Introduction to the Administrative Process

- Overview of Administrative Law
  - We study mechanisms administrative agencies use to make decisions
  - Administrative law comes from: the Constitution, APA (general and comprehensive), particular agency enabling acts (specific), and administrative common law
  - Judicial review: enforcing procedural and substantive constraints on agency action.
  - Enforcement – regulatory norms are enforceable by agencies and sometimes by private parties affected by violations of regulatory norms.

- Function of Administrative Agencies
  - Distribution of government benefits, granting of licenses and permits, policy making in a wide variety of regulated agencies, grant awarding, promotional, adjudication

- Benefits of agency regulation (versus cts/common law)
  - More specialized knowledge- specialists permanently on staff, in depth
  - More efficient, legislator too busy
  - Broader range of available tools
  - Agency can adopt rules rather than be stuck w/ controversy of parties
  - More likely to update, revisit, follow up
  - Agencies are in check: Congress (hearings), Pres (political influence), courts (review)

- Drawbacks to agency
  - More political
  - BUT, might be more realistic
  - Biased?
    - Consider employment policies

- Types of admin agencies
  1. Executive agencies – heads of agencies making up the President’s cabinet, serve at President’s will/pleasure.
  2. Independent agencies – insulated from Pres control, headed by multi-member group rather than single agency head, members w/ fixed staggered terms, can only be removed for cause
Due Process

-Introduction

-Fifth Amendment – No person shall be deprived of life, liberty, or property w/o due process of law.
- applies to states via 14th Amendment
- same case law under 5th and 14th Amendments
- Substantive due process versus procedural due process
  - Substantive due process – limits on what government can regulate
  - Procedural due process – procedures by which government may affect individual’s rights

Interests protected by due process

**Goldberg v. Kelley**

- Facts: welfare benefits terminated if caseworker determines that no longer eligible. No opportunity for personal appearance, for oral presentation of evidence, and for confrontation and cross examination of adverse witnesses. Can request post-determination hearing and then obtain judicial review.
- Held: due process requires an adequate hearing before termination of welfare benefits since they are a statutory entitlement. Constitution ensures a hearing.
- Rationale: Court emphasized fact that welfare necessary for individuals to obtain essential food, clothing, housing, and medical care. Most property now is an entitlement. Court says property can include airplane routs, television stations etc. This is similar to the entitlement we recognize in welfare payments. Court cites to Prof Reich who coined “new property” which created a new body of jurisprudence making a wider range of property covered under the due process clause.
- Pre-termination hearing need not take form of judicial or quasi-judicial trial.
- Hearing must:
  i) Be at a meaningful time and in a meaningful manner
  ii) Must get timely & adequate notice detailing reasons for proposed termination
  iii) Must have effective opportunity to defend by confronting adverse witnesses and presenting own arguments and evidence orally
  iv) Right to bring counsel
  v) Impartial decision maker, who must state reasons for determination and indicate evidence relied upon.
- Written submissions are unrealistic for many recipients who lack educational attainment necessary to write effectively and cannot obtain professional assistance
- Dissent – decision has no basis in Constitution but based solely on conception of fairness, does not think it is property because it is actually charity and we don’t need to give it to them in the first place.
- Here, court abandoning rights-privileges distinctions

Varying Reactions:

i. More people will be denied welfare in the first place because it will be much harder to get them off of it
ii. The court has over-proceduralized this.
iii. It’s good because there is a high success rate of people staying on welfare after a hearing.
iv. rights conferred are a mis-match for the problem. Not everyone pursues it because people are not provided a lawyer. 
v. Subsequent case law tends to cut back on the rights recognized in this case because of the concern that due process rights can be potentially problematic.
-Who is entitled to due process? (starts to narrow with Roth)

- **Roth Test**
  - **Facts:** Teacher hired for fixed 1 yr term; completed term and informed that wouldn't be rehired.
  - **Held:** not entitled to a hearing or statement of reasons not rehired. It's not a claim of entitlement because University gave him a K for a year but could let him go for any reason (which they exercised). Due Process only extends to liberty or property interests and here, no property interest or liberty interest. Court focused on whether an applicable source of law other than Con (K, or statute, etc) entitled some guarantee

**Test:** To have a property interest in a benefit, a person clearly must have more than an abstract need or desire, or unilateral expectation. He must have a legitimate claim of entitlement to it. Entitlement comes from any source of positive law that the state has and confers

- State law controls substantive guarantees of whether you have entitlement (or fed if it’s an agency), then fed law determines if it’s been taken away
- **Rationale:** property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.
  - Here, Roth had no expectation of being rehired – only hired for 1 year. There could have been breach of state K claim, but no due process
- **De facto** tenure – *Perry v. Sinderman* – right to reemployment found based on implied contract, arising from practices of institution.
  - entitlement need not be based on a written contract or statutory grant.
- **Distinguished:** if agency adopts a regulation, it is an enforceable rule that creates a legitimate entitlement – *Goldsmith v. Board of Tax Appeals*
- Circumstances where he would have had an entitlement:
  i. fired after 9 mos because he had a year K (entitled stated guarantee and definite standard to guide decision maker)
  ii. K said he could performance must be satisfactory. University says he is unsatisfactory. Could have a hearing, and if found satisfactory, he does have an entitlement claim
“Liberty” and “Property”

**Liberty**: freedom from material interference with people’s fundamental interests

- **Roth**: Roth did not lose liberty interest. **Liberty must be read broadly**, encompassing not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship god according to the dictates of conscience and generally to enjoy these privileges long recognized as essential to the orderly pursuit of happiness by men.

- **NOTE**: If Roth could not get a job anywhere else (forecloses opportunities) that would trigger due process

- **Reputational harm** may be deprivation of a liberty interest (**Roth**).

  - “**Stigma plus**” another deprivation (ex. fired from job) req for due process violation. **Paul v. Davis** ruined his name, but also restrained his ability from buying alcoholic beverages (**stigma alone doesn’t trigger prior hearing right**- Rehnquist)

  - **Conn v. Doe**: D was convicted sex offender who wanted his name to be cleared from a website. No right to a hearing because dangerousness was not relevant to statutory scheme, only conviction mattered

- **Property** – depends on some entitlement created & defined by an independent source (**Roth**) of law.

  - Must be deprived of something (**Roth** suggests that this is different than being denied something you want but don’t yet have).

- **American Manufacturers Mutual Ins. Co v. Sullivan**

  - **Facts**: person says he is entitled to workers comp and says since he was deprived of hearing, he wants benefits) –

  - **Held**: Court seemed to say no due process rights are available to an applicant for benefits (rather than a person challenging termination of benefits). Ex. welfare applicant not paid from time of filing application

    - Court distinguished **Mathews v. Eldridge** and **Goldberg v. Kelly** on grounds that those cases dealt with individual’s interest in continued payment of benefits.

    - A long term applicant could have a claim. Ex. Tenure achieved after 5 years, then fired after 7 (see **Perry v. Sinderman** – de facto tenure by implied K, thus entitlement)

    - **Hypo**: someone applies for a job that says if you have these qualifications you get it. Not entitled to the job under state law, unlike welfare: entitled if qualified
Defining “property” - **Cleveland Board of Education v. Loudermill** – property rights in continued employment

-Facts: employees could only be terminated for cause. They were not given a chance to respond to charges against them prior to discharge. They were given post-termination hearing.

**Held:** Legislature may elect not to confer a property interest in [public] employment but it may not constitutionally authorize the deprivation of such an interest, once conferred, w/o appropriate procedural safeguards

-Entitlement: if employer can only dismiss for cause
-Here, statute did not provide adequate pre-termination procedures
-State law is source of the settlement, and once they have created it, the statute can’t circumscribe federal due process (it is a floor, the state can give more, not less)

**Rationale:** written pre-termination proceeding is sufficient protection for a discharged employee if a full hearing is provided after discharge.

-Dissent: Rehnquist disagrees and says benefit of getting a good job (sweet) is dealing with bad procedures (bitter).
-Critique: would be disincentive for states to confer benefits at all
-Contracts w/ government – Supreme Court has held that ordinary state court breach of contract actions provide all the process that is due.

-As long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of Due Process Clause. **Goss v. Lopez.** Conversation was due process.

-**Swick v. City of Chicago** (7th Cir.)Placing a police officer on paid sick leave so that he could not wear a badge or carry a gun or arrest people is a de minimus deprivation.

-**Town of Castle Rock v. Gonzales:** Mother got restraining order against husband; he violates order and kidnaps their 3 kids. She calls police but they do nothing. Later, he murdered kids.
-CT says no liberty interest. SC gave some discretion to law enforcement. They must be very clear if they wanted to give any entitlements.
-Concurring: state did not assure safety, only ensured process/service

-Problem (p 46)- if K says it will be renewed if employee is satisfactory, and not renewed, it could be a break of K, but not due process

**State law** – sometimes different –

-NY- demanding requirements for welfare which was long term but is now temporary assistance
-CA- rejected Roth and held that a discretionary standard can trigger due process protection. **Saleeby v. State Bar.**
-liberty = freedom from arbitrary adjudicative procedures
-what protections are necessary depends on balancing the various interests involved.

**Underlying theme: role of state v. federal law**

Timing of the Hearing

*Mattews v. Eldridge:* current standard

Facts: Eldridge was informed the SS benefits would be terminated in a letter w/ reasons for termination. Agency found he ceased to be disabled. Instead of requesting reconsideration, he commenced this action challenging validity of procedure. He wants a face to face hearing

Test: In determining what process is due, consider

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through procedures used and the probable value, if any, of any additional or substitute procedural safeguards. (Accuracy)
3. The Gov’t interest, included function involved and fiscal and administrative burdens that add’l procedures would entail (think about aggregate)

-Note: using Mathews formula keep a clear focus on what rights one already has and what is being asked for. Focus is on the increment.

-Mathews signals a statement that Courts want to be flexible to both the claimant and the agency

-Holding: procedure adequate here (no evidentiary hearing required).

1. not same situation as Goldberg where gov’t benefit is only income source and based on financial need. Here, family contributions & other forms of gov’t aid available, other ways to get the money.
2. Medical evaluation is more sharply focused and easily documented – dependant on routine, standard, unbiased medical reports (more reliable), written submissions better than oral in medical disability situation, recipient has full access to all information relied upon by agency
3. not insubstantial burden on gov’t

-In case of emergency, the state could deprive an individual of liberty or property w/o prior hearing, even if later remedy is inadequate

-North American Cold Storage v. Chicago – Court upheld state law providing for destruction w/o prior hearing of food held in cold storage which authorities, after inspection, believed to be roting & creating public health prob. Court said that adequate remedy available in tort law. -an important government interest accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the deprivation. FDIC v. Mallen.

-health and safety concerns sufficient

-However, even when an agency is responsible for protecting public health or preventing environmental degradation, due process clause imposes some limits on its ability to impose obligations on private persons w/o hearing. TVA v. Whitman.

-Timing

-Court has accepted abbreviated pre-termination procedures designed to insure that the gov’t probably has cause for its decision, not that the decision was right.

-Cleveland v. Loudermill– pre-termination procedures serve as an initial check against mistaken decisions (whether there are reasonable grounds)
-How long a delay?
  \textbf{-delay of one year tolerated in \textit{Matthews};}\n  -A delay in post-termination hearing could still itself be a constitutional\n  violation. \textit{Loudermill} (9 mos. in that case was okay)\n  \textbf{-City of Los Angeles v. David} – when interest in a prompt hearing is purely\n  monetary, balance weighs much less in individual’s interest. (Here, pl.\n  challenged 27 day delay in hearing about recouping $134.50 for car towing).\n  -Suspension v. discharge\n  \textbf{-Court more lenient when it comes to suspension}\n  \textbf{-Gilbert v. Homar} – due process allows the suspension of tenured campus\n  policeman w/o a prior hearing and w/o pay\n  -state often finds that exigent circumstances require that a professional license\n  be immediately suspended.
Elements of a Constitutionally Fair Hearing

**Ingraham v. Wright**: paddling of students in schools challenged

- **Facts:** Here, they were heard in court not agency.
- **Issue:** does due process require notice and opportunity to be heard first?
- **Held** – No. Availability of a statutory or common law remedy that can compensate an individual for loss of liberty or property militates against right to pre-deprivation notice and hearing. Ex. A tort action would be enough
- **Rationale:** 14th amd. says “state” shall not deprive- and state uses judicial system and administrative system. Court does not want to interfere the process to avoid undermining authority of schools (the hearing would be disruptive). (Court probably thinks it could be done)
  - Theme: a civil action after the fact can compensate for a non-existing hearing before the fact
  - Theme: Courts want to give space to well accepted state common law remedies

**Application of Mathews test:**

1. Corporal punishment implicates a constitutionally protected liberty interest but low risk of erroneous deprivation b/c teacher sees misconduct and traditional common law remedies (tort) are fully adequate to protect due process.
2. Accuracy would not be compromised in a tort action
3. Incremental benefits of prior hearing could not justify the cost
   - High societal costs (primary educational responsibility)

**Goss v. Lopez** – held that disciplinary suspension of high school students for 10 days or less deprived them of property (state created entitlement to public education) and liberty (serious damage to standing w/ fellow pupils and teachers and later opportunities for education and employment).

- **Required “some kind of hearing”** – written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and opportunity to present own side of story. Like a “conversation.”
- Different than *Ingraham* b/c *Ingraham*, to be effective, teachers must enforce punishment on the spot. With a suspension than you expect to have something of a hearing right away since the punishment is so immediate.

**Parratt v. Taylor**

- **Held**: that the availability of state tort action after a random and unauthorized deprivation of property satisfied requirements of due process
  - Prison officials lost a prisoner’s $23 hobby kit.
  - However, if pre-deprivation hearing is feasible, *Parratt* rule does not apply
  - Negligent deprivation of property is not a due process violation at all. *Daniels v. Williams*. 
Right to Counsel

- APA § 555(b) provides that a person compelled to appear in person before an agency or representative thereof is entitled to be represented or advised by counsel.

- Some agencies exempt from APA coverage
- Gov’t not required to pay for the attorney

- *Walters v. Nat’l Ass’n of Radiation Survivors* – (Old 1862 statute) SC refused to allow veterans to bring lawyer when applying for gov’t benefits, citing Congressional intent that lawyers not share in award. Law said you can bring attorney to argue for benefits, but can only pay him 10$.
- SC says that this prevents representation by an attorney
- Congress can choose different model for disbursing benefits than taking away – informal, investigatory meeting w/o lawyers.
- *Rationale*: results were same whether lawyer was there or not. Lay reps have lots of experience with this and law degree is not critical.
- *Today*: Congress revised statute to allow lawyers to participate in appellate level

A student dismissed for academic reasons rather than disciplinary reasons is entitled to much less process – perhaps none at all.

- *Board of Curators, Univ. of Mo v. Horowitz* – U of MO Columbia med student wanted trial type hearing before getting kicked out of med school. Court said no hearing.
- *Rationale*: dismissal rested on academic judgment of school officials that she did not have necessary clinical ability to perform adequately as a medical doctor. More subjective and evaluative than typical factual questions presented in disciplinary decision, so trial would not be very helpful. Would not necessarily get more accurate/reliable decision. Must rely on professional judgment and there was notice about grade expectations. Court suggests gov’t interest is that a trial would be destructive. Might have had to give at least as much as *Lopez* (a “conversation”)

- If there are no factual issues involved, an agency can dispense with oral hearing.

*Altenheim German Home v. Turnock* (7th Cir.)

- *Van Harkin v. City of Chicago* – no right to confront police officer who have parking ticket b/c huge costs to gov’t, not a huge personal interest, and confrontation would not substantially decrease risk of erroneous deprivation.
Rulemaking versus Adjudication

-**Adjudication**
  - affects identifiable persons on basis of facts peculiar to each of them
  - procedural due process applies

-**Rulemaking**
  - government action that is directed in a uniform way against a class of people
  - no procedural due process

-Determining if rulemaking or adjudication

**Londoner v. Denver**
Facts: P's street is being repaved and he objects in writing, he says he wants an oral hearing. Court says a hearing is required.

**Held:** SC says an oral hearing is required. *Mathews yet decided*
- modern criticism: this is what agencies do on paper all the time.
- **Rationale:** Court found Due Process required that taxpayers must have notice and opportunity to be heard. Publication of the proposed assessment in a newspaper satisfied notice requirement. However, taxpayers were not given an opportunity to be heard because the assessment was fixed at a special city council meeting of which the time and date were not published and at which the taxpayers were not present to give argument.
  - **Held:** process violated due process; small number of people exceptionally affected
  - owners not given an opportunity to be heard (need hearing)
    - Mr. Londoner knows best what goes with his house so can’t call authority to talk about Londoner

**Bi-Metalic Investment Co. v. State Board of Equalization**
Facts: P brought suit enjoining State Board of Equalization and CO Tax Commission from putting in force an increased valuation of all taxable property in Denver by 40%

**Held:** due process does not apply to rulemaking settings
- **Rationale:** here, rule is about legislative facts: applies to more than a few people who are similarly situated, applies the same across the board, and it is impracticable that everyone has a direct voice in its adopted
  - citizens can protect their rights through power of voting.
  - distinguished from *Londoner* where facts were specific & fewer people
- **Florida East Coast** – affirms Bi-Metalic – no hearing req. in across the board rulemaking
- **Anaconda Co. v. Ruckleshaus** (10th) Agency adopts a rule that appears to have general applicability but really only regulates a single entity.  *As long as it’s phrased in general terms, it’s a rule. Due process is inapplicable because rule is general*
  - **Rationale:** Anaconda can send comments during rulemaking because rule was general class-wide determination, not specifically written to one entity

-Legislative versus adjudicative facts
- specific facts about a particular dispute (adjudicative fact) versus a broad general problem (legislative fact)
  - Adjudicative facts usually answer the questions of who did what, where, when, how, and why, with what motive
  - Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide issues of law and policy
Administrative Adjudication

-Statutory Hearing Rights

-Generally

-Federal APA and 1961 MSAPA do not require adjudicative hearings
-APAs lay out rules for formal hearings, but agencies need not use those procedures except where an external source (like another statute or state/federal constitution) requires a hearing.

