\*\*\*Important to support doctrinal argument with value judgment arguments (i.e.; functionalism, etc.) [about clarity, organization, good/real world arguments for the role you’re put in on the exam—PARSIMONY]

-Around 3,000 word limit overall (gives approx. word limit breakdown for each question)

-No special points for cites (no obligation to cite, but use as shorthand)

1. OVERALL THEORIES OF INTERPRETATION
   1. Two theories:
      1. Spirit of law—purposivism
         1. Follow the legislative intent/purpose, even if it, sometimes, conflicts with the letter of the law—*Riggs*
            1. Idea is that the legislatures would have written the statute to allow for this outcome had they been able to foresee this situation at the time of writing the statute
            2. Have to determine at what level of generality you’re thinking of the purpose/intent of legislature—generally a higher level than this specific case
         2. Can use legislative history (committee reports, floor statements, different versions of bills, legislative override of judicial decision, etc.), social context of passage of statute, and even text of statute itself (assuming reasonable legislators enacted the law) to determine intent/purpose—*Holy Trinity*
            1. Issue becomes whether or not floor statements and committee actions really reflect the will of the legislature

BUT does majority vote really reflect majoritarian view, since sometimes individuals vote for whole even when they disagree with part—*TVA*

Could say that committees reflect expertise or that, since they are self-selecting, committees are biased towards certain interests

Also have to think about what the will of the legislature is (i.e.; what faction? individuals? committees?)—is there collective purpose

Generally frowned upon to use statements made after passage or statements that were not likely to have been made known to other members because couldn’t really influence passage (i.e.; collective intent)—*Continental Can*

* + - 1. Can fix mistakes in expression and design—*Burwell* (Stevens’ dissent)
    1. Letter of law—textualism
       1. Follow the letter of the law (i.e.; text of provision, where it fits in the statute, definitions, consistent usage throughout statute, terms of art, etc.)—*WVUH* & *Burwell*
          1. Ignore legislative intent/purpose because text reflects the purpose/intent of legislature (i.e.; language reflects the compromises required to get legislation passed—no single intent realistic)

BUT this understanding is slightly unrealistic because it assumes (1) language is actually a deal and not just the majority ignoring everyone else, (2) that the legislature has foresight and that’s why they used the language they did, and (3) that the legislature actually pays attention to every single word in legislation

* + - * 1. Even when this means that there might be great discrepancies in application (i.e.; legislature can decide how to treat things however it wants)—*Marshall*

Not supposed to impose own values over what text says because that reflects legislators’ values (i.e.; just faithful agents not meant to review wisdom of legislation)

* + - * 1. Sometimes will go against plain meaning due to clear evidence of mistakes (i.e.; inartful drafting, closed doors drafting, long bills, etc.), but then just go to larger statutory structure (still not purpose)—*Burwell*

Idea is that you can fix mistakes in expression, BUT NOT design

* + - * 1. Two general ways of thinking

(1) Idea of legislative purpose as utterly incoherent/inaccessible—Scalia

Ignores/HATES legislative history (finds totally useless)—*Blanchard*

Believes that legislature is generally ignorant (can’t use what members are not using)

Believes that legislative history is more likely to reflect some ‘heady’ staffers’ intent

Believes that legislative history is irrelevant because it is easy to affect legislative history, but hard to change the language—forces legislature to really focus on language (avoiding moral hazard)

(2) Idea that legislative purposes are embodied in text (including compromises)—Roberts

Explains acceptance of scrivener’s error, but not limited absurdity doctrine

* 1. ALL believe that clear text gives way under (some kinds of) absurdity and scrivener’s error—*Kirby* & *Locke*
     1. Absurdity includes idea of going against (1) social consensus, (2) legislative majority consensus, AND (3) scrivener’s error, which are all based on idea of legislative mistake and determining if it is a legislative mistake
  2. BOTH can rely on formalist and functionalist views of legal system
  3. BOTH rely on canons of interpretation (see below) because
     1. Create predictability (i.e.; constrains judges)
     2. Mimic legislature (i.e.; allows judges to be faithful agents)

