I. Introduction
   A. Reasons for having Administrative Agencies
      1. Can regulate in areas, where expertise is needed to decide very fact-specific issues
      2. Agencies, as opposed to courts, can be proactive
         a. They are not limited by the actual case or controversy requirement
   B. Potential Problems
      1. Agencies can become self-promoting
      2. concerned that regulated industries may “capture” the agency
   C. Sources of Administrative Law
      1. Constitution
      2. Statutes
         a. APA—federal and state
            1.) General comprehensive guidance on common problems
            2.) Administrative law seeks to balance individual rights and the agency’s need to be flexible in policy
      3. Common law
   D. Techniques Available to Agency
      1. Problem → Legislative Solution → How to enforce → Agency Created → New Problem How Can Agency Ensure that the Objectives of the Original Legislation are Met?
      2. Research and Publicity
         a. Commission research
         b. Serve as clearinghouse for information
         c. Publicize findings
      3. Rulemaking (with statutory authority)
      4. Adjudication
         a. Conflicts w/ agency or conflicts between regulated parties
         b. Constrained by due process
         c. Different from courts
            1.) B/c usually a party to dispute
            2.) Specialists not generalists
            3.) Potential conflicts of interest
      5. Licensing
         a. Permit systems for dangerous activity
         b. Clearance system—less drastic than permit
            1.) Required to submit documents, if agency does nothing, can proceed
      6. Investigation and Law Enforcement
      7. Ratemaking
         a. legislature can delegate the ability to set prices and rates
         b. trend towards deregulation
      8. judicial review
         a. general judge can review agency actions for errors and law and reasonableness
      9. Legislative and Executive Review
   E. Administrative Law seeks to balance conflicting goals
1. Want agency to act lawfully, respond to public, make accurate and sound
determinations
2. But also want agency to act in an efficient, effective, economical manner
3. Must determine benefits, costs, and possible alternatives
F. Different Models of Admin Law
   1. transmission belt model—need agency to achieve statutory goals of legislature
      a. admin law should make sure agencies left alone
   2. Pluralist or interest representation
      a. Only legitimate to extent that agency engages in fair political process
      b. Admin law should make sure that agency process closely models the
         political process
   3. civil republican model
      a. admin law should encourage deliberative process
II. Constitutional Right to be Heard
A. Due Process, Hearings, and Mass Justice
      a. NY AFDC termination procedures only provided for a post-termination
         hearing.
      b. Held: Welfare recipients must have at minimum an informal opportunity
         to appear before the final decision maker prior to their termination.
         1.) Must have notice and the opportunity to appear in person either with or
             without counsel, and the chance to cross-examine witnesses
         2.) The gravity of the recipients potential loss outweighs the government’s
             interest in efficient adjudication
            a) Due process demands as flexible and contextual
         3.) Problem with court freezing its assumptions into place as a matter of
             law—what if benefits end up outweighing costs?
         4.) Reasons for hearing
            a) Preserve dignity, empower individuals
            b) Help claimant understand and accept decision
            c) Make sure accurate decision, decision maker reflects, control the
               exercise of discretion
            d) Get precedents to ensure consistent decisions
            e) Facilitate agency and judicial review
      c. In wake of Goldberg, courts trying to limit due process
         1.) Through how it defines “liberty” and “property:
         2.) Describe due process as contextually based
         3.) Describe agency action as generalized not individualized
B. Interests Protected by Due Process: Liberty and Property
   1. The Roth Test
      a. Board of Regents v Roth (US 1970)
         1.) Roth did not get hearing on decision not to renew his non-tenure
             teaching contract.
         2.) Held: Not entitled to hearing because no property interest entitling him
             to another year.
            a) Need to find due process interest before can employ balancing test
b) Need entitlement to have a property interest—arises out of statutes, rules or understanding (look to state K law here)

c) Even where there is a protected interest, governmental interests may still justify postponement of the hearing

d) Where one’s reputation, integrity, ability to seek future employment is implicated, may have liberty interest entitling to hearing

i. Court later held that stigma by itself is not an invasion of liberty—need additional change of right or status recognized by law—like loss of job.

ii. Purely Investigatory Hearing? No due process rights unless seeking to uncover and publicize criminal activities.

2. Property

a. Cleveland Board of Education v. Loudermill

1.) Ohio statute created a property interest in employment by specifying that termination could only be for cause, but the statute only provided for post-termination hearing and review.

2.) Held: The substance of the right and the procedure for its removal are distinct. If the state has created a substantive right, then the 14th amendment specifies the procedure for its termination.

a) Court rejects the notion of “the bitter with the sweet”.

b. Other possible types of entitlements:

1.) Licenses

2.) Public services—i.e. education, utilities

3.) Government Contracts

a) Unger v. National Residents Matching Program

i. Held: only a few types of government contracts are protected by due process: those involving extreme dependence (welfare benefits) or those in which the contract itself limits the state’s right to terminate (just cause provisions)

b. When is a Deprivation of Property only De minimis and not entitled to due process?

1.) Officer placed on paid sick leave

C. Timing of the Hearing

1. Matthews v. Eldridge

a. Disability beneficiaries did not receive a hearing prior to a termination decision, could seek reconsideration.

b. Held: SSA Disability beneficiaries are not entitled to a hearing prior to termination because the private interest in keeping benefits, the risk of erroneous deprivation are outweighed by the government’s interest in efficiency.

1.) Three Part Balancing Test:

a) Private Interest in keeping benefits

b) Risk of a wrong decision and how additional safeguards would affect this risk
c) Government’s interest and the burden of instituting additional safeguards.

2. Emergency
   a. Can dispense with prior hearing if public health and safety are threatened
      1.) Important government interest + substantial assurance that the deprivation is not baseless or unwarranted may justify postponement
   b. Matthews allows dispensing of hearing even when no exigent circumstances
      1.) Roth/Cleveland Situations—abbreviated procedure to ensure existence of probable cause enough if full hearing comes soon after

3. How long can hearing be delayed?
   a. Matthews—one year, Loudermill—9 months not unreasonable

4. Suspension v. Termination
   a. Can suspend without pay, without prior hearing without violating due process

D. Elements of Constitutionally Fair Hearing
   1. **Ingraham v. Wright**
      b. Held: The cost of imposing such a hearing outweighs the benefits of a hearing. Traditional common law remedies available to the students give due process and adequate protection.
         1.) State has chosen to allow corporal punishment as a policy choice and allows teachers who reasonably believe it necessary to inflict punishment—historical limitations on the student’s right to remain free from punishment.
         2.) Is state tort law an adequate substitute for due process?
            a) If pre-deprivation hearing is feasible, then state tort law may not be enough due process.
            b) If tort action eliminated, may also be problem
            c) Alternative reading of decisions holding that state stigma, and state breach of contract claims are not entitled to due process might be that there are liberty and property interests being infringed but that state defamation and state contract law provide all the process that is due.
   2. Goss v. Lopez
      a. Held: Some kind of notice and some kind of hearing, even if informal, before suspending students—but no right to counsel or cross-examinations.
   3. Walters v. National Ass’n of Radiation Survivors
      a. Held: deferred to congresses choice to keep lawyers out of VA hearings as much as possible, noting that inclusion of lawyers would not necessarily reduce error.
         1.) Due process may not always mean a trial-type hearing
   4. Academic Dismissal—much less process, perhaps even none as opposed to disciplinary dismissals—academic judgments more subjective.
   5. Right of cross-examination also a matter of cost-benefit weighing
6. Using Matthews balancing test, “paper” hearing may be enough in some situations if an oral conference is not likely to be more helpful

