

- I. Constitutional Right to Be heard
 - a. Due Process, Hearings, and Mass Justice
 - i. General
 1. Concerns the extent to which government agencies must provide process when they make decisions
 2. Important Concepts in the Course
 - a. Admin Law is Important
 - b. Administrative Procedure is Costly
 - c. Administrative Law is about Discretion
 - d. Issues of Admin Law involve fundamental Value conflicts
 - ii. Hearings and Welfare Termination: Due Process and Mass Justice
 1. **Goldberg v. Kelly**
 - a. Several P's bring suit alleging that they were dropped from the welfare rolls for erroneous reasons. Caseworkers, who has doubts about recipient, first must discuss eligibility requirements with recipients. Then, caseworker can propose to supervisor, who if agrees sends letter telling recipient they have 7 days to appeal to higher up (may support w/written statement or aid of attorney). If higher up agrees with supervisor, aid is stopped. Letter sent to recipients are allowed a post-termination "fair hearing" before state official. P's claim that this is violation b/c there is no (1) personal appearance, (2) no oral presentation of evidence, and (3) no confrontation and cross-examination of adverse witnesses. These are present at the "fair hearing" and a recipient who loses at fair hearing has judicial review.
 - b. **Held**, a state that terminates public assistance payments to a particular recipient w/o affording him the opportunity for an evidentiary hearing prior to termination *does* deny the recipient procedural due process in violation of the 14th amendment?
 - i. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication
 - ii. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.
 - iii. Termination of aid while a person waits for hearing has the ability to deny an *eligible* recipient the aid he needs to survive. The governmental interest in conserving fiscal and administrative resources do not override the welfare needs
 - iv. However, we note that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial
 1. Pre-termination hearing only has one function: produce an initial determination of the validity of the welfare

department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of benefits

2. Need only minimum procedural safeguards: notice setting out reasons for possible termination, oral presentation and confrontation of adverse witnesses, possibility of counsel
- c. Dissent: The majority, while ensuring that none will be taken off welfare rolls without due process, have also ensured that many less will be put on the rolls b/c the government will have to investigate every person it puts on much more closely
2. Notes on Goldberg v. Kelly
 - a. Determined some important things:
 - i. The right to a continued flow of welfare benefits is an interest which is protected by procedural due process
 - ii. The demands of procedural due process are flexible and contextual rather than rigid and non-contextual
 - b. Advantages of Trial Type Hearings:
 - i. Serves a dignitary function: treats the individual as important
 - ii. Helps the individual to understand and accept a negative government decision
 - iii. Good way to reach an accurate decision – protects individuals from factually or legally erroneous agency decisions
 - iv. Create a system of agency precedents which decision-makers follow in later cases
 - v. Serves an empowerment function: provides the individual a way to seize the attention of a bureaucratic institution
 - vi. Official will act seriously and effectively if people have a right to a trial before an impartial decisionmaker
 - vii. Good way to help gov'n't exercise discretion wisely
 - viii. Helps facilitate judicial review
- b. Interests Protected By Due Process: Liberty and Property
 - i. The Roth Test
 1. **Roth v. Board of Regents** (*reconceptualizing the terms "liberty" and "property"*):
 2. P hired by University for one-year contract (non-tenured). Contract states that University must notify by date if rehiring, but needs to give no reason. Sues under Due Process (14th) b/c of no hearing.
 3. **Held**, a right to re-employment on a contract that allows for willful termination is not a "liberty" or "property" as protected under the 14th amendment.
 4. (1) In order to fit under procedural Due Process, a right must be "liberty" or "property."
 - a. Liberty
 - i. (A1) In this case there is no suggestion that the state infringed on P's good name, reputation, honor, or integrity, and
 - ii. (A2) there is no suggestion that the State imposed on P a stigma or other disability that prevents him from seeking other employment.

- b. Property
 - i. (B1) To be property one “must have a legitimate claim of entitlement to it.”
 - ii. (B2) P’s contract stipulated that he had no entitlement.
- 5. Perry v. Sinderman (De Facto Tenure):
 - a. Court holds that in a case just like Roth’s without a tenure system, where the employment was based on implied contract, the Court held that an entitlement could be based on implied as well as express contract b/c implied contract rights are protected in state courts
- 6. Stigmatizing
 - a. Recent decisions also have stated that a stigma alone is not enough to deprive someone of liberty.
 - i. Paul v. Davis - police passed around a flyer with someone picture on it saying they were a shoplifter, and the court found that this was defamatory, but not a deprivation of liberty. Court stated that deprivation of liberty could be *stigma plus some other change of right or status recognized by state law* (e.g. job discharge).
- 7. Right/Privilege Distinction
 - a. Began with Bailey v. Richardson, which held that a gov’n’t job was a privilege and that dismissal was not deprivation or a right, and then moved on to Goldberg v. Kelly (which helped turn the tide) and then in Roth v. Board of Regents the distinction is destroyed.
- 8. Consequences to the positivist approach of **Roth**:
 - a. If the state can grant an entitlement (and thus a right) by statute, it can just as easily take it away by amending or discarding the statute.
- 9. Roth establishes that the definition of liberty applies to both substantive and procedural due process.
- 10. California law
 - a. Differs from the general *Roth* approach, and states that if a discretionary standard is used to make a determination about an individual, a hearing is required. Note 6
- 11. Investigative Proceedings:
 - a. In Hannah, people weren’t allowed to cross-examine their accusers in investigative hearings. However, in Jenkins v. McKeithen, the Court limited Hannah by holding that due process did apply to state investigative proceedings that sought to uncover and publicize criminal activity by unions and brand individuals as criminals.
- 12. Deprivation/Denied distinction
 - a. Must have Due Process if “deprived” of life, liberty, or property. Roth (“14th amendment safeguard of security of interests that a person has already acquired in specific benefits)”
- 13. American Manufacturers Mutual Insurance Co. v. Sullivan
 - a. SC held that no due process rights were available to an applicant for benefits (as distinguished from a person challenging a termination of benefits).
- ii. Elaboration of Property

1. Cleveland Board of Education v. Loudermill

- a. P's work for a city in Ohio (security guard and bus mechanic): can only be discharged for cause. They were offered no opportunity to respond to charges against them prior to discharge. One was discharged for lying on a job application, and one for failing an eye examination. Ohio provided no pre-termination hearing, only a post-termination hearing and judicial review. Post-termination hearing occurred about 9 months after discharge
 - i. Depends on whether the P's have a property right in continued employment – if they do, state can't deprive them of this right w/o due process
 1. Property rights are created and their dimensions are defined by existing rules or under standings that stem from an independent source such as state law
 2. The Ohio statute, which states these employees can only be removed for cause, plainly supports a property rights in continued employment
 - ii. Although a former case held that the property was conditioned on the procedure by which it was given and taken:
 1. Property can't be defined by the procedures provided for its deprivation any more than can life or liberty.
 - iii. Once you find that a property right is granted, you are not to find what process is due in a certain statute
2. Job as property – how to tell if a job is property?
 - a. Bishop v. Wood
 - i. Policeman is classified as a “permanent employee.” Trial Judge held that the policeman “held his position at the will and pleasure of the city.” The SC interpreted this statement and determined the job wasn't property.
 3. Other types of property
 - a. Licenses
 - b. Public Services
 4. Contracts with Government
 - a. If the government breaches a contract, can the person sue and say that they have been deprived of property? If government doesn't provide a hearing, could they be liable for breach of civil rights statute also?
 - i. The positivist approach of Roth and Loudermill might support such a claim, b/c a contract does create a legitimate claim of entitlement under state law.
 - ii. However, this is a problem, b/c if there had to be a hearing, where a ALJ could instruct the gov'n't to perform, this would prevent the government from breaching in efficient circumstances
 - b. Unger v. National Residents Matching Program
 - i. Girl sues alleging that Temple University Medical School breached a contract to admit her into a dermatology residency. Since Temple provided no prior hearing before renegeing on the agreement, she sued it for damages under § 1983. Court held that

only a few types of government contracts are protected by due process – those involving extreme dependence (e.g. welfare) and those in which the contract itself allows the state to terminate only for cause (*Roth* and *Loudermill*)

5. Due Process and *De Minimus* Deprivation

a. What sort of deprivation of property is de minimus?

- i. *Swick v. City of Chicago*: Placing a police officer on paid sick leave, so that he could not wear a barge or carry a gun or arrest people, is a *de minimus* deprivation

c. Timing of the Hearing

i. **Matthews v. Eldridge** (Defining the timing and elements of administrative hearings):

1. P denied disability benefits. Not allowed hearings up to more than a year (typically) after denial. Man believes he should receive hearing prior to denial (like Goldberg).
2. **Held**, an evidentiary hearing is not necessarily required prior to the termination of an entitlement of property.
 - a. These benefits are considered “property” under the 5th and 14th amendments.
 - b. “Due Process is flexible and calls for such procedural protections as the particular situation demands.”
 - c. Whether the Administrative Procedures are appropriate relies on three distinct factors:
 - i. The private interest that will be affected by the official action;
 - ii. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
 - iii. The Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
 - d. The interest here is less than that of Goldberg, because not all of these people are poor; Also, 10 to 11 months is not an excessive amount of time until a hearing; Therefore, this interest is not as great as a welfare recipient.
 - e. The procedures here are reliant on medical evidence, which is often accurate. Also, written evaluation is not always a problem, and people can get assistance at the SSA office. Also, the recipient’s representative is allowed full access to all information relied on by the state agency. Also, recipients receive a written decision that tells them why they are being cut off, so they argue their case to a specific point.
 - f. Finally, the public interest is against this. There would be excessive cost in terms of money and administrative burden. This could hinder how much people receive benefits.
3. Issues With Matthews

- a. *Matthews* is a large departure because it permits an agency to take action determining property or liberty interest prior to an evidentiary hearing in order to save the government money, not because of any emergency.
- b. The balancing approach in *Matthews* is the analytical framework for analyzing the timing and the elements of a hearing.
- c. *Matthews* and timing:
 - i. *Loudermill* stated taking too long could be itself a constitutional violation. *Matthews* allowed up to a year or more in allowing the hearing.
- 4. *North American Cold Storage Co. v. Chicago*
 - a. In case of emergency, the state can deprive an individual of liberty or property without a prior hearing, even if later remedy is inadequate)
- 5. *FDIC v. Mallen*
 - a. Suspension of banking executive under indictment for felony involving dishonestly
- 6. *Hodel v. Virginia Surface Mining Ass'n*
 - a. Agency closes mine prior to because it poses danger to public health
- 7. Roth issues about pre-termination employment:
 - a. *Loudermill* later states that “pre-termination procedures serve an initial check against mistaken decisions, essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”
- 8. *Gilbert v. Homar*
 - a. SC allowed suspension of a tenured policeman without a prior hearing and without pay. He had been arrested and charged.
- 9. Also, note that public safety may require that a licensing board also suspend a license in certain situations (dangerous surgeon, etc.)
- d. Elements of a Constitutionally Fair Hearing
 - i. **Ingraham v. Wright** (Elements of a Constitutionally Fair Hearing)
 - 1. Students were disciplined by paddling in school and injured. They wish to have hearing prior to infliction of physical pain.
 - 2. ***Held***, although paddling is a deprivation of liberty, the current practices provide all the necessary process due an individual.
 - a. Two part question:
 - i. (1) whether the asserted individual interests are encompassed within the 14th Amendments “life liberty or property;” and
 - ii. (2) If so, what procedures constitute “due process of law.”
 - b. What process is due requires consideration of three distinct factors, all viewed against a background of “history, reason, and the past course of action.”
 - i. First, must look at the individual interest: here, the child’s interest in avoiding corporal punishment while in the care of school authorities.
 - ii. Second, look at the procedural safeguards necessary to ensure protection of that liberty: here, criminal and civil remedies are available, and paddling has always been the law of the land

- iii. Finally, must balance the benefit against the cost: here, avoidance of paddling against the time, cost, and inefficiency of a hearing
 - ii. Due Process at School
 - 1. Goss v. Lopez
 - a. Held, a disciplinary suspension of high school students for ten days of less deprived them of property and liberty. However, no hearing was required, simply “some notice . . . and some kind of hearing.”
 - b. Also, students does not have the right to secure counsel
 - iii. Tort Remedies as a form of Due Process
 - 1. Several cases state that tort remedies are adequate due process
 - a. Parratt v. Taylor (unintentional deprivation of prisoner’s property)
 - b. Hudson v. Palmer (intentional deprivation of prisoner’s property)
 - c. Zinerman v. Burch (However, if a pre-deprivation hearing is feasible, the Parratt rule does not apply)
 - iv. State contract remedies as due process
 - 1. Unger decision indicated that a private party’s right to contract should not be treated as “property” for due process purposes
 - 2. Mid-American Waste Systems, Inc. v. City of Gary (Court considers contract rights property, but does not require an administrative hearing when the dispute concerns the interpretation of a contract)
 - v. Right to Counsel
 - 1. Walters v. Nat’l Ass’n of Radiation Survivors (court holds that statute that limits attorney fees in veterans benefit hearings (although they are provided with some other counsel) is fair)
 - vi. Academic Decisionmaking
 - 1. Board of Curators, University of MO. v. Horowitz (A student dismissed for academic as opposed to disciplinary reasons is entitled to much less process).
 - vii. Confrontation
 - 1. Van Harken v. City of Chicago (no cross-examination is necessary when appealing a parking ticket because cost outweighs the benefits)
 - viii. Paper Hearings
 - 1. Hewitt v. Helms (Court required only an informal, non-adversary review of the information supporting the decision, including whatever written statement the prisoner wished to submit, within a reasonable time after prisoner was placed in segregation).
 - 2. Altenheim German Home v. Turnock (If there are no factual issues to be resolved, and agency has discretion to dispense with an oral hearing).
 - ix. Adversary Systems
 - 1. Goldberg v. Kelly is the high water mark for the point of view that due process requires a trial-type hearing
 - 2. Goss opened the way for allowing informal meetings to substitute for trial-type hearings.
 - 3. Walters establishes that Congress can choose a sharply different model for disbursing government benefits: and informal, investigatory meeting without lawyers.
 - x. Lujan v. G&G Sprinklers

1. California Code makes contractors and subcontractors on state contracts pay employees same wages as private sector employees. If DLSE agency believes this hasn't happened, they can withhold payments equal to the difference (plus a penalty) from the general contractor – then general withholds same amount of payment to his subs. No hearing is held prior to the withholding, but subcontractor can contest the matter in court. TC held this violated a property right when payment from general to G&G was withheld.
 2. **Held**, the process afforded under typical due process is due process in this case.
 - a. Though we assume that G&G has a property (from the state contract) right in its claim for payment, it is an interest, unlike the interests in prior decisions, that can be fully protected by an ordinary breach of contract suit.
 - b. If California makes ordinary judicial process available to G&G, that is proper due process
 - c. Though the lawsuit may take years, and thus G&G won't receive payment for years, that hardship cannot be said to deprive G&G of its claim for payments under the contract. Lawsuits aren't quick – but the process is process and damages are awarded at that conclusion of the case.
- e. The Rulemaking-Adjudication Distinction
- i. Adjudication
 1. Government action that affects identifiable persons on the basis of facts peculiar to each of them and
 - ii. Rulemaking
 1. Government action directed in a uniform way against a class of persons
 - iii. **Londoner v. Denver**
 1. Denver ordinance forms a special commission to determine which streets needs to be paved. After paving, the total cost of the job was assessed and was apportioned among the property owners. This decision was binding on the Denver courts. Objecting owners could file written complaints with the council. P filed suit saying that at least he should have an oral hearing b/c those who benefited more did not have to pay more, and thus unfair. Held, (1) The constitution places few restrictions on the ability of a district to tax. (2) But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon who it shall be levied, and of making the assessment of apportionment, due process requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. (3) In this instance, a hearing, more than a simple written complaint (more like a judicial proceeding) is necessary.
 - iv. **Bi-Metallic Investment v. State Board of Equalization**
 1. P is owner of real estate in Denver. P wants to enjoin the Board of Equalization and the Colorado Tax Commission from putting in force an order of the Board increasing the valuation of all taxable property in Denver by 40%. Held, there is no right to be heard in this instance. (1) Where a rule of conduct

applies to more than a few people, it is impracticable that everyone should have direct voice in its adoption. (2) There must be a limit as to individual argument in such matters if government is to go on.

v. United States v. Florida East Coast Ry. Co.

1. (Ju. Rehnquist) A modern restatement of the Londoner/Bi-Metallic distinction
 - a. While a line dividing the two cases may not be a bright one, these decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards and proceedings designed to adjudicate disputed facts in particular cases.
2. (Ju. Davis)
 - a. The crucial difference between the two cases is that in Londoner specific facts about the particular property were disputed, but in Bi-Metallic no such specific facts were disputed, for the problem was the broad and general problem involving all taxpayers of Denver. The basic difference is that a dispute about facts that have to be found on 'individual grounds' ("adjudicative facts") must be resolved through trial procedure, but a dispute on a question of policy need not be resolved through trial procedure even if the decision is made in part on the basis of broad and general facts of the kind that contribute to the determination of a question of policy ("legislative facts")

vi. Cunningham v. Department of Civil Services

1. Two P's were demoted from their job as Director's of Design and the Department of Transportation. By statute, the two were entitled to priority for a new job, DEMS if it was "comparable" to their old job. They were denied the job, and the issue is whether they are entitled to a hearing on whether the jobs were "comparable." Held, a hearing is mandated in this case. (1) Former cases determine whether the agency was acting in a legislative or quasi-judicial capacity. (2) The crucial questions are whether the fact finding involves a certain person or persons whose rights will be directly affected, and whether the subject matter at issue is susceptible to the receipt of evidence. (3) Here, there are seemingly contented adjudicative factual issues. Under the statute, it must be determined whether the functions, duties and responsibilities of DEMS are the same or comparable to those previously carried out by plaintiffs. It is not, as the respondents suggest, whether P's are qualified for the position as DEMS.

vii. What happens when a general rule affects only a few specific people?

1. Anaconda v. Ruckelshaus

- a. EPA passes a regulation that only affects one entity. Court holds that b/c the rule is in general form, due process doesn't apply, and even if it did, it has been met b/c the entity could come to a public hearing and submit documents, etc.

II. Administrative Adjudication: Fundamental Problems

a. Statutory Hearing Rights (Federal)

i. General

1. The statutory process is likely to be more formal than the proceeding required for due process

2. Often the two don't overlap: a statute may require a hearing though due process does not an vice versa
- ii. Statutes
1. APA and 1981 MSAPA do not require adjudicative hearings
 - a. They lay out ground-rules for formal hearings, but agencies need not use those procedures except where an external source (another statute or state or federal constitution) requires a hearing
 - i. This is "Formal Adjudication"
 - b. If an external source doesn't require a hearing, then the agency can make its own hearing procedures
 - i. This is "Informal Adjudication"
 2. However, the APA's of many states and the 1981 MSAPA do not leave it to an external source to decide whether a hearing is required. They prescribe when hearings should occur – and provide for varying models of varying formality.
- iii. Federal Law – Right to a Hearing under the APA
1. APA § 554(a)
 - a. Applies to "adjudications required by statute to be determined on the record after opportunity for an agency hearing . . ."
 - b. When a statute calls for a hearing "on the record," these are code words that it wants the formal adjudication sections of the APA to come into play.
 - i. "On the record" doesn't mean that everything is typed up, etc.
 - ii. This phrase really means "on the exclusive record," which in turn means that the trier of fact is not allowed to consider any evidence except that which has been admitted at the hearing
 2. In APA Formal Adjudication:
 - a. 554(d): Agency must separate its prosecuting and adjudicating functions
 - b. 557(d): No party can engage in ex parte contacts with decision-makers
 - c. 556(d): Agency must allow such cross-examination at the hearing as "may be required for a full and true disclosure of facts"
 - d. If the private party wins and the agency's position wasn't substantially justified, the private party is entitled to recover attorney fees under the Equal Access to Justice Act
 - e. The hearing must be conducted by an ALJ who is hired and assigned to particular cases according to strict standards
 3. **City of West Chicago v. NRC**
 - a. Nuclear Regulatory Commission (NRC) licenses nuclear power plants. KM operated a thorium milling plant in West Chicago. The site had radioactive waste still at the plant. The method of decommissioning the plant is in dispute. The atomic energy act requires that a "hearing" be granted if requested for the granting, suspending, revoking, or amending of any license or construction permit. The City argues that the NRC must hold a formal, adversarial, trial-type hearing – NRC believes it can hold an informal hearing in which it requests and considers written materials w/o providing for traditional trial procedure like oral testimony and cross-examination.

- b. ***Held***, an informal hearing is all that is required.
 - i. Although APA § 554 specifies that the governing statute must satisfy the “on the record” requirement, those three magic words need not appear for a court to determine that formal hearings are required – however, in the absence of these words, Congress must clearly indicate its intent to trigger a formal hearing under the APA
 - 1. In this case, we have no difficulty ascribing different meanings to the word “hearing” even though it appears in succeeding sentences of the same statutory section.
 - 2. Informal adjudications constitute a residual category including “all agency actions that are not rulemaking and that need not be conducted through on the record hearings”
 - 3. Despite the fact that licensing is adjudication under the APA, there is no evidence that Congress intended to require formal hearings for all AEA § 189(a) activities.
 - ii. Taking into account the technical, scientific nature of the issues, the absence of credibility questions, and the apparent lack of controverted issues of material facts, the additional value of an oral hearing is minimal in this case.
 - iii. We agree that, even if we were to find that there was a property interest at stake here, the Commission’s procedures afforded the City all of the process that was constitutionally necessary
- 4. Why Agency’s wouldn’t want to do a formal hearing?
 - a. To avoid the formalities associated with it
 - b. To avoid the cost of the procedure
 - c. Wish to avoid ALJ’s as presiding officers:
 - i. The selection process gives an artificial edge to veterans, and agencies believe this impairs their ability to select ALJ’s w/ needed technical competence
 - ii. Agencies aren’t allowed to conduct appraisal of the performance of their ALJ’s
 - iii. If they can use informal proceedings, they can select their own officer to hear the case
- 5. When § 544 is triggered?
 - a. In rulemaking, the SC held that the ICC’s “after hearing” did not trigger § 544. Congress must use the words “on the record” or their equivalent.
 - i. US v. Florida East Coast Ry. Co.
 - b. Several Cases prior to West Chicago required formal procedures under statutes that called only for a “hearing”
 - i. Seacoast Anti Pollution League
 - 1. License by the EPA to determine whether to discharge hot water into the sea; one of the issues contested was factually the effect of discharge on sea life
 - 2. “Congress is presumed to intend formal adjudicatory procedures in a statute governing adjudication when it uses the word ‘hearing.’”