1. TEXTUAL CANONS
   1. Ordinary-meaning—words are to be understood in their ordinary, everyday meanings, unless the context indicates that they bear a technical sense
   2. *Expressio unius est exclusion alterius* [negative-implication]—the expression of one thing implies the exclusion of others
   3. Mandatory/permissive—mandatory words impose a duty; permissive words grant discretion
   4. Conjunctive/disjunctive—and joins a conjunctive list, or a disjunctive list—but with negatives, plurals, and various specific wordings there are nuances
   5. Presumption of nonexclusive “include”—the verb to include introduces examples, not an exhaustive list
   6. Grammar—words are to be given the meaning that proper grammar and usage would assign them
   7. Last-antecedent—a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent
   8. Punctuation—punctuation is a permissible indicator of meaning
   9. Whole-text—the text must be construed as a whole
   10. Presumption of consistent usage—a word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning
   11. Surplusage—if possible, every word and every provision is to be given effect; none should be ignored; none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence
       1. Existence—assume statute has unique requirement if otherwise there would be no reason for the statute it exist (*Overton Park*)
   12. General/specific—if there is a conflict between a general provision and a specific provision, the specific provision prevails
   13. *Noscitur a sociis* [associated-words]—associated words bear on one another’s meaning
   14. *Ejusdem generis*—where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind of class specifically mentioned
   15. Prefatory-materials—a preamble, purpose clause, or recital is a permissible indicator of meaning
   16. Title-and-headings—the title and headings are permissible indicators of meaning
   17. Interpretive-direction—definition sections and interpretation clauses are to be carefully followed
   18. Scrivener’s error—a provision that is clearly a typographical error may be corrected
2. SUBSTANTIVE CANONS—can be viewed as (1) tiebreakers or (2) overruling textual canons
   1. Used because:
      1. Mimic legislature
      2. Constrain judges
      3. Promote deliberation in Congress
      4. Protect important substantive values by raising costs for legislation
   2. Absurdity doctrine—a provision may be either disregarded or judicially corrected as an error if failing to do so would result in a disposition that no reasonable person could approve
   3. Rule of lenity—ambiguities in statute are to be construed in favor of defendants (*Bass*)
      1. Justifications for using this as a tiebreaker
         1. Fair warning
         2. Deference to legislature in defining criminal activity
   4. Elephants in mouse holes—legislatures won’t let major decisions/results turn on obscure or hidden material (*Burwell*)
   5. Constitutional avoidance—pick interpretation with no or fewer constitutional questions (*Zadvydas*)
      1. Understood to technically only be triggered when statute is ambiguous
      2. Justification is understood as legislatures wouldn’t write unconstitutional laws AND that it constrains judges from reaching out and determining constitutional questions AND forces legislature to be clear
      3. Two theories of thought
         1. Traditional—only adopt the interpretation to save the statute from unconstitutional striking down
         2. Modern—if other interpretation is fairly possible, construe to avoid unconstitutionality or potential constitutionality question
   6. Anti-retroactivity—statutes imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect (unless clear statement from legislature)
   7. Clear statement/non-delegation—requires clear statement from legislature to create requirement, etc. (*Bass*)
      1. Generally turns on idea of federalism and/or separation of powers
3. DELEGATION OF POWER TO AGENCIES
   1. Sources of agency power: Constitution, organic statute
   2. Important to understand the separation of powers purposes:
      1. (1) Avoids abuse of power
         1. Only works if (1) Congress is appropriately motived (i.e.; cannot be motivated by avoiding poor public reaction or concerns over re-election AND no party collusion across branches) and (2) President doesn’t have too much power AND collective decision making is feasible (i.e.; not too hard to make decision checking President)
      2. (2) Separation of functions by type (i.e.; expertise/practicability/representativeness)
      3. (3) Political fragmentation (i.e.; elections every 2, 4, and 6 years)
   3. NO explicit constitutional clause regarding administrative agencies, only mentions executive departments, offices, and officers though
   4. Purposes of delegation—*J.W. Hampton*
      1. Congress possesses inadequate information
      2. Congress wants the law to react to changing circumstances over time
         1. Agencies can react more easily because Congress was intended to be slow and cumbersome
      3. Congress has limited agenda space/time
   5. Non-delegation doctrine
      1. Idea is that by invoking non-delegation you force Congress to make social policy decisions, which—*Benzene* (Rehnquist concurrence):
         1. Facilitates political accountability
         2. Reduces degree of arbitrary government action
         3. Facilitates judicial review (gives them standard to review against)
      2. Congress cannot delegate its legislative powers to agencies in the Executive branch—*J.W. Hampton*
         1. Only okay if they are giving agency implementation power
            1. Determined by if there are intelligible principles in the authorizing statute (i.e.; goals (substance) and/or procedure) to serve as limits on the agency