-these hearings are called formal adjudication

-If no external source requires a hearing, the agency is usually free to choose its own dispute resolution procedure

Overview of the APA Procedural Models

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-Federal

-APA §554(a) applies to “adjudication required by statute to be determined on the record after opportunity for an agency hearing” signals Congress’ intent for formal adjudication.

-“on the record” = formal adjudication (triggers 556, 557 requirements)

-It’s also enough to establish congress intended there be an APA hearing

-“on the record” really means “on the exclusive record”

-trier of fact is not allowed to consider any evidence except that which has been admitted at the hearing. APA §556(e)

-When APA was written, there was presumption it would be used often but since 1986 (Chicago) they’ve been moving away

-In APA formal adjudication (§556 and 557 requirements): Operated as a trial, cross examination, presenting witnesses, summary judgment, ex-party contact restrictions

-557: After ALJ writes a commission, a party can appeal a decision

-agency must allow for cross examination at the hearing

-If the private party wins and the agency’s position was not substantially justified, the private party is entitled to recover attorney’s fees (congress must says so)

-hearing must be conducted by ALJ

City of West Chicago v. NRC

-Facts: Corporation sought permission to demolish six buildings and store on-site contaminated material. City challenges NRC (agency) order granting licensing amendment. Statute requires NRC to grant “hearing” if requested

-Held: informal hearing sufficient.

-magic words “on the record” not totally necessary to trigger formal hearing requirement. However, in absence of “on the record” words, Congress must clearly indicate intent to trigger formal hearings and magic words indicate such Congressional intent.
-here, no such intent demonstrated
-**Rationale**: City had meaningful chance to submit statements explaining its viewpoint.
  -benefit: less formal, easier, more efficient
  -downside: lack of process
  -agencies like to avoid ALJ judges
-No due process violation b/c **generalized** health, safety, and environmental concerns not liberty or property interests

**Seacoast** – prior to *City of West Chicago*
-First circuit overruled seacoast
-**Facts**: Involved determination of whether EPA can issue nuclear reactor to discharge water in sea
-**Held**: Congress is presumed to intend formal adjudication procedures in a statute governing adjudication when it uses the word “hearing”
  -no specific procedures required for informal adjudication

**Portland v. Endangered Species Committee (“God Squad”)**
-**Held**: APA’s adjudication provision applied to proceeding of Endangered Species Committee. Statute said they must use §554 and §556 but it did not say §557. **Court decided that since it said “on the record” they must have meant to trigger §557.**
  -Note: Several senators were on committee, so it may be a political decision by the 9th Cir (seems likely that omission of §557 was intended)

**Ashbacker Radio Corp. v. FCC**
-**Held**: If several applicants are competing for a single mutually exclusive license, SC has held that both applicants must be considered together in a single comparative hearing.
-**State**

1961 MSAPA requires an external source to trigger formal adjudication.

1961 MSAPA defines “contested case” (to which formal adjudication provisions apply) as a proceeding, including but not restricted to rulemaking and licensing, in which legal rights, duties, and privileges are required by law to be determined by an agency after an opportunity for a hearing.

-if not a contested case, then virtually no procedures required by MSAPA

**Sugarloaf Citizens Ass’n v. Northeast Maryland Waste Disposal Authority (MD)**

**Held:** the determination of whether a particular hearing required by statute is a “contested case” depends on applying the definition of “contested case” in the MSAPA to the agency activity, not whether the statute uses language indicating that the hearing is adjudicatory

-Here, formal hearing required b/c involves an application for a permit by a specific person or entity to construct a particular facility at a specified location.

-much broader than federal APA (contested case hearing must be provided if hearing required by statute, regulation, or constitution)

-Here, words “public hearing” sufficient to trigger formal adjudication

**Metsch v. University of Fla. (FL)**

**Facts:** student denied admission to law school. Requested hearing was denied

**Held:** no substantial interest; no administrative hearing required.

-injury is not the type that proceeding is designed to protect

-statute says that if his interest is “substantial” than he gets a hearing

-court are not comfortable with system where hearing is default

**Rationale:** decision is indicative of discomfort courts feel in a system where hearing is prescribed as a default- would be too rigid. It has too many unintended consequences. Like federal law, something needs to trigger it.

-**Using Rulemaking to limit issues to which hearing rights apply**

-**Agency can use rulemaking to resolve an issue and thereby displace an individual’s statutory right to an evidentiary hearing on that issue.**

**Heckler v. Campbell**

**Facts:** Hotel maid with back injury applied for SS. She wanted disability and had to submit information. There was a guideline that charts out whether or not people are disabled depending on the national economy. She was not disabled according to chart, but her expert thinks she was

**Held.** An agency (HHS) can rely on published medical-vocational guidelines to determine a claimant’s right to Social Security disability benefits.

**Rationale:** to require Secretary to re-litigate existence of jobs in national economy each hearing needlessly hinders an already overburdened agency

-Since the rule has already determined the issue: it does not matter if an expert disagrees

-If a valid rule has been issued even though you did not participate in the promulgation of the rule, it is controlling

-Claimant can try to challenge validity of rule (say it does not apply to you) or say it is arbitrary and capricious

-Protocols in rulemaking are sufficient

-Only get a hearing on threshold issue: whether she’s disabled

-benefits: efficiency, more uniformity of results
-cons: wont hear other side’s experts, people may lose trust in system
-only used for issues that do not require case-by-case determination

**Airline Pilots v. Dep't of Transportation** – Could agency can refuse to have a hearing if no material facts are in dispute. The union submitted a single affidavit from one of its members which the agency called “speculative and unsubstantial”

**Bowen v. Yuckert** – Court upheld another part of the grid that made determinations that pertained to characteristics of the individual applicant – impairment severity.

**Sullivan v. Zebley** – Court struck down rule under which a child would be deemed eligible for benefits only if he or she had one of 182 medical conditions listed in the rule.

-If Congress has given rulemaking power to an agency and conferred a right to individualized consideration or an evidentiary hearing, the Court has endorsed a presumption that the rulemaking provision will prevail.

**American Hospital Ass’n v. NLRB** – even if statutory scheme requires individualized determinations, decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses intent to withhold that authority

-Waiver: regulations should (must?) permit the affected persons to seek a waiver of the rules if they can show adequate reasons to justify one.

**Heckler v. Campbell,** Court found that there was a safety valve b/c if rule fails to describe claimant’s particular limitations, ALJ is not supposed to apply them

However, in **FCC v. WNCG** majority said that prior cases did not hold that the Commission may never adopt a rule that lacks waiver provision

-**Summary Judgment**

-an agency can use administrative summary judgment to deny a hearing when there are no disputed issues of material fact. **Weinberger v. Hynson, Westcott, & Dunning**

-must be clear that no material fact issues presented

-**Showing a Material Fact at issue**

-A court might allow an agency to refrain from a hearing if the party who wants the hearing cannot show what would be accomplished there.

-Party must show that an issue of material fact exists in order to get a hearing 
  -does not have to be a detailed factual allegation
Institutional decision and personal responsibility
- Models of adjudicative decision-making
  - Judicial model – adjudicative decision by an agency is like a decision by a judge; thus, administrative process should resemble judicial process as closely as possible.
    - ALJ personally listens to the evidence and arguments; no preconceptions; etc
  - Institutional model – views an agency as if it were a single unit with the mission of implementing a regulatory scheme.
    - off the record consultation

Morgan Cases
- Morgan I – “the one who decides must hear” (Sec of Agriculture made a decision but did not hear or read any evidence)
  - Held: Party’s right to a full hearing required a personal decision by the agency head (examiner may take evidence which can be shifted and analyzed by competent subordinates.)
  - Rationale: Like a judge, an administrator who takes responsibility for a decision must personally have heard the case - must “consider and appraise the evidence”
  - Note: most cases brush aside claims that the decision-maker was insufficiently familiar with the record.

Morgan II – administrator not required to be physically present at the taking of testimony. Rather that he “dipped into the record from time to time” to get drift, read the parties briefs, and discussed the cases w/ his assistants.
  - Proving a violation of Morgan I: Presumption that the deciding officials have complied with the legal requirements, such as familiarizing themselves with the record. Kansas Faculty.
  - Note: Usually not possible to subject decision-makers to discovery or trial about how they made a decision

Morgan IV – Secretary was questioned about (mental) decision-making methods; This is not favored by most courts
  - Note: Absent strong showing of bad faith/improper behavior, mental processes inquiry must be avoided: Citizens to Preserve Overton Park
    - Only applies if agency fails to explain its decision; if the agency furnishes some explanation, the court should review case based on that explanation. If insufficient, remand to agency for new one, rather than conduct a trial to find out how decision was made.

Morgan II – due process requires the preparation of an intermediate report (ALJ’s report to agency)
  - Held: those going against Gov’t in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of gov’t proposes and to be heard upon its proposals before it issues its final command.
  - later case made clear that due process does not require an intermediate report absence a showing of substantial prejudice from failure to prepare one. NLRB v. Mackay Radio and Telegraph
    - In NJ, held that if an intermediate report is created, the parties have a right to see it and object to it. Mazza v. Cacicchi. (decision must be based exclusively on record)
-APA now says that Administrative opinion always becomes public because intermediate report is part of the record.

-Ballard v. Comm’r of Internal Revenue – (US Tax Ct rule that hearing of certain cases could be assigned to a special trial judge, who prepares an opinion after hearing the case. Tax Court can modify or reject the opinion.) Court held that trial judge’s decision cannot be kept secret; it should be made part of the record.
Separation of Functions – §554(d)
- Administrative process criticized b/c a single agency makes the rules, investigates violations, prosecutes cases, and decides those cases.
  - However, this is the hallmark of the administrative process
  - Promotes efficiency and effectiveness
- Most agencies have internal separation of functions;
  - Persons engaged in adversary conduct on the agency's behalf cannot serve as an administrative decision-maker or furnish off-the-record advice to the decision-makers or supervise persons engaged in decision-making.

Walker v. City of Berkley –
Facts: City employee job terminated; challenged decision as violation of procedural due process. City denied her due process when same staff attorney was city's attorney in federal court and decision maker in post-termination hearing.
Held: same person cannot serve as both decision-maker in administrative process and as the advocate for the party that benefited from the decision in a federal court proceeding involving the same parties and same underlying issue
  - However, prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not have participated in making the determination under review. Goldberg v. Kelly

Withrow v. Larkin – combination of investigative and adjudicative functions does not, without more, constitute a due process violation. However, in Withrow, different people (but same agency) performed the investigative and decision making functions.
  - Investigator can’t talk to the decision maker, but everyone else in agency can

Nightlife Partners v. City of Beverly Hills – (same person served as an advocate, then adversary, and also advisor to the judge). Court held that there was a clear violation of separation of functions – the same person cannot serve as an advocate and then turn around and advise the decision-maker.
- State (PA) Lyness v. State board of Medicine – it is a violation for the board members (agency heads) to serve as both prosecutors and decision makers.
- APA 554(d) and MSAPA (1981) prohibit adversaries (investigators/prosecutors) from serving as adjudicators off the record. But other employees can furnish off-record advice to adjudicators.
  - Under the APA, an ALJ cannot consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.
  - Butz v. Economou – nor may a hearing examiner consult any person or party, including other agency officials, concerning the fact at issue in the hearing, unless on notice and opportunity for all parties to participate.
  - ALJ can probably receive law/policy advice from agency staff members
  - ALJ can’t be supervised by a person engaged in performing adversary functions for the agency.

Exceptions
- Congress exempted initial ratemaking and licensing proceedings from separation of functions (not accused of wrongdoing).
- Principal of necessity – a biased or otherwise disqualified judge can decide a case if there is no legally possible substitute decision-maker
- Rationale: better to have possibly bias decision than no decision at all
- Separation of functions does not apply *personally to agency heads* (can be investigator and participate in decision) – exempt b/c necessary
Bias

-Hard to prove, but if you can, the only thing they’ll do is change the decision maker. It’s not good to bring up because if you lose it does not look good for you.

*Andrews v. Agricultural Labor Relations Board*

**Facts:** ALRB filed complaint against Andrews alleging unfair labor practices arising out of a contested election lost by United Farm Workers. Person appointed to hear the case was an attorney that worked on employment discrimination cases for Mexican Americans. Andrews moved to disqualify.

**Held** – A trier of fact with expressed political or legal views cannot be disqualified on that basis alone, even in controversial cases. **Must show concrete evidence of bias.**

**Rationale:** right to an impartial trier of fact does not mean that the trier must be completely indifferent to the general subject matter before him. **Bias refers to the mental attitude of a judge towards a party, not to any views he may entertain regarding the subject matter.**

- In a political world, appointments are made based on similar ideological beliefs

**Grounds for disqualification**

- **Personal interest** – decision-maker or family has personal (usually financial) stake in the decision. *Tumey v. Ohio*
  - *Ward v. Village of Monroeville* – disqualified a small town mayor from serving as traffic court judge when fines went into city treasury, not mayor’s pocket b/c fines were a significant part of town’s budget (more fines = less taxes).
  - *Marshall v. Jerrico* – sums collected as penalty for child labor law violation returned to agency as reimbursement for costs of enforcement.
    - Held – no bias b/c official was acting in prosecutorial rather than adjudicatory capacity

- **Professional bias** – decision-makers by profession have a pecuniary interest.
  - *Gibson v. Berryhill* – state optometry agency comprised solely of independent optometrists disqualified optometrists who worked for corporations. Court held that board members had a personal pecuniary interest in limiting entry into field of independent optometrists. (adjudicatory)
    - However, optometry board consisting of a majority of independent optometrists not invalid in all cases. *Friedman v. Rogers.* (non-adjudicatory). Outside of a disciplinary context, due process constraints are weaker.

- **Prejudgment or animus.** Actual bias may be of two kinds: prejudgment of facts, or animus (prejudice) against a particular litigant. If either is present, due process requires decision maker to be disqualified
  - **Test** for disqualification is whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. *Cinderella Career and Finishing Schools v. FTC* (agency chair criticized newspapers for accepting ads strongly resembling the ads by Cinderella).
-**Andrews** – ruled that appearance of bias (without proof of actual bias) does not violate due process.
- An ALJ that decides a case against a party is not disqualified from deciding the case again on remand absent showing of concrete bias.

-Exception: Necessity
Ex Parte Contacts – §557(d)

- APA prohibits ex parte communications relevant to the merits of the proceeding b/w an interested person and an agency decision-maker or any other employee who may reasonably be expected to be involved in the decision-making process.

- Interested person: an individual with an interest in the agency proceeding that is greater than that of the general public (PATCO).

- Formal adjudication is supposed to be decided solely on the basis of the record evidence.

- APA §556(e) (“the transcript of testimony and exhibits, together w/ all papers and requests filed in the proceeding, constitutes the exclusive record for decision.”)

- Ex Parte communication = written or oral communication not on the record, of which parties lack notice.

- Does not include status report unless the status report could affect agency’s decision on the merits.

- ALJ can get ex parte advice from other employees on legal issues but CANNOT get advice from any employee on factual issues. §554(d)(1).

- Remedies for Ex Parte Communications

  - Disclosure of the communication and its content. §557(d)(1)(C).

  - Notice to parties and opportunity to respond.

  - The violating party must show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation. §557(d)(1)(D)

  - Improper ex parte communications, even when undisclosed during agency procedures, don’t necessarily void agency decision; Rather, agency proceeding is voidable. PATCO v. FLRA

  - Test: in enforcing this standard, a court must consider whether, as a result of the improper ex parte communications, the agency’s decision-making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.

    - Considerations – gravity of the ex parte communication, whether the contacts may have influenced the agency’s ultimate decision, whether the party making the contacts benefited from the agency’s ultimate decision, whether the contents of the communication where unknown to opposing parties, and whether vacation and remand would serve useful purposes.

-PATCO communications

- Facts: Contact by the Secretary of Transportation

  Held- order was not overturned b/c the discussion of PATCO’s situation was brief, labor leader had not made any threats or promises, and the conversation did not affect the outcome of the case (no prejudice).

  - Court does not like this communication but it did not influence

Facts: Dinner w/ Union Pres who urged the decision maker not to revoke status – interested person, even if not party to case.

  Held- Normally dinner okay b/c they are friends but they discussed merits – improper.

- Court they’re not going to remand- he ruled against PATCO anyway which implies the decision maker was not influenced. They let it go in this instance.
-DC Circuit has made it clear that the ex parte ban in APA §557(d) is **absolute** rule.
- Agency can't make exception to §557(d) no matter how useful that exception may be to the agency’s regulatory mission. *Electric Power Supply Ass’n v. Fed. Energy Regulatory Comm’n*
- “*God Squad*” 9th Cir. Case: President is interested person w/ a lot of influence – no ex parte communications permitted in adjudication (different than in rulemaking where ex parte communication is allowed).
The Role of Political Oversight 557(d)

Pillsbury v. FTC

Facts: FTC went before Congress while they were deciding case. Congress asked chairman how he construes the FTC Act and he said he intended a per se rule. Congress wanted them to use a different rule.

Issue – whether Pillsbury was deprived of due process by improper interference by Congressional committees w/ the decisional process of the FRC while the Pillsbury case was pending before it.

Held: Congressional intrusion into the adjudicative aspects of the FTC is improper and requires remand for a new decision because here there was a “searching examination” into the mental process of the Commission – improper

-Congress can talk about the issue, but not the case

Rule: when 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.

