I. Agencies in General
   a. Why have an agency? Specialized expertise, can expend the large amount of time required to
      investigate, continual changes require adaptation in the law frequently, better equipped to
      publish the results, easier to keep control over agencies (by legislature or executives) than the
      courts, are responsive to the political process. Can propose and pass regulations, investigate,
      enforce, and adjudicate. A court system must wait until an actual controversy arises.
   b. Drawbacks: Agency capture or runaway bureaucracy.
   c. Much admin. law comes from Constitution.

II. Constitutional Right to be Heard
   a. Due Process, hearings, and mass justice
      i. Decisions made by agencies that involve vital interests and may require process:
         benefit decisions, access to services, licenses, jobs or contracts, taxes, institutional
         decisions like parole or solitary confinement.
      ii. The availability of some type of hearing is extremely important to protect citizens from
         clumsy bureaucracy. Hearing gives them an opportunity to present their case to
         impartial decision-maker.
      iii. Administrative procedure is expensive, and reduces funds available to agencies to help
         people. It also causes delays and takes up a lot of time and energy that could be better
         spent helping clients. Question is whether process is always worth those costs…
      iv. Administrative law is about discretion. Much of the law is about the rules and
         institutions that limit that discretion.
      v. **Due process** requires the opportunity to be heard “at a meaningful time and in a
         meaningful manner.”
      vi. **Goldberg v. Kelly**—revolutionary case involving welfare recipients’ rights to due
          process before being terminated
          1. *Goldberg* says that under the circumstances here, where an entitlement for the
             basic necessities of life is being cut off, a **pre**-termination hearing is required;
             one after the fact will not suffice.
          2. The hearing need not be official or adjudicative in style, although complainant
             may be bring counsel. Must be able to present evidence **orally**, in writing not
             sufficient, and must be able to examine adverse witnesses. The final decision
             must be made on the legal rules and the evidence adduced at the hearing, and
             must be made by an unbiased decision-maker.
          3. In any situation, the opportunity to be heard requires a balancing of interests that
             must be tailored to the capacities, competence, and circumstances of those who
             are to be heard. The demands of procedural due process are flexible and
             contextual rather than rigid and abstract. (So will not always require a prior
             hearing, will not always require oral hearing).
          4. *Goldberg* also adopts a new concept of property—in this case the statutory
             entitlement creates a property interest—this does away with the prior right/gift
             distinction and judicial review. The question for deciding process, then, is often whether there is a
             property interest.
          5. *Goldberg* was overruled with regard to welfare with the new welfare bill, which
             specifically takes away the entitlement aspect.
          6. This case led to immediate benefits to welfare workers—80% who contested
             won. But maybe welfare would be better served by a less adversarial process
             that included cooperative and efficient bureaucrats.
7. There has been a lot of critique of this case and resulting retrenchment; the trend is away from this line of reasoning.

8. Purposes of due process/benefits of trial-type hearing: serves a dignitary function (treats the person as an individual), helps individual to understand and accept, leads to accurate decisions, creates precedents, empowers people, forces officials to act seriously and reflectively, helps government exercise discretion wisely, serves the purposes of the substantive programs (e.g. helping people get welfare benefits, etc.), identifies recurring problems, facilitates judicial review.


b. Interests protected by due process: liberty and property

i. Roth—requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth amendment’s protection of liberty and property. The threshold question is always whether an interest is being deprived.

ii. Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to contract, engage in common occupations of life, establish a home and bring up children, acquire knowledge, worship, generally enjoy those privileges long exercised as essential to the orderly pursuit of happiness by free men. It is a very broad concept.

1. Deprivation of liberty can be found where a person loses his job for reasons of dishonesty, or other reasons that could cause a stigma. If a person’s reputation is at stake because of what the government is doing, notice and opportunity to be heard are essential. This was not the case in Roth, so no liberty interest was implicated.

2. Paul v. Davis says that a person is not entitled to a hearing when accused of being a shoplifter. Although he was defamed, he was not deprived of liberty. If the government isn’t doing something tangible, it isn’t “doing” something to him. The fact that reputation alone isn’t a constitutionally-protected right troubles people. There is, however, the “stigma-plus” test, where, for example a person is listed as a drunkard and prohibited from buying alcohol. The deprivation of the liberty to buy the alcohol is aggravated by the stigma, and liberty deprivation is found.

iii. Property interests are not created by the Constitution. They are created and defined by independent sources, such as state law. Examples are contracts and rules or understandings that secure benefits and support entitlement. Implied contract rights can also be protected since they would be under state law (Perry v. Sindermann).

1. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” The court found that Roth did not have a property interest in his untenured job.

2. Concurrence argued that due process is required whenever the government denies a person a job, because the job is property, and liberty protects the right to work.

iv. FN 15 of Roth explains that a list of eligibility rules to be allowed to practice before tax board creates an interest to which procedural due process applies. Discretionary power means discretion after fair investigation, notice, hearing, and opportunity to answer.

v. Elaboration of property

1. Cleveland v. Loudermill says it doesn’t matter whether a state calls it property, if it looks and smells like property, it’s property. Property cannot be defined by
the procedures provided for its deprivation. The right to due process is
conferred, not by legislative grace, but by constitutional guarantee. While the
legislature may elect not to confer a property interest in public employment, it
may not constitutionally authorize the deprivation of such an interest, once
conferred, without appropriate procedural safeguards.

2. *Arnett*—Rehnquist’s “bitter and sweet” theory wasn’t destined to prevail b/c due
process goes along very well with state tort and contract rights.

3. *Bishop*—State law controls, and in the absence of state precedent, the federal
interpretation of the state statute controls. May get reasons but still there as at
will employee, so no due process protection. *Bishop* and *Loudermill* fit
together. (How?)

4. *Goss v. Lopez* held that as long as a property deprivation is not de minimis, its
gravity is irrelevant—due process is required. *Swick* found a deprivation to be
de minimis, but this limitation has never really taken hold, and most
deprivations of property require due process. Additionally, not all government
contracts are protected by due process, only those involving extreme
dependence or in which the contract itself allows termination only for cause.
However, remember that if a state allows a cause of action on a contract, then
that might serve as sufficient due process.

5. *Roth* and subsequent cases limit *Goldberg* to cases where people claim an
entitlement to some govt. benefit.

6. Breach of contract generally does not give rise to due process claims unless they
involve extreme dependence (like welfare benefits) or those in which the
contract itself allows the state to terminate only for cause (*Roth* or *Loudermill*)
(Jerad’s note—what does this mean in practice???)

   c. Timing of the hearing—*Mathews v. Eldridge*

   i. Some form of hearing is required before an individual is finally deprived of a property
interest. However, due process is flexible and tailored to the situation.

   ii. First threshold question: Has an interest been denied? If yes, then three factors:

      1. Private interest affected—how important is it?
         a. Degree of potential deprivation—in this case, disability benefits not
         found to have same degree of subsistence requirements in *Goldberg*.
         b. Length of deprivation

      2. Risk of erroneous deprivation with current procedures and the probably value of
additional or substitute procedures
         a. Nature of the relevant inquiry—are determinations routine, standard, and
         unbiased, or are they highly subjective? Does the decision turn on
         credibility issues? Procedural due process rules are shaped by the risk of
         error inherent in the process as applied to the generality of cases, not the
         rare exceptions.

      3. Government’s interest in fiscal and administrative burden an additional
requirement would impose—at some point the benefit to the individual is
outweighed by the cost to society

iii. In cases of emergency the state can deprive an individual of liberty or property without
a prior hearing, even if a later remedy is inadequate. *North American Cold Storage.*
Prior to *Mathews* that was the only way the govt. could deprive without prior hearing. *Mathews*
permitted an agency to do so to save money. *Loudermill* requires a pre-
termination procedure: employee to get oral or written notice of charges, an explanation
of the employer’s evidence, and an opportunity to present his side of the story. The court also noted that a delay in post-termination hearing could be a constitutional violation, though the nine-month delay in the case was not unreasonable.

d. Elements of a constitutionally fair hearing
i. Ingraham v. Wright—corporal punishment case: the court found that paddling implicates a constitutionally-protected liberty interest, but that due process is adequately met post hoc through common-law tort remedies, a prior notice and hearing is not required. If corporal punishment were not allowed under common law, then the case would be different. (Question whether this could apply to contract remedies in the case of teachers as well, instead of requiring hearing in advance)

ii. A prior hearing, if required may be a mere conversation between student and teacher or employer and employee. Parratt says that if a pre-deprivation hearing is not feasible because the deprivation is “random and unauthorized”, a state tort action may satisfy due process. However, if a pre-deprivation hearing is feasible, that rule does not apply.

iii. Other cases/notes: Board of Curators v. Horowitz—A student being dismissed for academic, rather than disciplinary reasons, is entitled to little or no process because it would interfere with the faculty/student relationship by making it adversarial rather than friendly. Mathews balancing was reduced to a straight cost-benefit analysis and upheld in the parking ticket cases. Additionally, if there are no factual issues to be resolved, an agency may dispense with an oral hearing. Walters v. Radiation Survivors—Constitution doesn’t guarantee the right to an attorney as part of due process, though many statutes provide that right. Furthermore, whether due process is met is decided by the overall picture, not the rare occasion where a person has special needs.

iv. APA 555(b) and 1981 MSAPA 4-203(b) give a right to retained counsel at trial-type hearings.

v. There is no absolute right to confrontation where the right to confrontation would not justify the cost of providing the right to confrontation

e. Rulemaking versus adjudication
i. Government action that affects identifiable persons on the basis of facts peculiar to them = adjudication. Government action directed in a uniform way against a class of persons = rulemaking. Procedural due process only applies to adjudication, not rulemaking. Rulemaking does not require procedural due process.

ii. Legislative-type action (quasi-legislative) = rulemaking.

iii. Londoner v. Denver—Municipal tax board imposed an assessment for funding of a road assessing an amount to each owner of property as the council believed to be appropriate. Since the council determined the tax for each property, the process was adjudicatory, and the taxed parties were entitled to due process. Reminder that Mathews tells us to take into account the nature of the private interest at stake. Levin says it’s not obvious that you want an oral hearing in this case.

iv. Bi-Metallic—On the other hand, when a large number of people are equally affected by government action, it is impracticable that all be heard, and furthermore the 14th amendment does not require that they be heard.

1. The 14th Amendment is satisfied when elected officials make judgments for the people. Ct. distinguishes itself from Londoner by stating that L. involved a small group of targeted people that were affected differently, whereas the whole city of Denver was treated the same in this case. The constitutional separation of powers grants taxing power to the legislature, so you cannot challenge the legislature by hearing. Since this is quasi-legislative, the reasoning follows.
2. Political remedy is something that you can fall back on (not necessarily a proxy for due process, but in cases where due process is infeasible, it may be all that there is).
3. Where facts that can be determined by anyone and not just by particular affected individuals, there is not much value to having hearings because the facts can be gathered in other ways.
4. Bi-metallic creates a more workable test which helps to get rid of arbitrary line drawing: Hearing is required when the rule applies to only certain specific people.

v. U.S. v. Fla. East Coast Ry. summarizes the modern interpretation of the Londoner-Bi-Metallic distinction: The line is not always bright between proceedings for promulgating policy-type rules or standards and those designed to adjudicate facts in particular cases. However, where no effort is made to single out any particular entity for special consideration based on its own peculiar circumstances, and factual inferences are used in the formulation of legislative-type judgments for prospective application only, that is rulemaking. Kenneth Davis explains it this way: The crucial difference between the two cases is that L. involves specific facts about particular property, but in B. no such specific facts were disputed. The principle may be that a dispute about facts found on “individual grounds” (adjudicative facts) must be resolved through trial procedure, but a dispute on a question of policy need not be so resolved even if the decision is made in part on the basis of broad and general facts of the kind that contribute to the determination of a question of policy (legislative facts).

vi. Cunningham—legislative vs. adjudicative fact distinction—Modifying Bi-Metallic, the court says the crucial questions are whether the fact-finding involves a certain person or persons whose rights will be directly affected, and whether the subject matter at issue is susceptible to the receipt of evidence. If the agency is acting in a general capacity so that the effect of its factual conclusions will be generally applicable, that’s rulemaking and no hearing is required. Where there are contested individual issues, then it’s adjudicative and there is a right to a hearing to contest evidence. The distinction between the two will blur when you talk about rules that by nature apply only to a few entities (such as tobacco litigation). (Side note: the court/agency(?) can make legislative decisions in the course of making an adjudicative decision.) Court labels it an adjudicative factual issue. There is probably a blending of adjudicative and legislative factual issues. Levin thinks that the court is wrong — it is legislative.

vii. Anaconda—Even when a facially general regulation applies only to one entity, there is no due process requirement. Critics of Anaconda say if a facially general pronouncement is individual in impact, the affected person should get a judicial type hearing.

viii. Note that even when a facially general pronouncement based on general determinations is individual in impact, it is legislative and no hearing is required. Anaconda. In that particular case, even if due process were required, the requirement was met through the public hearings prior to the rule being passed. However, it is at least suspect when a law singles people out for a bad reason. But as long as it’s addressed to a particular class and not a particular entity, it’s fine.

ix. Requirements of due process are flexible and contextual.

x. What you want from a rulemaking process is input from a large number of people, but not high-intensity input (I have no idea what this means)
a. Statutory hearing rights—federal  
   i. FEDERAL APA—Under Federal law, the default rule is for informal adjudication, and agencies are only required to engage in formal adjudication when an external source (such as another statute or the state or federal constitution) requires a hearing. Otherwise, an agency cannot be forced to grant a hearing.  
   ii. Federal APA § 554(a) says when the APA applies. If § 554 applies, then §§ 556 and 557 apply as well. §§ 558 and 555 apply to informal adjudication.  
   iii. The constitutional right to a fair hearing is not to be confused with statutory rights. In many situations, the rights overlap, but the ingredients required by each are not the same. The statutory procedure is likely to be more formal than due process requires.  
   iv. The federal APA does not require formal adjudicative hearings (nor does the 1961 MSAPA, upon which most state APAs are based). However, when another statute or constitution requires a hearing (often by using the magic words “on the record”) these are the rules that are used in formal adjudication under § 554(a):  
      1. “On the record” means on the exclusive record, which means that the trier of fact is not allowed to consider any evidence except that which is admitted at the hearing. Many informal hearings are also held on the record.  
      2. An agency must separate its prosecuting and adjudicating functions (554(d)) and no party can engage in ex parte contact with decisionmakers (557(d))  
      3. An agency must allow such cross-examination at the hearing as “may be required for a full and true disclosure of the facts” (556(d))  
      4. If the private party wins and the agency’s position was not substantially justified, the private party is entitled to recover attorney fees under the Equal Access to Justice Act; and  
      5. The hearing must be conducted by an ALJ who is hired and assigned to particular cases according to strict standards.  
   v. In the absence of a formal hearing requirement, an agency is free to choose its own dispute resolution procedure—this is called “informal adjudication”.  
   vi. Circuit split: If Congress provides for a hearing but doesn’t specify “on the record”, does it intend formal or informal adjudication? City of West Chicago v. NRC says that means informal. The court said that APA § 554 did not apply because the AEA did not include the words “on the record.” Although “on the record” need not appear for a court to determine that formal hearings are required, in the absence of these words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA. On the other hand, the First Cir. in Seacoast said that there is a presumption that when Congress specifies a hearing, that hearing is to be on the record and is to trigger § 554. Seacoast relied on a judicial review clause that required review “on the record”, saying this implied that there had to be a record, I guess.  
   vii. Levin says there is no way to distinguish the different outcomes apart from difference in opinion. ABA endorses Seacoast, Ad. Law section thinks it’s bad to presume that full-blown hearing always required.  
   viii. When a statute calls for a hearing in rulemaking, the S.Ct. has held that formal procedures need not be used unless the words “on the record” or their equivalent appear in the statute. Fla. East Coast Ry.  
   ix. Why not give this hearing? Very time-consuming and expensive. For a hearing, must hire ALJs who are based on seniority, may not be experts, and cannot do anything but adjudicate. If non-APA hearing, can hire whoever they want to do whatever they want.
x. Courts seem frequently to find that “even if due process is required, though we think not, the procedures already used constitute due process” (meaning the rulemaking hearing or whatever).