Idea is that agencies can control the means, but not necessarily the ends (discretion vs. policy-making power)

* + - * 1. Something that is too broad in scope, provides too much control to private individuals, and/or unlimited in discretion will violate non-delegation principle—*Schechter*

Concern with broad scope is that there is too much power in the agency, so there is an abuse of power concern because there are no checks/no democratic accountability—*Fed. No. 51* [tyranny of government and tyranny of majority]

* + 1. Court will not create intelligible principles for Congress out of no where [see constitutional avoidance canon below] (i.e.; will not enforce as hard constitutional constraint)—*American Trucking*
       1. Possibly reflects acceptance of reality of congressional power in modern industrial state OR concern about court’s own inability to draw clear line on how much delegation is too much (judicial modesty/restraint?)
    2. Court will combine with constitutional avoidance canon—*Benzene*
       1. Basically use non-delegation principle with constitutional avoidance canon to narrow the statutory interpretation so that it contains intelligible principles
          1. Inquiry involves review of:

Scope of discretion

Can vary acceptable discretion based on scope of power conferred AND can be solved by agency self-regulation—*American Trucking*

Scope of power regarding policy decisions

* + - 1. Reasons for movement to canon
         1. Changes in political and economic reality and/or
         2. Issues with creating workable judicial rule regarding delegation

1. RULEMAKING
   1. DEFAULT IS APA
      1. Section 551
         1. (4) “rule” means that whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements for an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures of reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
         2. (5) “rule making” means agency process for formulating, amending, or repealing a rule
      2. Section 553
         1. (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
            1. (1) a military or foreign affairs function of the United States; or
            2. (2) a matter relating to agency management or personnel or to the public property, loans, grants, benefits, or contracts.
         2. (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
            1. (1) a statement of the time, place, and nature of public rule making proceedings;
            2. (2) reference to the legal authority under which the rule is proposed; and
            3. (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
            4. Except when notice or hearing is required by statute, this subsection does not apply—

…(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* + - 1. …(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
         1. (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
         2. (2) interpretative rules and statements of policy; or
         3. (3) as otherwise provided by the agency for good cause found and published with the rule.
      2. (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.
  1. Formal
     1. MAGIC WORDS in organic statute—“required by statute to be made on the record…” (*Florida East Coast*)
        1. Follow Section 553(b), then follow Section 553(c)
           1. …When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 [adversarial trial style full hearing] of this title apply instead of this subsection.
  2. Informal
     1. Follow Section 553(b), then follow rest of Section 553
        1. …(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporated in the rules adopted a concise general statement of their basis and purpose…
     2. Courts have read this rule to require:
        1. Publication/notice of the proposed rule
           1. Including any scientific data utilized to promulgate the proposed rule (even data publically available)—*Nova Scotia*

Idea is that otherwise there can be no meaningful participation in the comments

If get new data that use to change final rule, then will have to do another comment period if the results are different than first data or new non-previously-disclosed methodology was used

* + - 1. Comment period (either in person or written)
      2. Publication of concise general statement of basis and purpose of final rule
         1. Including responses to any “significant” comments—*Nova Scotia*

Idea is that this both increases making of useful/good rules and transparency (i.e.; democratic legitimacy/accountability), but also facilitates judicial review

Not clear what counts as significant

* + 1. Courts have said that there is no administrative common law (i.e.; requirements must come for positive law), but this isn’t really followed—*Vermont Yankee*
       1. BUT agency administrators can use administrative common law—*Chenery*

1. ADJUDICATION
   1. DEFAULT IS APA
      1. Section 551
         1. (6) “order” means the whole or part of a final disposition, where affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
         2. (7) “adjudication” means agency process for the formulation of an order
      2. Section 554
         1. (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved [certain enumerated types of hearings].
   2. Created in an attempt to—*Crowell*
      1. (1) Allow for expertise
      2. (2) Allow for greater access to justice
      3. (3) Increase efficiency (concerns of overwhelming federal courts)
      4. (4) Increase accountability/policy conformity
   3. Formal
      1. MAGIC WORDS in organic statute—“required by statute to be determined on the record…” (*Sung*)
         1. Follow Section 554
   4. Informal
      1. NO specific APA procedural requirements
      2. BUT constitutional requirements and general APA limitations—*Sung*
         1. Courts will use the constitutional avoidance canon to read some sort of hearing requirement into most statutes that require adjudications despite no APA requirements, as no hearing would violate constitutional Due Process requirements
   5. Limits and requirements to ALL adjudications
      1. Constitutional Due Process requirements
         1. Generally due process not required when there are a large number of individuals that exhibit commonality (legislative)—*Bi-Metallic*
            1. But might in cases where there are a small number of individuals that do not exhibit commonality (adjudicatory)—*Londoner*
            2. Seriousness of the private interest effected doesn’t really seem to matter
            3. Courts will consider each of these factors, whose weight will change as you move between large and small numbers and facts and policy choices—*Florida East Coast*:

Impracticability

Kind of decision not for adjudication (making law vs. applying law)

Representation of similar interests (democracy)

* + - 1. Also important to consider whether you are losing a constitutionally protected life, liberty, or property interest—*Perry* (due process violation) compared with *Roth* (no due process violation)
         1. Idea is whether or not you have a legal entitlement, BUT how do you determine that AND what due process is required when you do

Legal entitlements are not just created by statutes (although states do define the scope of the entitlement)

State controls procedural protection by creation of due process right;

State control substance, NOT specific procedures; and

There is no necessary connection to importance at stake to individual (different from *Goldberg*’s right/privilege distinction)

Not allowed to provide for all procedures though

There is generally a balancing test to determine what due process procedures are required once due process is triggered—*Eldridge*

(1) Expected value of additional procedures for individual [private interest that will be affected, risk of erroneous deprivation, probable value of additional or substitute procedural safeguards] vs. (2) cost of extra procedures for government

Burden is on the claimant

Only additional procedures if increase accuracy and cost/benefit is okay

* + 1. While Congress cannot move constitutional Art. III jurisdiction to executive due to separation of powers concerns (*Murray’s*), agency adjudication is okay because they are not the final arbiter of disputes (i.e.; availability of review) AND generally on questions of fact, not law—*Crowell*
       1. Courts have accepted a view of overlapping/supervisory spheres regarding the branches of government
          1. Idea is that:

Federal courts get law, but administrators can decide facts (BUT *Chevron*)

Public rights disputes can be decided by administrators, but private rights disputes are limited to certain cases (BUT courts hold lots of cases to fall under this) and federal courts can revisit facts AND law in review (doesn’t have to be de novo always—deference generally to administrator)

Jurisdictional and constitutional facts (i.e.; agency authority over case) always given to federal courts (BUT *Arlington Heights*)

* + 1. APA Section 5 requires that in adjudications you separate out the individual that is prosecuting and the one adjudicating—*Sung*
       1. Idea is to both create uniformity and curtail prosecutorial/judicial overlap
       2. Concern of non-neutrality is greater than any benefit you might get from greater expertise on the case
       3. BUT after “professionalization” of INS judges several concerns exist—*Benslimane*
          1. APA doesn’t apply so “informal” adjudications allowed?
          2. Personnel being appointed as INS judges are bad
          3. There is a lack of oversight procedures

1. WHEN DO AGENCIES HAVE TO USE RULE-MAKING VS. ADJUDICATION?
   1. Constitution—*Londoner* and *Bi-Metallic*
   2. Unless restricted by congressional statute, the choice between when to utilize rule-making vs. adjudication is left mostly to the agency—*Chenery*
      1. Concerns about this allowing agency to bypass procedural safeguards of rule-making
         1. BUT this addressing concerns about retroactivity (not an all out bar on adjudicatory rule-making), lack of notice, and lack of support for new rule (arbitrariness)/lack of power to create new rule
         2. Functional arguments for allowing adjudicatory “rules”
            1. (1) Not reasonable to expect them to create rules beforehand when they’ve never been confronted with question before or stay adjudication to update/create rules for new questions

Also can control better scope of rule/policy because can individualize better at adjudication

Also allows creation of best narrow rule because can gradually learn what rule/policy is best over time (i.e.; expertise development)

* 1. No constitutional space where rule-making is required over adjudication (*Bell Aerospace*)
  2. If an agency rule is retroactive have to look at how it was made—*Chenery*
     1. If through adjudication, then balancing test (deferential)
     2. If through rulemaking, then only sustained if statute has clear statement allowing retroactivity—need clear statement from Congress (*Bowen*)
     3. BUT what defines retroactivity??
        1. Doesn’t mean anything that upsets status quo
           1. Idea is that retroactivity will always be a factor in cases of first impressions