-Note: court was concerned with the right of private litigants to a fair trial, and equally important, with their right to the appearance of impartiality

-Rule codified at §557(d)

-often, inquiries into agency position okay

-In the end, Commission not disqualified b/c enough time had passed and new members on the Commission; but contact still illegal.

-Pillsbury only applies to judicial or quasi-judicial proceedings (formal adjudication). DC Federation of Civic Ass’n v. Volpe.

-Rule does not apply when formal adjudication is on the horizon but not imminent. DCP Farms v. Yeutter. F: Congress wrote a letter saying what he wanted to happen and threatened to introduce legislation. (Pillsbury did not apply because when congressmen wrote letter the matter had not yet reached the point of quasi-judicial proceedings.)

-557(d)(1)(E) might be read to say that anticipation of proceeding is enough, but transparency is important- but it might or might not be ok to use threats (Levin think’s it’s ok, others disagree)

-Levin thinks there’s a transparency interest in being public about statements, but that it’s ok because process is political in nature and you need interchange among branches.

-Informal adjudication

-Even though Pillsbury does not apply, there are still limits on legislative intervention.

-Thus, if a decision-maker relies upon Congressional pressure in making his decision, the decision is arbitrary and capricious.
The Process of Administrative Adjudication

Investigations and Discovery
-Agency must secure massive amounts of info about the industry it regulates.
-When industries don’t comply, it can compel disclosure: “civil investigative demands”
-Key point: agencies need statutory basis other than APA to compel production of information. § 555(c, d)

-Craig v. Bulmash – a subpoena can be enforced where the investigation is for a lawfully authorized purpose, within the power of the legislative body to command. Probable cause is satisfied as long as the subpoenaed documents are relevant to the inquiry.
-An agency’s subpoena to obtain information to investigate in an enforcement proceeding is held to a lesser standard than that for a criminal prosecution.
-Commissioner investigating Bulmash’s alleged failure to pay minimum wage. Law requires employers to maintain records of names, addresses, and wages of all employees.
-4th Amendment satisfied when:
  i) Subpoena is within agency’s authority and jurisdiction
  ii) Terms of subpoena not too vague or indefinite or burdensome
  iii) Seeks information relevant to the investigation
  iv) Agency not acting in bad faith or for unlawful purpose
  v) Info sought is not privileged
-Also no valid 5th Amendment claim.
  i) 5th Amendment can only be invoked where there is a threat of criminal (not civil sanctions)
  ii) Only available to individuals, not corporations
  iii) Can be defeated by grant of immunity
-Agency must go to Court to enforce subpoena. ICC v. Brimson – agency can’t enforce its own subpoena
-Agency not required to give notice to persons investigated when it subpoenas materials from third party even though it will be too late for person investigated to raise defenses. SEC v. Jerry T. O’Brien.
-Privileges apply to agency investigations.
  -attorney-client
  -marital
  -5th Amend privilege NOT applicable – witness can’t refuse to take the stand in admin case
-Physical searches
-when an agency physically inspects or searches a home or business, it must ordinarily secure a search warrant. Marshall v. Barlow’s Inc.
-to obtain an administrative search warrant, the inspector need not establish probably cause to believe a violation has occurred. It is sufficient if the choice of the particular employer to be inspected was based on reasonable and neutral standards (ex. statistical sampling).
  -Burger requires 4 criteria b/f warrantless search –
    (i) substantial gov’t interest;
(ii) unannounced inspections must be necessary to further the regulatory scheme;
(iii) the statute must advise the owner of the periodic inspection program;
(iv) searches must be limited in time, place, and scope.

-No exclusionary rule in administrative law
-evidence that was illegally seized in violation of the 4th Amend. is probably admissible in admin proceedings even if could not be admitted in a criminal proceeding.
-However, some courts believe that evidence must be excluded in admin proceedings if the manner in which it was obtained constituted egregious violations of 4th Amend.
-INS v. Lopez Mendoza – illegally seized evidence can be used in admin procedure to deport

-Discovery
-1981 MSAPA appears to provide normal civil rules of discovery for admin investigations.
-However, APA does not require any form of discovery. Citizens Awareness Network v. US (1st Cir) (Ct upheld NRC’s elimination of discovery and substitution of mandatory disclosure).
Evidence at the Hearing

**Requero v. Teacher Standards and Practices Commission** (Oregon):
- **Facts**: Teacher lost license b/c of sexual misconduct toward students; students’ hearsay testimony introduced but students did not testify and teacher submitted countervailing evidence
- **Rule**: Most federal courts reject residuum rule. Thus, hearsay evidence alone, even if inadmissible in a civil or criminal trial, is capable of being substantial evidence for the basis of a ruling.
- **Held**: Although court could have relied on hearsay evidence for decision, in this case they could not because it was not the ‘appropriate case’
  - **Appropriate case substantial evidence test**: decision rests on substantial evidence a reasonable trier of fact could reach the conclusion that was reached
  - here, contradictory testimony and how easy it would have been to bring in more witnesses made it fail the test

**Residuum Rule**: agency decision must be supported by some evidence that would be admissible in a civil or criminal trial.
- Residuum rule still accepted by most states
- **APA §556(d) and 1981 MSAPA** – no order in a formal adjudication may be issued that’s not supported by reliable, probative, and substantial evidence.
  - Residuum Rule rejected in federal courts- only need substantial evidence test
  - Rationale: hearsay will be less convincing to a trier of fact than first hand evidence anyway, so leave it to trier of fact

**Burden of Proof and Standard of Review**
- proponent must discharge its burden of proof by preponderance of the evidence.
- burden of proof to establish an exception from a regulatory statute is on the party asserting that the exception exists. **NLRB v. Kentucky River Community Care Inc.**
- Generally, agency findings of fact are reviewed for substantial evidence.

**Hearsay**
- **Olabanji v. INS** – 5th Cir. Held that reliance on affidavit of a witness violated due process b/c INS could have subpoenaed him to testify and be subject to cross examination.
- **Ezeagwuna v. Ashcroft** – State Dept. official’s letter re fraudulent asylum documents (based on info from an embassy official he never met) was neither reliable nor trustworthy and contained multiple hearsay. Reliance on the letter was a violation of due process.

In administrative hearings, administrative judges are expected to take an active role in developing the record; especially important when one party is not represented by counsel.

**Open v. Closed Hearings**
- **Detroit Free press v. Ashcroft** – 6th Cir. Held that deportation hearings are formal and adversarial in nature and thus must be kept open to public
  - in response to Creppy memo
  - Court held further that decision to close hearings must be made on a case-by-case basis and the denial of an open trial must be supported by findings sufficiently specific that a reviewing court could determine whether the closure order was properly entered.
- **North Jersey Media Group v. Ashcroft** – 3rd Circuit decline to follow *Detroit Free Press* based on concerns about terrorism. **Held:** no First Amendment right of access to deportation hearings closed by Creppy memo.

Cross Examination

- APA requires that in adjudication, party is entitled to conduct such cross examination as may be required for a full and true disclosure of facts. 556(d).

- **Citizen's Awareness Network v. US** – NRC rule dispensed with cross examination rights; party seeking cross-examination must first seek permission from hearing officer and establish that it is necessary.  
  - 1st Cir. Upheld that rule as equivalent to the APA standard
  - APA requires that cross examination be available when required for full and true disclosure of the facts.
  - Rule okay though b/c discretionary, rather than complete abolishment of cross examination. But must be allowed when necessary for full disclosure of facts.
Official Notice §556(e)

-Agencies may take official notice of matters, including personal knowledge of the fact-finders, this is more than most courts (must give other party chance to dispute)

-Rationale: expertise of agencies, general/broad policy considerations (efficiency, etc)

-Levin “clear cut” rule: official notice requires opportunity to be heard except when absolutely nobody could think otherwise

-not unusual for agencies to use journals, other side should know in case they rebut

Franz v. Board of Medical Quality Assurance – agency record must provide as complete a basis for judicial review as due diligence makes feasible, including any technical matter necessary to enable a lay judge to determine whether an agency’s decision has adequate support (when info beyond lay knowledge, must provide enough info for evaluation by lay judge).

 Facts: Hospital suspended doc and gave him probation for ‘gross negligence’ no factual dispute, but standards for regular practice is not clear on the record. Court said it’s not ok

-Held: when in an adjudication an agency intends to rely on members’ expertise to resolve legislative fact issues, it must be specifically identified, the agency must notify the parties and provide an opportunity for rebuttal (rebuttal – APA §556(e))

-notification must be complete & specific enough to give effective opportunity for rebuttal.

-It must also help build a record adequate for meaningful judicial review.

-Notification should include brief statement explaining the opinion held by the adjudicative body, reasons for the opinion, and the members’ qualifications to hold it.

-Thus, court can’t just say they have enough knowledge/expertise without giving a chance for the other side to prove otherwise.

-Board of experts not required to summon expert opinions.

-Levin: Ct unlikely to uphold agency decision based on official notice in face of strong case presented to the contrary.

-Rebutting officially noticed evidence

Castillo-Villagra v. INS

Held: legislative facts that are non-disputable – agency need not provide an opportunity for rebuttal

-Legislative facts that are disputable –agency must give notice and offer opportunity to respond

-Adjudicative facts – must give notice and opportunity to respond.

-Most cases hold that the opportunity to rebut officially noticed facts can occur in the form of a motion to reopen the proceedings for further evidence.

-When an agency relies on background knowledge and experience to evaluate evidence, it is not taking official notice of anything and need not specially notify the parties and afford an opportunity to contest the evaluation.

-hard distinction to draw

-One way to read Franz: requires agency to provide opportunity for rebuttal in both
Findings and Reasons – APA §§ 555(e), 557(c)(3)(a)

- In Constitutionally required hearings, the decision-maker should state the reasons for his determination and indicate the reasons he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. *Goldberg v. Kelly.*

**CIBA-Geigy Corp (NJ)**

**Facts:** Department of Environmental Protection (DEP) renewed a permit allowing D to discharge chemically-treated stuff into ocean.

**Held:** court held that respondent DEP never made any factual finding that the discharge complied with Ocean Discharge Criteria

- An agency must set forth findings of fact if it acts in a quasi-judicial capacity.

**Rationale:** So people know how the decision was reached

- can decide whether it was arbitrary, capricious or if extralegal considerations drove the decision
- it is more likely that decision will be carefully considered and thus less likely that discretion will be abused solely to appease political factors
- provides for regularity, predictably, etc.

- Judicial review: No matter how great a deference the court is obliged to accord the administrative determination which it is being called upon to review, it has no capacity to review at all unless there is some kind of reasonable factual record developed by the administrative agency and the agency has stated its reasons grounded in that record for its action.

  - This is a problem for judicial review, b/c there is nothing in the record that indicates how DEP concluded that Ciba-Geigy’s permit complied with the EPA’s Ocean Discharge Criteria Regulations.

- the record did not indicate clearly how the permit comported with New Jersey’s anti-degradation policy [in the state’s water quality regulations].

- 4th Circuit w/ strict approach in *AT & T Wireless v. Virginia Beach* – letter w/ summary of case, meeting minutes, votes of council, and stamp “DENIED” constituted a “writing.”

**Post-hoc explanations are usually not permitted (met w/ suspicion and disfavor). *Overton Park.***

- No particular reason to believe post-hoc reasons are the ones they based their decisions on.

- Agencies have an incentive to give the explanations the first time.

- Even though there’s nothing in the rule that says you have to explain yourself explicitly, procedurally you have to do it for appellate reasons.

- it is more likely that decision will be carefully considered and thus less likely that discretion will be abused solely to appease political factors or arbitrarily

- remand back to agency for findings if findings insufficient
Equitable Estoppel

- **def** – If A’s statement or conduct reasonably induces B’s detrimental reliance, A will not be permitted to act inconsistently with its statement or conduct.

-Foote’s Dixie Dandy Inc v. McHenry (Ark): In some situations a state may be estopped by the actions of its agents (here, P would have been absolutely entitled to a tax status but P was told he did not have to file a form so P didn’t, but if P did he would have been entitled to the tax status anyway)

- estoppel is not an action that should be readily available against the state, but neither is it a defense that should never be available.

Gestuvo v. INS (Dist. Ct) recognized estoppel against gov’t when certain essential elements were present:

- the party to be estopped must know the facts
- he must intend that his conduct should be acted on or must so act that the party asserting estoppel had a right to believe it so intended
- the latter must be ignorant of the true facts, and
- he must rely on the former’s conduct to his injury

-Ark Court finds that the circumstances of the case warrant equitable estoppel

-Supreme Court has never accepted an estoppel claim and has rejected them on numerous occasions.

- **Rationale**: This way what is illegal could be made to be legal by low level gov’t employees, could be disincentive for agencies to give advise.

- Some states are drifting away, but SC is holding on strong. Someday in future it might change.

-Office of Personnel Management v. Richmond – Supreme Court implied that it is unlikely to uphold a claim for equitable estoppel against the government in any circumstances but did not totally slam the door.

-Here, former gov’t employee retired on disability considering whether to take a job; asks personnel office whether if he takes job, he can still get benefits. Orally assured that could still get benefits and given brochure confirming interpretation, so takes job. However, four years prior, Congress changed law, person didn’t know and brochure not updated and no longer can get benefits.

- To allow payment here would be payment not authorized by Congress; don’t want to enable the exec branch to undo laws passed by Congress. However, Ct didn’t decide case on that basis. Rather, said no benefits b/c Constitution says no money shall be drawn from Treasury except consequence of appropriations made by law.

- Heckler v. Community Health Services – Court denied equitable estoppel but stated some of the basic elements of estoppel:

- written advice
- from the government itself, rather than an intermediary
  - here, info from intermediary rather than agency itself so no estoppel
- showing a detrimental reliance (ex. Loss of a legal right or any adverse change in status).

-Government often gives advice – if the government could be estopped by mistaken advice, agencies would be deterred from giving such advice and could open floodgates to litigation.

- Occasionally, without invoking the language of estoppel, federal courts have found ways to protect people who have been misled by government.
- Party can rely on a declaratory order w/o concern
- declaratory order – administrative equivalent of judicial declaratory judgments.
- binds all parties.
Rulemaking Procedures

- Importance of Rulemaking
  - Advantages over adjudication
    - greater participation by all affected parties
    - more appropriate procedure to resolve general questions
    - prospective application
    - uniformity
    - political input
    - agency can set agenda
    - more efficient for agency
    - easier for affected people to research
    - executive and legislative oversight
  - Disadvantages as compared to adjudication
    - rules are often over or under inclusive
    - adjudication allows agencies to make decisions where it can observe the actual operation of the law, rather than making decisions in the abstract.
    - adjudication allows agencies to deal with new and unexpected problems
    - adjudication allows for clarification of ambiguities of rules

Definition of “Rule”

-Federal
  - Defines “rule” in §551(4) – whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency, including rates, wages, etc.
    - sloppy definition: “future affect” and “particular”
      - Can have past affect if it’s interpretive
      - Can’t “particularly” apply unless it’s phrased generally
  - Rule making – agency action which regulates the future conduct of either groups of persons or a single person
    - legislative in nature
    - operates in the future
    - primarily concerned with policy considerations
    - applies in general situations
  - “Adjudication” is the agency’s process for formulating an order, a final disposition of a matter other than rule making but including licensing.
    - Courts almost always presume that agency has rulemaking power even if only relied on adjudication in the past. Nat’l Petroleum Refiners v. FTC

-State: better definition
  - 1981 MSAPA: rule mans the whole or part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy or (ii) the organization, procedure, or practice requirements of an agency.
    - reading federal definition without “and future affect” and without “particular”
    - some states define rule more narrowly
Determining whether rulemaking or adjudication

-Cunningham v. Dept. of Civil Service:
Facts: Two P’s demoted from their jobs. By statute, both were entitled to priority for a new job if it was “comparable” to their old job. Both denied job via letter stating that jobs not comparable.
Issue: whether they are entitled to a hearing on whether the jobs were “comparable.”
Held: a hearing is mandated in this case. There are contested adjudicative facts.

Anaconda v. Ruckelshaus
-Even if rule only affects a single entity, hearing not necessarily required.
  “The fact that Anaconda alone is involved is not conclusive on the question as to whether the hearing should be adjudicatory, for there are many other interested parties and groups who are affected and entitled to be heard.”
-551(4) says: Agency’s statement of general or particular applicable designed to interpret implement law and policy in future

Results of Rulemaking label
Bi-Metalic – due process not required in rulemaking
  -However, if pl. not entitled to formal adjudication, he may have more rights if the proceeding is deemed to be rulemaking than informal adjudication

Prospectivity and Retroactivity
  -Rules normally establish law or policy for the future; orders generally concern past events and have a retroactive effect.
  -Bowen v. Georgetown Hospital:
    -Facts: HHS wanted to apply a rule retroactively to get financial reimbursements.
    -Held: SC invalidated retroactive portion of a rule promulgated by HHS.
    -Rationale: Retroactivity not favored so rules will not be construed to have retroactive effect unless their language requires the result.
      -It would look more like an ‘order’ than a rule because it would lack notice and comment rulemaking.
    -Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.
      -Here, secretary had no authority to promulgate retroactive rules.
    -Note: Courts have given retroactive effect to interpretive rules
    -Scalia says that if something looks like a rule but has a retroactive affect than it’s ok without public comment, it will be an order
      -that’s not good because retroactive liability has bad affects
-Initiation of Rulemaking (Notice and Comment- informal rulemaking)

-Agency must provide adequate notice of a proposed rule to affected parties (§553(d)).