xi. Chemical Waste took a different tack from West Chicago and Seacoast. The court held that under Chevron, courts should defer to reasonable agency interpretations of ambiguous statutes. Since the hearing requirement was ambiguous, it deferred to the agency’s interpretation.

xii. In order to facilitate judicial review, some courts have required a system of notice, comment, and explanation, like that required in informal rulemaking, before an agency completes informal adjudication.

xiii. Portland Audubon—Endangered Species Act requires hearings conforming to §§ 554, 555, and 556, but says nothing about § 557. The Court required the agency to comply with § 557 because it believed that the legislature wanted formal adjudication. Allowed court to look at testimony/evidence outside the record even though formal adjudication.

xiv. In rulemaking cases, the S.Ct. has made it clear that courts lack power to create extra-statutory procedure except in unusual situations. In Vermont Yankee, the Court declared that courts could not go beyond the rulemaking procedures set forth in the APA. Later, the Court extended this principle to adjudication. As a result, if the procedures for a particular adjudication are not prescribed by the APA or due process or some other source of law, the agency decides what procedure to provide—not the courts. Pension Benefit Guaranty. PBGC casts serious doubt on the correctness of the cases above.

xv. Note that in the case of informal rulemaking, the APA provides protections for the public, in the case of informal adjudication, virtually none.

xvi. Ashbacker principle—where, for physical, economic, or policy reasons, only one of several applications can be approved, all applicants in competition must be considered together in a single “comparative” hearing.

xvii. Wong Yang Sung held that the APA procedures must also apply for constitutionally required hearings, because the Court refused to attribute to Congress the intention to provide less process for constitutional rights. Congress overturned the case with regard to its narrow application, but the logic still remains and could be applied in other contexts. However, the courts seem to ignore or evade this holding.

xviii. Where due process requires a trial-type hearing, the court can decide what procedures are required under Mathews v. Eldridge.

b. Statutory hearing rights—State—Study in contrast with federal provisions.

i. STATE APA—1961 MSAPA require an external source to trigger the adjudicatory procedures spelled out by the APA. It provides for only one type of hearing—a full, formal, trial-type proceeding. But if the dispute in question is not a “contested case,” the 1961 MSAPA provides for virtually no procedures at all.

ii. 1981 MSAPA provides an inclusive definition of adjudication. With only narrow exceptions, all adjudicatory decisions are covered by the acts, regardless of whether an external source requires a hearing. Second these statutes create several distinct classes of agency adjudication, each subject to procedural requirements specially tailored to the circumstances.

iii. Note that the 1981 MSAPA, unlike the 1961 MSAPA and the Fed. APA, guarantees some sort of hearing for everyone.

iv. In some states APAs, hearings exist across board unless legislature carves out exemption. Most state APAs follow the federal law outlined above. The 1961 MSAPA provides for a full formal hearing only in “contested cases”.
1. A *contested case* is a proceeding in which the legal rights, duties, or privileges of a party are required *by law* to be determined by an agency after opportunity for a hearing or the renewal, suspension, or amendment of a license that grants a right. It is a full-fledged trial-type hearing. (Some states are different.) Did not require the words “on the record”—instead looks at the nature of the case.

2. *Sugarloaf*—Still requires an external source requiring a hearing for it to come into play. Must always have a statute or constitutional provision that creates right to formal hearing.

3. *Metsch*—FL APA requires hearing whenever “substantial interest” at play. Test for sub. interest: (1) injury, (2) injury is of type or nature proceeding designed to protect. This is broader than just property or liberty. Held that admission to U. is not substantial interest—only unilateral expectation. FL does provide only informal proceedings when there is no issue of material fact. The informal proceeding only requires notice, opportunity to present evidence, and a written explanation.

4. *Metsch* on the other side of *West Chicago*, because of very different facts that show absurdity of universal hearings.

5. Types of hearings: conference hearings, emergency adjudicative proceedings, summary proceedings.

6. Look at the words of the triggering language. Need to be able to read the actual language of the statute and also the legislative intent to figure out what the legislature really wanted to do. Also think about overall context and ask is it logical that the legislature really wanted it to be triggered?

c. Limiting issues to which hearing rights apply
   i. Answers the question whether an agency must provide an adjudicatory hearing prescribed by statute on an issue if the agency has already addressed that issue with a rule.
   
      ii. *Heckler*—A set of regulations that set criteria that, if met, determine whether or not there is a job in the national economy available to a social security claimant is ok. Claimant could file a petition to ask the agency to rescind its rule. Since the rule that allowed the matrix to be implemented was not arbitrary and capricious, the matrix stands. Even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine certain classes of issues that do not require case-by-case consideration, unless Congress clearly expresses an intent to withhold that authority. The party need only be allowed to offer evidence relating to their specific situation and to argue that the rules do not apply to him.

   iii. Court says she could have challenged when rule made…is that reasonable?

   iv. A contrary holding would require continual relitigation of issues that may be established fairly and efficiently in a single rulemaking proceeding. In this case, the type and number of jobs may be resolved as fairly through rulemaking as by introducing testimony for every hearing. There is desire also for uniformity and a streamlined process. Drawback is you lose the human touch.

   v. Party can contest the legitimacy of the rule—in this case held not to be arbitrary or capricious. If that doesn’t work, out of luck.

   vi. Rulemaking proceeding itself provides sufficient hearing. When the court says the issue has already been litigated, of course that is just a stripped-down hearing in forming the rule. This is *Bi-Metallic* in practice—you never get a hearing in rule-
writing or rule-practice stages. Since rulemaking supercedes the statutory right to a hearing, no real hearing takes place. You are stuck with the rule once it is applied.

vii. Waiver or “safety valve” provisions that allow affected person to seek waiver of the rules are important to the validity of rules that foreclose hearing rights.

viii. An agency can use “administrative summary judgment” to foreclose a hearing otherwise required by statute when there are no disputed issues of material fact. Heckler also shows that certain issues can be decided summarily, even when others are litigated.

1. Showing an issue of material fact is not a great burden, just minimal—need not make detailed allegations, but must be more than conclusory. Air Line Pilots Ass’n—Speculative and unsubstantiated allegations do not present an issue of material fact. Just because there is a statute saying you get right to hearing doesn’t mean you get it.

d. Institutional decisions and personal responsibility

i. Two ways to see administrative decision-making:

1. Judicial model—sees it like courtroom. Argue that fairness and acceptability to litigants should be goals of the process.

2. Institutional model—views agency as if it were a single unit with the mission of implementing a regulatory scheme. Under this view, adjudication is a policymaking technique, along with rulemaking, advice-giving, and publicity. Each adjudication should further agency policy. Stress accuracy and efficiency as the goals. Under this model, safeguards lie in the professional training of the officers, the cross-checking among them, and the in the agency heads who coordinate the operation.

3. The administrative process strikes compromises between these models.

ii. Morgan I—The one who decides must hear. The officer that makes the determinations must consider and appraise the evidence which justifies them. When a hearing is required, there must be adequate evidence to support necessary findings of fact. If the one who determines the facts has not considered the evidence, no hearing has been given.

1. However, an examiner may take the evidence, and competent subordinates may sift and analyze it. Officer must only consider and appraise.

2. Alternatively, the officer may delegate the power to make final decisions to someone else if legally permissible and if the adjudication will not be making new law or policy. Note how both are institutional model.

iii. Morgan II—If the hearing officer recommends action to the agency head, due process (or at least a statutory “full hearing”) requires that he prepare a report so that litigants are advised and can contest the issues. This is judicial in nature. A later case clarified that due process does not require an intermediate report in the absence of substantial prejudice from the failure to prepare one.

iv. Mazza v. Cavicchia—State, not federal case: It violates due process to not be able to see the facts that came out of the hearing, wouldn’t know the issues to rebut—must spell out reason for decision.

v. Morgan I in practice—when deciding authority chooses NOT to adopt the findings of its hearing officer, it must examine the record independently.

vi. Morgan IV—There is a rebuttable presumption that deciding officials have complied with legal requirements, including familiarizing themselves with the record. How to rebut? Good question, because it is usually not possible to subject decision-makers (or
their staff or law clerks) to discovery or trial about how they made a decision. “Inquiry into mental processes must be avoided absent ‘a strong showing of bad faith or improper behavior.” Overton Park. Such cases are a rare exception in order to encourage agencies to engage in uninhibited and frank discussions. As a result, it counsel cannot usually raise a plausible Morgan I contention.

vii. Overton Park was an exception. In that case, the court remanded for an explanation from the Secretary because of substantive, not procedural issues. This exception was very narrow, and probably would not be followed today. Applies only if agency fails to explain. Today, they would just ask for better explanation.

viii. Although the record is the exclusive basis for decision, decisionmaker may take official notice of non-factual information not in the record.

e. Separation of functions

i. Walker held that the same person cannot serve both as decisionmaker and as advocate for the party that benefited from the decision. There is an issue of zealoussness in litigation. If the person is litigating the issue, it is hard to believe that the same person could make a fair and unbiased determination on the merits.

1. § 554 (d)(2) codifies this: An employee investigating or prosecuting for an agency may not participate in a factually related case participate or advise in the decision.

2. 554(d) divides the agency employees into three groups: adversaries (investigators and prosecutors), adjudicators (meaning both the ALJ who hears the case and the agency heads who make the final decision), and everyone else. It prohibits staff members in the first group (adversaries) from serving as adjudicators or from advising the adjudicators off the record. But staff members in the third group (“everyone else”) can furnish off-record advice to the adjudicators. A staff member could be an adversary in one case and serve as an adjudicator or furnish advice to an adjudicator in a different (but similar) case.

3. 554(d)(1) provides that an ALJ may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. The Court has said: “Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing unless on notice and opportunity for all parties to participate. Thus, 554(d)(1) disables the ALJ (but not other agency decisionmakers, such as intermediate review boards or agency heads) from receiving ex parte advice on factual issues from any agency staff member (whether or not they have been adversaries in the case). But it does not appear to prohibit the ALJ from receiving advice on law or policy from agency staff members. And as far as agency heads are concerned, staff advice on factual matters must relate to evaluation of the evidence in the record, not introduction of new factual material. Introducing new facts would violate the exclusive record principle.

4. 554(d)(2) provides that an ALJ may not be supervised by a person engaged in performing adversary functions for the agency. Thus ALJs must be part of a separate unit within an agency, supervised only by someone who does not engage in investigation, prosecution, or advocacy. This provision is designed to prevent “command influence,” since an ALJ should not have to worry that a decision against the agency would jeopardize the ALJ’s career.

5. 554(d)(A), (B) exempts initial licensing and ratemaking proceedings from separation of functions.
6. **Principle of Necessity**—Under this principle, a biased or otherwise disqualified judge can decide a case if there is no legally possible substitute decisionmaker.

7. Exception for agency heads in § 554(d)(C): Since they are accountable for all aspects of operations, they have to have control over all aspects.

8. *Withrow* acknowledges that with regard to agencies, combination of investigative and judging functions is not a denial of due process.
   a. *Lyness*—Because of state due process protection, same agency head must not participate in both prosecution and decision. 1981 MSAPA directly contradicts this.

9. Recall that *Goldberg* requires an impartial decisionmaker. That person may have participated in some aspects of the case, but should not have participated in making the determination under review.

10. If sequence were reversed, might be okay…that is, if she decided first, then participated in trial second.

f. **Bias**
   i. *Andrews*—An administrative judge is required to be recused only in instances of actual bias and not potential bias or appearance of bias (unlike some real judges, where appearance is enough). Bias refers to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved. Bias in the form of an opinion on issues of law or policy is not grounds for disqualification. Even if you could infer that the nature of a lawyer’s practice can be taken as evidence of his political outlook (which improperly imputes views of client to the attorney anyway), it doesn’t matter. Even numerous and continuous rulings against a litigant form no ground for charge of bias or prejudice, even if erroneous.

   Note: Litigants are not entirely without remedy in this situation. If the decision is truly erroneous, they can appeal.

   ii. Why not have an “appearance of bias standard”? Because it’s such a specialized area of law, it would be nearly impossible to find an unbiased person to serve.

   iii. An adjudicator can be disqualified if he has a personal interest in the outcome of the decision. Decisionmakers by profession may have a pecuniary interest in the outcome of a case. (Need to consider the rule of necessity in these cases).

   iv. Types of bias:
      1. **Prejudgment of the individualized facts of a case**: Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker.
         a. *Cinderella*—Unguarded public statements look like prejudgment.
            Agencies get around bias by speaking in vague terms in public—charges have been filed, our complaint says, etc.—terms that keep them from looking like they have staked out an opinion.
         b. There is an important difference between prejudgment of individualized facts relating to a private party and prejudgments about law, policy, or legislative facts.
         c. A decisionmaker is not disqualified simply because he has taken a position even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances.

      2. **Animus against a particular litigant** (or a class which includes that litigant).
3. **Professional bias**—When participation in a profession gives a pecuniary interest in the outcome, such as licensing new optometrists

4. **Financial interest/personal stake in the outcome**—Decisionmaker automatically disqualified, whether actually biased or not.
   a. *Tumey*—Since judge received compensation out of fines collected—he was biased.
   b. *Ward*—Due process problem. Agencies budgets get cut—if they find more liability they get more revenue. Doesn’t matter that decision would be reviewed by impartial appellate court, they deserve a fair trial the whole way.
   c. *Cf. Marshall*—If acting in prosecutorial rather than judicial capacity, then the fact that your office keeps part of the fines is okay.