1. POLICY DOCUMENTS
   1. APA Section 553
      1. (b) …[e]xcept when notice or hearing is required by statute, this subsection does not apply—
         1. (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice…
   2. Distinction is cannot be substantive rule—*Pacific Gas & Electric*
      1. Isn’t binding until used in an order (i.e.; has no force of law—does not create/impose rights or liabilities)—BUT cannot use guidance alone to support order following guidance
      2. These effect type/timeline of judicial review available
      3. Viewed generally as beneficial because it gives notice prior to rules issued as order in adjudications
      4. Focus is on whether document has force of law and/or is binding
         1. This includes coercive/practical effects as well—*Appalachian Power Co.*
            1. Concerns about using this to circumvent notice-and-comment procedure safeguards as well as undermining access to judicial review
         2. Unclear if binding means (*Pacific Gas & Electric*) binding on agency or (*Appalachian Power Co.*) practically on private parties
            1. If binding on agency does that mean low-level agents OR higher-level officials
      5. Concerns over invalidating guidance documents is that these might lead to secret policies that come to light only in adjudicatory rules
2. CONTROL OVER DELEGATED POWER
   1. Why want control?
      1. If perfect cooperation between executive and Congress, imperfect communication exists and coordination is difficult in large organizations
      2. If competition between executive and Congress, want to move policy closer to Congress’ preferred policy
      3. Also politics (i.e.; looking good to electorate)
   2. Tools available
      1. Constraints: Constitution (kind of power—scope, kind of persons exercising power—personnel, kinds of procedures), organic statute, APA, agency’s own regulations
      2. Design—ex ante
         1. Structure and substance (i.e.; powers and jobs/requirements) when creating agency
         2. Procedures—either under APA or organic statute
      3. Control/oversight—ex post
         1. Appropriations (budget)—either amount of money or instructions for spending
         2. Requests for information/hearings regarding agency actions (i.e.; public shaming)
      4. Constitution
         1. One-house legislative veto of agency decision—*Chada*
            1. NO—interferes with purpose and effect of legal duties and rights of individuals, which is an act of law making, and this goes against constitutional process for law making (i.e.; bicameralism and presentment)

There is a question of why these constitutional constraints don’t apply to delegation to agencies

Difference in job/branch of the person making the decision?

Functional arguments?

Moves policy preferences of agency closer to that of current vs. enacting Congress—could be good or bad

Executive agency has greater expertise and information & greater ability to acquire those things

Issues with ex post facto concerns and no fair warning (also formal argument)

* + 1. Appointment of agency officials
       1. Officers—presidential nomination with advice and consent of Senate (Article II Section 2 Clause 2) [*Buckley*]
          1. Floor and ceiling
          2. Test for if someone is an officer

Not subject to control or direction of any other branch officials AND

Exercises significant authority

* + - 1. Inferior officers—Congress decides if appointed by President, heads of department, or courts with the statute
         1. Factors in determining—*Morrison*:

Removal by higher level official

Limited duties

Limited jurisdiction

Limited tenure

* + - 1. Employees—un-enumerated
    1. Removal of agency officials
       1. Limitation test—does restriction interfere with presidential duties and enforcement (i.e.; core Article II functions—not about taking away any power) (functionalist approach) [*Morrison*] [*Myers*’ overturning that Congress must approve removal has never been overturned]
          1. Applies across all categories of officers/employees

BUT doesn’t overrule *Humphrey’s* basic holding that independent agencies do not violate Constitution

Still allowed limitations for independent agency officials (think independent counsel [AG recommends, court appoints & defines scope of jurisdiction]—*Morrison*)

Defined by agencies that are headed by official(s) that cannot be removed at will of President OR court implied protection even without clear tenure protection in statutory language—*PCAOB*

Experts need to be politically independent to utilize expertise?

Scope of power and individual welding power might still be relevant, but not in *Humphrey’s* “quasi” form

* + - * 1. DISSENT (Scalia)—unitary executive (never okay to create executive agencies where President lacks plenary authority) [originalism]
        2. Multi-level protection from removal—*PCAOB*

Unconstitutional because only for cause removal on level directly below President

Concerns over direct line of accountability

Different from *Morrison* because two levels with only lower one for cause and different from *Humphrey’s* because one level for cause

Different from *Buckley*—just invalidates removal provision while leaving everything else in place

Seems to suggest that limitations are not okay if two or more levels of limited removal already

Can’t be categorical because this would call into question independent agencies/ALJ because their internal removals are limited

* + - 1. Officers—still follow test above, but generally understood to serve at the pleasure of the President (*Myers*)
         1. Used to be exception where other limitations (i.e.; Senate confirmation, for cause removal, etc.) are allowed for quasi-legislative/quasi-judicial officials, but not purely executive officials [formalist]—*Humphrey’s*

Also difference between the two was that *Humphrey’s* was about ex ante encroachment, whereas *Myers* was about ex post aggrandizement (similar to legislative veto)

Distinction doesn’t come from Article II Section 2

Removal power necessary as part of Article II Section 2 Clause 3 (Take Care)?

