PART I – INTRODUCTION

- Administrative agencies – units of gov’t other than legislature or courts
  - Regulatory agencies – enforce scheme of prohibitions or obligations
  - Benefactory agencies – disburse benefits, i.e. social security
- Administrative law – legal principles common to all admin agencies, including the procedures that agencies use to carry out their functions and the rules relating to judicial review of agency actions
- State APAs – apply to most or all state agencies, but not local agencies
- Administrative process: research and publicity, rulemaking, licensing/permits, investigation and enforcement, adjudication, ratemaking, judicial review, legislative and executive review

PART II – CONSTITUTIONAL RIGHT TO BE HEARD

- Hearings and welfare termination: due process and mass justice
  - Goldberg v. Kelly (SCt 1970) pg 22 – due process requires an evidentiary hearing before welfare benefits are terminated, but does not need to be a judicial or quasi-judicial trial
    - Balancing test – gov’t interest does not outweigh welfare recipient’s interest
    - Written submissions are not sufficient – must have chance to be heard orally
    - Required elements of hearing – right to present oral evidence, confront adverse witnesses, right to counsel
    - Welfare benefits became property by virtue of a statute
- Interests Protected by Due Process: Liberty and Property
  - Board of Regents v. Roth (SCt 1972) pg 33 – no constitutional right to a statement of reasons as to why the University decided not to rehire Roth
    - Only weigh interests involved to determine what form of hearing in required, not whether a hearing is required due to the interest involved
    - Liberty not at stake – Roth’s name or reputation was not at stake, no severe disadvantage for finding other employment, no law giving Roth an interest in being rehired
    - Stigma plus test – state imposition of a stigma is not an invasion of liberty w/o some other change or right or status
  - Existence of a property right depends on entitlement created by an independent source like a statute or regulation
  - American Manufacturers v. Sullivan (SCt 1999) Supp. pg 1 – no due process rights available to an applicant for benefits b/c under applicable state law, entitlement to benefits is only established when the medical treatment sought is determined to be reasonable and necessary
  - Town of Castle Rock v. Gonzales (SCt 2005) Supp. pg 2 – statute which said that police officers ‘shall’ arrest one who violates a restraining order did not create an entitlement to a property interest and to due process
- **Cleveland Board of Education v. Loudermill (SCt 1985)** pg 42 – state statutes can only create an entitlement to due process but cannot dictate what procedures will satisfy due process requirements under the federal constitution

- **Timing of Trial-type Hearings**
  - **Mathews v. Eldridge (SCt 1976)** pg 52 – a full evidentiary trial-type hearing is not required by due process before Social Security benefits are terminated (not about whether there is a protected property interest, just whether existing procedures were adequate)
    - 3 factors for determining type of due process required:
      - private interests that will be affected; risk of erroneous deprivation and value of additional safeguards; gov’t interest, including burden of additional procedures
      - Distinguished from **Goldberg**: eligibility not based on financial need; medical assessment easier than welfare need assessment and less likely to depend on credibility of witnesses; ability to use written submissions more effectively than welfare recipients
    - Used to determine timing and elements of constitutionally required hearing

- **Elements of a Constitutionally Fair Hearing**
  - **Ingraham v. Wright (SCt 1977)** pg 64 – due process does not require prior notice and an opportunity to be heard before a student is paddled
    - 2 step analysis: whether asserted interests are encompassed by due process’s protections and what procedures constitute due process
      - Liberty interests are at stake
    - What process is due depends on **Mathews v. Eldridge** factors
      - Strong private interest; value of additional safeguards is low b/c state is preserving common law; high gov’t interest b/c of cost
  - **Goss v. Lopez** – suspension of high school student for 10 days is a deprivation of property and liberty; there is an entitlement to a hearing, but not a full evidentiary hearing, really just a conversation w/teacher
  - **Lujan v. GG Fire Sprinklers** (SCt 2001) Supp. pg 7 – when gov’t breaches a contract, due process is satisfied by reliance on state contract remedies
  - **Board of Curators Univ. of Mo. v. Horowitz** (1978) – student dismissed for academic rather than disciplinary reasons are entitled to much less protection, sometimes none at all
    - No due process if no disputed facts; if discretion is involved in decision though, there is an interest in how that discretion is used
  - **Van Harken v. City of Chicago** (1997) – decriminalizing parking ticket system so that officers do not have to show up in court is valid due process under **Mathews v. Eldridge**
  - **Walters v. National Ass’n of Radiation Survivors** (1985) – statute limiting atty’s fees to $10 in VA cases provided adequate due process; want to honor Congress’s intent that veteran’s not have to divide award w/atty
- *CT Dep’t of Public Safety v. Doe* (2003) – convicted sex offender disputed inclusion on a website-published sex offender registration list b/c he said he was not dangerous
  - ‘Dangerousness’ not relevant to statute, only fact required was conviction to be included
  - Due process only requires a hearing when a relevant issue of fact is in dispute
- *Hamdi v. Rumsfeld* (SCt 2004) – due process entitles a US citizen detained as an enemy combatant to notice of the factual basis for the classification as such as an opportunity to rebut the assertions
  - Because of exigency of circumstances, hearing may be tailored to alleviate high burden on gov’t, i.e. allowing hearsay evidence