3. Case relied on the Attorney General’s manual on the APA, which states:
 - a. In [adjudication], it is assumed that where a statute specifically provides for administrative adjudication after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing
 - c. Chemical Waste Management (D.C.)
 - i. Statute specifies that that EPA must “conduct a public hearing.” Court holds that this is ambiguous, and they must defer to agency interpretation when a statute is ambiguous [Chevron].
 - d. Portland Autobon Society v. Endangered Species Commission (9th Cir.)
 - i. Statute of the Endangered Species Act requires the Committee make its determination “on the record, based on the report of the Secretary of the Interior, the record of the hearing held before the ALJ, and on such other testimony or evidence as it may receive.”
 - ii. Court held that this does require APA formal hearing.
6. Suppose a court believes than an agencies procedures for informal adjudication are not fair to private parties, yet neither the APA nor due process is applicable, and the court can’t fall back on any other statute or regulation to provide the necessary protection. Can the court mandate additional procedures?
 - a. In rulemaking, the SC has made it clear that courts lack power to create extra-statutory procedure except in unusual situations. In Vermont Yankee, the SC stated that courts can’t go beyond the rulemaking procedures set forth in the APA. The SC later extended this to adjudication.
 - b. Thus, if the procedures for a particular adjudication aren’t prescribed by the APA or due process or some other source of law, the agency – not the courts – decides what procedure to provide.
7. Comparative Hearings
 - a. In some cases, two or more applicants compete for only one available license [i.e. radio stations]. In such a situation the SC has stated that both applicants must be considered to gether in a single comparative hearing or else the second applicant’s statutory right to a hearing would be an empty thing.
 - i. Ashbacker Radio Corp v. FCC
8. Constitutionally Required Hearings
 - a. If the court believes that due process requires a trial type hearing, then Wong Yang Sung becomes applicable: the court held that APA formal adjudication applied to deportation hearings because the words “required by statute” in § 554(a) were intended to include hearings required by the constitution as well as hearings required by statute.
 - b. Although Congress overturned Wong with regards to deportation hearings, this DOES NOT preclude its use in other situations.

- c. However, courts have recently ignored or evaded the Wong principle – for instance, although prison cases required due process, there was no formal adjudication given.
 - d. In a recent case, the court held that formal adjudication was required for due process, but didn't even mention Wong, just relied on the Matthews v. Eldridge balancing test.
- b. State Law – Right to a Hearing
 - i. General
 - 1. Most states follow the 1961 APA and the federal APA and require an external source to trigger the adjudicatory procedures spelled out by the APA
 - 2. 1961 MSAPA § 1(2) formal procedures apply in a “contested case”: a proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after hearing.
 - a. If formal – you need a full, formal, trial-type hearing
 - b. If informal - there are virtually no requirements
 - ii. The New Approach – 1981 MSAPA and recent state statutes
 - 1. First, they proved an inclusive definition of adjudication
 - 2. Second, with only narrow exceptions, there are procedural requirements tailored to all different types of adjudication
 - iii. The Middle Ground
 - 1. Compromise between 1961 and 1981 MSAPA.
 - 2. These statutes define “contested case” to include any agency discretionary decision to suspend or revoke a right or privilege or to refuse to renew or issue a license, *regardless of whether* any other law requires a hearing.
 - iv. **Sugarloaf Citizens Ass's v. Northeast Maryland Waste Disposal**
 - 1. P seeks to prevent construction of a solid waste incinerator. At issue is whether the Maryland Department of Environment must hold a “contested case” hearing before granting the permit application
 - a. The APA does not grant a right to a hearing; that right must come from another source such as a statute, a regulation, or due process principal.
 - i. Moreover, the statute or regulation that creates the rights to a hearing may negate the fact that the hearing is to be a “contested case” or “adjudicatory hearing.”
 - b. Statue provides that the agency must “provide an opportunity for a public hearing in the county . . .” and the court finds that this triggers a “contested case” hearing
 - c. Where a statute requires an opportunity to an agency hearing prior to the issuance of a permit, the question whether such hearing is a “contested case” hearing ordinarily depends upon applying the definition in the APA to the agency activity
 - v. **Metsch v. University of Florida (inclusive approach)**
 - 1. Kid applied to UofF Law school and was denied. Wants a trial type administrative hearing b/c he believes his “substantial interests” have been determined by the law school.

- a. We find that his desire to study law at that school does not rise to the level of a “substantial interest” and thus he doesn’t receive a special hearing
 - b. This would take too much time and money, also, if every student who was denied admission could make this claim.
- vi. Notes on Sugarloaf
 - 1. The Maryland APA is much broader than the Federal APA – a contested case hearing is required when stated so in a regulation or by the constitution, as well as by statute. “Public hearing” was sufficient to trigger the APA
- vii. Conference Adjudicative Hearing
 - 1. Under §§ 4-401 and 4-403, this is a peeled down procedure intended for disputes in which there is no material issue of fact or in which there are disputed issues but the stakes are relatively low. Held by an impartial presiding officer that dispenses w/witness testimony and cross-examination.
- viii. Summary Adjudicative Proceedings
 - 1. Apply when the stakes are extremely low (less than \$100, etc.)
 - 2. Opportunity to tell one’s side of the story to a presiding officer, who renders a brief decision, which can be oral unless money is involved, and the party can appeal to the presiding officer’s superior.
- ix. What to consider in deciding which MSAPA to use – the extent that each statute:
 - 1. adequately protects the interests of private parties
 - 2. is easy to understand and apply to particular situations
 - 3. tailors procedures to the importance of the matters at stake
 - 4. promotes the casue of efficient and economic government administration; and
 - 5. is sufficiently flexible to deal with unforeseen or unusual circumstances.
- c. Limiting the Issues to Which Hearing Rights Apply
 - i. General
 - 1. This section considers the related issue of whether an agency must provide an adjudicatory hearing prescribed by statute on an issue if the agency has already addressed the issue in a rule
 - ii. **Heckler v. Campbell**
 - 1. Social Security Act (SSA) defines disability as any person having impairment (alongside age, education, and work experience) that prevents them from working in national economy. Two inquiries: Secretary must assess each claimants present job qualifications; second, Secretary must assess the jobs in the national economy to determine if claimant can find work. P was denied application for SS. ALJ determined there was work available. Never stated which work was available though.
 - 2. **Held:** The Secretary may rely on published medical-vocational guidelines to determine a claimant’s right to disability benefits.
 - a. (1) The Secretary can rely on rulemaking to resolve certain types of issues.
 - b. (2) The agency should not have to constantly relitigate issues that may be established fairly and accurately in a single rulemaking proceeding.
 - c. (3) Claimants have ample opportunity to present evidence relating to their own ability and to offer evidence that the guidelines do not apply to them.
 - iii. Foreclosure of hearing rights through rulemaking

1. *Campbell* holds that an agency can use rulemaking to resolve an issue and thereby displace an individual's statutory right to an evidentiary hearing.
- iv. Issues suitable for rulemaking
1. *Campbell* states that "certain classes of issues are applicable for rulemaking" – "ones that do not require case-by-case determination."
 2. In *Bowen v. Yuckert*, the Court upheld another aspect of the medical-vocational grid that pertained to individualized characteristics.
 3. In *Sullivan v. Zebley*, Court strikes down a third 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. Court believed that some children who deserved benefits would be denied.
- v. Presumptions
1. Large number of cases where Congress provides an agency rulemaking power alongside providing for evidentiary hearings.
 - a. *American Hospital Ass'n v. NLRB*
 - i. "Even if a statutory scheme requires individualized determinations, the decision maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress has clearly expressed an intent to withhold that authority."
 - b. *FCC v. WNCN Listeners Guild*
 - i. Court upheld FCC rule that radio stations' changes in format would never be considered during licensing proceedings. Court holds that it is valid b/c former cases "did not hold that the Commission may never adopt a rule that lacks a waiver provision [for exceptional cases]."
- vi. Summary Judgment
1. Can use summary judgment when there are no genuine issues of material fact
 - a. Upheld in *Weinberger v. Hynson, Westcott & Dunning, Inc.*
 - b. 1981 MSAPA contains the functional equivalent of a summary judgment procedure: If an agency has adopted an appropriate implementing rule, in can use the "conference adjudicative hearing" model, a streamlined version of the formal adjudicative hearing, to resolve a matter as to which there is no disputed issue of material fact.
- vii. Showing a material fact issue
1. *Connecticut Bankers Ass'n v. Board of Governors*
 - a. "The party must make a minimal showing that material facts are in dispute, thereby demonstrating that 'an inquiry in depth' is appropriate."
- d. The Conflict Between Institutionalized and Judicialized Decision-Making
- i. General
 1. Judicial Model
 - a. The administrative process should resemble judicial process as closely as possible
 - b. Adherents argue that fairness and acceptability to private litigants should be the primary goals of the agency adjudicative process
 2. Institutional Model

- a. The administrative agency is a singly unit with the mission of implementing a specific regulatory scheme
 - b. Therefore, adjudication is a policy making technique, along with rulemaking, advice-giving, and publicity.
 - c. Adherents stress accuracy and efficiency as the dominant values to be pursued.
 3. This section addresses a number of problems on the borderline between judicial and institutional decisionmaking: personal responsibility of decision-makers, separation of functions, ex parte contacts, bias, and independence of the administrative law judge.
- ii. Personal Responsibility of Decision-Makers
 1. Four *Morgan* cases in the 30's and 40's that dealt with this issue
 2. *Morgan v. United States (Morgan I)*
 - a. P alleges that hearing examiner took evidence but did not file a report. Acting Sec. of agriculture heard oral argument. Sec. made final decision. P asserts that Sec. has not heard or read any of the evidence or briefs or heard oral argument, but simply rubber stamped a decision made by someone else.
 - b. **Held**, a hearing must be held, and the person who makes the decision must know the evidence.
 - i. (1) This duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.
 3. *Morgan I* notes
 - a. Strikes a huge blow for the judicial, rather than the institutional method.
 - b. *Morgan I* cannot be read literally. The Secretary of Agriculture could not possibly hear and read briefs on every case. Several ways that agencies get around *Morgan I*.
 - i. Agency head delegates power to make final decisions to someone else; two problems, though: no always legally permissible; second, judicial proceedings often make new policy, so Sec. has to review those few decisions where this is the case
 - ii. Person who conducts the hearings and hears the evidence could decide the case, and that would be final unless the agency head decides to consider an appeal
 - iii. Decision of a hearing officer could be subject to appeal to an intermediate review board within the agency
 - iv. Agency head might consider only a highly condensed summary of the evidence and arguments in a case that is prepared by law clerks or other employees.
 4. Intermediate Reports
 - a. Statutes generally require the hearing officer to prepare a report in order to focus the issues for the benefit of both parties and the final decisionmaker.
 - i. *Morgan II* considers the issue of the failure of a hearing examiner to prepare a decision

- ii. Court implies that due process requires the preparation of an intermediate report: “Those who are brought into contest with the Governemnt in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.”
 - b. The right to object to an intermediate report
 - i. Mazza v. Cavicchia
 - 1. **Held** that due process is violated when the parties are not allowed to object to a hearing report, b/c erroneous conclusions could have been made, etc.
 - 2. Mazza comes down strongly on the judicial side of decisionmaking
- 5. Morgan I in practice
 - a. Occasionally, but not often, a court does find violation that a decisionmaker was insufficiently familiar with the evidence
 - i. Matter of University of Kansas Faculty
- 6. Morgan IV
 - a. Cannot subject a judge to decision-making inquiry
 - b. “Just as a judge cannot be subjected to scrutiny . . . so the integrity of the administrative process must be equally protected.”
 - c. This has been respected by both state and federal courts.
 - d. Exception to Morgan IV
 - i. Citizens to Preserve Overton Park, Inc. v. Volpe
 - 1. Court must make a decision and he has to provide reasons for such a decision. In this case, agency has to provide decision (p. 116)
 - 2. Applies only if an agency fails to explain the decision. If explanation is unsatisfactory, court should remand for new opinion
 - 3. If agency fails to explain its action, most cases indicate that the court should remad the case to the agency to provide an explanation rather than conduct a trial to find out how the decision was made
 - a. Florida Power & Light Co. v. Lorion
 - e. Exclusive Record For Decision
 - i. Decisions can only be made from evidence on the record
 - f. Oral Arguments
 - i. 1946 MSAPA provides for oral arguments
 - ii. 1981 MSAPA does not provide for oral arguments
- e. Separation of Functions and Internal Agency Communication
 - i. General
 - 1. Although people have criticized agencies b/c they seem to serve as legislator, investigator, prosecutor, judge and jury, constitutional challenges to that system have been unsuccessful.

2. The issue though is whether, when a single agency has combined functions, whether a single individual within the agency can play an adversary role in the case, then serve an adjudicatory role in the same case.
3. Most agencies are instructed to achieve an internal separation of functions – persons engaged in adversary conduct on the agency’ behalf cannot serve as an administrative decisionmaker or furnish off-the-record advice to the decision-makers or supervise persons engaged in decision-making.
4. Judicial v. Institutional Model
 - a. Judicial Model: we separate functions to make it adversarial
 - b. Institutional: a CEO can investigate, argue for his side, etc. on a new product

ii. **Walker v. City of Berkely**

1. P terminated from city job. She believed assistant city manager who conducted her pre-termination hearing had been biased against her. Appealed discharge to Personnel Board, who find her termination without cause. Decision is then relayed to City Manager, who was responsible for the final administrative decision on Walker’s termination. While waiting, Walker filed action in District Court alleging violation of procedural due process at pre-termination hearing, and staff attorney was assigned to defend the city. The staff attorney filed a motion in federal court to dismiss the action, while at the same time she was preparing her recommendation for the City Manager on the Personnel Board’s termination decision. After filing the DC motion, she recommended that the Personnel Board’s decision be overruled and that Walker be terminated
2. **Held**, the city violated due process when it caused the same staff attorney to function as the City’s attorney in DC and as the decisionmaker in Walker’s post-termination hearing.
 - a. Due Process can allow the same administrative body to investigate and adjudicate a case.
 - b. However, there is a fatal defect in allowing the same person to serve as both decisionmaker and as advocate for the party that benefited from the decision.

iii. Due Process and Combination of Functions

1. In Withrow v. Larkin, the SC held that due process wasn’t violated when a state agency first investigated Dr Larkin, then conducted an adjudicatory hearing to determine if his license should be revoked

iv. Pennsylvania View

1. Court held that due process prohibits the agency heads from exercising the functions of both prosecution and decision. In the future, a wall of division must be erected w/in the agency so that the persons who make the ultimate adjudicatory decisions are not involved in the prosecution decision.

v. Statutory Solutions to the Combination of Functions

1. APA § 554(d) and 1981 MSAPA § 4-213(b):
2. These sections divide agency employees into three groups in each case:
 - a. Adversaries (investigators, prosecutors, etc.)

- b. Adjudicators (Both ALJ who hears the case and the agency head who makes a final decision)
 - c. Everyone else
 - 3. Prohibits staff members in the first group from serving as adjudicators or from advising the adjudicators off the record. But staff members in the third group can furnish off-record advice to adjudicators.
 - a. This is explicit in 1981 MSAPA § 4-213(b)
 - 4. Also, note that a staff member can be an adversary in one case and serve as an adjudicator or furnish advice to an adjudicator in a different (but similar) case.
 - vi. Additional Separation of Functions Provisions
 - 1. APA § 554(d)(1):
 - a. An ALJ can't consult a person or party of a fact in issue, unless on notice and opportunity for all parties to participate . . .”
 - i. SC: “Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate.”
 - ii. Thus, prohibits ALJ from receiving advice on factual issues, but not advice on law or policy from agency staff members
 - 2. APA § 554(d)(2):
 - a. ALJ may not be supervised by a person engaged in performing adversary functions for the agency
 - i. Investigation, prosecution, or advocacy.
 - ii. Designed to prevent “command influence,” since the ALJ shouldn't worry about whether his decision should jeopardize his career.
 - vii. Exceptions to separation of functions
 - 1. Congress exempted initial licensing and ratemaking from separation of functions in APA § 554(d)(A) & (B)
 - 2. When it exempts “members of the body comprising the agency” this means agency heads such as cabinet secretaries and commissioners
 - a. The (C) exemption seems to provide that agency heads are personally allowed to engage in conflicting functions
 - viii. The Principle of Necessity
 - 1. A biased judge may preside over the case if there is no other possible substitute decisionmaker
- f. Bias
 - i. General
 - 1. The previous section considered one kind of bias: a person engaged as a prosecutor, an investigator, or advocate may find it difficult to wear two hats
 - 2. This type of bias is different: adjudicator is tainted by personal animus, prejudice on the issues, or a personal stake in the decision
 - ii. **Andrews v. Agricultural Labor Relations Board**
 - 1. P contested whether an ALO (temp judge) should sit for his hearing. The hearing was for the decide whether the ALRB had engaged in unfair labor practice. Manocal was hired as the AOL, and he was a lawyer who worked

for a firm that represented employment discrimination claims on behalf of Mexican Americans. DC said this was fine. Held, (1) The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him . . . it does not pertain to his feelings on a subject matter. (2) The human mind, even at its infancy, is not a blank piece of paper, and people will naturally have biases. (3) The more politically or socially sensitive a matter, the more likely that an ALO, like any citizen, will have a view. (4) Our courts only allow to dismiss a judge when a party can demonstrate actual bias, not when the party can only estimate the “appearance of a bias” as is being done here. (5) Even if bias appears on the face of his opinion, it is not for this court to review when no bias has been shown. Dissent: Disqualification of a quasi-judicial officer on the basis of appears bias is necessary and provides two functions: (a) the litigant’s right to a fair hearing is protected, and (b) public confidence in the integrity of our system of justice is sustained. It is nearly impossible to show “actual bias” and that should not be the standard. Bias against a class of which a party is a member is sufficient grounds for disqualification.

iii. Personal Interest

1. Personal interest in a case is a clear and recognized ground for dismissal
 - a. Turney v. Ohio
 - i. A judge received his compensation out of fines he levied on Defendants
 - b. Ward v. Village of Monroeville
 - i. Extended *Turney*. Small town mayor was disqualified as traffic court judge b/c the fines went to the town treasury, allowing him to lower taxes on people.
 - c. Marshall v. Jerico
 - i. Court distinguishes *Turney* from *Ward*. Upheld a statute under which sums collected as civil penalties for violation of the child labor laws were returned to the Employment Standards Administration of the Labor Department as reimbursement for its enforcement costs. The court said that the official who had decided to seek penalties, an ESA assistant regional administrator, was acting in a prosecutorial rather than judicial capacity; hearing would be held before an ALJ independent of the ESA
2. Professional Bias
 - a. This is if decisionmakers by profession have a personal interest
 - b. Gibson v. Berryhill
 - i. State optometry agency was composed solely of independent optometrists. The agency determined that optometrists would lose their license if they worked for corporate employers. The court held that the board had a pecuniary interest in limiting entry into the field to independent optometrists like themselves and keeping corporate chain stores out.
 - c. Friedman v. Rogers

- i. Court backs away from *Gibson*. An optometry board consisting of a majority of independent optometrists was no invalid for all purposes. A bias for interest claim must be based on a particularized analysis of the facts presented.
- 3. Prejudgment or animus
 - a. Prejudgment of the actual facts of the case, or animus against a particular litigant or class of litigants. If decision maker's statements indicate this bias, due process requires disqualification
 - b. *NLRB v. Donnelly Garment Co.*
 - i. An ALJ who decides a case against a party is not disqualified from deciding it again after remand to the agency
 - c. *Hortonville Joint School District v. Hortonville Educ. Ass'n*
 - i. A school board that conducts negotiations with a striking teachers' union is not disqualified from discharging teachers who participate in an illegal strike. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision maker."
 - d. *Cinderella Carrer and Finishing Schools v. FTC*
 - i. Agency orders charm school to quit deceptive claims in advertising. Commissions ALJ dismissed the charges. While the Commission was deciding whether to adopt the ALJ's decision, Commission Chair Paul Rand made comments criticizing the charm school to the press. Court held that his participation violated due process b/c the speech indicated he prejudged the facts in the case.
 - ii. Court noted though:
 - 1. "Nor is a decisionmaker disqualified simply b/c he has taken a position even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'cAPAble of judging a particular controversy fairly on the basis of its own circumstances'"
- 4. The appearance of bias
 - a. Andrews majority found that an "appearance of bias" doesn't violate due process.
 - b. However, the "appearance of bias" standard is often used to disqualify federal and state judges. 28 USC 455(a)
 - c. MSAPA 4-202(b): "is subject to disqualification for bias, prejudice, interest, or other cause provided in this Act or for which a judge is or may be disqualified."
 - d. Thus, a judicial, not institutional approach
 - e. Argument for institutional approach
 - i. Agency decision makers, unlike judges, are responsible for carrying out a regulatory statute. They wear multiple hats. They have strong views on law and policy. A judicial "appearance of bias" standard creates many uncertainties whne applied to admin. adjudicators.

- f. Washington uses an appearance of bias standard(especially in local land use or environmental cases)
 - 5. Raising the Bias Issue
 - a. Federal APA § 556(b)
 - b. 1981 MSAPA § 4-202(b)-(f)
 - c. Some states provide parties one preemptory challenge of a judge in each case.
 - d. Federal law permits a party to file an affidavit challenging a judge on the basis of bias
 - i. If the affidavit alleges facts that would be sufficient to establish bias, and is accompanied by a certificate of counsel stating that it is made in good faith, the judge is disqualified without further ado. This can be done only once in each case. 28 USC § 144.
- g. Ex Parte Contacts
 - i. General
 - 1. This section concerns communications between agency decisionmakers and people who are outside the agency
 - a. Separation of functions concerns people within the agency
 - 2. Viewed together, the Ex Parte Contact rule and the separation of functions rules prohibit off-the-record communications to agency decisionmakers from outsiders and from agency adversaries, but these rules permit off record communications to decisionmakers from staff advisors if such advisers have not played adversary roles.
 - ii. **PATCO v. FLRA**
 - 1. PATCO (Air traffic controllers) members engaged in an illegal strike against the gov'n't. § 720(f) of the Civil Service Reform Act provides that the FLRA "shall revoke the exclusive recognition status" of a union that calls such a strike. After a hearing, the FLRA's ALJ revoked PATCO's licence. Unanimously affirmed by 3 FLRA agency heads. Case concerns contacts between agency heads and others while the matter was being decided. Those contacts are: (1) Secretary of Transportation called an agency head, not to talk about the case, but to tell him that no meaningful efforts to settle the strike were underway – he would appreciate a quick handling of the appeal from the ALJ to the agency heads; he also called another agency head to tell him the same thing; and (2) Head of the American Federation of Teachers met an agency head (long-time friend) for dinner; Head urged member not to revoke PATCO's license status.
 - 2. **Held**, these contacts do not rise to the level of corruption necessary to reverse and remand for a new proceeding.
 - a. Civil Service Reform Act requires FLRA hearing to be conducted in accordance with the APA – these are formal adjudications.
 - i. Thus § 557(d) governs ex parte communications
 - b. § 557(d) *prohibits ex parte communications "relevant to the merits of the proceeding" between an "interested" person and an agency decisionmaker*
 - i. Applies only to an interested person

- ii. Is any written or oral communication not on the public record to which reasonable prior notice to all parties is not given, but . . . not including requests for status reports on any matter or proceeding” [§ 554(14)]
 - 1. These requests are allowed even when directed to an agency decisionmaker rather than an employee
 - 2. However, decision of the judge must consider whether such request could influence the merits
- iii. Explicitly prohibits communications relevant to the merits of the proceeding
 - 1. Construed broadly and include more than just “fact in issue” as used in APA § 554(d)(1)
- c. Congress wanted “common sense guidelines to govern ex parte contacts in administrative hearings,” for two reasons:
 - i. Disclosure is important to prevent the appearance of impropriety from secret communications in a proceeding decided on the record.
 - ii. Also, disclosure is an instrument of fair decision-making; only if a party knows what arguments are presented to a decisionmaker can the party know how to respond
- d. Remedies for Ex Parte Contacts:
 - i. Disclosure of the Communications and their Content
 - ii. The violating party has to “show cause why his claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation
- e. Thus, agency proceedings blemished by ex parte contacts are *voidable*
- f. Must decide whether the agency decision-making process has been tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect
- g. Factors to consider:
 - i. Gravity of the ex parte contacts
 - ii. Whether the contacts could influence the agencies decision
 - iii. Whether the party making the improper contacts benefited from the agency’s ultimate decision;
 - iv. Whether the contents of the communications were unknown to opposing parties, who thus had no opportunity to respond;
 - v. Whether vacation of the agency’s decision and remand for new proceedings would serve a useful purpose.
- h. Courts main concern is the integrity of the process and the fairness of the result.
- i. Reviewing the actual contacts
 - i. Transportation secretary was not improper
 - 1. He was an interested person
 - 2. Would have been improper had he chose to discuss the merits of the case

3. It would have been better if the member would have put this on the record
4. This talk did not prejudice the FLRA decision
- ii. Dinner with Head of Teachers Association was not improper
 1. He has membership on a council that, unbeknownst to him, wrote an amicus curae brief; this is enough to consider him an “interested person”
 - a. Also, he’s a head of a labor union and he might have felt this would have a bad effect on other unions
 2. It is simply unacceptable behavior for any person directly to attempt to influence the decision of a judicial officer in a pending case outside of the formal, public proceeding
 3. However, we recognize that judges must have friends, neighbors, and social acquaintances.
 4. When the conversation turned to the PATCO case, the member should have terminated the discussion (10-15 minute discussion)
- iii. Because no party benefited from the discussions, the dinner had no effect on the ultimate decision on the member or the PATCO case, or b/c no threats or promises were made at the dinner, this does not rise to the level of “corrupt tampering with the adjudicatory process.”
- iii. State Law
 1. 1961 MSAPA § 13; 1981 MSAPA § 4-213(c) & (d)
 - a. Prohibits ex parte contacts in a contested case
- iv. President as an Interested Person
 1. Portland Audubon Society v. Endangered Species Commission
 - a. The President, at his position, renders him an interested person for purposes of § 557(d)(1). Also, he is “outside the agency” for the purposes of a ban on ex parte communications. He cannot do ex parte contacts.
 2. Sierra Club v. Costle
 - a. The President and the white house staff can engage in Ex Parte communications in rulemaking
- v. Remedies for ex parte contacts
 1. It is against the law to probe the mind of agency decisionmakers. [Morgan IV]
 2. However, in cases of ex parte contacts, the agency staff and decisionmakers must submit to a grueling inquiry into who said what and when
- vi. Who can you talk to?
 1. § 557(d) prohibits communications between outsiders and advisors to decisionmakers
 2. This goes into effect no later than the time a proceeding is noticed for a hearing
- h. The Role of Administrative Oversight
 - i. Pillsbury v. FTC
 1. Pillsbury wants an order from the FTC set aside that decides them to divest their assets. They believe they were deprived due process b/c of improper

interference by Congressional committees with the decisionmaking process of the FTC while the Pillsbury case was pending before it. A FTC hearing examiner dismissed the case against Pillsbury, but the Commission reversed the decision and ordered the examiner to proceed, ultimately rendering a decision before Pillsbury. Early in the process, several members of the FTC appeared before House and Senate antitrust subcommittees of the house judiciary committee. When Chairman of FTC came before the Senate subcommittee he met a barrage of questions by the committee challenging his view of the requirements of § 7 of the Clayton Act and the application of a certain doctrine announced by the Supreme Court. The committee delved into the minds of the Chairman and others heard him. The chairman recused himself, but other members did not.

