Contents

Preface		xxi
Acknowledgments		xxv
Chapter 1		
Chapter 1	Low to Domilation	1
From Common	Law to Regulation	1
A. The Limitations	s of Tort Law	3
	MacPherson v. Buick Motor Co.	6
	Notes and Questions	9
	Rotche v. Buick Motor Co.	10
	Notes and Questions	13
	The Law and Economics Perspective	15
	Ford Motor Co., Fatalities Associated with Crash	
	Induced Fuel Leakage and Fires	17
	Grimshaw v. Ford Motor Co.	18
	Notes and Questions	23
	Note on the Limitations of Common Law Adjudication	
	More Generally	24
B. The Limitations	s of Contract Law	27
	Notes and Questions	28
C. The Justification	ns for Regulation	29
1. Economic Ju	ustifications for Regulation	29
	OMB, Circular A-4, To the Heads of Executive Agencies	
	and Establishments, Subject: Regulatory Analysis	30
	Notes and Questions	32
2. Social Justifi	ications for Regulation	34
-	Cass Sunstein, After the Rights Revolution: Reconceiving	
	the Regulatory State	35
	Notes and Questions	38
	From Justification to Legislation: A Note on the Role of	
	Politics	39
D. What is an Agen	icy?	40
Chapter 2		
		4 2
Legislation		45
A. The Legislative	Process	45
	Overview of the Legislative Process	46
	Abbe R. Gluck, Anne J. O'Connell & Rosa Po,	
	Unorthodox Lawmaking, Unorthodox Rulemaking	54
	Notes and Questions	57
	Notes on Theories of the Legislative Process	58

۲

xi

58

3rd proof

۲

۲

Contents

B. Legislative Drafting	61
1. The Basic Steps of Legislative Drafting	61
Legislative Drafting Manual, Office of the Legislative	
Counsel, U.S. Senate	62
House Legislative Counsel's Manual on Drafting Style,	
Office of the Legislative Counsel, U.S. House of	
Representatives	63
Notes and Questions	65
2. The Political Realities of Legislative Drafting	66
Victoria F. Nourse & Jane S. Schacter, The Politics of	
Legislative Drafting: A Congressional Case Study	66
Notes and Questions	72
C. A Statute: The 1966 Motor Vehicle Safety Act	74
1. The Story of Auto Safety Legislation	74
Notes and Questions	78
2. The National Traffic and Motor Vehicle Safety Act of 1966	80
The National Traffic and Motor Vehicle Safety	
Act of 1966	80
Notes and Questions	92
Senate Report (Commerce Committee)	
[To accompany S. 3005]	93
Notes and Questions	100
D. The Structure of a Modern Statute	100
Note on the Relationship Between Operative and	105
Implementation Provisions	105
Note on Preemption Provisions, Savings Clauses, and	105
Federalism Issues	105
Sherman Antitrust Act	106
Federal Trade Commission Act	107
Civil Rights Act of 1964	107
Occupational Safety and Health Act of 1970	108
The Telephone Consumer Protection Act	110
Homeland Security Act of 2002	111
Patient Protection and Affordable Care Act	112
The Dodd-Frank Wall Street Reform and Consumer	114
Protection Act Notes and Questions	114 117
Notes and Questions E. Specificity and Delegation	117
1. Political Reasons for Delegation	120
David Epstein & Sharyn O'Halloran, The	140
Nondelegation Doctrine and the Separation of	
Powers: A Political Science Approach	121
Notes and Questions	124
2. The Normative Implications of Delegation	125
David Schoenbrod, Power Without Responsibility: How	140
Congress Abuses the People Through Delegation	126
Jerry L. Mashaw, Greed, Chaos and Governance: Using	140
Public Choice to Improve Public Law	127
F	