**Rulemaking versus Adjudication**
- Adjudication - gov’t action that affects identifiable persons on the basis of facts particular to each of them; procedural due process applies
- Rulemaking – gov’t action directed in a uniform way against a class of people; procedural due process does not apply
- *Londoner v. Denver* (SCt 1908) pg 73 – right to an oral hearing when city of Denver established a committee to determine a tax to cover street paving and how that tax would be apportioned
- *Bi-Metallic v. State Board of Equalization* (SCt 1915) pg 75 – no right to a hearing when the matter at issues affects the general public (i.e. increase of valuation of property across the board)
- *Cunningham v. Dept of Civil Service* (SCt NJ 1975) pg 78 – hearing is required when determining entitlement of a city employee to priority to a new position when that priority depends on comparing old position to new position – adjudicative issue
- *Anaconda v. Ruckelshaus* – no due process required when EPA imposed a rule that was general in form, but actually only affected one entity

**PART III – ADMINISTRATIVE ADJUDICATION: FUNDAMENTAL PROBLEMS**
- **Introduction**
  - Federal APA and 1961 MSAPA do not require adjudicative hearings
    - Lay grounds rules for formal hearings but only need to use those procedures when an external source requires a hearing
  - Many state APAs and 1981 MSAPA prescribe when a hearing should occur
- **Statutory Hearing Rights – Federal**
  - If federal statute calls for an agency hearing that is ‘on the record’, signal that Congress intended a formal APA adjudication
  - §554 – formal adjudication requirements
    - Agency must separate prosecuting and adjudicating functions
    - No ex parte contact allowed w/decision maker
    - Must allow cross-examination
- In private party wins and agency’s position was not substantially justified, private party is entitled to recover atty’s fees
- Hearing must be conducted by an ALJ
  - [Dominion Energy v. Johnson](1st Cir. 2006) Supp. pg 11 – no evidentiary hearing required when agency determined whether to grant a CWA variance permit b/c CWA does not required hearing ‘on the record’
  - [Seacoast](– overruled; previously held that there was presumption that agency hearings were formal unless otherwise stated
  - [Chevron](– 2 step analysis
    - Did Congress provided for their intention for how the statute should be interpreted
    - If yes → congressional intent controls
    - If no → whether the agency’s answer is based on a permissible construction of the statute
  - [Chevron](analysis only applies when the agency is interpreting its own statute
- **Statutory Hearing Rights – State**
  - 1961 MSAPA – formal adjudication procedures apply to ‘contested cases’ (proceedings including, but not limited to, ratemaking and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing)
  - [Sugarloaf Citizens v. Northeast Maryland Waste Disposal Authority](State court 1991) pg 94 – hearing is required b/c decision to grant a permit for building a waste incinerator site is a ‘contested case’
  - [Metsch v. University of Florida](FL Dist. Ct. App. 1989) pg 95 – hearing is not required when a law school applicant is denied admission b/c FL APA procedures for formal hearings only apply when a party’s substantial interests are at stake except when a student’s interests are determined by the State University System
- **Limiting Issues to which Hearing Rights Apply**
  - [Heckler v. Campbell](ScT 1983) pg 100 – Secretary of HHS may rely on published medical-vocational guidelines to determine claimant’s right to Social Security benefits instead of holding a hearing on the issue
    - Agency may rely on rulemaking authority to determine issues that do not require case-by-case consideration
    - Claimant may present evidence specific to their ability or argue that guidelines do not apply to them
    - This substantive issue is not personal to claimant – issue is just whether there are jobs in the country for people w/certain characteristics
  - [Air Line Pilots v. Dept of Transportation](DC Cir 1986) pg 108 – if claimant does not show an issue of material fact is in dispute, then there is no need for a hearing, and agency can dispose of claim w/SJ
- **Institutional Decisions and Personal Responsibility**
  - Judicial mode of agency decision making – like a judicial decision
  - Institutional model – views agency as a single unit
• Morgan v. US (SCt 1936) pg 110 – agency officer who makes the ultimate decision must consider and appraise the evidence which justifies that decision
  ▪ Unrealistic if applied too broadly
  ▪ Ok if person hearing the case prepares an intermediate report for agency head to make a decision on

• Citizens to Preserve Overton Park – courts can sometimes demand an explanation for an agency’s decision; concerned w/substantive review (whether decision was rational) not w/procedural review (whether decision maker was sufficiently familiar w/record)
  ▪ Record made at the hearing is the exclusive basis for the decision

• Separation of Functions
  ▪ Walker v. City of Berkeley (9th Cir. 1991) pg 118 – denial of due process for the same person to serve as the administrative decision maker and as a advocate for the agency in federal court involving the same parties and issues
  ▪ §554(d) – no employee engaged in investigation or prosecuting many participate or advise in the adjudicating function – agency heads are excluded from this prohibition
    ▪ ALJ may not consult a person or party on a fact in issue unless there is notice and opportunity for all parties to participate (does not prohibit consultation of other agency officials on issues of law or policy)

• Bias
  ▪ Andrews v. Agricultural Labor Relations Board (Cal. 1981) pg 123 – appearance of bias is not enough to disqualify an administrative trier of fact – must prove actual bias
    ▪ Want to have people in agencies w/experience in those particular types of cases; politicians always appoint those who share their views to agency positions
  ▪ 2 types of actual bias
    ▪ Prejudgment of individualized facts of the case
    ▪ Animus or prejudice against a particular litigant or class of litigants
  ▪ Ward v. Village of Monroeville – disqualified small town mayor from serving as traffic court judge; the more fines collected, the less taxed he would have to impose on constituents
  ▪ Gibson v. Berryhill (SCt 1973) pg 128 – disqualified board of only independent optometrists when they rules that optometrists would lose their license if they worked for corporate employers
    ▪ SCt later backed away from this position – board w/majority of independent optometrists was not invalid for all purposes
  ▪ Can disqualify if personal or financial stake in the decision

