**Exam Strategy:**

* 1. Tools are what matter, not labels. Just make args and use tools.
  2. Make arg that legislature arrived at X because of Y with sensitivities of issues.
     1. Have rough checklist but not rough formula. Pick over according to what will make it most persuasive.
  3. Play role you are given faithfully
     1. Make best arguments
     2. Anticipate/distinguish

**Checklist:**

* + Democracy & accountability
    - Interest groups rather than the people?
  + Constitution’s structure of law making?
    - Separation of powers
      * What powers should we be separating?
  + Certainty/clarity
  + Good policy?
* Expertise
  + Reduce judicial discretion
* Are judges engaging in law making under the guise of applying statutes?
  + Might love or hate X depending on what it does

***U.S. CONSTITUTION:***

* **Art. I Section I**: “All legislative power herein granted hall be vested in a Congress of the United States”
  + Section 8: “to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers”
* **Art II. Section I**: “The executive power shall be vested in a President of the United States of America”
* **Article II. Section 2**: President shall nominate, and by and with Advice and Consent of the Senate, shall appoint…all Officers of the U.S., whose appointments are not herein otherwise provided for; but the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone.
  + e.g. Pres. appoints “principal officers,” with advice and consent of senate; power to appoint inferior officers is vested w/ president unless vested elsewhere; anybody can pick employees
* **Article II, Section 3**: President shall take care the laws be faithfully executed
* ***5th AM:*** Nor shall any person…be deprived of life, liberty, or property without due process of law.”

**Statutory Interpretation**

**Basic Interpretive Tools**

* Text
  + Statute is controlling
  + Title: Persuasive
* Purpose
* Context
* Legislative Intent
* Legislative History

**Vetogates:** junctures in the legislative process where a proposed bill can be derailed by a relatively small number of individuals.

* Committee
* Calendar/Scheduling
* Senate debate
* Conference
* Presidential approval/veto

*Step One*: **TEXT**

Why?

* Actual law
* Democratic accountability
* Constitutional structure
* Clarity
* Cabins judicial discretion
* There can’t be collective intent
* Forces Congress to enact good law

**Note:** You can look for legislative purpose, but only by using the text to preamble, overall structure, common sense inference about why the statute was passed

Text-based tools:

* Ordinary meaning:
  + Dictionary
  + Common understanding
    - Trumps technical meaning (*Nix*)
    - More than one?
      * Statute’s audience?
      * Argue *why* one is better than the other
* *Linguistic Canons*: Pick the one that works and discredit use of others
  + Why*?*
    - Help courts get right answers more often
    - Reduce judicial discretion
      * Usage of language – standardized
      * Objective
  + *Ejusdem generis:* general in a list of specifics 🡪 interpret consistent w/specifics
    - Define according to what you want to show
  + *Noscitur a sociis*: words meaning can be clarified by those around it
  + *Expressio unius*: inclusion of things 🡪 exclusion of others
* *Tools:*
  + Punctuation
    - Absence of comma, assume that the term modifies only the immediately preceding term (and vice versa)
* *Whole Act*:
  + Consistent meaning
  + Avoid conflict
  + Avoid surplusage
  + Titles – informative but don’t trump statutory text
  + Purpose clauses – helpful guide if ambiguous
* *Whole Code*:
  + Presumption of Implied Repeals
  + Different statutes + same subject matter 🡪 read like same law
    - Cross-statutory inferences

Can go **beyond** if:

* Absurdity doctrine:
  + Only if applying the statute to the situation would be so absurd it would be universally rejected
    - Deep-seated social value everyone agrees with (*Kirby)*
      * Consistent with dem/separation of powers b/c avoiding outcomes no legislature would have wanted
    - ***Ask****:*
      * Are you aren’t dressing up purposivism? (*Public Citizen – Kennedy Concurrence)*
        + Judicial discretion/constitution
* Scrivner’s Error:
  + Only if obvious mistake in the transcription
    - Not worried about discretion/
  + Is certainty more important than this case?
    - Certainty/good policy
      * Arbitrary in nature? E.g. dates
* Ambiguity:
  + Only if at least two reasonable interpretations
    - Triggers Step Two