5. If a decisionmaker’s statements indicate that any kind of bias is present, due process requires that the decisionmaker be disqualified.

   g. **Ex parte contacts**
      i. Basic ground rule: stay away from ex parte contacts in administrative hearing as much as in judicial hearing. Reason: no opportunity for rebuttal by other side, improper in adversarial context
      ii. Section 557(d) applies in cases of formal adjudication, so there must be a statute that requires a hearing “on the record.” 557(d) applies when a proceeding is noticed for hearing, or, if the outsider knows that it will be noticed, at the time he acquires such knowledge.
      iii. *PATCO*—§ Section 557(d) of the APA prohibits ex parte communications “relevant to the merits of the proceeding” between an “interested person” and an agency decisionmaker.
         1. An interested person is one who has more interest than the public at large.
         2. This applies to formal adjudications only.
      iv. § 551(14) defines an ex parte communication as “an oral or written communication not on the public record to which reasonable prior notice to all parties is not given, but not including requests for status reports on any matter or proceeding.” However, a request for a status report or a background discussion may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings. The judgment will have to be made whether a particular communication could affect the agency’s decision on the merits.
      v. If a contact occurs, it should be put on the record.
      vi. Agency proceedings that have been blemished by ex parte communications are *voidable*, but not automatically void. A court must consider whether, as a result of improper ex parte communications, the agency’s decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect.
      vii. In making this discretionary determination, a number of considerations may be relevant:
         1. The gravity of the ex parte communications
         2. Whether the contacts may have influenced the agency’s ultimate decision
         3. Whether the party making the improper contacts benefited from the agency’s ultimate decision
         4. Whether the contents of the communications were unknown to opposing parties who therefore had no opportunity to respond
5. Whether vacation of the agency’s decision and remand for new proceedings would serve a useful purpose

viii. *PATCO*—It is simply unacceptable behavior for any person directly to attempt to influence the decision of a judicial officer in a pending case outside of the formal, public proceedings.

ix. Levin says *PATCO* may have been wrongly decided—Shanker probably didn’t have the type of interest contemplated by the statute

x. *Portland Audubon revisited*—The President of the United States is an interested party under § 551. Problem is that this situation was construed as formal adjudication. If it’s formal adjudication, there’s no getting around the rule. If, however, it’s really a political decision, this makes no sense. *Cf. Sierra Club v. Castle*—President can engage in ex parte contacts in rulemaking. Note: In cases of alleged ex parte contacts, Morgan IV is inapplicable, and agency staff and decisionmakers must submit to a grueling inquiry into exactly who said what to whom.

h. The role of political oversight

i. *Pillsbury*—Congress may investigate the agency as to broad legislative matters and call them to task for failing to adhere to the intent of Congress in supplying meaning to the often broad statutory standards from which the agencies derive their authority. However, when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency’s legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

1. In this case, Congress subjecting an administrator to searching examination of why he reached the “wrong” decision in a case still before him sacrifices impartiality.

2. Congress is an “interested person” for purposes of § 551.

3. Congress can influence the agencies on purely legal questions. So that when Congress believes that the agency is not properly interpreting the statutes, they may tell them so.

4. This is potentially problematic, because agencies frequent make policy in adjudication. Congress needs to be able to oversee policymaking, and agencies that don’t heed Congress will find themselves unfunded.

ii. *DCP Farms*—*Pillsbury* not applicable until you reach the point of quasi-judicial proceedings. Congressman could therefore exert pressure until an actual hearing. Additionally, the court was concerned about limiting congressional oversight. Levin says ordinarily you give the benefit of the doubt to the administrator. Political pressure happens all the time outside of proceedings. The system trusts the administrator to administer the rule with sufficient integrity. The court must presume that the agency decided on the basis on which they said they decided it. Also, Congressman’s pressure would still be legal. Problem would be acting on the pressure.

1. Note: The administrator at least has to say that he is making his decision based on the statutory criteria, even though it may be based solely on the threats of Congress. Otherwise, it is arbitrary and capricious

iii. *D.C. Federation of Civic Ass’ns v. Volpe* limits the holding of *Pillsbury* to cases of formal agency adjudication.
IV. The Process of Administrative Adjudication
a. Investigations and discovery
   i. Agencies need information for rulemaking, legislative proposals, or investigation. Usually the info. is provided voluntarily. Sometimes, though, the agency must compel disclosure. It does so by two modes:
      1. Subpoena duces tecum (or civil investigative demands—CIDs)
      2. Physical inspections
   ii. Agencies need a statutory basis other than the APA to compel production. § 555 (c) and (d).
   iii. By and large, the rules are not as strict as the criminal system—there is a pretty broad ability to search.
   iv. Craib v. Bulmash—No Fourth Amendment privacy claim can be asserted against an administrative subpoena that requests records that are required to be maintained under lawful statutes. No ‘probable cause’ (4th Amendment) is required to search those records, but the request must pass test of reasonableness. No Fifth Amendment claim because the information demanded is the appropriate subject of a lawful regulatory scheme.
   v. Oklahoma Press says such searches are almost always “reasonable”. The analogy is to a grand jury subpoena, not a search warrant.
   vi. Defenses to subpoena: agency has no jurisdiction over the matter, procedural rule violation, or subpoena too vague and indefinite or unreasonably broad and burdensome. However, all are difficult to sustain. Additionally, court may refuse to enforce a subpoena when the agency is acting in bad faith or is trying to pressure or harass the demandee.
   vii. ICC v. Brimson—Agency cannot enforce its own subpoenas, must go to court.
   viii. When an agency searches a home/business, normally need search warrant (Barlow’s rule).
   ix. Exception to Barlow’s rule: ‘pervasively regulated businesses’ NY v. Burger criteria. Four criteria for justifying warrantless searches Burger decision:
      1. Substantial government interest in regulating business
      2. Unannounced inspections must be necessary to further regulatory scheme
      3. Statute must advise the owner of the periodic inspection program
      4. Searches must be limited in time, place, and scope
   x. Fifth Amendment
      1. No 5th amendment protection for corporations. Bellis v. US—even though the holder of the records could be incriminated, he is just the instrument of the company and has no 5th Amendment privilege because he is required to keep such statutes by law. But he can’t be forced to testify himself. The records are public record—hole in 5th amendment protection. In all areas where agency requires you to keep records, they can also require you to put them forth.
      2. Exception: if gambling & drug transactions and law requires you to keep them, then this is obviously an end run b/c requiring records to be kept for an inherently criminal industry.
      3. If records are kept voluntarily—no 5th Amendment protection. See US v. Doe. Not being compelled to testify against himself—wrote them on own volition.
      4. Turns on whether by producing you are giving them information that they wouldn’t otherwise have—i.e. by turning the records over that would show them that you are a thief rather than having them actually have to look in the records.
5. If don’t turn over the records, can make comments about a person’s refusal to testify or turn over documents. Limiting right protection where administrative agencies are involved

b. Evidence at the hearing
   i. § 556(d)—Hearings: Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence… A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
   ii. Basically, § 556 (d) says any kind of evidence may be received, including oral evidence that amounts to hearsay. Nothing says it has to meet same standards of admissibility as in courtroom. Contrasts with MSAPA.
   iii. MSAPA recommends following state evidence codes generally but says it cannot be excluded solely because it is hearsay.
   iv. Majority rule: Residuum rule: Requires that an administrative agency’s findings be supported by some evidence that would be admissible in a civil or criminal trial. Criticism of residuum rule: Concerns about cross-examination unfounded because much that evades hearsay is equally untested, but is still accepted. Says officers can decide, and that the substantial evidence test will address the issue.
   v. Minority rule: Substantial evidence test: Case-specific inquiry. Hearsay may be admitted just like any other evidence. However, the finding of the court must be based on substantial evidence based on the whole record. Factors to consider: alternative to relying on the hearsay, importance of the facts sought to be proved to the outcome, state of opposing evidence, consequences of decision either way, etc. This means that hearsay may be sufficient, but it may not be.
   vi. The federal courts do not follow the residuum rule. They use the substantial evidence rule, and the S. Ct. has said that hearsay can be enough. Richardson v. Perales.
   vii. Reguero—The question is whether hearsay alone is enough to sustain a verdict even if there is no supporting evidence that would have been admissible. The court ruled that hearsay evidence could be enough, but was not enough in this case. Adopts the substantial evidence test.
      1. In looking at other factors, court noted that it is okay to allow an administrative decision to rely on hearsay alone, but if there is an inexpensive alternative to relying on the challenged hearsay, then that alternative should be used. In Reguero, there was an inexpensive alternative and no reason was given why it was not used, so the court does not allow the hearsay.
   viii. In Matthews the court accepted the idea that the agency can rest on inadmissible evidence—it was all hearsay. (?)
   ix. Why allow hearsay anyway? Because there is no jury to protect from the hearsay evidence. Because the ALJ hears the evidence and has expertise. One argument is that admissibility rules should be more lenient here. In a court judge decides what is too prejudicial. In hearing, ALJ would look at to see if it is admissible so why not let him take into account on merits. The agency is composed of experts that are supposed to be more familiar with the issues than a jury or even a judge. Agency should be freer to see
evidence because they are professionals, not laypeople. Whole idea of rules of evidence has less force in this context.

x. Administrative judges are expected to take an active role in developing the record. This is especially important when one of the parties is not represented by counsel.

c. Official notice
   i. A court is permitted to take judicial notice, i.e. treat as proven, various facts and propositions which are very likely to be true (limited to adjudicative facts that are readily provable from objective source or otherwise self-evident). These are matters of such common knowledge that they cannot reasonably be the subject of dispute or that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

   ii. Agencies are permitted to take official notice of matters which could be the subject of judicial notice—and they can also go further and notice matters which a court could not. § 556(e). Because so much can be the subject of official notice—so much of it being the personal knowledge of the fact-finders—it is important that parties have a fair opportunity to contest and rebut the facts or material so noticed.

   iii. Franz—The board found that the doctor was negligent in choosing a hospital with no ICU and scheduling surgery before finding a surgeon. The court did not have any expert evidence as to whether these things were negligent, but relied on their own expert knowledge to determine that the doctor was negligent. The court affirmed the decision as to the finding of negligence in choosing a hospital with no ICU because that was obvious to a layperson. However, it reversed on the finding regarding scheduling the surgery before finding a surgeon because that decision required the board to make a record of its official notice so that the doctor could offer a rebuttal.

   iv. Due process requires, when in an adjudication an agency intends to rely on members’ expertise to resolve legislative fact issues, that it notify the parties and provide an opportunity for rebuttal. The notification must be complete and specific enough to give an effective opportunity for rebuttal. It must also help build a record adequate for judicial review. Only where the professional significance of underlying facts seems beyond lay comprehension must the basis for the technical findings be shown and an opportunity for rebuttal given.

   v. Most courts allow a motion for rehearing/motion to reopen the proceedings to serve as the opportunity to rebut the official notice not given in the record at the time of the initial decision.

   1. Except immigration, can be deported while petition pending.

   2. Admin proceedings can be suspended while petition for rehearing considered.

   3. But there is an argument that is too late: stigma, harder to change someone’s mind. If you insist they be given right before decision more likely they’ll be receptive to it. Want to have decided things stay as they are. Case book correct that usually subsequent petition is good enough. Usually sophisticated decisionmakers who have fund of knowledge.

   vi. Even if the agency gives an opportunity to rebut, it cannot rely on a bare assertion. The agency has to give some evidence to support its assertions. Otherwise, the court has no basis to determine whether the agency could take official notice.

   vii. Official notice should be easier in legislative facts than in adjudicative facts, but this should not be treated as a Litmus test, because there are situations where you can take account of adjudicative facts through official notice, and conversely some legislative facts can’t be taken notice of. Ex: facts of airbag case, would have been problem to put
out rule that makes findings without evidentiary basis, just saying we are experts. Trend of courts is to scrutinize basis for major rule.

1. Legislative facts (efficacy of seatbelts) but agency has to produce studies, data, etc. to support position. Otherwise court wouldn’t review facts. Maybe less can support legislative facts there has to be some basis.

viii. Summary: The doctrine of official notice is used to relax the burden on agencies and allow them to draw on expertise in some ways, but they still have to point to something to validate expertise even if outside record.

ix. If an agency rejects uncontroverted expert testimony in reaching its decision, it should probably provide notice to the party against whom such notice is taken.

x. States—MSAPA§4-212(f): Official notice may be taken of (1) any fact that could be judicially noticed in the courts of the state, (2) the record or other proceedings before the agency, (3) technical and scientific matters within the agency’s knowledge, and (4) codes or standards adopted by any state or federal agency, or by a nationally recognized association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material notices.

xi. Davis & Randall—ICC used own view that rate wouldn’t be profitable. Court would uphold agency’s decision in only limited circumstances. If the challenger has a good case, substantial evidence would not be enough. Any decent case by challenger, then court will be unlikely to take just a blanket statement of expertise of the Board.

xii. Burden of proof: burden of persuasion v. burden of production.

d. Findings and reasons
   i. Ciba-Geigy—Agency must provide reasons for its decision—forces agency to think
   ii. Purpose:
      1. notice to all interested parties,
      2. ensure that agencies act w/in scope of delegated authority,
      3. facilitates appellate review
      4. no post hoc rationalizations—don’t want to substitute reasons of lawyer for that of agency (delegation of authority, sep of powers argument)
   iii. Overton Park—If an agency has failed to make findings or to state reasons, the deficiency cannot be repaired by post-hoc rationalizations. Create temptation for agency not to do its job at the time if you allow post hoc rationalizations.
      1. Exception: Cf. Bagdanas—affidavit could be considered as an explanation of the agency’s decision which the court then upheld but it was to be “viewed critically.”
   iv. Findings=good idea but hard to impose the requirement if not required by due process
   v. PBGC v. LTV—Federal courts are precluded from imposing procedural rules on agencies as a matter of administrative common law—must have some basis for requiring findings

e. Equitable estoppel—Dixie Dandy
   i. Equitable Estoppel—Contrast between state and federal law in these situations
   ii. Estoppel is not available in federal courts (never or almost never?)—i.e. the government is not bound by equitable estoppel and apparent authority when the action of its agent misleads a person to his detriment.
   iii. A party can rely on a declaratory order without concern about the nebulous doctrine of equitable estoppel against the government. Also, a party who disagrees with an agency’s declaratory decision can seek judicial review of it.
   iv. To get estoppel in some state courts, must prove four things:
1. The party to be estopped must know the facts
2. He 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 is so intended
3. The latter must be ignorant of the true facts
4. He must rely on the former’s conduct to his injury.

v. *Foote’s Dixie Dandy* (state case)—The state can be estopped when the factors above are shown. Unemployment tax. Old auditor said that Foote didn’t need to file any new info. New advisor caught the mistake and required Foote to pay. Estoppel requires reasonable reliance. Circumstances were sufficient for equitable estoppel.

vi. *Heckler v. Community Health Services*—Government sought money back from excess reimbursements for clinic. Any responsible decision-maker wouldn’t rely unless got it in writing—need more than oral assurances. Money that they weren’t supposed to get in the first place. Not losing a legal right to something

vii. (?) Why not allow estoppel?
   1. Constitutional argument that only Congress can appropriate money
   2. Would lead to less advice by federal advice-givers [main argument—would lead to imposition of strict controls on info]
   3. All taxpayers suffer for the benefit of one who didn’t want to pay taxes
   4. Encourage more litigation

