Word limit: 2,500

1. STATUTORY INTERPRETATION
   1. Theories underlying \*1\*:
      1. Purposivism—legislative intent/purpose EVEN IF conflicts with the letter of the law
         1. Utilize legislative history, social context of passage of statute, and even text
            1. Can point in different directions
         2. BUT question whether any of this really reflects majoritarian view OR that there even is a single collective intent/purpose for the issue OR whether the comment had any impact/who’s comments are most important
      2. Textualism—letter of the law ignoring legislative intent/purpose
         1. Will go against plain meaning of single provision and look to whole statute if CLEAR evidence of mistake in that provision (i.e.; scrivener’s error—sometimes deployed when absurdity, but couch it as scrivener’s error)
         2. BUT question if viewing the language as reflective of legislative compromise is realistic given current politics/attentiveness
         3. Two theories behind:
            1. Idea of legislative purpose as utterly incoherent/inaccessible
            2. Idea that legislative purposes are embodied in text
      3. BOTH rely on formalist and functionalist views of legal system
      4. BOTH rely on canons of interpretation
         1. Creates predictability/constrains judges
         2. Mimic legislature/faithful agents
   2. Textual canons \*4\*
      1. Ordinary meaning
      2. *Expressio unius* [negative-implication]
      3. Mandatory/permissive
      4. Conjunctive/disjunctive
      5. Presumption of nonexclusive “include”
      6. Grammar
      7. Last-antecedent
      8. Punctuation
      9. Whole-text
      10. Presumption of consistent usage
      11. Surplusage
      12. Existence
      13. General/specific
      14. *Noscitur a sociis* [associated words]
      15. *Ejusdem generis* [general limited by specific in lists]
      16. Prefatory materials
      17. Title and headings
      18. Interpretive direction
      19. Scrivener’s error
   3. Substantive canons \*5\*
      1. Can be viewed as (1) tiebreakers or (2) overruling textual canons
      2. Absurdity
      3. Rule of lenity
      4. Elephants in mouse holes
      5. Constitutional avoidance
         1. Two theories
            1. Traditional—only adopt interpretation to save statute
            2. Modern—if other interpretation fairly possible, avoid unconstitutional
      6. Anti-retroactivity
      7. Clear statement
      8. Non-delegation doctrine (original delegation of power by Congress) \*6\*
         1. Congress is limited in the power it can delegate to agencies
            1. TEST—intelligible principles

Looking for things that limit scope of power, scope of discretion, and/or control by private parties/interest groups [about ensuring accountability]

Can balance them (i.e.; can increase discretion, if decrease power and vice versa)

Will combine with constitutional avoidance canon to narrow statutory interpretation so that it contains intelligible principles

Purpose is to create workable judicial rules and to work within the current political/economic reality

1. TYPES OF AGENCY DECISIONS
   1. Rules/rule making \*8\*
      1. Definitions (APA)
         1. Rule—“agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe”
         2. Rule making—“agency process for formulating, amending, or repealing a rule”
      2. Purpose behind allowing:
         1. Greater expertise
         2. Faster adjustments to changing circumstances
         3. Overcomes Congress’ limited time/agenda space
      3. Notice required under 553:
         1. Must be published in Federal Register or personally served on interested parties and must include
            1. Time, place, and nature of public rule making proceedings
            2. Legal authority under which the rule is proposed
            3. Either terms and substance of proposed rule OR description of subjects and issues involved
         2. Must include any scientific data utilized to promulgate the proposed rule EVEN IF publically available to allow for meaningful participation
      4. Formal—follow notice requirement under 553, then 556/557 (adversarial trial style full hearing)
         1. Trigged by magic words in organic statute—“on the record after opportunity for an agency hearing”
      5. Informal—notice and comment under 553
         1. Three parts:
            1. Notice as required under 553
            2. Then comments from interested persons through written submissions with or without opportunity for oral presentation
            3. Then statement of rule adopted and concise general statement of basis and purpose

Concise general statement requires responses to any significant comments (not clear what counts as significant)