-Notice:
  -including a statement of the time, place, and nature of the public rulemaking proceedings
  -reference to the legal authority under which the rule is proposed
  -Agency can add supporting documentation for a final rule to the record, but it should only supplement or confirm existing data.
  -either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Portland Cement.*
  -Rationale: allows interested parties to comment meaningfully

-Final rule published in Federal Register. APA §552(a)(1).

Agency must give parties a reasonable time to respond (in writing) after given notice. §553(c)

-CT Light and Power (DC Cir) – 30 days was not an unreasonable period given the industry’s familiarity with the issues
-Fla. Power and Light (DC Cir) – 15 day period sufficient given the statutory deadline the agency faced and the fact that the agency received 61 comments and altered the rule according to comments.

Chocolate Manuf. Ass’n v. Block (4th Cir).

Facts: USDA promulgated rule dealing w/ appropriate levels of sugar, salt, and fat in foods. Notice talked about lowering sugar but never mentioned chocolate milk. Final rule included chocolate milk as non-recommended food and removed it from program. Pl. challenged rule.

-Held: notice was inadequate to provoke them to comment, it would have been easy to plainly state the issue
-Rationale: Court did not accept argument: When they stated some but not all it should have been enough to have general notice.
  -it would have been easy to specifically say the issue
  -idea of congressional mandate is to address issues that have been ok until now

-Logical Outgrowth Test: notice is adequate if the changes in the original plan are in character w/ the original scheme and the final rule is a logical outgrowth of the notice and comments already given.

1. agency can promulgate a final rule that differs from its proposal but the agency does not have carte blanche to establish a rule contrary to its original proposal just b/c it receives a suggestion to do so.
   -Agency can start broad so long as it’s a natural outgrowth
2. what’s so good about notice
   -agency will be educated by comments it receives
   -fair to have chance to comment if gov’t plans to change something
   -learn about various political support
   -higher quality result, more informed decision, more political acceptable
3. an interested party must be alerted by the notice to the possibility of the changes eventually adopted from the comments.
   -Comments don’t give notice; agency itself must give notice
4. Most cases require a showing of prejudice
Some states (Iowa, VA) apply logical outgrowth test, while others make them start over again without proper notice. MSAPA uses “substantially different test”

Causation - After notice and comment, who can put things in the record?

*Air Transport Ass’n v. CAB* (DC Cir) – petitioner said agency was prejudice. Agency relied on staff studies that had been placed in public docket at the end of the comment period

-**Issue**: should challenger be required to explain why the lack of disclosure was prejudicial?
-**Held**: court upheld the rule against procedural challenge because petitioner did not explain what it would have said had it been given earlier access to staff studies… However:

  *Shell Oil Co v. EPA* (DC Cir): court held that the challenger’s obligation to show prejudice did not apply to a violation of the logical outgrowth principal. It’s up to agency to show that comments on changes it made between proposed and final rules would have been useless.

  -Courts have been receptive to giving a meaningful chance to look at data

*Richards v. Commissioner* - How informative must a rulemaking notice be? See 553(b)(3) (either terms or substance of proposed rule). Here, all you have to do is call office and ask for a copy, it was enough.

*E-rulemaking* - Agencies now post notice on the web, but get hundreds of responses - technology gone wild?
Public Participation

- Informal Rulemaking
  - few requirements
  - agency is free to limit public participation to written submissions unless the agency determines otherwise or some species of law requires more (oral hearings)
    - often agencies exercise discretion to conduct oral hearings
    - effective, resolves questions
  - note: some people excluded from process b/c lack of money, education, and resources, which can undermine rulemaking.
  - growth of E-rulemaking

Formal Rulemaking – APA §§ 556, 557
- 553(c): when rules are required by statute to be made on the record after opportunity of an agency hearing, sections 556, 557 of this title are applicable.
- Ex parte communications (557(d)) are prohibited, however the rights of private parties are much more detailed and extensive in formal rulemaking than in informal or hybrid rulemaking
- requires opportunity for trial type hearing, including right to present oral evidence, conduct cross examination and submit rebuttal evidence.
  **US v. Fla. East Coast Railway**: “hearing on the record” language necessary to trigger formal rulemaking; otherwise agency not required to go beyond informal procedures in §553.
- Facts: ICC wanted to fix problem by increasing box car rental rates. They conducted rule making proceeding to set the rates. Some companies thought they didn’t get a full hearing.
  Held: simply having “after hearing” written is insufficient to trigger formal rulemaking. Must have same words as 553(c)
    - formal rulemaking has almost disappeared – very inefficient and time-consuming (years)

-Hybrid Rulemaking
- statutes instruct specific agencies to make rules using procedures that are somewhat more elaborate than APA informal rulemaking (somewhere b/w §553 and §557)
  - For example, statute may require legislative hearing and also opportunity for interested persons to question or cross-examine opposing witnesses (**VT Yankee**).
  - hybrid rulemaking led to debate in DC circuit over whether procedure rather than substance should be emphasized in judicial review of rulemaking
    - **Bazelon**: courts should not scrutinize technical merits of decision but should establish decision process which assures a reasoned decision
    - **Leventhal**: better no judicial review at all than one without substance of judicial confirmation that agency is not acting unreasonably
  **Vermont Yankee v. NRDC** (SC):
  Facts: Corporation contended that the rulemaking proceedings (to deal with the question of environmental effects associated with the uranium fuel cycle) provided an adequate database for the regulation adopted. Therefore, the...
adoption of the resultant administrative rule and the decision to grant petitioner's license were statutorily valid.

**Held:** SC said DC cir improperly intruded into agency's decision making process by denying agency the right to exercise administrative discretion in deciding how it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence.

- Courts can't impose extra procedures in rulemaking beyond the APA §553 absent clear Congressional intent
  - **Held:** Court can require the agency to come up with a better record but cannot (because of Vermont) tell them how to get that record. Agency can figure out how, but court can use substantive review powers.
- Administrative agencies should be free to fashion their own rules of procedures absent constitutional constraints of "extremely compelling circumstances."
- 'compromise': Courts adopted the APA and congress specified in §553 what the procedures would be
  - Although courts are still interested in making rules are reasonable, they don't have much procedural power to give agencies more possibilities
- Court can still use APA to give a "hard look" and find something "arbitrary and capricious."
  - Court has substantive review powers if it insists
- Courts also apply this principle (lack of procedural power) to adjudication as well as rulemaking.
Procedural Fairness in Rulemaking

-Role of Agency Heads-

- **Morgan** principle (he who decides hears) not directly apply

- APA and MSAPAs specifically provide that agency decision-makers must actually consider written and oral submissions received in course of the rulemaking proceeding. §553(c).

- However, the requirement does not necessarily mean that the agency head must **personally** preside at an oral proceeding or personally read all written submissions.

- Agency head has lots to worry about other than this

- 1981 **MSAPA** explicitly provides that others may preside at oral rulemaking proceedings and prepare summaries for subsequent personal consideration by the agency head.

- Agency head must understand both sides’ arguments – to make an informed decision

-Ex parte contacts

- Formal rulemaking: Ex parte contacts are forbidden §557(d).
  - if they occur agency must disclose the substance on the public record

- Informal rulemaking: Not forbidden
  - assumption was that federal APA neither banned ex parte communications nor required the inclusion of such communications in the record.

**HBO v. FCC** (DC Cir) *(BEFORE VT Yankee, Sierra Club)* modifies this
- **Held**: Communications received prior to issuance of a formal notice of rulemaking do not have to be put on the public file, unless they form the basis for the agency’s action.
  - **Problem**: assumes that court will have the record on file but might not.
  - **Problem**: can/should lobbyists from competing interest groups lobby?

- Further held: Once notice of proposed rulemaking has been issued, any agency official or employee who is or may reasonably be expected to be involved in the decision, should refuse to discuss any matters relating to the disposition of the proceeding with any interest person. If Ex parte contacts occur, the written document or a summary of the oral communication must be placed in the public file.
  - **rationale**: useful for judicial review
  - court concerned with maintaining a full record – record will not reflect an agency’s actual basis of decision unless it contains all ex parte communications

**Sierra Club v. Costle** (DC Cir) – *(Modifies HBO)*
- **Held**: ex parte communications may be desirable in informal rulemaking but all documents or communications that are of central relevance must be disclosed.

- **Rationale**: politics have a large role to play in rulemaking, and that’s ok

- **Rule**: to overturn rule based on Congressional pressure, must show:
  - content of the pressure on Secretary is designed to force him to decide facts not made relevant by Congress in applicable statute
-secretary’s determination must be affected by those extraneous considerations

-Held: communication w/ Pres must be disclosed if they are basis for decision
  -Rationale: Pres should be able to talk to agencies openly
  -Note: when there are only 2 stakeholders
    -it makes more sense to ban ex parte communications because it’s more like adjudication

-Prejudgment
  \textit{ANA v. FTC} (DC Cir).
  -Rule: \textbf{Clear and Convincing Test}: An agency member may be disqualified from a proceeding when there is a clear and convincing showing that he has an \textbf{unalterably closed mind} on matters critical to the disposition of the rulemaking.

-Facts: FTC proposed rule banning TV ads for any product directed to children too young to understand the selling purpose of the ad. Chairman of FTC had written and spoken extensively in a variety of settings about children’s television and advertisements.
  -Dist Court said he prejudged (Cir Ct. Dissent said he acted as an advocate, and did not just state his opinion)
  -Held: Chairman not disqualified b/c he remained free, in theory and reality, to change his mind upon consideration of presentations made by those who would be affected.
  -Rationale: impartial does not mean uninformed, unthinking, or inarticulate.
    -mere discussion of policy or advocacy on legal question insufficient
    -adverse to proper rulemaking to disallow him to speak his mind
    -agency heads will try to support certain policy, court did not want them to feel threatened from doing so
  -Dissent: commissioner more than expressed opinion, he became an advocate
  -Note: much more lenient than standard for adjudication (\textit{Cinderella})
    -rulemaking process requires more debate than adjudicative
Statement of basis and purpose
-APA requires a concise general statement of basis and purpose of agency rule
  - Auto Parts and Accessories v. Boyd (DC Cir): only major issues of policy need be addressed in a statement of basis and purpose.
    - Problem: hard to know what court will consider important
    - Federal Courts ask whether statement of basis and purpose is sufficient to prevent rule from being arbitrary and capricious.
  - Purpose is to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.
    - Agency must respond only to arguments that are significant/material
  - Rationale: it gives agency incentive to think carefully about policies
  - State: many permit agencies to issue rules w/o any written explanation.

California Hotel & Motel Ass’n v. Industrial Welfare Comm’n. (SC CA)
Held: Rule invalid because respondent did not include an adequate statement of basis to support the order that fixed wages, hours, and working conditions for the public housekeeping industry.

Rationale for statement of basis and purpose:
- facilitates meaningful judicial review of agency action
  - Judicial review for arbitrary/capricious (hard look standard) makes it a de facto requirement of a substantial statement of finding regardless of what legislator said or not in APA
- Subjects the agency, its decision-making processes, and its decision to more informed scrutiny by the Legislature, and the regulated public, lobbying, and public interests groups, the media, and the citizenry at large.
  - Synthesizing their views serves to enhance the process
- Induces agency action that is reasonable, rather than arbitrary, capricious, or lacking in evidentiary support
- Introduces an element of predictability into the administrative process so public can shape its conduct accordingly
- Stimulates public confidence in agency action by promoting both the reality and the appearance of rational decision-making in government.
- Most scholars agree there should be statement, but don’t know how detailed
- Professor Frohnmayer (Utah) Does not think agency should have to make statement
  - It takes too much effort to get everyone to agree on one rationale
- Chenery Doctrine: if a rule is challenged in court as arbitrary and capricious, the court normally will use the agency’s contemporaneously stated reasoning as the basis for resolving the challenge.
  - Incentive for agency to make sure that its statement of basis and purpose contain a full account of its justifications for adopting a rule
  - Post-hoc rationalizations are strongly disfavored
Issuance and Publication

- Rules are required to be published and are normally not effective until a specified period after their publication (although many going online now too)
  - Important b/c it facilitates easy public access to rules’ contents
  - FRA requires the Federal Register to be published every federal working day, which includes all rules of general applicability and legal effect and notices of proposed rulemaking.
- Under Federal APA, an agency rule becomes effective no sooner than 30 days following publication.

Regulatory Analysis

- Regulatory analysis is an intensive, formal examination by an agency of the merits of a proposed rule.
  - Rationale: intended to involve a more detailed and systematic assessment than is inherent in the ordinary process of notice-and-comment rulemaking.
    - Regulatory analyses can aid careful consideration of the desirability of particular rules by structuring agency consideration of their costs and benefits, their advantages and disadvantages, and the various alternatives available.

- Federal: a series of (Presidential) executive orders have mandated that executive branch agencies engage in cost-benefit analysis.
  - Rule: (executive order 12866- Clinton and GWB- softer) required for “significant” regulatory action – any regulatory action that is likely to result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.
    - Good policy: tax payers will be more satisfied because things will be more cost-effective, agency may be indifferent to costs
    - Bad policy: alleged discrimination (and other ‘benefits’) cannot be really quantified
- Under regular rulemaking notice and comments they have to do a lot of this anyway through responding to the comments in your statement of purpose
- In mid 90s Sen. Dole wanted to subject cost-benefit test more often
  - got a lot of business support
  - opposition from environmental law
  - democrat senate filibuster got over this issue

- Not reviewable by court
  - Court can still review for arbitrary/capricious as a backdoor to regulate cost-benefit
  - Scholars think too much impacts statements, it’s just politics (not reviewable)

State: “by request approach” regulatory analysis is triggered on request of certain designated persons (state can choose: governor, 300 citizens, city, etc)
  - Problem: gives too much control: power to make the agency to do the analysis is a form of power, can be a tool of obstruction (costs)

Methodist hospitals of Dallas v. Texas Industrial Board- By statute it was required to file a “public benefit-cost” note. Here they gave no numbers. Legislature sometimes require this in a places it’s not really justified. Texas court responded by upholding a boiler plate and letting it go.
  - Federal level, no judicial review.
Rules As Part of the Agency Policymaking Process

-Rulemaking Exemptions – APA §553 (Rationale: notice and comment is time consuming and expensive, they are subject to judicial review)

-Good Cause exemption §553(b)(3)(B)
-Federal and state APAs contain exemptions providing that notice and comment proceedings may be omitted in particular circumstances for good cause.
-Good cause = situations where it would be unnecessary, impracticable or contrary to the public interest for the agency to follow them

Example: a rule that makes a “technical correction” by reinstating a rule that was earlier dropped by mistake in a recodification of an agency’s regulations, OR if rule is minor and technical so that most people don’t care, OR taking things off the books that are no longer relevant.

-Public comment unnecessary where the regency has absolutely no discretion about the comments of its rule, as where the task is merely to make a mathematical calculation or ascertain an objective fact.

-Rules designed to meet a serious health or safety problem, or some other risk of irreparable harm, often qualify for exemption on the basis of impracticability or contrary to the public interest.

-However, pursuant to policy of narrow construction of the exemption, cts sometimes refuse to accept an agency’s assertion of urgency at face value.

-Courts prefer notice-and-comment because of all the benefits it has

-Findings: Agency must make explicit finding at the time of issuance that good cause exists and must give reasons for the finding.

-No time limit: for good cause agency may dispense of the normal requirement that a rule may not become effective until 30 days after is issuance.

-Direct/final rulemaking: When an agency plans on relying upon the good cause exemption, it should issue a rule using direct and final rulemaking.

-Streamlined variation of the normal procedure used for issuing totally uncontroversial rules

-Process: agency publishes the rule and announces that if no adverse comments are received w/in a specified time period, the rule will become effective as of a specified later date. If even a single adverse comment is received, the agency w/draws the rule and republishes it as a proposed rule under normal notice-and-comment procedure.

-Interim-Final Rules: when agency adopts rule in reliance on impracticable or public interest prongs of good cause exemption, it should require comments on the rule after it becomes effective and perhaps change or rescind rule after considering comments.
Direct-Final Rules (ACA Recommendation): agency adopts rule; people have 30 days to object; if objections are received, the rule undergoes normal notice and comment procedures (unnecessary exemption).

American Academy of Pediatrics v. Heckler – Sec of DHS made a rule that said must be a notice in room that if here is discrimination call this #. Rule issued without notice-comment. Judge said it was too hasty because they did not consider some of the practical problems on hospitals (notice and comment have an important role to play).

Procedural Rules exemption—§ 553(b)(A)

Rule: rules of agency organization, procedure, or practice are exempted from usual notice and comment procedures.

-no similar exemption in MSAPAs

US Dept. of Labor v. Kast Metals Corp. (5th Cir):
Facts: Corp challenged warrant since rule unlawfully issued under exemption
Held: Rule is lawful because it did not have a substantial impact within the community so it was procedural not substantive
Before inspecting a factory for unsafe working conditions, OSHA must secure a warrant

Rule: (Substantial Impact Test) when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or products of that industry, notice and opportunity for comment should first be provided.

-Courts must look beyond the label of “procedural” to determine whether a rule is of the type Congress thought appropriate for public participation.
-An agency rule that modifies substantive rights and interests can only be nominally procedural and the exemption for such rules of agency procedure cannot apply.
-A rule is not procedural if it departs from existing practice and has a substantial impact on the regulated industry. Brown Express.

Chamber of Commerce v. US – Court found that a directive that required employers to go beyond mere compliance with the Act had a substantive component and thus not a procedural rule. (Directive ordered that workplaces w/ worst records would be targeted for inspection but OSHA would forgo inspections if employer enrolled in self-inspection program).

DC Cir test: (mixed success) court inquires more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior. American Hospital Ass’n v. Bowen.

-hard test to implement.
-Air Transportation v. Departement of Transportation (DC Cir)
-Facts: FAA had a massive overhaul of all their procedural rules
-Held: Should have had notice-comment because rules encoded a substantive value judgment on substantial rights.