3rd proof

X11

۲

۲

Со	ontents	xiii
	Edward L. Rubin, Law and Legislation in the	
	Administrative State	129
	Notes and Questions	130
Cl	hapter 3	
	atutory Interpretation by Courts	131
A.	A Classic of Statutory Interpretation	132
	Church of the Holy Trinity v. United States	133
	Notes and Questions	138
B.	Text-Based Tools	145
	1. Ordinary Meaning vs. Technical Meaning	146
	Nix v. Hedden	146
	Notes and Questions	148
	Barber v. Gonzales	148
	Notes and Questions	150
	Muscarello v. United States	151
	Notes and Questions	159
	2. Textual Canons of Construction	160
	a. A Classic Example of Textual Canons	160
	Babbitt v. Sweet Home Chapter of Communities for a	
	Great Oregon	161
	Notes and Questions	173
	b. Linguistic Canons	175
	i. Ejusdem generis	175
	ii. Noscitur a sociis	177
	iii. Expressio unius est exclusio alterius	180
	iv. Other Linguistic Canons	180
	(1) Punctuation	180
	(2) The Last Antecedent Rule	182
	(3) Conjunctive vs. Disjunctive	184
	(4) May vs. Shall	185
	(5) Any	186
	Notes and Questions	187
	c. Whole Act Canons	189
	i. The Whole Act Rule	189
	(1) Identical Words—Consistent Meaning	190
	(2) Avoiding Redundancy and Surplusage	192
	ii. Titles and Provisos	192
	(1) Titles	192
	(2) Provisos	193
	d. Whole Code Canons	193
	i. In pari materia	193
	ii. Inferences Across Statutes	196
	iii. Repeals by Implication	198
	e. The Court's Recent Word on Text	200
	Bostock v. Clayton County	200
	Notes and Questions	217

۲

۲

Contents

3. Substantive Canons	218
a. The Rule of Lenity	219
United States v. Santos	219
Notes and Questions	229
b. The Constitutional Avoidance Canon	230
Zadvydas v. Davis	231
Almendarez-Torres v. United States	236
Notes and Questions	242
c. The Federalism Clear Statement Rule	243
Gregory v. Ashcroft	244
Notes and Questions	253
d. The Presumption Against Preemption	254
Geier v. American Honda Motor Company	255
Williamson v. Mazda Motor of America	259
Notes and Questions	261
e. The Presumption Against Retroactivity	263
f. The Presumption Against Extraterritorial Application	264
4. Scrivener's Errors and Absurd Results	264
United States v. Locke	265
Notes and Questions	267
5. Criticisms of Canons of Construction	269
Nina A. Mendelson, Change, Creation,	
and Unpredictability in Statutory	
Interpretation: Interpretive Canon Use in the	
Roberts Court's First Decade	270
Abbe R. Gluck & Lisa Schultz Bressman, Statutory	
Interpretation from the Inside—An Empirical	
Study of Congressional Drafting, Delegation, and	
the Canons: Part I	274
Notes and Questions	276
C. Intent and Purpose-Based Tools	277
1. Forms of Legislative History	278
2. Judicial Reliance on Legislative History	281
Moore v. Harris	282
Notes and Questions	291
3. Principles for Reliance on Legislative History	295
Victoria F. Nourse, A Decision Theory of Statutory	
Interpretation: Legislative History by the Rules	295
Notes and Questions	301
D. Tools for Considering Changed Circumstances	301
Bob Jones University v. United States	302
Notes and Questions	314
E. Theories of Statutory Interpretation	314
1. Intentionalism	316
a. What Does Intent Mean?	317
b. Whose Intent Is Relevant?	317
c. Is Collective Intent Coherent?	318
d. Does Intent Reflect More Than Legislative Self-Interest?	319
e. Does Intent Constitute Law?	320
f. May Intent Trump Text?	320

