THE REHNQUIST COURT'S CANONS OF STATUTORY CONSTRUCTION

This outline was derived from the Appendix to "Foreword: Law As Equilibrium,"
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This Appendix collects the canons of statutory construction that have been used or developed by the Rehnquist Court, from the 1986 through the 1993 Terms of the Court (inclusive). The Appendix divides the canons into three conventional categories: the textual canons setting forth conventions of grammar and syntax, linguistic inferences, and textual integrity; extrinsic source canons, which direct the interpreter to authoritative sources of meaning; and substantive policy canons which embody public policies drawn from the Constitution, federal statutes, or the common law.

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I. TEXTUAL CANONS

- **Plain meaning rule:** follow the plain meaning of the statutory text, [FN1] except when text suggests an absurd result [FN2] or a scrivener's error. [FN3]

II. LINGUISTIC INFERENCES

- **Expressio unius:** expression of one thing suggests the exclusion of others. [FN4]
- **Noscitur a sociis:** interpret a general term to be similar to more specific terms in a series. [FN5]
- **Ejusdem generis:** interpret a general term to reflect the class of objects reflected in more specific terms accompanying it. [FN6]
- Follow **ordinary usage of terms**, unless Congress gives them a specified or technical meaning. [FN7]
- Follow **dictionary definitions of terms**, unless Congress has provided a specific definition. [FN8] Consider dictionaries of the era in which the statute was enacted. [FN9] Do not consider "idiosyncratic" dictionary definitions. [FN10]
- "May" is usually precatory, while "shall" is usually mandatory. [FN11]
- "Or" means in the alternative. [FN12]

III. GRAMMAR AND SYNTAX

- **Punctuation rule:** Congress is presumed to follow accepted punctuation standards, so that placements of commas and other punctuation are assumed to be meaningful. [FN13]
- Do not have to apply the "rule of the last antecedent" if not practical. [FN14]
IV. TEXTUAL INTEGRITY

• Each statutory provision should be read by reference to the whole act. [FN15] Statutory interpretation is a "holistic" endeavor. [FN16]

• Avoid
  ➢ interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary. [FN17]
  ➢ interpreting a provision in a way inconsistent with the policy of another provision. [FN18]
  ➢ interpreting a provision in a way that is inconsistent with a necessary assumption of another provision. [FN19]
  ➢ interpreting a provision in a way that is inconsistent with the structure of the statute. [FN20]
  ➢ broad readings of statutory provisions if Congress has specifically provided for the broader policy in more specific language elsewhere. [FN21]

• Interpret the same or similar terms in a statute the same way. [FN22]

• Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue. [FN23]

• Provisos and statutory exceptions should be read narrowly. [FN24]

• Do not create exceptions in addition to those specified by Congress. [FN25]
V. EXTRINSIC SOURCE CANONS

A. AGENCY INTERPRETATIONS

- Rule of **deference to agency interpretations**, unless contrary to plain meaning of statute or unreasonable. [FN26]

- Rule of **extreme deference** when there is **express delegation** of law-making duties to agency. [FN27]

- Presumption that **agency interpretation of its own regulations** is correct. [FN28]

B. CONTINUITY IN LAW

- **Rule of continuity**: assume that Congress does not create discontinuities in legal rights and obligations without some clear statement. [FN29]

- **Presumption** that Congress uses **same term consistently in different statutes**. [FN30]

- **Super-strong presumption of correctness** for statutory precedents. [FN31]

- **Presumption that international agreements do not displace federal law**. [FN32]

- **Borrowed statute rule**: when Congress borrows a statute, it adopts by implication interpretations placed on that statute, absent express statement to the contrary. [FN33]

- **Re-enactment rule**: when Congress re-enacts a statute, it incorporates settled interpretations of the re-enacted statute. [FN34] The rule is inapplicable when there is no settled standard Congress could have known. [FN35]

- **Acquiescence rule**: consider unbroken line of lower court decisions interpreting statute, [FN36] but do not give them decisive weight. [FN37]
C. EXTRINSIC LEGISLATIVE SOURCES

- Interpret provision **consistent with subsequent statutory amendments**, [FN38] but do not consider subsequent legislative discussions. [FN39]

- Consider legislative history if the statute is **ambiguous**. [FN40]

- **Committee reports** are authoritative legislative history, [FN41] but cannot trump a textual plain meaning, [FN42] and should not be relied on if they are "imprecise." [FN43]

- **Committee report language** that cannot be tied to a specific statutory provision cannot be credited. [FN44] House and Senate reports inconsistent with one another should be discounted. [FN45]

- **Presumption against interpretation considered and rejected** by floor vote of a chamber of Congress or committee. [FN46]

- **Floor statements** can be used to confirm apparent meaning. [FN47]