* + 1. EXCEPTION—when agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rule issued) that notice and public comment/hearing are impracticable, unnecessary, or contrary to the public interest
  1. Orders/adjudication \*10\*
     1. Definitions (APA)
        1. Order—“final disposition, whether affirmative, negative, injunctive, or declaratory, of an agency in a matter other than rule making, but including licensing”
        2. Adjudication—“agency process for the formulation of an order”
     2. Purpose behind allowing:
        1. Greater expertise
        2. Greater access to justice
        3. Increased efficiency
        4. Increased accountability/policy conformity over quasi-judicial decisions
     3. General APA requirement for hearings \*12\*—have to separate out the individual that is prosecuting and the one adjudicating
        1. Idea is to have a neutral decision maker
     4. Formal—follow 554
        1. Triggered by magic words in organic statute—“on the record after opportunity for an agency hearing”
     5. Informal—NO specific APA procedural requirements
        1. BUT constitutional requirements (i.e.; some sort of hearing for immigration decisions) and general APA limitations (i.e.; separation of prosecutor and adjudicator roles) still apply
  2. Policy/guidance documents \*14\*
     1. EXCEPTION to 553 for interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice
     2. TEST—cannot have force of law or be binding (could be practically or otherwise)
     3. Cannot be used alone to support an order

1. EXECUTIVE/LEGISLATIVE CONTROL
   1. Legislative \*15\*:
      1. Ex ante:
         1. Structure and substance (i.e.; powers and jobs/requirements)
            1. Appointments/removals (under constitutional limits)
         2. Procedures (either organic statute or APA—just a default if there are no specific procedural requirements in organic statute) [under constitutional limits]
      2. Ex post:
         1. Appropriations
         2. Requests for information/hearings
         3. Appointments (under constitutional limits)
   2. Executive \*17\*:
      1. Appointments/removals (under constitutional limits)
      2. Untested presidential means—oversight committees under President, executive orders, directives, publicity, bring decisions in house, or send your people into the fields
2. JUDICIAL REVIEW
   1. Is this judicially reviewable? \*18\*
      1. Agency actions made reviewable by statute AND final agency action (i.e.; rules or final orders)
         1. Excludes actions that are precluded from judicial review by statute OR actions that are committed to agency discretion by law (i.e.; discretion on whether or not to bring an action/issue regulation because no standard to review against—NOT allowed to just punt on whether falls within regulatory field)
         2. Non-final agency action (i.e.; action subject to internal agency review process, guidance document, etc.) can only be reviewed once used in enforcement proceeding
            1. BUT can review guidance documents if challenged as substantive rules on procedural grounds
   2. What can the court do? \*18\*
      1. Can both compel agency action unlawfully withheld or unreasonably delayed OR hold unlawful and set aside agency action, findings or conclusions
   3. NO post-hoc rationalizations by the agency allowed \*21\*
      1. Idea is that changing rationales during subsequent litigation would effect notice and opportunity to be heard of parties and record for judicial review
   4. MUST first determine what is at issue (i.e.; informal adjudication, etc.) to determine what standard of review from APA applies \*19\*
   5. Standards of review/challenges that can be brought against reviewable agency actions (APA) \*18\*
      1. Procedurally defective
         1. Simply ask do the procedures conform with any procedural requirements in Constitution or APA or organic statute or administrative common law
         2. Constitution
            1. Due Process \*8\*

To determine if due process required courts will look at:

First: whether you are losing a constitutionally protected life, liberty, or property interest or statutorily provided interest

Second: weighing of factors including:

Impracticability of due process being granted to each individual (i.e.; small vs. large numbers)

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

Representation of similar interests (i.e.; commonality vs. individuality)

To determine if an additional procedure is required courts will try to determine if the procedure will increase accuracy by:

Weighing (1) expected value of additional procedures for individual [i.e.; private interest that will be affected, risk of erroneous deprivation, probable value of additional/substitute procedures] vs. (2) cost of extra procedures for government

* + - * 1. Judicial branch jurisdiction (not really a question in this class)

Overlapping/supervisory spheres where [BUT often not clear lines]

Federal courts get law and administrators facts

MOST IMPORTANT—federal courts get private rights disputes and administrators get public rights disputes where federal courts can revisit facts and law in review

Federal courts get jurisdictional and constitutional facts

* + - * 1. NO one-house legislative veto because Congress must follow bicameralism and presentment [BUT then why don’t agencies have to follow this? executive branch? functionally easier? not exercising legislative authority?] \*15\*
        2. Retroactive \*13\* (not just anything that upsets the status quo) rule/order requires review

