inferred in *Imbler* that prosecutors also enjoy an immunity. Although this is not part of CL, it is a reasoned-based decision.

3) ***Smith v. Wade (U.S., 1983):*** Wade was a prisoner who was assaulted by other inmates. Brought suit against the prison guards, who he claims should have known the assault was likely. Brought under §1983. ["under color of state law"] Issue over when to award punitive damages – when guards had recklessness/callous disregard/indifference [from the CL] or

with actual malicious intent?

a) Majority (Brennan): Recklessness is fine, affirm the award of punitive damages.
   i) **Apply the CL standard for awarding punitive damages**.
      (1) **Timeframe: All available CL, not just at time of enactment**.
      (2) CL: Don't need to show actual malice to award punitive damages.
      (3) The standard is not higher under §1983 claims than under other tort claims.
      (4) Deterrence argument doesn't work, as the officers should already be deterred by the threat of punishment, and not just by a threat of punitive damages.
b) Dissent (**Rehnquist**): Should only look for the 1871 Congressional intent: Where malice was the standard for punitive damages.
   i) The CL went the other way here.
      (1) **Timeframe: CL at the time of enactment**.
c) Dissent (**O'Connor**): Can use the CL when it's clear… Here it's not.
   i) **CL went both ways, the majority and the dissent [Rehnquist] are just picking evidence for their own support.**
   ii) Look to §1983 policies.
      (1) Worried about floodgates of lots of punitive suits being brought.
d) Both judges [except O'Connor] accept the use of Common Law here. They just disagree on what it says.
   i) Congressional Intent and the Timeframe: Intent can cut either way on the timeframe.
      (a) Either the legislature intended for the CL of the time to apply….or
      (b) **Maybe Congress intended for the statute to evolve with evolving CL!**

D. LEGISLATIVE BACKGROUND

Introduction: Types of Legislative History.

1) **Background circumstances of legislation. [**Legislative History**]**
2) **Committee Reports.**
3) **Sponsor and Drafter Statements.**
4) **Legislative Deliberations.**
   a) Committee Hearings.
   b) Floor Debates.
   c) Rejected Proposals and Amendments.
   d) "dog that didn't bark."
5) **Post-Enactment Legislative Behavior.**
   a) Testimony.
   b) Presidential signing statements.
6) **Legislative Inaction.**

Criteria: Available, Relevant, Reliable.

1) **Available.**
   a) What is not generally available:
      i) There are no open meetings between committees and agencies.
      ii) Committee mark-ups used to not be available.
      iii) Privileged memos. Memos that refer to what the Govt. was asking from Congress.
2) **Relevant [**to the question**]**.
   a) Is it actually relevant to the statutory interpretation, or is it "mere puffery"?
3) **Reliable.**
   a) What is not generally reliable:
      i) Manipulated.
      ii) Unrepresentative.
      iii) Early in the process.
      iv) Views of outliers.
      v) Loser's history!!
4) **Committee Reports and Sponsor Statements are the most reliable confirmation of the plain meaning.**

Statutory v. Legislative History

1) **Statutory History** = The entire circumstance's of a statute's creation and evolution.
   a) The old British Exclusionary Rule allowed this.
   b) **New Textualism generally allows this.**
2) **Legislative History** = More narrow, refers to the internal legislative pre-history of a statute. Record of discussion, deliberation, and voting for the law that was enacted.
   a) Scalia and some others say using legislative history is like "looking over a crowd and picking out your friends."
   b) **We need to use all tools available to us, including the text, LH, and purpose.**
   c) Almost all court opinions cite some legislative history!