V. Rulemaking Procedures
   a. Advantages of rulemaking: Participation by all affected parties, appropriate procedure, generally apply only prospectively, providing warnings to regulated parties, *uniformity*, political input, agency agenda setting, agency *efficiency*, easier for regulated parties to find and understand than case law, makes legislative and executive oversight easier.
   b. Disadvantages to rulemaking: Less flexible, policy must be made in the abstract, creating cruder, less sensitive law, not good for new and unexpected problems, there will still have to be adjudication involving the rules.
   c. Courts generally accept that an agency has a right to make rules unless there is something in the statute which gives clear evidence that the legislature did not intend for the agency to have rulemaking power.
   d. Importance of rulemaking
   e. Definition of “rule”
      i. APA 551(4): “Rule” means the whole or a 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 of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.
         1. Order is anything that is not a rule
         2. “Or particular applicability” doesn’t belong
      ii. *ACUS Guide*—“Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent’s past conduct.” Rules address a whole class of people.
      iii. Differences Between Rules and Adjudications:
1. Rule is usually prospective; order is often retroactive
2. Rule usually requires a further proceeding to make it concretely effective against a particular individual; an order needs no further proceeding to make it effective
3. Rule is usually directed at and binds a described class that may open to admit new members; an order is directed at and binds only those who were parties to the adjudicative proceeding
4. Rule ordinarily is based on findings of fact that are legislative or general in nature and is often based on predictions about the future; Order is based on facts specific to the parties and on findings of past events
5. In close cases, a court might determine whether a particular proceeding is rulemaking or adjudication by asking whether rulemaking or adjudication procedures are most appropriate for its efficient, effective and fair operation.

iv. Interpretive rule: speaks to a generality of cases, but interprets the rule—doesn’t require notice of comment
v. Bi-Metallic doctrine militates against due process rights in rulemaking
vi. APA provides more procedural rights for rulemaking than for informal adjudication
vii. Legislative vs. Non-Legislative Rules—Legislative rules are rules issued by an agency pursuant to an express or implied grant of authority to issue rules with the binding force of law. Nonlegislative rules (interpretive rules or statements of policy) are agency rules that do not have the force of law because they are not based upon any delegated authority to issue such rules. Both are treated as rules under the APA.

viii. Bowen—Courts will not allow administrative agencies to pass retroactive regulations unless it is clear in the enabling statute that Congress intended for the agency to have power to pass retroactive regulations and the regulation clearly states that it is to be applied retroactively. We don’t want retroactive rules for policy reasons. Scalia’s concurrence says there is a difference between true retroactivity and secondary retroactivity. New rules can make you worse off because of the effect of past decisions and will not be invalid because of retroactivity.

ix. Retroactive liability through an adjudicative order is reviewed for “reasonableness” or abuse of discretion — balancing test that weighs the possible unfairness of retroactive application against the statutory interest in applying a new case law principle to the situation at hand.
x. Smiley—“Where a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency’s current authoritative pronouncement of what the statute means.”

f. Initiation of rulemaking
i. § 553(b) says notice or a proposed rule must be published in Fed Register
ii. § 553(c) says after notice, agency shall solicit comment
1. some case law suggests there can be constructive notice from other comments re: rulemaking
iii. Disclosure of Scientific Information (see below)
1. yes: Portland Cement v. Ruckelshaus [more accepted gloss of §553 from common law]
2. no: American Mining v. Marshall (no evidence that Secy relied on these documents)
iv. Chocolate Manufacturers Assn’n—APA 553(b) requires that notice in the Federal Register of a proposed rulemaking contain “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” WIC program—no
subsidy for chocolate milk. The agency can’t adopt the rule without another round of notice and comment.

v. The policy purpose is “to allow the agency to benefit from the experience and input of the parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules.”

vi. An agency does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period. An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments.

1. The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. Notice is adequate if the changes in the original plan are in character with the original scheme and the final rule is a logical outgrowth of the notice and comments already given.

vii. Administrative Conference suggested that the APA should provide for a minimum comment period of not fewer than 30 days, subject to the agency’s right, which exists under current law, to shorten or eliminate the comment period if it could establish good cause.

viii. *Portland Cement Ass’n v. Ruckelshaus*—The notice of rulemaking is required to include scientific data or methodology upon which the agency relied in formulating its proposal. “In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance. If this is not feasible, as in the case of statutory time constraints, information that is material to the subject at hand should be disclosed as it becomes available.” Another court has said that documents which became part of the record after the close of the comment period were not required to be provided because they consisted of background information and data as well as several internal memoranda, but there was nothing to indicate that the Secretary actually relied on any of those documents in promulgating the rule or that the data they contain was critical to the formulation of the rule.

ix. *Rybachek*—Information may be added to the record in response to the public comments, and there is no need to allow for comments on these responses to comments by the agency. However, under *Idaho Farm Bureau Fed’n v. Babbitt*, where the data added to the record is relied upon in explaining the final rule, this information becomes more than a response to comments and is not merely supplementary. Instead, if it provides the only scientific information about the reason for the agency action, the public should have a right to comment. That case overturned a rule that added a snail to endangered species because supplementary data didn’t support the findings.

x. *Air Transport Ass’n v. CAB*—In order for a challenge to information added after the comment period to be sustained, the challenger must indicate with reasonable specificity which portions of the documents it objects to and how it might have responded if given the opportunity. However, in *Shell Oil Co. v. EPA*, the court said that in a logical outgrowth case, the person challenging the rule does not have the burden to show the comments that he would have made; instead, the agency has the burden of showing that comments on the changes it made between the proposed and final rules would have been useless.

g. Public participation

i. Informal rulemaking
“Notice and comment rulemaking”—this is what most rulemaking is.

2. Under Federal APA, the agency is free to limit public participation to written submissions unless the agency determines otherwise or some other species of law requires more.

3. Under 553(b) — Notice must be published in the Federal Register

4. Under 553(c) — Requires agency to allow written submissions

5. 553(c) — Also requires that the agency incorporate in the rules adopted a concise general statement of their basis and purpose.

6. State APAs require an opportunity to make written submissions to the agency concerning a proposed rule and also, if properly demanded, an opportunity for oral hearing, if demanded by a certain number of people.

ii. Formal rulemaking—§556, 557—“on the record”

1. §556 & 557 come into play when § 553(c) requires the agency to conduct formal rulemaking “when rules are required by statute to be made on the record after opportunity for an agency hearing.” APA §§ 556, 557 contain the required procedures for rulemaking:

2. Trial-type hearings for rulemaking had been disastrous

3. Bi-metallic doctrine in another guise (?)

4. Issues at stake in rulemaking are policy-making issues or scientific issues that are not well-explored through a courtroom adversarial approach

5. §§ 556, 557 require trial-type hearings, including the right to present evidence, cross-examine witnesses, and submit rebuttal evidence.

6. In formal rulemaking, the record made before the agency is the exclusive basis for agency action.

7. Ex parte communications (557(d)) are prohibited

8. Separation of functions provisions of 554(d) are inapplicable.

9. U.S. v. Florida East Coast Ry.—A statute that the ICC “after hearing” can establish rules with respect to car service does not require that the agency give the procedures required under 556 and 557 because “after hearing” is not the same thing as “on the record after opportunity for an agency hearing.” Congress can provide for more procedures than those provided in § 553, but still less than §§ 556 and 557.

   a. Florida East Coast shows a presumption against formal rulemaking

   b. Allowing formal rulemaking lengthens the process and makes it more difficult for the agency to reach its goals. Also, trial-type procedures may not be the best way of determining policy.

10. 1981 MSAPA does not require any trial-type procedures in rulemaking except “to the extent another statute expressly requires a particular class of rulemaking to be conducted pursuant to the adjudicative procedures provided in Article IV, Section 4-101(b).” Agencies may provide such procedures if they want to.

iii. Hybrid rulemaking—Statutory schemes that resemble the basic notice and comment process, but include additional/alternate procedural requirements that are designed to broaden opportunities for public participation

1. (?) FL East Coast Ry.: §553=Maximum procedural requirements congress was willing to have the courts impose on agency rulemaking. Misconceives standard for judicial review. Standard = contemporaneous explanation’s validity rests on propriety of the finding sustainable on administrative record made—not done so reversed & remanded. Ct says it CAN look at substance. Unpredictable judicial
review requiring procedures that agency didn’t know in advance. Would cause agencies to use full judicial procedures to avoid reversals. Defensive mechanism type rationale—unless it’s part of the law, ct can’t impose it. However, on revisiting the case, the ct allowed judicial review on an ‘arbitrary & capricious’ basis—legally acceptable but this decision wasn’t invalid under that standard.

2. Congress may provide for procedures greater than those provided under § 553, but less than the formal procedures of §§ 556 and 557.

3. Vermont Yankee Nuclear Power Corp. v. NRDC said “ Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. Circumstances where a court could overturn because of failure to require procedures beyond the statute are rare. Exception might be constitutional constraints or extremely compelling circumstances. Held: APA §553 sets the procedural minimum and the statutes or agency procedural regulations applying, and the court can’t impose stricter procedural requirements.

4. In terms of the Ethyl debate mentioned at the beginning of this section, the Supreme Court has rejected the “Bazelon” position, and the “Leventhal” position has prevailed. The “hard look” review still stands.

5. Pension Benefit said “Vermont Yankee stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA. At most, Overton Park suggests that 706(2)(a) of the APA, which directs a court to ensure that an agency action is not arbitrary and capricious, imposes a general procedural requirement of sorts by mandating that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency’s rationale at the time of decision.” Vermont Yankee (re: informal rulemaking) also applies to informal adjudication: the minimum requirements for informal adjudication are set out in § 555 which doesn’t impose any requirements. Unless DUE PROCESS so requires, courts cannot require more.

6. YANKEE – OVERTON PARK TENSION
   a. Yankee Case – courts can’t impose on agencies mere specific procedural requirements that have no basis in the APA
   b. Overton Park – suggests that APA 706(2)(a) which directs courts to ensure action isn’t arbitrary and capricious imposes a general procedural requirement b/c mandates agency to take steps needed to provide explanation that renders their decisions and rationale reviewable –
   c. Compromise—Yankee gives agency a lot of leeway to decide how to best establish the record – but have to show some method to make the record to prove that the decision was legitimately founded

h. Procedural fairness in rulemaking
   i. Role of agency heads
      1. Federal and State APAs require that agency decisionmakers must actually consider the written and oral submissions received in the course of the rulemaking proceeding. An agency head need not read all (or even any) of the written submissions, transcripts and summaries, but must understand their contents so that he or she can make an informed decision.
2. Commissioners may rely on summaries of the record prepared by their staff. However, if staff members systematically suppressed all comments on one side of a question, the agency decisionmakers would need to take independent steps to familiarize themselves with those comments.

3. Persons who wish to challenge a rule are usually not free to examine an agency head in court to ascertain whether he or she understood the record assembled during the rulemaking proceeding. (Morgan IV)

ii. Ex parte contacts—HBO, Sierra Club v. Costle

1. In rulemaking proceedings, an agency acquires a voluminous amount of material concerning the proposed rule. The compilation of this material is known as the rulemaking record. The record serves three basic functions: it aids public participation, it provides materials helpful to the agency in making a decision, and it facilitates judicial review of the agency decision.

2. In formal rulemaking, 557(d) does not allow ex parte communications. If ex parte communications do occur, the agency must disclose their substance on the public record.

3. In informal rulemaking, the assumption for many years was that the federal APA neither banned ex parte communications nor required the inclusion of such communications in the agency rulemaking record.

4. Not followed—HBO v. FCC—This case invalidated a rule of the FCC because part of the basis of the agency’s decision was ex parte communications, and the FCC did not put this information in the record. There have been no cases following HBO since it was decided. Sierra Club is the standard now.

5. Followed—Sierra Club v. Costle—Where agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of more questionable utility. However, since the statute provides that the promulgated rule may not be based (in part or whole) on information or data which has not been placed in the docket, the EPA must justify its rulemaking solely on the basis of the record it compiles and makes public. That Congress did not extend the ex parte contact provisions of the amended section 557 to section 553 — even though such an extension was urged upon it during the hearing — is a sound indication that Congress still does not favor a per se prohibition or even a “logging” requirement in all such proceedings.
   a. Don’t need the ex parte contacts ban b/c the agency will have to defend its rule against an open record anyway
   b. Agency has an incentive to make sure that everything gets into the record, at least enough to sustain the rule

6. It is entirely proper for Congressional representatives to vigorously represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule, administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources.

7. Sierra Club re: contacts of President—it’s probably okay
   a. In light of Vermont Yankee (can’t require more than in the statute), Sierra Club realized that it can’t ban ex parte contacts.
b. Sunshine Act: extended ex parte contact ban to formal rulemaking & adjudication—didn’t extend to informal rulemaking.

c. Agency rulemaking must be accountable to standards of rationality, science & orderliness but it is also going to be political and reflect Pres’ interests. Needs of politics & policy interact.

8. Sangamon Valley Television Corp—Two broadcasters trying to get slots. Feels like adjudication even though claims to be rulemaking. Shocked court’s conscience that one side wined & dined while the other didn’t. Policy for allowing ex parte contacts:
   a. Efficiency: shouldn’t try to judicialize the process,
   b. Policy-making process must be more open-ended & free flowing
   c. Agency needs as much info as possible

iii. Prejudgment

   1. Association of National Advertisers v. FTC— FTC tried to shield kids from seeing ads from commercials for products including sugary cereals, chairman made public statements re issue. Need a clear and convincing showing that the rulemaker has an unalterably closed mind on matters critical to the disposition of the rulemaking. It is very hard to disqualify someone in a rulemaking context; much harder than in an adjudicative hearing. Policymakers have to have opinions. He has indicated that he would favor a rule, but has not indicated that he will not consider different forms of the rule or what the rule should contain.