If through adjudication, then deferential balancing test

If through rule making, then only sustained if statute has clear statement about allowing retroactivity

* + - * 1. Appointments (FOR EXECUTIVE BRANCH AGENCIES—not same for congressional agencies) \*15\*

Officers—presidential nomination with advice and consent of Senate

Floor and ceiling

TEST for if officer

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

Exercises significant authority

Inferior officers—Congress decides if appointed by President, heads of department, or courts with the statute

FACTORS for if inferior officer

Removal by higher level official

Limited duties

Limited jurisdiction

Limited tenure

Employees—un-enumerated

* + - * 1. Removals \*16\*

TEST—does restriction interfere with presidential duties and enforcement

Duties include

“Take care” laws are enforced

Commander in Chief

Pardons

Foreign affairs

Allows limitations to allow for independent agencies (i.e.; agencies that are headed by official(s) that cannot be removed at will of President)

Multi-level protection from removal—suggests that limitations are NOT okay if two or more levels of limited removal are in place already

BUT not categorical because of independent agencies

Important to look at scope of power and individual welding power (i.e.; quasi-legislative OR quasi-judicial OR solely executive power?)

Concern is about ensuring accountability

* + - 1. Unless restricted by congressional statute, the choice between when to utilize rule making vs. adjudication is left mostly to the agency \*13\*
         1. NO constitutional space where rule making is required over adjudication, BUT Due Process might require adjudication over rule making
    1. In excess of statutory authority \*19\*
       1. First: *Chevron* step zero (i.e.; *Mead*)
          1. Is there any indication that Congress delegated force of law interpretations to agencies on this question?

Good indication—express authorizations to engage in rule making or formal adjudication (neither necessary nor sufficient because don’t need this and can have not delegated even with this—have to make sure not contradicted by other language)

Bad indication—wrong agency interpreting the law OR just power to administer

OR falls under major question doctrine—deeply economically and/or politically significant issues that aren’t assumed to be delegated by implication

* + - * 1. If no, *Skidmore* deference (degree of agency’s care, consistency, formality, and relative expertness, persuasiveness of agency’s position)
        2. If yes, ask if this interpretation was promulgated in the exercise of that force of law authority

Good indication

Informal adjudications

Factors include: low volume, high-level officials, precedential value going forward

Formal adjudications and rule making—APA procedures followed

Police/guidance documents—not really considered final agency actions so not generally reviewable until worked into adjudication/rule

* + - * 1. If yes, then *Chevron*
        2. If no, then *Skidmore* deference
      1. Second: *Chevron*
         1. Has Congress spoken directly to the precise question at issue?

Determine by utilizing normal statutory interpretation (includes idea of constitutional avoidance canon & too big to delegate idea (i.e.; non-delegation))

* + - * 1. If intent of Congress is clear, it controls
        2. If ambiguous (not just facially) or silent, then is agency interpretation reasonable (i.e.; within acceptable range of meaning)

If yes, then uphold

If no, then court decides

* + 1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law \*22\*
       1. First: look to see whether the agency weighed the relevant factors
          1. Includes ignoring required factors as well as using prohibited factors
          2. HAVE TO RUN *CHEVRON*/*MEAD* AS TO DEFERENCE TO AGENCY INTERPRETATION OF FACTORS
       2. Second: if they did consider all the relevant factors, was there clear error of judgment—“hard look”
          1. Includes

Failure to completely consider an important part of the problem (MUST GIVE REASONS)

Counter to factual evidence (either) \*21\*

Unsupported by substantial evidence in a case subject to 556/557 or otherwise reviewed on the record of an agency hearing provided by statute

Not de novo BUT not totally deferential

“On the record” includes entire record, including counter-evidence to the official findings

Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court (i.e.; Posner thinks immigration judges are incompetent)

So implausible cannot be agency expertise or ascribed to difference in views

* + - * 1. In the event of policy reversals

NO heightened standard of review

BUT must acknowledge prior policy, explain changes in facts and address reliance interests

Unclear whether or not politics accounting for change is acceptable—no one says can be ONLY reason