Silence means open procedure for removal with President being default?

Need some sort of accountability, but could need to insulate officers from politics (neutrality)?

* + 1. Other untested means of presidential control—Kagan
       1. Oversight committees under President
       2. Executive orders
       3. Directives
       4. Publicity
       5. Ways to control outside of removal/hiring:
          1. Bring decisions in house
          2. Send your people into the fields

1. JUDICAL REVIEW
   1. DEFAULT IS APA
      1. Section 701
         1. This chapter applies according to the provisions thereof, except to the extent that—
            1. (1) statutes preclude judicial review; or
            2. (2) agency action is committed to agency discretion by law.
      2. Section 704
         1. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
      3. Section 706
         1. 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. (1) compel agency action unlawfully withheld or unreasonably delayed; and
            2. (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) 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

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

* + - 1. 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.
  1. Types of challenges that can be brought against agency actions:
     1. (1) Questions of law (authority)—substance [*Chevron*]
     2. (2) Procedures (Constitution, APA, organic statute)
     3. (3) Wrong facts (generally subsumed under rationality review)
     4. (4) Arbitrary and capricious—rationality
  2. First step is to determine what is at issue (i.e.; informal adjudication, etc.) to determine what standard of review from APA applies—*Overton Park*
     1. How do you distinguish between rule and order (adjudication)?
        1. Constitutional—*Londoner* and *Bi-Metallic*
        2. APA—appears to be substance, but seems to be procedure used
           1. Question of how to figure out what procedure is required if substance of the two can be similar—i.e.; both prospective and retrospective in some cases
        3. Things to think about:
           1. Optimal form of creating policy/law
           2. Legal constraints
           3. Strategy of agencies
  3. Pre-*Chevron*:
     1. De novo review of questions of law—*Crowell*
        1. Deference to questions of fact (including mixed law/fact questions—*Hearst* and *Skidmore*)
           1. Level of deference seems to be slightly related to the process involved in administrator coming to this conclusion
        2. APA Section 706 embodies this question of law distinction
  4. *Chevron* step zero (i.e.; limits on *Chevron*’s domain)—*Mead*
     1. Before applying *Chevron*, Courts will ask if there is any indication that Congress delegated force of law interpretations to agencies on this question
        1. Good indication—express congressional authorizations to engage in the process of rulemaking or formal adjudication vs. just power to administer
           1. BUT neither necessary nor sufficient
        2. Bad indication—the wrong agency is interpreting the law (i.e.; immigration judge interpretation of criminal code)
           1. OR question falls under major question doctrine—deeply economically and/or politically significant issues aren’t assumed to have been delegated by implication by Congress (i.e.; elephants in mouse holes canon) [*King v. Burwell*]

Idea is to ensure right form of accountability

BUT don’t want agencies to be able to avoid accountability by just avoiding the question all together (i.e.; must decide whether or not you are regulating—cannot just say won’t decide)—*Mass. v. EPA*

This is about no interpretative deference

* + 1. If yes, then ask if this interpretation was promulgated in the exercise of that force of law authority
       1. If yes, then *Chevron*
       2. If no, then *Skidmore* deference
       3. How decide this?
          1. Look at:

For informal adjudications:

High volume—functional argument (worried not really using expertise/deliberation/accountability🡪not published)

Low-level officials—same functional argument

Lack of precedential value going forward (different from *Chenery*—because there even though one party will be precedent going forward)

IMPORTANT

For formal adjudications or rulemaking:

Whether APA procedures were followed

Guidance documents are not considered final agency actions and cannot be relied on as force of law, so you would only have guidance documents as they are worked into an adjudication/rule