E. Rule Making versus Adjudication
1. Londoner v. Denver
   a. Denver Ordinance established a special assessment district that apportioned the cost of paving roads among property owners who could only object by filing written complaints.
   b. Held: Due process requires notice and hearing for the affected tax payers at some point before the tax is fixed.
2. BiMetallic Investment Co. v. State Board of Equalization
   a. Colorado board increased valuation of all property in Denver without a hearing.
   b. Held: When all individuals are equally affected by a proposed change, no notice and hearing is required—it is impractical that everyone should play an equal role in rule making. Instead individuals are protected by the political process.
3. Distinction between when a small number of people are exceptionally affected, each one on individual grounds and where everyone is equally affected.
4. Distinction is also really between policy making and adjudicating disputed facts in particular cases as well.
   a. Adjudicative facts
      1.) Jury type facts: who, what, when, where, why
      2.) Parties in best position to contribute—explain or rebut evidence
   b. Legislative facts
      1.) General facts helpful to deciding policy questions—not necessarily concerning immediate parties.
      2.) Parties contributions may not help sort the facts out.
5. Cunningham v. Department of Civil Service
   a. DOT ruled that positions were not comparable without holding a hearing—effect of ruling was that demoted employees were not entitled to priority for the positions.
   b. Held: Individuals are entitled to a hearing when the agency acts in its adjudicatory capacity as opposed to its rulemaking capacity directly affecting the rights of particular individuals and the decision can turn on the evidence before the agency.
      1.) Where an activity has elements of both—i.e. ratemaking—due process may still require a hearing.
      2.) If plaintiffs lack evidence, then no evidentiary hearing is required but still need a chance to present their arguments either orally or in writing.
   c. If agency had adopted a rule instead, even if one party affected still not necessarily enough to trigger due process right to adjudicatory hearing.
      1.) Bi—Metallic Applies no matter how many affected individuals as long as using general criteria and not expressly singling out.

III. Administrative Adjudication: Fundamental Problems
A. Background
  1. dealing with when a statute, not the constitution grants the right to a hearing
  2. Formal Adjudication
     a. Both Federal APA and 1961 MSAPA (most states) do not require
        adjudicatory hearing, they just lay out guidelines, but agencies only have
        to follow these guidelines for a formal hearing when another external
        source requires a hearing.
     b. 1981 MSAPA and several state APA’s specify themselves when a hearing
        should occur and provide different models.
  3. Informal Adjudication
     a. Where no external source requires a hearing, the agency can choose its
        own procedures

B. Federal Statutory Hearing Rights
  1. Federal APA § 554
     a. Only applies where an hearing is required to be “on the record”
        1.) “on the record” required by congress is different from the mere fact
           that a record is maintained at a hearing
     b. If it applies:
        1.) Must separate prosecutorial and adjudicatory functions
        2.) No ex parte contacts
        3.) If the private party wins, and the agency’s position was not
           substantially justified, private party entitled to recover attorney’s fees
        4.) Hearing must be conducted by an ALJ
  2. City of West Chicago v. NRC
     a. Atomic Energy Act requires NRC to grant a hearing.
     b. Held: Absent the magic words “on the record”, a formal hearing under the
        APA is not required just because the statute at issue specifies that there
        shall be a hearing. Even where an action is clearly adjudicative, There
        must be some clear indication of congress’s intent to authorize a formal,
        on the record hearing under the APA.
        1.) Just because an agency has historically held formal hearings does not
           mean that they are required to do so.
        2.) If due process requires a hearing, absence of intent or “on the record”
           does not preclude the APA from applying—but Matthews balancing
           test does not require a formal hearing here.
  3. Ambiguous Statutes
     a. Chemical Waste v. EPA (D.C.) followed Chevron to defer to agency’s
        interpretation of ambiguous statutes like “a public hearing”.
  4. Vermont Yankee—court can not mandate additional requirements for
     rulemaking or [by extension in later case] adjudication if the procedures are
     not required by the APA, due process, or other source of law.
  5. Comparative Hearings
     a. When two parties are applying for a mutually exclusive thing, an agency
        must provide all parties a single comparative hearing to protect a statutory
        right to a hearing.

C. State Statutory Hearing Rights
1. 1961 APA triggered where there is a “contested case”—includes ratemaking, licensing, and any other proceeding where the legal rights, duties, or privileges of a party are required by law to determined after a hearing
   a. Some states more broad: Contested case includes any agency discretionary decision to suspend or revoke a right or privilege or to refuse to renew or issue a license—regardless of whether law requires a hearing
   b. Sugar loaf Citizens Ass’n v. Northeast Maryland Waste Disposal Authority
      1.) state APA only applies to contested case where required by law to provide a hearing. Here permits for incinerator at issue.
      2.) Held: Right to a hearing is not determined by APA, but rather by another statute—if the statute grants a hearing the court then looks to the language of the state APA to determine if this is a contested case. Applies here because the granting of a license is at issue.
         a) Broader than federal APA—triggered just by “public hearing”

2. 1981 MSAPA applies to nearly all adjudications—but has different procedures for different categories of adjudications
   a. conference adjudicative hearings—no dispute or material fact, or low stakes—just party testimony no cross-ex or witnesses
   b. emergency adjudicative proceeding—immediate danger to public health, safety, or welfare. Must give notice and statement of findings, then give an proceedings afterwards that would have been required.
   c. Summary adjudicative proceedings—very low states. Just opportunity to tell story to presiding officer.

3. Metsch v. University of FL
   a. Denied admission to law school. Florida APA grants hearing where substantial interests of a party are determined by an agency—but does not apply to students in the state university system
   b. Held: A sincere desire to study at a university is not a substantial interest—just a hope. Even if it were a substantial interest, exception applies b/c the legislature would not grant greater rights to nonstudents than to students.

D. Limiting Issues to which Hearing Rights Apply
   1. Heckler v. Campbell
      a. SSA switched from relying on expert testimony to determine if jobs exist, but then issued matrix that determined through rulemaking if given ability, age, education, work experience jobs exist.
      b. Held: The right to an individualized hearing does not bar SSA from using rulemaking to resolve certain classes of issues. Can still show that the guidelines should not be applicable to them.
         1.) Can use rulemaking to resolve issues that do not require case by case determination.
         2.) Presumption that can use rulemaking unless congress clearly expresses intent to withhold authority to resolve general classes of issues this way.
         3.) Some rules may not need a waiver provision.
2. Administrative Summary Judgment
   a. Can use when no disputed issues of material fact
      1.) Need only “minimal showing” to show dispute—speculative and unsubstantiated claims don’t apply
   b. 1981 MSAPA provides same thing with conference adjudicative hearing
E. Institutional Decisions and Personal Responsibility
   1. Two Models of Adjudicative Decision Making
      a. Judicial model—agency should strive to mimic courtrooms to maximize fairness and acceptability to litigants
      b. Institutional model—adjudication is really a form of agency policy making, and agency needs to be able to arrive at accurate, efficient outcomes.
      c. Reality of adjudicative process strikes compromises between competing goals.
   2. Personal Responsibility of Decision Makers
      a. Morgan v. United States
         1.) Alleging that actual decision made by someone else and that Secretary of Agriculture just rubberstamped.
         2.) Held: Where responsibility for making the decision has not been delegated, a “full hearing” requires that the decision maker base his or decision upon the evidence.
            a) It is okay to delegate some responsibilities—taking evidence, prosecution, as long as the final decision maker considers the evidence.
            b) In practice, presume that decision maker considered the record, unless have evidence to the contrary. Morgan IV—can not question agency about their decision making process and deliberations, unless first have evidence of bad faith/improper conduct.
               i. Citizens to Preserve Overton Park exception: Where agency has failed to explain the decision, may review decision for substance—was it rational (can ask for an explanation) even if would not review the procedure.
      b. Options:
         1.) Person who hears the evidence could decide subject to the agency head’s choice to consider an appeal.
         2.) Decision of hearing officer could be subject to intermediate review board, with agency head having discretion to consider appeals from review board.
         3.) Agency head could consider summary of evidence and arguments.
      c. Morgan II: need an intermediate report from the hearing officer if failure to prepare one would be a substantial prejudice.
         1.) NJ—should have right to see intermediate report
      d. 1961 MSAPA required that Agency Heads hear oral arguments
F. Separation of Functions
   1. Walker v. City of Berkley
a. Same city attorney who was working on defending the city in walker’s federal case also filed recommendations to the Personnel Board.
b. Held: While due process allows the same agency to investigate and adjudicate, the same person cannot serve both roles.