1. History/Background Circumstances

1) ***Leo Sheep Co. v. United States (U.S., 1979):*** Court goes into the history of the Land Grant given to the Union Pacific Railroad Co.: the checkerboard land grant. Grant is under the Union Pacific Act of 1862. Issue is whether the U.S. has an implied easement to cross over private land to get to its public land.
   a) Majority (**Rehnquist**): **No implied easement for the U.S. here**.
      i) Goes into the **history** of why the U.S. granted land in this checkerboard pattern.
         (1) Had something to do with the possible unconstitutionality of Congressional powers to enforce a railroad construction plan.
         (2) Also: The railroad land lets the Govt. increase the value of its own land.
         (3) **Reliability:** Govt. didn't really think about the accessibility issue… just wanted to build the railroad, and fast.
      ii) Text? No implied easement in text.
      iii) Look to CL easement of necessity: None for the Govt. here b/c of its power of eminent domain.
      iv) Congressional Intent: Amendment proposing a reservation of this ability for the Govt. to pass over private land failed. = Rejection?
      v) Canon: When there is a federal grant issue, construe in favor of Govt…. however, this canon is generally not applied in railroad grants cases.
      vi) Does the court go with the **"best answer"** here?
         (1) Reliance interest in **keeping private land private**.
         (2) Now, both sides can negotiate/bargain.
         (3) Use the history to frame the bargaining powers between these two entities.
   b) *Note: **Private land owners might have an easement of necessity here… The decision doesn't cut both ways.**

2) Who uses History/Background circumstances?
   a) Textualists would say that history is less subject to manipulation.
   b) Intentionalist and Purposivists look to it to provide a background for legislative intent/purpose.

2. Committee Reports

1) **Committee Reports: <u>Most Reliable Source of Legislative History.</u>**
   a) Should be considered as authoritative and should be **given great weight**.
      i) The reports explain each section of the bill, what each chamber passed, and what each committee did with the bill.
         (1) Written by executive branch, by drafting office, or by lobbyists. [not senators].

ii) Overview [**general intent**] and analysis of specific provisions. [**specific intent**].
iii) Drafters have knowledge.
iv) Availability of committee reports.

b) Limitations:

i) Sometimes there are no committee reports on a provision, b/c debate took place on the floor.
ii) Often ambiguous.
iii) Could have some **lobbying effect** from those who want to present the history of a bill in a certain light.
iv) Competency of courts to detect bad LH?
(1) Eg. The Armstrong-Dole conversation: [Scalia refers to this in *Blanchard*]
(a) Dole [senator] states that he didn't write the committee report, it's not a senator's job to write these. Says he read most, but not all, of it.
(b) No one voted on the committee report. It is not law. [Validity problem?]
(c) However… more legislators read the committee reports than the statutes.
(d) Although senator didn't write it, he was still in the room: **Accountability**. Agency head represent the staff who wrote the reports.
(e) Conclusion: **Committee Reports are NOT law, but can be helpful tools to figure out law.**

c) Often used at the state level.

2) ***Blanchard v. Bergeron (U.S., 1989):*** Blanchard filed a §1983 suit after he had been beaten by a sheriff's deputy. Won $10K in damages. Asked for atty's fees, under §1988. Issue is over what are "reasonable attys fees." Is this amount limited by the amount in the contingency fee agreement?

a) Majority (**White**): Define "reasonable attys fees" by the Johnson factors, not limited by contingency fee.
i) **House and Senate Committee Reports**:
(1) Refer to the *Johnson* (older case) factors for assessing reasonableness.
(2) Also: 3 District Courts cases that correctly applied the Johnson factors.
ii) Looks to purpose of statute: To make sure civil rights plaintiffs get adequate counsel.

b) Dissent (**Scalia**): Shouldn't be relying on Committee Reports here.
i) It's likely that some random staff member put the cited cases in there, and no one even read this/voted on this.
(1) **The "ignorant yes vote" problem**. [unlike Armstrong, who disagrees w/ Committee Report.]
ii) **Committee Reports are unreliable evidence of what the Congress had in mind**.

3) A way to approach the relationship between the Statute and Legislative History:

Statute and LH both Unclear	**Statute Clear and LH Clear in opposing directions**
- Decisionmakers have more tools with which to add more of their own values?	- Doesn't the text govern in this case?
Statute Unclear and LH Clear	**Clarity is Relative**
- Could be useful to figure out what the statute means. - But… couldn't this also represent what the staff and committee members could not get into the text?	- They know it will be referenced, so LH is fair game. - Sometimes, LH clarifies ambiguous text and makes it clear.