Note: there is some discomfort with procedural rule exemptions
-reason: these rules could be made under other exemption. Public input might be important on procedural matters
-counter: agency should best understand how to run things

State: MSAPA does not have procedural rule exemption
-Exempted Subject Matter -- §553(a)
-Proprietary matters – rules relating to public property, loans, grants, benefits, or contracts, are excluded from notice and comment procedure and effective date and right to petition.
-Ex. Good cause was applicable to post 9/11- BUT instead they notified all airports with licenses that their individual licenses (Ks) were being modified. So FAA revised safety practices without changing regs at all.
-agency management and personnel
-military and foreign affairs functions
-narrowly read exception – Independent Guard Ass'n v. O'Leary – rule prohibiting any civilian that used drugs from guarding nuclear weapons found not to involve a military function (must be direct military function)
-Even DOD has concluded that congress may have gone overboard from exempting military from notice and comment, so they do it voluntarily. Notice and comment is generally a good thing.
Nonlegislative Rules

-Legislative rules: NO EXEMPTION
-Rules issued by an agency pursuant to an express or implied grant of authority to issue rules with the force of law
-need notice and comment
-failure to comply would be violation of law
-limiting effect on discretion of complying party
-Because they can directly alter the rights and obligations of citizens, they are often considered to be the most important type of agency rules.
-bind private persons; can extinguish citizens’ rights to be heard on the issue
-also bind the issuing agency

Non-legislative rules/Guidance Documents
-Guidance documents – rules that don’t have the force of law
-not automatically binding upon agencies or citizens
-issues of agency discretion
-exempt from usual notice and comment procedures
-Note: sometimes if it “suggests” something mid-level workers will treat it like a rule anyway
-agencies sometimes say “this creates no rights…”
-Policy: Don’t want to disincentive to use guidance documents. We want public to know what the agency is thinking
-BALANCE with: if it’s legally binding, should have a chance to be heard in the beginning through notice-comment, rather than end.
-Most reasonable way to draw the line is whether the person has a chance to challenge it later.
-Some courts have held that interpretive rule is invalid if it is inconsistent with a prior interpretive rule and require notice and comment rulemaking Alaska Professional Hunders Ass’n v. FAA.
-generates reliance, but most scholars disagree with holding
-If you make it hard for them to issue these rules than agency is less likely to issue them. Agency pays penalty for issuing without soliciting notice-comment.

Policy statements
-Form of non-legislative rule: can consider them but not legally binding
-Notice and comment not required for general statements of policy.
-Policy: agencies put out thousands of these and need to balance rule so that we don’t create disincentive to agencies to put out guidance documents Mada-Luna v. Fitzpatrick (9th Cir): 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 free to exercise discretion to follow or not follow the announced policy in an individual case.
-Held: directive was a statement of policy b/c it operated only prospectively and did not establish a binding norm that would limit the director’s discretion.
-9th Cir rejects the substantial impact test as a basis for applying the nonlegislative rules exemption
-Held: If 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.

- **CNI v. Young** (DC Cir.): administrative pronouncement that only binds the agency, not members of the public is binding on the agency.

- **McLouth Steel Products** - Binding effects in practice - Court said that EPA was invalidly treating their agency model as a legislative rule.

- CNI expanded in **CropLife America v. EPA** – Court found that policy statement in a press release was binding given its unequivocal language.

- **Alaska Professional Hunters v. FAA** – inconsistent with a prior interpretive rule so change in position can only be accomplished through notice-comment
  - generates reliance, but most scholars disagree with holding

- **Policy statement is distinguished from legislative rule**
  - although a policy statement can’t be treated as binding, agency can refer to it even though it is not bound by it.
  - if you must consider factors in a ways such that failure to do that would be a violation of law, that’s closer a legislative rule.

- **State:** 1/2 states have no exemption for guidance documents without complying with rulemaking procedure

- **Interpretive rules**

  - **Hoctor v. USDA** (7th Cir):
    - **Facts:** internal memo requiring all dangerous animals to be in 8ft high fence
    - **Held:** when Cong. authorizes agency to create standards, it is delegating legislative authority, rather than setting forth a standard which the agency can particularize through interpretation. **If a rule promulgated through such delegation is intended to bind (rather than be a tentative statement of the agency’s view), notice and comment is required.**
    - **Rationale:** you should get a chance to challenge it at some stage and if not in the beginning, than at a later stage
      - Admin rules are important because agencies are experts and it’s subject to judicial review anyway, and rulemaking is expensive
      - also do not want to give disincentive to agencies to create guidance documents because they’re helpful
    - Rules w/ a numerical component not usually interpretive; here, 8ft appears to be an arbitrary choice which cannot be derived from a process of interpretation

  - **Rule:** Court can assume that an agency intended to use legislative rulemaking authority where, in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate.

  - a rule is plainly not legislative if the agency has no legislative rulemaking authority at all w/ respect to the subject area of the rule.

- **A guideline or interpretive rule that is inconsistent w/the regulation it purports to interpret is invalid; must go through notice and comment rulemaking.**

  - **Guernsey; National Family Planning** in determining whether something is an interpretive rule, some courts ask **whether the agency intended the rule to establish a binding norm.** If so, rule invalid b/c not enacted w/ notice and comment procedures. Expansion of the “binding effect” test generally used for statements of policy.
Some courts have held that an interpretive rule is invalid if it is inconsistent with a prior interpretive rule and require notice and comment rulemaking. However, most scholars disagree with holding interpretive rules to the same standard as rulemaking that generates reliance.
Required Rulemaking

- Courts generally reluctant to interfere w/ agency’s choice of lawmaking procedures
- **SEC v. Chenery:** agency’s discretion to decide whether to make rule or adjudicate, subject to few exceptions
- **NLRB v. Wyman-Gordon Co** (plurality opinion)

**Facts:** Board relied upon new rule developed in prior case to bind party in subsequent case. *Excelsior* case created a requirement they treated as a rule

**Held:** an agency may develop a new policy through adjudication, but it must give subsequent individuals a right to be heard on the question of whether the rule should be modified or abandoned.

- Might argue that rulemaking is better, more benefits
- can cite to precedent but it’s not conclusive
- Here, the company did have to comply because board made adjudicative order in previous case.
- However, here, this was an order thru valid adjudication.

**NLRB v. Bell Aerospace**

**Facts:** Agency certified bargaining unit of Bell’s buyers that under previous Board policy, would have been regarded as “managerial employees” who could not be given such rights. Co argued that significant policy change should have been made in rulemaking rather than individual adjudication.

**Held:** Pursuant to *Chenery*, Board’s preference for adjudication deserved great weight. It’s agency’s discretion to use adjudication or rulemaking

- Benefits of Adjudicative process might be better for agency so they can keep options open, agency might want to have narrow holdings to not expose them to political dangers, complex situations not for rulemaking

**Limits:** When would the Board’s lawmaking by adjudication be impermissible?

**Mercy Hospital v. Local 250:** Board announced a policy that registered nurses at nonprofit hospitals may always be represented by a separate bargaining unit. A hospital challenged that policy and sought a larger bargaining unit, but the Board refused to receive evidence or to hear the case. The 9th Cir. Reversed

- 9th Cir ruled that hospital not involved in earlier proceeding had a right to be heard. (9th cir). Since it’s adjudication, board MUST hear every case.
- right to open the issue in a way you can’t with rulemaking rules
- something of a penalty on adjudication to induce rulemaking because it is more efficient

**Guernsey:** Medicare guideline would have been invalid if it had been inconsistent with regulation that it purported to interpret

**Reliance and Retroactivity**

**Bell Aerospace** alludes to three situations in which reliance interests might require a “different result” (*Chenery* exception)

- The adverse consequences of retrospective adjudicative lawmaking would be substantial to *parties who had relied on past decisions of the agency*
- New liability is sought to be imposed retrospectively by adjudication on individuals for past
actions which were taken in good-faith reliance on agency pronouncements

iii) Fines or damages are involved

iv) Note: different result (when cts discern unfair retroactivity) is to hold that any attempt to apply the new policy to the party would be void as an abuse of discretion.

-According Wholesale Dept case, the question of whether a new case-law rule announced in an agency adjudication is unfairly retroactive, so as to constitute an abuse of discretion- 5 factor test:

i) Whether the particular case is one of first impression

ii) 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

iii) The extent to which the party against whom the new law is applied relied on the prior law

iv) The degree of the burden which a retroactive order imposes on a party

v) The statutory interests in applying the rule to the case at hand despite the reliance of a party on the old standard
Petitions

Members of the public can petition agency for the issuance, amendment, or repeal of a rule as well as a reexamination of the status quo. Any person can petition agency to commence rulemaking, but court does not necessarily have to grant it and court will be disinclined to review these appeals very favorable. Rationale: court does not want to second guess an agency’s decision, so scope of review is narrow. Court views itself as ill-suited to override these decisions, court has to be respectful of agency’s priority setting.

State MSAPAs require a statement of reasons upon denial of rulemaking petition. Federal APA does not require any statement but does require a brief statement of the grounds for denial of any application or petition filed with an agency.

**WWHT v. FCC** (DC Cir, 1981)

**Facts**: broadcasters asked FCC to issue rule requiring cable operators to carry scrambled signals. FCC denied petition.

**Held**: where the proposed rule pertains to a matter of policy within the agency’s expertise and discretion, the scope of review should 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 the facts have some basis in the record.

- where an agency decides against rulemaking, the record need only include the petition, comments pro and con, and an explanation of the agency’s decision
- it is only in the rarest and most compelling of circumstances that court acts to overturn agency judgment not to institute rulemaking.
- extremely narrow judicial review

Rationale: court does not want to second guess an agency’s decision, Court views itself as ill-suited to override these decisions, could overburden agency to regulate where they see fit, agency should set its own priorities, internal management, budget, personal, competing priorities are things that court does not have much of a firm basis for overriding.

**Deadline for response**

- Even if courts will not supervise petitioning process closely, APA can impose constraints on the process at the agency level.
  - 1981 MSAPA requires that an agency act on a petition within 60 days
  - 1961 MSAPA requires that agency acts within 30 days
- **Federal APA has no time constrains**

- Even w/o a formal petition, an agency can conduct internal review of its rules to determine which ones should be changed or abandoned.
- Congress can enact deadlines for the completion of particular proceedings.

**International Chemical Workers Union** (DC Cir) – a court must consider four factors in determining whether an agency’s delay in issuing notice-comment period was unreasonable: [rare case]

i) **the length of time that has elapsed** since the agency came under a legal duty to act

ii) **reasonableness of the delay** must be judged in context of the statute authorizing agency action

iii) **consequences of the delay**

iv) **any plea of administrative error**, administrative convenience, practical difficulty in carrying out legislative mandate, or need to prioritize in the face of limited resources
- **Lapses**: some state statutes put an outside limit on the rulemaking period; if the rule cannot be completed in a certain amount of time, the agency must start over.

  Ex. California = 1 year; 1981 MSAPA = 6 mos.
Agencies often entertain requests for waivers in cases in which the applicants can demonstrate that the rule does not work appropriately in their cases. Waivers are a necessary corrective to the rigidity of rules, but agencies not required to issue. If an agency gives a waiver to one person, they have to give it to similarly situated people (*Dickson v. Secretary of the Airforce*). Dangers: giving too many waivers diminishes the value of rulemaking; agencies might be favor one group over another.

Agency must give a hard look to waiver applications that are stated with clarity and accompanied by supporting data and must state the basis for its decision to grant or deny a waiver with clarity and care. *WAIT Radio v. FCC* (DC Cir.)

FCC rejected radio station’s application without giving adequate reasons and refused to hold a hearing. Agency must articulate with clarity and precision its findings and the reasons for its decisions.

Supreme Court has not held that an opportunity for a waiver is required for every significant rule. Courts have upheld agency refusals to grant any waivers from certain (discrimination) rules (ex. FAA rule that commercial pilots cannot be over age of 60).

Too many waivers?

Too many diminishes the value of rulemaking; practice of waivers has given rise to some concern because it’s less transparent process.
Political Control of Agencies

[Nondelegation In a nutshell: For decades, court kept taking suggestion seriously but never really enforcing any limitations on agencies (except Panama and Schechter). In Whitman the question was whether there was too great a power to give an admin agency to air pollution standards for safety. Court said it was well within scope of delegation. Court could have taken a textual stance and said all legislative power is vested in Congress and it can’t delegate it to the agency. However, in the 21st Century the numerous benefits of agencies has been made apparent in part because of the expertise they bring to issues. In Witman, the court tried to shed light on this by saying that the Congress must lay down by legislative act an intelligible principle to which the agency authorized to act is directed to conform. Perhaps one of the reasons why the non-delegation theory has thrived is the difficulty in answering the question of where to draw the line between power Congress can delegate and power it cannot. Part of the solution to this question is structural: Congress can be involved in agency oversight and the President, who appoints agency heads, is accountable to the electorate.

-In practice, courts will rarely limit agency’s power with non-delegation doctrine. But it does not hurt if a litigator adds it in a brief to strengthen their argument.
- State courts take it more seriously (see State law below) It’s ok to treat them differently because state agencies are likely to be under-funded, can’t trust them with same authorities as sophisticated fed agencies.]

Nondelegation

Non-Delegation Doctrine: Congress’s power to delegate legislative authority limited

- Constitution does not clearly say congress can give power to Agencies, only a couple cases where court limited what power Congress can give.
- Separation of powers: Constitution assigned all legislative power to the legislature; therefore, Congress cannot transfer any part of that power to the executive branch agencies.
- Checks and balances: delegation to agencies may be inevitable, but the legislature must impose adequate limits on the discretion of such agencies.
- Only quasi-legislative and quasi-adjudicative powers implicated; quasi-executive powers are not the subject of the delegation doctrine.
- Issues that come up:
  - whether rule falls w/in the agency’s statutory grant of rulemaking power
  - whether the statutory grant is too broad

- Rule: General non-delegation: Congress can delegate quasi-legislative power as long as it gives the agency an intelligible principal to follow in exercising that power. Agency can refine that principle.
- Note: in 21st century we see the benefits of agency’s rulemaking power
- States have a different policy: less $, staff, time than Congress, so less deference

-History

Field v. Clark (1892) – principle that delegation doctrine is important, but court upholds the law anyway
- In 1935, SC twice held statutes unconstitutional under the delegation doctrine (the first and the last time).
  - Panama Refining Co. v. Ryan – SC invalidated a provision of Nat’l Industries Recovery Act that authorized Pres to ban interstate
shipments of oil produced in violation of state law because it lacked an
intelligible principle of when to ban/when to approve.

-Schecter Poultry Corp v. United States—(main case) SC struck
down provision of NIRA that authorized Pres to approve codes of fair
competition for poultry and other industries. SC was particularly
concerned that the Act did not prescribe adequate admin procedures
for approval of the codes. Constitution could not be read to give Agency
so much power.

-Behind scenes: NIRA was in existence for 1.5 years and
approved thousands and thousands of codes- approved in
hurried, thoughtless way.

-From the New Deal to the Present – Basically, the court just gives lip service
to the doctrine but refuses to enforce it

-Yakus – SC upheld statute authorizing FCC to issue regs “as public
convenience, interest, or necessity requires.” Court shows it will not
follow Schecter

-Revival of Non-delegation doctrine

-Amalgated Meat Cutters and Butcher Workman v. Connally:
Facts: Act empowered Pres to issue orders and regulations he deemed
necessary to stabilize prices, rents, wages, and salaries.
-Held: Court upheld the act b/c it provided sufficient standards to limit the
President’s discretion and limited the time frame

-Non-delegation requires courts to examine not only whether
statute contains an intelligible standard, but also the total system
of controls, both substantive and procedural, that limit agency’s
power

-SC looked extensively at leg. history to find that delegation was
proper

-Industrial Union Dept, AFL-CIO v. American Petroleum Institute:
-Facts: OSHA law gives power to Sec of labor to adopt safety standards that
are reasonably necessary or appropriate to provide safe or healthful places of
employment. OSHA construed the act to require standards set at the safest
possible level that is technologically feasible & would not cause material
economic impairment of the industry.
-Held: 4 justice (plurality) overturned the Agency’s benzene standard. Court
said the delegation was ok.

Rule: In the absence of a clear mandate in the act, it is unreasonable to
assume that Congress intended to give the Sec the unprecedented power
over American industry. Such a sweeping delegation of power might be
Unconstitutional under Schecter and Panama.

-A construction of the statute that avoids this kind of open ended grant
should be favored. So benzene standard was no good, but act is ok.

-3 important functions of non-delegation-
-ensures decisions are made by congress and people,
-provides intelligible principles,
-allows for judicial review to test if principles given are applied right
-Court have often required more precise standards in a legislative delegation
when the statute threatens a fundamental right such as freedom of speech.

-Whitman v. American Trucking
**Facts:** Clean Air Act requires EPA to set air standards at level requisite to protect pub health with adequate margin of safety

**Issue:** whether it was too great a power to give an agency power to make a rule for air pollution standards for safety

**-Rule:** Constitution vests all legislative power in Congress. Congress must lay down by legislative act an *intelligible principle* to which the agency authorized to act is directed to conform.

  - Agency can’t cure an unlawful delegation by adopting a limiting construction on a statute.

**-Held** Court says scope of delegation is well within Con permissible limits.

  - *We have almost never felt qualified to second guess congress regarding the permissible degree of policy judgment that can be left to those applying the law; certain degree of discretion is needed.*

  - “requisite” means not lower or higher than necessary – fits comfortably w/in scope of discretion permitted by Court’s precedent.