2. APA §554(d) divides agency into adversaries, adjudicators, and everyone else—as long as not adversary can furnish off-record advice to adjudicators.
a. But ALJ cannot receive ex parte advice on factual issues from agency or be supervised by person who is in adversary role.
b. Exception for agency heads to engage in conflicting roles
   1.) MSAPA has no exception
   2.) Not clear if have to have been head at all critical stages

3. Initial Ratemaking and Licensing exempted
4. “Principle of Necessity”—biased or otherwise disqualified judge can decide if no legally possible substitute.

G. Bias
1. Andrews v. Agricultural Labor Relations Board
   a. Judge represented similar clients before becoming temp. ALJ.
   b. Held: ALJ is not biased—as long as the ALJ is not biased towards a litigant (or class of litigants) or has already made up his mind, it does not matter if he has views on the subject matter.
      1.) Adequate relief if findings are not supported by the evidence.
2. Test from Cinderella v. FTC: Would a disinterested party conclude that the decision maker had prejudged the law and facts?
3. In contrast to this institutional approach, 1981 MSAPA takes judicial approach—appearance of bias is enough to disqualify.
4. Personal Interest
   a. Can be disqualified for having personal stake in the outcome—but okay if agency benefits as long ALJ independent.

H. Ex Parte Contacts
1. PATCO v. FLRA
   a. Sec. Of Transportation asked for expedited handling of illegal strike. Shanker had dinner with his friend Applewiate and urged not to revoke.
   b. Held: As to the telephone calls, they may have been improper but there was no prejudice and PATCO got an opportunity to respond. The conversation with the friend was an ex parte contact because he was an interested party and tried to influence the outcome.
      1.) Interested party= interest greater than that of general public
   c. Factors:
      1.) The gravity of the communication
      2.) Whether or not the ex parte contact influenced the outcome
      3.) Whether or not party with the ex parte contact benefited
      4.) Whether or not the other side was aware of the communication and had a chance to respond.
      5.) Whether vacating and remanding would serve useful purpose.
2. Portland Audubon Society—President and his staff are interested parties outside of the endangered species committee for the purposes of the ex parte contacts ban.
   a. Is this really a judicial process or is it a political process since cabinet heads are also on board?
   b. Different than rulemaking where President and white house can have ex parte contacts

I. The Role of Political Oversight
   1. Agency Adjudication and Legislative Pressure
      a. **Pillsbury v. FTC**
         1.) FTC was deciding on Pillsbury’s acquisition of two other companies. Anti trust subcommittees of the house and senate called chairman and commissioners before them.
         2.) Held: Improper interference by a Congressional Committee can deprive a party of due process. No problem with just holding hearings and taking agency to task, but can not focus on the mental processes in a pending hearing—interference in agency’s judicial function.
            a) Holding limited to formal adjudication, but even invention in informal adjudication can not be so serious as to render the decision arbitrary or capricious.
            b) DC circuit—contact okay if matter is not yet to the point of quasi-judicial proceedings
            c) Status inquiries by congressional members okay

IV. The Process of Administrative Adjudication
   A. Investigations and Discovery
      1. Agency needs information for variety of tasks: possible violations of law, rulemaking, legislative proposals
      2. when must compel disclosure uses subpoena duces tecum—civil investigative demands or CIDS
         a. APA § 555 (c) & (d)—must have a statutory basis other than APA to compel production. Have to go to court to enforce
      3. **Craib v. Bulmarsh**
         a. Craib did not want to produce records that he was required to keep regarding sister’s care takers.
         b. Held: An agency is not required to show probable cause for a subpoena—the test is one of “reasonableness”
            1.) Court enforces subpoena
               a) Issued for lawfully authorized purpose w/ power of legislature
               b) Documents relevant to inquiry
               c) Request is reasonable—documents are specified, and there is an opportunity for review before the party is penalized.
            2.) 5th amendment is not a defense against the production of records which are statutorily required to be kept—unless the requirements are directed at a selective group of inherently suspect criminal activities.
         c. More stringent standards where agency wants to make an actual inspection
            1.) Don’t need probable cause just reasonable and neutral standards
2.) Warrantless inspections
   a) Substantial government interest
   b) Unannounced inspections must be necessary to further regulatory scheme
   c) Statute must advise of the periodic inspection program
   d) Searches must be limited in time, place and scope

4. Defenses:
   a. Subpoena might be quashed if the agency lacked jurisdiction over the matter
   b. Subpoena might be struck if agency violated procedural rule
   c. Subpoena might be found too vague, broad, indefinite or burdensome—but unlikely to so
   d. Court might find bad faith on the part of the agency

5. Agency is not required to give notice to the party it is investigating when it obtains materials from a third party

6. Privileges
   a. Attorney-client, work-product, marital communications privileges apply to agency proceedings
   b. 5th Amendment usually not applicable
      1.) Agency can draw an adverse inference from an assertion of privilege
      2.) Corporations, partnerships, entities have no claim of privilege
      3.) Person fearing incrimination must be in possession of documents
      4.) Does not apply to materials seized under search warrant
      5.) Only applies to materials produced as the result of state compulsion unless act of producing them would be incriminatory
      6.) Inapplicable when statute requires records to be kept and maintained

7. Alternative Dispute Resolution in Administrative Adjudication
   a. 1990 APA amendments encourage AD—but certain situations where ADR is not appropriate—where matter needs to be authoritatively resolved to create precedent

B. Evidence at the Hearing
   1. Reguero v. Teacher Standards and Practices Commission
      a. TSPC relied on hearsay testimony that teacher abused students.
      b. Held: Hearsay evidence is admissible in administrative proceedings as long it is reasonable. The findings may be based on hearsay evidence as long as a reasonable person could make the finding based on the evidence as a whole including countervailing evidence (substantial evidence standard).
         1.) Rejecting residuum rule that in some jurisdictions requires that even if hearsay is admissible, there must still be a residuum of legal evidence to support the decision.
         2.) Factors:
            a) Alternatives to hearsay evidence
            b) Importance of facts being proved by hearsay
            c) State of supporting or opposing evidence
            d) How cross examination is affected by the hearsay evidence.
2. APA § 556(d)—any evidence allowed unless irrelevant, immaterial, or repetitious—but some statutes specify that judicial rules of evidence are to be followed
3. Proponent of an order bears the burden of persuasion
4. ALJ expected to take active role in developing the record

C. Official Notice
1. broader than judicial notice (notice over facts not disputed to be common knowledge)
2. APA § 556(e)—broad, but have to give parties the opportunity to rebut
3. Franz v. Board of Medical Quality Assurance
   a. Medical Board relied on their own expertise to suspend Franz’s license.
   b. Held: The board has an obligation to provide enough information for a reviewing court to base his decision on, including giving notice and the opportunity to rebut when it relies on its expert opinion in areas where common law knowledge does not supply the link between the action and the result.
4. generally okay to give notice with decision, if offering opportunity to reopen proceedings if the party can rebut
5. do not have to give notice when using background knowledge and experience to draw conclusions from the evidence