* + - * 1. Seems to apply *Skidmore* to decide this question
        2. Basically case-by-case determination of whether *Chevron* deference is warranted
    1. If no, then *Skidmore* deference
       1. Degree of agency’s care; consistency, formality, and relative expertness, persuasiveness of agency’s position
  1. *Chevron*—about determining if the agency’s interpretation is invalid and they, therefore, are operating outside of their statutory authority
     1. NO distinctions between fact questions and questions of law
     2. Passes on statutory interpretation power a bit to agencies under idea that in cases of ambiguity there is an implicit delegation to the agency from Congress
        1. Why do this?
           1. Foresight/communications failures by Congress
           2. Expertise of agency (same argument underlying general legislative delegation)
           3. Accountability greater with agency (same argument underlying general legislative delegation)
     3. Two-part test
        1. Whether Congress has spoken directly to the precise question at issue (asking if range or just one meaning)
           1. If intent of Congress is clear it controls

This doesn’t necessarily mean the agency loses because the clear interpretation could match agency interpretation—*Sweet Home*

* + - * 1. If ambiguous or silent, then second question
        2. How do you determine this?

Rely on what would have to find interpretation before *Chevron* (i.e.; dictionary definitions, textual canons, legislative history, substantive canons, etc.—*MCI v. AT&T*, *Brown & Williamson*)

Court will use things like constitutional avoidance canon in step 1, even though this assumes two plausible interpretations—*Sweet Home* Scalia DISSENT

OR too big to delegate idea (i.e.; non-delegation canon)—*Brown & Williamson*

Rely on congressional purpose flexibility/functionalism

* + - * 1. Dissents alone do not show ambiguous enough to get past step one—*Sweet Home*

Court has obligation to do what it can to resolve ambiguities

* + - * 1. Different from ordinary statutory interpretation because you would really only ever get to step 2 (i.e.; not facial ambiguity)
      1. Is agency interpretation reasonable (accepting that there is a range of permissible meanings a statue might have)
         1. If yes, then uphold
         2. If no, then court decides
         3. Court will not look at policy arguments in reasonableness determination—only objective reasonableness of statute meaning utilized

Unclear if reasonableness just means within range of permissible meanings or something else

* 1. Review standards can come from (1) Constitution, (2) APA, (3) organic statute, or (4) administrative common law
  2. Not about soundness/wisdom of rule, but procedures and adequacy of reasonableness
  3. Agencies cannot change justifications for decisions after the fact (no post-hoc rationalizations)—*Chenery*
     1. Idea is that changing rationales during subsequent litigation would effect notice and opportunity be heard and agency response to individual concerns
  4. Facts review
     1. For review of facts, might have some constitutional dimension, but mostly APA Section 706
        1. “Substantial evidence”
           1. Level of scrutiny applied in these cases is not totally deferential, but not de novo—*Universal Camera*

More like Court of Appeals review of trial court’s fact determinations

* + - * 1. “On record” includes all record, including counter-evidence to official findings—*Universal Camera*

Not supposed to just find enough evidence to support then stop; must review whole record (still deferential though, as long as counter-evidence is appropriately dealt with at lower level)

* + - * 1. Sometimes courts will not defer to lower level findings at all despite clear statutory language because of concerns over the competency of the lower level adjudicators (think *Mead*-like step zero)—*Iao*
  1. Arbitrary and capricious review—Section 706(2)(A)
     1. Applies to agency actions, findings, and conclusions (only applied to informal rulemaking and informal adjudications—other sections of 706 cover formal rulemaking and formal adjudications)
     2. *Overton Park*:
        1. Whether the agency weighed the relevant factors
           1. NO post hoc rationalizations allowed

Idea is to create a consistent record for judicial review and require procedures that help facilitate judicial review

* + - * 1. This relies a lot on statutory interpretation

In post-*Chevron* world, unclear whether or not this would be subject to agency deference (RUN ANALYSIS)

* + - * 1. This includes ignoring required factors, as well as using prohibited factors—*State Farm*
      1. If clear error of judgment if they did consider the relevant factors
         1. Fails completely to consider an important part of problem—*State Farm*

Difficult to determine (similar to question of what comments need specific responses in N&C rulemaking)

* + - * 1. Counter to factual evidence—*State Farm*
        2. So implausible cannot be agency expertise/cannot be ascribed to difference in view—*State Farm*
    1. MUST give reasons (hard look—cannot just ignore things)—*State Farm*
    2. Court will not displace an agency’s expertise here, but looking for rationality—*State Farm*
    3. NO heightened standard of review for policy reversals—*FCC*
       1. No need to explain departure or that new policy is better BUT must acknowledge prior policy, explain changes in facts, and address reliance interests
       2. Unclear whether or not politics accounting for change is acceptable (*State Farm*—no BUT *FCC*—yes)—no one says can be ONLY reason
          1. Concerns about hiding these motives if not allowed to be at least part