۲

xiv

۲

3rd proof

۲

Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and

2. Purposivism

	Application of the Law	322
	Notes and Questions	325
3. Textualism and New Textualism		326
	a. Is Textualism Constitutionally Compelled?	328
	b. Is Textualism More Constraining?	328
	c. Is Textualism Distinctive?	331
	d. Is Textualism Internally Consistent?	331
	e. Is Legislative History an Impermissible Interpretive Tool?	332
	Antonin Scalia, A Matter of Interpretation: Federal	
	Courts and the Law	333
	Notes and Questions	338
	4. Dynamic Interpretation	340
	Ŵilliam N. Eskridge, Jr., Dynamic Statutory	
	Interpretation	340
	T. Alexander Aleinikoff, Updating Statutory	
	Interpretation	343
	Notes and Questions	346
Cł	hapter 4	
Po	licymaking by Rule: A Case Study	349
	NHTSA Gets Organized	351
Π.	Michael R. Lemov, Car Safety Wars: One Hundred	551
	Years of Technology, Politics, and Death	351
	Notes and Questions	353
R	Standard 208 Takes Shape: 1967 to 1971	354
р.	NHTSA, Title 23—Highways and Vehicles	354
	Notes and Questions	356
	NHTSA, Occupant Crash Protection in Passenger	000
	Cars, Multipurpose Passenger Vehicles, Trucks,	
	and Buses	359
	Notes and Questions	361
C.	Standard 208 Hits a Wall: 1971 to 1976	364
-	Transcript of Public Record; Conversation 488-15,	
	Nixon Presidential Library and Museum,	
	National Archives	365
	Transcript of Public Record, Nixon Presidential Library	
	and Museum, National Archives	368
	Notes and Questions	371
	Chrysler Corp. v. Department of Transportation	372
	Notes and Questions	383
	NHTSA, Motor Vehicle and School Bus Safety	
	Amendments of 1974	385
	Gerald R. Ford, Statement on Signing the Motor	
	Vehicle and School Bus Safety Amendments of 1974	387
	Notes and Questions	388
	NHTSA, Notice, Seat Belt Interlock Option (1974)	390
	Notes and Questions	390
	-	

321

xv

۲

3rd proof

۲

Contents

D.	Standard 208's Death and Resurrection: 1976 to 1989	391
	NHTSA, Final Rule, Occupant Restraint Systems (1981)	391
	Notes and Questions	393
	Motor Vehicle Manufacturers Ass'n of the United States, Inc.	
	v. State Farm Mutual Automobile Insurance Co.	394
	Notes and Questions	394
	NHTSA, NPRM, Occupant Crash Protection	398
	Notes and Questions	401
	NHTSA, Final Rule, Occupant Crash Protection	402
	Notes and Questions	405
Co	oncluding Questions	407
	1. GM vs. NHTSA	407
	Jody Freeman, Collaborative Governance in the	410
	Administrative State	410
	2. The Shape of the Industry and the Goals of the Regulation	412
C	hapter 5	
	atutory Implementation by Agencies	415
А.	The Notice-and-Comment Rulemaking Process Notes and Questions	416 420
R	An Example of Notice-and-Comment Rulemaking: NHTSA Standard 208	420 421
р.	NHTSA, NPRM, Occupant Crash Protection (1981)	424
	Notes and Questions	429
	NHTSA, Final Rule, Occupant Crash Protection (1981)	430
	Notes and Questions	446
С	The Standard Form of Notice-and-Comment Rules	447
с.	Note on the "Formalization" of the Agency Explanation	449
D.	The Tools of Statutory Implementation	451
	1. Statutory Analysis	453
	a. An Example of Statutory Analysis	454
	NHTSA, Passenger Automobile Average Fuel Economy	
	Standards; Denial of Petitions for Rulemaking	454
	Notes and Questions	457
	b. The Practice of Agency Interpretation	458
	Jerry L. Mashaw, Agency Statutory Interpretation	459
	Notes and Questions	462
	Kevin M. Stack, Purposivism in the Executive	
	Branch: How Agencies Interpret Statutes	465
	Notes and Questions	467
	2. Scientific Analysis	468
	a. Two Examples of Scientific Analysis	469
	NHTSA, Final Rule, Occupant Crash Protection (2000)	469
	Notes and Questions	471
	NHTSA, Part 581—Bumper Standard	472
	Notes and Questions	474
	b. The Use of Science	475
	Sidney Shapiro, Elizabeth Fisher & Wendy Wagner,	
	The Enlightenment of Administrative Law: Looking	
	Inside the Agency for Legitimacy	475