Arguments for and against Legislative History

1) **For**:
   a) **Free Proof:** Let in all the evidence and just discount appropriately [Breyer].
      i) The problem with LH is not use, it's abuse.
      ii) If we don't look at it, we're losing information.
   b) 2nd Order Control is effective in Congress: If one member goes over the line, they can be fired.
   c) Judges should just use LH as a means of bulking up this control that the legislature exercises: Discipline the legislature…. tells them they are accountable.
2) **Against**:
   a) **Legislatures enact statutes, not history.** [Article I, §7 = The text is the only authoritative law.]
   b) Accessibility cost for value conferred.
      i) Eg. How much will you have to dig around the extensive history to get something that might not even be valuable? [Brought up in *Pepper v. Hart*]
   c) Judicial and Legislative **manipulation**.
   d) Competence to discipline [by legislatures] and to spot manipulation [by judges].
   e) Constitutional Concerns: Avoid bicameralism, presentment to the president, majority vote.
   f) The "ignorant yes voters": Considered the matter at a quick and general level.
      i) If the leadership minority does have a view, is it suspect because it's the minority? Even if it doesn't contradict the majority, who have no view?

3. Statements by Sponsors or Drafters of Legislation

1) During the floor debate, **sponsors of bills and floor managers make explanations of statutory meaning and compromises reached to achieve enactment**.
   a) Sponsors know a lot about the bill.
   b) However… sponsors can also distort the meaning to please own interests.
      i) Sometimes insert these statements into LH after the fact.
   c) **Generally, this is where you stop with LH… don't go farther.**
   d) The House of Lords generally excluded LH in their decisions… until *Pepper v. Hart*.

2) How to **connect these few sponsors to the majority**?
   a) **Hypothetical intentions:** If majority didn't think about specifics, isn't it ok to say that they would have thought about them like the sponsors did?
   b) **Delegation:** The uninvolved legislators delegated their intention-formation to the sponsors and committee chairs.
   c) **Conventions:** Since everyone knows the sponsors' views will carry weight as "intention," they can speak or live with the convention = Acquiescence.

3) ***Pepper v. Hart (House of Lords, UK, 1992):*** College allowed employees to get a discount for their kids' tuitions. This was a benefit subject to taxation. Finance Act of 1976 defined "cash equivalent of the benefit." Debate about **what this cash equivalent was**.
   a) Court: This is the first time the **court has abandoned the Exclusionary Rule** [reference to Parliamentary Material as an aid to statutory interpretation is impermissible] **and will look to Parliamentary material to figure out this statute**. Find for the parents here.
      i) Rely on the statutory statement made by Parliamentary floor manager.
      ii) Limits:
         (1) To confirm meaning.
         (2) Only where statute is ambiguous/obscure.
         (3) To confirm meaning when manifestly absurd or unreasonable.
         (4) Can only look to **clear statements made by the minister** [floor manager] **or other promoter of the bill**.
         (5) Look for explanations of what mischief the bills were trying to solve.
      iii) The Court's job is to give effect to the intent of the Parliament.
         (1) Parliament didn't intend to be ambiguous when they wrote this… so let's look and see at what they clearly meant.
      iv) If the judges look at legislative history, might as well let the attys have access to it too.
         (1) Limit admissibility and assign costs.
   b) *Note: Will this **lead to unnecessary costs?** When we have to look through all the materials to find anything relevant?

4) When is LH most useful?
   a) LH is more valuable when textual ambiguity stems from lack of foresight rather than from lack of consensus.
   b) LH from indecipherable omnibus bills.
   c) Less weight to LH where there is an agency that dominates the scheme.
   d) Less weight to LH where scheme is detailed and technical.

4. Legislative Deliberation: Hearings, Floor Debates, Rejected Proposals and Dogs that Didn't Bark

1) Although as a general rule we stop at sponsor statements when evaluating LH, **can sometimes look to Legislative Deliberation**. [happens after Committee Reports are sent out]
   a) **These statements are given less weight than other sources of LH**.
      i) **Exchanges among supporters** = Reflect the compromises made.
         (1) These are **costly**.
         (2) Votes depend on it, as well as legislator's accountability/reliability.
      ii) **Exchanges among opponents** = Less weight to these.
         (1) These are **cheap**.
         (2) Legislators can say whatever they want, vote not dependent on it.
         (3) Easily distorted.
   b) *BankAmerica v. United States (1983):* Court looked to the **floor debate** at the end of the process.
      i) Point of order was raised about whether the conference committee had changed the meaning by now allowing interlocks, and point of order failed.
      ii) This dialogue between the senate majority leader and a "nobody" is important because it happened at the end of the process, when they had almost reached a decision.