  - *Stevens concurring-* court should stop speaking in fictions. Should just recognize, not pretend, that the legislature is delegating its legislative power. Rulemaking authority is legislative power. Those provisions of the Constitution though, do not limit the ability of the leg to delegate their power to others. As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconst about it.
State Non-delegation –

*Nutshell: State courts take it more seriously (see State law below) It’s ok to treat them differently because state agencies are likely to be under-funded, can’t trust them with same authorities as sophisticated fed agencies.]*

*Thygesen v. Callahan* (Ill.) (alternative to federal perspective)

**Held:** legislative delegation valid if it sufficiently identifies:
- persons and activities potentially subject to regulation
- harm sought to be prevented
  - the general means intended to be available to the administrator to prevent the identified harm

*Here,* invalid b/c legislature did not say the harm to be prevented nor the means to prevent it; also, no meaningful standards.

- Delegation to private persons
  - raises serious issues b/c private delegtees are not subject to direct political control.
  - SC. invalidated one such law in *Carter v. Carter Coal*
    - However, federal courts have upheld a number of delegations of gov’t authority to private delegates.
    - a significant # of state cases have overturned delegations to private persons or entities.

- Incorporation by reference of federal law
  - many state statutes incorporate federal statutes and regulations by reference.
  - some states uphold; some don’t.
    - Ex. *Michigan*, holds that the legislature does not unconstitutionally delegate power when it incorporates standards set by some other entity, so long as those standards have independent significance. *Taylor v. SmithKline Beecham Corp.*
- **Legislative Controls**
  - The most direct means by which legislature can control agency action is by specifying its desires in the agency enabling act at the outset.
    - However, legislatures are rarely specific in delegating authority to agencies.
    - Instead, agencies vested w/ broad discretion under open-ended statutory delegations of authority

- **Legislative Veto**
  - Mechanism that allows legislators to invalidate or suspend agency action by vote of one House of Congress
  - *Ins v. Chadha*
    - **Facts**: House overrides decision of IJ to keep the noncitizens and not deport
    - **Issue**: Is it Con for immigration act to have a one house veto?
    - **Held** it is unconstitutional to legislate w/o bicameralism & presentment.
    - Two house vetoes are also unconstitutional b/c they violate required that legislation be presented to President
  - **Rationale**: There is enough agency oversight with judicial review and agencies are subject to the APA regulations
    - Bicameralism is important because it requires deeper analysis since both houses need to agree.
  - *Chadha* decision to apply to both adjudication and rulemaking.
  - Many state legislatures permit legislative vetoes.
    - However, courts in at least a dozen states have held such provisions unconstitutional

- **Line Item Veto**
  - *Clinton v. City of New York*
    - **Facts**: Clinton used authority to cancel funds that would have underwritten NYC’s system of providing medical care to indigent
    - **Held**: unconstitutional, the cancellation procedure would have allowed the president in legal and practical effect to amend the appropriations act by repealing a portion of it
    - **Kennedy Rationale**: Too much power in the hands of one branch, court threaten certain groups of people

**Alternatives to the Legislative Veto**

- **Congressional Review Act (CRA)**
  - Ex. Congress used CRA to override OSHA rule that would have cost $100b.
    - Statute that requires virtually all rules of general applicability, adopted by virtually all agencies to be submitted to Congress and General Accounting Office (GAO) before taking effect.
    - Distinguishes b/w major and non-major rules
      - **major rule** is determined to be economically significant by OIRA
        - cannot take effect for at least 60 calendar days after submitted to Congress.
      - **non-major rule** can take effect whenever the agency determines
-**Rule**: CRA allows Congress to veto (major or non-major) rule by enacting a joint resolution of disapproval (similar to a statute: both houses must approve and President) -applies to notice/comment rules, interpretive rules, policy statements, etc -if rule is disapproved:  
  -it is treated as if it never took effect  
  -the agency may not reissue the rule in substantially the same form unless Congress enacts legislation enabling it to do so.  
-In practice, not used often. Only used once- Congress used CRA to override OSHA rule that would have cost $100b (2001)  
  -congress does not always have time to look at them  
  -treated as never took effect standard is not good for action in reliance reasons

**Suspensive veto**

-**Legislative committee suspends agency rule for a limited period of time**  
  -Could argue this is not like *Chadah* situation because it’s only a suspension, so it does not need bicameralism and need congress to actually repeal rule.  
  -courter: it could still be harmful during suspension

-**Martinez v. Dept. of Industry, Labor, and Human Resources** *(Wisc)*  
  -Held: upheld statute b/c constitution only had implied separation of powers principles; law did not interfere w/ branches’ independence.  
  -**New Hampshire** has also upheld suspensive veto  
  -However, Ky. ruled suspensive veto unconstitutional  
  -**Rationale**: States are in a different situation than fed: more lenience in state Court system b/c less $, staff, time than Congress

Many states only permit suspensive veto or legislative veto in particular situations such as: undue hardship, arbitrariness, changed circumstances  
-effectiveness of such limits has been questioned  
-If a statute does prescribe specific grounds on which a reviewing committee can intervene, courts have held that committee has overstepped limits.  
-**MSAPA** allows suspensive veto if agency did something in violation of underlying statute  
  -might be better because it keeps things tighter, under control  
  -might be worse because courts are the ones better able to deiced if there’s a violation of underlying intent and if politicians it could be bad

**Other Legislative Controls**

**Oversight committees**  
-Committee authorized to hold public hearings on proposed or adopted agency rules, to give advice to agencies concerning such rules, and to submit bills to the legislature to overcome by statute rules the agency declines to w/draw on its own.
Authorization committees of congress consider legislation in a particular area and supervise agencies that enact legislation in those areas.
- Appropriations committees scrutinize agency’s budget

Investigations and hearings
- Standing committees of Congress investigate the manner in which agencies spend money and discharge their duties
- Hold hearings, request agencies to submit written reports, write committee reports.
- Committee can subpoena documents that an agency does not want to disclose
- Legislative agencies, like GAO, can also be employed for oversight purposes.
  - **Walker v. Cheney** – GAO’s investigatory powers limited; since no leg. Committee requested info sought or authorized litigation, GAO could not get the info

Funding
- Congress and state legislatures fund every unit of government
- Appropriations provide mechanism to achieve legislative objectives w/o altering statutes which furnish authority for agencies.

Direct contacts
- Individual members of Congress make direct contacts w/ agencies that are causing problems for their constituents.

Appointment and removal
- Appointment – Senate confirmation of Pres appointment of officers of US; inferior officers may be appointed by Pres alone, by heads of depts., or courts of law.
  - Congress cannot serve as admin officials
- Removal – officers of the US may not be subject to removal by congress, except by impeachment by the House and conviction by the Senate. **Bowsher v. Synar**.
Executive Control

Appointment Power

- Pres must appoint principal officers w/ advice & consent of Senate.

_Buckley v. Valeo_

- Facts: Some members of the FEC appointed by Congress
- Held: Congress cannot appoint such members
- Rule: President must appoint principle officers with advise and consent of the Senate

- Principal Officers include heads of exec depts., the members of independent agencies, and may include high-level officials in depts. and agencies. Also includes fed judges.

-Congress may allow inferior officers to be appointed by the President alone, by the Courts, or by the heads of Departments

-Problem: difference between principle and inferior officers is not clear

_Morrison v. Olson_ – (inferior v. principle) Court upheld statute allowing a special court to appoint an independent counsel to investigate and prosecute possible violations of federal law by high ranking federal officials

- Held: independent counsel was clearly an inferior officer b/c
  - subject to removal by a higher executive branch officer
  - duties limited to investigation of certain federal crimes
  - limited jurisdiction
  - temporary position

- Generally, “inferior officer” connotes a relationship w/ some higher ranking officer below the President. _Edmond v. US_ (holding that members of the Coast Guard Ct. of Criminal Appeals were inferior officers)
  - inferior must have a superior
  - inferior officers are those whose work is directed and supervised at some level by others who were appointed by presidential nomination w/ advice and consent of the Senate.

-Employees aren’t covered by appointment power provisions at all:

_Freytag_. Okay for chief judge of tax court to appoint special trial judges. Majority said tax court was a “court of law” so could appoint; concurrence said tax court is “head of department.” Didn’t want them to be just employees.

- _Landry v. FDIC_ (DC cir)
  - Held: FDIC’s ALJs were deemed “employees” and thus did not have to be appointed in conformity to Appointment Clause b/c they could never render final decisions on their own, on make recommendations which agency reconsidered de novo
  - Rationale: term “officer of the United States “ interpreted narrowly

-Legislatures cannot place their own members in administrative positions (Incompatibility Clause)

-Legislatures regularly prescribe qualifications that executive appointees must meet, including state residence requirements, language requirements, exam, political balance etc.

_Marine Forests Society v. California Costal Comm’n_ (CA)

- Facts: CA SC upheld statute allowing the majority of commissioners from costal commission to be appointed through legislature.
- Rule: legislature can appoint people who perform executive function
Rationale: legislature has plenary power, executive function is divided among elected officials, etc.
Effect: **CA has more of a flexible approach.** They can make contextual decisions rather than (federal) bright line test.

-Removal Power and Independent Agencies
-Not expressly mentioned in Constitution.

*Myers v. US* (1926): power to remove is an incident of the power to appoint

**Held:** SC struck down fed statute that required Pres to get Senate approval to remove a postmaster

Rationale: pres needed to be able to removal agency official he disagrees with because he should be able to give directions to people in office

-**In practice:** -pres has to induce cooperation rather than issue an order to say “it shall be so”

*Humphrey’s Executor v. US* (1935): President does not have illimitable power to remove heads of independent agencies.

-**Independent agency:** cant be removed by Pres unless good cause
-**Executive agencies:** pleasure of President (purely executive)
-**Note:** Pres can choose who can serve as the chair of the commission so even if you can’t fire them you can demote them

*Wiener v. United States* – Court invalidated Eisenhower’s removal of a member of the War Claims Commission b/c the Commission had been created to adjudicate according to law (not purely executive); thus, *Humphrey’s Executor* precluded the President from removing its members.

-Current law:

  *Morrison v. Olson*: Court abandons *Humphrey’s* reasoning.

  -**Test:** proper inquiry is whether removal restrictions “impede the President’s ability to perform his constitutional duty.”
  -**Good cause** (for removal) req’t was ok for independent counsel.

  - **Bowsher v. Synar** Congress lacks the power to remove officials engaged in admin functions

  - **Kendall**: outer limits of relationship with president: Congress wanted postmaster to pay a certain amount to the carrier, postmaster refused to pay claiming the pres had instructed him not to comply. Court upheld writ of mandamus against postmaster

-**Justice Jackson, Concurring Youngstown**: Presidential power: 3 kinds
  1-Pres acts pursuant to expressed or implied authorization of Congress, authority is at its maximum
  2-Pres acts in absence of statutes supporting or prohibiting his action, Pres can only rely on his Con powers
  3- Pres acts incompatibly with expressed/implied will of Congress, power at its lowest ebb

-**Independent agencies**: Presidential executive orders exempted independent agencies from rulemaking proceedings from OIRA review.

  -However, ACUS recommended that as a matter of principle, presidential review of rulemaking should apply to independent agencies to the same extent as executive agencies. ABA agrees

  -Although it makes sense for judicial decisions to be made outside of political, rulemaking should have presidential influence.
-Executive Oversight

-Executive office entrusted w/ job of coordinating modern regulation, promoting sensible priority setting, and ensuring conformity w/ President’s basics mission.

-The Office of Information and Regulatory Affairs (OIRA) regularly conducts oversight of significant rulemaking proceedings on behalf of the White House

-Exec Order 12866

- principles for agencies to follow to extent permitted by law and where applicable.
- principles require agencies to consider many factors when devising regulation (cost/benefit, alternatives, impact, etc).
- agency must submit regulatory agenda and plan identifying the most important significant regulatory axns the agency plans to take in the next year → OIRA → Pres.
- meetings and conferences to share info about reg issues
- centralized review of regulations that have major effect on economy, enviro, pub health, state/local/tribal gov’t, conflicts w/ other agency axns, or raise novel legal or policy issues.

- strong endorsement of Executive oversight in *Sierra Club v. Costle*
  - to prevent duplication and inefficiency

-Independent agencies are exempt from OIRA review

-Line Item Veto Act unconstitutional – *Clinton v. NY.*
Scope of Judicial Review §706

- Issues of Basic Fact
  - Types of review, from most judicial power to the least:
    - Trial de novo: court rehears evidence and re-decides the case- §706(2)(E)
      - Only available if:
        1. Adjudicatory agency action and inadequate fact-finding or
        2. Issues did not come before the agency and are before the court for the first time
    - Independent judgment on the evidence – court decides the case on the record made by the agency but need not give any deference to the agency fact findings
      - Infrequently employed in federal admin law, but used in some states
    - Clearly erroneous – court reverses if it is left w/ the definite and firm conviction that a mistake has been committed
      - Standard used by federal court of appeals to review decision of trial judge when no jury.

*-Substantial evidence – court cannot reverse if a reasonable could have reached the same conclusion as the agency.
  - Standard used by fed court of appeals in reviewing jury findings
  - Applicable to judicial review of agency fact-finding occurring in formal adjudication or formal rulemaking
  - Some evidence – court cannot reverse if there is some evidence to support the agency’s conclusions.
  - Non-reviewable – agency’s factual determinations cannot be reviewed

-Substantial Evidence Test
  - Court reviews entire record for substantial evidence in formal adjudication and formal rulemaking (APA §§556, 557)
    - Some statutes apply substantial evidence review even if the agency action is not formal rulemaking or adjudication.
    - In most other situations, facts are reviewed under arbitrary and capricious standard

*Universal Camera Corp. v. NLRB*

Facts: NLRB retaliatory discharge case when employee testified against employer at hearing contrary to the law. Factual dispute: what was the reason.

Held: Court ensures there was substantial evidence to support finding.

Meaning a reasonable person could make the decision This is the same test that applies for jury verdict.

Rule: Wagner Act states that “the findings of the Board, if supported by evidence, are conclusive.” Court interprets this to mean substantial evidence review.

-Thus, Reviewing court must look to the record as a whole to determine if determinations are supported by substantial evidence.
  - Substantial evidence means more than a mere scintilla; it is such evidence that a reasonable person would accept as adequate to support a conclusion
  - It doesn't fail if reasonable person (or a court) would have come to a different result as long as a reasonable person could come to that result
-Rationale: Court following a “reasonable person” standard (even if it disagrees) because agencies have expertise so it defers so long as a reasonable person agrees. -Rationale: Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses, their demeanor, and lived with the case has drawn conclusions different from the Board’s than when he has reached the same conclusion. -Witness credibility should be given great deference

-Note: when agency reviews ALJ decision, it reviews de novo
-Rationale for deference to agencies
  -Agencies specialize and develop expertise in the areas they regulate
  -Fact-finding is an essential element of the delegated power, and thus, the legislature intends the court to respect those findings absent a serious error. -Discourages appeal from litigants, conserving resources of courts and agencies
  -Courts are likely to have a different political orientation than agencies.
-Note: substantial evidence test a lot like clearly erroneous test which is used by App courts reviewing Dist decisions. It’s a hire standard, but can’t put mathematical term.
  -SC acknowledged there is not a single instance in which a reviewing court conceded that the use of one standard rather than the other would in fact have produced a different outcome. Dickinson v. Zurko
-Note: Court must look at both sides of story- the agency counsel can’t put on a case that’s adequate on its own terms then stop. Court must look at evidence on other side and consider whether reasonable person could reach conclusion board reached.
-Issue: Is there a difference from when appeals is a ALJ upheld v. overturned? -substantial evidence test still in effect
  -Due to ALJ first hand view of live witnesses, Courts can are more persuaded that a reasonable person could reach this decision
-Hypo: Suppose it’s not a retaliatory discharge case and it’s a complex merger case with FTC. ALJ finds that merger is consistent with antitrust laws but FTC says it would violate them. They only used statistical analysis. It’s on appeal. Is ALJ’s conclusion going to hurt board? -could argue that agency heads are politically charged
  -if ALJ has written a 100 page thoughtful decision and board does superficial job, it will probably go against board.
  -Court will always look at overall situation
-Hypo: ALJ v. Board and there is a split decision 3-2, will that hurt board? -indication that court take a look bc someone involved had a different opinion
-Issues of Law

-Possible Approaches in reviewing issues of law:
  -Traditional: independent judgment, courts grant some weight to agency’s interpretation
  -Substitution of judgment: no deference given to agency’s view
  -Reasonableness test: courts accept an agency’s interpretation of an ambiguous statute if the interpretation is reasonable.

-CT State Medical Society v. CT Board of Examiners in Podiatry (state: CT):
  -Facts: Podiatry Board issued declaratory ruling that the ankle is part of the foot so that podiatrists could treat ankle ailments.
  -Held: The construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations.
  -Rationale: Legal determinations are less deferential
    -ordinarily, great deference given to construction of statute by an agency – but such deference given to time-tested agency interpretation of a statute when the agency has consistently followed its construction and the interpretation is reasonable.
    -Here, power to define “foot” not delegated to agency
    -Here, they had an interest in defining the foot more broadly
    -dominant approach of state courts: Courts decide the law.