2. **Held**, Congressional intrusion into the adjudicative aspects of the FTC is improper and requires remand for a new decision.
 - a. Sometimes a committee must promulgate specific interpretive rules to inform people of their expectations of the broad rules given to the agency from Congress. Also, there are going to be investigations by Congress into how the agency interpreted those rules. This is fine.
 - b. However, when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function.
 - c. At this point, we become concerned with the right of private litigants to a fair trial, and equally important, with their right to the appearance of impartiality
 - d. Although the SC was reluctant to disqualify members of the FTC ofr bias or prejudice, though the SC was concerned with dismissing the case for all time – that is not urged here
 - e. This case is remanded for a new hearing and a new commission of FTC people can decide what remedy to make
- ii. Note Professor Levin wrote an article saying ways in which the hearing didn't affect the FTC decision at all
- iii. In 1976, Congress added APA § 557(d) which makes members of Congress interested persons
- iv. Informal Adjudication
 1. In D.C. Federation, a Congressman said that he would not give funding to build the DC subway until a bridge project was underweigh. Court held Pillsbury inapposite b/c that case applies only to *formal adjudication*.
 - a. However, there are limits on informal adjudication:
 - i. Under the governing statute, the secretaries decision should be based on engineering on conservation considerations, not the wished of Congressmen. If the Secretary relied on the Congressman, his decision would be arbitrary and capricious.
 2. Criticism of D.C. Federation:

- a. Any agency policymaker who took seriously the DC Circuit's view to ignore the policy views of legislators would be rendered ineffective in a matter of months.
- v. DCP Farms v. Yeutter
 - 1. DCP farms split itself into 51 trusts, b/c they are limited to \$50,000 per person. Congressman wrote USDA Secretary that the trust violated the provision, that the Congressman would introduce legislation to amend the law unless DCP was disqualified, and the USDA responded by staking it would take an aggressive position regarding DCP farms.
 - 2. **Held**, Pilsbury is inapplicable b/c, when the Congressman wrote the letter, the matter hadn't reached the point of quasi-judicial proceedings.
 - a. Won't reach this stage until the hearing.
 - b. The Congressman's letter was more about an overall policy debate than about a particular case
- vi. Legislative Casework
 - 1. When a constituent calls a Congressman, and then they call the agency, this is set out in APA § 557(d) – which allows Congress to make status inquiries, which explains the reference in § 551(14).
 - a. Might Want to Read Levin Article; 95 Mich L. Rev. 1, 40 n.153 (1996)

III. The Process of Administrative Adjudication

a. Investigation and Discovery: An Agency's power to obtain information

i. General

- 1. Compels disclosure through subpoena duces tecum, or “civil investigative demands” (CID's)
- 2. Can also compel physical inspections
 - a. APA § 555(c) & (d)
 - b. 1981 MSAPA § 4-210
 - c. Both need a statutory basis other than the APA

ii. *Craib v. Bulmash* (Compelling discovery over 4th and 5th amendment defenses)

- 1. Craib (Labor Commissioner) is investigating allegations that Bulmash failed to pay minimum wage requirements, and wants records of employers and payment. Statute *requires* these records be kept. Bulmash says this is a violation of 4th amendment search and seizure and 5th amendment self-incrimination.
- 2. **Held**, a subpoena for records in this case does not violate 4th or 5th amendment.
 - i. Fourth Amendment: Case Law: Oklahoma Press Pub Co v. Walling.
 - ii. “no question of actual search and seizure is raised where the agency has not sought ‘to enter the [subpoenaed parties] premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections
 - iii. Explicitly rejected that subpoena could only be enforced where a specific charge or complaint was pending

- iv. Probable cause, supported by oath or affirmation, is satisfied as long as the subpoenaed documents are relevant to the inquiry
- v. the requirement of reasonableness, including the particularity of describing the place to be searched and person or things to be seized comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry
- vi. The subpoenaed party must have the opportunity for judicial review before suffering any penalties for refusing to comply
- vii. Bulmarsh cannot challenge for vagueness or overbreadth. Commissioner can clearly investigate wage matters
- viii. Probable cause in these cases is less stringent than in criminal cases
- ix. These are documents accumulated in the ordinary course of business, required by statute, and must be given
- b. Fifth amendment: Protection against self-incrimination
 - i. *Shapiro v. United States*: Court rejects fifth amendment claim for records which are required to be kept in order to enforce regulatory schemes
 - ii. *Marchetti v. United States* distinguishes *Shapiro* by stating that 5th amendment applies to a selective group inherently suspect of criminal activities
 - iii. This case is just like *Shapiro* in that the information requested is the “appropriate subject of a lawful regulatory scheme.”
- 3. Dissent: This is ridiculous. The 5th amendment is a fundamental protection of liberty and the government should not be allowed to use these documents to incriminate Bulmarsh
- iii. Judicial Enforcement
 - 1. *ICC v. Brimson*: agency cannot be give the power to enforce its own subpoenas.
- iv. Defense to subpoena enforcement
 - 1. Cases like Oklahoma Press make clear that such demands for information by an agency are almost always “reasonable” under the 4th amendment.
 - 2. Defenses:
 - a. 4th amendment
 - b. The face of the subpoena may disclose that the information sought concerns the type of matter over which the agency has no jurisdiction and thus no power to investigate
 - c. The agency might have violated a procedural requirement in its statute or rules with regards to the issuance of subpoenas
 - d. Trial Court might find a request too vague and indefinite or unreasonably broad and burdensome
 - e. May refuse to enforce because the subject of the demand sustains the burden of showing that the agency is acting in bad faith for an improper purpose and thus abusing the court’s process
- v. Notice

1. Agency is not required to give notice to a party when it subpoenas info from a 3rd party.
 - a. California does not follow this: in *Levin v. Murawski* the court dismissed this notion and held man did get notice under California's constitutional right to privacy
- vi. State law and Investigative Subpeonas
 1. *Levin v. Murawski* states that a Board must meet minimum threshold foundation before a court can enforce a subpoena. This foundation would resemble the requirement of probable cause in obtaining a search warrant and furnish at least some assurance of the complainant's responsibility.
- vii. Privileges
 1. Attorney Client Privilege and the Work Product Privilege apply to agency investigations, along with marital communications privilege.
 - a. 1981 MSAPA § 4-212(a) (extends all court privileges to agency proceedings)
 2. Witness in agency cannot refuse to take the stand or be sworn in. He can refuse to answer questions
 3. Court in agency proceeding has the right to delay the proceeding if criminal matter is running alongside that case
 4. If authorized by statute, agency can offer immunity and thus compel disclosure
 5. Privilege does not apply to corporations, partnerships, or unincorporated associations like unions
 6. Privilege can be asserted only if the person fearing incrimination is in possession of the documents subpoenaed.
 7. Privilege does not apply to materials seized under a valid search warrant b/c the person from whom the documents are seized is not compelled to admit anything about them
 8. Privilege applies only to testimony that is produced by state compulsion. Thus, private papers are not privileged, b/c they were prepared voluntarily.
 9. Privilege is inapplicable to the production of records if a statute requires those records to be prepared and maintained
- viii. Physical Searches
 1. Agency must secure a search warrant to do physical searches
 - a. To get one, agency need not have probable cause, only needs for decision to be based on "reasonable and neutral standards, such as a statistical sampling technique approved by the agency."
 - b. Warrant can be obtained ex parte (w/o notice to the employer)
 2. *New York v. Burger* states that four criteria must be met to justify warrantless admin inspections:
 - a. Substantial government interest in regulating the business
 - b. Unannounced inspections must be necessary to further the regulatory scheme
 - c. Statute must advise the owner of the periodic inspection program
 - d. Searches must be limited in time, place and scope.
- ix. Exclusionary Rule in Administrative law

1. Evidence that was illegally seized in violation of the 4th amendment is probably admissible in an admin proceeding even if it wouldn't be in a criminal proceeding b/c of the exclusionary rule
 - a. Some courts say if the violation of the 4th amendment was egregious, then it cannot be let it to the admin proceeding
- x. Discovery
 1. Once an adjudication has formally commenced, both parties may seek info in the hands of the other or a third party.
 - a. 1981 MSAPA § 4-210(a) provides the normal civil rules of discovery apply to administrative proceedings
 - b. Discovery usually consists of disclosure of the contents of an agency's files or witness lists of subpoenas duces tecum.
 - c. Post complaint subpoenas:
 - i. APA § 555(d)
 - ii. MSAPA (1981) § 4-210(a)
- b. Evidence at the Hearing
 - i. **Rugero v. Teacher Standards and Practices Commission**
 1. P applied to reinstate his teaching license, and was denied b/c of allegations he sexually harassed two sixth grade girls. Girls didn't testify, and court relied on two hearsay testimonies, not the girls' testimony. P claims he inadvertently harassed one of the girls, and said the second girl made it up to punish him for ratting on her best friend.
 2. **Held**, the court can rely on heresay evidence, but not when it .
 - a. (1) Residuuum rule: the agency can accept any evidence that is offered, although there must be a residuum of legal evidence to support the claim before an award can be made."
 - b. (2) Hearsay evidence is as admissible as any other type of evidence.
 - c. (3) Oregon law provides that we follow the "substantial evidence" test: can be found "when substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." Therefore, heresay evidence may be enough.
 - d. (4) Here, the two students were available to be called as witnesses, and no reason was given why they didn't testify.
 - e. (5) It is beyond question that the student's direct testimony is better evidence than their hearsay statements.
 3. **Concurrence**: I would state it as this: Where the claim and the findings involve conduct that would constitute a crime, hearsay evidence alone is insufficient to establish the conduct.
 - ii. Major statutes
 1. APA § 556(d)
 - a. long been interpreted to allow the admission of hearsay
 2. MSAPA § 4-212(a), (d) and (e) and 4-215
 - a. explicitly allows the admission of hearsay
 - iii. Residuuum
 1. Second Question related to above case: can an agency rely exclusively on evidence that would not be admissible in court (not just on hearsay alone)?

- a. APA § 556(d) – can be interpreted to completely reject the residuum rule
 - b. Majority of states still adhere to the residuum rule
 - c. Residuum Rule is not followed in federal courts
 - 2. Richardson v. Parales (Residuum rule – Federal)
 - a. Agency finds man is not disabled. Only evidence in support of a determination was a series of written evaluations by various Dr.’s appointed by the agency. Court of appeals holds that written and unsworn medical evidence was hearsay. SC reverses, stating that the reports could be substantial evidence for a decision.
- iv. Hearsay and Substantial Evidence
 - 1. “Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.”
 - 2. Substantial evidence standard is by far the most common approach in both state and federal court for review of agency decisions.
 - 3. This approach requires a court to be quite deferential toward an agency’s findings of fact, but still permits the court to overturn such findings if it feels an injustice has been done.
- v. Hearsay and Confrontation
 - 1. Can you argue that use of hearsay violates your due process rights?
 - a. Olabanji v. INS
 - i. Court holds that due process is violated by agency deciding that immigrant’s marriage was a sham based solely on affidavit of agent who had interviewed wife of immigrant. This is so b/c the INS could have secured wife’s testimony; however, noted they could have relied only if they couldn’t secure her testimony.
- vi. Burden of Proof and Persuasion
 - 1. APA § 556 (d) allocates the burden of proof to the proponent of an order. This refers to the burden of persuasion, not production.
 - 2. In general, proponent must discharge by preponderance of the evidence (51%), as held by Court interpreting § 556(d) alongside stating “unless Congress dictates otherwise.”
 - 3. In some situations, the applicable burden of persuasion is heaving that the preponderance standard.
 - a. In one case where the APA procedure did not apply, the Court found the need to use a “clear and convincing” standard.
- vii. Responsibility of a Judge to bring out the evidence
 - 1. Unlike ART III, etc., judges, ALJ’s and AJ’s are required to bring out evidence and take an active role in interrogation. In some instances, failure to do so can be grounds for reversal.
 - a. See Hoke v. Brinlaw Mfg. Co.
- viii. Closed or Open Hearing
 - 1. MSAPA § 4-211(6) requires an open hearing
 - 2. Federal agency decision: Fitzgerald v. Hampton (D.C. Circuit)
 - a. Agency wanted to close a hearing, and person wanted it open. Court holds the person has a due process right to the hearing. Book notes, “this was before Matthews v. Eldridge.”

c. Official Notice

i. Judicial Notice v. Official Notice

1. A court is permitted to take *Judicial* notice – i.e. treat as proven – various facts and propositions which are very likely to be true.
 - a. However, the court must first afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed.
2. Agencies are permitted to take *Official* Notice of matter which could be the subject of Judicial Notice – and they can go further and notice matters which the court cannot.
 - a. Compare APA § 556(e); and 1981 MSAPA § 4-212(f)

ii. Franz v. Board of Medical Quality Assurance

1. Board suspended Dr. Franz's license to practice medicine. Dr. Franz was a general practitioner. After deciding patient needed surgery to repair a perforated ulcer. Franz scheduled surgery at a hospital, with no ICU, that he had staff privileges at. The same day he scheduled surgery, he picked a surgeon. Board found that he was grossly negligent, and TC sustained.
 - a. (1) Due process requires, when in an adjudication an agency intends to rely on members' expertise to resolve legislative-fact issues, that it notify the parties and provide opportunity for rebuttal.
 - b. (2) If the agency meets these requirements, we see no opportunity for prejudice.
 - c. (3) There is a difference between common sense questions, and those where expert knowledge is required. Only where the professional significance of underlying facts seems beyond lay comprehension must the basis for the technical findings be shown and an opportunity for rebuttal be given.
 - d. (4) No expertise is needed to show that the choice of hospital's here was a gross departure. However, the court's findings that it was negligent to schedule surgery before choosing a surgeon.

iii. Taking Official Notice

1. *Franz* states that a medical licensing board consisting of physicians is not required to summon experts and hear their testimony before disciplining a licensee for malpractice.

iv. Rebutting Officially Noticed Evidence

1. Notice is often given before the decision
2. However, in many instances the first time a party learns that an administrative judge or the agency head plan to take official notice of a fact is when the party reads the decision. Generally the agency should offer the party an opportunity to move that the record be reopened for further proceedings at which a rebuttal opportunity is present.
 - a. Castillo Villagra v. INS on 193
 - i. Court finds first two facts are legislative and non-disputable; third fact was legislative but disputable; fourth fact was adjudicative and disputable. Therefore, the court held that the agency should have

warned P that it intended to take notice of the third and fourth fact and offered him an opportunity to respond.

v. Legislative Facts

1. 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.
 - a. MSAPA § 4-215(d) last sentence
2. Franz somewhat denies this distinction, and it can be read to suggest you must take official notice in situations above alongside official notice in situations where you are presuming a fact is true
 - a. Cohen v. Ambach
 - i. Chiropractors can't solicit unless pamphlet is "in the public interest." D busted for soliciting. Board forms opinion. **Held**, when the board uses its own expertise to evaluate, it must give D notice.

d. Findings and Reasons

i. General

1. Judges must state their reasons and findings
2. APA § 556(c); APA § 555(e) requires a statement of reasons in certain cases of informal adjudication
3. 1981 MSAPA § 4-215(c)

ii. In the Matter of Ciba-Geigy Corp (New Jersey 1990)

1. The Department of Environmental Protection (DEP) renewed a permit allowing D to discharge chemically-treated shit into the Atlantic Ocean. People were pissed.
 - a. DEP's permitting process doesn't fit into either adjudication or rulemaking.
 - i. Although DEP didn't conduct a trial-type hearing in considering Ciba-Geigy's permit renewal application, the agency reviewed extensive documentation submitted by both Ciba-Geigy and interested members of the public
 1. Included fact evidence of draft permit and evidence offered during public comment period
 - ii. An agency must set forth findings of fact if it acts in a quasi-judicial capacity.
 1. So that people can know how the decision was reached and people can decide whether it was arbitrary, capricious or extra-legal considerations that drove the decision
 - b. 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.
 - c. 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. Second, the record did not

indicate clearly how the permit comported with New Jersey's anti-degradation policy [in the state's water quality regulations].

iii. Legal Authority in Federal Courts

1. Federal Courts are precluded from imposing procedural rules on agencies as a matter of administrative common law.
 - a. *Vermont Yankee* held that a court could not impose rulemaking procedures requirements beyond those specified in the APA, in order to improve decisionmaking.
 - b. *Pension Benefit v. LTV* says the same for adjudication procedures

iv. Link Between Facts and Law

1. *Adams v. Board of Review*

- a. Commission listed medical findings, then wrote that these findings of symptoms weren't b/c she was a telemarketer. Court reversed b/c of lack of "subsidiary findings" stating: "Administrative bodies can't rely upon findings that contain only ultimate conclusions. . . The commissions solitary finding that P failed to prove causation doesn't give the parties any real indication as to the bases for its decision and the steps taken to reach ti, nor does it give a reviewing court anything to review. . . A finding of facts must indicate what the ALJ in fact thinks occurred, not merely what the contradictory evidence indicates might have occurred."

v. Statutes that Require Explanations

1. *Dunlop v. Bachowski (SC)*

- a. Statute allowed a Secretary of Labor to sue in DC to set aside a union election tainted by fraud. Secretary refused to bring suit. SC holds this action is judicially reviewable and interpreted the underlying statute to require the Secretary to state reasons for his refusal and the essential facts on which the decision was based. This would permit intelligent judicial review, inform a complaining union member why his request has been denied, and would promote careful consideration.

2. *Hydraulic Syndicate v. Alaska (State Case)*

- a. Statute required state to balance public good and private harm when it seized land to build a highway. Court held that the state must provide a "decisional document" before doing so.

3. *Citizens to Preserve Overton Park, Inc. v. Volpe*

- a. Court declined to imply a requirement of an explanation into a statute. Statute granted funds to a city to build a highway, and provided that a road should not be built though a park unless there is no feasible and prudent alternative. The Secretary didn't explain why there was no such alternative and the SC held that no such explanation was required by statute. SC remanded the case to the DC to conduct a de novo trial, at which the court could require the Secretary to provide an explanation if that would be necessary.
- b. Later cases generally follow the route that the dissenters in this case suggest: they require a remand to the decisionmaker to supply an explanation, rather than a trial at which the explanation is adduced.

vi. Post Hoc Rationalizations

1. *Overton Park* and other cases say that if an agency fails to make findings or to state reasons, the deficiency can't be cured by post hoc rationalizations.
 2. However, *Bagdonas v. Dep't of Treasury* is different. BATF had discretion to allow a person convicted of gun crime to possess a firearm if they weren't a danger to the public. BATF turned some dude down and gave no explanation. Rather than remand to the agency after BATF sent the DC a reason why they didn't uphold the permit, the court ruled that the affidavit could be considered as an explanation of the agency's decision, although it must be "viewed critically."
- vii. Findings at every level
1. There doesn't have to be a written decision at every level – there just has to be one set of findings and conclusions: that is all that either due process or the APA's require.
 - a. "To adopt someone else's reasoned explanation is to give reasons."
- e. Estoppel
- i. General
 1. 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.
 - ii. **Foote's Dixie Dandy, Inc. v. McHenry(State Case)**
 1. A person asked a field auditor Yates for the Employment Security Division about the corporation's employment tax status; the person had always relied on Yates for such questions.
 2. **Held**, estoppel can be allowed against the state.
 - a. We abandon the principle that the state can never be estopped by the actions of the agents. Estoppel is not a defense that should be readily available against the state, but neither is it a defense that should never be available.
 - b. Estoppel of the state is a principle of law recognized in more and more jurisdictions [including Alabama, California, New York, and Pennsylvania].
 - c. Four elements listed are necessary:
 - i. The party to be estopped must know of the facts;
 - ii. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended;
 - iii. The latter must be ignorant of the true facts; and
 - iv. He must rely on the former's conduct to his injury
 - iii. Federal Law
 1. The SC has never accepted an estoppel claim and has rejected them on numerous occasions.
 - a. **Office of Personnel Management v. Richmond**
 - i. Court implied that it is unlikely to uphold a claim for estoppel against the gov'n't in any circumstances, but it did not totally slam the door.
 1. If some "affirmative misconduct" by the gov'n't
 - ii. Reasons why not likely:

1. Courts, through sovereign immunity, are w/o jurisdiction to entertain a suit to compel the Government to act contrary to a statute, no matter what the context or circumstances.
2. To recognize estoppel based on misrepresentations by the Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved by Congress.

b. Heckler v. Community Health Services

- i. The court assumed for the sake of argument that the gov'n't could be bound by estoppel if the facts were strong enough.
 1. Estoppel requires reasonable reliance

iv. Advice Giving

1. If agencies could be estopped by mistaken advice, then they would stop giving advice, and this harm would outweigh the benefit of estoppel when it is bad advice.

v. By any other name . . .