2) **Rejected Legislative Proposals**.
   a) The *Wetlands cases* are examples of the court dealing with rejected legislative proposals.
   b) Background to *Rapanos:*
      i) Federal Water Pollution Control Act Amendments of 1972: Prohibit the discharge of pollutants into the nation's waters, excepting only discharges allowed in the act.
         (1) **"Navigable waters"** = Waters of the US, including the territorial seas.
      ii) House Bill limited "navigable waters." Senate Amendment was proposed to limit the scope of "navigable waters." **Amendment was rejected**.
      iii) *U.S. v. Riverside Bayview Homes (1985):* Court took rejection of Amendment as Congressional intent to not limit "navigable waters."

iv) *Solid Waste Agency v. Army Corps (2001):* [We got the Clear Statement Rule here, Congress is acting on the fringe of its Commerce powers] Court rejected expansion of wetlands jurisdictions to waters used by migratory birds.

c) ***Rapanos v. United States (U.S., 2006):*** Rapanos backfilled wetlands near navigable waters. Corps asserted jurisdiction.
   i) Plurality (**Scalia**): This is too much of a stretch for "navigable waters." No jurisdiction.
      (1) Congress "acquiescence" is really Congressional failure to express any opinion.
      (2) Need clearer statement of acquiescence.
   ii) Concurrence (**Kennedy**): Applied *Solid Waste* standard. However, this isn't included under "navigable waters."

d) Is a rejected proposal just the **result of vetogates**, and of a difficult process to pass bills?
   i) Seems like they debated this amendment extensively though…

e) When judges look at rejected proposals, can have 2 views of it:
   i) Either not read it as part of the bill, since it was rejected.
   ii) Or consider the rejected proposal as unnecessary, as bill already has this function.

E. POST-ENACTMENT LEGISLATIVE BEHAVIOR

1) When is subsequent legislative history relevant to statutory interpretation?
   a) Types of **subsequent legislative history**:
      i) Proposals to amend.
      ii) Oversight history.
      iii) Efforts to bend interpretation.
      iv) Other statutes that interpret original statute.
      v) Presidential signing statements.

2) ***Montana Wilderness Association v. United States Forest Service (9th Cir., 1981):***
   a) *Note: This opinion was first decided, then new evidence was introduced and there was a re-hearing.
      i) This is an example of a **judge INCORRECTLY using legislative history** [in the 1st opinion anyway.]
   b) Facts: Burlington Northern [U.S. Forest Service] acquired a patch of land in Montana from Northern Pacific, who originally got in under the checkerboard land grant. Burlington wanted to build a road. Environmentalists stepped in to prevent Burlington from doing this.
      i) Lower Court relied on the Northern Pacific Land Grant and the **Alaska National Interest Land Grant** to give defendants an easement by necessity.

c) **Opinion 1** (**Judge Norris**): Reverse lower court, **no easement here as Alaska Land Grant only covers Alaska**.
   i) Looks to **§1323** [**text**] of the Alaska Act:
      (1) §1323(b) has "public lands," which is defined elsewhere to include only Alaska land.
      (2) §1323(a) has "National Forest System," which is not defined.
         (a) = must mean this whole section refers to Alaska (?)
      (3) **Title** also suggests that we're talking about Alaska land only.
      (4) **In pari materia**: Read similar statutes similarly. (a) and (b) are nearly identical, should be read the same.
      (5) **Whole Act Rule**: Consider the entire statute as a whole. Since every other part of the text refers to Alaska, then it's likely that this part refers just to Alaska also.
      (6) **Canon of continuity** = Established rules and practices.
      (7) **Canon that statutes in derogation of the sovereign are narrowly construed**.
      (8) **Canon that statutes about public grants are narrowly construed**.
         (a) **Norris should have stopped at the text and he would have been fine. Runs into trouble when he tries to make the Legislative History work for him.*
   ii) Looks to **Legislative History**:
      (1) Energy Committee Report.
         (a) Can be read either way.
         (b) Norris tries to do a textual analysis of the Report… why??
      (2) Sponsor statement on the floor.
         (a) Sen. Melcher says it applies nationwide. Judge discounts this b/c it was made after the fact.
            (i) **However, this is a sponsor statement. Shouldn't this be given greater weight? Also, this was likely a response to Udall's statements. Meant to clarify that it applied nationwide.*
         (b) Sen. Udall says it only applies to Alaska. Judge relies on this.
            (i) **His Amendment failed though! He's inserting this into the history after the fact. This is **Loser's History**, which we shouldn't rely on! [not only after the bill already passed, but after a new Pres. was elected. loser's history x 2.]*
      (3) The **"failure of the dog to bark"** [Sherlock Holmes, Silver Blaze]: Nothing in the Grant suggests that it was meant to apply to lands outside of Alaska.
         (a) **If no legislator notes that an important policy is being changed, a court should presume that no big changes are intended**.
            (i) See: *Bock Laundry*, *Chisom*, Justice Stevens.
         (b) It's rare to sneak something in without discussing it.
            (i) Scalia's counter: The text is a bark.
      (4) Exchanged letters among senators who thought it applied nationwide. Judge discounts these b/c they're not representative.

