LRS Outline

Always consider (and argue) both levels: the doctrinal level and the value level

You can challenge agency’s decisions on the following grounds:

1. Procedurally invalid (Nova Scotia, Chenery 1)
2. Not authorized by law
3. Not supported by the evidence
4. Not reasonable/rational (arbitrary and capricious)
   1. Agency didn’t give reasons (similar to #1)
   2. Agency didn’t consider the right factors (similar to #2)
   3. Agency’s explanation doesn’t make sense given the evidence (similar to #3)

*Separation of Powers*

Art. I Vesting Clause = all legislative power is vested in Congress

There is so little precedent here that courts are more likely to consider historical practice

3 kinds of questions you might ask about an agency’s action:

1. Is this kind of thing an agency can do?
   1. Two reasons why it might not be:
      1. It’s the type of action the legislature is supposed to take
         1. Congress violated Art. I by unconstitutionally delegating to an agency the power that Congress is supposed to hold.
         2. How do we know?
            1. No intelligible principle under which the agency must act (J.W. Hampton & Jr. Co. v. United States) (Schechter Poultry)

Congress gives the agency too much power

Congress gives the agency too much discretion

* + - * 1. The power is given to the wrong people

Ex. Schechter Poultry = power to industry people

* + - 1. BUT the courts don’t really enforce the nondelegation doctrine (Whitman v. American Trucking)
      2. But it still lives on as a form of statutory interpretation (Benzene Case)
    1. It’s the type of action the courts should take (Crowell v. Benson)
       1. As part of the New Deal, the Supreme Court accepted that a lot of dispute-resolution handled by the courts can be handled by agencies
       2. Courts ≈ appellate overseers of agencies
       3. But there are limits!
          1. Some private-rights decisions MUST be made by Art. III courts

Ex. Bankruptcy

1. Can Congress exercise this kind of control over an agency?
   1. Are there limits on Congress’s oversight mechanisms?
      1. Ex. Chadha (no one-house veto of agency decisions)
      2. Ways that Congress CAN control agencies:
         1. Appropriations
         2. Hearings/Investigations/Audits
         3. Congress creates agencies and defines their power
   2. Hiring and Firing Agency Personnel
      1. Appointments Clause = Art. II Sec. 2
      2. To what extent can Congress shape the hiring decisions?
         1. Buckley v. Valeo (President must choose officers)
         2. Congress can decide who chooses inferior officers
      3. To what extent can Congress shape the firing decisions?
         1. Requiring Congressional consent is unconstitutional (Myers)
         2. Restrictions on removal are mostly constitutional.
            1. Humphreys = constitutionality based on the type of power the agency wields
            2. Morrison = type of power doesn’t matter because purely executive inferior officers can have removal restrictions, too (purely executive officers still can’t)

Do the restrictions interfere w/the Pres’s ability to do her job? (core Art. II duties)

If no, then they’re constitutional

Independent agencies can have removal restrictions, too

Not overruling the formal holding of Humphries

Don’t say quasi-(blank), but understand that the type of power is still relevant

* + - * 1. PCAOB

Prohibits some forms of double insulation but CAN’T be read as prohibiting all forms without rendering SO MANY employees unconstitutional

1. Can the President exercise this sort of control over an agency?
   1. Not much doctrine here
   2. Kagan article
      1. There are many mechanisms available to the president to oversee agencies and not many constitutional limitations.

*Process*

1. Were there procedures the agency was required to follow in order to take this action, and did it fail to follow them?
   1. Where can we find the procedural requirements?
      1. Due Process Clause
         1. Is this the type of action that might trigger DP concerns?
            1. Londoner and Bi-Metallic

Adjudicative = DP concerns (Londoner)

Legislative = no DP concerns (Bi-Metallic)

* + - 1. If yes, then: does the action affect the type of private interests that trigger DP? (legal entitlements)
         1. Goldberg, Roth, Perry, Londoner, and Bi-Metallic
      2. If yes, then: how much process must be provided?
         1. Cost-benefit analysis as under Mathews v. Eldridge
    1. APA
       1. Required by statute to be made “on the record after opportunity for an agency hearing”?
          1. If yes, formal rulemaking is required (post-Florida East Coast)
          2. If no, then:
       2. What did the agency do?
          1. Informal rulemaking (resulting in a rule)