• Ex Parte Contacts
  ▪ Ex parte contact rule and separation of functions rule – prohibit off-record communications relevant to the merits of the proceeding to agency decision-makers between interested parties and agency decision-makers,
but allow off-record communication to decision-makers from staff advisors if they have not played an adversary role

- **PATCO v FLRA** (DC Cir 1982) pg 132 – contact b/t agency head and Secretary of Transportation and dinner w/a union proponent who was also a friend were improper, but not severe enough to remand the hearing
  - Status reports are not prohibited contact
  - 2 remedies for improper ex parte contact
    - Disclosure of improper communication and its content
    - Violating party must show cause why their claim or interest should not be dismissed, denied or otherwise adversely affected b/c of violation
- Prohibition extends to communications b/t interested parties and advisers to the agency decision-maker

- The Role of Political Oversight

- **Pillsbury Co v. FTC** (5th Cir 1966) pg 142 – Congressional inquiry into the FTC while case was pending indicating how Congressman thought the statute should be interpreted in such a case was improper – Commission was not disqualified due to passage in time and change in personnel
  - Holding has been limited to decisions reached in formal adjudication
  - In formal or informal adjudications, agency cannot rely solely on Congress’s wishes to make a determination (would be arbitrary and capricious)
  - Only applies to cases that are in proceedings, does not apply to cases that only may reach proceedings
- Distinction b/t comment on law and policy issues and comment of facts being adjudicated

- **DCP Farms v. Yeutter** pg 148 – APA prohibits ex parte contacts once a hearing is anticipated; this does not apply to Congress, more to how the private party responds

### PART IV – THE PROCESS OF ADMINISTRATIVE ADJUDICATION

- Investigation and Discovery

- Subpoena duces tecum – civil investigative demands by agencies seeking to compel disclosure of information to find out if law has been violated
- **Craib v. Bulmash** (Cal. 1989) pg 170 – agency demand that an individual employer disclose records that he was statutorily required to keep does not violate either the 4th or 5th Amendments
  - Reasonableness test – investigation must be for an authorized purpose and the subpoenaed documents must be relevant to the inquiry
  - No self incrimination claim when the records are required to be kept in order to enforce regulatory schemes
- **Oklahoma Press Co v. Walling** (SCt 1946) – probable cause is satisfied as long as the subpoenaed documents are relevant to the inquiry
- Agency must go to court to enforce a subpoena
Possible defenses: agency has no jurisdiction, procedural violation in issuing the subpoena, request is too vague or indefinite or unreasonably broad or burdensome, agency is acting in bad faith for an improper purpose.

Atty-client privilege and work product privilege
- Agency can draw an adverse inference from assertion of privilege
- Agency can offer ‘use’ immunity
- Privilege can only be asserted by person in possession of documents that are being subpoenaed
- Does not apply to material seized under valid search warrant
- Does not apply to corporations, partnerships or unions
- Does not apply if records are required to be prepared or maintained by statute

Physical searches – agency must show that choice of entity to be inspected is based on reasonable and neutral standards
- Generally needs warrant, but may not apply to pervasively regulated industries (i.e. liquor or gun dealers) – Burger rule
  - 4 criteria: substantial gov’t interest in regulating the business, unannounced inspections must be necessary to further the regulatory scheme, statute must advise business owners of the periodic inspection program, search must be limited in time, place, and scope

Exclusionary rule – evidence that was illegally seized may still be admissible in administrative proceedings
- OK Press – no probable cause required for agency subpoenas
- Marshall v. Barlow – warrant is required for inspecting business premises
- Shapiro v. US – if entity is required to keep records, then no claim for invasion of privacy for agency to request production of those records
- US v. Doe – if possessing the requested documents would be incriminatory, then privilege applies

Findings and Reasons
- Fundamental requirement that decision maker state findings of fact and reasons for decision
- In the Matter of Ciba-Geigy Corp (NJ 1990) pg 196 – procedures were insufficient for stating findings of fact and reasons for decision b/c statute required findings based on 10 factors – decision did not indicate how those factors were decided
  - Court must be able to review manner of reasoning, not just the ultimate decision
- Failure to state findings of fact and reasons for decision cannot be remedied by post-hoc rationalizations

Equitable Estoppel
- Foote’s Dixie Dandy v. McHenry (Ark 1980) pg 211 – gov’t is estopped from collecting back taxes when employer relied on advice of gov’t auditor in not filing a request to transfer their unemployment tax record to a separately incorporated store
- Only problem was a single form that wasn’t filed and would have routinely been approved if it had been filed
- 4 required elements for estoppel
  - Party to be estopped must know the facts
  - Party must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended
  - Latter must be ignorant of the true facts
  - He must rely on former’s conduct to his injury
  - *OPM v. Richmondi* (ScT 1990) – no estoppel against gov’t when Navy officer gave incorrect advice about retiree’s ability to take an extra job w/o losing Navy benefits
  - *Heckler v. Community Health Services* (ScT 1984) – charitable clinic was advised by a private company which handed claims for gov’t that its use of funds would not reduce its Medicare reimbursements – DHHS sought to recover excess reimbursements
    - Reliance on oral vs. written advice
    - Reliance on private intermediary company v. direct gov’t agency
    - Insufficient detrimental reliance b/c clinic was only asked to repay funds it shouldn’t have recv’d
  - *GE v. EPA* (DC Cir 1995) – agency must give fair notice to a regulated party of what conduct it prohibits or requires before it can invoke sanctions – another way to assert estoppel