D. Findings and Reasons
1. In the Matter of CIBA-GEIGY Corp.
   a. NJ renewed permit to dump into ocean without giving reasons.
   b. Held: when an agency acts quasi judicially it must issue findings of fact so that the reviewing court can know that the decision was based on.
2. agency needs to show the link between facts and findings—show rationale not just holding
3. alternatively, courts may interpret the underlying statute as requiring an explanation for agency action
4. Post Hoc rationalizations generally disfavored, although normal remedy is to remand to agency or accept the post-hoc rationalization
5. one set of findings and conclusions all due process or APA requires

E. Equitable Estoppel
1. Apparent Authority
   a. Used in law to bind principal when action of an agent misleads a person to his detriment
2. Foote’s Dixie Dandy v. McHenry
   a. Auditor told Foote it did not need to file new paperwork to preserve tax rate.
   b. Held: state can be equitably estopped where justice and fair play require:
      1.) Party to be estopped knows the facts
      2.) Know or should have known that the other party would rely
      3.) Other party is ignorant of the facts
      4.) Relies on other parties assurances to his detriment
3. SC has never accepted idea of equitable estoppel for federal government –but no flat rule that it does not apply b/c sovereign immunity
V. Rulemaking Procedures

A. Importance of Rulemaking

1. Movement away from adjudication towards more rulemaking
2. Advantages:
   a. All affected parties can participate in proceedings
   b. More suited to determining policy
   c. Only applying prospectively—don’t have to worry about reliance
   d. Uniformity
   e. More opportunity for political input
   f. Agency can set its own agenda
   g. More efficient
   h. Easier for those affected to know what the law is
   i. Easier for legislative and executive branches to oversee
3. Advantages for Adjudication
   a. More flexible
   b. More concrete application to facts
   c. Allows agency to deal with situations as they arise
4. “Ossification” of the rulemaking process
   a. Rulemaking has become more rigid and burdensome with increased requirements to survive judicial scrutiny
5. Enabling statutes usually, but not always, give agencies rulemaking authority

B. Definition of “Rule”

1. APA § 551 (4) defines rule as “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 includes approving or setting rates, wages, structures, reorganizations, facilities, applicants, services, costs.
2. Rulemaking distinguished from adjudication
   a. Rulemaking is a legislative type policy determination that has future application
      1.) Open to an expanding class
      2.) MSAPA do not require “future effect”
   b. Adjudication applies to past acts and applies the law to evidentiary facts
      1.) Only binds named parties
   c. Test: rule making usually requires adjudication to make it effective against particular individuals
   d. “or particular applicability” drafters of APA wanted to allow certain actions like ratemaking to be able to be carried out under rule making
      1.) Under MSAPA—ratemaking for a class of people is rulemaking, while rate making for one named party is adjudication
3. Prospective v. Retroactive
a. Bowen v. Georgetown University Hospital
   1.) HHS issued a retroactive rule for Medicare reimbursement
   2.) Held: General rule that retroactivity is disfavored in law, and only
        understand agency to have authority to act retroactively if expressly
        provided by congress.
b. Secondary retroactivity—a rule with future effect will affect past
   transactions—but not the same as the Bowen situation of altering the past
   legal consequences of past actions.
c. When agency has not previously acted and is not replacing a previous
   stance, then court has signaled that retroactivity may not be as large of a
   problem

C. Initiation of Rulemaking
   1. Chocolate Manufactures Ass’n v. Block
      a. CMA claims that it should have had notice that chocolate milk might be
         excluded under new WIC rules.
      b. Held: the APA requires notice of either the terms and substance of the
         proposed rule or a description of the subjects and issues involved. It is
         okay that final rule differs from what is proposed as long as the changes
         are logical outgrowth of the original scheme—not the case here when
         court looks at the history of the use of chocolate milk, the preamble
         discussion and the proposed rule.
   2. Must allow reasonable time for comment—look at context..
   3. Rule making record
      a. Portland Cement—must reveal studies, reasoning behind rule so that
         public can comment meaningfully
      b. Agency can add documentation to record to respond to comments without
         triggering new comment period.
      c. However, where agency goes beyond response and adds data that public
         questions, 9th Cir. Has said should be able to do so.

D. Public Participation
   1. Informal Rulemaking
      a. “notice and comment rulemaking”
      b. only type of rulemaking recognized by state APAs
      c. can limit participation to written submissions
      d. not all interested parties have same opportunity to participate in the
         process: may lack the economic, education, or organizational resources
   2. Formal Rulemaking
      a. Formal rule making under APA §556 & 557 is only triggered when rules
         are required by statute to be made on the record after the opportunity for a
         hearing.
      b. If it is required, participants have the opportunity for a trial type hearing,
         the right to present evidence, cross examination, rebuttal evidence.
      c. United States v. Florida East Coast Railway Co.
         1.) Interstate commerce act requires that ICC adopt rules “after hearing”
            but ICC refused to grant railroad a trial type hearing.
2.) Held: Hearing as used by the APA does not necessarily mean the right to present oral arguments, evidence, and cross examine opposing witnesses. The notice and comment period given by the agency meets the requirement of the statute.

d. Strong presumption in courts against formal rule making
   1.) Inefficient, can frustrate regulatory goals, unsuitable for determining policy type issues

3. Hybrid Rulemaking
   a. Some statutes require more formal procedures than those required for informal rulemaking but less formal than formal rule making
   b. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council
      1.) The court of appeals held that even though the AEC had met the requirements of § 553 more was required.
      2.) Held: Unless there is a compelling or constitutional issue, courts are not free to impose additional requirements on agencies above and beyond the APA. Review focuses on whether the agency has followed the APA or other relevant statutory mandate
         a) Can more closely review substance—“hard look review”.
         b) Some steps that courts require to facilitate judicial review seem to impact agencies procedural choices

E. Procedural Fairness in Rulemaking
   1. Role of Agency Heads
      a. Morgan I requires that the person who takes responsibility for an agency decision have some familiarity with the record.
      b. Staff-prepared summaries can not distort the record
      c. Morgan IV though says that usually can’t inquire into the mind of the rule maker

2. Ex Parte Contacts
   a. Rulemaking Record
      1.) Aids public participation
      2.) Provides helpful materials to agency decision
      3.) Facilitates judicial review
   b. Ex parte contacts in formal adjudication forbidden
   c. Ex parte contacts in informal adjudication
      1.) HBO v. FCC (DC Cir.)
         a) There were a number of ex parte contacts of participants in the rulemaking process, many after the close of arguments.
         b) Held: There is an assumption that final rules reflect a reasoned decision based on a body of evidence. Relevant information gathered ex parte must be disclosed, but informal conversations are okay as long as they do not frustrate judicial review or raise serious questions of fairness.
      2.) Sierra Club v. Costle
a) After the close of the comment period, the EPA was involved in a series of meetings at the white house where the white house tried to change their mind.
b) Held: Where congress has wanted to limit ex parte contacts in rulemaking it has done so, but under the clean air act ex parte communications are only required to be disclosed when they are of central relevance to the rulemaking or where due process is at stake.
   i. Complete isolation within the executive branch is not desirable or required—it is okay if the white house affects the outcome as long as there is still some factual basis for the outcome in the record.
   ii. Might be more restrictive of ex parte communications where quasi adjudication among conflicting private claims to valuable privilege was involved.
3.) 1981 MSAPA—must disclose all written materials but oral ex parte communications are not prohibited and they do not have to be disclosed.