553(b) and (c) = notice and comment rulemaking

Requires: notice, opportunity for comment, and a concise statement of basis and purpose accompanying the final rule

Nova Scotia = response to comments

Vermont Yankee = cross-examination is not required

UNLESS, exemptions in 553

Ex. General statements of policy

Guidance documents

How do we decide if something is a rule or guidance document? (PG&E v. FPC)

Force of Law

Practically Binding (Texas v. United States)

Formal v. Functionalist approaches

* + - * 1. Adjudication (resulting in an order)

No APA-required procedures

But the judge cannot be a prosecutor

But there are other sources of legally-required procedures

* + - * 1. The agency can choose either one (Chenery II and Bell Aerospace)

*Question of Law*

When a court reviews agency outcomes, it might:

1. Ask if the agency complied with the law
2. Ask if the agency’s decision is in accordance with the facts
3. Ask if the agency’s decision is rational (arbitrary & capricious)
   1. #2 can be nested under #3
   2. This section focuses on #1
   3. CHEVRON

Under Chevron, the court’s interpretation of the statute does not control

* The question must be about the meaning of the statute
* Also, the agency had to actually interpret the statute
* Step Zero (Mead)
  + Did Congress delegate interpretive authority to this agency to interpret this statute?
    - Most obvious way to know for sure = saying this agency will execute this statute
      * Notice and comment delegation
    - Most obvious way for no = an agency interpreting a statute way outside its wheelhouse
  + Did the agency exercise that authority to interpret the statute?
    - In Mead, the court focused on
      * Procedural formality (IR and FA are likely to get to Chevron)
      * Volume of decisions
      * Ranking of involved officials (higher = better)
      * Is the stated meaning precedential to the agency?
  + If no to either one, no Chevron deference
  + Instead, the court will interpret the statute itself
  + BUT it will consider the agency’s interpretation as persuasive evidence (Skidmore deference)
  + If yes, Chevron!
* Step One
  + Did Congress speak clearly to the interpretation at hand?
    - If yes, apply Congress’s meaning
    - If no, defer to any reasonable interpretation by the agency
    - Ambiguity is not the typical ambiguity
      * The court will apply statutory interpretation in step 1 (Babbitt)
      * Only moves to step 2 if it CAN’T resolve the ambiguity
* Step Two
  + Is the agency’s interpretation reasonable (within the bounds set by Congress)
  + Apply the canon of constitutional avoidance here, not Step 1, because it’s triggered by ambiguity
* Major Question Doctrine
  + A way to resolve ambiguity in Step 1
    - Choose the interpretation that doesn’t raise nondelegation concerns (Benzene, Brown and Williamson)
    - It’s basically an application of the nondelegation canon in Step 1
    - Don’t defer to agencies’ interpretations of major questions (Mass. v. EPA)
  + But sometimes the question is SO big that courts don’t think Congress granted interpretive authority (King v. Burwell)
    - More of a Step 0 question
      * But not a Mead analysis
    - You just don’t even get into Chevron because it’s not the kind of question Congress would delegate

When an agency changes course, it must explain itself and rely on that initial explanation if challenged

* A policy must be defended on the basis for which it was enacted (Chenery II)
* FCC v. Fox says you have to address the old policy, but you don’t have to explain why the new one is better
  + Partisan preference is not a sufficient explanation

You can’t challenge a guidance document because it’s not a final agency decision

*Arbitrary and Capricious Review*

a.k.a. rationality review, abuse of discretion, etc.

1) Did the agency consider the right factors?

a. Overton Park

b. Claims about the way the law constrains the agency’s decision

c. Question of statutory interpretation

d. If an agency has explicitly stated the factors it thinks it needs to consider, there is a question of deference (Chevron)

2) Did it fail to provide reasons (similar to Nova Scotia)?

a. Applies to ALL agency actions other than formal rulemaking

b. For formal rulemaking, you can still consider these challenges. You just call it substantial evidence review.