**PART V – RULEMAKING PROCEDURES**
- Introduction – Importance of Rulemaking
  - Advantages: participation by all affected parties, generally no retroactivity, uniformity, political input, agency agenda setting, agency efficiency, oversight
  - Rulemaking has become much more burdensome and rigid than originally anticipated
- Definition of “Rule”
  - APA defines rule as having general or particular applicability – courts generally ignore those words
  - Litigants may want “adjudication” to avoid no due process in rulemaking but if not formal adjudication, then may have more rights if rulemaking
  - *Bowen v. Georgetown University Hospital* (ScT 1988) pg 230 – DHHS could not adopt a rule w/retroactive effect even when a prior version of the rule was invalidating due to improper procedure during rulemaking
    - Power to adopt retroactive rules has to be expressly granted by Congress
    - Concurring – if rule has unreasonable secondary retroactivity (future effect that affects past transactions), then it may be found to be arbitrary or capricious
May be implicit authorization for retroactivity if statute contains a deadline that was missed
  o Interpretive rules may have retroactive effect

- Initiating Rulemaking Proceedings
  o Chocolate Manufacturers Ass’n v. Block (4th Cir 1985) pg 235 – notice of proposed rule is adequate if the changes to the originally proposed rule are in character with original scheme, and the final rule is a logical outgrowth of the notice and comments already given
    ▪ If the final rule materially alters the issues involved in the rulemaking or substantially departs from the terms or substance of the proposed rule, notice is inadequate
  o Period for notice and comment usually has to be 30 days or more
  o Detail required - §553(b)(3) – either the terms or substance of the proposed rule or a description of the subjects and issues involved must be disclosed
    o Long Island Care at Home v. Coke (SCt 2007) Supplement – initial proposal that indicated that the agency was considering the matter was sufficient notice b/c it was reasonably foreseeable that it would be decided differently
  o MSAPA – agency may not adopt a rule that is substantially different than the proposed rule
  o Portland Cement Ass’n v. Ruckelshaus – notice should include data and methods for how the agency formulated the proposed rule
  o CT Light and Power v. NRC – agency must disclose technical studies and data used in decision to propose a particular rule
  o Air Transport Ass’n v. CAB – burden on petitioner to indicate w/reasonably specificity what portions of the documents are objected to and how it might have responded if given the chance

- Public Participation
  o Informal rulemaking
    ▪ Usual notice and comment procedures
    ▪ Agencies can limit comment to written submissions only
    ▪ E-notice and comment procedures are being used more often
  o Formal rulemaking
    ▪ No ex parte contacts
    ▪ Separation of functions provision is not applicable
    ▪ If rules are required by statute to be made on the record after an opportunity for an agency hearing, §§556 and 557 apply
    ▪ US v. FL East Coast Ry Co (SCt 1973) pg 247 – ‘after hearing’ in statute did not trigger formal rulemaking requirements; only required informal rulemaking procedures
  o Hybrid rulemaking
    ▪ Some statutes instruct agencies to use more elaborate procedures than APA informal rulemaking
Vermont Yankee Nuclear Power v. NRDC (SCt 1978) pg 254 – reviewing courts cannot impose more procedural requirements than are included in the APA
  • APA sets out the maximum procedural requirements Congress intended to allow the courts to impose on agencies during rulemaking
  • Overton Park – courts can require agency to provide an explanation of their decision to allow for judicial review of their rationale
  • PBGC v. LTC – applies Vermont Yankee to informal adjudication
  • Agencies still have to have a rulemaking record, but have full discretion is how that record is developed

Procedural Regularity in Rulemaking
  o APA and both MSAPAs provide that the agency decision-maker must actually consider the written and oral submissions rec’d in the course of the rulemaking proceedings
  o 1981 MSAPA – others may prepare a summary for agency head’s consideration
    ▪ Federal and state APAs have been construed the same
  o Ex parte contacts are forbidden in formal rulemaking
    ▪ Agency must disclose their substance in the record
  o Informal rulemaking – assumption that ex parte contacts are neither banned nor required to be included in the record
  o HBO v. FCC (DC Cir 1977) pg 264 – generally communications before final rule is issued does not have to be put in record unless that information is the basis of the agency’s action; once notice of proposed rulemaking is issued, agency officials who are reasonably expected to be involved in the decision should refuse any ex parte contacts
  o Sierra Club v. Costle (DC Cir 1981) pg 267 – HBO is not followed in informal rulemaking procedures; only requires summary of ex parte contacts if they were found to be central relevance to the decision
    ▪ Need to allow some ex parte contacts b/c of political process
  o Ass’n of National Advertisers v. FTC (DC Cir 1979) pg 279 – an agency member may be disqualified when there is a clear and convincing showing that he was an unalterably closed mind on matters critical to the disposition of the rulemaking
    ▪ Agency heads are appointed to implement certain statutory programs w/the expectation that they have certain views
    ▪ Cinderella test for prejudgment in adjudication – if a disinterested observer may conclude that the decision-maker has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it

Issuance and Publication
  o APA §552(a)(1) – rules are required to be published and are normally not effective until a certain period after their publication
o Federal Register Act – Federal Register is published daily w/all rules of general applicability and legal effect and notices of proposed rulemaking
o APA – effective no sooner than 30 days after publication in Federal Register
o 1961 MSAPA – effective 20 days after filing
o 1981 MSAPA – effective 30 days after latest of filing, publication and indexing