1. Federal law has found ways to hold the government accountable w/o invoking the name of estoppel.
2. Agency must give "fair notice" to a regulated party of what conduct it prohibits or requires before it can invoke sanctions against that party.
 - a. "Fair notice may require publishing an interpretation of an ambiguous rule or otherwise informing the party of the agency's view before the regulation is enforced against the party.
 - i. The court finds that an agency might not have given fair notice of its approach

vi. Declaratory orders

1. These are legal stipulations based on hypothetical facts. These raise an estoppel issue. They are authorized by APA § 554(e) and 1981 MSAPA § 2-103. Many states are based on 1961 MSAPA § 8

IV. Rulemaking Procedures

a. Importance of Rulemaking

i. The advantages of Rulemaking over solely adjudication

1. Participation by all affected parties: notice is given, and anyone that wants can submit comments
2. Appropriate Procedure: When an agency makes new law, the process of rulemaking is superior to adjudication – can answer broad policy issues, and the procedures have been designed for the precise purpose of exploring issues of law, policy, and legislative fact
3. Retroactivity: Rules apply only prospectively, and thus don't upset reliance interests
4. Uniformity: All people that fall within a class are bound by a rule, as opposed to only the binding order on a party
5. Political Input: Politically active people can generate momentum against or for an agency policy

6. Agency agenda setting: agency has more control over setting its agenda through rulemaking, as opposed to the happenstance of deciding only the individualized cases before them
 7. Efficiency
 8. Difficulty of Research in adjudication
 9. Oversight: easier for other branches to exercise authority over the agency in rulemaking
- ii. The advantages of adjudication:
 1. Flexibility
 2. Concreteness over abstraction
 3. The new and unexpected is met
 4. Residual Adjudication
 - iii. Rulemaking “ossification” – Professor McGarrity
 1. Although informal rulemaking is an effective governmental tool, it has become increasingly rigid and burdensome
 - a. Assortment of analytical requirements have been imposed on the simple rulemaking model
 - b. Evolving judicial doctrines have obliged agencies to take greater pains to ensure that the technical bases for rules are cAPABLE of withstanding judicial scrutiny
 2. This is what E. Donald Elliot calls the “ossification” of rulemaking
 - iv. Rulemaking Authority
 1. Enabling statutes are issued by Congress that allow broad rulemaking power
 2. When the authority of the agency to promulgate rules is questioned, courts often side with the agency
 - a. *National Petroleum Refiners v. FTC*
 3. However, sometimes they reach the opposite result
 - a. *Amalgamated Transit Union v. Skinner*
 - i. The language of the statute seems to contemplate only adjudication
- b. Definition of Rule
 - i. General
 1. APA § 551(4)
 - ii. ACUS A Guide To Federal Agency Rulemaking
 1. A cease and desist order would fall within this definition, yet this is something that only happens in adjudication
 2. Attorney General’s Manual
 - a. Rulemaking is an agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only b/c it operates in the future but also b/c it is primarily concerned with policy considerations. The object of the rulemaking proceeding is the implementation of prescription of law or policy for the future, rather than the evaluation of a respondent’s past conduct.
 3. The issue with “particular applicability” goes to the drafters wish that certain actions of a particular nature, such as the setting of future rates or the approval of corporate reorganizations, to be carried out under the relatively flexible procedures governing rulemaking.

4. Courts have upheld agency actions as rules even though they only applied to a single entity.
- iii. The “or particular” language
 1. Mentioned above: one problem with this is that if these are rulemaking they are exempted from the APA’s separation of functions provisions, which apply only to adjudications
 2. Many federal enabling statutes require a hearing on the record before ratemaking of particular applicability – which triggers formal rulemaking
 - iv. State Law Definition
 1. Rule or Order
 - a. 1981 MSAPA § 1-102(10): Rule means 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. The term includes the amendment, repeal, or suspension of an existing rule.
 - b. In contrast, an “order” in 1-102(5) is “agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one or more specific persons.”
 - c. Under 1981 MSAPA, if it is addressed to a named party, it is an “order” and is subject to the adjudication provisions of the statute
 - d. If it is addressed to all members of a described class, or general applicability, then it is a rule
 - e. Some states define rule more narrowly than the 1981 MSAPA
 - i. Provides a list of exclusive things that are rules
 - v. Distinguishing between rulemaking and adjudication
 1. A rule is usually, or perhaps always, prospective, but an order will often be retroactive
 2. A rule usually requires a further proceeding to make it concretely effective against a particular individual, while an order needs no further proceeding to make it effective.
 3. A rule is usually directed at and binds a described class that may open to admit new members, while an order is directed at and binds only those party to the adjudication
 4. A rule irdinarily is based on findings of fact that are legislative or general in nature; order is based on specific party facts
 - vi. Benefits of Rulemaking Label
 1. The *Bi-Metallic* Doctrine usually militates against due process rights in rulemaking; so the due process party would want it characterized as an order
 2. When the party, under the APA, has no hope for qualifying for formal adjudication, they may gain more procedural rights if the proceeding is deemed rulemaking (informal) rather than adjudication.
 - a. Yesler Terrace Community Council v. Cisneros
 - i. HUD determined that Washington had several procedural protections in place, which allowed local public housing authorities to dispense w/a grievance procedure they had used. The court had to decide whether the HUD’s decision was

rulemaking or adjudication: “This decision has no immediate concrete effect on anyone, and it acts prospectively.”

vii. Legislative and Non-Legislative Rules

1. Legislative Rules: Rules issued by an agency pursuant to an express or implied grant of authority to issue rules with the binding force of law.
2. Non-Legislative Rules: Often called interpretive rules, or statements of policy, are agency rules that don't have the force of law.
3. Both are w/in the definition of “rule”

viii. Criticisms:

1. Some think the distinction is too rigid and should be replaced with a more flexible system

ix. Prospectivity and Retroactivity

1. **Bowen v. Georgetown University Hospital**

- a. HHS adopted a rule that changed the formula for calculating how much hospitals get from medicare people. The DC set it aside b/c it was a rule and didn't follow notice and comment. The HHS readopted the rule following procedures, but it had retroactive effect: it purported to allow HHS to recoup from the hospitals the amounts that the agency would have saved if the 1981 rule had never been set aside.
- b. **Held**, the retroactive effect of this rule is INVALID and set aside.
 - i. Retroactive rules are not favored, and arguments that people had notice b/c of the first messed up rule isn't good enough
- c. Concurrence: Scalia, J.
 - i. The “future effect” language means that rules can't make things illegal which were previously legal to do.
 - ii. However, there can be secondary retroactivity in a way where taxation of a trust fund will inherently affect past conduct.
 1. However, if this secondary retroactivity is substantial, it may be arbitrary and capricious

2. Retroactivity

- a. Note that 1981 and 1961 MSAPA don't contain this “future effect” language.
- b. Note that agencies have allowed retroactive effect for interpretive rules

3. The majority's two canons:

- a. First, there is a presumption that statutes and rules don't apply retroactively.
- b. Second, an agency may not as a general matter, issue retroactive legislative rules unless Congress expressly authorizes retroactivity

4. Reasonableness limitations:

- a. When an agency imposes retroactive liability through an adjudicative order, courts review the decision for “reasonableness” or abuse of discretion. They apply a balancing test that weighs the possible unfairness of retroactive application against the statutory interest in applying a new case law principle to the situation at hand.

- b. Sometimes incorporate information from the private sector
 - 2. Executive Order 12866: Requires federal agencies to publish a semi-annual list, called the Unified Regulatory Agenda, identifying all regulations under development and providing detailed information about upcoming “significant” regulatory actions (effect on economy of \$100 million)
 - iii. Reasonable Time
 - 1. Connecticut Light and Power (DC Cir.)
 - a. 30 day proposed rule to final rule period not insufficient in light of industry familiarity with issue involved, but warned that no shorter period would be allowable. However, they later upheld a 15 day period.
 - iv. Detail Required
 - 1. § 553(b)(3): “either the terms or substance of the proposed rule or a description of the subject and issues involved” must be disclosed, and many state APA’s contain parallel language.
 - v. State Provisions
 - 1. 1981 MSAPA § 3-107: Sets up a test to tell if the final and proposed rules are substantially different.
 - a. One person in a state noted that people were reluctant to put out proposed rules until they thought the language was finalized.
 - 2. Some states apply a lenient logical outgrowth test
 - 3. Some require new rulemaking proceedings when the rule “substantially” differs from the proposed
 - vi. Information that informs basis of rule
 - 1. The notice of rulemaking is required to include scientific data or methodology upon which the rule was formulated
 - a. Portland Cement v. Ruckelshaus
 - i. DC Circuit believes people need this to comment on
 - 2. However, should it be sufficient as long as the agency tells its factual basis of the rule and not necessarily the studies it used to get there.
 - vii. Additional Materials added to the record
 - 1. Rybencheck v. EPA (9th Cir)
 - a. The EPA added 6000 pages to the rulemaking record in response to comments made during that period. The court held that the addition of these materials after the close of the comment period didn’t entitle to the public to comment on them.
 - viii. Causation
 - 1. Shell Oil Co. (DC Cir.)
 - a. It is up to the agency to show that comments on the changes it made between the proposed and final rules would have been useless.
- d. Public participation
 - i. Informal Rulemaking
 - 1. Written or Oral argument
 - a. Under the federal APA in informal rulemaking, the agency is free to limit public participation to written submissions unless the agency determines otherwise or some other species of law requires more.

- b. Typical state APA follows 1961 MSAPA § 3(a)(2) and requires an opportunity to make written submissions to the agency concerning a proposed rule and also, if properly demanded, an opportunity for an “oral hearing.”
 - i. Must be demanded by 25 persons, a government subdivision, another agency, or an association of more than 25 members
 - ii. Justification: (1) there is an oral questioning process that can help solve issues; (2) direct and instantaneous contact and are better at expressing depth of feeling or emotions; (3) they can be more effective in provoking broad-based public opposition to a proposed rule; (4) better for people who aren’t good writers; (5) may ensure better public satisfaction with the process
2. Underwriting participation in rulemaking
 - a. One of the major functions of rulemaking procedures is to ensure that agency rules are consistent with the will of the political community at large; another is to make sure that agencies possess enough information to make sound rules
 - i. These rules can be ensured if everyone has an opportunity to participate in the procedures; quite frankly, not everyone has the economic, educational, or organizational resources to do so.
 - ii. One problem in this area is rules for the poor; the agency can’t assume that it knows what is best for these people
- ii. Formal Rulemaking
 1. Procedures for “formal rulemaking” are in APA §§ 556, 557
 - a. Require trial-type hearings, including the right to present evidence, cross-examine witnesses, and submit rebuttal evidence
 - b. The record is the exclusive basis for agency action
 - c. Ex parte communications (§ 557(d)) are prohibited
 - d. Separation of functions provisions in § 554(d) are inapplicable
 2. When to use formal rulemaking: § 553(c) states that “when rules are required by statute to be made on the record after opportunity for an agency hearing, section 556 and 557 of this title” are applicable
 - a. Illustrative Case: US v. Florida East Coast Railway Company
 - i. Appellee railroad companies brought an action in the District Court for the Middle District of Florida to set aside the incentive per diem rates established by appellant Interstate Commerce Commission (Commission) in a rulemaking proceeding. The district court sustained railroads’ position that the Commission had failed to comply with the applicable provisions of the Administrative Procedure Act, 5 U.S.C.S. § 551 et seq. The district court held that the language of 49 U.S.C.S. § 1(14)(a) of the Interstate Commerce Act required the Commission in a proceeding to act in accordance with the Administrative Procedure Act, 5 U.S.C.S. § 556(d). Thus, the district court held that the Commission’s determination to receive submissions from railroads only in written form was a violation of § 556(d) because railroads were prejudiced by that determination. On appeal, the court held that inextricably intertwined with the hearing requirement of the Administrative Procedure Act in this case was the meaning to be given to the language “after hearing” in 49 U.S.C.S. § 1(14)(a). The court held that the term “hearing” as used in § 1(14)(a) did not necessarily embrace either the right to present evidence orally and to cross-examine

opposing witnesses, or the right to present oral argument to the agency's decisionmaker. Thus, the court concluded that the hearing requirement of § 1(14)(a) was met. The judgment was reversed and the matter was remanded so that the district court could consider those contentions of the parties that were not disposed of by this opinion.

3. The trigger for formal rulemaking
 - a. According to *Florida East Coast*, when a statute authorizes rulemaking of general applicability, it does not require an agency to go beyond the informal procedures of § 553 unless the statute explicitly provides that the rule be made after a hearing on the record, or uses language similar to that.
 - i. A strong presumption against the invocation of APA formal rulemaking
 4. Statutory “hearing requirements” in rulemaking
 - a. *Florida East Coast* holds not only that the ICC proceeding was not governed by § 556 and 557 of the APA, but also that the “hearing” mandate of the ICA gave the railroads no broader right to be heard than they would have possessed under the APA alone
 5. The Merits of Mandatory trial-type Rulemaking Proceedings
 - a. Studies show that trial-type hearings are inefficient
 - i. FDA formal rulemaking to determine how much peanuts should be in peanut butter
 - b. Second concern is that the use of trial-type hearings in rulemaking has been found to obstruct agency action and frustrate agency regulatory goals
 - i. For more, see 251, bottom
 - c. Third, there is a belief that they are unsuitable for determining most issues presented in rulemaking proceedings
 - i. Usually, trials are used for specific facts and disputes, not general policy undertakings
 - d. In response to these concerns, look at the ACUS recommendations on 252
 6. State Law
 - a. 1981 MSAPA doesn't require any trial-type proceedings in rulemaking except “to the extent another statute expressly requires a particular class of rulemaking to be conducted pursuant to the adjudicative procedures provided in Article IV, § 4-101(b).
 - i. It does permit agencies to provide such procedures at their discretion, where they find them to be useful and feasible
- iii. Hybrid Rulemaking and the Limits on Judicial Supervision of Administrative Procedure
1. General
 - a. Hybrid statutes instruct specific agencies to make rules using procedures that are somewhat more elaborate than APA informal rulemaking
 - i. Many laws from the 70's contain requirements that the agency hold a “public hearing” or provide interested persons “an opportunity for the oral presentation of data, views, or arguments” in rulemaking
 - ii. Some of these laws also provide, alongside the hearing, for cross-examination of opposing witnesses

- iii. Basis for the rules reflected the growing complexity of rulemaking issues and the need to probe the accuracy of public comments on these issues, alongside the strong belief among legislators in the value of oral communication between regulators and the regulated.
 - b. In some instances Courts occasionally held that proceedings had been conducted improperly b/c of an agency's failure to permit procedural devices that would supplement the usual notice and comment procedures
 - i. This led to a debate in the DC circuit. Bazelon suggested that "courts should not scrutinize the technical merits of each decision, but should establish a decision-making process which assures a reasoned decision. In Ethyl case, Bazelon again warned that "because substantive review of math and science evidence by technically illiterate judges is dangerously unreliable" the court must focus on procedure." However Leventhal responded by saying that simply b/c they are unskilled should not eliminate substantive review, b/c it is better to have no judicial review at all than to have a charade that gives the impression of judicial review."
2. CASE: Vermont Yankee Nuclear Power Co. v. NRDC
- a. Respondent organization objected to the grant by the Atomic Energy Commission of a license to petitioner corporation to operate a nuclear power plant, pursuant to the Atomic Energy Act of 1954, [42 U.S.C.S. § 2011](#) et seq. The United States Court of Appeals for the District of Columbia Circuit remanded the decision of the Commission. The corporation challenged the remand. The corporation contended that the rulemaking proceedings instituted by the Commission 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. The Court held that the lower court improperly intruded into the Commission's decision making process by denying the Commission the right to exercise its administrative discretion in deciding how, in the light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence. The court reversed the judgment and remanded the case to the district court.
3. Responses to Vermont Yankee
- a. The main objective of the decision could have been to send a message to lower courts to avoid imposing procedural requirements on agencies in rulemaking w/o at least purporting to find support in statutory or other provisions of law
 - b. Professor Davis contends that Vermont Yankee was wrong to forbid courts from creating common law rulemaking requirements b/c § 559 can be read to authorize these requirements. In his view, court-created common law is necessary to ensure an acceptable system.
 - c. Professor Byse, on the other hand, has commended the decision for recognizing that the judiciary must respect the procedural decisions mandated by Congress, and that agencies are in the best position to evaluate the efficacy of their fact-finding procedures
4. Hybrid Rulemaking Statutes after Vermont Yankee
- a. This decisions effectively eliminated more hybrid statutes since the 70's
5. Substantive review after Vermont Yankee

- a. Basically, under the courts handling of the case, the Leventhal position has one out (from Ethyl case) – A court has the ability to look at the substantive issues
- b. The court, in Overton Park recognized the courts power to hold an agency rule arbitrary and capricious could serve as a nindirect means of controlling the agency’s procedural choices, although Vermont Yankee forbid this
- c. At times, the “steps” that court’s require agencies to take in order to facilitate judicial review do seem to carry rather strong implications for the agencies procedural choices
- 6. Vermont Yankee in adjudication
 - a. PBGC v. LTV: Court holds that the agency’s highly informal procedures had been inadequate, because PBGC had “neither apprised LTB of the material upon which it would base its decision, given LTB an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards, not provided LTV a statement showing its reasoning in applying those standards.” Supreme Court reversed the decision, stating that none of these are requirements of the APA, and the agency must abide by that or a statute. This is the court extending Vermont Yankee to adjudicatory proceedings.

e. Procedural Fairness

i. The Role of Agency Heads

- 1. Federal APA, 1961 and 1981 MSAPA all provide that agency decisionmakers must actually consider the written and oral submission received in the course or rulemaking proceedings.
- 2. However, this doesn’t mean that the agency head must personally preside at an oral proceeding or personally read all written submissions.
- 3. 1981 MSAPA § 3-104(b)(3) provides that other may preside at oral rulemaking proceedings and prepare summaries for subsequent personal consideration by the agency head. Both federal and state APA’s have been construed in the same manner.
- 4. However, if staff members systematically suppressed all comments on one side of a question, the agency decisionmakers would need to take independent steps to familiarize themselves with those arguments.
- 5. According to Morgan IV, persons who wish to challenge a rule are usually not free to examine an agency head in court to ascertain whether he or she understood the record assembled during the rulemaking proceedings.

ii. Ex Parte Communications and Political Influence in Rulemaking

1. General

- a. The record is formed, which serves three basic functions:
 - i. It aids public participation
 - ii. It provides materials helpful to the agency in making a decision
 - iii. It facilitates judicial review of the agencies decision
- b. 1961 and Federal APA are silent on the creation of the record
- c. 1981 MSAPA provides for a rulemaking record and specifies the materials it must include

- d. In FORMAL rulemaking, ex parte communications are forbidden in that kind of rulemaking, and if they nevertheless occur the agency must disclose their substance on the public record. [APA § 557(d)]
- e. In INFORMAL rulemaking, the assumption for many years was that the federal APA neither banned ex parte communications nor required the inclusion of such communications on the record.

2. HBO v. FCC

- a. Between the close of oral argument and the adoption of the First Report and Order, several ex parte contacts occurred.
 - i. The possibility that there is here one administrative record for the public and this court and another for the Commission is intolerable
 - ii. Implicit in the decision to treat the promulgation of rules as a final event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material – documents, comments, transcripts, and statements – with reference to which such judgment was exercised.
 - iii. When there are references to the public record, yet we know that many more meetings and discussion occurred, the court can't help but treat the rationale of the agency as fiction and call its decision arbitrary.
 - iv. Informal contacts between agencies and the public are the bread and butter of the administrative process and are completely appropriate so long as they don't frustrate judicial review or raise serious questions of fairness.
 - v. Thus, communications which are received prior to issuance of a formal notice of rulemaking don't, in general, have to be put in a public file
 - 1. If the information contained in such a communication forms the basis for agency action, then that information must be disclosed to the public in some form
 - vi. Once a notice of proposed rulemaking is issued, however, there should be no ex parte contacts, and any that do occur should be placed in the public record so that interested parties may comment on them.

3. Sierra Club v. Costle(opposite view)

- a. There was a big fight over levels of sulfur dioxide emissions. Environmental Defense Fund says that b/c of an "ex parte blitz" by private persons, elected officials, and executive branch officials, the agency backed down from being "on the verge" of adopting stricter limits on sulfur dioxide emissions.
 - i. Where an agency action involves informal rulemaking of a policymaking sort, the concept of ex parte contacts is of questionable utility.
 - ii. Congress made it clear in the APA that it doesn't prohibit ex parte contacts in an informal rulemaking context:

1. “The APA forbids ex parte contacts when an “adjudication” is underway
- iii. That it did not extend the ex parte contact provisions of the amended § 557 to § 553 – even though such an extension was urged upon it during the hearing – is a sound indication that Congress still does not favor a per se prohibition or even a “logging” requirement in all such proceedings
- iv. If oral communications are of “central relevance” they should be placed in the docket. We will not put a blanket “no oral comment” during the post-comment period prohibition in place
- v. The President has the power to direct and supervise agency policymaking
 1. Would be required in adjudication or quasi-adjud
 2. Would be required if the enabling statute made it “central issue” docketing
- vi. Regarding contacts with Congressman:
 1. The content of the pressure upon the Secretary is designed to force him to decide upon factors not made relevant by Congress in the applicable statute; and
 2. The secretary’s determination must be affected by those extraneous considerations.
 3. There is no showing that either criterion is satisfied
4. Contrasting Views
 - a. Scalia believes that prohibiting ex parte contacts will produce politically unacceptable rules:
 - i. First, since it will be more difficult for an agency to gauge the political acceptability of its rules, the legislature will be required to intervene into agency rulemaking to avoid an increased number of unacceptable rules.
 - ii. Second, this increased need for intervention will generate tension between the agencies and congress, making it increasingly difficult for them to get along on a day-to-day basis,
 - iii. Third, substantial and unnecessary costs would be imposed on regulate persons and agencies when rules turn out to be unacceptable, and Congress intervenes.
5. Switching off HBO
 - a. The reasoning in HBO has been largely removed from the case law.
 - i. State and Federal
 - b. However, in one case the court found that fairness had been breached by a television decision and remanded the case for open proceedings.
6. Imposing restrictions on yourself
 - a. Some agencies have imposed written summary restrictions on themselves which requires them to disclose written summaries
 - i. E.g. the EPA
7. 1981 MSAPA § 3-112(b)(3)

- a. Requires all written material received or considered by an agency to be included in the record; but it doesn't prohibit oral ex parte communications, nor does it require any disclosure of them in the rulemaking record.
 - 8. The OIRA
 - a. Since 1981, Presidents have entrusted the Office of Information and Regulatory Affairs, with a supervisory role over agency rulemaking.
 - iii. Bias and Prejudgment
 - 1. **Association of National Advertisers v. FTC**
 - a. FTC considered rules restricting advertising directed toward children that were too young to understand its message. The Chairman of the FTC had spoken numerous times in public about his disdain for advertising to children.
 - i. Congress, in this type of proceeding, has enacted specific statutory provisions that require more procedures than those of § 553 but less than the full procedures required under § 556 or § 557
 - ii. An agency decisionmaker is not the same as an agency adjudicator; they are allowed to discuss the policy issues around them. They are not required to be bound to the test of *Cinderella Finishing Schools, Inc.*
 - iii. An agency member may be disqualified in a rulemaking proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking.
 - iv. In the present case, we find that the P have not met this standard
 - 2. State Cases
 - a. The ANA standard has found some acceptance in state courts
 - b. However, Washington is more flexible in allowing for their to be a prejudgment showing of bias.
- f. Issuance and Publication
 - i. General
 - 1. Facilitates easy public access to their contents
 - 2. Allows affected parties to ascertain the relevant law and to adjust their conduct accordingly
 - 3. Rules are required to be published and normally are not effective until a specified period after their publication
 - ii. Regulations
 - 1. APA § 552(a)(1) & Must abide by the Federal Register Act, 44 USC §§1501-1511
 - a. Then, major rules of general applicability go to the CFR
 - 2. 1918 MSAPA § 2-101
 - a. Requires the periodic publication and indexing of proposed and recently adopted state agency rules in a frequently issued publication similar to the Federal Register
 - i. Thirty Three states have this as of 1983
 - iii. Effective Dates

1. APA § 553(d): final agency rule becomes effective no sooner than 30 days following publication of that final rule in the Federal register
 2. 1961 MSAPA § 4: rule becomes effective 20 days after its filing
 3. 1981 MSAPA § 3-115(a): rule becomes effective 30 days after the latest of its filing, publication, and indexing
- g. Regulatory Analysis
- i. General
 1. An intensive, formal examination by an agency of the merits of a proposed rule.
 2. It is intended to involve a more detailed and systematic assessment than is inherent in the ordinary process of notice and comment rulemaking
 3. This is largely an issue of cost-benefit analysis that is required
 - ii. Federal Level & State Level
 1. At federal level, this is a series of Executive Orders
 - a. Order 12291 (Reagan, extended by Bush)
 - b. Order 12866 (Clinton)
 - i. Excerpt on 304-305
 2. During the past decade, nearly half the states have amended their APA's to require regulatory analysis in rulemaking
 - iii. Legislative Developments
 1. Since the election of the 104th Congress, the legislative branch has displayed an active interest in adopting regulatory analysis requirements of its own
 - iv. Merits of the Cost-Benefit Analysis
 1. Agencies too often take actions that are not cost-justified (Breyer opinion)
 2. Cost-Benefit Analysis exceeds the practical cAPAcity of the administrative process (Sargentich opinion)
 - a. It is too difficult to measure the benefits and costs of certain things
 3. Leads to a more efficient allocation of government resources by subjecting the public sector to the same type of quantitative assessments and constraints as those in the private sector (Weidenbaum's opinion)
 4. In between analysis (Pildes and Sunstein approach)
 - v. Legal Constraints
 1. EO 12866 (Clinton) stated it applies "only to the extent permitted by law."
 2. Thus, if a statute directs and agency to issue a rule that even the agency itself would not deem cost-justified, the agency must follow the statute.
 - vi. Judicial Review of analysis requirements
 1. Courts respect the intention that their reviews are quite limited: they have consistently declined to review agencies' compliance with the two Executive Orders
 2. Normally, the agency's analysis and data will be added to the rulemaking record, and on appeal the court can take account of this material as it decides whether the rule is reasonable on the merits
 - vii. State level judiciary review
 1. 1981 MSAPA § 3-105(f) limits judicial review of regulatory analyses, though it does so to a lesser extent than does EO 12866.