3) Did the agency make a clear error of judgment?

a. Yes, if there was no factual basis for its decision

b. Yes, if it’s arbitrary/irrational for some other reason

i. Discussion of this in State Farm and FCC v. Fox

ii. The court doesn’t offer its own interpretation OR accept the agency’s

* + - The analysis is somewhere in the middle

Methods of Statutory Interpretation:

* Legislative History
* Plain Meaning Rule (TVA v. Hill)
* Absurdity Doctrine (Riggs v. Palmer) (United States v. Kirby)
* Purposivism (Holy Trinity) (Stevens dissent in West Virginia University Hospitals v. Casey)
* Textualism (Scalia: West Virginia University Hospitals v. Casey)
* Maxims of common law are assumed
* Look at the problem the statute meant to remedy
* The statute’s title
* Consistent wording across statutes (intra-statutory comparison)
* NOT a rationality test (United States v. Marshall)
* Scrivener’s Error (mistake in meaning (Stevens) or typo (Scalia)) (United States v. Locke dissent)
* Rule against surplussage
* Congressional intent (King v. Burwell)
* Rule of Lenity (United States v. Bass)
* Canon of Constitutional Avoidance (Zadvydas v. Davis)
* Nondelegation Doctrine (J.W. Hampton, Jr. & Co. v. United States)