   2. Rulemaking different from adjudication: more of a political process—need political commitment more than impartiality.

   3. Dissent wanted a preponderance of evidence that he had a closed mind

   4. Should the Cinderella test be understood as applying only to prejudgment of adjudicative facts?

   i. Statement of basis and purpose (need more information)

   ii. At state level & DC circuit, don’t require these statements

   iii. Ca. Hotel & Mote—Set aside the rule because the commission should have given a better statement of its reason.

   iv. Policy: Will induce rational decision-making

   v. Federal courts have required basis.

   vi. Vermont Yankee critical of ad hoc cross-examine requirements, fear of that here. In this case, there must be a reasonably sufficient basis.

   vii. Agency cannot always anticipate what issues a court will consider important. Agency has to address every point that a court might think is important—otherwise, there is too much risk of reversal=sloWS down process.

   viii. Again, court suspicious of post hoc rationalizations—agencies have strong motive for face-saving rationales

   j. Issuance and publication

   i. Governed by 552(a)(1) and Federal Register Act

   ii. The FRA requires the Federal Register to be published each federal working day. That publication includes all rules of general applicability and legal effect and notices of proposed rulemaking. In addition, the FRA requires the publication of a complete codification of all documents having general applicability and legal effect that were published in the Federal Register. This publication is entitled the CFR.
iii. A general principle is that, absent good cause, a final rule does not become effective immediately upon publication or filing. 553(d) states that a final agency rule becomes effective no sooner than 30 days following publication of that rule in the Federal Register.

iv. *Nguyen*—A claimant under 552(a)(1) cannot succeed unless the unpublished material at issue affected his substantive rights. The purposes underlying the publication rule are avoidance of arbitrary agency decisionmaking and guidance for the legitimate expectations of the regulated public. There are three major factors to be considered in determining whether agency action affects individuals’ substantive rights.

v. When an unpublished interpretation changes existing rules, policy or practice, it affects substantive rights

vi. If the interpretation deviates from the plain meaning of the statute or regulation at issue, it affects substantive rights. But if an instruction merely restates the plain meaning of statutory or regulatory terms, there will be no appearance of arbitrary decisionmaking and prior publication is much less important.

vii. If an agency rule is of binding force and narrowly limits administrative discretion, it affects substantive rights.

viii. ?????All rules must be published in the federal system

ix. Cannot feasibly publish every rule. See Nguyen and Note 3.

k. Regulatory Analysis—*Exec. Order 12866*

i. This is intensive, formal examination by an agency of the merits of a proposed rule—usually includes a cost-benefit analysis (CBA) as mandated by series of presidential orders

ii. Reagan’s order=benefits must outweigh the costs

iii. Clinton’s order=benefits must justify the costs

iv. Sometimes benefits are hard to quantify

v. Triggering question: if rule costs >$100,000 –must prepare CBA

vi. Methodist Hospitals v. TX Industrial Accident Board (state case): no numbers—just said the benefits will be increased delivery and costs will be increased revenue. Ct said that they basically complied. State courts seems disinclined to police statutory CBA requirements very aggressively

vii. Other methods of Review:

1. Office of Management & Budget reviews analysis.
2. Congressional committee can call people up for hearings.
3. Cts will monitor the quality of the analysis indirectly—analysis goes into the record, when look at the merits of the rule one of the things that they review when they decide whether rule was arbitrary & capricious—must show rule was rationale in context of all material gathered during the analysis.

VI. Rules as Part of the Agency Policymaking Process

a. Just as formal rulemaking is out of vogue because it is too cumbersome, so too has informal rulemaking’s notice and comment requirement gone out of style—agencies look for exemptions to these requirements.

b. Rulemaking exemptions

i. Good cause exemptions

1. Federal APA 553(b)(B) — Rules are exempted from usual notice and comment procedure when it would be unnecessary, impracticable, or contrary to the public interest for the agency to follow them. The agency must make an explicit
finding at the time of issuance that good cause exists and must give reasons to support that finding. (narrow construction)

2. 553(d)(3) — For good cause an agency may dispense with the normal requirement that a rule may not become effective until 30 days after its issuance.

3. When are usual rulemaking procedures “unnecessary” within the meaning of the Federal APA?
   a. When a minor or merely technical amendment in which the public is not particularly interested is involved
   b. When the agency has absolutely no discretion about the contents of its rule, as where its task is merely to make a mathematical calculation or ascertain an objective fact. Since nothing the public might say could affect the rule, the agency has good cause to forego a comment period.
   c. When the agency is acting under a congressional deadline and the details of the plans had all been aired during proceedings at the state level

4. Direct final rulemaking is a streamlined variation on the normal 553 procedure. Agencies use it for issuing rules that they consider totally noncontroversial. Under this procedure, the agency publishes the rule and announces that if no adverse comment is received within a specified time period, the rule will become effective as of a specified later date.

5. Impractical or contrary to the public interest — Both terms are construed as coming into play when an agency has an overriding need to take immediate action. Rules that are designed to meet a serious health or safety problem, or some other risk of irreparable harm, often qualify for exemption on this basis. Also where the usual procedures would undermine the objectives of the statutory scheme the agency is trying to enforce (price freezes).

6. Interim-final rules — Agencies that 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, then they may revise the rule after comments. Final in sense of going into effect, but interim in the sense that agencies will continue to study the rule.
   a. Might there be some reluctance to change from the interim measure once they’ve put it out there? Problem: nothing more the court can do at this point.

7. State: “imminent peril test”, See Melton v. Rowe—Act passed June 8th, budget begins July 1—must come up w/ means of implementing welfare reduction—sufficient for abdicating notice & comment

8. Agencies when invoking the exemption act immediately and then ask for post-hoc notice & comment

9. Direct Final Rulemaking: agency publishes rule and if no adverse comment received w/in 30 days then rule will become effective, but if adverse comment received then agency withdraws rule and begins notice and comment. If no adverse comment then necessarily uncontroversial.

ii. Procedural rules—Kast

1. 553(b)(A) — Expressly exempts rules of agency organization, procedure, or practice from the requirements of notice and comment rulemaking. In determining whether the APA requires notice and comment rulemaking, the interests of agency efficiency and public input are in tension. When a proposed regulation of general applicability has a substantial impact on the regulated
industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided. The exemption of section 553(b)(A) from the duty to provide notice by publication and a forum for public comment does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated. Although the plan departed from a previous inspection formula, change alone is insufficient to satisfy the twin prongs of departure and substantial impact.

2. *Kast Metals*— When proposed regulation has substantial impact on regulated industry, notice and comment must be provided (substantial impact test). Procedural rules are exempted from APA notice and comment procedures. Such rules, because they do not directly guide public conduct, do not merit the administrative burdens of public input proceedings. Courts are concerned with the effect on those within its regulatory scope. To determine whether the rule is substantive or procedural, you must look at whether the rule substantially affects the substantive rights of the party. Must look at how people will react to the rule, even if it looks to be procedural.

   a. OSHA engaged in random inspections prior, new rule based inspections on incidents of accidents

   b. Held: no substantial impact b/c possibility for inspection always existed.

3. *JEM Broadcasting v. FCC* (FCC refused to accept incomplete applications): DC circuit said it’s an issue of degree. Procedural on its face but there will be a substantive impact on their rights and duties.

4. State APAs don’t have a procedural rule exemption at all.

iii. Exempted subject matter

1. 553(a)(2) — Excludes rules relating to “public property, loans, grants, benefits, or contracts” from all of the provisions of 553, including notice and comment procedure as well as the requirements for deferred effective date and the right to petition.

2. 553(a)(1) — Exempts a rule from all rulemaking procedures to the extent there is involved a military or foreign affairs function of the U.S. The legislative history and relevant case law direct that exceptions to the APA be narrowly construed, and that the exception can be invoked only where the activities being regulated directly involve a military function.

iv. Non-legislative rules

1. Legislative and non-legislative rules

   a. Legislative rules are issued by an agency pursuant to an express or implied grant of authority and have the force of law. That means they are binding and enforceable in the same way as other laws. “Binding effect: on private persons (can extinguish citizens’ right to be heard on issues they address, see Heckler v. Campbell), and on issuing agency—must adhere to them until such time as they may be revoked/invalidated by a court. Agency can’t violate its own legislative rules

   b. Nonlegislative rules are made in a more informal setting and do not have the force of law. They are divided into policy statements and interpretive rules by the APA. Nonlegislative rules are not automatically binding on agencies or citizens, but they can sometimes have some constraining effects on subsequent agency action, such as where the elements of an estoppel are present, or where the agency’s failure to
explain why it did not adhere to the rule renders the action arbitrary and capricious. They are “guidance documents”—agency rules that do not have the force of law (not based upon delegated authority to issue such rules). Increased agency reliance on these rules because less cumbersome to enact. Not automatically binding on citizens/agencies.

c. Two types of non-legislative rules:
   i. interpretive rules
   ii. general statements of policy

d. Both exempted from notice & comment in Fed APA

e. Most State APAs require the same procedural rules for non-legislative rules

2. Policy statements
   a. *Mada-Luna*—The court found that the 1981 statement was exempt because it operated prospectively and because it did not establish a binding norm. The prospectivity test is silly, the only real key criteria is whether the policy statement establishes a binding norm.

   b. Policy statements of agencies serve two purposes: They inform the public concerning the agency’s future plans and priorities for exercising its discretionary power, and they serve to educate and provide direction to the agency’s personnel in the field, who are required to implement its policies and exercise its discretionary power in specific cases.

   c. The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case. To the extent that the directive merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make individualized determinations, it constitutes a general statement of policy. To the extent that the directive narrowly limits administrative discretion or establishes a binding norm that so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion, it effectively replaces agency discretion with a new binding rule of substantive law and requires notice and comment.

   d. If an agency claims that a policy statement is non-binding, it must also not treat the statement as definitive. The agency must allow parties to fight the statement anew each time the issue comes up in individual cases.

   e. Rules that leave officials ‘free to consider the individual facts in the various cases that arise—individual can argue that agency should disregard the policy statement & treat his case differently.

   f. *Pacific Gas & Electric*—Policy statement: the kinds of plans that will be approved are those that provide for rank ordering of recipients. Allowed: just a flexible statement, may be adjusted later.

      i. *Cf. McLouth Steel Products*: mathematical model adopted internally. Court states: If claim it is just a tentative deal, then
must act as if it were just a tentative deal and must be open for consideration


3. Interpretive rules
   a. *Hoctor v. USDA*—USDA regulation says that facilities housing animals “must be constructed of such material and of such strength as appropriate for the animals involved.” The USDA then issued an internal memorandum requiring fences to be at least 8 feet high. For the memo to be interpretive it must actually be an interpretation of an already existing regulation. The rule must be derived from the text of a regulation by a process reasonably described as interpretation. Interpretive rule must be based on specific statutory provisions rather than on an agency’s power to exercise its judgment as to how best to implement a general statutory mandate. If not interpretive, requires notice and comment.
   b. When Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation. Therefore, an agency cannot contend that it is interpreting the statute; it must contend that it is interpreting one of its regulations.
   c. If the interpretation is unfounded by the rule, then the interpretation is not valid (DUH!).
   d. If a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.
   e. *Am. Mining Congress*—Can make a numerical value as long as subject to rebuttal—only making a tentative statement; then go back to the rationale of a policy statement

c. Required rulemaking
   i. Federal law—*NLRB v. Wyman-Gordon, NLRB v. Bell Aerospace*
      1. *NLRB v. Wyman-Gordon* (358) — NLRB based their decision regarding Wyman-Gordon on another case. The NLRB in the other case had set forth a rule, but did not apply that rule in that case. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. The plurality says that the court should have used rulemaking, but in the present case, Wyman-Gordon was given a full adjudicatory proceeding. Since this was not a rule, Wyman-Gordon gets a chance to argue that the agency’s decision in Excelsior was wrong. This kind of works like res judicata, so parties are not bound by what the NLRB does in other cases. So agencies can use adjudication, but precedent will not be treated as deferentially as rulemaking.
         a. Should treat it as rulemaking b/c worded expressively as prospective—didn’t apply it to the case at hand, just to future cases
         b. Counter-arguments to this position: (1) Just b/c enunciate new principles doesn’t mean you’re not adjudicating. (2) The fact that it was
prospective only is not unprecedented in the adjudicative world. [see Buckley v. Valeo].

c. All of labor law has developed in that way. At the time b/f this, the board had never before used rule-making.

2. Reasons why rulemaking would have been better:
   a. B/c they have an alt route available, they should use the rulemaking route (more legitimate)
   b. opportunity for everyone to be heard—notice & comment gets wider range of perspective
   c. better opportunity for those affected to shape the board’s position
   d. better assurance that rule will affect everyone equally.

3. \textit{NLRB v. Bell Aerospace}—Courts very deferential to the Board’s decision that adjudication is more efficient than rulemaking. Will allow the board to develop its rules through case law rather than through rulemaking. An administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity... The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. The court noted: It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding.

   a. Exception: When party relied on the old rule. But Board remains able to replace old principles w/ new principles but doesn’t have to use a rulemaking proceeding—can cut slack to those who relied on the old rule. However, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. Nor are fines or damages involved here.

4. \textit{Retail Union}—Whether a new case-law rule announced in an agency adjudication is unfairly retroactive, so as to constitute an abuse of discretion, entails balancing at least five factors: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of the law; (3) the extent to which the party against whom the new law is applied relied on the prior law; (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying the new rule to the case at hand despite the reliance of a party on the old standard.

5. If an adjudication changes its interpretations and rulings drastically in a way that the parties could not have anticipated, the courts may reverse the judgment on the grounds that the decision was arbitrary and capricious, but will leave the precedent intact for future litigation.

6. Courts generally will not tell agencies that they have to make policy through rules.

7. \textit{NLRB v. St. Francis}—Board announced a rule about unionization and then hospital said it wasn’t a great idea. Board said, “we settled that last year.” Ct says if you’re going the adjudication route then can’t treat it as settled. If had used rulemaking, then wouldn’t have to listen at all.
ii. State law—we did not study this!
   1. Most states appear to follow the principle that agencies generally have discretion to make their law either by order or by rule. This discretion appears to be limited only by a specific statute or agency rule to the contrary, and by a general unreasonableness or abuse of discretion standard.
   2. Several state courts have required agencies to use rulemaking rather than adjudication either on the basis of due process (which is unusual, except in maybe criminal process) or on legislative intent (more often used).
   3. Medgal—Uses legislative interpretation to determine that the legislature intended that the agency would use rulemaking to introduce its policies.
   4. Problem with requiring rulemaking is that it is time-consuming, and infeasible because it is almost impossible for a board to determine what might happen and to issue rules before the fact.
   5. Bessemer Mountain Case (375) — Very vague standard. The agency needs to have some standards for decision making.

d. Petitions
   i. §553(e) authorizes all members of the public to petition an agency for the issuance, amendment, or repeal of a rule
   ii. APA 553(e) and MSAPA allow members of the public to petition an agency for the issuance, amendment, or repeal of a rule. Public petitions are good for changing the status quo or for bringing to the agency’s attention problems with rules that were adopted without notice and comment. Even if notice and comment were available, petitions are a way for members of the public who did not know about the proposed rule to voice their concerns.
   iii. An agency is bound to provide a statement of reasons for denial of a rulemaking petition under APA 555(e) and MSAPA, forcing the agency to actually consider the petitions and facilitating judicial review.
   iv. WWHT, Inc. v. FCC (379) — Whether, and under what circumstances, a reviewing court may require an agency to institute rulemaking proceedings after the agency has denied a petition for rulemaking — Where the proposed rule pertains to a matter of policy within the agency’s expertise and discretion, the scope of review should “perforce be a narrow one, limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.” Where the agency decides not to proceed with rulemaking, the record for purposes of review need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency’s explanation of its decision to reject the petition.
   v. Geller rule: 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.
   vi. NAACP v. FPC: Court could require the commission to reconsider its denial of the petition when the commission’s only reason for denial was a mistaken belief that it did not have jurisdiction in the matter. The Court did not require the FPC to institute rulemaking decisions, just to reconsider the petition.
   vii. n. 3 (382) — MSAPA requires that state agencies respond to petitions within 30 days (1961) or 60 days (1981). The Federal APA has no deadline, so many federal agencies do nothing with petitions that they receive.
viii. n. 6—Agency delay in conducting rulemaking proceedings may be cured through legislation imposing deadlines, although this may do more good than bad. Courts may also be allowed to compel agency action unlawfully withheld or unreasonably delayed in certain circumstances.