2. Even w/o statutes that limit the judicial control over CBA requirements, some courts are disinclined to police statutory CBA requirements very aggressively
- viii. Specialized Regulatory Analysis
 1. Sometimes, certain acts require analysis on specialized issues:
 - a. Environmental Policy Act
 - i. Requires analysis of major federal actions significantly affecting the human environment
 - b. Regulatory Flexibility Act
 - i. Agencies must consider the effect of proposed rules on Small business, small not for profits, and small government entities
 2. These are often used to make sure the agency focuses its attention on an issue of primary importance
 3. Sometimes, EO's have directed regulatory analyses also. For instance, Reagan wanted to know the effect on all federalism values.

V. Rules as Part of the Agency Policy-Making Process

a. Exemptions from rulemaking procedure

i. Good Cause Exemption

1. General

a. In both federal and state APA's

i. APA § 553(b)(B)

ii. 1981 MSAPA § 3-108

b. These exemptions provide that notice and comment proceedings may be omitted in particular circumstances for "good cause."

i. When it would be "unnecessary, impracticable, or contrary to the public interest" for the agency to follow procedure

c. Rationale is that the need to observe usual rulemaking procedures can, in appropriate situations, be accommodated with the equally important need to conduct government administration in an expeditious, effective, and economical manner.

d. Numerous court decisions have declared that the good cause exemptions from notice and comment procedure must be "narrowly construed and reluctantly countenanced."

e. Research shows that agencies invoked the exemptions expressly in 25% of the rules they issued; by implication they relied on it 33% of the time.

2. Timing Provisions

a. A separate provision in the APA, § 553(d)(3) provides that for good cause an agency may dispense with the normal requirement that a rule may not become effective until thirty days after its issuance.

i. This provision is intended to accommodate situations in which the government has urgent reasons to act quickly. However, courts often respond skeptically to government pleas of urgency.

1. E.g. of skepticism is *United States v. Gavrilovic* on p. 327

3. Unnecessary

a. The legislative history of the federal act indicates that the exemption should apply when comment is "unnecessary so far as the public is

- concerned, as would be the case if a minor or merely technical amendment in which the public isn't particularly interested is involved.”
- b. Also, when the agency has absolutely no discretion about the contents of its rule, as where its task is merely to make a mathematical calculation or ascertain an objective fact
 - i. Nothing the public could say would affect the rule
 - c. Also, APA public procedures where unnecessary because EPA was acting under a congressional deadline and the details of the plans had all been aired during proceedings at the state level
4. Direct Final Rules
 - a. The agency publishes the rule and announces that if no adverse comment is received w/in a specified time period, the rule will become effective as of a specified later date
 - i. If even a single adverse comment is received, the agency withdraws the rule and republishes it as a proposed rule under the normal notice-and-comment procedure
 - b. Administrative Conference of the United States has recommended that when an agency plans to rely on the unnecessary prong of the good cause exemption, it should issue its rule using “direct final rulemaking”
 5. Urgent Rules
 - a. Little distinction between the “impracticable” and “contrary to the public interest” parts of the good cause exemption
 - b. Both come into play when agency needs to take immediate action
 - i. Eg. Rules designed to meet serious health or safety problems, or some other risk of irreparable harm
 - c. According to the rule of narrow construction, courts sometimes refuse to accept an agency’s assertion of urgency at face value.
 6. Statutory Deadline
 - a. Another line of cases finds good cause on the basis of a statutory deadline for the issuance of rules
 - b. This rationale is unlikely to succeed if the court believes that the agency itself was dilatory and brought the deadline pressure on itself
 7. Undermines the objective of the statutory scheme
 - a. Can be found to be “impracticable” or “contrary to the public” interest if it undermines the purpose of the statutory scheme
 - i. E.g. about raising wages, b/c merchants would have raised wages (or prices, not sure?) during notice and comment
 8. State Law
 - a. 1961 MSAPA § 3(b)
 - i. if there is an “imminent peril” to the public health, safety, or welfare, it may adopt an emergency rule
 9. Interim final rules
 - a. Agencies who adopt a rule in reliance on the impracticable or public interest prongs of the good cause exemption usually request comments on the rule after it becomes effective.

- a. 1981 MSAPA does not contain an exemption with the broad scope of APA § 553(a)(2), but it does contain some
 - i. §3-116(3)-(5)
 - ii. E.g. a rule that “Establishes specific prices to be charged for particular goods or services sold by an agency” or that concerns “care of agency owned or operated facilities.”
 - 5. Agency management and personnel
 - a. APA § 553(a)(2) rules “relating to agency management or personnel” are exempted
 - b. Legislative history of the APA shows that this exemption should not apply to rules that have a substantial effect on persons outside of the national government
 - c. Consider Joseph v. Civil Service Comm’n and Stewart v. Smith on 331
 - i. Joseph: rules authorizing federal employees to participate in District of Columbia elections, despite Hatch Act restrictions on political activity, were void for lack of notice and comment
 - ii. Stewart: Bureau of Prisons announces that it would refuse to consider persons over 34 years of age for employment – held valid under management and personnel exemption
 - d. 1981 MSAPA excepts from usual rulemaking procedures rules “concerning only the internal management of an agency which do not directly and substantially affect the procedural or substantive rights or duties of any segment of the public.:
 - i. Similar in 1961 MSAPA § 1(7)(A)
 - 6. Military and foreign affairs functions
 - a. APA § 553(a)(1) exempts a rule from all rulemaking procedures “to the extent there is involved a military or foreign affairs function of the united states.”
 - i. Admin Conference thinks it should be narrowed
- iii. Procedural Rules
 - 1. “Rules of agency organization, procedure, or practice” are exempted from usual notice and comment procedures by APA § 553(b)(A).
 - 2. There is no similar exemption in either MSAPA or state APA’s
 - 3. Illustrative Case: *U.S. Department of Labor v. Kast Metals Corp.*
 - a. **Facts:** OSHA must secure warrants before inspecting a facility for unsafe working conditions. Previous, OSHA used a random method. Then, they passed a rule where inspection was based on accident rates. They selected Kast under the new rule. DC found that the new rule did not fit under the “organization, procedure, or practice provision” b/c it had a substantial impact on regulated persons. This Court reversed.
 - i. On the surface, this is a procedural rule.
 - ii. Initially, courts will honor an agency’s characterization if it reasonably describes what the agency in fact has done
 - iii. In *Brown Express Inc. v. United States*, the court recognized that a seemingly procedural rule does not have its apparent nature cast in stone for purposes of APA rulemaking requirements

- iv. The “substantial impact test” is the primary means by which courts look beyond the label “procedural” to determine whether a rule is of the type Congress thought appropriate for public participation
- v. The government still must satisfy a federal magistrate, as it did in this case, that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria”
- vi. Adherence to the safety and health standards promulgated by OSHA should not turn on the agency’s ability or inclination to play watchdog (following the statute is more important than how they get a warrant).

iv. Non-Legislative Rules

1. Legislative and Non-Legislative Rules

a. General

- i. Legislative Rules are rules issued by an agency pursuant to an express or implied grant of authority to issue rules with the force of law.
- ii. Non-Legislative Rules are guidance documents, that don’t have the force of law, as they are not based upon delegated authority to issue such rules.
- iii. The reliance of non-legislative rules is going to increase
- iv. Legislative rules
 - 1. Binding on individuals
 - 2. Binding on the issuing agency, who must adhere to them until such time as they may be revoked or invalidated by the court
 - 3. Agency may not violate its own rules, though with proper authority it may be able to waive them.
- v. Non-legislative rules are not binding on citizens or agencies
 - 1. Often subdivided into “interpretive rules” and “general statements of policy

2. Policy Statements

a. **Mada-Luna v. Fitzpatrick**

- i. P Mexican National subject to deportation from drug crimes. He had served as an undercover agent for the federal government, his wife and children were US Citizens, and he had been kidnapped and threatened with death by Mexican drug traffickers. He applied for “deferred action” status. In 1978 and 1981, the INS adopted Operations Instructions about how to determine deportation, not using notice and comment. The director denied P deferred status under the 1981 instructions; he would have had a better chance under the 1978 instructions
- ii. **Held**, the Operation Instructions constitute a general statement of policy and not a Rule
 - 1. Policy Statements serve a dual purpose:

- a. Inform the public concerning the agency's future plans and priorities for exercising its discretionary power
 - b. Educate and provide direction to the agency's personnel in the field, who are required to implement its policies and exercise its discretionary power in specific cases.
 2. The criteria for determining whether something constitutes a rule or a policy statement is "the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case."
 - a. To the extent the directive merely provides guidance of agency officials in exercising their discretionary powers while preserving their flexibility and their opportunities to make "individualized determinations," it constitutes a policy statement
 3. To satisfy § 553's policy statement exception, the rules must:
 - a. Operate only prospectively
 - b. They must not establish a "binding norm" or be "finally determinative of the issues or rights to which they are addressed," but must instead leave INS officials "free to consider the individual facts in the various cases that arise."
 4. Simply b/c agency action has a substantial impact doesn't mean it is subject to notice and comment if it is otherwise exempt under the APA
 5. The operating instruction here provided great latitude for decision-making, and thus is a statement of policy
- b. California
 - i. In California, where every document had to follow notice and comment, many people found it easier to go to the legislature and change the statute than to adopt guidance documents
 - ii. Other agencies simply defied the law, and issued underground guidance documents, hoping they wouldn't be challenged
 - c. Case Law
 - i. One approach says that if the agency statement declares "the agency will" this will be considered a legislative rule, while if it is written in permissive terms, it is more likely non-legislative
 - d. Substantial Impact Test
 - i. Both the ABA and the American Conference recommend notice and comment when the statement will have a substantial impact on regulated parties
 - e. Models

- i. In *McLouth Steel Products*, the court found that an agency using a mathematical model was treating it like a rule. The court required the model be subject to § 553 or reconsider the petitioners claim.
 - ii. However, in another case the court found that a presumption for one thing didn't make it a rule.
 - f. Self-Binding Effect
 - i. *Community Nutrition Institute v. Young*
 - 1. FDA adopted an "action level" stating it would take no action against corn producers whose products contained less than X amounts of a carcinogen. The court held this was a legislative rule that should have been adopted through notice and comment – the court was convinced that the FDA had bound itself, although no outside person.
 - ii. Congress in 1997 declared that the FDA guidance documents are non-binding, but that the agency must obtain public input on such documents either before or after promulgation
 - g. State Internal Document Exemption
 - i. 1981 contains no general exemption for policy statements, but it does contain some narrow exemptions that exclude from usual rulemaking requirements many pronouncements that would also be policy statements under the Federal APA
 - 1. § 3-116(2) exempts "criteria or guidelines to be used by the staff of an agency" in performing certain functions, such as those of "defense, prosecution, or settlement of cases," but only if disclosure of those criteria or guidelines would facilitate the disregard of requirements imposed by law, enable law violators to avoid detection, or might give persons contracting with the state an unfair competitive advantage."
3. Interpretive Rules
 - a. **Hoctor v. USDA**
 - i. Animal Welfare Act authorizes USDA to adopt rules "to govern the humane handling, care, treatment, and transportation of animals by dealers." Using notice and comment, it adopted a rule entitled "structural strength requirement" and then it later adopted an internal memo addressed to its inspectors, in which it said that all dangerous animals must be inside a perimeter fence at least 8 ft. high. Hoctor deals in exotic cats. It would cost millions to replace his fences. He doesn't think they need to be replaced.
 - ii. **Held**, this is a rule and thus requires notice and comment.
 - 1. Provided an agency's interpretation of its own regulation doesn't violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.

2. There is normal or routine interpretation at one end of the spectrum; on the other end is arbitrariness – such as a number that is binding (6 ft. as opposed to 7 ft. or 8 ft.)
 3. When agencies base rules on arbitrary choices, they are legislating, and so these rules are legislative or substantive rules and require notice and comment rulemaking.
 4. The greater the public interest there is in a rule, the greater the need to let the public participate in the proceedings.
 5. Had the USDA said it couldn't imagine anything less than 7 ft. would be secure, so it would presume, subject to rebuttal, that it was safe, it would have been on better ground – it would have been tying the rule to the animating standard, that of secure containment, rather than making it stand free of the standard, self-contained, unbending, arbitrary.
- b. Required or Prohibitive Legislative Rulemaking
- i. The clearest case where a court can assume that an agency intended to use its legislative rulemaking powers is where “in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate.”
 - ii. Conversely, a rule is plainly not legislative, but rather interpretive, if the agency has no legislative rulemaking authority at all with respect to the subject area of the rule.
 - iii. Whether a general rulemaking provisions empowers an agency to make legislative rules and how far the power extends are issues of statutory interpretation. Usually, ambiguities are resolved in favor of legislative rulemaking power, because the courts tend to believe that such power is an essential tool in carrying out a regulatory program.
- c. Interpretation v. Arbitrary Choice
- i. If one requirement of a valid interpretive rule is that it can be “Derived by interpretation,” however, some cases do not seem to enforce the requirement very stringently.
- d. Rationales for the exemption
- i. Legislative history of the APA suggests that interpretive don't require notice and comment b/c they are “subject to plenary judicial review.”
- e. State Law
- i. 1961 MSAPA contained no exemption for interpretive rules, but most state agencies have ignored the requirement that they provide notice and comment procedures before adopting those rules
 - ii. 1981 MSAPA § 3-109 contains an exception for interpretive rules that is much narrower than federal APA § 553(b)(A).
 1. Requires an initial determination of whether the agency has been delegated authority to issue rules with the binding force of law. If the agency has that authority, the exception

becomes unavailable: the agency must follow the MSAPA rulemaking procedures, even if the agency intends the rule to be wholly interpretive rather than legislative. If it doesn't, it can skip notice and comment

2. Also, note that under the MSAPA, when an agency that lacks legislative rulemaking power does exercise the option to issue an interpretive rule w/o following the usual rulemaking procedures, this comes with a price tag: on judicial review, a court must determine wholly de novo the validity

b. Required Rulemaking

i. NLRB v. Wyman-Gordon Co.

1. Wyman-Gordon was going to have an election to allow employees to decide whether to be represented by a certain bargainer or by no union at all. The NLRB required that the company furnish a list of all its employees for electioneering purposes, citing a prior order in an *Excelsior* adjudication as the precedent for such a requirement.
2. **Held**, an agency cannot promulgate new rules in adjudicatory proceedings, because it is a rule then and is subject to APA procedures. However, in the present case, this was an order.
 - a. Rulemaking may not be avoided by the process of making rules in the course of adjudicatory proceedings
 - i. Falls short of the substance of the requirements of the APA
 - ii. Isn't published in the Federal Register, and only select organizations have notice
 - iii. Nobody had opportunity to participate in the procedure but two parties
 - b. The Board did not even apply the rule it made to the parties in the *Excelsior* proceeding, the only entities that could properly be subject to the order in that case. Instead, the Board purported to make a rule.
 - c. However, in this case the Board issued an order that directed the company to provide the list. This is not a rule.
3. Concurring in Result:
 - a. Although it is true that the adjudicatory approach frees an agency from the procedural requirements specified for rule making, the Act permits this to be done whenever the action involved can satisfy the definition of "adjudication" and then imposes separate procedural requirements that must be met in adjudication.
 - b. If the Board were to decide, after careful evaluation of all the arguments presented to it in the adjudicatory proceeding, that faced with the unpleasant choice of either starting all over again to evaluate the merits of the question, this time in a "rule-making" proceeding, or overriding the considerations of fairness and applying its order retroactively anyway, in order to preserve the validity of the new practice and avoid duplication of effort.
4. Dissenting Opinion:

- a. They are flouting the APA and cannot play fast and loose with the rules

ii. **NLRB v. Bell Aerospace**

1. United Auto Workers petitioned the NLRB to hold a representation election to determine whether the union would be certified as bargaining representative of the buyers. Company opposed the petition on the ground that the buyers were “managerial employees” and thus were not covered by the Act. SC agreed with company.
 2. **Held**, The Board does not have to invoke its rulemaking procedures if it determines, in light of the Supreme Court’s opinion, that buyers are “managerial employees under the act.”
 - a. In Chenery II, the court noted that the Commission had a statutory duty to decide the issue at hand in light of the proper standards and that this duty remained “regardless of whether those standards previously had been spelled out in a general rule or regulation.”
 - b. Also, noted in Chenery II: In performing its important functions, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action at the exclusion of the other is to exalt form over necessity.
 - c. The view expressed in Chenery II and Wyman Gordan make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.
 - d. It is true that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board had discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.
- iii. When would the Board’s lawmaking by adjudication be impermissible?
1. 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 to support his position. The 9th Cir. reversed.
- iv. Reliance and Retroactivity
1. Bell Aerospace alludes to three situations in which reliance interests might require a “different result”
 - a. The adverse consequences of retrospective adjudicative lawmaking would be substantial to parties who had relied on past decisions of the agency
 - b. 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
 - c. Fines or damages are involved
 2. According to a leading 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:
 - a. Whether the particular case is one of first impression

- b. 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
- c. The extent to which the party against whom the new law is applied relied on the prior law
- d. The degree of the burden which a retroactive order imposes on a party
- e. The statutory interests in applying the rule to the case at hand despite the reliance of a party on the old standard
 - i. For an example of a case applying these rules, see *Retail Union* on p. 367

v. Abuse of Discretion

1. *Ford Motor Co. v. FTC*

- a. FTC issued a cease and desist order against Francis Ford, an auto dealer. The Commission found the repossession practices were in violation of an FTC Act. The court of appeals vacated the order, stating that this adjudication changes existing law, and has widespread application, and therefore should be addressed by rulemaking
- 2. Ford Motor Co became subject of a study by the ABA, that stated:
 - a. The ABA approves the following principles respecting the choice between rulemaking and adjudication in administrative proceedings:
 - i. An agency is generally free to announce new policy through adjudicative proceedings
 - ii. When rulemaking is feasible and practicable, an agency which has been granted broad rulemaking authority ordinarily should use rulemaking rather than adjudication for large-scale changes, such as proscribing established industry-wide practices not previously thought to be unlawful.
 - iii. An agency should not be empowered to treat its adjudicatory decisions precisely as if they were rules. In particular, it is inappropriate to empower an agency or court to treat third-party departures from holdings in agency adjudication as, ipso facto, violations of law. Where the precedent of a prior adjudication is sought to be applied in a subsequent adjudication, a party should have a meaningful opportunity to persuade the agency that the principle involved should be modified or held inapplicable to his situation

vi. Benefits Programs

- 1. Few federal cases assert that an agency must execute specified lawmaking by rule rather than by order, despite the absence of a statute explicitly requiring that approach.

c. Rulemaking Petitioning and Agency Agenda-Setting

i. Provisions

- 1. APA § 553(e)
- 2. 1961 MSAPA § 6
- 3. 1981 MSAPA § 3-117

ii. *WWHT, Inc. v. FCC*

1. Broadcasters of subscription television asked the FCC to issue a rule that would require cable TV operators to scramble subscription shows.
2. Issue: Whether, and under what circumstances, may a reviewing court require an agency to institute rulemaking proceedings after an agency has denied a petition for rulemaking
 - a. The legislative history of § 553(e) did not intend to compel an agency to undertake rulemaking merely b/c a petition to do so has been filed
 - b. The most comprehensive statement by the court as to the availability and scope of review of an agency's decision to deny a petition comes from *Natural Resources Defense Council v. SEC*
 - i. Agency decision is based on factor not inherently susceptible to judicial resolution
 1. i.e. internal management consideration as to budget and personnel
 2. Evaluations of its own competence
 3. Weighing of competing policies w/in broad statutory framework
 4. Time for action has not yet arrived
 - c. Where an agency decides not to proceed with rulemaking, the record must provide the petition for rulemaking, comments pro and con where deemed appropriate, and the agency's explanation of its decision to reject the petition
 - d. It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking
 - e. There is a rule in *Geller* that an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject has been removed
 - f. Court review of the agency's actions should be extremely narrow
 - g. In this case, the orders of the commission must be affirmed.
- iii. Deadline for response
 1. **1981 MSAPA § 3-117** gives the agency 60 days to act on a petition
 2. **1961 MSAPA** gives the agency 30 days
 3. **APA § 553(e)** had no time limit – often petitions are never heard of again
- iv. Procedures for dealing with petitions
 1. **1981 MSAPA § 3-117** requires an agency to adopt rules prescribing the form of petitions and the procedure for their submission, consideration, and disposition
 2. **APA § 553(e)** contains no such requirement
- v. Factors a court should consider to determine whether an agency's delay was unreasonable – **APA § 706(1)** (*International Chemical Workers Union* (D.C. Cir. 1992):
 1. Court should ascertain the length of time that has elapsed since the agency came under a legal duty to act
 2. The reasonableness of the delay must be judged in the context of the statute which authorizes the agency's action
 3. The court must examine the consequences of the agency's delay

4. The court should give due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources
- vi. Lapse of rulemaking proceeding
 1. In some states, statutes place an outside limit on the rulemaking period:
 - a. **1981 MSAPA § 3-106(b)** prescribes a six month period
 - b. A time limit prevents an agency from using undue delay as a means of defusing or circumventing widespread public opposition to its action
- d. Waivers of rules
 - i. Agencies often entertain requests for waivers in cases in which the applicants can demonstrate that the rule does not work appropriately in their case
 - ii. **WAIT Radio v. FCC**
 1. Wait Radio could follow the purpose of the Agency's clear channel rules, and applied for a waiver. The FCC rejected the waiver.
 2. ***Held***, the FCC must reconsider Wait Radio's exception for a waiver
 - a. That an agency may discharge its responsibility by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases
 - b. An agency need not sift pleadings and documents to identify such applications, but allegations such as those made by petitioners, states with clarity and accompanied by supporting date, are not subject to perfunctory treatment, but must be given a hard look.
 - iii. Hospitality to Administrative Waivers
 1. In general, academic opinion accords with Judge Leventhal's position above, endorsing waivers as a necessary corrective to the rigidity of rules.
 - iv. Cases
 1. In *KCST-TV v. FCC*, the majority cited *WAIT Radio* for the proposition that an agency must take a hard look at meritortious applications, but Judge Scalia disagreed, arguing that if this statement were applied broadly, it would mean, in effect, that there could be no rules but only case by case adjudication
 - v. Duty to explain waiver denials
 1. *Dickson v. Secretary of Defense*: Although the statute of limitations had passed on three army veterans discharged for alcohol related crimes, the new army policy would promote a more favorable discharge. The Board could have waved the time bar in the interests of justice, but did not. The court noted that the Board had not spelled out its reasons for finding that waivers were "not in the interest of justice"
 - vi. Danger of waivers
 1. As a species of deregulation, waiver programs can give rise to charges that the agency is enforcing its mandate to leniently
 - vii. State provisions
 1. *Florida* requires that agencies grant waivers or variances when (1) the person subject to a rule demonstrates that the purpose of the underlying statute will be

or has been achieved by other means, and (2) application of a rule would create a substantial hardship or would violate principals of fairness

2. Iowa State Bar Association, in draft legislation, proposes that an agency shall waive one if its rules upon a showing that application of the rule to the petitioner would not serve any of the purposes of the rule.” In addition, an agency may grant a waiver if (a) application of the rule to the petitioner would cause undue hardship, (b) the waiver would be consistent with the public interest, and (c) the waiver would not prejudice the substantial rights of any other person.