• Regulatory Analysis
  o Executive Order – agencies should engage in CBA of proposed rule and possible alternatives; significant regulatory actions must provide a CBA
  o Limited judicial review of agencies compliance w/CBA requirements
  o Some specialized regulatory analyses – National Environmental Policy Act (environmental impact statement), Regulatory Flexibility Act (statement of effect on small businesses)

PART VI – RULES AS PART OF THE AGENCY POLICYMAKING PROCESS
• Rulemaking Exemptions
  o Good cause exemptions
    ▪ APA §553(b)(B) – exempt from notice and comment when it would be “necessary, impracticable, or contrary to the public interest”
      ▪ Unnecessary when rule is making a minor technical correction when the public is not interested
      ▪ Impracticable or contrary to public interest – when rule is urgently needed or when the normal procedures would undermine the objective of the statutory scheme the agency is trying to enforce
    ▪ APA §553(d)(3) – for “good cause” an agency may dispense w/normal requirement that rule may not become effective until 30 days after issuance
      ▪ Gov’t has heavy burden in showing good cause when the rule creates criminal liability for previously lawful conduct
    ▪ Direct final rulemaking – agency immediately adopts rule but if anyone objects to it after publication then the rule will be withdrawn and usual notice and comment procedures will commence
    ▪ Interim final rule – when agencies adopt a rule in reliance on the ‘impracticable’ or ‘public interest’ prongs of the good cause exemption – usually request comments on the rule after it becomes effective
  o Procedural rules
    ▪ APA §553(b)(A) – rules of agency organization, procedure, or practice are exempt from notice and comment requirements
      ▪ Must distinguish procedure from substance
- **US Dept of Labor v. Kast Metals (5th Cir 1984) pg 332** – rule changing how businesses are selected for OSHA inspection was exempt because it was only substantive by derivative – rights and obligations of the employer haven’t changed
  - Substantial impact test – exemption does not extend to those procedural rules which depart from existing practice and have a substantial impact on those regulated
- **Exempted subject matter**
  - These exemptions are narrowly construed
  - APA §553(a)(2) – excludes matters relating to public property, loans, grants, benefits or contracts
  - APA §553(a)(2) – excludes rules relating to agency management or personnel
  - APA §553(a)(1) – excludes rules to the extent that there is involved a military or foreign affairs function of the US
- **Non-legislative rules**
  - Legislative rules – issued by an agency pursuant to an express or implied grant of authority to issue rules w/the force of law
  - Non-legislative rules – do not have the force of law b/c not based on delegated authority to issue such rules; exempt from notice and comment procedures and delayed effectiveness
    - **Policy statements**
      - **Mada-Luna v. Fitzpatrick (9th Cir 1987) pg 338** – in order to qualify as a policy statement it must be prospective and must not establish a binding norm or be finally determinative of the issues or rights to which they are addressed – critical factor is the extent to which the agency is free to exercise discretion to follow or not follow the announced policy in an individual case
      - **Appalachian Power Co. v. EPA** – if the agency treats a document issued at HQ as controlling in the field, then it is in effect binding and therefore a legislative rule
    - **Interpretive rules**
      - **Hector v. US Dept of Agriculture (7th cir 1996) pg 347** – interpretive rules are distinct from those decisions which make a reasonable but arbitrary rule which although consistent w/the underlying statute or regulation still represents an arbitrary choice among methods of implementation
      - Rule is legislative if w/o a legislative rule by the agency, the legislative basis for the agency’s enforcement would be inadequate
      - Rule is non-legislative or interpretive when the agency has no legislative rulemaking authority at all w/respect to the subject matter of the rule
• Required Rulemaking
  o Courts are generally reluctant to interfere w/an agency’s choice of lawmaking procedures (rulemaking vs. adjudication)
  o NLRB v. Wyman Gordon (SCt 1969) pg 359 – NLRB could promulgate a new rule during adjudication when it was only to apply 30 days after the decision and was not applied to the parties to the case
    ▪ Agency is free to adopt new case law principles through adjudication but then it must entertain any arguments put forth that have not been considered before – if done through rulemaking then all arguments can be considered at once during notice and comment
  o NLRB v. Bell Aerospace (SCt 1974) pg 363 – agency can announce new principles in an adjudicatory proceeding although 3 situations when there might be a different result based on reliance interests
    ▪ When the adverse consequences of retroactive adjudication would be substantial to parties who had relied on past agency decisions
    ▪ When new liability is sought to be imposed retrospectively by adjudication on individuals for past actions which were taken in good faith reliance on agency pronouncements
    ▪ When fines or damages are involved
• Petitions
  o APA and MSAPAs allow public to petition an agency for the issuance, amendment or repeal of a rule
  o APA – does not require a statement of reasons explicitly when denying a rulemaking petition but another section requires the agency to provide a brief statement of the grounds for denial of any application or petition filed with an agency
  o WWHT v. FCC (DC Cir 1981) pg 379 – an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject has been removed – court may not force a rulemaking procedure if denial was adequately supported by facts and policy concern and was not arbitrary or capricious
  o MA v. EPA (SCt 2007) Supp pg 35 – EPA had to provide reasons for denying petition, even though such denial was w/ in their discretion
  o 4 factors to consider when determining whether the agency’s delay was unreasonable
    ▪ Length of time since agency came under a legal duty to act
    ▪ Reasonableness of delay judged in the context of the statute which authorizes the agency’s action
    ▪ Consequences of agency’s delay
    ▪ Existence of any administrative error or practical difficulty in carrying out the deadlines including need to prioritize limited resources
• Waivers
o WAIT Radio v. FCC (DC Cir 1969) pg 386 – denial of waiver must be accompanied by a statement of reasons – reason cannot be that w/o waiver action would violate the rule or regulation
o May be a requirement that every significant rule have a waiver provision
  ▪ Some agencies have never granted a waiver from certain rules – upheld by courts