-Chevron v. NRDC – for interpreting a rule
  -Facts: There was a challenge to the EPA’s bubble policy to determine under what circumstances a factory can upgrade its equipment without getting permit from EPA.
  The ChevronTest:
    -Step One: if the intent of Congress is clear, the agency must give effect to the unambiguously expressed intent of Congress. If, however, Congress has not directly addressed the precise question at issue:
      -can also discern (imply) that agency should make choice even if congress has not spoken directly to the issue, and it might be inappropriate for court to do so. See FDA v. Brown
    -Step Two: the court determines whether the agency’s answer is based on a permissible (reasonable) construction of the statute (reasonableness determination in this context means ‘not arbitrary and capricious’)
      -Step 1: whether statutory meaning is clear or ambiguous
      -Step 2: if ambiguous, whether the agency’s interpretation is reasonable or permissible
    -The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction or even the reading the court would have reached if the question had originally arose in a judicial proceeding.
  -Very differential standard
    -Court has deemed few laws “unreasonable” (RNC v. FEC - said their definition of using best efforts is to say that it was legally required even though it was not legally required. It was misleading.
    -Question: Did judiciary give away too much?
-Rationale: If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority
  -such regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.
-Usually applies to notice-and-comment rulemaking and formal adjudication

Applying Step 1

-FDA v. Brown Williams Tobacco Corp (5-4)– FDA issued controversial reg regarding cigarettes and tobacco. Court held the regulations unlawful
  -In reviewing whether Cong. has specifically addressed the question at issue, a reviewing Court should not view statutory provision in isolation.
  -Fundamental cannon of statutory construction that statute must be read in context w/ view to place in overall statutory scheme
  -b/c Food, Drug, and Cosmetic Act aimed at regulating products to make them safe and tobacco products are not safe for any purpose, the rule was not based on reasonable interpretation of statute.
  -Cannon that statutes should be construed to avoid constitutional problems has been frequently deployed to overcome Chevron deference.
  -Although the Ct has not always given controlling weight to this cannon

Applying Step 2

-Chevron: should determine step two through traditional tools of statutory construction.

-AT & T v. Iowa Utilities – Court held that FCC could not require local phone companies to provide new competitors w/ unlimited access to their facilities b/c governing statute b/c Act req. FCC to apply some limiting standard.
-ABA Administrative Law Section identified methods by which ct may reverse agency using Step 2
  -inquiring into whether the statutory context, viewed as a whole, clearly rules out the option the agency selected or a premise on which it relied.
  -inquiring into whether the agency reasoned from statutory premises in a well-considered fashion

-NRDC v. Daley – quota set was unreasonable b/c only had 18% chance of meeting conservation goals Cong. directed agency to achieve

-Chem Manuf Ass’n v. EPA – rule that imposed extra costs w/o advancing the purposes of the statute deemed unreasonable

-Republic Nat’l Committee v. FEC – reading “best effort” to mean mandatory was unreasonable; Congress did not authorize tactic to mislead donors so unreasonable interpretation

-Step two very much like arbitrary and capricious test
  -Levin: whether agency implemented the statute in a reasoned fashion
  -Court can reverse agency using Chevron’s flexibility
  -Facts usually given more deference
-Exceptions to *Chevron*: What is the scope of review “step 0”

-Interpretations – such as those in opinion letters, policy statements, agency manuals, and enforcement guideline – which lack the force of law, do not warrant *Chevron* deference. *Christensen v. Harris County*
  -entitled to respect, but only to extent that those interpretations have power to persuade.

-If agency lacks power to make rules carrying the force of law and no administrative formality - agency acts through an informal pronouncement
  -*US v. Mead Corp*: Administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority.
    -importance on the quality of the process
    -Issue with *Mead*: formal adjudication and notice and comment have force of law. But that’s not always true (military hearings, informal adjudication), although decision has force of law, there are no required procedures. Thus, should the *Chevron* deference apply?

-Once the Court has determined a statute’s meaning, an agency’s later interpretation of the statute is interpreted against that settled law. *Neal v. United States*.

-Other (possible) *Chevron* exceptions
  -Statutes that the agency doesn’t administer
    -Courts decide on their own, w/o deference, issues arising under, generic statutes, like Freedom of Info Act
  -Limits on Jurisdiction
    -Although not settled law, cases suggest that an agency’s legal interpretation that determines the scope of its jurisdiction is not entitled to *Chevron* deference
    -Big questions
    -Procedural Statutes
    -Litigation positions

-Note: Even if court finds no error of law, there would still be Q as to whether agency used its power in an allowable fashion- arbitrary and capricious inquiry
-Issues of Discretion in Adjudication
-Courts review discretionary elements of agency actions under arbitrary and capricious test. APA §706(2)(A).
  -Definition – courts shall hold unlawful and set aside agency action that is arbitrary, capricious, or an abuse of discretion.
  -similar to a reasonableness standard
  -used to review informal adjudication
-Salameda v. INS: (Posner)
  Facts: alien petitioned for suspension of deportation for experiencing extreme hardship. IJ denied relief and BIA affirmed.
-Issue: whether INS’s judicial officers addressed in a rational manner the questions the aliens tendered for consideration.
-Held: BIA did not adequately consider issues –fails under the arbitrary and capricious test. BIA did not look at the fact that immigrants were involved in community service and because since children were born here, they’d have a hard time moving.
-Rationale: Even if BIA’s result is ok, their reasoning was inadequate
-Persuasive? (Case turned on BIA’s failure in considering relevant factors)
  -BIA did not consider community service opportunities Salameda lost
    -BIA say that community service is not something they want to consider but them must explain or make it clear why they wanted to change precedent here- they considered these issues in past.
    -Dissent does not read past cases that way.
  -Court also says that BIA should’ve discussed kids who were citizens
  -Dissent says BIA should’ve deported kids also and they only forgot the name so it’s not a big deal, and community service is hyper technical.
-Citizens to Preserve Overton Park
- Facts: Sec. of Transportation granted funds to build highway through park. Statute prohibited use of parks for highways unless no feasible and prudent alternative. Sec. did not explain why no feasible and prudent alternative.
-Held: Secretary’s decision was arbitrary and capricious
-Rule: Under the arbitrary and capricious test, Court decides:
  -whether the Secretary acted w/in the scope of his authority
  -whether choice made was arbitrary, capricious, or abuse of discretion
    -To make this determination, the Court considers whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.
      -If an agency failed to consider a relevant factor or took account of a factor it should not have considered, the action should be set aside as arbitrary or capricious.
  -The reviewing court must be able to find that the Sec could have reasonably believed there are no feasible alternatives
  -Sec’s decision is entitled to a presumption of regularity and the ultimate standard of review is narrow; court cannot substitute its judgment for agency’s
  -Here, remanded back to agency
-However, in Pension Benefit Guaranty Corp v. LTV, Supreme Court limited the relevant factor approach.
“If an 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 large number of agency decisions might be open to judicial invalidation.”

**Abuse of discretion**

- Agency’s discretionary determination shall not be overturned unless found to be unwarranted in law or w/o justification.

- Agency actions that constitute an abuse of discretion:
  - Action that rests upon a policy judgment that is so unacceptable, renders action arbitrary
  - Reasoning that is so illogical can render action arbitrary
  - The asserted or necessary factual premises of the action do not withstand scrutiny under the appropriate standard of review
  - The action is w/o good reason, inconsistent w/ prior agency policies or precedents
  - The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action
  - The action fails in other respects to rest upon reasoned decision making

**Chenery Rule** – a court cannot affirm an agency decision on some ground other than the one relied upon by the agency in the decision under review.
Issues of Discretion in Rulemaking – Arbitrary and Capricious Review

**Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins.**

**Facts:** During Carter Administration, Transportation Dept adopted passive restraint rule (airbags or seat belts), then Regan gets elected and the rule gets rescinded.

**Held:** An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance

- Rule originally said manufacturers need to put in seatbelts and airbags. When they rescinded the rule, the agency did not explain why airbags were no good, only said seatbelts were not good.
- This is not undue meddling unlike Salameda

**Rule:** Under arbitrary and capricious standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection b/w the facts found and the choice made.

- normally, an agency rule would be arbitrary and capricious if the agency relied on facts Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence b/f the agency, or so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

**Here,** agency failed to consider alternative of requiring airbags.

**Note:** A reviewing ct. should not supply a reasoned basis for the agency’s action that the agency itself did not give.

- Court differs to agency regarding studies and expertise **Baltimore Gas and Electric v. NRDC**- SC they should defer to agency’s fact finding/scientific knowledge.

**Here,** Failing to consider other options to passive restraints → rules fails arbitrary and capricious test

- court remanded for further consideration
- another remedy would be to vacate the rule and start over

- **HARD LOOK:** court here giving a hard look

- **Note:** agency that changes its position w/o supplying reasoned analysis fails arbitrary and capricious test

- **Politics:** Court noted there are safety benefits to the automatic seatbelt since using the agency's logic that people don't use seatbelts because they're lazy

- **Backdrop: Regan comes in with a more de-regulatory philosophy.** There is a politically driven policy that the court does not find appropriate. Is this an appropriate exercise of judicial review function?

- **Yes:** Court can take a “hard look” as long as it’s enforcing legislative will- safety is most important. (Counter: nitpicking)

- **No:** dissent says that this is linked to a change in administration, and since they were elected by the people, it’s ok for the agency to change its mind.

- **Arbitrary/Capricious v. Substantial Evidence**

- **DC circuit says there no difference in stringency at all.**

- Arbitrary/Capricious used to be viewed as lenient when it was equated with standard you apply to statute.
-Although there are cases that say “substantial evidence is stricter” most observers say that one is not stricter than the other.

-Difference between these tests:
  -**Substantial evidence in usual APA sense is about the formal record.**
    -There has to be substantial evidence in record.
    -So it will play out differently perhaps, but the amount of evidence you need is about the same.

**Borden v. Commissioner of Public Health** (Mass.):

**Facts:** Commissioner banned formaldehyde.

**Held:** Commissioner of Pub Health can ban any hazardous substance if public health can’t be protected through adequate labeling. TC held hearing on toxicity and invalidated the rule.

**Rule:** the court should be ultra-deferential to an agency

- person challenging regulation must prove its illegal, arbitrary/capricious
- If the agency procedure is non-adjudicative, pl. may not meet its burden by arguing the record does not affirmatively show facts which support the regulation.
  
  if the question is fairly debatable, the courts cannot substitute their judgment for that of the legislature.

-Federal v. State

-**Procedural not substantive: state agency does not need list of reasons**
  -it’s easier for agency if they don’t have to come up with facts/rationale until action is brought. P is less likely to sue. Agency has less room to fear judicial review.
    -fed courts don’t do this because they want agencies to think about rule as their making it- think about possible challenges

**Hard Look Review – more probing review**

-**Used to describe review in federal courts** (ex. *Motor Vehicle*)
  -reviewing court scrutinizes the agency’s reasoning to make certain that the agency carefully deliberated about the issues raised by its decision.
    -detailed explanations for agency’s actions required – must address all factors relevant to the agency’s decision.

-**Court may reverse agency decision if it fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose.**
Availability of Judicial Review

Reviewability - Q of whether a person can get judicial review in the first place

- There is a presumption that an administrative action is subject to judicial review
  - Must have an agency action to challenge
  - APA §702 General rule judicial review is available
  - APA §703 where to go: statutory review or non-statutory review. If absence/inadequacy admin statute go to fed dist court
  - APA §701: exceptions: except to extent...

- Statutory preclusion – APA §701(a)(1)
  - generally, APA embodies a presumption of reviewability; need clear and convincing evidence to overcome presumption. Abbott Labs v. Gardner
  - Bowen v. Michigan Academy of Family Physicians
    Facts: family physician tried to challenge regulation. Part of statute says when things can be challenged and when they can't.
    - Held: Court starts with strong presumption that Congress intends judicial review.
      - In Eurika court did not allow individual claims.
      - Here, even though act only provided for appeals for Part A, not part B of Medicare, court says attack on validity of regulation is not the same as a determination of the amount of particular claim, which the Act impliedly denies review of.
        - Court draws a distinction: in Eurika it was small matters, here. the case involves a nation wide coverage
          - if it's a method issue: reviewable, if it's amount determination in individual case: not reviewable
        - Rationale: court does not want to clog up the system. There are only so many regulations and it only takes one case to determine cost benefit ratio.
        - Note: Courts will rarely allow preclusion of constitutional claim. More likely to review rules than adjudication and law than fact (despite apparent statutory preclusion)
          Webster v. Doe: decision by CIA director to fire employee foreclosed from review, but Con claims can be reviewed
          - Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.
        - Courts often construe apparently preclusive statutory language to permit some form of review
          - courts allow some issues to be precluded more readily than others
          - the presumption against preclusion of Con issues is almost irrebuttable
          - The court is also less willing to find preclusion in cases involving administrative rules than in administrative adjudication and less willing to foreclose legal challenges than factual challenges.
            - precluded if nothing else is: it takes lots of resources to go through record- unlike legal issue, Courts are best at resolving law.
            - Some statutes provide for pre-enforcement review of rules during a short period (ex. 60 days) but preclude review of the rules in subsequent enforcement actions.
              - Some due process constraints on the use of time limits. For example, Congress cannot totally preclude judicial review of prior administrative actions, even for non-constitutional errors, in the context of criminal enforcement.
-Actions committed to agency discretion – APA §701(a)(2) courts declines to review

Citizens to Preserve Overton Park v. Volpe –

-Facts: Sec. of Transportation granted funds to build highway through park. Statute prohibited use of parks for highways unless no feasible and prudent alternative. Sec. did not explain why no feasible and prudent alternative.

-Held: SC said agency discretion exception should be construed narrowly

-Exception should only apply when the statute is drawn in such broad terms, that there is no law to apply
-Here, statute clearly provided law to apply so reviewable

Heckler v. Chaney

Facts: death row inmate petitions FDA to say that lethal injection is not a “safe and effective” use of drug. FDA declines to take up his plea.

Held: FDA’s decision not to exercise its enforcement authority may not be judicially reviewed. No law applies to exercise of FDA’s prosecutorial discretion.

-generally, agency’s failure to take action is presumptively unreviewable, but review happens b/c statute is narrowly construed in most cases

Rationale: FDAs priorities are different seemed to have shielded the FDA.

Test: if the statute is drawn so that a Court would have no meaningful standard against which to judge the agency’s exercise of discretion, review is precluded.

-Rationale for not reviewing agency discretion

-Agency must balance a # of factors w/in its expertise when deciding not to enforce.
-Involves decision of where resources should be spent
-Agency not acting in a coercive capacity when deciding not to enforce.

-Hypo: FDA statute says you shall bring a proceeding if there is probable cause to believe something has been violated.

-Not reviewable. Presumption that it can’t be reviewed is overcome where substantive statute provides guidelines for agency

-Hypo: FDA shall have enforcement proceedings every time probable cause is there but it’s not in a statute, it’s in a guideline, can it be reviewed?

-Not reviewable according to opinion which says “statute”
-could say by adopting reg, agency has limited their own discretion
-policy reasons: here, there is a guideline to apply. Most courts will apply the law even if it has not come from congress.

-Hypo: Cheney wanted to bring enforcement proceedings to make FDA ban execution drugs across the board because they’re not safe and effective
-Levin: resources are limited. Court should not decide priorities

-However, Auer v. Robins said they can review failures to issue a rule even though they can’t review failure to issue individual enforcement proceeding. Reasons: no tradition pertaining to rulemaking proceedings, important to look at broader issues, not individual cases

-Hypo: Cheney asked FDA to bring enforcement proceeding and FDA wrote back and said no because you’re catholic

-Yes, justified on constitutional grounds. FDA is bound by constitution
-Hypo: Cheney asks for enforcement proceedings and FDA says no because we've determined that these drugs are effective
  -Yes, FDA has by the decision it made, identified a basis that the court can evaluate. He would argue that the drugs need to be “safe” too
-Hypo: Cheney says they acted inconsistent with past practice
  -Yes it’s can be seen as an abuse of discretion and if what agency did was unconscionable court could review.

-Montana Air Chapter – if claim is legal error affecting a non-enforcement error: provides bench mark on case merits, courts review
  -Ex. FDA said “we don’t mess with Texas”
  -of authority: DC is less willing
  -courts have drawn the line at legal error as opposed to discretion area because if they go all the way with this logic, there would be no unreliability left

Inaction

-Norton v. SUWA-
-APA 706(1) Agency compelled for unreasonable delay or unlawfully held
-Case highlights importance of identifying a specific “agency action”
-Facts: Ps argue that statute mandates the total exclusion of off road vehicles off of wilderness areas
-Held: claim under 706(1) could proceed only where a plaintiff asserted that an agency failed to take a discrete agency action that it was required to take.
  Rationale: If there’s no legal mandate, than court can’t enforce it. if there’s something required by law, court can say you must do it (but can’t tell you how) but you can’t even get to that stage unless you are challenging a discrete failure to act rather than a broad encompassing failure to act
-Rule: if agency is failing to take some individualized step (discrete) that its required to take, court can make them. But if P wants agency to do something really broad or generic (“they aren’t doing anything and they should”) than the court can’t do anything.
  -Good policy?
    -this is something that they leave to congress
    -court does not to manage agency
    -history in backdrop: courts have done this in admin school discrimination cases, but not here, too much management
  -“Unlawfully withheld” means not legally required,
  -“Unreasonable delay” cannot be unreasonable with action that is not required
Standing

-Article III: Federal court can only entertain “cases” or “controversies”
-person seeking judicial assistance must have a sufficient stake in the dispute.
 -Tennessee Electric Power Co. v. TVA Court held that private power companies lacked standing to enjoin the Tennessee Valley Authority from competing with them on the ground that the Constitution doesn’t allow the federal Government to enter the power business.
 -FCC v. Sanders Brothers Radio: Communications Act provided that anyone “aggrieved or whose interest were adversely affected” by a licensing decision of the FCC could seek review. Sanders was affected b/c someone else got a license.
 -The court made clear that Congress could confer such standing in order to promote the public’s interest in a correct interpretation and application of federal law.
 -United Church of Christ v. FCC: Church tries to sue FCC for issuing license to a racist TV station. The court held that viewers had standing to “vindicate the broad public interest relating to a licensee’s performance of the public trust inherent in every license.”