3. Prejudgment
   a. Association of National Advertisers v. FTC (DC Cir)
      1.) FTC chairman spoke out prior to conclusion of rulemaking about evil of advertising in children’s programming.
      2.) Held: The court should not hold administrators to judge like standards of neutrality when they are acting as a policymakers, as long there is not clear and convincing evidence that the agency member has an unalterably closed mind—not the case here.
         a) Just because congress may have enacted rulemaking provisions beyond those required by § 553, it does not make a proceeding quasi-adjudicative.

   F. Statement of Basis and Purpose
      1. California Hotel and Motel Association v. Industrial Welfare Commission (CA)
         a. CA labor code requires that each rule have a statement of the basis of the rule.
         b. Held: On review the court asks whether the agency acted within the scope of its authority, did it employ fair procedure, and was the action reasonable. To determine reasonable, the statement must reflect the legal, factual, and policy foundations for a rule and must address comments and alternatives —recitation of authority here is not enough.
         c. Reasons in favor of statement:
            1.) Facilitates judicial review
            2.) Allows more scrutiny by regulated parties, interested groups, legislature and public
            3.) Helps to ensure that agency is reasoning through decision and not making an arbitrary or capricious decision
            4.) Helps facilitate predictability in rulemaking process
5.) Increases appearance of legitimacy

2. Federal APA § 553(c) requires a concise general statement of the basis for the rule.
   a. SC has interpreted this to mean that major issues of policy will be addressed and courts have also required that the agency respond to significant and material arguments.

3. Contrast 1961 MSAPA which only requires explanation when public requests it not all the time like 1981 MSAPA and Fed.

4. Post Hoc rationalizations disfavored.

G. Issuance and Publication
   1. publication ensures compliance and communicates standards to the public
   2. Federal register published each day with rules and notices of proposed rules.
   3. absent good cause rule does not become final for 30 days.

H. Regulatory Analysis
   1. systematic assessment involving more than just the usual notice and comment proceeding—most commonly take form of cost benefit analysis
   2. series of presidential orders have mandated that executive branch agencies engage in CBA
      a. supposed to prove analysis for all “significant regulatory action” (over $100 million) to OIRA “to the extent permitted by law”
      b. pros: lead to efficient use of resources, prevent agency tunnel vision
      c. cons: may not be practical, hard to quantify some things
      d. Regulatory Flexibility Act—supposed to consider impact on small entities
   3. some states require for all rules.
   4. controversy over whether compliance with CBA should be reviewable—usually not because no remedy.

VI. Rules as Part of the Agency Policymaking Processes
   A. Rulemaking Exemptions
      1. In general courts tend to favor rulemaking procedure, and construe exemptions narrowly
      2. good cause exemptions
         a. Federal and state APAs allow agencies to avoid notice and comment for good cause.
         b. APA § 553(b)(B) exempt when:
            1.) unnecessary,
               a) technical or minor amendment—correcting mistake, repealing meaningless rule
               b) agency has no real discretion about contents of rule
               c) some suggest that agencies should use direct final rulemaking in these situations
                  i. streamlined process where agency gives notice and says rule will go into effect unless negative comment received by the deadline, if get negative comment use normal notice and comment
            2.) impractical or contrary to the public interest.
               a) Urgent need for action such as statutory deadline
b) Waiting would undermine objectives of the statutory objectives
c) Often use “interim-final” rules in these situations
   i. Seek comment after the rules go into effect
   ii. What if interim-final rule is invalid?
      (a) Some courts invalidate permanent rule as well
c. Fairly often used, despite courts saying they narrowly construe exemption
d. APA §553(d)(3) for good cause may also do away with waiting 30 days
   for the rule to go into effect.

3. Procedural rules
   a. APA § 553(b)(A) exempts rules of agency organization, procedure, or
      practice
      1.) No equivalent in state APA’s
      1.) OHSA changed how it selected businesses for inspection.
      2.) Held: Not a substantive rule requiring notice and comment because its
          affect did not have a substantial impact on the regulated industry
c. Alternative test used by DC circuit: look at whether rules have a
   substantive value judgment or put stamp of approval/disapproval on
   behavior.
d. Problem b/c not a bright line distinction under APA between substance
   and procedure.

4. Exempted subject matter
   a. Certain rules categorically exempt from usual notice and comment
      procedures
   b. APA § 553(a)(2) all rules relating to public property, loans, grants,
      benefits, or contracts exempt
   c. APA § 553(a)(2) exempts rules relating to agency management or
      personnel
   d. APA § 553(a)(1) exempts rules relating to military and foreign affairs
      1.) but DOD usually follows notice and comment for rules having
          substantial and direct effect on the public

5. Nonlegislative rules
   a. Legislative and nonlegislative rules
      1.) legislative rules: issues pursuant to express or implied grant of
          authority to issue rules with the force of law
          a) have a binding affect on individuals
          b) can be either procedural or substantive
      2.) nonlegislative rules—guidance documents, not have force of law
          a) not automatically binding
   b. Policy statements
      1.) Mada-Luna v. Fitzpatrick
         a) INS sent instruction to its staff regarding the deferment of
            deportment
b) Held: Instructions which leave discretion to implementing official are only guidance and thus non-legislative statements of general policy.
   i. Statements of general policy must be prospective, must not be final, determinative, or establish a binding norm.
   ii. 9th Cir. Rejecting the “substantial impact” test—want to look at its affect on agency decision making not its effect on the public at large.
2.) Can be invalid if agency treats as a binding legislative rule when applying it to individuals.
3.) Debate over whether a rule can still be nonlegislative if the agency has only bound itself (DC cir. = yes).
4.) Only S.C. case on the matter Vigil allows the exception for non-tentative change b/c there was not notice and comment on original rule—most commentators derisive of its rationale.

c. interpretive rules
   1.) USDA internal memo set height of fence for dangerous animals at 8 feet interpreting earlier rule requiring that animals be kept within appropriate enclosures.
   2.) Held: An interpretive rule, to be exempt from notice and comment, must be interpreting something—it must be able to be derived from the original rule or statute. Arbitrary rules choices where the agency is choosing among several alternatives is a legislative function and notice and comment is required.
      a) Would have allowed interpretive rule with numerical component if had limited by calling it rule of thumb or presumption.
   3.) Rule is plainly interpretative if the agency has no legislative rulemaking authority in that subject matter—EEOC on discrimination.
   4.) Some courts will look at how agency classifies rule and what its intent was.
   5.) Some courts look at whether the rule was intended to be a binding norm---but most courts distinguish between test for policy statement and test for interpretive rule.
   6.) Must be consistent with what it is interpreting: amendments of legislative rules must themselves be legislative rules.

B. Required Rulemaking
   1. federal law
      a. NLRB v. Wyman-Gordon
         1.) In a previous case, the NLRB had changed positions and required disclosure of names and addresses of employees, but did not apply to those before it—said all others 30 days from order.
         2.) Held: Even if adjudicatory procedures are followed, the board may not use adjudication to issue new prospective rules of general applicability—however the decisions can serve as precedent and bind the parties before it.
a) Counter: may be hard to tell at commencement whether or not retroactive application would make sense.

b. NLRB v. Bell Aerospace
   1.) The substantive case was remanded to the board for a determination as to whether buyers are managerial employees
   2.) Held: It is permissible for agencies to promulgate a new standard of general applicability in adjudication—the agency has to decide the matter at hand and may need a standard to deal with unforeseen circumstances.
      a) Important that showed flexibility
   3.) General Rule: Choice of adjudication or rulemaking is within agency’s discretion.
      a) Possible exemptions: substantial adverse consequences because of reliance on past decisions, new liability imposed for past actions taken in reliance, fines or damages involved.
         i. Is new rule announced in adjudication unfairly retroactive:
            (a) Case of first impression?
            (b) Abrupt departure from previous decisions?
            (c) Reliance on prior law?
            (d) Burden of the order?
            (e) Statutory interest in applying the new rule
         ii. Court found such an abuse of discretion where FTC issued a ruling with widespread application that changed existing law and impacted a widespread practice.