PART VII – POLITICAL CONTROL OF AGENCIES

• Non-delegation Doctrine
  o Congress’s power to delegate its legislative authority is limited
    ▪ Separation of powers argument
    ▪ Checks and balances argument
  o Currently – SCt respects that doctrine but has upheld every delegation brought to its attention
  o Amalgamated Meat Cutters v. Connally (DDC 1971) pg 402 – validity of delegation is strengthened by being subjected to judicial review and there were standards to evaluate whether Congress’s intentions were being carried out
  o Industrial Union v. American Petroleum Institute (SCt 1980) pg 404 – broad delegations of power may be permissible if the delegate has expertise of the matters to be regulated – depends whether sufficient standards of implementation of the delegation are found in the legislative history or whether the delegation was justifiable by the necessity of the situation
    ▪ Non-delegation doctrine ensures that that policy choices are made by those who are politically responsible, that power is delegated w/guidelines, and that courts have standards by which to review the delegation and use of the power
  o Whitman v. American Trucking Ass’n (SCt 2001) Supplement pg 38 – CAA gave some guidance for the implementation of the power delegated to the EPA

• Rationale for political review
  o Executive and legislative review of agency rules provides opportunity for checks on agency decisions
  o Legislative review is more effective than judicial review b/c agency process was intended to replace the legislative process
  o Agencies should be accountable to those authorizing their actions

• Legislative controls
  o Legislative veto
    ▪ Legislative veto – means allowing legislators to invalidate or suspend an agency’s action by less that a statute
    ▪ INS v. Chadha (SCt 1983) pg 441 – legislative vetoes are unconstitutional because such a veto is a legislative action requirement bicameral and Presidential approval or presentation
      • Concurrence – should have been decided on the separation of powers issue – veto was a judicial action
Alternatives to the legislative veto
  - Congressional Review Act – requires all rules of general applicability adopted by nearly all agencies to be submitted to Congress and the General Accounting Office before taking effect
    - Major rules cannot take effect for at least 60 days after submission to Congress
    - Congress can veto non-major and major rules by a joint resolution of disapproval
  - Other legislative control
    - Oversight committees
    - Investigations and hearings
    - Funding measures
    - Direct contacts b/t members of Congress and agencies on behalf of constituents

Executive controls
  - Appointment power
    - Buckley v. Valeo (SCt 1976) pg 464 – Congress may only delegate the appointment of inferior officers to the President, Courts of Law or to Heads of Departments (executive branch agencies)
    - Principal officers must be chosen by the President on advice and consent of the Senate
    - Morrison v. Olson (SCt 1988) – upheld statute allowing a special court to appoint independent counsel to investigate possible federal violations by high ranking executive officials
      - Appointments should not be made by incongruous branches (judicial branch should not appoint an executive official)
      - Inferior officers are subordinate to some other official
      - Question of whether this has been overruled
    - Edmond v. US (SCt 1997) – inferior officers are those whose work is directed and supervised at some level by others who were appointed by presidential nomination w/the advice and consent of the Senate
      - Morrison appointment indicated the special prosecutor was to be independent of the supervision or control of any officer in the Department – has this been overruled by Edmond?
    - Mere employees of agencies are not subject to the appointments clause (i.e. ALJs)
    - Legislators can set qualifications that executive appointees must meet
  - Removal power and the independent agency
    - Humphrey’s Executor v. US (SCt 1935) pg 475 – statute can constitutionally limit the President’s power to remove at will for officials not acting in a purely executive function
      - Being able to be removed at will destroys such officials independence from the executive branch
Independent agencies – created to lessen political influence of the agencies' decisions
- Heads cannot be removed by the President except for good cause, usually have statutory requirements for staggered terms and party balance

**Morrison v. Olson** (SCt 1988) pg 478 – determination of whether it is constitutional to limit President’s removal power to only cases of good cause or whether it impermissibly interferes with the executive’s function is not entirely dependent on whether the official functions in a wholly executive way
- Separation of powers question can be looked at as whether there is any attempt by Congress to take another branch’s power
- Still look at whether the limitation will cause a disruption of the Executive’s function

Congress cannot keep for itself the power to remove if this would usurp the power of another branch

**Executive oversight**
- Office of Information and Regulatory Affairs (OIRA) – conduct oversight of significant rulemaking for the White House
  - EO 12498 required agencies to submit anticipated rulemaking initiatives to OIRA each year for approval
  - EO 12866 – agency must prepare a Regulatory Plan on significant regulatory actions it expects to propose or finalize, OIRA will notify President if it believes the plan is inconsistent w/President’s priorities
- If a matter has been entrusted to an agency official, the President cannot lawfully require the official to act at variance w/the statutory mandate