Injury in fact and zone of interests – APA 702

Ass’n of Data Processing Services Orgs. v. Camp

Facts: petitioners, who provided data processing services, challenged a ruling by Comptroller of Currency that national banks could provide data processing services. Court applies 3 part test:

Issue: whether P alleges that challenged action has caused injury in fact

Held: Here, Ps are within the zone of interest and have standing

-Zone of Interests Test: whether the interest sought to be protected by compliant is arguably w/in zone of interests to be protected or regulated by the statute in question (codified at APA §702)

-to satisfy test P must show that he has suffered injury in fact because of the challenged action

-Court said statute was meant to protect interests of others- it can be economic or non-economic interest.

-Note: Congress usually has a primary purpose but also many other interests and purposes.

-Injury in fact test rooted in Art. III but zone of interests is prudential, meaning Congress could abolish it

Hypo: scholar about to write a book on an issue and just when he was going to publish it, the rules were changed and research was ruined so no profit

-would have injury in fact, but would not be in zone of interest.

-Rationale: if everyone within zone of interest is happy with rule, but someone from fringes stirs it up, it’s not good

-Levin thinks its ok, but finding out who is in zone is tricky.

-court wants to limit law suits to people who are either intended beneficiaries of statute or almost so

-O’Conner dissent– does not to be someone who they intended to benefit, but someone whose interest are related to statute.
- Causal connection and public actions

- **Lujan v. Defenders of Wildlife**:  
> - **Facts**: Endangered species Act requires fed agencies to consult with Sec of Interior to ensure action funded by agency is not likely to jeopardize continued existence or habitat of endangered species. Defenders of Wild life challenged a rule promulgated by Sec which says there is no obligation to consult as to actions outside of the USA. Thus, AID need not consult with Sec regarding funding of projects in Asia

- **Rule**: Standing requirements (in addition to Zone of Interests):  
> 1. **Injury in fact** – an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical  
> 2. There must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.”  
> 3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision  
>    - **Warth v. Seldin**: held that poor people had not standing to challenge zoning laws b/c even if zoning laws were struck down, no guarantee that low-income housing would be built  
>    - But **Arlington Heights v. Metro Housing Dev Corp** – builder and buyer of low-income housing had standing to challenge zoning laws b/c they demonstrated that the challenged law had prevented construction of a specific low-income housing project which the builder was prepared to build and the buyer could afford to purchase

- Here, Court found that pl. lacked standing  
  - No imminent injury (no concrete plans to travel to Sri Lanka)
  - No causal connection with secretary  
  - Redressability not established  
  - The citizen suit provision does not stand; any person cannot bring suit, b/c that would move the balance of power from the executive to the judiciary, and this violates the separation of powers.
  - Procedural violation cannot by itself satisfy standing injury requirement

- Rationale for standing  
  - Separation of powers  
  - Parties have to be adverse to each other so that they'll both advocate strongly and have incentive to fight for respective objections  
  - Want to keep out frivolous suits

- **Associations as Plaintiff**  
  - An association can seek review on behalf of its members  
  - **Hunt v. Washington State Apple Advertising** – an association has standing to sue on behalf of its members when  
  (a) one or more of its members would have standing to sue in own right, AND  
  (b) the interests org. seeks to protect are germane to the org’s purpose, AND  
  (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.
-If you are a member of NAACP the court can't preclude you from bringing a suit on the issue if NAACP already has.

-Must have concrete injury – **Sierra Club v. Morton**

**Facts:** Sierra Club sued to enjoin development of ski resort in wilderness area

**Held:** Sierra Club lacked standing b/c it failed to allege that it or its members suffered any injury. A historic commitment to conservation is not enough. **Must have concrete injury**

-Court said that recreational, aesthetic, or environmental injuries can be permitted if pl shows they will be actually harmed.

-**Note:** However, many states permit public actions

-Federal Courts must always resolve questions of standing before reaching any other issues. **Steel Co v. Citizens for a Better Environment.**

-**Procedural Injuries** – a person who can establish injury in fact from failure to follow procedure has standing to challenge agency’s failure to follow procedure.

-**Loophole:** If Congress gives an affirmative right/interest, if it is injured, sue

-SC not clipping off congress wings as much as you think?

-**Citizen suits**

  - **Lujan** holds invalid the citizen suit provision of ESA

  - separation of powers argument

  - Even if statute provided $100 bounty for citizen who brings successful suit under ESA, probably no standing. **Vermont Agency of Nat. Resources v. Stevens** (an interest unrelated to the injury in fact is insufficient to give standing; an interest that is a mere byproduct of the suit itself cannot give rise to a cognizable injury in fact)

  - **FEC v. Akins** – court allowed suit to challenge FEC’s failure to treat AIPAC as a political committee. Statute allowed anyone who believed an injury occurred to bring suit. Ct held that P had a concrete and particularized injury – lack of info required to be disclosed under statute.

- **Qui tam actions** – allows the private Plaintiff to bring suit on behalf of the US to recover amnt of a false claim made against gov’t. If citizen wins, it receives a bounty (% of gov’t recovery)

  - SC upheld standing

  - Not a by-product of the lawsuit; person bringing suit is assignee of gov’t interest

  - Common at time Constitution was written

-In some **states**, taxpayers have standing to challenge the legality of action taken by the legislative or executive branch which they allege involves an unlawful expenditure of state funds.

-However, at the federal level, taxpayers ordinarily lack standing to challenge the expenditure of federal funds unless it can be demonstrated that a victory on the merits will reduce the amount of taxes a taxpayer is required to pay.
Finality and the Final Order Rule – APA §704 (stops claims from coming too soon)
-Final Order Rule – courts only review final orders; the litigant must complete the entire admin process before a court will review decisions which the agency took along the way.
- Bennett v. Spear – two conditions must be satisfied for an agency action to be final:
  - the action must mark the consummation of the agency’s decision making process – it may not be tentative or interlocutory
  - the action must be one by which rights or obligations are determined or from which legal consequences will flow.

FTC v. Standard Oil Co. of California:
Facts: FTC issued compliant that they had reason to believe that Socal engaging in unfair methods of competition. While that was pending Socal filed a claim in federal court to see if FTC did have a reason to believe this.
-Socal arguing that either FTC erroneously thinks they violated antitrust laws or FTC filed the claim for no good reason.

Held: issuance of a complaint is not a final agency action.
- Not a definitive statement of position – represents a threshold determination that further inquiry is warranted.
- Agency should be given opportunity to correct its own mistakes and apply its expertise.

-Rationale: Companies will have to litigate which takes time and money, Court says that if FTC is doing something bad, it’s unfortunate and high litigation costs come with living in an organized society.
- Downside to allowing Socal do what it wants:
  - Delay problem: FTC wont be able to complete process before hearing from dist court, so it slows them done
  - Powell fears this will happens every time FTC brings claim

Exceptions:
- Res Judicada can be brought: point of res judicada is to not have to litigate it.
- Immediate order/preliminary injunction in pending litigation
  - it’s final relative to fate of people who will not get benefits.
  - can have immediate review if there’s irreparable harm to public. DDT
- Court grants interim relief and the company argues that agencies should not have granted it.
  - 7th said that it’s just like Socal. Although it told manufacturer to obey injunction, under Socal it’s not over they can appeal at end.
  - DC cir says you can appeal it either way.
    - notion of de facto finality seems like it should apply in both cases. It’s now or never. It’s actually regulating so it seems like a strong case that there ought to be judicial review now.
- Civil procedure analogy: exception to interlocutory relief: irreparable harm (injunction)
  - MSAPA permits immediate review of a non-final order where postponement of judicial review will result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.
-Non-final actions: Cases where decision reviewed by another before becoming final are often held to be non-final actions
  - *Franklin v. Massachusetts* – Sec. of Commerce conducts census and reports to Pres, who transmits a statement to Congress allocating the # of seats for each state. Court held that Sec. of Commerce’s action was not final and thus not reviewable.
  - *Dalton v. Specter* – Court refused to review an action of Sec. of Defense and Pres under Base Closing Act (Sec. recommends which base to close; Pres has discretion to accept or reject the report as a whole). Court held: (1) Sec. of Defense’s action not final and (2) Pres is not an agency.
  - BUT, *Bennett v. Spear* – Court reviewed of Opinion of FWS, which recommended that the Bureau of Reclamation take certain steps. Court held that the opinion “alters the legal regime” and permits the Bureau to take action that could harm endangered species w/o concern for penalties.
  - Petitions for reconsideration render agency action non-final
    Party cannot seek judicial review until the agency resolves the petition for reconsideration.

Ripeness

- Normally in rulemaking context when it has been issued but not yet gone into effect and challenger wants to challenge it immediately

  **Abbott Laboratories v. Gardner:**
  
  **Facts:** FDA made a regulation to require drug manufacturers to print the name of the equivalent generic drug prominently when they printed the name brand. FDA said that it would have to be done “every time” Pharmaceutical Cos brought suit to challenge rule requiring generic name on labels and other material every time the trade name is used.
  
  **Held:** in considering whether controversy is ripe for review, Court should see:
  
  (1) the fitness of the issues for judicial resolution, AND
  - here, it’s a Q of law: congressional intent (Qs of fact can be ok too)
  
  (2) the hardship to the parties of withholding court consideration
  - burden was reputation and costs of reprinting, also it will be the same issue the court will have to deal with during an enforcement proceeding
  - also, both parties will know where things stand (FDA will also know how to act)

  **Rationale:** ripeness doctrine helps courts avoid entangling themselves in abstract disagreements over administrative policies.

  - *Harlem’s main point: we know the issue now, and it will be same at enforcement proceedings: Q was about congressional intent*
  - Here, final administrative action w/ definite harm to pl.
  - Gov’t argued it’s not ripe bc rule is being challenging before enforcement
  - Note: Most rules these days are reviewable right after promulgation when the issue is congressional intent (legal issue) and the company has some interest.
  - **Dissent:** this ties up matter of litigation so they can delay putting labels on the bottle.
  - this is a cost, but court thinks it’s ok, and better to deal with issue right away
  - **Dissent** (Clark) companies are just ripping off consumers

  **Toilet Goods** –
**Facts:** In order to enforce rule, FDA can inspect factor and demand entry and demand knowing what chemical formulas are. Company was upset because they were worried they’d leak it to competition.

**Held:** This FDA rule was not ripe for pre-enforcement review.

**Note:** FDA rule provided it “may” order and inspection and if Co refuses, FDA “may” suspend instead of “must”

**Rationales:** Although it’s may be a legal issue, it does not seem to be the kind of that you can review based on congressional intent.

- **We don’t know whether FDA will be abusive with their power, so we don’t know if there is an illegality or not.**
  - On hardship side, it’s not shown that they will face any hardship- no great urgency, court could make a better/more informed decision if they know how the law was being used.

- **Hypo:** Company wants review because there’s no need for an “every time” requirement bc doc who write the prescriptions already know what the generic equivalents are- lack of need for the rule.
  - Hardship is the same as it is in original case (compliance)
  - susceptible to judicial review if the issues are congressional intent,
  - if it’s facts: they can also be dealt with. The court can look at rulemaking record and see what the facts were, and do it- look at record
    - although Abbott is sometimes interpreted as needing a legal issue, not true all the time these days because there is a record that has facts

- **Hypo:** Co says that printing generic name every time will not make a difference
  - Here, it makes sense to see what effects in real world will be first.
  - It would be hard for court to make factual finding on whether it’s working out
  - some factual issues, there will not be an administrative record for court to work from
    - if it’s factual there may not be any record, court could say it’s not ripe

**Hypo:** FDA puts out policy statement/interpretive rule in which they say it will be our general approach to say a label displays the generic name prominently if it appears every time the brand name appears, but it would depend.

- If we’re talking about legislative intent, whether it’s an interpretative rule or not does not matter.
- If it’s congressional intent, it’s feasible for court to do it immediately

- In practice, Abbott Labs balance is normally struck in favor of immediate reviewability of legislative rules, but there are occasional exceptions.

**Non-legislative rules less likely to be treated as ripe, but sometimes ripe**

- **Better Gov’t Ass’n v. Dept. of State:** guidelines adopted by Justice Dept. listing factors that agencies should consider in granting fee waivers under FOIA. Court held that in light of hardship to pl., it was ripe case for review.
  - Important factor that can militate against ripeness in the context of informal administrative action is the concept of “finality” – concern is not so much w/ avoiding interruption of the pending process, as with ascertaining whether the agency has reached a firm or definitive position.

- **National Park Hospitality Ass’n v. Dept. of Interior** – Court held that agency’s stmt about its legal obligations was unripe for review.
  - NPS did not have authority to administer Act so it’s stmt would not affect primary conduct.
not fit for judicial review b/c should await concrete dispute (even though legal question)

Undermining Abbot Labs?

-Reno v. Catholic Social Services: Statute allowed certain undocumented aliens to apply for permanent residence if continuously present since 1986 w/ only brief absences. INS rule provided that any absence from US would break chain of continuous presence. Held: Court refused to hear b/f applied to particular aliens since the regulation only limited access to a benefit.

-Thunder Basin Coal v. Reich- held that Congress intended to preclude pre-enforcement review of regulations under Mine Safety Act b/c the statute provided for an elaborate post-enforcement administrative procedure which could address petitioner’s claim of invalidity of the regulation.

A reviewing court has discretion to grant a stay of agency action while it contemplates the review process by granting a preliminary injunction against agency action in question. MSAPA factors on whether to grant a stay (federal law calls for a similar balance):
- the likelihood the applicant will prevail on the merits
- whether the applicant will suffer irreparable injury
- whether relief will substantially harm other parties to the proceeding
- whether threat to public health, safety, or welfare relied on by agency is not sufficiently serious to justify the agency’s refusal to grant a stay

-Exhaustion of Remedies – APA §704

Rule: Generally, court will not hear case until the party has first exhausted administrative remedies

Exhaustion rule rationale:
- agency closer to facts; get a more accurate result
- agency can fix their own errors- efficiency
- agencies have expertise
- without it, circumvent process as a whole

McCarthy v. Madigan:
Facts: federal prisoner filed a damages action alleging prison officials had violated 8th Amend by deliberate indifference to his medical condition. The lower courts dismissed for failure to exhaust admin remedies.

Test: 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 gov’ts interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.

-Three situations in which interest of the individual weigh heavily against requiring exhaustion: (exhaustion exceptions)
  (1) If the admin action will unduly prejudice to subsequent assertion of a court action (ex. Unreasonable or indefinite timeframe from admin action)
  (2) admin remedy may be inadequate b/c of some doubt as to whether the agency was empowered to grant effective relief
(3) an admin remedy may be inadequate where the admin body is shown to be biased or has otherwise predetermined the issue.

-Here, unnecessary to exhaust constitutional claim for money damages b/c (1) admin procedure imposes many deadlines w/ high risk of forfeiture if pl. fails to comply and (2) the admin remedy does not authorize an award of monetary damages.

-exceptional case – most litigants are required to exhaust all admin remedies b/f going to court, even though remedies seem slow, costly, frustrating, and useless

-case has been overturned by statute – now prisoner must exhaust admin remedies b/f suing. However, case still good law outside prison context.

Portela-Gonzales v. Sec. of Navy

Facts: P fired from job; filed grievance; skipped appeal and filed suit. Alleged appeal would have been futile

Held: reliance on the exception in a given case must be anchored in a demonstrable reality; a pessimistic prediction or hunch that admin procedures will be unproductive is insufficient.

New Jersey Civil Service Ass’n v. State [NJ]:

Facts: whether state employees who formerly functioned as hearing officers in the DMV are entitled to appointment as Admin law judges.

Held: (NJ) the exhaustion requirement is not an absolute prerequisite to seeking appellate review; 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.

- State of New Jersey: b/c here, no facts and disputes nor does resolution of the issue call for special administrative expertise. Thus, putting appellants through expense and delay of admin process is unjustified.

-Factors in the judicial balance
  - nature and severity of harm to pl.
  - need for agency expertise
  - nature of the issue involved (issue of law, con law, jurisdiction, factual)
  - adequacy of remedy in light of pl. particular claim
  - extent to which the claim appears to be serious rather than a tactic for delaying the agency process
  - clarity or doubt as to the resolution of the merits of pl. claim
  - the extent to which exhaustion would be futile
  - extent to which pl. had a valid excuse for failure to exhaust

Futility exception: if it’s clear and known result and futile to go through agency.

-if it’s a claim with almost all precedent against you, it is probably not futile

Legal claims- under federal law, a party must exhaust admin remedies even though dispute concerns a question of law or of the agency’s jurisdiction or its authority.

-Generally, agency lacks authority to determine the Con-ality of statutes
  - Thus, for on-the-face challenges of the constitutionality of a statute, exhaustion not required, since no admin remedy in such cases (ex. 1984 civil rights cases)

-however, exhaustion required if
  (1) statute requires exhaustion, or
  (2) if the case presents both constitutional and non-constitutional issues, or
(3) if the constitutional challenge is to the statute or regulation as applied to the plaintiff.

- Exhaustion as preclusion under APA 704
  - Normally, a party who cannot get judicial review b/c of failure to exhaust remedies can go back to agency.
  - However, sometimes not permitted, ex, if a party failed to raise the issue the first time in front of the ALJ. Courts generally refuse to consider that issue on judicial review b/c it has been waived (exact issue rule)

  *Darby*- Fed case, did not have to exhaust all levels. Court looked at congressional content
  - 704 is more about finality- can't appeal mid way through case

  *If a court requires exhaustion and petitioner failed to pursue admin remedy b/f time period for such action runs out, Court generally not permitted to raise claim.*

- Issue exhaustion is not required in Social Security cases. *Sims v. Apfel.*
- *Patsy* – a 1983 plaintiff is not required to exhaust state remedies