d) **Opinion 2** [after re-hearing] (**Judge Norris**): **Defendants have an easement here, pursuant to the Alaska Act.**
   i) Looks to §1323 of Alaska Act.
      (1) If there were no contrary legislative intent, the text would conclusively support a limitation to Alaskan land.
   ii) Looks to **Legislative History**:
      (1) Energy Committee Report again, the 2 Senators' statements.
      (2) New evidence: House-Senate Conference Committee report, which was considering another act, interpreted §1323 of the Alaska Act as **applying nationwide**.
         (a) Although the above was evidence after-the-fact, it is persuasive.
            (i) This tips the scale in favor of this interpretation.

e) *Note: Does this case interfere with *Leo Sheep*?
   i) Different statutes at issue! Here, it's the Alaska Act. In *Leo Sheep*, it was the 1862 Land Grant.
   ii) Also: There might a policy argument for the different bargaining strengths of the parties.

3) Who uses Post-Enactment Legislative History?
   a) New Textualists are more against this than they are against Legislative History.
   b) Courts will generally consider it if it's persuasive and/or accompanied by an amendment to the statute.
   c) "Public-reliance" argument = When a subsequent Congress assumes one interpretation of statute in enacting a new statute, go with this interpretation.

4) **Presidential Signing/Veto Statements**.
   a) Reagan, Bush 41, and Clinton administrations used them.
   b) Bush 43 had the most, at over 800 challenges to alter statutes.
   c) **Purpose of Presidential Statements**.
      i) Discussing the features of the law.
      ii) Constitutional concerns raised by the Pres.
      iii) **Intention to apply the law in a particular way**, based on executive agency interpretation of statute.
   d) Meaningless if courts don't reference them?
      i) They can be meaningful indications of **how the executive branch will implement** these statutes.
      ii) President is part of the enacting coalition, as his signature is needed. [so not technically post-enactment, as bill hasn't been enacted yet.]
   e) Problems with using these:
      i) No chance for Congress to respond.
      ii) Unreliable evidence of Congressional intent.

f) Can use these if both the statute and legislative history are ambiguous… but it's still shaky.
g) Can use veto statements if Congress came back and amended a veto.

F. LEGISLATIVE INACTION

Legislative Inaction – 3 Kinds of Acquiescence

After an agency or the judiciary issues and interpretation:

1) **The Acquiescence Rule: Congress does nothing.**
   a) Implies that Congress acquiesces with the interpretation.
2) **The Re-enactment Rule: Congress re-enacts the statute.**
   a) If Congress re-enacts a statute without making any material changes, presume that Congress intends to incorporate its prior interpretation.
      i) Especially if the interpretation is authoritative, settled and relied upon.
      ii) This is the highest reliability acquiescence, as Congresses actually acted with some statutory scheme in mind.
         (1) Eg. Civil Rights Act of 1991: Made some changes to the Civil Rights Act of 1964.
         (2) Should assume that anything it left alone carried over its prior interpretation.
3) **The Rejected Proposal Rule: Congress rejects a proposal [that would have modified the interpretation].**
   a) Implies that Congress has rejected that interpretation.