**PART VIII – THE SCOPE OF JUDICIAL REVIEW**
- Scope of Review of Agency Findings of Basic Fact
  - Possible scopes of review – de novo, independent judgment on the evidence, clearly erroneous, substantial evidence (most prominent standard in federal administrative law), scintilla test
  - Substantial evidence and clearly erroneous tests
    - **Universal Camera v. NLRB** (SCt 1951) pg 536 – reviewing courts must take into account contradictory evidence and base decision on whether there was substantial evidence in the record to support the Board’s decision
      - Must review the record as a whole, not just the evidence that the Board gave weight to
    - If the agency head reverses an ALJ’s credibility findings, this determination is treated by the reviewing court as a minus factor under the substantial evidence test
Substantial evidence has to be more than a mere scintilla – such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (directed verdict standard)

- Scope of Review on Issues of Legal Interpretation
  - 3 levels of deference – substitution of judgment based on independent judgment (weak deference), substitution of judgment w/o deference, reasonableness or strong deference
  - CT State Medical Society v. CT Board of Podiatry (CT 1988) pg 558 – interpretations of law should be left to courts, but will give deference to a time-tested agency interpretation of a statute
    - Dominant view in state courts – weak deference
  - Chevron v. NRDC (SCt 1984) pg 560 – reviewing court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an agency administrator
    - Has Congress spoken directly on the issue?
      - Can look at the specific statute as well as inferences drawn from other statutes in the area, and the fit or structure of the entire statutory scheme
    - If not, whether the agency’s answer was based on a permissible construction of the statute?
      - Implicit delegation to allow agency to fill in gaps of statutes they are supposed to administer
  - Example of strong deference approach to judicial review
  - Only applies to statutes that the agency administers
    - Christensen v. Harris County (SCt 2000) Supplement – interpretations in opinion letters do not carry the force of law and do not warrant Chevron type deference
    - US v. Mead (SCt 2001) Supplement pg 61 – agency actions, such as tariff classifications, were not intended by Congress to carry the force of law and therefore Chevron does not apply; instead the Skidmore deference of granting the level of respect to the extent that the document has the power to persuade
      - Although just b/c a statement does not carry the force of law, it doesn’t mandate the exclusion of Chevron deference
    - A court’s prior judicial interpretation of a statute would trump an agency’s construction that would otherwise have Chevron deference

- Judicial Review of Discretionary Determinations in Adjudication
  - Arbitrary and capricious test to review discretionary elements of administrative rules, informal and formal adjudications, fact-finding in informal adjudications
  - Salamedo v. INS (7th Cir 1995) – review of deportation suspension request that was denied – agency should have considered other information when determining ‘extreme harshness’
  - Citizens to Preserve Overton Park (SCt 1971) – first decide whether administrator acted w/in scope of his authority; then decide whether the actual choice made was not arbitrary, capricious, or an abuse of discretion
- Look to what factors the relevant statute requires the agency to consider when making a discretionary decision
  - *Butz v. Glover Livestock* (SCt 1973) – agency’s choice of sanction should not be overturned unless it is unwarranted in law or w/o justification in fact
  - Other abuses of discretion: arbitrary policy decision underlying discretion, illogical reasoning, insufficient factual basis, inconsistent w/prior agency policies, failure to adopt an alternative solution
  - *Chenery* rule – court cannot affirm an agency decision on some ground other than the one relied on by the agency in the decision under review
  - When agency is departing from precedent, there must be a reasonable explanation for that departure
- Judicial Review of Discretionary Decisions in Rulemaking
  - Arbitrary and capricious test to review policy choices in rulemaking
  - *Motor Vehicle Manufacturers v. State Farm* (SCt 1983) pg 592 – rescission or changing of a rule was arbitrary and capricious b/c the agency did not provide a reasoned explanation of the rescission
    - Reviewing court cannot set aside an agency rule that is rationally based on consideration of the relevant factors and w/in the scope of the delegated authority of the agency
    - Recission or changing of a rule is subject to arbitrary and capricious standard of review
  - *Borden v. Commissioner of Public Health* (Mass 1983) pg 599 – strong deference approach; statute did not require any specific tests to determine safety, so lack of those tests were not fatal
  - Hard look review
    - Court looks to whether the agency carefully deliberated about the issues raised by their decision
    - Agencies must offer detailed explanations for their actions, including all relevant factors
    - Court can reverse if agency failed to consider a plausible alternative and explain why it rejected those alternatives
    - Agency must explain any change from precedent

**PART IX – THE AVAILABILITY OF JUDICIAL REVIEW**
- Judicial Jurisdiction
  - If a statute is explicit as to the review procedures, that is the exclusive procedure to be followed for that statute
  - If no explicit statute, then ordinary rules of jurisdiction apply
- Reviewability
  - Statutory Preclusion of Judicial Review
    - Rebuttable presumption that administrative actions are subject to judicial review
    - *Bowen v. MI Academy of Family Physicians* (SCt 1986) pg 632 – when the statute only expressly precluded judicial review of the
amount determination, there was still room for judicial review of the method of the determination

- Failure to provide for judicial review is not equivalent to congressional intent to preclude such review

- *McNary v. Haitian Refugee Center* (SCt 1991) – statute which precluded review of a determination respecting an applicant, did not preclude review of challenges to unlawful practices in processing applications

- *Yakus v. US* (SCt 1944) – upheld regulation which stated that challenges to it could only be brought w/in 60 days after it was promulgated

  o Actions ‘Committed to Agency Discretion’

    - 2 types of agency discretion
      - Discretion that is reviewable under §706(2)(A) – arbitrary and capricious, abuse of discretion
      - Discretion that is committed to agency discretion by law and is not reviewable at all