VI. Political Control of Agencies

a. Introduction

- i. Main principals: Checks and Balances & Separation of Powers
- ii. In state agencies, the problems of separation of powers and checks and balances may differ from the situation under Federal law
 1. First, some state agencies are directly created by state constitutions, giving such agencies a status equivalent to the legislature and governor
 2. Second, some state officials are directly elected by the voters, which provides a form of direct accountability
 3. When an agency has constitutional status, or when agency heads are elected, the normal legislative and executive checks on agency action may not be applicable or may apply in a different way

b. Non-Delegation Doctrine

i. General

1. Maintains that Congress’ power to delegate its legislative authority is limited
2. From Field to the New Deal
 - a. Field v. Clark (1892) – principal that delegation doctrine is important, but court upholds the law anyway
 - b. In 1935, SC twice held statutes unconstitutional under the delegation doctrine (the first and the last time).
 - i. Panama Refining Co. v. Ryan
 - ii. Schechter Poultry Corp v. United States
3. From the New Deal to the Present
 - a. Basically, the court just gives lip service to the doctrine but refuses to enforce it

ii. Revival of the Delegation Doctrine

1. Amagated Meat Cutters v. Connally

- a. Economic Stabilization Act of 1970 gave the President the authority “to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries.” This act supplied sufficient standards. The safeguarding of meaningful judicial review is one of the most important things around. This is available here.

2. Industrial Union Dept v. Americal Petroleum institute

- a. Occupational Health and Safety Act (OSHA) allows Sec of Labor to adopt safety and health standards for the workplace, which must be “reasonably necessary or appropriate to provide safe or healthful places of employment.”

- b. In concurrence: Non delegation doctrine serves three functions:
 - i. (1) it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our gov'n't most responsive to the popular will;
 - ii. (2) it guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion;
 - iii. (3) it ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. If the nondelgation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as 'a case of death by association.'"

- iii. Standards

- 1. Courts have often required more precise standards in a legislative delegation when the statute threatens a fundamental right such as freedom of speech

- iv. Safeguards

- 1. Professor Davis argues: Five Principal steps should be taken to alter the non-delegation doctrine and to move toward a system of judicial protection against unnecessary and uncontrolled discretionary power:
 - a. The purpose of the non-delegation doctrine should not longer be either to prevent delegation or to require meaningful statutory standards; the pupose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power
 - b. the exclusive focus on standards should be shifted to an emphasis more on safeguards
 - c. When legislative bodies have failed ot provide standards the courts should not hold the delegation unlawful but should require that the administrators must as rapidly as feasible supply the standards
 - d. The non-delegation doctrine should gradually grow into a broad requirement extending beyond the subject of delegation – that officers with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards and to confine and guide their discretion through standards, principles, and rules
 - e. The protection should reach not merely delegated power but also such undelegated power as that of selective enforcement

- v. Arguments for reviving the delegation doctrine

- 1. Shoenbrod believes that courts should invalidate statutes that state only the goals that Congress wishes to acieve (like providing safe and healthful workplaces or cleaning up the air) but leave to agencies the hard decisions about means.
- 2. Aronson argues that the delegation doctrine should be revived in order t o block the enactment of laws dictated by special interests

- vi. Mistretta v. United States

1. Scalia dissents arguing that Congress violated the delegation doctrine when it creates the Sentencing Commission in the Judiciary
- vii. Arguments against reviving the doctrine
 1. Stewart opposes any effort to revive the doctrine: “Detailed legislative specification of policy under contemporaneous conditions would be neither feasible nor desirable in many cases and the judges are ill-equipped to distinguish contrary cases
- viii. Non-Delegation and state agencies
 1. Thygesen v. Callahan
 - a. A legislative delegation is valid if it identifies:
 - i. The persons and activities potentially subject to regulations
 - ii. The harm sought to be prevented; and
 - iii. The general means intended to be available to the administrator to prevent the identified harm
 - b. In this case, both part (b) and (c) are not present
 2. Delegations to private persons
 - a. Contrary to federal cases, a number of state cases have overturned delegations to private persons
 - i. See p. 417
 - b. Incorporation by reference to federal law
 - i. See p. 418-19
- c. Rationale for legislative and executive [political] review of agency action
 - i. Arthur Earl Bonfield, State administrative rule
 1. Courts are not the proper bodies to protect us against legal agency rules that are simply unwise or unpopular, b/c courts are not broadly representative institutions that are directly responsible to the people
 2. Agencies should be directly accountable to those authorizing rule-making actions
 3. Only institutions with direct political legitimacy like the governor and the legislature can coordinate potentially divergent, conflicting, or inconsistent rules of several agencies purely on policy grounds.
 4. Gubernatorial and legislative review of rules can also check unlawful agency rule making.
- d. Legislative Controls
 - i. The legislative veto
 1. General
 - a. Generally, when a legislature finds an exercise of granted agency authority unacceptable, it can respond by narrowing the agency’s enabling act or by overturning the specific agency action deemed objectionable.
 - b. However, enactment of a statute to overcome agency action is difficult in part b/c it requires the concurrence of both houses and the president.
 2. **INS v. Chadha** (the legislative veto – one house – deemed unconstitutional)
 - a. Majority
 - i. “Convenience and Efficiency are not the primary objectives – or the hallmarks – of democratic government and our inquiry is

sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency...”

- ii. Framers intended that all lawmaking function pass both houses and then go to President.
 - iii. The framers decided that the legislative procedure be finely wrought and exhaustive
 - iv. Must consider whether Congress’s action contains an issue that is sufficiently legislative in character.
 - v. The House, by instituting a veto, had the legal effect of “altering the legal rights, duties and relations of persons, including the Attorney General, the Executive Branch officials and Chadha, all outside the legislative branch.”
 1. Therefore, it is legislative in character
 - vi. When Congress makes the choice to delegate, it must delegate with precision. Congress can only implement policy in one way: bicameral passage and presentment by president
 - vii. There are only four times one house may act alone, and this is not one of them.
- b. Powell’s Concurrence:
- i. This is a judicial function and should be struck down on separation of powers grounds. Congress is acting retroactively and this is a problem; this is not prospective like a legislative function and should be struck down on those grounds.
- c. White’s Dissent:
- i. The pure constitutional logic to which the majority pointed is very difficult to overcome. Essentially, the dissent agreed that to legitimate the veto the Court would have to stretch the Constitution's language, but Justice White argued that its language has been stretched equally far in other analogous instances. The analogies he offered, however, did not persuade the Court.
 - ii. If Congress can delegate a form of legislative power to the executive, why can it not delegate a form of legislative power to some of its own members? The type of legislative power that Congress has delegated to the executive is the power to make rules, and rulemaking is often an integral part of administering just as it is an integral part of judging. Thus, one does not depart far from the Constitution's letter in stating that the Constitution, in granting administrative powers to judges allows them, at least in some instances, to make rules.
 - iii. Similarly, the dissent points to cases that have upheld congressional delegation of legislative-like powers to private groups. The legislative veto, however, involves a delegation to those who will act in their official capacities as members of Congress; in that capacity they can possess only those powers bestowed upon them by article I. The question of how, say, one House could exercise legislative power in the face of express

bicameral and presentation requirements then seems to arise in a context different enough to make the private group analogy less compelling.

iv. Finally, the dissent noted that the one-House veto carries out the Constitution's spirit, for it means that executive action would take effect only if the Executive and both Houses of Congress approved it. The executive action might be viewed as an executive proposal to the Congress, later enacted by the silence of both Houses. Yet, to analogize silence to legislating goes rather far. If one takes the analogy literally (if, for example, one would still require the President to act pursuant only to constitutionally, and thus congressionally, delegated authority) one destroys the analogy's power.

d. Breyer's legislative veto substitute

i. To develop a veto substitute that satisfies the literal wording of the Constitution's bicameral and presentation clauses while it more nearly approximates the compromise functions of the legislative veto. ... That fast track rule would provide: 1) when an executive branch agency enacts a regulation (or takes other action) subject to a special confirmatory law requirement, a bill embodying that special confirmatory law shall be introduced automatically (say, under the name of the Majority Leader, as sponsoring Senator); 2) the bill will be held at the desk, and not referred to committee; 3) the bill will be neither debatable nor amendable; it cannot be tabled or subjected to filibuster, etc.; and 4) the Senate will vote upon the bill, up or down, within sixty days of its introduction.

3. Dissent's argument

a. If Congress may delegate the decision on Chadha's fate to an administrative agency, it should also be able to delegate it to a subunit of itself

4. Extension of *Chadha* to rulemaking

a. Only a few weeks after *Chadha*, the court decided w/o an opinion that Chadha applied in the rulemaking, alongside adjudication, context.

5. Policy issues

a. Agency rules that were subject to a legislative veto lead to several policy issues:

- i. Those groups having greater resources or prior influence with congressional committees have an additional chance to affect agency action not available to those without such resources
- ii. Congressional committee members are not as familiar with a rule under review as agency personell
- iii. Congressional committees actually review the agency decision, which are much smaller in composition than congress as a whole.
- iv. Reduction in the incentive of oversight committees to sponsor legislation.

6. Reality Check

- a. In the 13 years after *Chadha*, about 400 new legislative vetoes have been enacted into law, usually in the form of provisions requiring agencies to obtain the approval of appropriations committees for various action
- 7. State legislative vetoes
 - a. Courts in at least a dozen states have held such provisions unconstitutional
 - b. Some states have explicitly provided for a legislative veto in their constitutions
 - c. One state supreme court has squarely upheld a two house veto
- 8. Functionalist approach to separation of powers problems
 - a. Relatively flexible approach that asks whether a given structural arrangement intrudes too far on the functions of any branch of government, or concentrates too much power on any one branch
- 9. Doctrinal Evolution
 - a. Cases in the SC have reinforced Chadha, but have done so under the separation of powers doctrine.
 - i. *Bowsher v. Synar*: the constitution “commands that Congress play no direct role in the execution of the law.” Therefore, Congress may not remove an officer who is engaged in Executive functions, even if it complies with the bicameralism and presentment clauses of the Constitution.
 - ii. *MWAA v. Citizens for the Abatement of Aircraft Noise*: If the Board’s actions were deemed to be legislative, Chadha required that they be exercised in conformity with the bicameralism and presentment requirements. On the other hand, if the Board’s actions were considered to be executive, the separation of powers doctrine as interpreted in Bowsher would not permit their exercise in full.
 - ii. Alternatives to the Legislative Veto
 - 1. Congressional Review Act
 - a. 5 USC § 801-808
 - b. Statute requires that virtually all rules of general applicability be submitted to Congress and to the General Accounting Office before they take effect
 - i. Must be accompanied by a report containing various items of information about the rule
 - ii. Major v. Non major rules
 - 1. Major: One determined to be economically significant by OIRA under Exec Order 12866
 - 2. Non-major rule cannot take effect for at least 60 calendar days, whereas a non-major rule can take effect whenever Congress determines
 - c. Congress can veto the rule by enacting a joint resolution of disapproval.
 - i. Must be approved by both houses and signed by the President
 - ii. There is also a statute provided for fast-track consideration
 - d. Supporters of the law have argued that its wide scope is necessary, b/c many non-major rules embody questionable decisions; moreover, agencies must not be allowed to shield new policies from congressional scrutiny by

burying them in supposedly nonbinding documents such as policy statements

2. Effects of a CRA disapproval
 - a. The CRA provides that, in such cases, if a resolution of disapproval is eventually enacted, the rule must be treated as if it had never taken effect.
 - b. The CRA further provides that, if a rule is disapproved, the agency may not re-issue the rule in substantially the same form unless Congress enacts legislation allowing it to do so.
 - i. 5 USC § 801(b)(2)
3. Suspensive Veto
 - a. Generally, this is adopting a statute that allows a legislative committee to suspend an agency rule for a limited period of time
 - i. Martinez v. DILHR
 1. JCRAR (a legislative committee) could suspend a rule for five different reasons. JCRAR was required after suspending to introduce a bill in each house to repeal the rule. If it wasn't repealed, the rule went into effect. Court held that this was constitutional in Wisconsin b/c a sharing of powers in appropriate unless it disturbs "the balance between the three branches of government" and several other reasons. Court found the JCRAR suspension didn't intone any of these evils.
 - ii. Another state supreme court has endorsed such a veto, but a third has held it unconstitutional.
4. Grounds for Objection
 - a. The fact that there were a limited number of grounds on which the committee in Martinez could suspend a rule is fairly typical.
 - b. 1981 MSAPA § 3-204(d) instructs the legislative review committee to object to a rule only if it is beyond the agency's procedural or substantive authority.
 - i. Bonfield supports the MSAPA approach – p. 459
 - c. In some states, the grounds for objection are unrestricted.
5. Burden Shifting
 - a. 1981 MSAPA § 3-204(d) assigns a reviewing role to an "administrative rules review committee" (ARRC) consisting of three members from each of the two houses of the legislature.
 - i. May object to all or a portion of a rule that it considers to be "beyond the procedural or substantive authority delegated in the adopting legislation."
 - ii. Then, the AARC must file a statement of reasons, and then the agency can respond in writing.
 - iii. If the committee then does not withdraw its objection, the burden then is on the agency to prove that the rule passes muster in a subsequent judicial review proceeding
 - b. Official comment says this is not a legislative veto b/c it only authorizes the AARC to alter one aspect of the procedure by which the legality of the

rule will be finally determined by the courts. Simply, this requires agencies to avoid making rules that have questionable legality b/c they will have to manage the cost of challenged rules.

iii. Other legislative controls

1. Oversight committees

- a. Most states have adopted formal continuing legislative oversight mechanisms to review the legality and desirability of agency rules
 - i. E.g. 1981 MSAPA § 3-204(d) establishing the AARC
- b. In congress, responsibility of oversight is much more diffused
 - i. Authorization committees are responsible for considering legislation in a particular area – these committees also oversee the agencies in the area (labor, commerce, energy, etc.)
 - ii. Plus, an agencies budget request is scrutinized by Congress and can be altered to serve an oversight function

2. Investigations and hearings

- a. Many standing committees of congress and state legislatures constantly investigate the manner in which agencies spend money as well as how they discharge responsibilities.
- b. In addition to committee investigation, legislative investigative committees may be employed for oversight purposes.
 - i. E.g. the General Accounting Office
- c. A few states have also created an office of ombudsman that is authorized to receive and investigate citizen complaints about any state agency or aspect of the state administrative process, and to make a report and recommendation to the legislature and/or governor on such complaints

3. Funding measures

- a. The appropriations (of funds) mechanism provides a convenient way to achieve legislative objectives without altering the statutes which furnish authorities to agencies

4. Direct Contacts

- a. Individual members of Congress and state legislatures consider that their responsibilities include making direct contacts with units of government that are causing problems for their constituents.

e. Executive Control: Personal Decisions

i. The Appointment Power

1. **Buckley v. Valeo**

- a. Statute enacted that said FEC was to be composed of 8 members, many of which were to be appointed by Congress. Challenged on grounds that b/c FEC has wideranging rulemaking and enforcement powers, Congress has no business (under separation of powers) appointing officers (Art. II, § 2, cl. 2)
- b. **Held**, Congress has no business appointing officers in this situation.
 - i. Any appointee exercising significant authority is an Officer of the United States, and must be appointed following the constitution. Surely the commissioners are at least Inferior Officers

- ii. Constitution is interpreted to say that Congress is not included among those as “heads of Departments” in cl. 2
- iii. The rationale of the appellee, that the reason for not placing the appointment with the President was that President would have power to dictate how an incumbent candidate would run election, is discarded. This is also applicable to Congressman.
- iv. Necessary and Proper: Congress does not have the power to enforce laws and make administrative rules, and therefore they cannot appoint officers to the commission.

2. Principal v. Inferior Officers

a. Morrison v. Olson

- i. Ethics in Government Act of 1978 Allows for Congress to appoint an “independent counsel” to investigate and prosecute specified government officials for violations of federal criminal law. The Att. General first conducts an investigation, then reports to the Special Division (a court). The Special Division then appoints the counsel and defines the counsel’s prosecutorial jurisdiction. Independent Counsel must comply with department of justice policies, and can be removed “for good cause” by the Att. General. Either the Special Division or the Independent Counsel can say when the task is completed. Certain congressional committees have oversight jurisdiction regarding the independent counsel’s conduct.
- ii. **Held**, Congress may provide for the judicial appointment of independent counsel for purposes of investigating and prosecuting federal criminal offenses.
- iii. Two classes of officers under the appointment clause:
 - 1. Principle officers – Selected by the President with the Advice and Consent of the Senate
 - 2. Inferior Officers – Congress may allow to be appointed by the President alone, by the heads of departments, or by the judiciary.
- iv. This does not violate separation of powers.

b. Edmond v. United States

- i. Court holds that members of the Coast Guard Court of Criminal Appeals, a tribunal that hears appeals in court-martial cases, were inferior rather than principal officers. Rationale: these judges didn’t have the kind of case specific jurisdiction or limited tenure that an independent counsel had.
- ii. Definition by Scalia of Inferior Officer is on p. 468

c. Who can appoint “inferior officers”

i. Freytag v. Commissioner

- 1. Tax Court judge (special trial court) could be appointed by the Chief Judge of the court. The Supreme court held this was just fine, but for separate reasons. (1) Tax Court exercised judicial powers and thus was one of the “Courts of Law” mentioned in the appointments clause. It is not a “department.” (2) Tax Court is a Department as that is defined in appointments clause, not a “Court of Law”

d. Employees

- i. Could Congress appoint civil servants, like desk clerks? Perhaps not – the appointments clause would not be an obstacle, but the separation of powers clause would be.

- 1. Springer v. Government of Phillipine Islands – Idea being that Congress has power to make, not enforce the laws

3. State Appointments

- a. State Governors appoint most executive branch officials. Some states the officials are elected. In some states, the Governor shares power with the legislature or other political officials.
- b. In states in which the constitution doesn't expressly limit the appointment power to the President, the courts have resorted to general separation of powers principals in order to sort out the respective prerogatives of the governmental branches.

- i. Some courts say appointments are inherently executive, and thus only by Governor

- ii. Parcell v. State

- 1. Flexible Approach: Membership had to be balanced w/regard to party affiliation. Balancing test consisting of four criteria: (1) the nature of the powers being exercised by the agency; (2) The degree of control being exercised by the legislature; (3) Whether the legislature's objective was to cooperate with the executive branch, as opposed ot establishing its superiority in the executive domain; and (4) the practical results of this blending of legislative and executive powers

- iii. Spradlin v. Arkansas Ethics Commission

- 1. Denied Parcell by saying that state's case law "rejected the notion of a 'blending' of powers in favor of a more strict separation."

4. Legislators as appointees

- a. The incompatibility clause usually prevents this: they can't be legislatures and something else.
- b. Even when it doesn't apply, many state court decisions rely on the separation of powers doctrine to bar legislators from holding executive branch jobs

5. Qualifications

- a. Congress can make qualifications as to who can be appointed (speak a certain language, pass a certain test, be a resident of a state)
 - i. Such specifications are generally upheld at both the federal and state levels.

ii. Removal of Officers

1. General

- a. Except in its provisions on impeachment, the Constitution does not expressly speak of removal of officers.

2. Case Law Progression

- a. In Myers, CJ Taft wrote for the Court that Congress could not limit the Presidents Removal Power over any officer of the United States whom the President had appointed
- 3. Humphrey's Executor v. United States
 - a. Roosevelt removed Chairman of FTC Humphrey without following the statutory mandated reasons.
 - i. The commission is non-partisan, and it must act with impartiality. The chairman of the FTC isn't like a postmaster, and thus Myers doesn't apply
 - 1. The postmaster has no duty relating to the legislative or judicial power
 - ii. The commission acts quasi-legislatively and quasi-judicially in that it is following the Congressional mandate and that it hears cases on those issues. It cannot be said to be an arm or eye of the executive.
 - iii. We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named
- 4. About Humphreys Executor
 - a. Humphrey's Executor decision ushered in "independent agencies"
 - b. Agencies that are considered independent are not subject to direct Presidential control . . . the idea is that, free of direct executive control, the agency can perform its administrative functions impartially and regulate purely in the public interest
 - c. Heads can only be removed for "good cause."
 - i. Differ from "executive agencies" whose heads serve at the Presidents will
 - d. Statutory requirements of staggered terms and party balance among the members of these agencies are intended to bolster their independence
 - e. Weiner v. United States
 - i. Eisenhower removed head of three-year established War Claims Commission which resolved claims concerning injuries to persons or property during WWII. Court *held* that b/c the commission had been created to "adjudicate according to law," the philosophy of Humphrey's Executor precluded the President from removing the head at will.
 - f. Significance of Independence
 - i. Emerging scholarship suggests independence isn't that big of a deal, b/c the line between Indep agencies and Exec agencies is fine
 - 1. Both function in the same way, and are subject to the same APA and judicial review. Both are staffed by civil service employees who are protected from discharge except for cause. Most principals in book apply to both. Both have to submit budget proposals. Both work closely with President in forming policy. President can choose the chair of multimember indep agencies.