Plus all decisions require some value judgments

* + - * 1. Could be dependent on whether agency is an independent one

Could push for less politics to force expertise (*FCC* Breyer dissent) or more politics because not really part of political system/not the same concerns (*FCC*)

* + - * 1. Balancing of expertise vs. accountability and the optimal kind of accountability inform where one lands on this
  1. Timing and scope of agency policymaking
     1. Scenario 1: All parties agree that substantive rule
        1. Pre-enforcement: Rules count as final agency actions and are, therefore, sometimes subject to immediate review [organic statutes also sometimes give affected parties power to seek judicial review of a legislative rule as soon as it is finalized by the agency]
        2. Enforcement/adjudication: If a regulation is not or cannot be challenged when it is first promulgated, a party generally may seek judicial review when the agency attempts to enforce the rule against them [generally will encompass the same legal challenges as would have been considered in pre-enforcement review]
           1. BUT if substantive rule was challenged in court and sustained after being promulgated, a party that WAS NOT part of that initial suit generally can challenge the regulation at enforcement

BUT stare decisis might make the challenge futile

* + 1. Scenario 2: Agency makes policy statement
       1. Pre-enforcement: Legal challenge raising question whether agency statement a “general statement of policy” or is instead a “substantive rule”
          1. If court finds substantive rule, then the substantive rule is itself subject to judicial review and will be found to be invalid for not complying with the N&C rulemaking procedures
          2. If court concludes that the statement is a general statement of policy (a “valid” guidance document), then the policy statements is exempt from N&C rulemaking procedures

Debatable, BUT, generally not considered final agency action so is not reviewable pre-enforcement

* + - 1. Enforcement/adjudication:
         1. If general statement of policy applied in enforcement/adjudication, the party to that proceeding can generally seek judicial review of the order issued at the closing of the proceeding

Questions as to when a party could challenge a guidance document that makes a policy not to enforce

Strong presumption under APA that courts will not review decisions made by prosecutors to prosecute or not—*Heckler*

Comes from language of “agency action is committed to agency discretion by law”

Idea is that there is no law to apply in regards to abuse of prosecutorial discretion (i.e.; no standard against which a court can review such inactions)

Cannot review inactions for abuse of discretion AND this counts as inaction

Difference between action and inaction is that action involves coercive action against a person (threatens liberty and property interests) and inaction involves leaving alone

Separation of powers concern also because “Take Care” clause is discretion by executive, so allowing review by judicial intrudes

Agency cannot simply point to the existence of the guidance document to support the order, but has to provide independent grounds to support the lawfulness of the order

* + 1. Scenario 3: Agency make no pre-enforcement policy statement
       1. Pre-enforcement: N/A
       2. Enforcement/adjudication:
          1. Agency announces a policy with the force of law in the course of issuing an order at the completion of an agency adjudication

Agency would have to supply grounds to support the lawfulness of the order since there would be no prior agency statement of policy on which the agency could rely

* 1. Sequence and timing of agency enforcement actions
     1. Scenario 1: Agency sues party in federal court to enforce statutory or regulatory obligations
        1. Administrative adjudication: N/A
        2. Article III adjudication and/or review: A federal district court will adjudicate de novo the party’s liability under the statute or regulation
           1. The party may also challenge the legality of the agency’s action
     2. Scenario 2 & 3:
        1. Agency initiates enforcement proceeding in an administrative tribunal
        2. Applicant initiates an administrative proceeding by seeking a benefit, license, etc.
        3. Administrative adjudication:
           1. Hearing—some are prohibited from considering certain legal claims or the party cannot raise an issue for some other reason

These are then considered only by an Article III court on review, or in a separate federal court proceeding initiated against the agency

* + - * 1. Admin appeal—private party can often appeal an adverse ruling to an administrative appellate tribunal [though time to pursue this appeal is frequently quite limited]

Ultimate authority to resolve the administrative appeal is lodged in the head of the agency

* + - 1. Article III adjudication and/or review:
         1. Private party who loses before the agency may often seek judicial review of the agency’s decision

Generally done by filing a “petition for review” with an Article III court, petitions for review go directly to the federal courts of appeal [unless statute requires party to file their petition in federal district court]

* + - * 1. Federal court will review the agency’s order finding the party liable under the statute or regulation

This leads to less than de novo reconsideration of certain questions that were resolved by the agency