*Step Two*: What tools are most helpful for what you want/opponent wants:

Substantive Canons:

* Constitutional avoidance
  + *Classic:* when faced with two interpretations of a statute, one that is constitutional and one that is not 🡪 interpret to save the act
  + *Modern*: construe a statute to avoid even serious constitutional doubts
    - Sliding scale between ambiguity of text and seriousness of constitional issue
    - Delegation problems?
* Rule of Lenity
  + Underlying reason?
    - Cabin judges? Prosecutors? Forcing legislators to be clearer?
* Presumption against retroactivity
  + Grounded in constitutional provisions
* Presumption in favor of principles of federalism

*Intentionalist:*

* Congress’s specific intent regarding the case at hand
  + Need some sort of evidence that they thought about this particular problem
    - Text, legislative history, conditions at time of enactment

*Purposivist:*

* Use the background purpose that underlies the enactment of the statute
  + Text, social context, common law, goal of judges to make law cohesive
  + Different levels of generality one can use to describe the purpose
    - Find appropriate level of generality for your chosen purpose

*Imaginative Reconstruction:* What would a reasonable legislature have done/wanted?

*Dynamic Interpretation* – courts apply their own values/understandings to interpret statutes

* 1. Social Context:
  + specific intentions of a statute can be sacrificed if they are inconsistent with statute’s genera/meta intent given social changes
* 2. New legal rules/polices – court may reconcile conflicting statutory mandates to avoid conflict (i.e. narrower so can accommodate both)

Legislative History:

Hierarchy:

1. Conference and committee reports
   1. Assumes that Congress has adopted as its intent the intent of the committee
2. Sponsor statements
   1. Weighty (authoritative?) – susceptible to manipulation
3. History of the bill, rejected proposals
   1. Is it really reflective of intent or is there another explanation?
4. Floor and hearing statements
   1. Scripted, easy to manipulate but useful if narrative existed
5. Subsequent legislative history
   1. Inaction: What does the inaction *mean?*
      1. Strict silence 🡪 tough to infer anything
         1. Collective action?
      2. Rejects bill that would accomplish meaning being urged 🡪 interpretation disfavoured
      3. Congress re-enacts after decision w/o overturning 🡪 favour

**REGULATION & THE ADMNISTRATIVE PROCESS**

|  |  |  |  |
| --- | --- | --- | --- |
| Controlling Body over Agencies | Congress | Executive | Judiciary |
| Doctrine | Non-Delegation | Removal | Encroachment on Art III powers |
| Constitutional | Art. I | Art. II | Art. III |
| Tools of Control | Funding Organic Law (hardwiring)  Oversight  Appointment role | OIRA/OMB » cba  Removal (sometimes) | Judicial review |

**Non-Delegation Doctrine**

*Functionalist approach:* what does this power look like in practice, and is it okay on balance?

* Some blending of powers is ok
  + Versus Formalism

*Relevance:* Last invoked to repeal a statute in 1935; more of a canon to interpret narrowly

Congress cannot delegate its inherent lawmaking powers to agencies without laying down an “**intelligible principle**” to which the agency must conform

*Ask:* is the agencies power executive or quasi legislative?

* Quasi-legislative 🡪 impermissible; separation of powers
  + **PLAY** with line
* Can’t punt policy calls to agency; must give *some* guidance
  + Preserve policy making for Congress
    - Is it so vague that agency is actually making law?
    - Even if intelligible, is it just too much power?
  + Reduce arbitrariness via procedure
    - Is there enough procedure mandated?
  + Promote judicial review
    - Is the principle clear?
* **THINK**: Courts moving away from formalism. Look at statute; what does it entail? How does it really play out? 🡪 Categorize it.
  + Expertise
    - Who has the information/what kind of information is it?
  + Capacity
  + Free from political influence?
  + Efficiency
    - Do we think the agency should be doing this?
  + Accountability
    - Do we want deliberation?
    - Is it so big we don’t need to worry?
  + Vagueness versus scope
    - Do we prefer a vague but more limited delegation or a broad but clear delegation?
  + Implications?
    - Can court regulate it?
    - Can/should Congress fix it?