1) ***Bob Jones University v. United States (U.S., 1983):*** Bob Jones University and other universities had a racially discriminatory admissions standard on the basis of its religious doctrine. The issue is whether it qualifies as a **tax-exempt §501(c)(3)** under the Internal Revenue Code.
   a) **IRS Ruling: Need to be one of the 8 categories AND not contrary to public policy**. IRS said that the schools were not "charitable" because they promoted racial discrimination, which was against public policy.
   b) Majority (**Burger**): **University is not tax-exempt under §501(c)(3)** b/c it goes against public policy.
      i) Text: Lists institutions that qualify for tax-exempt statutes. However, court should look beyond the text when it goes against the statute's purpose.
         (1) **Whole Code Rule**: Entitlement to tax exemption depends on CL notions of "charity."
            (a) Look to §170 [about donor exemptions]: mentions "charitable."

(b) CL gave exemptions to charities that didn't violate public policy.
(i) **Isn't this a weaker case for importing the CL? This statute is specific, newer, lists out explicit criteria.*

ii) Purpose of tax exemption: Given to institutions that confer some benefit to the public.
iii) Civil Rights Act of 1964: Signals the Govt's agreement that racial discrimination in education violates public policy.
iv) **Congressional Acquiescence**:
(1) **Congress has been aware of the IRS rulings and has not changed the statutes**. Had many hearings on this issue.
(a) **Could reflect vetogates?*
(2) Denied tax-exempt status to private clubs.
(a) **Had power to act, doesn't this cut the other way? Aka, why didn't it enact specific exemptions for universities like this?*

c) Dissent (**Rehnquist**): Look to the text: Doesn't say anything about public policy.
i) Plain Meaning, Expresio unius.
ii) Lots of revisions of the Revenue Act… how could they have possibly just meant the CL "charitable"??
iii) Statements by Congress: IRS is not in the business of making policy.
d) ***Note: Generally, these little bits of Congressional acquiescence would NOT be enough in a normal case. This case deals more with public policy/morals. <u>Political Equilibrium</u> case.**

2) Congressional Inaction.
a) **Why things don't get passed in Congress**.
i) Interpretation is not widely known.
ii) Actual Acquiescence.
iii) Didn't have time to act.
iv) **Vetogates**.
v) Political Equilibrium.
b) Example of Inaction. Immigration act says to exclude from admissions to the U.S.: "Aliens afflicted with psychopathic personality, epilepsy, or a mental defect."
i) Enacted in 1952, Congress intended it to apply to homosexuals as "psychopathic."
ii) APA characterized homosexuality as sociopathic. Committees in both houses deemed that sufficient. 1973: APA drops that characterization.
(1) Textualist argument: Statute doesn't say "homosexual."
(a) Look at the plain meaning of 1952 [intentionalist textualist] or 1975 [textualist: notice concerns]
(2) Intentionalist argument: Always intended the term to evolve as science and medical standards evolve.

(a) They amended it… had the ability to be more explicit, but chose not to. [couldn't get the right number of votes.]

iii) Changed circumstances.

iv) Subsequent legislative history.

G. OTHER STATUTES

Introduction: Why Use Other Statutes when Interpreting a Statute? Canons and Conventions

1) **In Pari Materia.**
   a) = Other statutes might use the same terms or address the same issues.
2) **Borrowed or Modeled Statutes.**
   a) Borrowed = Inter-jurisdiction. Form different jurisdiction. [weaker]
   b) Modeled = Intra-jurisdiction. From same jurisdiction. [stronger]
      i) This can be federal-federal.
3) **Rule Against Implied Repeals.**

1. In Pari Materia

1) ***Cartledge v. Miller (S.D.N.Y., 1978):*** Provisions of the Employee Retirement Income Security Act [ERISA] prohibited the assignment or alienation of pension benefits. Issue is over whether there is an exemption for spouse and child support payments. State court ordered the garnishing of wages of Cozart, Collections went after the money.
   a) Majority: There is an **exemption for spouse and child support payments**.
      i) Purpose of ERISA = For the security and well-being of employees *and dependents*.
         (1) **The Collections Agency is going after this… is not a dependent. Fulfilling purpose?*
      ii) General principle of state interest in the maintenance and support for the family.
      iii) Overall Congressional purpose not to interfere with this state power.
         (1) Basic state police powers are not superseded by federal legislation unless it's the clear and manifest purpose of Congress.
         (2) **Exemptions in**: [**In pari materia**]
            (a) Social Security Act.
            (b) Veteran's Benefit Act.
            (c) Railway Retirement Act.
            (d) Bankruptcy Act.
               (i) These Acts have all been **interpreted** by the highest court to contain exemptions. [Bankruptcy was later explicitly amended by Congress.]