ix. n. 7—An agency may be required to make a decision on a rulemaking proceeding within a specified period of time to prevent an agency from using undue delay as a means of defusing or circumventing widespread public opposition to its action.

x. Purpose is to force agency to re-examine status quo (this leads to more responsive government)

xi. MSAPAs require statement of reasons upon denial of rulemaking petition

xii. Fed APA has no such requirement but requires a brief statement of the grounds for denial of any application or petition filed w/ agency (explanatory statement)

1. forces agencies to consider reasons for denial—discouraging impulsive denials
2. facilitates judicial review
3. gives rise to gov’t concerns about determining its own priorities/workload

xiii. WWHT v. FCC—small burden on agency to explain why not pursuing rulemaking—should have provided some explanation

xiv. Extremely narrow judicial review

xv. Geller v. FCC—when new facts come to light, should re-rulemake

xvi. If you’re talking about a discretionary allocation of resources, ct has no power to affect such prioritization. Ct can’t second-guess the priorities of the agencies.

xvii. NAACP v. FPC—Secretary wouldn’t proceed b/c didn’t have jurisdiction. Ct said, yes you do—must act in accordance w/ statutory mandate

1. When sec’y gives a dif reason based on an erroneous reading of the law or based on a set of facts that we know aren’t in existence anymore, then Ct can review.

xviii. In re Int’l Chemical Workers: Ct can compel agency action unlawfully withheld or unreasonably delayed—consider 4 factors:

1. length of time that has elapsed
2. reasonableness of the delay judged in the context of the statute which authorizes the action
3. consequences of the agency’s delay
4. due consideration in the balance to any plea of administrative error admin convenience, practical difficulty in carrying out a legislative mandate or need to prioritize in the face of limited resources

e. Waivers

i. Waivers granted when rule would produce harsh or unanticipated consequences

ii. Reason for waivers: Rules are rigid if there is no safety valve

iii. Rules apply across the board. They may work fairly and well in the generality of cases, but they sometimes produce harsh or unanticipated consequences when applied in particular situations. Agencies often entertain requests for waivers in cases in which the applicants can demonstrate that the rule does not work appropriately in their cases.

iv. Wait v. FCC—A request for waiver which pleads with particularity the facts and circumstances which warrant such action and which is supported by data sufficient to support a finding of the facts and circumstances alleged to warrant a waiver must be considered by the agency, and the agency must issue an opinion which shows that it has considered the petitioning party’s argument.

v. Scalia (in KCST-TV v. FCC (D.C. Cir)) says that WAIT only requires consideration of waivers when the agency is dealing with a rule which otherwise might be impermissibly
broad. It is possible that rules can be crafted which do not require the availability of an exemption to make them valid, either because the rule is so precise or because the subject is not one as to which precision is required.

vi. Waivers can undercut the legitimacy of the regulatory regime.

vii. *Dickson*: time bar normally would have prevented a petition from Dickson to have discharge from dishonorable than honorable for a 20 year old case. Majority held that the agency should have given a reason.

VII. Political Control of Agencies

a. Nondelegation doctrine *AFL-CIO v. Am. Petroleum Inst., Thygesen*, —This is not an aggressively enforced doctrine. Article One says that all legislative power is vested in Congress. Some would say that this makes administrative agencies and delegation unconstitutional. It is too late in the game to take this position. The question now is how much can be delegated. Rehnquist would say that policy-type questions must be decided by the legislature and cannot be passed on to an administrative agency.

b. *Field v. Clark* (398) — Determine whether Congress had established an “intelligible principle” or a “primary standard to guide the delegate in making the decision.”

c. *Panama Refining*—Delegation that president could make the interstate shipment of “hot oil” a federal crime when the President deemed such a ban desirable. This delegation was struck down because Congress “has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”

d. *Schechter Poultry*—Most admin. law scholars find this to be an acceptable use of the non-delegation doctrine. Delegation to the President to adopt “codes of fair competition” was invalid because the NIRA lacked an adequate standard to govern the drafting of codes. The court in this case thought that the procedures that Congress set forth were neither defined nor fair. If this delegation were allowed, then anything that the Congress could reach within the commerce clause could be reached by the president upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer.

e. *Yakus*—Intelligible principle of “fair and equitable” prices is upheld. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Only if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

f. *Amalgamated Meat Cutters*—Even if statute on its face does not give an intelligible principle, one may be implied from the context in which the statute was passed. Standards can be articulated in legislative history rather than in express statutory language. Any action taken by the Executive under the law must be in accordance with further standards as developed by the Executive. This requirement means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.

g. *Industrial Union* (404) — OSH Act 3(8) says that standards must be “reasonably necessary or appropriate to provide safe or healthful places of employment.” Sec. 6(b)(5) directs the Secretary to “set the standard which most adequately assures, to the extent feasible that no employee will suffer material impairment of health.” OSHA construed the statute to require it
to set standards at the safest possible level which is technologically feasible and which would not cause material economic impairment of the industry.

i. Plurality interprets unclear statute in a different way than OSHA so that they can find it constitutional. Plurality notes that OSHA’s construction would give OSHA the power to impose enormous costs that might produce little, if any, discernible benefit. If OSHA’s interpretation is correct, the delegation would not pass the nondelegation doctrine (Judicial legislation).

ii. Rehnquist interprets the statute as too vague and, therefore, unconstitutional. He states that delegations of legislative authority must be judged according to common sense and the inherent necessities of the governmental coordination. 6(b)(5) admonishes the Secretary to adopt the most protective standard if he can, but excuses him from that duty if he cannot. In the case of a hazardous substance for which a safe level is either unknown or impractical, the language of 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Congress in this case chose to pass a difficult policy question on to OSHA. The three functions of the nondelegation doctrine are (1) it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress; (2) to the extent that Congress finds it necessary to delegate, the recipient of the authority is given an “intelligible principle” to guide the exercise of the delegation; and (3) ensures that courts charged with reviewing the exercise of delegated powers will be able to test that exercise against ascertainable standards.

h. *Mistretta*—Scalia (dissent) argues that it is an unconstitutional delegation of authority when Congress empowers an agency whose only function is to make rules and which is not engaged in law enforcement or adjudication. Scalia argues that this delegates purely Congressional power.

i. Arguments against delegation doctrine (412) — Detailed legislative specification of policy under contemporary conditions is either not feasible or is not desirable in many cases. The authority being delegated involves complex issues which are incapable of detailed legislative specification of policy. Finally, judges are not competent to determine the degree of policy specification that is possible.

j. STATE LAW—*Thygesen*— Under Stofer, a legislative delegation is valid if it sufficiently identifies: (1) the persons and activities potentially subject to regulations; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm. Some states are much stricter with the non-delegation doctrine.

k. *American Trucking*— The EPA statute requires the EPA to set each standard at the level “requisite to protect the public health” with an “adequate margin of safety.” The court determines that the EPA’s factors are reasonable, but states that the EPA has “articulated no ‘intelligible principle’ to channel its application of these factors.” The EPA frequently defends a decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard. But the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does.” The court does not strike down the statute, but remands it to the EPA to give the agency an opportunity to extract a determinate standard on its own. This serves two of three basic rationales for the nondelegation doctrine: (1) If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. (2) Such standards enhance the likelihood that meaningful judicial review will prove feasible. It does not serve the third function: (3) To “ensure to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our
Government most responsive to the popular will.” (Rehnquist concurrence in Benzene case). “An agency wielding the power over American life possessed by the EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability.”  “If EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.”  Rationale for political review—Bonfield

b. Legislative controls—basics:  Legislature and executive are more able to review and correct agency action (?)

a. The legislative veto

i.  Legislature may respond to unacceptable agency action by narrowing the agency’s enabling act or by overturning the specific agency action deemed objectionable (this requires presidential approval, or an override of a presidential veto).  “Legislative veto” allows legislators to invalidate or suspend agency action by less cumbersome means than the enactment of a statute.  It might provide for disapproval of an agency rule solely by a resolution passed by one or two houses of the legislature, or by a legislative committee, without any participation by the chief executive.

ii. Use of the legislative veto has withered in the face of constitutional challenges.

iii. INS v. Chadha—Kills the legislative veto.  Concurrence argues that the legislative veto intrudes on the court’s power because Congress is essentially functioning as an appeals court for what was an adjudicative decision of the agency.  Dissent — The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration.  The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed.  The Executive has agreed to legislative review as the price for a broad delegation of authority.  If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself.  Unconstitutional b/c: presentment clause, bicameralism, separation of powers: leg acting in judicial function.  Best rationale for the ct’s position is not the one it gave but rather the separation of powers argument: one house veto puts too much power in the hands of one branch w/ no checks.  Powell mode of analysis works even though for a dif purpose.

iv. Clinton v. City of NY (line item veto):  Unconstitutional b/c allows Pres to change (make) law—leg function.  Dissent: congress gave pres power—not case of Pres usurping power (reason for sep of powers doctrine)

v. States not subject to Chadha

1.  Enourato allowed funding of a building project to continue unless funding ended by veto=functionalist approach: whether a given structural arrangement intrudes too far on the functions of any branch of gov’t or concentrates too much power in any branch

2.  Formalist approach: certain functions are deemed to belong exclusively to particular branches of gov’t so that any misallocation of tasks to the ‘wrong’ branch is deemed unconstitutional.

vi. Alternatives to the legislative veto

1.  Congressional Review Act— requires that virtually all rules of general applicability be submitted to Congress b/f they take effect.  Probably not unconstitutional under Chadha.  Satisfies bicameral and presentment requirements.  Congress can veto the rule by joint resolution of disapproval—must be approved by both houses & Pres.
a. allows for fast track system: Congress doesn’t enact disapproval resolution & cts are instructed not to draw any inferences about congress’ attitude re the law
b. statute’s def of rule=interpretive rules, policy statements, etc.
c. if rule is disapproved, rule is treated as if it never took effect
d. if disapproved, agency must change a major part of the rule

2. Only one actual vote under the CRA — that was to get the rule to go into effect before the 60 days

3. State Law—Chadha does not apply to the states; most states have followed Chadha, but some states do allow legislative veto

vii. Other legislative controls

1. State alternative—Suspensive veto (458) — Allows a committee of the legislature to suspend a rule for the following stated reasons:
   a. Absence of statutory authority
   b. An emergency relating to public health, safety or welfare
   c. Failure to comply with legislative intent
   d. Conflict with state law
   e. Changed circumstances
   f. Arbitrariness and capricious or imposition of an undue hardship

2. The suspension runs for the duration of the term. This may or may not be constitutional

3. Burden shifting—In some states, a legislative committee is given the power to object to a rule that it considers to be “beyond the procedural or substantive authority delegated to the adopting agency.” The committee must file a concise statement of its reasons for objecting, and the agency may then respond in writing. But if the committee does not withdraw its objection, the burden will be on the agency to establish the validity of the rule in any subsequent judicial review proceedings. This is generally considered constitutional.

4. Other Legislative Controls
   a. oversight committees
   b. investigations & hearings
   c. funding measures
   d. direct contacts

b. Executive controls
   i. Appointment power—Buckley v. Valeo, supplement
      1. Art. II, Sec. 2, cl. 2 — By the words of the Constitution, this is a clear case.
      2. There is an unstated understanding that the president will appoint people suggested by each party
      3. Under Article II, Sec. 2, cl. 2 (Appointments Clause):
         a. Principal Officers of the United States: The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law
         b. Inferior Officers: Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
         c. Heads of Departments refers departments in the executive branch or at least having some connection with that branch
d. Congress may NOT reserve for itself the right to appoint Officers, either principal or inferior.

4. Under *Edmond v. U.S.* members of the Coast Guard Court of Appeals were inferior officers. “Inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.

5. *Buckley v. Valeo*: Statute provided that election commission consist of 8 members, including 2 members from Senate & House (each)
   a. only Pres can appoint under appointments clause
   b. clearly principal officers--those that rank just below the Pres
   c. Congress & Pres have continued to follow this system informally. Pres takes recommendations of the min & maj leaders to heart. Not in anyone’s interest to have a partial FEC.

   ii. Removal power and the independent agency— *Humphrey’s Executor*
   1. Under *Morrison* the majority found that the independent counsel was an inferior officer. Special ct can appoint independent counsel b/c inferior officer.
   2. Reasons given were that she was subject to removal by a higher executive branch officer, even though she possessed a degree of independent discretion in the exercise of the powers of her office; her duties were limited to the investigation of certain federal crimes; she could only act within the scope of the jurisdiction conferred by the special court; and her position was temporary, in that she was “appointed essentially to accomplish a specific task, and when that task is over the office is terminated.” DISSENT: Scalia says that independent counsel was not an inferior officer because the job was not as limited in power or duration as the majority maintained; he argued that the status of being an inferior officer should depend primarily on whether one is subordinate to some other official. Scalia says that because the independent counsel could be removed under only very limited circumstances, she was “independent of, not subordinate to, the President and the Attorney General.”
   3. State level—not bound by appointment clause: balancing test that separates appointments—state deciding to get away from formal approach of Buckley and go to a logical power-sharing arrangement, See *Parcell*.
   4. *Freytag*—Tax Court was created with both regular judges and special trial judges. Special trial judges were to be appointed by the chief judge of the court. Both majority and concurrence agree that the special trial judges are “inferior officers.”
   5. Majority says that since the Tax Court exercised judicial power and were, thus one of the “Courts of Law” mentioned in Appointments Clause. Majority rejects treatment of the Tax Court as a “department” because that term refers only to “executive divisions like the Cabinet-level departments.” The Majority also stated that it did “not address any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as FTC, the SEC, the FERC, the CIA, or the Federal Reserve Bank of St. Louis.”
   6. Concurring says that the Tax Courts are not included in the Appointments Clause because this clause refers to “THE Courts of Law” and the article THE means Article III courts only. The concurring said that the appointment was valid “because the Tax Court is a ‘Department’ and the Chief Judge is its head.”
7. Appointment of Employees — Employees are members of an agency who do not exercise “significant authority pursuant to the laws of the United States.” These employees do not have to be appointed under the Appointments Clause, and Congress probably cannot appoint employees because of separation of powers.

8. (State Law)—

iii. Executive oversight—*Exec. Order 12866*

1. Congress cannot impose limitations on the president’s ability to remove an officer in a purely executive position because this would restrict the president’s ability to faithfully execute the law as required by the Constitution — it would violate the separation of powers doctrine.

2. OIRA = Office of Information & Regulatory Affairs — oversees significant rulemaking proceedings on behalf of White House.

3. Agencies submit anticipated rulemaking to OIRA each year for approval.
   a. Encourages coordination of regulatory efforts.