**What are the functions of the Non-delegation Doctrine?**

* Ensures important choices of social policy are made by Congress 🡪

**accountability**

* Provides agencies with “intelligible principle” to guide exercise of delegated discretion
* Allows that courts are able to test exercise of discretion against ascertainable standards

**Two ways to view the Non-delegation Doctrine:**

* + As a means of limiting the legislative power to delegate issues about which Congress is

supposed to deliberate (i.e. that legislative power should go to the legislature)

* + That some decisions are too important to be made by agencies even if they are not

discretionary, and that these decisions should go to Congress (Benzene, allowing agency wide discretion as long as it made a threshold determination limiting its own power)

**Congressional Control of Agencies**

1. Enabling statute: Congress is creating the agency, and so can “hardwire” the scope of the agencies authority, etc
2. Appropriations: Congress sets the budget for agencies and decides whether to fund them
3. Oversight hearings: call heads of agency before Congress to testify
4. Create Inspector General (IG) within agency
5. Legislative veto (*Chadha*)
   1. Resisting one house veto b/c:
      1. Constitution
      2. Functionalism 🡪 does not promote deliberation
6. Appointment power: Senate “advice and consent” to appointment of high ranking officials

**THINK:** Why is Congress trying to control the agency?

* Political tool for election victories?
  + Doing just what it takes to get re-elected?
* Or is this a good thing because doing what the people want?
* Substantive policy?
  + Congress is making checking their policy choice
  + But isn’t that why it was delegated in the first place?
* Democracy?
* *Note:* Build arguments for/against using pieces from non-del

**Presidential Control of Agencies**

*Appointment*:

Is the person an officer or employee?

* Employee 🡪 Congress can do anything
* Officer:
  + Principal: President has **exclusive** power to appoint
    - Nomination by President, confirmation by Senate
    - Art. II Section 2 Clause 2/Appointments Clause
  + Congress can delegate appointment power

**ASK:**

* Does X report to someone else?
  + *Most important consideration ­–***play**; how far up?
* What kind of discretion does X yield?
* Pragmatic: don’t want everyone to be principal
* More modern cases disclaim this box-like approach

*Intra-session Presidential appointment; Canning* (shows direction of courts)

* Limits presidential authority
  + Only appoint in *the* recess; not *a* recess:
    - Text (“The Recess” 🡪 just one)
    - Earlier drafters views (*Chada & Meyer* also endorse earlier history)
      * Ignores that old rules with modern doctrine creates gridlock
      * Courts have real role in deciding appropriateness of roles of different branches; will not just accept practice
        + Art. III
      * *Dissent*: Purposivist – underlying goals of Constitution🡪 apply

*Removal:*

* **Executive branch agencies:** appear under the President in the government organizational chart and are run by officials who can be fired at will by the President
  + Including Departments, subdivisions of Departments
  + These heads are known as “at will” officials
* **Independent agencies:** heads serve fixed terms that expire in staggered years and are removable by the President only for cause or good cause – heads not subject to plenary presidential removal, have job protection.
  + Usually multi member commissions or boards.
  + Does not mean conclusively that the agency is any less under the President’s thumb
  + This is sometimes constitutional

*Formalist approach:* categorize power (leg/exec/jud) 🡪 what does Constitution say about who wields that power?