C. Petitions
   1. §553 (e) of APA allow members of the public to petition an agency for the issuance, amendment or repeal of a rule.
      a. Does not require a statement of the reasons for denial (most states do) but §555(e) which requires a brief statement upon denial of any application or petition has been interpreted as having such a requirement.
   2. WWHT v. FCC
      a. Broadcasters filed petition with FCC to require cable companies to carry their scrambled signals.
      b. Held: While a court can review a grant of a petition, a court is very deferential because it is dealing with policy choices and the agency’s discretion. Only require in rare abnormal circumstances like where the factual basis for prior decisions has changed, there is a mistake about jurisdiction.
   3. Federal APA contains no time limit—unlike state APAs.
      a. Congressional deadlines—courts often do not enforce.
      b. Where citizens want to expedite proceedings courts look at:
         1.) Length of time that has elapsed
         2.) Context of the statute
         3.) Consequences of the delay
         4.) Administrative pleas/explanations
4. Agencies can conduct their own internal review of rules—but usually don’t due to scarce resources, not wanting to find out mistakes, political pressures.

D. Waivers
1. Wait Radio v. FCC (DC Cir.)
   a. WAIT wanted a waiver of FCC clear channel rules
   b. Held: While an agency is free to issue general rules, it also needs to seriously consider individual cases and judicial review requires a clear statement of the reasons for the agency’s actions even though it is understood that a waiver is generally discretionary and a high hurdle.
2. As important as they are, SC has said that waivers are not essential to a rule’s validity—but otherwise broad rules may be saved by a waiver clause.
3. FL: Statute requires waivers be granted when person demonstrates that the statutory purposes are or will be met another way and that the application of the rule would be a substantial hardship.
4. Iowa: draft legislation would require waiver where the applicant can show that applying the rule to them would not serve any of the purposes of the rule.

VII. Political Control of Agencies
A. Introduction
   1. agencies can be seen as a threat to our basic system of checks and balances and separation of powers
      a. Some state agencies are constitutionally created and some agency heads are elected

B. Nondelegation
   1. basic premise that congress’s ability to delegate legislative powers is limits
      a. separation of power—should not be able to transfer power to executive branch
      b. checks and balances—if transferring need limits on discretion of agencies
   2. Field v. Clark (1892)
      a. General rule that cannot delegate legislative power to the president but president is not engaging in law making when he decides if a given condition exists.
   3. Only time ever used principle was to hold two NIRA provisions unconstitutional in new deal era.
      a. Panama Refining & Schechter —congress must establish guiding principle
   4. Amalgamated Meat Cutters v. Connally
      a. Economic Stabilization act gave President broad powers to set wages and prices.
      b. Held: Not a violation of the nondelegation doctrine because congress supplied sufficient standards, limited the time frame of the powers—did not give the president a blank check.
   5. Industrial Union Department v. American Petroleum Institute (SC)
      a. OHSA has power to set health and safety standards that are “reasonably necessary”.
      b. Held: [Rehnquist’s concurrence] Invalid delegation because congress did not make the fundamental policy choice as to how costs should be
weighed—should not give secretary the choice of which fundamental value should be ranked higher.
1.) This also ensures that reviewing courts have a standard by which to measure rules validity
2.) Require more precise standards when fundamental rights are threatened
c. What appears to be happening in these cases is that the court does the work of the legislature, makes policy choice and fleshes out the statute to supply a standard.
   a. At issue is whether the EPA can consider costs in setting standards
   b. Held: Agency can not itself cure deficient legislation by deciding which portion of its authority to exercise—statute here provides adequate standard without giving too much discretion.
      1.) Again court fleshes out the statute.
7. Non-Delegation Doctrine in the States
   a. Thygesen v. Callahan (IL)
      1.) Legislature delegated to agency power to set maximum rates for check cashing.
      2.) Held: A valid delegation specifies: The persons and activities subject to regulation, the harm sought to be prevented, the general means intended to be available to the administration to prevent the identified harm. Here the legislature did not specify the harm sought to be prevented.
   b. More state cases have overturned delegations
   c. Some states say fuzzy standards are okay if there are sufficient procedural safeguards.
C. Rationale for Political Review
   1. want legislative review because unlike courts legislatures are directly accountable to people
   2. more able to resolve conflicting rules and regulations on policy grounds
D. Legislative Controls
   1. legislative veto
      a. when congress can not or does not specify its wishes in the agency’s enabling act, it frequently used the legislative veto to invalidate or suspend agency action by less cumbersome means than enacting a new statute.
      b. Immigration and Naturalization Service v. Chada
         1.) Immigration and nationality act provide that the house or the senate could veto suspensions of deportations.
         2.) Held: Legislative vetoes are unconstitutional because article I, §7 requires that law making go through a bicameral process with presidential approval.
         3.) Concurrences would have invalidated only on separation of powers grounds—acted impermissibly by adjudicating individual rights.
         4.) Chada applies to both rulemaking and adjudication situations, but is still showing up in new laws.
5.) Shift now to rely more on the separation of powers doctrine.

c. Many state legislatures use, in some state constitutions.

2. alternatives to the legislative veto
a. congressional review act (1996)
   1.) congress can veto either major or non-major rules (either legislative or nonlegislative) by enacting a joint resolution of disapproval—both houses of congress + president signs.
   2.) If disapproved as if it were never enacted, and the agency may not try again unless congress says it can.
      a) ABA alternative would allow agencies to issue same rule with explanation
   3.) Used to defeat OHSA ergonomics rule—10 years in the making, defeated in week.

b. Many states use suspensive vetoes that allow legislative committees to suspend agency rules for a limited period of time.
   1.) WI committee could suspend for emergency relating to public health and safety, absence of statutory authority; failure to comply with legislative intent, conflict with state law, changed circumstance, arbitrary, capricious or imposition of undue hardship.
   WI said constitutional—but state does not have an express separation of powers clause. Said only need presentment for permanent suspensions.

c. MSAPA says can only object to rules beyond the procedural or substantive authority of the agency—thus should not be able to object purely on policy grounds—but some find these limits unrealistic.
   1.) MSAPA provides for bicameral AARC committee to review the rules

d. West VA approach—agencies could not promulgate rules only propose—but W.VA sup. Ct. said unconstitutional.

e. Line Item veto case—court said unconstitutional following Chad

3. other legislative controls
a. most states have formal continuing legislative oversight mechanisms to review legality and desirability of agency rules in form of oversight committees.
   1.) In US congress have both authorization committees and government affairs committees conducting oversight
b. Standing committees hold hearings and investigate agency activities—can subpoena to produce documents

c. Can also use legislative investigative agencies like general accounting office.

d. Few states have office of ombudsman that collect complaints about agencies

e. Can alter priorities through funding
f. Members of legislature may make direct contact to try to resolve constituent problems

E. Executive Controls
   1. appointment power
a. Buckley v. Valeo
   1.) Federal election commission was to consist of two members appointed by president of senate, two by speaker of house (upon recommendation of majority and minority leaders) and two by president.
   2.) Held: Congress cannot vest appointment in power in itself. The constitution specifies that the President appoints officers, and that inferior officers may be appointed by department heads, the president, or courts.
      a) But commission is still free to have same powers as a congressional committee—investigative and informative functions.