Cases

* A.L.A. Schechter Poultry Corp. v. United States
  + Further defines limiting principle test for delegation
  + Don’t delegate power to trade organizations
* Babbitt v. Sweet Home
  + Courts resolve statutory ambiguity in Chevron step 1 using statutory interpretation
* Bi-Metallic Investment Co. v. State Board of Equalization
  + Legislative decisions do not raise DP concerns and do not require hearings
* Blanchard v. Bergeron
  + Reasonable attorney fee” is not limited to the contingency fee
* Board of Regents of State Colleges v. Roth
  + DP is not required for not being re-hired
* Buckley v. Valeo
  + President must nominate all executive officers
  + Used a “significant authority” test to determine officer v. employee
* Chevron v. Natural Resources Defense Council
  + 1) Has Congress spoken directly to the issue in question?
    - Decide via statutory interpretation
    - If yes, Congress controls
  + 2) If no, then the court must uphold the agency’s interpretations if it is reasonable
  + When statutes are ambiguous, agencies can pick an interpretation as long as it’s within the permissible range
  + Deference to agencies!
* Church of the Holy Trinity v. United States
  + Statute against indentured servants not applicable to priests
* Continental Can Company, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union
  + “Substantially all” = 85%
* Crowell v. Benson
  + Some adjudications involving private rights can be done by agencies
  + Courts can decide questions of law de novo on appeal
  + Courts must review constitutional facts
  + Unclear if this is still good law (Chevron)
* FCC v. Fox
  + When an agency changes course, it must address the old policy and give reasons for the new one, but it doesn’t have to explain why the new is better than the old
  + You do have to explain when he facts have changed
  + You do have to address reliance interests
* FDA v. Brown & Williamson
  + Major questions doctrine (If Congress wants to delegate this power, it needs to do so explicitly)
  + Applies to hugely important economic and political issues
* Free Enterprise Fund v. PCAOB
  + Double insulation is bad
* Goldberg v. Kelly
  + DP apples to the decision to terminate benefits
* Heckler v. Cheney
  + You can’t challenge prosecutorial discretion
  + Courts can review agency decisions involving choice but not those involving inaction
* Humphrey’s Executor v. United States
  + Myers only applies to purely executive positions
  + Removal restrictions are okay on positions with other types of power
* Iao v. Gonzales
  + Posner does something like Mead for fact review: adds a step 0
    - Does this agency deserve deference with regards to these facts?
* Immigration and Naturalization Service v. Chadha
  + No one-house veto of agency decisions
* Industrial Union Department, AFL-CIO v. American Petroleum Institute
  + Benzene case
  + Congress needs to decide if industry or employees will bear the burden (nondelegation)
* J.W. Hampton, Jr. & Co. v. United States
  + No nondelegation concerns if there is a limiting principle (tariffs)
* King v. Burwell
  + ACA: “an exchange established by the state” includes the fed. gov.
  + Roberts’ opinion = quasi-textualism (uses the text to derive purpose)
* Londoner v. Denver
  + Adjudicative decisions raise DP concerns and require a hearing
* Massachusetts v. EPA
  + The EPA must either regulate greenhouse gasses or explain that it doesn’t believe them to be harmful
  + Major question doctrine = agencies don’t get deference on major questions
* Mathews v. Eldridge
  + There are different levels of procedural requirements for trials
  + Establishes a cost/benefit analysis for deciding how much procedures are necessary
  + (value at stake to claimant)(decreased likelihood of error) > cost of procedures
  + Chief goal = accuracy
* MCI Telecom v. AT&T
  + Chevron doesn’t give us a way to arbitrate between formalism and functionalism
* Mead v. United States
  + Added a Chevron step 0: did Congress delegate power to this agency to interpret this statute?
  + If yes, Chevron
  + If no, Skidmore
* Morrison v. Olson
  + Removal restrictions on purely executive officers are okay.
  + Type of power doesn’t matter. What matters is the president’s ability to do her job
  + Distinguishes between principle and inferior officers
* Motor Vehicle Manufacturers Association v. State Farm
  + A&c review considers:
    - Whether the agency relied on the wrong factors
    - Whether the agency failed to consider a major part of the problem
    - If the agency’s decision runs counter to the facts
  + The agency must explain major aspects of its decision
* Myers v. United States
  + President must be able to fire all executive agents
* Overton Park v. Volpe
  + A&c review includes looking at whether the agency considered the right factors and gave them the right weight
* Perry v. Sindermann
  + DP does apply when the school has specific criteria for (not) re-hiring someone to see if you met those criteria
* PG&E v. FPC
  + Guidance documents do not have the force of law; substantive rules do
  + Agencies can rely on rules in enforcement proceedings; they must defend guidance documents each time
* Riggs v. Palmer
  + Murdered his grandpa, can’t inherit
* SEC v. Chenery
  + A rule must stand or fall based on the agency’s reasons for it when it was created (no ex post facto rationalizing)
  + Agencies can choose to use rulemaking or adjudication
  + Retroactivity
    - In adjudication requires a balancing test, but courts are accepting
    - In rulemaking, Congress must explicitly give the agency power to enact rules with retroactive effect
* Skidmore v. Swift & Co.
  + Agency interpretations deserve deference according to their persuasiveness
* Texas v. United States
  + DAPA = procedurally invalid rule, not guidance document
    - Binding on lower agents
    - Carries the force of law
    - Creates legal entitlements (or grants access to them)
* TVA v. Hill
  + Snail Darter. Statute says don’t build the dam.
* United States v. Bass
  + Interpreting a gun statute
* United States v. Florida East Coast Railway
  + “after hearing” does not require formal rulemaking
* United States v. Kirby
  + Arresting a mail carrier for murder does not violate a statute prohibiting obstruction of the mail
* United States v. Locke
  + Prior to Dec. 31st means prior to (miners lose their claim)
* United States v. Marshall
  + Weight of LSD includes weight of blotter paper
* United States v. Nova Scotia Food Products Corp.
  + You have to respond to the notice-and-comments comments in your final statement
  + You have to provide the basis for your scientific beliefs (what studies?)
  + This allows courts to properly oversee agency decision-making
* Universal Camera Corp. v. NLRB
  + Substantial evidence review requires looking at the record as a whole
  + Court review of agency decisions = appellate court review of lower courts
  + Only applies to formal procedures
* Vermont Yankee v. NRDC
  + APA does not require cross-examination for informal rulemaking
  + A court cannot impose additional procedures beyond those mandate by the APA and the organic statute
* West Virginia University Hospitals, Inc. v. Casey
  + “reasonable attorney’s” fee does not include $ for expert witnesses
* Whitman v. American Trucking Associations
  + An agency can’t fix an unconstitutional delegation of power by adopting a narrowly constructed view
  + Clean Art Act doesn’t give the EPA too much power
  + Courts really won’t enforce a meaningful nondelegation principle
* Wong Yang Sung v. McGrath
  + Separation of duties between prosecutors and judges in agency adjudications
* Zadvydas v. Davis
  + Immigrants cannot be retained indefinitely