* Start with framer’s view, then subsequent changes to initial history
  + (*Opposite* of non-delegation)
  + (Rejects purposivist args that begin with the values of the Constitution🡪apply)

**Key**: you can’t really control an agency unless you can hire and fire

*In general:*

* Aggrandizement: Congress inserting themselves into removal power has never been accepted
* Encroachment: Limiting presidential power to remove – traditionally accepted
  + *PCAOB* is exception 🡪 but what does it entail?
    - Commission is a department
    - Multimember body can be a head
      * Does it only apply to department heads? What does it mean about constitutionality of insulating removal o people just below the heads of agencies?

**THINK:**

* Is the power that the agency wields necessary for President to carry out constitutional duty?
  + What type of power does X wield?
    - Only executive power?
      * Harder to limit removal power – removable at will by President
    - Quasi-legislative or independent agency:
      * Easier 🡪 textual arg 🡪 meant to be independent from President control
  + Degree of limitation
    - Structure
      * Single –usually okay
      * Double—PCAOB says no
        + Or is issue in PCAOB the level of bar

“break the law or wilful abuse”, not just “good cause”

*Oversight*

* In practice: Hard for President to remove (politics, have to reappoint, hard to get through senate)
* 🡪 want other mechanism to keep agencies in line b/c often change position/may be influenced by lobbyists
* *Executive Orders*
  + What is an executive order?
    - Not simultaneous with passage of a bill
    - President may want to effect a new policy, but has not been able to get legislation passed
    - Authorized either by statute or by constitution
      * E.g.- military issues fall under Commander in Chief Clause in Art. II
    - Can be struck down by a court
  + Independent agencies are exempt from OIRA review
  + For executive agencies:
    - Planning: “Any significant regulatory action” (annual effect on economy of 100M) 🡪 submit to OIRA review *before* it gets published as a Notice of Proposed Rulemaking in the federal register
      * Debate about whether this includes guidance documents with this economic effect. Obama most recently indicated they are.
      * Agency must do CBA (unless forbidden by statute)
    - Review: after agency takes public comments and makes decision about the scope of its final rule 🡪 submit to OIRA before final rule may be published
      * Return letters (OIRA proposes changes to regulation)
      * Prompt letters (suggest new plans/issues to work on)
  + *OIRA*
    - Think of as wielding a veto over agency’s ability to move forward with a rule
      * If OIRA issues a return letter w/ proposed changes or alternative suggestions, agency cannot ignore it.
    - +
      * value neutral requirements/increase efficacy
    - -
      * Allows political control over expert agencies
      * Creates costs/decreases efficiency

***Regulatory Process***

***Agency’s Power to Adjudicate***

*Under Constitution: why can agencies adjudicate?*

* Due Process concern when individuals’ interests are implicated in a decision
  + DPC demands Art. III court (w/ all that implies 🡪 judges insulated from politics, etc.)
* Public v. Private
  + Blurry distinction if rights v. benefits
  + In general:
    - *Private* rights cases (citizen v. citizen)
      * Always Art. III tribunal (Constitution)
    - *Public* rights cases (citizen v. gov – enforcement/benefits cases)
      * Art. II court adjudication is sufficient
        + Art. III courts (i.e. fed courts) have significant oversight of agency decisions

🡪 Art. II court is adjunct of Art. III court

De novo review of law

De novo review of at least some facts

Court can decide not to enforce agency’s order

***Administrative Procedure Act (APA)***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **THE APA** | **RULES**: future minded, can be either ind’l or general | | Formal rulemaking (§ 556 and § 557) need special language to trigger: “**on the record** after opportunity for an agency hearing;” abundance of procedural reqs, including hearing, ev., insulation. *Facts*: Substantial evidence. *Policy*: A&C. *Law*. Chevron. | |
| **Informal rulemaking**, aka “notice-and-comment rulemaking” (§ 553): need 1) notice, 2) record and 3) explanation of reasoning (*NS*), but courts cannot common-law fashion additional req’s (*VY). Facts*: A&C. *Policy*: A&C. *Law:* Chevron. | |
| **ORDERS**: past-oriented | | Formal adjudications (§ 556, § 557, § 554): trial like adversarial hearings; require an opportunity for oral presentation (except for benefits or licenses). *Facts:* Substantial Evidence. *Policy:* A&C. *Law*: Chevron. | |
| **Informal adjudication**: no section specifies particular procedures. DPC. *Overton Park* 🡪 hard look review. *Facts:* A&C. *Policy*: A&C. *Law:* Mead. | |
| **OTHERS** | | Good cause (notice and pub. proc. impract; unnecc; contra to pub. interest);  General Statements of Policy; Interpretive rules; Military/foreign affairs; relating to ind’l loans/grants/benefits/contracts | |