b. Morrison v. Olsen
   1.) Independent counsel is an inferior officer b/c subject to removal by higher executive branch officer, limited duties and scope controlled by commission, temporary position.
   c. Coast guard court of criminal appeals inferior officers. Test in Edmonds: Inferior officers—work is directed and supervised by others who were appointed by presidential nomination process.
   d. Justices disagree over whether “courts of law” only refer to article III courts.
   e. States—wide variations—some states require legislative confirmation, some don’t—some state constitutions leave to legislature to decide, and allow for legislature to reserve it to itself.
      1.) Some states say legislature can’t appoint b/c of separation of powers problem.
      2.) Some look at it as perception of functions of judicial v. executive—some states will allow chief judges to appoint AJL’s.
      3.) Kansas: look at nature of powers of agency, degree of control of legislature, whether legislature’s objective was to cooperate with executive branch, not establish superiority, and practical results.
   f. Federal, and most state constitutions say legislators can not be appointees
   g. Legislatures can usually specify appointment criteria—but may in exceptional cases infringe to much on appointment discretion

2. removal power and the independent agency
   a. Myers v. United States—early case said president’s removal power could not be limited.
   b. Humprey’s executor v. United States
      1.) Congressional statute said FTC commissioner could only be removed for cause. Roosevelt tried to remove anyway.
      2.) Held: difference between president’s ability to remove an officer like the postmaster with purely executive duties and a commissioner who has both executive and adjudicative duties. To create an independent agency congress needs the power to fix tenure.
   c. Wiener—such a limitation on presidential removal power could be implied from the adjudicative function of the agency.
1.) Other cases say where limitations are not express, removal power should be incident to power of appointment. I.e. unlimited term = at will. But, much variation in case law.

d. Independent Agency v. Executive Agency

1.) Both subject to APA, carry out enforcement and rulemaking, and are subject to judicial review, both tend to work fairly closely with president.

e. Morrison v. Olsen

1.) Independent Counsel Act said Attorney General could only remove with “good cause”

2.) Held: Rather than rigidly defining categories of executive/adjudicatory, a better test is whether congress have unreasonably infringes with President’s exercise of executive power.

a) Congress not usurping power for itself, or for judiciary—no separation of powers problem because the balance of powers is not disrupted.

3.) Scalia’s dissent—constitution gives president all of the executive power, not just some—any limitation is unconstitutional.

f. Bowsher v. Synar—just because congress can limit the president’s power to remove, does not mean that congress can retain removal power for itself.

g. Mistretta—United States Sentencing Commission—okay because not unduly strengthen or weaken judicial branch

h. States vary.

3. Executive oversight

a. OIRA allows for structured presidential review of rulemaking by OMB including by independent agencies. Reformed to make process much less secretive and more accountable. Agency must identify changes. All written memos must be disclosed.

b. Kendall—president should not be able to interfere with law imposing duty on agency head

c. Youngstown Sheet metal—President can have power to act without statutory authorization if not against constitution.

1.) Jackson’s concurrence. Presidential Power strongest when president acting according to the express or implied authorization of congress. Next, in absence of statutes president can rely on constitutional powers. Least power when acting contrary to congress.

2.) Not clear where OIRA falls—“twilight zone” b/c no congressional action

VIII. Scope of Judicial Review

A. Issues of Basic Fact

1. Agencies determinations of who, what, when, why, where questions can be reviewed by several formulas

a. Trial de novo—trial court would decide issue anew

b. Independent judgment of the evidence—decides case on agency record, w/o deference agency findings
c. Clearly erroneous—court reverses only for clear mistakes
d. Substantial evidence—court will not reverse if a reasonable person could have reached the same conclusion as the agency.
   1.) Standard under the APA § 706
e. Some evidence—court can not reverse if there is some or “scintilla” of evidence
f. Facts not reviewable at all—statute might preclude review

2. Universal Camera Corp v. NLRB
   a. Act provided that the findings of the agency were to be conclusive if supported by the evidence.
   b. Held: This means that there must be substantial evidence of the type required by a reasonable mind and that opposing evidence must be taken into account as well.

3. Party that is proponent of an issue has the burden of persuading the trier of fact by preponderance of evidence

B. Issues of Law: The Chevron Doctrine
   1. Three possible approaches
      a. Traditional view: Substitution of judgment
         1.) Could decide issue for itself (authorized by APA to do so)
         2.) Weak deference: Grant “some weight” to agency interpretation
      b. No deference to agency view
      c. strong deference to agency view
   2. Connecticut State Medical Society v. Connecticut Board of Examiners in Podiatry
      a. Held: no special deference to agency decision that ankle part of foot because no prior interpretation of statute
      b. View of most state courts
      c. Factors indicating need to defer to agency
         1.) Comparative competence
         2.) Interpretation of rules
         3.) Factors indicating agency interpretation is probably correct
         4.) Procedures in adopting interpretation
         5.) Thoroughness of consideration
         6.) Contemporaneous construction
         7.) Long standing construction
         8.) Consistency
         9.) Reliance
         10.) reenactment
      a. EPA legislative regulation said that plant equals one stationary source under clean air act.
      b. Held: Two step inquiry when reviewing agency interpretation of statute:
         1.) Is congressional intent clear?
            a) If congressional intent is clear, court must give effect to unambiguous meaning given by congress
            b) In practice, FDA v. Brown-Williamson—look at context of statute
2.) If congress has not spoken to issue, then ask is agency’s interpretation permissible under the statute?
   a) Court should defer to agency construction unless the agency’s interpretation is arbitrary capricious or clearly contrary to statute
   c. Court has said may not apply to interpretative rules and other statements which lack force of law
d. Other possible exceptions:
   1.) Constitutional issues
   2.) Departures from SC precedent
   3.) Private rights of action
   4.) Limits on jurisdiction
   5.) Broad procedural statutes
   6.) Statutes that agencies don’t administer

C. Exceptional Cases: Chevron Exceptions
   1. US v. Mead Corp
      a. United States Customs Service issued tariff classification in “ruling letter.”
      b. Held: No chevron deference because no indication that ruling carries force of law—need explicit or implicit congressional delegation.
   1.) Degree of Deference determined by:
      a) Degree of care
      b) Consistency
      c) Formality
      d) Expertise
      e) Persuasiveness
   2.) But, can have chevron deference even where no notice and comment proceedings
c. Agency view may still be due some deference

D. Issues of Discretion in Adjudication
   1. 706(2)(A) authorizes review under the arbitrary and capricious test
      a. administrative rules
      b. informal adjudications
      c. formal adjudications
   2. Salameda v. Immigration and Naturalization Service
      a. To suspend deportation, alien must prove evidence of extreme hardship
      b. Held: extreme hardship must consider hardship to children and community involvement, INS must address these arguments in a logical manner.
c. Congress has now prohibited judicial review of such INS decisions
   3. Citizens to Preserve Overton Park
      a. When reviewing discretionary agency action, court asks if agency was within scope of authority and whether decision was based on consideration of relevant factors, whether there was a clear error of judgment
   4. Pension Benefit Guaranty Corp—limited relevant factors to those directly related to action, not those found in tenuously related statutes
   5. Factual underpinnings must still find support in record
   6. not an abuse of discretion to treat parties differently unless decision unwarranted in law or without justification in fact
7. ABA Checklist
   a. Policy judgment so unacceptable as to be arbitrary
   b. Illogical reasoning to point of being arbitrary
   c. Factual premises do not stand up to relevant standard of review
   d. Action, without justification, inconsistent with prior agency actions
   e. Arbitrarily failed to adopt alternative raised in action
   f. Fails to rest on reasoned decision making

8. Chenery Rule: Court cannot affirm agency decision on grounds other than those relied on by agency
   a. Rule announced must be rule applied