- **Contemporaneous and subsequent understandings** of a statutory scheme (including understandings by President and Department of Justice) may sometimes be admissible. [FN48]

- **The "dog didn't bark" canon:** presumption that prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule. [FN49]
VI. CONSTITUTION-BASED CANONS

- Avoid interpretations that would render a statute unconstitutional. [FN50] Inapplicable if statute would survive constitutional attack, or if statutory text is clear. [FN51]

A. SEPARATION OF POWERS

- Super-strong rule against congressional interference with President's authority over foreign affairs and national security. [FN52]

- Rules
  - against congressional invasion of the President's core executive powers. [FN53]
  - against review of President's core executive actions for "abuse of discretion." [FN54]
  - against congressional curtailment of the judiciary's "inherent powers" [FN55] or its "equity" powers. [FN56]
  - against congressional expansion of Article III injury in fact to include intangible and procedural injuries. [FN57]
  - against congressional abrogation of Indian treaty rights. [FN61]

- Presumptions
  - that Congress does not delegate authority without sufficient guidelines. [FN58]
  - against "implying" causes of action into federal statutes. [FN59]
  - that U.S. law conforms to U.S. international obligations. [FN60]
  - favoring severability of unconstitutional provisions. [FN62]
B. FEDERALISM

• Super-strong rules
  ➢ against federal invasion of "core state functions." [FN63]
  ➢ against federal abrogation of states' Eleventh Amendment immunity from lawsuits in federal courts. [FN64]

• Rules
  ➢ against inferring enforceable conditions on federal grants to the states. [FN65]
  ➢ against congressional expansion of federal court jurisdiction that would siphon cases away from state courts. [FN66]
  ➢ against reading a federal statute to authorize states to engage in activities that would violate the dormant commerce clause. [FN67]
  ➢ favoring concurrent state and federal court jurisdiction over federal claims. [FN68]
  ➢ against federal pre-emption of traditional state functions, [FN69] or against federal disruption of area of traditional state regulation. [FN70]

• Presumptions
  ➢ against federal pre-emption of state-assured family support obligations. [FN71]
  ➢ against federal regulation of intergovernmental taxation by the states. [FN72]
  ➢ against application of federal statutes to state and local political processes. [FN73]
  ➢ states can tax activities within their borders, including Indian tribal activities, [FN74] but also presumption that states cannot tax on Indian lands. [FN75]
against congressional derogation from state's land claims based upon its entry into Union on an "equal footing" with all other states. [FN76]

against federal habeas review of state criminal convictions supported by independent state ground. [FN77]

finality of state convictions for purposes of habeas review. [FN78]

Congress borrows state statutes of limitations for federal statutory schemes, unless otherwise provided. [FN80]

- Principle that federal equitable remedies must consider interests of state and local authorities. [FN79]

C. DUE PROCESS

- Rule of lenity: rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability [FN81] or criminal penalty. [FN82] Rule of lenity applies to civil sanction that is punitive [FN83] or when underlying liability is criminal. [FN84]

- Rules
  - against criminal penalties imposed without showing of specific intent. [FN85]

  - against interpreting statutes to be retroactive, [FN86] even if statute is curative or restorative. [FN87]

  - against interpreting statutes to deny a right to jury trial. [FN88]

- Presumptions
  - in favor of judicial review, [FN89] especially for constitutional questions, [FN90] but not for agency decisions not to prosecute. [FN91]

  - against pre-enforcement challenges to implementation. [FN92]
- against exhaustion of remedies requirement for lawsuit to enforce constitutional rights. [FN93]
- judgments will not be binding upon persons not party to adjudication. [FN94]
- against national service of process unless authorized by Congress. [FN95]
- against foreclosure of private enforcement of important federal rights. [FN96]
- preponderance of the evidence standard applies in civil cases. [FN97]

VII. STATUTE-BASED CANONS

- In pari materia: similar statutes should be interpreted similarly, [FN98] unless legislative history or purpose suggests material differences. [FN99]

- Presumption against repeals by implication. [FN100]

- Purpose rule: interpret ambiguous statutes so as best to carry out their statutory purposes. [FN101]

- Strong presumptions
  - in favor of enforcing labor arbitration agreements. [FN113]
  - federal grand juries operate within legitimate spheres of their authority. [FN124]

- Presumptions
  - against creating exemptions in a statute that has none. [FN103]
  - federal private right of action (express or implied) carries with it all traditional remedies. [FN105]
  - court will not supply a sanction for failure to follow a timing provision when the statute has no sanction. [FN106]
against national "diminishment" of Indian lands. [FN108]
against taxpayer claiming income tax deduction. [FN110]
Bankruptcy Act of 1978 preserved prior bankruptcy doctrines. [FN111]
statute creating agency and authorizing it to "sue and be sued" also creates federal subject matter jurisdiction for lawsuits by and against the agency. [FN118]
against application of Sherman Act to activities authorized by states. [FN122]