(ii) **If Congress knows how to amend, then don't we have an expresio unius problem here, where it didn't explicitly amend this act?*

(3) Department of Labor and Treasury agrees with this interpretation.

(4) Congress probably didn't think about this… was more concerned with employment law.

b) *Note: Textualists are ok with this canon.

2. Borrowed or Modeled Statutes

1) Why should we reason from Borrowed/Modeled Statutes?
   a) Shows **legislative intent**.
   b) Past interpretations are presumed to be good policy.
   c) **Coherence of law overall** is a good thing.
   d) Textualists are generally comfortable with using this canon.

2) Problems with reasoning from Borrowed/Modeled Statutes.
   a) **Statutes really aren't that coherent**.
   b) Presumes that legislatures act reasonably?
      i) Maybe the legislature intended for the courts to smooth away any inconsistencies, and strive for coherence.
   c) As for Borrowed:
      i) **Different jurisdiction = Different policies? Different concerns?**
         (1) What did the legislature intend?
         (2) What did the legislature know?
            (a) **Did they really know what was going on in other states?**
            (b) **If a decision is poorly reasoning, it doesn't need to be followed.**

3) **Modeled Statute.** ***Lorillard v. Pons (U.S., 1978):*** ADEA prevents discrimination based on age in the workplace. Does the statute or the 7th Amendment guarantee a right to jury trial for claims brought under ADEA?
   a) Majority (**Marshall**): **Right to jury trials for suits brought under ADEA**.
      i) This statute is **modeled on the Fair Labor Standards Act** [FLSA]. [these statutes are from the same jurisdiction: federal law.]
         (1) FLSA guarantees right to jury trial. ADEA procedures are similar.
         (2) The differences between the two are explicitly listed… Jury trial is not one of the differences.
      ii) This statute is **different from Title VII** [which doesn't allow jury trials] b/c of the different forms of relief. [**Note: Congress changed Title VII in 1991.*]
      iii) *This statute is kind of a hybrid – reflects political compromise?

iv) Text: "legal or equitable relief."
(1) Legal implies that there is a right to jury trials.
(2) This comes **from the CL** – Courts should know this.
v) 7th Amendment issue here?
(1) Might be a case of Constitutional avoidance.

4) **Borrowed Statute.** ***Zerbe v. State (Alaska, 1978):*** Zerbe was wrongfully cited. Claim was later dismissed but no one informed the judge of dismissal. Arrest warrant was sent after Zerbe, he spent 9 hours in jail. He filed this suit against the state employees, alleging negligence. Alaska had statute that said no claim may be brought against the state for various listed torts, including false arrest/imprisonment. Is this claim a **negligence claim or a false arrest/imprisonment claim**?
a) Majority: **This claim is based on negligence**.
i) This statute is **borrowed from the federal statute §2680**, which has similar liability restriction for suits against the federal government.
(1) **Why restrictions? Can't sue the govt. unless they give you permission! Intentional torts are exempt [choices by private individuals.]*
(2) Some federal cases have interpreted this to bar these kinds of suits.
(3) Other federal cases have interpreted the other way. [court here thinks this is better reasoning.]
(a) = Claim arises out of failure to keep adequate records. = Negligence.
b) **The Supreme Court, in Shearer, rejected this court's interpretation of §2680.*

3. Rule Against Implied Repeals

1) Why have this **Rule Against Implied Repeals**? [generally: **subsequent statutes from same jurisdiction**.]
a) This is an often followed canon.
b) Prevents importing repeals without legislatures even being aware of it.
i) Kind of like a **Clear Statement Rule**.
ii) If you want to repeal, better be clear about it!!
c) Textualists accept this canon too. [Are pretty much ok with all of the Canons dealing with Other Statutes.]