2. However, Indep agency's seem to have more discretion in conducting litigation, and can face less scrutiny of their communications with Congress
5. Removal Issues in the Modern Era
 - a. General
 - i. "Unitary Executive" theory maintains that all agencies that perform functions of an executive nature should be under the effective control of the President
6. **Morrison v. Olson**
 - a. Independent Counsel can only be removed by Attorney General for Good cause.
 - b. Court considers the Separation of Powers claim
 - i. "The removal provisions in this case are more analogous to Humpry's Executor and Wiener than Myers or Bowsher."
 - ii. The analysis in this case should not turn on whether the officer performs "purely executive" functions rather than "quasi-legislative" or "quasi-judicial" functions. Rather, the analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.
 1. Thus, "the real question is whether the removal restrictions are of such a nature that they impeded the President's ability to perform his constitutional duty
 - iii. Although the Independent Counsel (Inferior Officer) exercises no small amount of discretion and judgment in deciding how to carry out her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Exec Branch as to require as a matter of constitutional law that the counsel be terminable at will.
 - iv. Nor do we think the "good cause" removal provision at issue here impermissibly burdens the president's power to control or supervise the Indep Counsel, as an executive official, in the execution of her duties under the Act
 - v. This case does not involve an attempt by Congress, or the Judiciary, to increase their powers. Finally, this is not a case that undermines the executive power
 - vi. Ultimately, we conclude the Act doesn't violate the separation of powers.
 - c. SCALIA: All exec should be w/ President. That's what the constitution says.
7. About Morrison and Beyond
 - a. There is both public dissatisfaction and public satisfaction with the independent counsel statute are expressed in the book.

- b. Congress may not retain for itself the power to remove officials engaged in administrative functions under *Bowsher v. Synar*.
 - i. “Since Congress reserve the right to remove the Comptroller General and he performed executive functions under this Act, Congress had in effect retained control over the execution of the law. Such control was unacceptable, b/c of the ‘the command of the Constitution that the Congress play no direct role in the execution of the laws.’”
 - c. More Functionalism: *Mistretta v. United States*
 - i. Court displays a flexible, permissive stance toward an administrative structure that did not fit easily into the traditional allocation of powers among the branches of gov’n’t. Congress established the Sentencing Commission, an independent agency in the Judiciary, and some judges would serve on the Commission. Court upholds commission, reasoning that the Commission’s structure did not unduly strengthen or weaken the judicial branch. SCALIA dissented alone, again.
 - d. Most state Constitutions explicitly vest removal authority in the Chief Executive
 - e. Inferring Tenure
 - i. Even where a legislature has the power to confer removal protection on a government official, the relevant statute may leave room for debate as to whether the legislature intended to do so. Many cases recite that “in the absence of specific provisions to the contrary, the power of removal from office is incident to the power of appointment.”
 - ii. Where the term of office is unspecified, courts are strongly inclined to find that the officer serves at the pleasure of the appointing authority.
 - iii. Where an officer has been appointed for a specific number of years, results vary more widely. Sometimes, if the agency has a structure and functions resembling those of a typical independent agency, courts have little trouble inferring a legislative intention that its members should be removable only for cause.
- iii. Executive Oversight
 - 1. General
 - a. The Office of Information and Regulatory Affairs (OIRA) regularly conducts oversight of significant rulemaking proceedings on behalf of the White House
 - i. Received a Broad Charter under Reagan’s Exec Order 12291 and 12498
 - 1. Created a “regulatory planning process,” under which agencies would submit their anticipated rulemaking initiatives to OIRA each year for approval
 - b. Clinton’s Exec Order 12866
 - i. Page 493-495

2. Case Law
 - a. Kendall v. United States
 - i. Congress passed a special law to resolve a dispute between the postmaster general and the contract carrier of the Post Office. The law directed the postmaster to pay the amount owed to the carrier, as calculated by the solicitor of the treasury. The postmaster refused to pay, claiming that the President had instructed him not to comply. The SC upheld a writ of mandamus against the postmaster, saying that the President does not have control to forbid the laws execution, as was done in this case
 - b. Youngstown Sheet and Tube:
 - i. President ordered seizure of steel mills, and SC found it invalid. Main Opinion: President's seizure was not authorized by statute and could not be justified by independent constitutional powers – also, President is not a lawmaker. Jackson's well-cited opinion: President's powers:
 1. (1) where the "President acts pursuant to an express or implied grant of authority from Congress, his powers are greatest";
 2. (2) President acts in the absence of statutes supporting or prohibiting his acts, and thus can only rely on his own independent constitutional powers;"
 3. (3) President takes action "incompatible with the will of Congress, and thus can only rely on his own constitutional powers minus and constitutional powers of Congress over the matter."
3. Merits of Executive Oversight
 - a. There was a strong endorsement of Exec Oversight in Sierra Club v. Costle
 - b. Judging the Reagan-Bush Years
 - i. OMB failed to provide a generalist perspective for two reasons:
 1. It was not selective in what was reviewed
 2. The administration's ideological beliefs usually prevailed over an agency's policy analysis
 - ii. Clinton's order eliminated (a) by only considering certain rules under review
4. Legality of Exec Oversight
 - a. Congress has not expressly allowed presidential review, but this program has been widely assumed to fall into Jackson's "zone of twilight" areas where Congress has not either authorized or prohibited
 - b. Particular exercises of OIRA's authority pose problems:
 - i. Critics sometimes claimed, during Reagan-Bush, that OIRA was violating the law by forcing agencies to delay their issuance of regulations, notwithstanding applicable statutory deadlines
 1. Clinton Order imposes deadlines

- ii. *Kendall* has commonly been read to mean that if a matter is entrusted to an agency official, the President cannot lawfully require the official to act a variance with the statutory mandate.
- 5. Independent Agencies
 - a. Both Exec Order 12291 & 12866 exempted independent agencies rulemaking proceedings from OIRA review
 - b. ACUS recommends that “as a matter of principal, presidential review of rulemaking should apply” to independent agencies as much as other agencies.
 - i. The ABA takes the same position
- 6. Disclosure Issues
 - a. One of the most important aspects of the Clinton order was the administration’s adoption of “sunshine” principals, allowing public access to the decision-making of OIRA.
- 7. State Exec Review
 - a. Executive Review takes a wide variety of forms: some like the federal model, some aren’t
 - b. In California, the Office of Administrative Law (OAL) must approve virtually all administrative rules. Largely, it serves as the states English Teacher – deciding whether the meaning of the rule will be easily understood by those persons directly affected by it.
 - c. Differences between OAL and OIRA
 - i. OIRA’s function is openly political
- 8. Gubernatorial vetoes
 - a. Some states allow the governor to decline to approve a rule for any reason
 - b. 1981 MSAPA § 3-202 follows the lead of these states by empowering the governor to rescind or suspend any rule or to summarily terminate any pending rulemaking proceedings, to the extent the agency involved would itself have had such authority.

VII. Scope of Judicial Review

- a. Findings of Basic Fact
 - i. From those that provide for most judicial power to the least:
 - 1. Trial De Novo:
 - a. Court rehears the evidence and re-decides the case
 - 2. Independent judgment on the evidence:
 - a. Court decides the case on the record made by the agency but need not give any deference to agency fact findings
 - 3. Clearly Erroneous:
 - a. The court reverses if “it is left with the definite and firm conviction that a mistake has been committed.”
 - 4. Substantial Evidence
 - a. The court cannot reverse if a reasonable person could have reached the same conclusion as the agency.
 - 5. Some Evidence
 - a. The court can’t reverse if there is some evidence in support of the agency’s conclusion – the “Scintilla test”

6. Facts not reviewable at all
- ii. The substantial Evidence and Clearly Erroneous Tests
 1. **Universal Camera v. NLRB (substantial evidence)**
 - a. Issue is the effect of the APA and the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the NLRB.
 - b. Wagner Act: “The findings of the Board as to the facts, if supported by the evidence, shall be conclusive.”
 - i. The court reads this to mean substantial evidence
 - ii. Such relevant evidence that a reasonable mind might accept to support a conclusion. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury
 - c. The substantial evidence test takes into account whatever in the record fairly detracts from its weight
 - d. Congress makes it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.
 - iii. Why shouldn’t a court that believes that agency findings are clearly erroneous be able to overturn agency decisions?
 1. Agencies specialize and develop expertise in the areas they regulate
 2. When it creates a regulatory program, the legislature usually delegates to an agency all of the powers necessary to execute the legislative scheme, including the power to adjudicate and to find facts.
 3. The narrowness of the reviewing power discourages disappointed litigants from appealing, thus conserving resources of both courts and agencies.
 4. Courts are likely to have different political orientation than agencies. A court shouldn’t be able to impose its views on the legislature and executive.
 - iv. Disagreement between Agency and ALJ?
 1. Under Universal Camera, if agency heads reverse an ALJ’s credibility findings, this disagreement is treated by courts reviewing the agency heads decision under the substantial evidence test as a minus factor. The reviewing court requires the agency heads to “fully articulate their reasons for disagreeing with the ALJ on questions of credibility; the court then decides w/heightened scrutiny whether the heads decision is supportable.”
 2. State Courts differ greatly
 - v. Supreme Court review of Court of Appeals
 1. In *Allentown Mack Sales v. NLRB*, the SC overturned a Court of appeals decision applying the substantial evidence test.
 2. In some states, Supreme Courts review lower court decisions as if they had never occurred
- b. Issues of Law
 - i. Three approaches a court takes to review agency action
 1. Traditional view (substitution of judgement, rightness, or independent judgement)

- a. Court decides the interpretive issue for itself
- b. Federal and State APA's authorize this approach
 - i. APA § 706
 - ii. 1981 MSAPA § 5-116(c)(2), (4)
- c. Court grants some deference (“weak deference”)to the agency’s interpretation
- 2. Substitution with no deference
 - a. Question of agency’s statutory interpretation
- 3. Reasonableness or Strong Deference Approach
 - a. Treat interpretive views the same as findings of fact under substantial evidence review
 - b. Chevron Case

ii. Connecticut State Med. Society v. Conn. Board of Exam. In Podiatry

- 1. Conn. APA permits modification or reversal of an agency’s decision “if substantial rights of the appellant have been prejudiced b/c the administrative findings, inferences, conclusions, or decisions are:
 - a. In violation of constitutional or statutory provisions
 - b. In excess of the statutory authority of the agency
 - c. Made upon unlawful procedure
 - d. Affected by other error of law;
 - e. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
 - f. Arbitrary or Capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion
- 2. 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.

iii. Chevron U.S.A., Inc. v. Natural Resources Defense Council

- 1. When a court reviews an agency interpretation, it must answer two questions:
 - a. First, has Congress spoken to the issue?
 - i. If yes, and their intent is clear, then the matter is over, and courts have the final say on what is Congressional Intent.
 - b. If not, then the questions of the court is whether the agency interpretation is based on a permissible construction of the statute
- 2. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.
 - a. These regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.
 - b. Judges are not experts in the field, and are not part of either political branch of gov’n’t

iv. Reasonableness or Substitution of Judgment at the state level

- 1. Conn. State Medical Society substitution of judgment is the dominant state court view
- 2. Some states follow Chevron

3. Some states grant no deference
 - a. Celebreeze v. National Lime & Stone
- v. Factors indicating an agency decision has a comparative advantage
 1. Comparative Competence:
 - a. Technically complex matters might be better for the agency; Court as constitutional or non-technical matters
 2. Interpretation of Rules:
 - a. Greater deference to agency's interpretation of its own rule than to their interpretation of a statute
- vi. Factors indicating an agency decision is probably correct
 1. Procedure in adopting interpretation.
 - a. Interpretations in a rule after notice and comment might get more weight
 - b. Interpretations in an order after adversary proceedings might get more weight
 2. Thoroughness of Consideration
 3. Contemporaneous Construction
 - a. Greater deference is due to an interpretation made contemporaneously w/enactment of the statute, particularly if the agency members or staff participated in drafting the legislation
 4. Long-Standing Construction
 - a. One that has been time-tested
 5. Reliance
 - a. If public has relied on the interpretation, more deference
 6. Reenactment
 - a. Greater deference if it can be shown legislature indorsed the interpretation
- vii. Chevron in Application
 1. Step two is nearly identical to the arbitrary and capricious standard
 2. Chevron Strong Deference can also apply to lega interpretations contained in the opinions of agency heads in formal adjudication
 3. Martin v. Occupations Safety and Health
 - a. Chevron doesn't apply to an interpretive rule
- viii. Exceptions to Chevron
 1. Constitutional Issues
 - a. NO Chevron deference
 2. Departures from SC precedent
 - a. NO Chevron deference
 3. Private Rights of Action
 - a. NO Chevron deference to an agency's interpretation that limits a private right of action conferred by statute on one private party against another private party. Congress did not delegate to an agency the power to affect this judicial remedy.
 4. Limits on Jurisdiction
 - a. Can a court decide the agency doesn't have jurisdiction?
 - i. Yes: The courts, not the agencies, should decide the limits of the agency power

- ii. No: Almost any issue of statutory interpretation can be phrased in terms of agency jurisdiction.
- ix. Applying Step One
 - 1. Courts draw freely from many of the canons of statutory construction in step one
 - 2. There is a wide range of factors that may influence a courts decision
 - 3. The Canon that statutes should be read to avoid constitutional issues has also been frequently deployed to overcome Chevron deference.
- x. Applying Step Two
 - 1. AT&T Corp v. Iowa Utilities Board(SC)
 - a. Although the governing statute is vague as to what kinds of limits on access should be imposed, the agency is interpretation is unreasonable b/c the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do.
 - 2. Whitman v. American Trucking Association(SC)
- c. The Limits of the Chevron Doctrine
 - i. General
 - 1. One of the most controversial questions about the scope of Chevron was whether the deference prescribed by that case should depend on the format in which an agency interpretation appears.
 - 2. The Court has tried to resolve the format debate, at least in broad outline
 - a. Reno v. Koray: (internal agency guideline, which is not “subject to the rigors of the APA, including public notice and comment” are entitled to “some deference.”)
 - b. Christensen v. Harris County: Interpretations contained in formats such as opinion letters are entitled to respect under our decision in *Skidmore v. Swift and Co.* but only to the extent that those interpretations have the power to persuade.
 - ii. US v. Mead Corp (issue discussed above)
 - 1. **Issue**: Whether a tariff classification ruling by the US Customs Service deserves judicial deference?
 - 2. **Held**, a tariff classification has no claim to judicial deference under Chevron, there being no indication that Congress intended such a ruling to carry the force of law, but we also hold that under *Skidmore v. Swift & Co.* the ruling is eligible to claim respect according to its persuasiveness.
 - a. Administrative implementations qualify for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.
 - i. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication of notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.
 - ii. The want of notice-and-comment does not decide cases though

- b. Precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedent and they receive no *Chevron* deference as a class.
 - c. In sum, classification rulings are best treated like “interpretations contained in policy statements, agency manuals, and enforcement guidelines. They are beyond the *Chevron* pale.”
 - 3. **Dissent:**
 - a. Skidmore deference is a recipe for uncertainty, unpredictability, and endless litigation
- iii. Informal Adjudication
 - 1. Under *Mead*, *Chevron* certainly governs interpretations that agencies adopt in formal adjudication, but its applicability to informal adjudications will apparently depend not on the statutory scheme in question. In adjudicative situations that are not exactly APA formal proceedings, but nevertheless entail highly structured evidentiary interpretations, the Court has had no trouble concluding that *Chevron* does apply.
 - a. *INS v. Aguirre-Aguirre*
- iv. Limits on Jurisdiction
 - 1. Suppose the agency’s legal interpretation is one that expands its jurisdiction. Must the court give it *Chevron* deference?
 - a. Argument against: Courts, not agencies, should decide the limits of an agency’s power
 - b. For: Almost any issue of statutory interpretation can be phrased in terms of agency jurisdiction; hence the distinction between jurisdictional and non-jurisdictional issues is unintelligible.
- v. Other Possible *Chevron* Exceptions
 - 1. Statutes that agencies don’t administer
 - a. E.g. the APA and the Freedom of Information Act
 - 2. Broad Procedural Statutes
 - a. E.g. What does “hearing” mean under *Chemical Waste Management v. EPA*?
 - 3. Departures from SC precedent
 - a. *Lechmere v. NLRB*, and other cases, an agency is not free to alter a statutory interpretation that the Supreme Court has previously affirmed, because the statute is no longer ambiguous.
- d. Judicial Review of Discretionary Determinations in Adjudication
 - i. General
 - 1. A great variety of Administrative action is reviewable under § 706(2)(A) of the APA and corresponding provisions in state law:
 - a. “Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”
 - ii. **Salameda v. INS**
 - 1. **Issue** is whether this constitutes “extreme hardship” in relation to a deportation proceeding. Also, it is whether the INS’s judicial officers addressed in a rational manner the questions that the aliens tendered for consideration.
 - 2. **Held**, the board did not consider the issues sufficiently

- a. The Board failed to consider the alien’s community involvement and the hardship of the child, Lancelot, in the consideration. They didn’t give sufficient rationale
 - b. Agencies do not have the same freedom as courts to change direction without justifying the change
- iii. About Salameda
 - 1. After Salameda, Congress passed PL 104-208, and the standard for alien’s to suspend deportation become “exceptional and extremely unusual hardship.” Congress prohibited judicial review of such decisions
 - 2. Overton Park: Secretary can’t grant funds for highways that mess up parkland if another route is feasible. The court interpreted this as saying that the Secretary could not approve a parkland route unless each alternative route was unsound from an engineering point of view or would present unique problems.
 - a. The SC stated that “substantial evidence” standard wasn’t necessary. That applies to formal rulemaking and adjudication, and Overton Park was neither
 - b. The DC would have to apply arbitrary and capricious standard:
 - i. First, court is required to ask whether Secretary acted within the scope of his/her authority.
 - ii. Second, § 706(2)(A) further requires a finding that the actual choice made was not “arbitrary, capricious, an abuse of discretion . . .” To make this finding the court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment
 - 3. Chalking in the Boundary lines
 - a. In cases involving discretionary action, the Q’s of legal interpretation include determination of which factors a statute requires the agency to consider and which ones it should not consider. If the agency failed to consider a relevant factor, or took account of a factor it should not have considered, its action should be set aside as arbitrary and capricious
 - 4. Exercise of discretionary power
 - a. After resolving issues of legal interpretation, a court reviewing an agency’s exercise of discretionary power under the arbitrary, capricious standard must satisfy itself that the factual underpinnings of the agency action find support in the record. Finally, the court reviews the exercise of discretion itself
 - b. In suspension of deportation cases, if the INS finds that the alien would experience extreme hardship, it then must decide whether to exercise discretion to suspend deportation
 - i. Likewise in licensee cases
 - c. Overton Park makes clear that the above cases are reviewable for “clear error of judgment”
 - 5. Restatement of Scope-of-Review Doctrine, by the ABA
 - a. Checklist of the kinds of agency errors that can constitute an abuse of discretion:

- i. The action rests upon a policy judgment that is so unacceptable as to render the action arbitrary
 - ii. The action rests upon reasoning that is so illogical as to render the action arbitrary
 - iii. The asserted or necessary factual premises of the action do not withstand scrutiny under [the relevant standard of review]
 - iv. The action is, w/o good reason, inconsistent with prior agency policies or precedents.
 - v. The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action
 - vi. The action fails in other respects to rest upon reasoned decisionmaking
 - 6. Reasoned decisionmaking – the *Chenery* Rule
 - a. Under the rule in the second *Chenery* case, a court cannot affirm an agency decision on some other ground other than the one relied on by the agency in the decision under review.
 - 7. Closed or open record
 - a. For Closed (Federal Law opts firmly for this):
 - i. *IMS* case mentioned that an exception to the closed record requirement exists where an agency fails to explain its decision sufficiently for the court to review the decision. However, courts ordinarily remand such cases.
 - ii. Rationale:
 - 1. Judicial Economy
 - b. For Open:
 - i. Some states
 - ii. 1981 MSAPA § 5114(a)(3) permits a court to consider new evidence regarding any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review
 - iii. Rationale:
 - 1. Agency files may be huge, or a complete mess
 - 2. Parties interested may not have known about the proceeding and not entered evidence, or parties had incompetent council
- e. Judicial Review of Discretionary Decisions in Rulemaking
 - i. **Motor Vehicle Manufacturers Ass'n v. State Farm (Hard look review)**
 - 1. Whether the NHTSA should require “passive restraints”(airbags or seat belts). People don’t buckle up – but if they did there would be less deaths. Rule was the subject of 60 rulemaking notices: rule was imposed, amended, rescinded, and reimposed. 1977 rule required cars to be produced with passive restraints. Under Reagan administration in 1981, the court eventually rescinded the standard – stating it couldn’t produce significant safety benefits. Felt the costs would be too much also.
 - 2. **Held**, the agency must consider all alternatives and provided detailed reasons before dismissing an alternative in this case.

- a. The agency's action in promulgating such standards therefore may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. § 706(2)(A).
- b. 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.
- c. Under the arbitrary and capricious standard:
 - i. Reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of authority delegated to the agency by the statute . . .
 - ii. The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made.
 - iii. We must consider whether there has been a clear error of judgment.
- d. An agency rule will be arbitrary and capricious if:
 - i. Agency relied on factors which Congress has not intended it to consider
 - ii. Entirely failed to consider an important aspect of the problem;
 - iii. Offered an explanation for its decision that runs counter to the evidence before the agency;
 - iv. Is so implausible that it could not be ascribed to a difference in view or the product of agency expertise
- e. In this case:
 - i. The first reason this is arbitrary and capricious is that NHTSA gave no consideration whatever to modifying the Standard to require that airbag technology be utilized
 - 1. Not one sentence of its rulemaking statement discusses the airbag only option.
 - ii. An agency must cogently explain why it has exercised its discretion in a current manner
 - iii. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.

ii. Borden, Inc. v. Commissioner of Public Health (Soft look review)

- 1. Comm of Pub Health can ban any hazardous substance if public health can't be protected through adequate labeling. Commissioner banned something (UFFI). TC held hearing on toxicity and invalidated the rule.
- 2. **Held**, the court should be ultra-deferential to an agency
 - a. A P must prove the "absence of any conceivable ground upon which the rule may be upheld."
 - b. A properly promulgated rule has the force of law and must be accorded all the deference due to a statute.