• Narrow interpretation of statutory exemptions. [FN102]
• Allow de minimis exceptions to statutory rules, so long as they do not undermine statutory policy. [FN104]

• Rules
• against state taxation of Indian tribes and reservation activities. [FN107]
• favoring arbitration of federal statutory claims. [FN114]
• that Court of Claims is proper forum for Tucker Act claims against federal government. [FN116]
• that "sue and be sued" clauses waive sovereign immunity and should be liberally construed. [FN117]

• Narrow interpretation of exemptions from federal taxation. [FN109]
• Federal court deference to arbitral awards, even where the Federal Arbitration Act is not by its terms applicable. [FN112]
• Strict construction of statutes authorizing appeals. [FN115]
• Construe ambiguities in deportation statutes in favor of aliens. [FN119]
• Principle that veterans' benefits statutes be construed liberally for their beneficiaries. [FN120]
• Liberal application of antitrust policy. [FN121]
• Principle that statutes should not be interpreted to create anticompetitive effects. [FN123]

VIII. COMMON LAW-BASED CANONS

• Presumptions
  ➢ in favor of following common law usage where Congress has employed words or concepts with well settled common law traditions. [FN125] Follow evolving common law unless inconsistent with statutory purposes. [FN126]

  ➢ that jury finds facts, judge declares law. [FN134]

  ➢ that public (government) interest not be prejudiced by negligence of federal officials. [FN136]

  ➢ that federal agencies launched into commercial world with power to "sue and be sued" are not entitled to sovereign immunity. [FN137]

  ➢ favoring enforcement of forum selection clauses. [FN138]

  ➢ against criminal jurisdiction by an Indian tribe over a nonmember. [FN139]

  ➢ that party cannot invoke federal jurisdiction until she has exhausted her remedies in Indian tribal courts. [FN140]

  ➢ that federal judgment has preclusive effect in state administrative proceedings. [FN141]

  ➢ importing common law immunities into federal civil rights statutes. [FN142]

• Rules
  ➢ against extraterritorial application of U.S. law, [FN127]
    except for antitrust laws. [FN128]

  ➢ that debts to the United States shall bear interest. [FN130]
- presuming against attorney fee-shifting in federal courts and federal statutes, [FN132] and narrow construction of fee-shifting statutes to exclude unmentioned costs. [FN133]

- presuming that law takes effect on date of enactment. [FN135]

- Super-strong rules

- against waivers of United States sovereign immunity. [FN129]

- against conveyance of U.S. public lands to private parties. [FN131]

[FN1]. See Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2594 (1992); United States v. Providence Journal Co., 485 U.S. 693, 700-01 (1988). But see id. at 708, 710 (Stevens, J., dissenting) ("[The Court has] long held that in construing a statute, [it is] not bound to follow the literal language of the statute -- 'however clear the words may appear on superficial examination' -- when doing so leads to 'absurd,' or even 'unreasonable,' results." (quoting United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-44 (1940) (internal quotation marks omitted))).


[FN7]. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989).


S. Ct. 1483, 1493-95 (1994) (acknowledging that petitioner's textual argument, based upon "the canon that a court should give effect to every provision of a statute," "has some force" but refusing to accept the averred meaning, because it was "unlikely that Congress intended the [disputed clause] to carry the critically important meaning petitioner assigns it").


[FN28]. See Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386-87 (1994); Mullins Coal Co. v. Director, Office of Workers'


[FN39]. See Sullivan v. Finkelstein, 496 U.S. 617, 628 n.8 (1990); id. at 631-32 (Scalia, J., concurring in part). But see Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085, 2089 (1993) (inferring congressional approval of judicial regulation of the implied 10b-5 cause of action from subsequent congressional legislation acknowledging such a cause of action "without any further expression
of legislative intent to define it”); cf. Hagen v. Utah, 114 S. Ct. 958, 969 (1994) (considering history of legislative amendment to subsequent act as evidence that the later act incorporated the provisions of an earlier act, even though the amendment was ultimately rejected).


[FN52]. See Department of Navy v. Egan, 484 U.S. 518, 527 (1988);

[FN53]. See Morrison v. Olson, 487 U.S. 654, 682-683 (1988); see also Carlucci v. Doe, 488 U.S. 93, 99 (1988) (noting the "general proposition" that the executive branch's power to remove officials from office is incident to the original congressional grant of authority to appoint that official).


[FN57]. See Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2135-37 (1992); id. at 2146 (Kennedy, J., concurring in part and concurring in the judgment).


see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.").


[FN96]. This presumption is very probably not a viable canon today. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 520-21 (1990)


bar an alien's claim for political asylum).


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