4. *Kendall*—Pres instructed Postmaster not to pay a fee as directed by Congress. Ct ordered him to pay: Pres had duty to make sure laws are faithfully executed—not forbid their execution.

5. Executive order: ‘to the extent allowable by law’ = agencies are expected to go along w/ it only to the extent that their legal authority permits. Disclaimer: Cts have been suspicious of misuse of Pres’s power & interference w/ agency’s responsibilities.

6. If independent agency, then don’t have to comply w/ executive order.

7. *Myers*—The president generally has the power to remove officers appointed by him for not implementing the laws as he believes that they should. The court acknowledges that “there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.”

8. *Humphrey’s Executor*— The president’s ability to remove officers of independent agencies may be limited by Congress. An independent officer is one who is not restricted solely to the performance of executive functions, but who is also charged with the duty related to either legislative or judicial power. The FTC was considered an independent agency because it was to be non-partisan and to act with entire impartiality. It was created Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed and to perform other specified duties as a legislative or as a judicial aid. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.
9. Wiener—If the purpose of the commission is to adjudicate, this is not a political issue because that is not how adjudication is supposed to be. Therefore, the commission is not subject to non-discretionary executive removal even in the absence of protection by the legislature.

10. People appointed to independent agencies are not supposed to be subject to presidential control.

11. According to Darren, Humphrey’s Executor and Myers have been overruled by Morrison. Jared’s notes said that they are generally well-received…(?)

12. Morrison v. Olson—The question is whether the limitation of removal of the independent counsel only for “good cause” violates the separation of powers clause by not allowing the president to remove an executive officer at his will. The independent counsel exercises a purely executive function, so the president argues that he should be able to remove the counsel at his will under Myers. The majority says that the test is not just whether the agency is purely executive, but whether the limitation of the president’s removal power would “interfere with the President’s exercise of the “executive power” and his constitutionally appointed duty to “take care that the laws be faithfully executed” under Article II.”

13. Dissent (Scalia) says that because “all of the executive power” is vested in the president by the Constitution, an action which deprives the President of exclusive control over the exercise of purely executive power is unconstitutional. Because the independent counsel exercises even some control over an executive power, he should be subject to removal by the president at will.

14. The Court’s Reasoning: The attorney general can fire the independent counsel. Therefore, the president has some control. The Dissent: There is a limit on the president’s ability to control the independent counsel; therefore, it is unconstitutional.

c. The Scope of Judicial Review
   a. Congress and President cannot look at every little detail of what administrative agencies do; therefore, judicial review is sometimes the best course of action for those affected by administrative agencies.
   b. Issues of basic fact
      i. §706(2)(A): agency factfinding in informal adjudication allows reviewing ct to reverse agency only if its findings are arbitrary, capricious, or an abuse of discretion=essentially an assessment of the reasonableness of agency action
      ii. §706(2)(E) substantial evidence test= A reasonable person could have believed it and its supported by substantial evidence (similar to reviewing a jury verdict)
      iii. Universal Camera—Court uses ‘substantial evidence’ test. Defers to the board as experts. Ct must consider the record as a whole: i.e. if there are competing stories either of which the Board might reasonably believe. The Court has to look at both sides. ALJ and the Board disagreed. No stricter standard of review—same substantial evidence standard. ALJ’s decision is part of the record. Give ALJ’s decision the probative weight it demands.
      iv. Substantial evidence test is used by courts in reviewing board decisions. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must do more than create a suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to
direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

v. Why give this deference to the agency:
   1. Agencies specialize and develop expertise in the areas they regulate. Their fact-finding process reflects that expertise
   2. Because fact-finding is an essential element of the delegated power, the legislature intends a court to respect those findings, absent a very serious error by the agency.
   3. Discourages disappointed litigants from appealing
   4. Limits the ability of a court to impose its values in place of the agency’s values

vi. Agency heads have more power to reject factual findings of ALJs than courts do to reverse a master. The reviewing court requires the agency heads “to fully articulate their reasons” for disagreeing with an ALJ on credibility questions; the court then decides “with heightened scrutiny” whether the heads’ decision is supportable.

vii. Allentown Mack—The Supreme Court will seldom review lower courts’ application of the substantial evidence test, but will apply the same test as the lower court in cases that it does review.

viii. One reason for independent judicial review is that the judiciary is not a political body at large and does not have to pander to the legislative and executive branch

c. Issues of law
   i. Skidmore Deference
   ii. Connecticut State Medical Society—State Case) (Substitute of judgment-weak deference approach) Courts can substitute their judgment for that of the agencies in determining the scope of the agency’s authority. Court says that it does give great deference to agency interpretation of a statute when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency’s interpretation is reasonable. Podiatrists trying to include ankle as part of the foot.
      1. Marbury v. Madison: cts=experts on the law
      2. Will allow weak deference but ct mostly decides
      3. More deference if time-tested then can defer to the Board. Means that Community has accepted it, legislature has had a chance to overrule it.
   iii. Chevron—Courts must accept a reasonable agency interpretation of its own statute
      1. Two-step test—asks two question in determining whether court should defer to administrative agency’s interpretation of its own statute:
         a. Does the statute interpreted have clear meaning? If yes, court and agency must defer to Congress. If no, i.e. it is either ambiguous or silent, then ask question two.
         b. Is the agency interpretation permissible or reasonable? Very close to arbitrary and capricious standard. If yes, then defer to agency. Follows deferential approach unless arbitrary, capricious, or manifestly contrary to statute.
            i. This isn’t too hard to show—if there is no clear intent one way or another, then how could it be unreasonable? The only face-saving way is to strike it on part 1.
         2. This is strong deference
3. Weakened by Mead and Christensen, which applied Chevron only to legislative, notice and comment legislative rules and formal adjudications, not letters, enforcement guidelines, policy manuals, etc.

4. Mead did say, however, that rules that meet the guidelines in #3 are binding in courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. (Does this change Chevron or merely clarify?)

5. Why have strong deference: judges not experts in the field, judges not part of political branch directly accountable to the people, thus their policy preferences should not override those who are politically accountable, agencies are experts in the field, want to discourage appeals.

6. Why strong deference might be problematic: goes against constitutional grant of authority to the courts, need the courts to prevent agencies from defining the limits to their own authority

7. Lechmere: stare decisis trumps Chevron deference. If the first interpretation is affirmed by the S. Ct., then the agency is not free to alter statutory interpretation—statute is no longer ambiguous. Does not extend to interpretations of C of A. Would have a chilling effect.

8. Exceptional Cases (exceptions to Chevron)

d. Exceptional cases (Chevron exceptions)—Christensen, Mead

i. Christensen—The Court substitutes its interpretation of the statute for that asserted in an Opinion Letter of the agency. “Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference. . . . Instead, interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in Skidmore, but only to the extent that those interpretations have power to persuade. Under Auer, “an agency’s interpretation of its own regulation is entitled to deference. But Auer deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however is not ambiguous—it is plainly permissive. To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, Auer deference is unwarranted.”

ii. When the agencies’ rules are not subject to the political process, courts may not be as deferential to the agencies’ interpretation of the scope of their power

iii. Chevron deference does not apply to opinion letters and informal rules

iv. Mead—not a Chevron-type delegation. If the customs service after notice & comment had put out a regulation that day planner was a diary, Chevron would apply. Chevron deference when there is implicit or explicit delegation. Delegation would be presumed b/f in Chevron.

1. Skidmore deference applies= agency has more experience/information; value to having administrative and judicial uniformity regarding the law

2. In situations where Skidmore or Chevron will apply, turns on whether the ruling will have force of law. If has legally-binding force, then judged under Chevron. If no legal force, then Skidmore will apply (these were just ruling letters)

3. Concern that if let the agency get full amount of deference w/o going through the process then no incentive to go through the process. Allowing agency to have law-making power w/o going through process of law-making.
v. Brown & Williamson: S. Ct. struck down tobacco regulation. Said they wouldn’t apply Chevron to FDA decision. Regulations of tobacco have force of law. Ct didn’t defer to FDA b/c unlikely Congress would delegate a policy decision of such economic and political magnitude to an administrative agency.

1. Corollary: ct will decide then. Imp matters will be decided by the ct rather than agencies. Strong statement of judicial self-confidence

e. Issues of discretion in adjudication

i. Courts use the arbitrary and capricious test in reviewing the discretionary element of all kinds of agency actions, including administrative rules, informal adjudications, and formal adjudications. Arbitrary and capricious is also applied to factfinding in informal adjudication. This standard is equivalent to the “reasonableness” standard applied to agency legal interpretations under Chevron step 2.

ii. Salameda—An agency may not abandon an interpretation without an explanation. Agencies do not have the same freedom as courts to change direction without acknowledging and justifying the change. Must also have a compelling reason(?).

1. The question is whether the INS’s judicial officers addressed in a rational manner the questions that the aliens tendered for consideration.

2. Reviewing the agency’s exercise of discretion. Courts are to defer to a reasonable interpretation of an ambiguous statute. The agency did not fully give its reasoning, so it abused its discretion. The agency failed to look at one of the factors that could have been considered in determining “undue hardship.” The agency may be free to change its standards, but it must give reasons for the change so that it can be determined that the change was not capricious.

3. Dissent: Easterbrook responds that the decision should only have been reversed if this had been a close case and if additional consideration by the court would have made a difference in the outcome.

4. Objective: ensure that the Board has thought about it. If take an action that departs from past policy and pay it no heed, then that is capricious—consistent over time. Must acknowledge that it’s making that change. Look at relevant factors. Ultimate standard of review is narrow

5. Problem: when a ct gets to intrusive, it may be exceeding its legitimate authority. Separation of powers issue.

6. Ct is on a weaker ground w/ respect to the policy side as opposed to the issue of law.

iii. Citizens to Preserve Overton Park—Congress prohibited the use of parks for highways unless “there is no feasible and prudent alternative” route. The court interpreted the statute to mean that the Secretary could not approve a parkland route unless each alternative route was unsound from an engineering point of view (not “feasible”) or would present “unique problems” (not “prudent”). The Secretary did not explain why there was no feasible and prudent alternative route. If the Secretary applied this test, the proper standard for review by the district court was arbitrary and capricious. The court is first required to decide whether the Secretary acted within the scope of his authority. Section 706(2)(A) requires a finding that the actual choice made was not “arbitrary, capricious, an abuse of discretion.” To make this finding the court must consider whether the decision based on a consideration of the relevant factors and whether there has been a clear error of judgment. The court is not empowered to substitute its judgment for that of the agency. However, if the agency failed to consider a relevant
factor, or took account of a factor it should not have considered, its action should be set aside as arbitrary and capricious.

1. “Substantial evidence” review applies only to formal rulemaking or formal adjudication, and the decision in Overton Park was neither. Although a hearing was required, it was merely a public hearing for the purpose of informing the community about the project and eliciting its views. Such a hearing is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial evidence review.

iv. PBGC—An agency is not necessarily required to consider as a “relevant factor” policies expressed in statutes not related to the agency. “If agency action may be disturbed whenever a reviewing court is able to point to an arguably relevant statutory policy that was not explicitly considered, then a very large number of agency decisions might be open to judicial invalidation. In addition, because the PBGC can claim no expertise in the labor and bankruptcy areas, it may be ill-equipped to undertake the difficult task of discerning and applying the “policies and goals” of these fields.”

1. Steps to the arbitrary and capricious test:
   a. Statutory Interpretation: What are the boundaries of the agency’s discretionary power? Use Chevron to decide this, unless the agency has not delineated its interpretation as in Salameda.
   b. Court must satisfy itself that the factual underpinnings of the agency find support in the record. (See III.D.)
   c. Review the exercise of discretion itself. Reviewable only for clear error of judgment; court may not substitute its judgment for that of the agency. Overton Park.
   d. Checklist of agency errors that can constitute an abuse of discretion (compiled by Levin, p. 588) are:
      i. The action rests upon a policy judgment that is so unacceptable as to render the action arbitrary.
      ii. The action rests upon reasoning that is so illogical as to render the action arbitrary.
      iii. The asserted or necessary factual premises of the action do not withstand scrutiny under the relevant standard of review.
      iv. The action is, without good reason, inconsistent with prior agency policies or precedents.
      v. The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action.
      vi. The action fails in other respects to rest upon reasoned decisionmaking
   v. The Chenery rule: A court cannot affirm an agency decision on some ground other than the one relied on by the agency in the decision under review.
   vi. In reviewing informal agency action, the court is generally limited to the materials considered by the agency (“closed record” approach).
   vii. There is an exception where it can be demonstrated that the agency failed to examine all relevant factors or to adequately explain its grounds for decision, or that the agency acted in bad faith or engaged in improper behavior in reaching its decision. The court can also take evidence to help it understand technical material in the record.

f. Issues of discretion in rulemaking
i. *State Farm*—“Hard-look review” — A reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. The court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Since the new agency determined that the original plan was not justified by the cost, it should have addressed the alternative way of achieving the objectives of the Act and given adequate reasons for its abandonment. An agency must cogently explain why it has exercised its discretion in a given manner. The courts may not accept appellate counsel’s post hoc rationalizations for agency action. An agency’s action must be upheld, if at all, on the basis articulated by the agency itself. An agency may revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained. The agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made. Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence.

1. Ct said didn’t look at all the alternatives. Ct doesn’t require agency to look at every possible choice. Airbags had already been given a degree of credibility by NHTSA b/c included in the original rule. Agency must follow the mandate of the statute—look at every option. Cost-benefit analysis: executive/congressional mandates that studies are done. Ct will be concerned if the issues those studies highlight aren’t addressed. Concerned about arbitrary agency decisionmaking. Agency can’t just state ‘substantial uncertainty--must provide a rational connection b/w the facts found and the choice made. Majority fears a perversion of the statutory mandate but this mandate allows them to consider costs. Congress intended SAFETY to be a preeminent factor. Safety benefits are not in doubt. In that context, the decision looks fishy.