*Lenses for Agency Action and implication for procedure of agency action*

* Expertise/efficiency: does a procedure promote expertise (e.g. making reasoning public?)
* Legis. del./legitimacy: does a procedure answer a concern about lack of democratic legitimacy? (e.g. paper hearing🡪accountability)
* Rights of individuals: does a procedure protect interest or rights (face to face hearing?)

*DPC considerations for adjudications:*

Where there is an individual determination at stake, DPC requires individualized adjudication (*Londoner*)

When there is a general determination at stake, no DPC req. for individualized adjudication (*Bi-Metallic)*

* Pragmatic 🡪 efficient decision making

Agency Choice: if agency is authorized to do either adj. or rule making, agency has discretion; not court’s business. *Chenery II. Bell Aerospace*.

* Expertise versus don’t know how to police?
* Adjudication usually preferred b/c individualized, ease of process w/ same binding effect
  + 1. **Formal Adjudication**
       1. Mimics a trial
       2. If Organic statute requires adjudication decision on the “record” with opportunity for a “hearing”
          1. §554(c)(2); 556, 557
          2. Especially in cases where agency is imposing sanction or liability on a party
       3. Elements
          1. Unbiased tribunal presided over by ALJ (556(b))
          2. Notice of proposed action (process) (554(b))
          3. Full and fair disclosure of facts; oral or documentary evidence (556(d))
          4. Right to present evidence and know opposing evidence
          5. Decision based entirely on evidentiary record (556(e))

**CANNOT** add to the record after initial determination. Any agency action can be affirmed on review only on the basis of record in initial determination. *Chenery I.*

Can be applied retroactively.

Substantive restraint (rather than procedural)

Can’t be unfair to impose 🡪 disrupt expectations

Not categorical constraint

Not clear when a rule is retroactive

Play with this blurry line

* + 1. **Notice and Comment** (Informal) Rulemaking
       1. Agencies’ preferred method for regulating- (after *FL East Coast* Decision)
       2. §553
          1. Agency puts general notice of proposed rulemaking in Federal Register
          2. “Interested persons” can comment on proposed regulation
          3. Agency weighs comments and promulgates rule
          4. Record: agency must generate a record that includes all relevant material on which their decision is based to interested parties for their comment. *Nova Scotia*.
          5. Account of reasoning: agency must give a reasoned elaborate account of their decision including a response to the critiques from interested parties. *Nova Scotia.*
          6. Courts can’t impost additional requirements. Only APA. *VT Yankee*.
          7. Agencies can grant rights
          8. Agencies can make own rules

Can be retroactive

* + - 1. Purposes of N&C
         1. Addresses legitimacy gap- allows interested parties to weigh in
         2. Transparency and accountability

Allows contemporary congressional scrutiny and later judicial review.

* + - * 1. Encourages deliberative process conducive to considered policy-making.