2) ***Morton v. Mancari (U.S., 1974):*** Indian Reorganization Act of 1934 gives employment preferences to qualified Indians in the Bureau of Indian Affairs. Was this preference repealed in the Equal Employment Opportunity Act of 1972, which prohibited racial discrimination? Lower court said the EEOA implicitly repealed earlier Act.
a) Majority (**Blackmun**): **Indian preference stands, old act was not repealed.**

i) Look to purpose of the Indian Reorganization Act.
   (1) = To give Indians control over their own tribes.
   (2) Active role of Indians in the BIA.
ii) **Congress did not intend to repeal the Indian preference** in the 1972 Act.
   (1) Explicitly exempted Indians in Title VII.
      (a) **If Congress knew how to make exemptions, why not make an explicit exemption here? [expresio unius.]*
   (2) Other Indian preference programs enacted.
      (a) **Could just be savings clauses?*
   (3) **Repeals by implication are not favored**.
      (a) In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. [not the case here.]
      (b) **A specific statute will <u>NOT</u> be controlled or repealed by a later general one**.
         (i) Specific trumps General. [think about this if it were in the reverse temporal order, if general was first, then specific.]

H. AGENCY INTERPRETATIONS

1) General Rule: <u>The Supreme Court grants deference to Agency Interpretations of Statutes.</u>

a) Agencies are the enforcement arm of legislation – the Executive Branch.
b) <u>Administrative Procedures Act</u> [APA]: To set aside an agency action, the court must conclude that a regulation is **"arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."**
c) Statutory Interpretation by agencies: Not so much the technical elements [eg. the numbers], but more about the meaning the agency comes up with for a statutory word.
   i) Agencies are policymakers: Look to the purpose behind the statute.
   ii) Subject to political considerations independent of legislatures.
   iii) Can also be pressured by lobbyists.
   iv) Interpret statutes more flexible, in tune with the changing times.
   v) Are granular and expert.
   vi) Supposed to be politically neutral.
d) **<u>Rationale for Deference:</u>**
   i) **Political Accountability**.
      (1) Executive > Courts.
   ii) **Expertise**.
      (1) Technocrats, scientists, analysts.
   iii) **Delegation**.

(1) Agencies are Congress' designated interpreters of the gaps left in the statutes [not the courts!]

2) Pre-*Chevron*.
   a) *Skidmore v. Swift (1944):* Courts don't need to defer to agencies.
      i) Agency interpretations are expressions of experience and judgment, but judges don't need to defer to them.
   b) *General Electric v. Gilbert (1976):* Does the Title VII prohibition against sex discrimination prohibit discrimination on the basis of pregnancy?
      i) EEOC 1966: Pregnancy is NOT sex. EEOC 1972: Pregnancy is sex.
      ii) Court: Not discrimination… Can go with the 1966 interpretation.
      iii) [later added Pregnancy Disc. Act of 1978.]

3) ***Chevron, U.S.A., Inc. v. Natural Resources Defense Council (U.S., 1984):*** Whether the EPA's decision to treat the same industrial grouping as a single "bubble" was a reasonable construction of the statutory term "stationary source."
   a) Majority (**Stevens**): **Defer to agency interpretation, as it was reasonable here.**
      i) **If a statute is silent or ambiguous with respect to the specific issue**, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
         (1) Here, there was no clear Congressional intent, so go with the reasonable agency interpretation.
         (2) Court doesn't hold it up b/c agency necessarily got it "legally" right, but because it's a reasonable interpretation.
      ii) Limits:
         (1) **The judiciary is the final authority on issues of statutory construction and <u>must reject administrative constructions which are contrary to clear congressional intent</u>**.
         (2) Legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

4) Scope of *Chevron*?
   a) Max: So long as there's an agency, we'll defer. [no one goes this far.]
   b) Scalia: Agency's view must be authoritative. [wants higher-up official in agency]
   c) Stevens: Wants to limit it on fact v. law.
   d) Breyer: Case by case fashion limitations.

5) Criticisms of *Chevron*:
   a) Article I, Section 7.
   b) Lets the executive branch announce major shifts in public policy even when this contradicts the will of Congress.