2. Defenders of hard look review state that by forcing an agency to articulate the reasoning actually facilitates the democratic process

ii. *Borden* (state view) — “Soft-look review” — In order to invalidate an agency’s rule under the arbitrary and capricious review, a plaintiff must prove the absence of any conceivable ground upon which the rule may be upheld.

iii. “Hard look test” means that the reviewing court scrutinizes the agency’s reasoning to make certain that the agency carefully deliberated about the issues raised by its decision. Courts require that agencies offer detailed explanations for their actions. The agency’s explanation must address all factors relevant to the agency’s decision. A court may reverse a decision if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose.

iv. If the agencies are not paying attention to the factors that Congress told them to consider, then the courts should not be very deferential; if the question is a purely factual one regarding risks, the courts should be more deferential

v. When an agency is making predictions within its expertise, a court examining this kind of scientific determination, as opposed to simple findings of fact, must generally be at its most deferential.

vi. Soft looks sees ossification as a problem (slowing the process down too much)
vii. Substantial evidence review goes along with a closed-record review; arbitrary and capricious review goes along with open-record (n. 5, p. 607)

viii. FYI: What’s the dif b/w arbitrary & capricious & substantial evidence? Substantial evidence (universal camera & formal adjudication) finding support in a record that was compiled at the time of the action. Arbitrary & capricious supposed to be less intrusive b/c didn’t require record. However, now have administrative record and decision must be well-reasoned to it. Functional dif b/w 2 standards: a&c=based on file drawers during rulemaking; substantial evidence=trial record. Most opinions say it comes to the same thing.

d. The Availability of Judicial Review

1. Introduction: judicial remedies—Normally, everyone is entitled to judicial review.
2. §1331 federal question case=jurisdiction
3. If following §1331, then look to venue statute to go to some district ct. why do some people do that and some go to the DC circuit. Some statutes allow them to go directly to the appellate court.

b. Reviewability

i. Statutory preclusion

1. Statutory preclusion: §701(a)(1): ‘This chapter applies…except to the extent that (1) statutes preclude judicial review…’ The legislature can preclude judicial review, thus rendering administrative action partially or completely unreviewable. The questions arise when judicial review seems inconsistent with a statutory scheme, but the legislature did not explicitly preclude judicial review.
2. Bowen—Congress provided for appeals from eligibility determinations under both Part A and Part B, but authorized judicial review of amount determinations only under Part A. The appellant in this case is arguing for judicial review of a regulation of the DHHR which provides for lower payments to allopathic family physicians than other physicians. The court notes that if judicial review is not explicitly precluded, the statute must upon its face give clear and convincing evidence of an intent to withhold judicial review. The mere failure to provide specially by statute for judicial review certainly is no evidence of intent to withhold review. The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The court acknowledges that determinations as to amount of payment were intended to be excluded because looking at the legislative history, Congress deliberately intended to foreclose further review of such claims. However, the court differentiates between a challenge of application of an admittedly valid regulation and a challenge of the regulation itself. In this case, Congress did not intend the agency’s regulations to be free from judicial review.
3. Here there is a statute that seems to say no judicial review for this claim. Ct didn’t follow that statute.

a. Presumption of judicial review—must show my clear & convincing evidence that judicial review was not intended.

b. For the ct to take a case like MI Academy is more cost effective b/c can decide whether the method is valid which will affect more cases—requires few judicial resources
c. Distinguishes US v. Erika: ct impliedly precluded judicial review: if you decide a factual dispute (Erika), then spending a lot of time on issues which they are less qualified for.

4. We want an effective use of the court’s resources, so look at what the courts are most capable of looking at. See hierarchy of reviewability below.

5. Hierarchy of Reviewability — From Most Reviewable to Least Reviewable: Constitutional Grievances; Administrative Rules; Legal Challenges; Factual Challenges; Application of Law to Facts

6. McNary—Statute precluding judicial review of a determination respecting an application except in the context of a subsequent deportation order was held not to preclude judicial review involving collateral challenges to unlawful practices used by the INS in processing applications in general. Just because Congress gives the agency freedom from judicial review in its determinations does not mean that Congress intends that the agency can use any standards it wants in making its determinations and that those standards and general practices are precluded from review.

7. Preclusion of constitutional review — Commentators say that Congress can deprive the courts of the power to review some disputes, but cannot deny litigants a federal forum for the assertion of constitutional claims.

8. Time Limits—Some environmental legislation provides for pre-enforcement judicial review during a short period, but preclude review of the rules in subsequent enforcement actions against polluters who violate the rules.

9. Czerkies—Ct will NEVER read a preclusion statute to say you can’t have a means of precluding a constitutional issue. Webster v. Doe: no challenge to legality of the practice but will not assume in the absence of clear congressional statute that meant to preclude clear constitutional questions.

ii. Actions “committed to agency discretion”

1. Heckler— FDA refused to take enforcement action disagreeing with petitioner’s construction of the law and relying on his discretion not to enforce the Act in cases where there is no serious danger to the public health or a blatant scheme to defraud. Rehnquist looks at APA 701(a)(2) which provides that the chapter on judicial review “applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law.” Overland Park says that under (a)(2) review is not available if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. In refusals to take enforcement steps, the presumption is that judicial review is not available. Agency’s decision not to prosecute or enforce is generally committed to an agency’s absolute discretion. The decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Agency refusals to institute investigative or enforcement proceedings fall within 701(a)(2) unless Congress has indicated otherwise, and are thus unreviewable.

2. “No law to apply” — Why does this not violate the non-delegation doctrine? Is it because there is law to apply to determine when the agency may act and what the agency’s scope is, but there is no law to apply to determine when an agency may choose not to act???

3. If the agency refuses to act, and you can:
a. consider the various loopholes left by Chaney, for example, did the legislature really give the agency discretion to refuse to regulate
b. challenge an erroneous legal interpretation in the decision not to regulate
c. construe the statute to provide a private right of action in court against the person creating the health hazard
d. petition the agency to adopt a legislative rule on the subject or a policy statement that would structure its discretion
e. engage in political action

4. An agency’s denial of a petition for rulemaking is appealable to the courts. This would seem to imply reviewability.

5. The Court has found the following decisions are committed to agency discretion:
   a. The President’s decision to accept or reject a list of military base closings proposed to him by the Defense Base Closure and Realignment Commission
   b. An agency’s decision not to continue to fund a health program out of its lump sum appropriation
   c. An agency’s refusal to reconsider its own decision.

6. Levin agrees with the Scalia view: There could be reasons for abuse of discretion even if no standards are involved.

7. If Cheney writes in and says there is a violation and FDA doesn’t investigate—violation.

   c. **Standing**—complex and frequently changing body of law, has constitutional and common law bases. Constitutional source is Article III of the Constitution, which limits federal courts to “cases” and “controversies”. Standing seeks to assure that the system remains adversarial, and keeps the anti-majoritarian judiciary from dominating the political branches. (Separation of powers) However, this conflicts with other strongly held values, such as the check on the other branches and the plaintiff’s need for redress.

   i. Standing requires three showings: Injury in fact, zone of interests, and that the court can redress their injuries.

   ii. **Injury in fact**—it can be a prospective injury, i.e. those would suffer economic or other harm in the future qualify. Early view was that standing required legally protected interest that was adversely affected by the agency’s decision—an interest recognized by the Constitution, common law, or statutes. This test fell into disfavor because it was too rigid, and tended to confuse merits issues with standing issues.

   iii. Who has standing?

   1. A person directly affected by agency action generally has standing to seek judicial review.
   2. A person indirectly affected by agency action generally only has standing to seek judicial review if a statute authorizes standing.
   3. Courts sometimes recognize statutory standing where Congress had evidenced a specific intention to benefit the plaintiff’s class.
   4. APA provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” This can be read to grant broader standing.

   iv. **FCC v. Sander Bros.**—major breakaway from the previous standard—held that “persons aggrieved” included competitors of a successful applicant, even though the
Act was intended to protect the public interest, not the competitor’s. The test for being “aggrieved” was not limited to a personal wrong. The court reasoned that Congress may have believed that person financially injured would be the only one with a sufficient interest to bring errors of law to the attention of the appellate court. This was the first of a series of cases in which parties were granted standing under various statutory review provisions on the assumption that Congress viewed them as “private attorney generals.”

v. APA § 702 provides that a person “adversely affected or aggrieved by agency action within the meaning of a relevant statute” can obtain judicial review. This includes aesthetic, conservational, recreational, and economic values. This contributed to the liberalizing trend, because litigants began to argue that the Act did not merely codify the existing “legal interest” theory but rather expanded the availability of standing to include all parties adversely affected.

vi. In Data Processing, the Supreme Court created a two-prong test: (1) has the complainant alleged injury in fact, and (2) is the interest sought to be protected by the complainant within the zones of interest to be protected or regulated by the statute or constitutional guarantee in question.

vii. Zone test is statutory in nature, congress can abolish it.

viii. Zone of interests—not meant to be particularly demanding; standing is found unless plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. Two-part inquiry: first, determining which interests the statute arguably protects, and second, determining whether the agency action affects those interests.

ix. Postal Workers—held that postal union’s interest in challenging a grant of service to overnight companies was not within the zone because the statute establishing the postal monopoly was intended to secure postal services, not to secure employment for workers.

x. NCUA—Applied the “zone of interests” test. Majority concluded that statute requiring a common bond among groups in a credit union put plaintiff banks within the zone of interest because the intent of the provision was to limit credit unions’ market. Dissent argued that the common bond provision did not place the banks in the zone of interests because the purpose of that provision was to protect the members of the credit union by preventing it from overexpanding.

xi. Zone test can be satisfied by meeting the purpose of a specific provision, which may not be the same as the overall regulatory scheme. Bennett. Bennett also noted that this test is prudential and nonconstitutional, therefore Congress may modify or abrogate it.

xii. Causal connection and public actions

1. Lujan v. Defenders of Wildlife—Constitutional minimum of standing contains three elements:
   a. Injury in fact, which is an invasion of a legally protected interest which is concrete (rather than ideological) and particularized (to plaintiff rather than generalized to many citizens) and actual or imminent, non conjectural or hypothetical
   b. Causal connection between injury and the conduct complained of
   c. Likely (as opposed to speculative) that the injury will be redressed by a favorable decision.
2. Party seeking to gain standing has the burden of proof. When the party claiming the injury is not directly affected by the regulation, causation and redressability ordinarily hinge on the response of the regulated third party to the government action or inaction — and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury. “A plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.” “To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take care that the laws be faithfully executed.’ It would enable the courts, with the permission of Congress ‘to assume a position of authority over the governmental acts of another and co-equal department’ and to become ‘virtually continuing monitors of the wisdom and soundness of executive action.’”

3. Under Hunt—An association has standing to sue on behalf of its members when (a) one or more of its members would otherwise have standing to sue in their own right; (b) the interests the association seeks to protect are germane to the organization’s purpose, and (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.

4. Procedural rights are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

d. Timing
  i. Finality—FTC v. Standard Oil (Socal case)
  1. FTC v. Standard Oil (Socal)—An agency action is reviewable only if it is “final” or otherwise “directly reviewable” under APA § 704. This means that an agency must make its final decision on the merits.
  2. As a general rule, courts review only final orders. This means that ordinarily a litigant must complete the entire administrative process before a court will review decisions which the agency took along the way.
  3. Piecemeal appeal is not efficient. It is not enough for the party to claim hardship based on the costs of litigation.
  4. Denial of interim relief is something that the court can take up early because it will affect the party requesting the interim relief. Granting of interim relief will also be reviewable because it causes irreparable harm to the party more than merely litigation costs.
  5. Courts may allow for immediate review of non-final action where postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.
6. Judicial intervention into non-final actions denies the agency the opportunity to correct its own mistakes and apply its expertise—will interfere.

7. Exhaustion of administrative remedies on a particular issue does not mean the decision is final.

8. Reviewing court can review even preliminary procedural agency actions not directly reviewable are subject to review on the review of the final action.

9. **Bennett v. Spear**—Orders final when two conditions met:
   a. Action must mark the completion of the process
   b. Action must be one by which rights or obligations have been determined or from which legal consequences will flow

10. Catch-22 cases: Agency recommendation to President not reviewable because not final, but President’s decision not reviewable under the APA because he’s not an “agency”.

11. Pending petitions for reconsideration render the agency’s decision non-final until resolved

12. Court can review agency’s failure to act, not withstanding final order rule.

ii. Ripeness—**Abbott Labs**

1. **Abbott Labs**—Most (but not all) legislative regulations are ripe for pre-enforcement review. Non-legislative rules less likely to be deemed ripe, but may on occasion. Complying with an agency rule would require great expense from the regulated parties. The main hardship was that the regulated parties would suffer greatly if they waited to get sued first because suit would damage their reputations. Therefore, waiting to be sued is not a very viable option for the drug companies. The issue is purely legal (a statutory interpretation). The two-prong test is that the issue is fit for judicial review and that there is harm to the party in waiting to be sued.
   a. Non-final informal administrative actions probably not ripe.

2. In many cases, a court will await a concrete application of the agency action to the plaintiff before reviewing its legality where a private party may be threatened by agency action which has not yet occurred.

3. **Toilet Goods**—The rule in this case provides that the FDA “may” order an inspection and “may” suspend certification. The court would not find that the rule was ripe for judicial review because it was unknown how the rule would be applied because it was so flexible.

4. Legal issues are generally seen as more fit for judicial review, but if it is unknown how the rule will be applied, then the courts may wait.

5. Factual issues are generally seen as less fit for judicial review. However, rules may be challenged on factual issues because the court needs to look at the record before the court.

6. Where a rule does not have the force of law but is a policy statement, the courts will more likely say that the issue is not ripe for review.

7. **Automatic Laundry Case**—Even when a decision comes from a head of an agency, the court must assure itself that this decision is definitive before it can be sure that the issue is ripe for review.

iii. Exhaustion of remedies

1. Generally, a court will not hear the case until the party has first exhausted all administrative remedies.
2. *McCarthy v. Madigan*—Where Congress specifically mandates, exhaustion is required. Where Congress has not clearly required exhaustion, sound judicial discretion governs. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. Administrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the government’s interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further. The court notes three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion:
   a. When requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action
   b. Administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief.
   c. Because the agency may lack the institutional competence to resolve the particular type of issue presented, i.e. constitutionality of a statute
3. The procedure itself may be challenged, such that the question of the adequacy of the administrative remedy is for all practical purposes identical with the merits of the plaintiff’s lawsuit
4. The agency may lack authority to grant the relief requested.
5. The administrative body may be shown to be biased or has otherwise predetermined the issue before it.
6. Concurring opinion by Rehnquist, Scalia, and Thomas would have invalidated solely because the administrative procedure did not allow for the type of relief which the prisoner demanded and was, therefore, furnished no effective remedy at all.
7. *NJ Civil Service Ass’n v. State*—(NJ State Court)law provides that “unless the interest of justice requires otherwise, review shall not be maintainable so long as there is available a right of review before any administrative agency or office.” Exceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision. In a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply.
8. *Portela-Gonzalez*— To excuse exhaustion of remedies requirement, claimant must show that it is certain that their claim will be denied on appeal, not merely that they doubt an appeal will result in a different decision.
9. If the head of the agency has already ruled on the issue, then maybe exhaustion would be excused.
10. If the question is a constitutional question, the complainant may be able to go directly to the court.
11. A section 1983 plaintiff is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be.
12. Factors in the judicial balance
   a. Nature and severity of harm to plaintiff from delayed review
   b. Need for agency expertise in resolving the issue
   c. Nature of the issue involved (law, constitutional issue, jurisdictional issue, application of law to fact)
d. Adequacy of remedy in light of plaintiff’s particular claim  
e. Extent to which the claim appears to be serious rather than a tactic for delaying the agency process  
f. Apparent clarity or doubt as to resolution of the merits of the claim  
g. Extent to which exhaustion would be futile because an adverse decision is certain  
h. Extent to which petitioner had a valid excuse for failure to exhaust  
iv. Difference between final order, ripeness, and exhaustion of remedies