۲

xvi

3rd proof

۲

14-Jul-23 17:50:27

	c. Assessing Risk	478
	David Ropeik & George Gray, Risk!	480
	Notes and Questions	484
	3. Economic Analysis	488
	Cass Sunstein, Cost-Benefit Default Principles	489
	Notes and Questions	492
	a. An Example of Cost-Benefit Analysis	493
	OIRA, Return Letter	494
	NHTSA, Final Rule (Part Two)	502
	Notes and Questions	509
	b. The Mechanics of Cost-Benefit Analysis	510
	i. Monetizing	510
	W. Kip Viscusi, Fatal Tradeoffs	510
	Notes and Questions	512
	Further Note on Monetization	512
	ii. Discount Rate	516
	Cass R. Sunstein, Cost-Benefit Default Principles	516
	Notes and Questions	518
	NHTSA, Final Rule, Average Fuel Economy Standards	
	for Light Trucks Model Years 2008-2011 (2006)	519
	Notes and Questions	521
	OMB, Circular A-4, To the Heads of Executive	
	Agencies and Establishments, Subject:	500
	Regulatory Analysis	522
	Notes and Questions	523
	c. The Controversy over Cost-Benefit Analysis	523
	Cass R. Sunstein, Cost-Benefit Default Principles	523
	Frank Ackerman & Lisa Heinzerling, Pricing the	
	Priceless: Cost-Benefit Analysis of Environmental Protection	526
	Notes and Questions	520 528
	4. Equity and Distributional Analysis	530
	OMB, Circular A-4, To the Heads of Executive	550
	Agencies and Establishments, Subject:	
	Regulatory Analysis	531
	Control of Air Pollution from New Motor	001
	Vehicles: Heavy-Duty Engine and Vehicle Standards	533
	Notes and Questions	535
	5. Political Analysis	535
	EPA, Notice of Denial of Petition for Rulemaking,	
	Control of Emissions From New Highway Vehicles	
	and Engines (2003)	536
	Notes and Questions	538
E.	Other Policymaking Formats	539
	1. Adjudication	539
	a. Formal Adjudication	541
	Boston Medical Center Corporation and House	
	Officers' Association/Committee of Interns and	
	Residents	542
	Notes and Questions	552

۲

3rd proof

REGS_FM_pi-xxx_proof2.indd 17

۲

```
14-Jul-23 17:50:27
```

۲

xvii

Contents

b. "Informal" Adjudication	1	554
	Penalty Procedures and Factors	554
Notes and Qu		561
	David Friedman, Acting Administrator,	
	Before the Subcommittee on Consumer	
	n, Product Safety and Insurance	563
	ector General, Audit Report	566
Notes and Qu	*	575
2. Guidance		576
OMB Final Bu	Illetin for Agency Good Guidance Practices	577
Notes and Qu	0,	579
÷	son, Regulatory Beneficiaries and Informal	
	olicymaking	580
	nunications Commission: Industry	
	on the Commission's Case Law	
Interpreti	ing 18 U.S.C. §1464 and Enforcement	
	egarding Broadcast Indecency	582
Notes and Qu	· · · · · · · · · · · · · · · · · · ·	590
÷	erpretation Files Search	593
	rsbaugh, NHTSA Chief Counsel, to Brian	
	xec. Director of Global Safety and Field	
	ions, General Motors Corp.	594
Notes and Qu	-	597
Chapter 6		
Control of Agency Action		599
A. Presidential Control of Agency	Action	599
· ·	dependent Agencies and Presidential	
Control Thereof	1 0	601
Myers v. United	d States	603
5	ecutor v. United States	607
Morrison v. Ol		612
Notes and Qu	lestions	620
÷	Fund v. Public Company Accounting	
Oversight 1		622
8	C v. Consumer Financial Protection Bureau	631
Notes and Qu	lestions	641
2. Control of Agency Personn		645
3. Control of Appropriations		646
	off, OMB's Resource Management Offices	
	cy Policy Control	647

۲

	o o craigni Doura	044
	Seila Law, LLC v. Consumer Financial Protection Bureau	631
	Notes and Questions	641
2.	Control of Agency Personnel	645
3.	Control of Appropriations	646
	Eloise Pasachoff, OMB's Resource Management Offices	
	and Agency Policy Control	647
	Notes and Questions	649
4.	Regulatory Planning and Review	651
	Executive Order No. 12866, Regulatory Planning	
	and Review	652
	Notes and Questions	665
	a. Return and Prompt Letters	667
	b. The Debate About Regulatory Planning and Review	676