    - *Heckler v. Chaney* (SCt 1985) pg 638 – when the statute which the decision’s authority is premised on provides no meaningful standard by which to judge the decision, there can be no judicial review
      - Presumption that agency refusals to take enforcement steps are generally not judicially reviewable

    - Presumption of unreviewability of discretionary decisions on whether or not to prosecute can be overcome by statutory standards appropriate for judicial review

    - SCt – agency’s refusal to engage in rulemaking is reviewable

  o Inaction

    - §706(1) – court can compel agency action that was unlawfully withheld or unreasonably delayed

    - *Norton v. Southern Utah Wilderness Alliance* (SCt 2004) pg 75 supplement – federal courts can only compel agency actions that are discrete and legally required; can direct an agency to take action but cannot direct how it shall act
      - A general categorical mandate does not allow a court to decide whether a particular non-action by the agency fails under that mandate
    
    - If P had filed a rulemaking petition to try to prompt agency to take action and they refused, then it would be reviewable under §706(1)

- Standing

  o Injury in Fact and Zone of Interests

    - *Ass’n of Data Processing Service Orgs. v. CAMP* (SCt 1970) pg 649 – 3 step inquiry for determining standing
      - Whether P alleges that the challenged action has caused him injury in fact, economic or otherwise
• Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question
  o Focus should be on the specific provision rather than the entire statute on whom it was designed to protect
• Whether judicial review of this particular action has been precluded
  - *Air Couriers v. American Postal Workers* – since the statute granting a monopoly to USPS for carrying mail was not passed to protect the postal workers, they were not within the zone of interests that the statute intended to protect
  - *Zone of interest prong is prudential – Bennett v. Spear*, Congress provided that under ESA any citizen could sue for certain violations which dispensed with the zone of interests requirement
• Causal Connection and Public Actions
  - *Lujan v. Defenders of Wildlife* (SCt 1992) pg 655 – 3 elements of constitutional minimum of standing
    • Injury in fact which is concrete and particularized and actual or imminent and not hypothetical
    • Must be a causal connection between the injury and the conduct complained of
    • Must be likely (vs. speculative) that the injury will be redressed by a favorable decision
  - Associations have standing when: (1) one or more of their members would have standing to sue; (2) the interests the ass’n seeks to protect are germane to the organization’s purposes; (3) neither the claim nor the relief requested requires the participation of individual members in the lawsuit
  - *Sierra Club v. Morton* (SCt 1972) – historic commitment to conservation is not sufficient to establish standing
  - P who can establish injury in fact can have sufficient standing to challenge an agency’s failure to prepare as EIS even though it would not require the agency to cease the project regardless of environmental damage
  - *Vermont Agency of Natural Resources v. US* (SCt 2000) – an interest unrelated to the injury in fact is insufficient to give standing – interest that is only a byproduct (i.e. a bounty for bringing suit) itself cannot give rise to a cognizable injury in fact
  - *FEC v. Akins* (SCt 1998) – even if P’s injury is shared by millions, still sufficient to provide standing
  - *MA v. EPA* (SCt 2007) Supp. pg 89 – a State can have standing to sue an agency by meeting the 3 part test of *Lujan*
• Timing
  o Finality
- **FTC v. Standard Oil Co. of CA (SCt 1980) pg 669 – FTC complaint was not a final agency action and was therefore not reviewable – complaint had no effect on daily conduct; no legal effect other than that Socal must litigate**
  - **Ripeness**
    - **Abbott Labs v. Gardner (SCt 1967) pg 675 – pre-enforcement judicial review of a regulation is permissible on consideration of 2 factors: (1) fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration**
      - Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in P’s conduct of their affairs w/serious penalties attached to non-compliance, access to the courts under the APA and DJA must be permitted, absent a statutory bar or some other unusual circumstances
      - Balance is generally struck in favor of immediate reviewability of legislative rules
    - Interpretive rules and policy statements may also be ripe for review, particularly when it is a ruling of a Board or agency head
      - May also be ripe when they speak only about what a statute means – court has all the information it will ever have about congressional intent at that time
  - People should not have to wait for adjudication if it is possible to go forward w/judicial review now, especially when there would be substantial costs involved in complying w/the rule and having to wait for adjudication
- **Exhaustion of Remedies**
  - **McCarthy v. Madigan (SCt 1992) pg 686 – if the administrative procedures could pose a trap for the unknowing and the P is seeking damages for which the agency has no ability to grant, P does not have to exhaust administrative remedies**
    - General rule – parties must exhaust prescribed administrative remedies before seeing relief from federal courts
    - Balancing test – balancing the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion
    - 3 circumstances when the individual’s interests weigh against exhaustion
      - When exhaustion would result in undue prejudice to subsequent assertion of a court action
      - When administrative remedy would be inadequate b/c of doubt the agency could grant effective relief
      - When administrative remedy would be inadequate b/c agency is biased or has predetermined the issue
- **NJ Civil Service Ass’n v. State** (NJ 1982) pg 691 – when a question only requires interpreting the law and legislative history and there are no facts in dispute, no requirement to exhaust

- **Portela-Gonzalez v. Sec. of the Navy** (1st Cir 1997) – safe harbor under futility exception requires claimant to show that their claim will be denied on appeal, not merely that they doubt an appeal will result in a different decision

- Exhaustion under APA - §704 which describes final rules, acts as an exception to the exhaustion doctrine; final rules are judicially reviewable

- Constitutional issues – purely facial constitutional challenges do not have to exhaust remedies; constitutional challenges as to the application of a statute to a P, may have to exhaust