*Non-Rules*

* If it’s not a substantive rule 🡪 no procedural reqs
  + Statements of Policy*:* §663(b)(A) – N&C reqs **do not** apply b/c do not have the force of law. E.g. memos, letter, press releases that explains priorities/plans to use authority
    - **ASK:** 1. Does it bind? 2. Significant practical impact? 3. Preserve flexibility for substitutes?
  + Interpretive Rules:§ 553(b)(A) exempts IRs 🡪 declaration of how the agency interprets an ambiguous statute or regulation. *American Mining.* No force of law 🡪 N&C reqs **do not** apply.
    - *Hoctor* – no exemption b/c
      * 1. Quantitative (arbitrary numbers?)
      * 2. Regulates conduct
        + If no valid rule making procedure followed, can’t use non-rule to get same regulatory effect as a rule
      * 3. Process of decision making
      * 4. Authority granted
        + Agency can’t decide it’s substantive but see if process was followed with non-rule.

***Judicial Oversight of Agencies***

**For what reasons may a reviewing court set aside agency actions?**

* “Arbitrary and capricious,” abuse of discretion, or not in accordance with law – APA § 706(2)(A) – Hard Look Review
* Constitutional violation
* Excess of statutory jurisdiction
* Failure to follow proper procedure
* Not supported by “substantial evidence” (formal rulemaking/adjudicatory decisions –

APA §§ 556, 557) – APA § 706(2)(E)

* Not warranted by facts where facts are subject to trial de novo
* Challenges are:
  + Agency exercise of discretion
  + Questions of Fact
  + Questions of Law

**APA Section 706: Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

* 1. Compel agency action unlawfully withheld or unreasonably delayed
  2. Hold unlawful and set aside agency action, findings, and conclusions found to be:
     1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
     2. Contrary to constitutional right, power, privilege, or immunity
     3. In excess of statutory jurisdiction, authority, or limitations, or short of statutory

right

* + 1. Without observance of procedure required by law
    2. Unsupported by substantial evidence in a case subject to sections 556 and 557 of

this title or otherwise reviewed on the record of an agency hearing provided by

statute, or

* + 1. Unwarranted by the facts to the extent that the facts are subject to trial de novo

by the reviewing court

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

*Whole Record*: (informal): what was before the decisiomaker at the time; (formal) evidentiary record in trial like hearing.

***Policy Review***

*Hard Look/A&C Review* (APA **§706(2)(a)**- a court shall determine terms of agency action…and **set aside action found to be arbitrary, capricious,** an abuse of discretion, or otherwise not in accordance with the law).

1. Adjudication (*Overton Park)* – agencies win 80% of the time; v. deferential
   1. Did agency act within the scope of its authority under statute?
   2. Was the choice made arbitrary & capricious?
      1. Agency must consider **relevant factors**
      2. Agency cannot make a “**clear error of judgment”**
      3. Need full record &contemporaneous statement of how agency reached its decision
         1. Can’t rest its decision on arbitrary information & reasoning must be sound
            1. Informal adjudication: agencies must provide **reasons for decisions**
            2. Court not allowed to substitute own judgment
2. Rulemaking (*Nova Scotia, State Farm*)
   1. Was action beyond authority under statute?
      1. *Nova Scotia* rejects plain language arg in favour of purposivist
   2. Did agency disclose the information on which they based their decision?
      1. Two reasons:
         1. N&C
         2. Judicial review
      2. Agency must present “adequate basis and explanation” for action and its reasoning must be rational
         1. A&C if: (*State Farm*)
            1. Agency relied on factors which Congress had not intended it to consider
            2. Entirely failed to consider an important aspect of the problem

Effects or costs of policy involved, facts and circumstances of that aspect, substantial arguments, or failed to responds to relevant comments by participants

* + - * 1. Offered an explanation for its decision that runs counter to the evidence before it
        2. It failed to consider a viable alternative
        3. Gave an explanation that is so implausible it could not be ascribed to a difference in view or the product of agency expertise
  1. Changes in Policy:
     1. Two scenarios:
        1. Does the new policy rest on fact findings that contradict those of prior policy?
           1. No: (*FCC v. Fox*)

Agency must:

Acknowledges prior policy

Show new policy is statutorily permissible

Give reasons for new policy

Does not have to say why *not* old policy or that the reasons for this policy are better

Sufficient that agency believes it to be better

* + - * 1. Yes:

Must explain why *not* old policy

Must explain why it’s disregarding old facts

Must explain why reliance interest on prior policy are insufficient to stay the course

**Fact-Finding Review** (APA §706; *NLRB*)

*Why?*

* Without it, agencies could find whatever facts they pleased and thus alter the operation of statutes or legal rules to change their meaning
* We want agencies to be explicit about their rules and clear in announcing their opinions

*Why might we want to favor agency factfinding over judicial review?*

* + Quick, inexpensive administrative resolution of controversies
  + Agencies can draw specialized inferences based on their experience
  + Burden of reviewing costs for millions of administrative cases would be intolerable
  + Judgments about facts should be made by those whose judgments are subject to greater
  + Political control

**Factfinding Challenges In Practice**

• A **reviewing court is making a finding that the facts do not support the agency’s position** o For informal proceedings, this is part of general arbitrary and capricious review -Thus, A and C targets both A and C exercises of authority AND A and

C findings or uses of facts \*\*\*  
o For formal proceedings, this is governed under the substantial evidence test. An

Article III court is applying the substantial evidence standard.

* + In practice, these tests don’t really matter – they end up being pretty much the same
  + **Substantial Evidence Review:** 
    - ALJ/Board relationship is important
    - Be on the lookout for Allentown issue of policymaking disguised as fact-finding
    - **Most agencies will just issue a rule!**

1. Formal Proceedings (RM & Adj.) (*Universal Camera*)
   1. *Substantial Evidence* (§706(2)(E))
      1. Judge **whole record**
         1. Not enough that some evidence supports agency finding; substantial evidence in light of the whole record must be present
      2. Agency entitled to overrule ALJ but ALJ findings form part of the record
2. Informal Proceedings (§706(2)(A)) *(Allentown)*
   1. A&C fact-finding review
      1. **ASK:**
         1. Is there something the agency is doing that makes judicial review difficult?
         2. Is agency making a rule, but disguising it as fact finding?
            1. Court is reprimanding agency opting to set policy through adjudication

**Questions of Law Review**

*Skidmore, Chevron, Mead*

**APA 706**

* Reviewing court shall decide all relevant questions of law and interpret statute
* If reviewing court finds that relevant law is ambiguous, then Chevron framework kicks in
* Don’t confuse with A&C – interpretation could be reasonable **AND** arbitrary and capricious. Two different tests.

1. Phrasing of questions matters
2. *Mead* test: **informal Adjudications** (formal proceedings (always) + N&C RM (strong presumption) pass *Mead*)
   1. Did Congress delegate agency authority to make rules having force of law?
   2. Was agency interpretation pursuant to that authority (i.e. was it speaking w/ the force of law?
      1. **THINK** 
         1. What evidence is there that Congress intended to defer to the agency on this question?
            1. **Careful**: this is what *Chevron* is about but unclear how 3 factors (force of law, official rank, procedural formality)🡪 **play**
         2. Who promulgated?
            1. Democratic accountability: is this who better than the courts?

Not sufficient condition

* + - 1. How many? 2 or 20,000 a year?
         1. Deliberation?
    1. If **yes** to both: *Chevron*
       1. Usually when:
          1. N&C RM (force of law)
          2. Formal adj. or RM interpretation
          3. Information adjudication interpretation if:

Statutory circumstances indicate Congress expects agency to speak with the force of law

Delegation issue?

Other constitutional issue?

Related agency expertise?

Complexity of administration of statute?

Agency is in fact speaking with the force of law 🡪 decision binding on all parties

* + 1. If **no** to either: *Skidmore*
       1. Usually when:
          1. Policy statement
          2. Enforcement guideline or manual
          3. Interpretive rule (unless agency’s conferred authority & other statutory circumstances demonstrate that Congress would expect the agency to be able to speak with the force of law.