e Debate About Regulatory Planning and Review Notes and Questions

xviii

680

۲

14-Jul-23 17:50:27

۲

Contents

	. Presidential Directives	680
	Other White House and Agency Involvement	681
B.	ongressional Control of Agency Action	682
2.	. New Legislation	685
	· Appropriations Legislation	685
	. Oversight Hearings	689
	Brian D. Feinstein, Congress in the Administrative State	690
	. Fire Alarms	693
	. Legislative Vetoes	694
	Immigration & Naturalization Service v. Chadha	696
	Notes and Questions	709
	. Congressional Review Act	703
	Food and Drug Administration: Congressional	,
	Review Act Report	712
	Notes and Questions	715
	. Congressional Control of Agency Officials	716
	Bowsher v. Synar	716
	Notes and Questions	727
C.	idicial Control of Agency Action	728
0.	. Judicial Control of Agency Statutory Interpretation	728
	a. Skidmore	729
	Skidmore v. Swift & Co.	729
	Notes and Questions	732
	b. Chevron	733
	Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.	
	Notes and Questions	742
	i. Clear Meaning or Ambiguity	744
	MCI Telecommunications Corp. v. $AT \mathcal{E}T$	745
	Notes and Questions	753
	Food & Drug Administration v. Brown & Williamson	
	Tobacco Corp.	753
	Notes and Questions	766
	King v. Burwell	768
	Notes and Questions	769
	ii. Reasonable Agency Interpretations	769
	c. Mead and Barnhart	770
	United States v. Mead Corp.	771
	Notes and Questions	781
	Barnhart v. \widetilde{W} alton	783
	Notes and Questions	785
	d. The Major Questions Doctrine and the Movement Away	
	from Chevron	786
	West Virginia v. EPA	789
	Notes and Questions	810
	. Judicial Control of Agency Regulatory Interpretation	814
	Auer v. Robbins	815
	Kisor v. Wilkie, Secretary of Veterans Affairs	819
	Notes and Questions	827
	Note on the Interpretation of Regulations	828
	Notes and Questions	830

3rd proof

۲

14-Jul-23 17:50:27

۲

xx

Contents

3. Empirio	al Evidence on Deference Frameworks	831	
1	Kent Barnett & Christopher J. Walker, Chevron in the		
	Circuits	831	
	Notes and Questions	834	
4. Judicial	Control of Agency Statutory Implementation	835	
	ew of Agency Policy	836	
	Citizens to Preserve Overton Park, Inc. v. Volpe	837	
	Notes and Questions	841	
	Motor Vehicle Manufacturers Ass'n of the United States, Inc.		
	v. State Farm Mutual Automobile Insurance Co.	844	
	Notes and Questions	856	
	FCC v. Fox Television Stations, Inc.	859	
	Notes and Questions	866	
	Federal Communications Commission v . Prometheus Radio		
	Project	867	
	Notes and Questions	873	
b. Emr	irical Evidence on Judicial Control of Agency Policymaking	874	
s. mil	Cass R. Sunstein & Thomas J. Miles, Depoliticizing	0.1	
	Administrative Law	874	
	Notes and Questions	876	
c. Iudi	cial Control of Agency Procedure	876	
or juar	Vermont Yankee Nuclear Power Corp. v. Natural Resources	0.0	
	Defense Council, Inc.	878	
	Notes and Questions	886	
	United States v. Nova Scotia Food Products, Inc.	887	
Notes and Questions			
d. Iudi	cial Control of Agency Fact-Finding	892 893	
ai juai	Dickinson v. Zurko	893	
	Notes and Questions	895	
3 Availabi	lity of Judicial Review	895	
a. Stan		896	
a. Stan	Massachusetts v. EPA	896	
	Notes and Questions	907	
h Revi	ewability	909	
c. Tim		911	
C. 1111		511	
Appendix A	Selected Provisions of the Constitution of the		
11	United States of America	915	
Appendix B	Selected Provisions of the Administrative		
	Procedure Act	937	
Appendix C	Presidential Administrations and Secretaries of	501	
Appendix C		961	
	Department of Transportation, 1967-87	901	
Table of Cases		965	
Index		90) 973	
тиск		21)	

۲

14-Jul-23 17:50:27

3rd proof

۲