9. Federal cases—closed record review
   a. Exceptions
      1.) Agency failed to examine all relevant factors
      2.) Agency did not explain grounds for decision
      3.) Agency acted in bad faith

E. Issues of Discretion in rulemaking
1. State Farm Case
   a. NHTSA decided not to require passive restraints or airbags.
   b. Held: under the arbitrary and capricious standard of review, revocations of standards still requires reasoned analysis by the agency because did not consider alternatives, did not explain choice, no evidence in support of conclusion in light of fact that congress intended safety not cost to be decisive factor.
   c. Arbitrary and Capricious if:
      1.) Relied on factors not intended by congress
      2.) Failed to consider part of problem
      3.) Explanation runs contrary to evidence
      4.) Im plausible decision
   d. Also known as “hard look review”
   e. Baltimore Gas & Electric—more deference afforded technical, scientific findings requiring special expertise

2. Borden (MA case)
   a. Arbitrary and capricious means plaintiff must show absence of any conceivable grounds for regulation

3. Arbitrary and Capricious v. Substantial Evidence—most say now same thing, even though used to be that sub. Evidence was a stricter standard

IX. Availability of Judicial Review
A. Judicial Remedies
1. the expense, long waiting time, fact that harm may already be done, and the need to have a continued relationship with the agency may all preclude judicial review from being practical remedy
2. statute often provides for explicit review procedure—trend to giving responsibility for review to appellate courts
3. Federal Courts have jurisdiction under
   a. 28 USC 1331—actions arising under the constitution, laws, treaties of United States
b. 28 USC 1361—district court jurisdiction over mandamuses to request action by agency/officer
c. 28 USC 1343 jurisdiction over civil rights claims
d. diversity jurisdiction
e. supplemental jurisdiction

B. Reviewability
   1. statutory preclusion
      a. strong presumption in favor of judicial review
         1.) APA § 701(a)(1) applies except where statutes preclude judicial review
      b. Bowen v. Michigan Academy of Family Physicians
         1.) Medicare act provided for review of part A distributions, silent on part B
         2.) Held: Absence of intent that congress deliberately meant to foreclose review
      c. Legislative history on APA—intent to withhold review must be clear and convincing
         1.) “shall be final” often read to permit judicial review
   2. actions committed to agency discretion
      a. APA § 701(a)(2) precludes review to extent which “committed to agency discretion by law.
      b. Heckler v. Chaney
         1.) Chaney wanted FDA to review using drugs for lethal injections
         2.) Held: FDA’s discretion may not be judicially reviewed because this is a case where there is essentially no law to apply
         3.) Dictum: Different result if refusal to act based on mistaken belief about jurisdiction, or where agency is abdicating statutory responsibility, or where constitution implicated
c. Denials of petitions for rulemaking may be reviewable

C. Standing
   1. Old test—needed legal interest, only exception for statutory standing
   2. § 702 of APA provided that a person suffering legal wrong because of an agency action or adversely affected or aggrieved by agency action has standing
   3. injury in fact and zone of interests
      a. Association of Data Processing Service Orgs. V. Camp
         1.) Sellers of data processing services challenging ruling that banks could provide data processing services
         2.) Held: Standing requires injury in fact and the interest asserted by the plaintiff must be within the zone of interests sought to be regulated by statute or constitutional provision asserted.
            a) Interest and injury do not have to be economic—can be aesthetic, conservational, or recreational
            b) Interest can not be so marginally related or inconsistent with purposes of statute
   4. causal connection and public actions
a. Lujan v. Defenders of Wildlife
   1.) Endangered species act said anyone could sue. Plaintiffs had desire to see wildlife in other countries and wished to challenge rule saying that AID need not consult with secretary if foreign wildlife threatened.
   2.) Held: Injury in fact requires 1) that it be concrete and particularized, not hypothetical, 2) causal connection between injury and defendant’s conduct, 3) must be likely, not speculative that injury will redressed by court action.
   3.) Associations can sue on behalf of members when a) one or more members would otherwise have standing to sue on own right, b) interests are germane to organization’s purpose and c) neither the claim nor relief requires participation of individual members
   4.) In contrast, many states allow public actions to vindicate public interests
b. Jus tertii rule: plaintiffs can not assert the rights of third parties only their own.
c. Interest can exist where congress has created right—i.e. election case—all voters have right to information, each can allege that it has not been fulfilled and sue to vindicate it.
d. Procedural interest: do not have to address redressibility requirements if have an otherwise tangible interest at stake.
e. Citizen suit provisions—lujan saying congress must identify the injury they seek to vindicate and relate it to the class of persons.
5. some states have abolished test and anyone can sue

D. Timing
   1. finality
      a. general rule: courts only review final orders
      b. FTC v. Standard Oil
         1.) FTC issued complaint saying they had reason to believe they were engaged in unfair competition
         2.) Held: Agency actions are only reviewable if they are the final agency action or otherwise directly reviewable under § 704 of the APA. No definitive ruling or regulation here, no legal force or practical effect beyond ordinary burden of litigation. Judicial review would not serve efficiency or enforcement.
            a) Exhaustion of remedies not the same thing as finality
      c. Final = consummation of agency’s decision, and rights and obligations have been determined—legal consequences flow
      d. Exception: May get review if inadequate remedy or irreparable harm from postponing
      e. Franklin v. MA
         1.) Held that no final action because secretary’s action subject to review by president, and president’s decision not reviewable b/c president not an agency.
   2. ripeness
      a. general rule: need concrete agency action before can seek review
b. Abbott Laboratories v. Gardner
   1.) FDA rules said that drug companies had to show the generic name of a
drug whenever they used the trade name.
   2.) Held: Ripe for review considering fitness of issues and the hardship to
the parties. Regulations have direct and immediate impact on the
plaintiffs.
c. Toilet Goods v. Gardner
   1.) Fact that FDA may do inspections not enough of a hardship, or final
   enough for review
d. Some interpretive rules and policy statements ripe for review, but some
   found to not be final.
   1.) Letter of advice from agency head can = final.
e. Statutory time periods—usually applied from time rule becomes ripe for
review
3. exhaustion of remedies
   a. general rule: must first exhaust all administrative remedies
   b. McCarthy v. Madigan
      1.) McCarthy filed damages for violation of 8th amendment rights.
      2.) Held: in deciding whether exhaustion is required, court looks to
congressional intent and balances the interest of the individual against
institutional interests in favor of exhaustion. Exhaustion not required
where it would subject an individual to undue prejudice or irreparable
harm or where the agency may not be empowered to grant effective
relief.
c. New Jersey Civil Service Ass’n v. State (NJ)
   1.) Appellants challenging implicit refusal to appoint them as ALJ’s.
   2.) Held: Do not need to exhaust remedies where only legal questions are
at issue, where administrative remedies would be futile, irreparable
harm would result, agency jurisdiction is doubtful or public interest
requires.
d. If statute does not require exhaustion and court has discretion usually
consider:
   1.) Nature and severity of harm to plaintiff
   2.) Need for agency expertise in resolving
   3.) Nature of the issue
   4.) Adequacy of the remedy
   5.) Extent to which claim is just delaying agency process
   6.) Clarity or doubt as to resolution of merits of claim
   7.) Extent to which exhaustion would be futile
   8.) Extent to which there is a valid excuse for failure to exhaust
e. Last sentence of § 704 of APA—court has held as exception to exhaustion
rule if agency does not make it mandatory that they have to exhaust.
f. Constitutional challenges not required to exhaust unless statute requires or
   if party has both constitutional and non-constitutional claims or if is only
attacking constitutionally as applied to plaintiff