1. NO deference when:
   1. No agency has been given authority to interpret the statute *e.g. APA*
   2. Criminal law
   3. Controlling judicial decision about what the statute means
2. *Chevron:*
   1. Has **Congress spoken to the precise question at issue**?
      1. Presumption against deference
         1. Only gives deference if Congress clearly spoke about delegating authority to the agency
            1. Not explicit: frame as not ambiguous if it seems likely Congress did not want agency to have this power (then no step two, which is v. deferential)
            2. **THINK:** How do you make it either ambiguous or unambiguous and why?

Remember reason why statute is ambiguous is formally irrelevant (reframe in previous step)

Is it a big issue?

Congress should have been explicit

Delegation issue?

Too much power?

Remember legal realists are winning here: who is going to do a better job of interpreting regardless of formal separation of powers?

Implicit v. explicit

Constitutional issue?

If the second interpretation raises serious constitutional issues then avoid step two by making it not ambiguous b/c interpretation 2 is not reasonable.

If applies 🡪 trumps

Dem accountability & comparative competence

Use all tools of statutory interpretation to figure this out

* 1. If ambiguous 🡪 **is agency construction reasonable**?
     1. If same as Congress’s 🡪 of course reasonable
     2. Purely statutory inquiry
        1. Use statutory interpretation tools
     3. Very deferential step
     4. Flexible: agency can change interpretation in the future
     5. If reasonable 🡪 can still be A&C

1. *Skidmore:*
   1. Court interprets statute 🡪 binding, force of law precedent
      1. Agency’s interpretation can be persuasive; looks to:
         1. *Thoroughness* of consideration
         2. *Validity* of reasoning
         3. *Consistency* w/ earlier pronouncements
   2. Not particularly deferential, generally

**Challenging Agency Action: CHECKLIST**

1. Does the agency have constitutional authority?
   1. Agency structure?
      1. Separation of powers/delegation
         1. Is the wrong gov. branch performing the wrong power?
         2. *Crowell* – is the issue before the wrong court?
            1. Not usually an issue b/c though no one can draw the line it’s far away fro our world (DP analysis in step 5)
      2. Removal/appointment issue
2. Does the agency have statutory authority to do what it is doing?
   1. What does the statute say/who gets to do the interpreting?
      1. *Chevron* analysis
   2. Is the agency acting within that authority?
      1. WHAT GOES IN TO THE ANALYSIS HERE?
3. Was the agency’s action arbitrary and capricious? (applies to every agency action)
   1. *Note:* ***assuming*** *facts as agency found them to be*
   2. Essentially we are asking how good the fit is between the goal (statute) and the means (policy).
      1. Procedural:
         1. Did it consider the **relevant factors**?
         2. Did Congress prohibit it from considering anything it did anyway?
            1. *E.g. Benzene*
      2. Substantive
         1. *State Farm*
            1. Did they just get it wrong?

Careful b/c bleeds into fact review.

1. Fact review
   1. Is the state of the world the agency based its policy on wrong in some way?
      1. Deferential
         1. 2 tests:
            1. If the agency action is pursuant to formal RM or formal Adj or when agency hearing is otherwise provided by statute 🡪 **substantial evidence test**
            2. All others 🡪 **A&C** (not the same as above b/c you are testing a different aspect of the agency action)
            3. *Note:* o meaning difference between the two
2. Procedural defects in the way the agency took its action?
   1. Procedure cannot be ascribed by fed courts
   2. Analyse by:
      1. Constitution: DP (*Londoner/BiMetalic* considerations)
      2. Organic statute: it can put whatever procedural requirements it wants on the agency (trumps APA)
      3. APA: gap fills for whatever the statute does not explicitly provide for
         1. Rules v. orders🡪 agency: pick away!
         2. Formal RM 🡪 triggered by magic words
         3. Informal RM 🡪 NS
            1. Doesn’t always have to comply

Good cause exception

Non-legislative rules

E.g. policy statements/interpretative statements that do not have the force of law 🡪 no procedural rules

Where do exec powers fit into “attacking agency action”?