- c. The ban would be justified if the commissioner could rationally find that UFFI could not be labeled adequately to protect the public health and safety, or that UFFI presents an imminent danger to the public health and safety
 - d. Here, there was evidence before the judge indicating that UFFI would potentially in some conditions emit dangerous substances.
- iii. Hard look review
- 1. Under this test:
 - a. Reviewing court scrutinizes the agency's reasoning to make certain that the agency carefully deliberated about the issues raised by its decision
 - b. Demand detailed explanation that address all factors relevant to the agency's determination
 - c. Court may reverse if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose
 - d. The agency must allow broad participation in its regulatory process.
 - 2. The merits of Hard Look review;
 - a. Generally
 - i. One one hand, you should allow unelected and inexpert judges to substitute their own judgments and values for those of an expert agency;
 - ii. One the other, it is a necessary corrective to bureaucratic tendencies to build empires, be captured by the regulated industry, or act unreasonably, maliciously, politically, carelessly, or inconsistently.
 - b. A. Shep Melnick
 - i. If the issue is that agencies will run wild and issue lots of arbitrary and capricious orders or will be captured by special interests, this view is wrong. Judicial intervention has an unfortunate effect of policymaking. Review subjects agencies to debilitating delay and uncertainty. It forces agencies to substitute trivial pursuits for important ones. It has discouraged administrators from taking responsibility for their actions and for education the public.
 - c. Stephen Breyer
 - i. The Court in Motor Vehicle must not have been aware of how difficult it is for an agency seeking to set standards to obtain accurate, relevant, and unbiased information . . . One incentive strict review creates is perverse: The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant an agency will be to change the status quo.
 - d. Merrick B. Garland
 - i. Under the emerging model of hard look review . . . Agencies may still function as quasi-legislatures, but het courts now seem intent on reminding them that quasi-legislatures don't possess the same authority as real ones do . . . Vindicating Congressional intent may protect not only the autonomy of regulated parties, but also the

interests of statutory beneficiaries – by ensuring not only that the agency not exceed its congressional authorized power, but also that it use that power as congress intended.

- e. Thomas O. MaGarity
 - i. The predictable result of hard look review of complex rulemaking is ossification . . .B/c the agencies perceive that the reviewing courts are inconsistent in the degree to which they are deferential, they are constrained to prepare for the worst-case scenario on judicial review. The can be extremely resource-intensive and time-consuming.
 - f. Seidenfeld
 - i. The assertion that merely easing the standard of review will deossify the process is . . . tenuous. Increasing overall deference to agency rulemaking will forfeit many of the benefits of hard look review. Better approach is to reform judicial review by specifying operational modifications about how courts should perform the review.
- iv. Soft look and predictive facts
- 1. Most health, safety, and environmental regulations rely on predictions, computer modeling, extrapolations, and other techniques by which government tries to minimize risks in the face of economic or scientific uncertainty
 - 2. Baltimore Gas and Electric: “At the frontiers of science . . .When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”
- v. Judicial Remedies
- 1. Court can remand the case
 - 2. Court can vacate the rule and make the agency start over
 - 3. *Checkosky v. SEC*,
 - a. Court split sharply as to whether the court has the power to remand the agency action w/o vacating it - Dissent: “706(2)(A) provides that a reviewing court faced with an arbitrary and capricious agency decision shall – not may – hold unlawful and set aside the agency action. Setting aside means vacating; no other meaning is apparent.”
- vi. Substantial evidence v. arbitrary and capricious
- 1. In a number of statutes, Congress has called for substantial evidence review of legislative rules
 - a. This test ordinarily applies ot formal adjudication or formal rulemaking-proceedings at which evidence is taken in a trial-type setting and the decision-maker considers only material in the record.
 - 2. Judicial review of rules under a substantial evidence standard is no different that under an arbitrary and capricious standard. Both call for reasonableness review and both require that there be sufficient factual basis in the record for the result reached by the agency.
 - a. Conflicting View: when Congress deliberately calls for substantial evidence review, it intends more rigorous judicial scrutiny than would occur under the arbitrary and capricious test

vii. State law review of discretionary action:

1. *Borden*, soft-look review, represents the typical, extremely defferential approach taken by many states reviewing agency rules.
 - a. Agency decision should be upheld if there is a discernable reason for it
2. Many states have moved closer to the federal model, but not quite to hard look review
3. 1961 MSAPA § 15(g)(6) allowed a court to reverse if administrative decisions were “arbitrary and capricious or characgterized by abuse of discretion or clearly unwarranted exercise of discretion.”
4. Seems to call for a hard look review
5. 1981 MSAPA § 5-116(c) reflects serious misgivings on the part of its drafters about hard look review of discretionary actions. It brackets the “arbitrary and capricious” language so that states can remove it.

VIII. The Availability of Judicial Review

a. Introduction

i. Judicial Remedies

1. General

- a. In order to seek the assistance of a court in reviewing agency action, counsel must confront the basics:
 - i. The chosen court must have jurisdiction to hear the case; and
 - ii. P must plead a recognized cause of action and seek a recognized remedy that provides the needed relief

2. Judicial Jurisdiction

- a. The clear trend at the federal level is to lodge responsibility for statutory review of rules and final orders in appellate, not in trial courts.
- b. In most states, however, judicial review typically begins at the trial court level.
 - i. See 1961 MSAPA § 7, 15(b).
 - ii. 1981 MSAPA § 5-104 gives states a choice
- c. In construing ambiguous review statutes, courts often prefer appellate courts, not trial courts, unless there is a need for additional evidence, and then TC is preferred.
 - i. Rationale for each is on 613, para 2 and 3
- d. In some circumstances, the appellate court can take the evidence itself. 1981 MSAPA § 5-114(a).
 - i. Most often, however, the appellate court will remand to the agency to amplify the record.

3. Administrative procedure statutes

- a. Many states have past statutes conferring jurisdiction on particular courts
- b. 1961 MSAPA provided for judicial review of “contested cases” by filing a petition in a TC. It also provided for review of the validity or applicability of a rule by an action for declaratory judgment in a TC
 - i. 1981 MSAPA is more comprehensive

4. No explicit statutory review procedure

- a. If there is not explicit statute concerning judicial review of particular agency action or of agency action in general, a private litigant must file a

civil action against the agency or the official who invade the person's legal rights.

- b. Federal courts have jurisdiction to conduct judicial review of agency action under:
 - i. 28 USC § 1331 (Federal Questions)
 - ii. 28 USC § 1361 (any mandamus action to compel Officer to perform duty)
 - iii. 28 USC § 1343 (Civil rights cases)
- c. Once federal jurisdiction under § 1331 is established the federal APA comes into play. Sections 701 and 706 establish the parameters for judicial review.
- d. *City of Chicago*: The majority opinion suggests that federal courts have discretion to refuse to hear cases originating in state or local administrative agencies under the flexible provisions of the supplemental jurisdiction statute, 28 USC § 1367(c)

b. Reviewability

i. Preclusion of Judicial Review

- 1. The legislature can preclude judicial review, thus rendering administrative action partially or completely unreviewable. See APA § 701(a)(1).
- 2. **Bowen v. Michigan Academy of Family Physicians**
 - a. Generally, this is a review of a medicare cases. Legislature provided for appeals from adverse eligibility determinations under both Part A (basic medicare) and Part B (optional coverage) but authorized judicial review of amount determinations under Part A only. Thus, the gov'n't points to the exclusion by inclusion principal.
 - b. **Held**, the court can review this decision.
 - i. We begin with the strong presumption that Congress intends judicial review of administrative action
 - ii. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.
 - iii. As a general matter, the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.”
 - iv. Considering legislative history, we find that congress didn't want trivial claims clogging up the court.
 - v. In light of Congress' express provisions for carrier review of millions of what it characterized as 'trivial' claims, it is implausible to think it intended that there be no forum to adjudicate statutory and constitutional challenges to regulations promulgated by the Secretary.
 - vi. We ordinarily presume that Congress intends the executive to obey its statutory commands, and accordingly, that it expects the courts

to grant relief when an executive agency violates such a command.
That presumption has not been surmounted here.

3. Interpreting Preclusive statutes

- a. Courts frequently construe statutes to afford judicial review
- b. Some get afforded review more frequently than others:
- c. The presumption against preclusion of constitutional grievances against an agency is practically irrebutable.
- d. The court has proved less willing to find preclusion in cases involving administrative rules than in cases involving agency adjudications
- e. Less willing to foreclose legal challenges than factual ones
 - i. Especially when the legal issue isn't w/in agency's particular field of expertise
- f. The consensus of commentators is that congress can deprive the federal courts of the power to review some disputes, but can't deny litigations a federal forum for the assertion of constitutional claims.
 - i. Scalia's dissent in *Webster v. Doe* takes strong issue with this latter assertion.

4. Time Constraints

- a. *Yakus v. US*
 - i. Regulations setting maximum price for goods during wartime, and regulation can only be challenged within 60 days of the rules promulgation. Statute said those criminally prosecuted couldn't challenge the decision. Court holds that D can't challenge the regulation in criminal trial.
- b. Some Due Process constraints on the use of time limits to preclude review do exist. In the context of a criminal enforcement action, Congress apparently can't totally preclude judicial review of prior administrative action – even for non-constitutional errors
 - i. *US v. Mendoza-Lopes (p. 637)*

5. State Law

- a. Some states allow preclusion w/o any exceptions
- b. Some states allow only limited preclusion.
- c. Some states don't permit any preclusion of review.

ii. Actions Committed to Agency Discretion

1. General

- a. This subchapter considers agency action which is un-reviewable b/c it is "committed to agency discretion by law."
 - i. APA § 701(a)(2).

2. *Heckler v. Chaney*

- a. Chaney was sentenced to death. Petitioned the FDA b/c use of drug in capital punishment had not been approved as "safe and effective." FDA Commissioner relied on his discretion and chose not to enforce the act in cases where there is no serious danger to the public health or a blatant scheme to defraud.
- b. **Issue:** What is the extent to which determinations of an agency not to act under their enforcement authority may be judicially reviewed

- i. Court first sought to interpret § (a)(2) in Citizens to Preserve Overton Park:
 1. Quoted language from Overton Park shows that this section is applicable only where “statutes are drawn in such broad terms that in a given case there is no law to apply.”
 - ii. The quote answers several questions:
 1. It clearly separates the exception provided by § (a)(1) from the (a)(2) exception. The former applies when Congress has expressed an intent to preclude judicial review. The latter applies: even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.
 - a. This avoids conflict with the abuse of discretion standard in § 706
 2. This court has continually recognized that agency’s decisions not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.
 - iii. Reasons why it is unsuitable to review agency discretion
 1. An agency decision involves a complicated balancing of a number of factors which are peculiarly within the agency expertise (whether violation occurred, agency resources will be best spent here, overall policy considerations, whether the agency will succeed, etc.)
 2. When an agency refuses to act it generally doesn’t exercise its coercive power over an individual’s liberty or property rights, and thus does not infringe on areas that courts are often called upon to protect.
 3. An agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the executive branch – which has long been the province of the Executive.
 - iv. There is a presumptive immunity from judicial review when an agency doesn’t act.
 1. However, the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers
 - v. Thus, we leave to Congress, and not the courts, the decision as to whether an agency’s refusal to institute proceedings should be judicially reviewable.
3. Decisions the courts have committed to agency discretion:
 - a. President’s decision to accept or reject a list of military base closings proposed to him.
 - b. Agency’s decision not to continue to fund a health program out of its lump sum appropriation.

- c. Agency's refusal to reconsider its own decision.
- d. CIA director's decision to terminate an employee; where statute said "whenever in his discretion he . . . deems it necessary."
- 4. The "no law to apply test continues to be invoked today –and was invoked in *Webster v. Doe*.
- 5. It is apparent that the question of whether agency action is committed to agency discretion is largely a policy question, not simply a matter of whether there is "law to apply."
 - a. Thus, Court's typically offer pragmatic and policy reasons for its conclusion.
- 6. Other remedies a client can consider if the agency doesn't act:
 - a. Did the legislature really give the agency discretion to refuse to regulate?
 - b. Did the agency's non-enforcement decision contain an erroneous legal interpretation?
 - i. It is unclear whether courts will decide legal issues that arise in connection with attempted review of an agency non-enforcement decision.
 - c. Construing the statute to provide a private right of action in court against the person creating the health hazard.
 - d. Petitioning the agency to adopt a legislative rule on the subject or a policy statement that would structure its discretion.
 - e. Engaging in political action.
- 7. Recently, the court stated in dictum that an agency's refusal of a petition for rulemaking is appealable to the courts.
 - a. *Auer v. Robbins*.
- 8. State law: MSAPA §§ 1-102(2); 5-102(a); 5-116(c)(8).

c. Standing

i. Injury in Fact and the Zone of Interest

1. General

- a. Under Article III, federal court can only entertain "cases" or "controversies."
 - i. Person must have a significant stake in the dispute
- b. Standing is also statutory
 - i. E.g. the APA, and other statutes often definei who has standing to seek review.
- c. The "Prudential" component
 - i. In some circumstances, the courts rely on principles of institutional self-restraint to deny standing to someone who otherwise has it.
 - 1. E.g. The Zone of Interest Test

2. Cases – explanations

a. Tennessee Electric Power Co. v. TVA

- i. Court held tha 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.

b. FCC v. Sanders Brothers Radio

- i. 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.
 - c. United Church of Christ v. FCC
 - i. 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.”
- 3. **Ass’n of Data Processing Service Orgs. V. Camp** (Injury In Fact/Zone of Interest)
 - i. Comptroller of Currency issued ruling saying that national banks could provide data processing services. The P’s, who sold data processing, challenged by saying this violated the National Bank Act.
 - ii. Held, the petitioners have standing in this case
 - 1. First Step: Injury in Fact
 - a. Clearly, these people possess this.
 - b. They would suffer a loss of profit, and would suffer b/c the bank’s were going to do data processing for two of their customers
 - 2. Second Step: Is this interest w/in the zone of interests sought to be protected or regulated by the statute?
 - a. APA § 702: “Any person aggrieved by agency action w/in the meaning of a relevant statute.”
 - b. Bank Services Corporation Act: “No bank service corporation may in engage in any activity other than the performance of bank services for bank’s”
 - c. Therefore, the P’s are w/in the zone of interest.
 - 3. Third: has judicial review of the Comptroller’s action been precluded?
 - a. We find no evidence that it has
 - iii. Dissent:
 - 1. Injury in fact is the only thing that really needs to be considered to determine standing, unless there is a clear congressional intent to deny it.
 - 2. An approach that treats the distinct issues of standing, reviewability, and the merits, and decides each on the basis of its own criteria assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done.
- 4. State APA

- a. 1961 MSAPA § 7: “[T]he validity or applicability of a rule may be determined in an action for declaratory judgment . . . if it is alleged that the rule, or its threatened application, interferes with or impairs . . . the legal rights or privileges of the P.”
 - i. Law of many states
 - b. 1981 MSAPA § 5-106(a)
 - 5. Applying the Zone of interest tests:
 - a. Nationale Credit Union Adm’n v. First National Bank & Trust (an undemanding application)
 - i. Q was whether a credit union could sign up members from several different employers. The statute provided “credit union membership is limited to groups having a common bond of occupation and association.” Court held that the banks had standing b/c the “common bond” provision was intended to limit the market that a credit union could serve.
 - b. Air Courier Conferences of Amer v. American Postal Workers Union (Zone test has teeth)
 - i. Postal statute, PES, states that the Postal service has a monopoly over carrying the mail. USPS suspended the ban and let overnight carriers in. USPS workers sued. The P’s met the injury in fact test, but failed the zone of interest test b/c a different statute, not the PES, went to Postal employee rights.
 - 6. Explication on the Zone Test
 - a. The zone of interest test if “prudential”: congress, if it wishes to do so, can abolish it – and can abolish it under the APA
 - i. Bennett v. Spears: federal case
 - b. Zone of interest test supposedly excludes P’s “whose suits are more likely to frustrate than to further statutory objectives.”
 - i. Clark v. Security Industries Association
 - c. Many states reject the “zone of interest” test, but some accept it
 - i. Arguably, 1981 MSAPA § 5-106(a)(5)(ii) accepts the zone test as well
 - 7. Standing of Agencies
 - a. In general, if the P agency is viewed as the subordinate to the decisionmaker, it cannot seek review
 - b. However, if the P is a separate agency or governmental unit whose legal mission is jeopardized by the decision, it can seek judicial review.
 - c. When a statute creates a separate administrative court, both the gov’t and private litigants can seek judicial review of such court’s decisions.
 - ii. Imminent injury, Causation, Remediability – The Public Action
 - 1. **Lujan v. Defenders of Wildlife**
 - a. There are three standing elements:
 - i. The P must have suffered an “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.

- ii. 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.”
 - iii. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision
 - b. In this case, P does not have standing.
 - i. There is not concrete imminent injury (they don’t know when they will go to Sri Lanka.
 - ii. It goes beyond the limit of reason to say that anyone who observes or works with an endangered species, anywhere in the world is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.
 - iii. P’s failed to demonstrate redressability:
 - 1. It is unclear whether the agencies would follow the Secretary’s advice; therefore, a judgment against the Secretary would not necessarily redress the harm to endangered species
 - iv. 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.
2. Associations as Plaintiffs
- a. Hunt v. Washington State Apple (SC case)
 - i. Association has standing to sue when (a) one or more of its members would otherwise have standing to sue in their own right, (b) the interests the association seeks to protect are germane to the organization’s purpose, and (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.
 - b. Most states follow *Hunt* on this issue
3. The Public Action
- a. To make standing, the injury in question must be immediate rather than speculative, particularized to the plaintiff rather than generalized to many citizens, and concrete rather than ideological.
 - b. The leading case denying standing in public actions is *Sierra Club v. Morton*
 - c. Most states permit “public actions.”
4. Causation and Remediability
- a. To establish standing, a plaintiff that has been “injured in fact” must also establish that the injury is “fairly traceable” to the conduct complained of (causation) and also that is “likely” that the injury will be redressed by a favorable decision (remediability).
 - b. Often, the causation and remediability requirements overlap.
 - c. Numerous cases have applied the causation and remediability tests to deny standing to plaintiffs in public action.

- i. *Steel Co. v. Citizens for a Better Environment*: Court held that none of the environmental injuries in fact claimed by the organization's members could be redressed by the payment of civil penalties to the Treasury or by any of the other relief sought by the plaintiffs.
 - d. Causation and remediability issues have also arisen in cases involving local laws that inhibit the construction of low income housing:
 - i. *Warth v. Seldin*: held that poor people who wanted to live in Penfield had no standing to challenge Penfield's zoning laws which prohibited the construction of low-income housing b/c it couldn't be shown that anyone would build those units or anyone would buy them.
 - ii. However, in *Village of Arlington Heights* these barriers were overcome b/c a developer and a buyer brought the action saying they would build and buy these units
 - iii. Look at 1981 MSAPA § 5-106(a)(5)(iii)
5. Procedural Injuries
 - a. If an agency fails to prepare a required environmental impact statement (ESI)(something that weighs costs and benefits of the action), a person who can establish injury in fact from construction of the dam has standing to challenge the agency's failure to prepare and EIS.
6. Citizen suit provisions
 - a. *Lujan v. Defenders of Wildlife*: Invalidated the idea of any citizen can sue provision – b/c it amounts to legislative interference with the President's duties to “take care that the laws be faithfully executed.”
 - b. Several states have adopted statutes allowing any citizen to sue to prevent unreasonable damage to natural resources
7. Taxpayer action:
 - a. In every state, taxpayers have standing to challenge the legality of action taken by the legislature or the executive branch (at either the state or local level) which they allege involves an unlawful expenditure of public funds.
 - b. In contrast to the experience at the state level, at the federal level recognition of taxpayer actions has been extremely grudging. A federal taxpayer ordinarily lacks 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 the taxpayer is required to pay.
 - i. However, in *Flast v. Cohen*, the Court allowed a taxpayer standing to sue a government expenditure program benefiting religious schools.
- d. Timing
- i. The Final Order Rule
 - 1. Statutes
 - a. APA § 704
 - b. MSAPA §§ 5-102 and 5-103
 - 2. **FTC v. Standard Oil Company of California**

- a. ***Held***, the issuance of an FTC complaint before administrative adjudication concludes is not “final agency action” subject to judicial review
 - i. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise;
 - ii. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary
 - iii. Review of whether a complaint should have been filed delays answering the ultimate question in the adjudication
 - iv. Judicial review of the averments in the Commissions complaints should not be a means of turning prosecutor into the defendant before the adjudication concludes
 - v. Key Statutes: § 704 and § 706
 3. ***Bennett v. Spears*** (summarizing the cases)
 - a. Two conditions must be satisfied for agency action to be final:
 - i. The action must mark the consummation of the agency’s decision making process – it must not be of a merely tentative or interlocutory character.
 - ii. The action must be one by which rights or obligations have been determined, or from which legal consequences will flow
 4. Issues with The Final Order Rule
 - a. **MSAPA § 5-103** allows immediate review of a non-final order where “postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement. Socal indicates that the first sentence of § 704 contains a similar implicit exception
 - b. The **APA** is vague on whether the President counts as an agency, but the courts say if Congress wants the President to be reviewable, they have to say so explicitly.
 - c. Several cases hold that recommendations by the Secretary of XXX that must go to the President first are not final after passing from the secretary and the President is unreviable (without explicit statement)
 - d. Despite the Final Order rule, a court can review an agency’s failure to act on a matter before it (**APA §§ 555(b), 706(1)**.) However, a court asked to remedy agency foot-dragging faces a dilemma: An order to expedite one matter may delay other matters or force the agency to decide a matter before it is prepared to do so.
 - i. In one case, the Court refused to allow for mandatory deadline scheme with the disability programs
- ii. Ripeness
1. Statutes
 - a. **APA § 705**
 - b. **MSAPA § 5-102, 5-103**
 2. ***Abbott Laboratories v. Gardner***
 - a. To prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative

policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

- b. Twofold aspect: requiring the court to evaluate
 - i. (1) The fitness of the issues for judicial decision and
 - ii. (2) The hardship to the parties of withholding court consideration.
- c. Where
 - i. (1) the legal issue presented is fit for judicial resolution, and
 - ii. (2) where a regulation requires
 1. (a) an immediate and significant change in the P's conduct of their affairs
 2. (b) with serious penalties attached for non-compliance,
 - iii. Access to the courts under the APA and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstances. . .
3. Commentary on Ripeness
 - a. Mashaw claims that pre-enforcement review often encourages regulated parties to litigate instead of comply with rules, since there is virtually no penalty for launching a challenge.
 - b. Early review requires the agencies to anticipate every possible legal issue that anyone might raise, which produces massive rulemaking records and lengthy statements of basis and purpose.
 - c. Seidenfeld disagrees with Mashaw. He thinks pre-enforcement review compels agencies to do a better job in writing their rule.
 - d. Interpretive Rules and policy statements have, in some cases, been held ripe for review (though less likely than legislative rules)
 - i. Finality often militates against ripeness in non-legislative rules
4. Undermining Abbott Labs
 - a. A few recent SC cases have undermined Abbott Labs and indicate a majority of the justices want to set limits on pre-enforcement review (683-84)
 - i. *Reno v. Catholic Social Services, Inc.*
 - ii. *Thunder Basin Coal Co. v. Reich*
5. Issues with a short statute of limitations for challenging rules
 - a. Because of Abbott Labs, Congress assumes that most rules will be challenged before they are enforced; a short statute of limitations assures that the challenges will be brought and cleared up quickly. Moreover, the short limitation period protects the reliance interests of those who intend to comply with the rule, b/c they can be certain that the rule is valid once the limitations period has passed.
 - b. Courts say that statute of limitations time periods begin running from the time the rule is ripe for review
6. Judicial Stays
 - a. APA § 705, MSAPA § 5-111
 - b. Issues with stays:

- i. If the court refuses a stay, the damage to the petitioner may be irreparable; even if the petitioner ultimately wins on the merits, it may be too late to rectify the harm.
 - ii. However, if the court does stay the action, a law enforcement program may be sidetracked for years, with great damage to the public interest
 - c. MSAPA § 5-111 sets forth the factors that a court should consider in deciding whether to grant a stay when an agency has already refused to grant a stay b/c of concern about the public health, safety, or welfare.
- iii. Exhaustion of Administrative Remedies

1. McCarthy v. Madigan

- a. Under the Administrative Remedy Procedure Act for Inmates, there are formal policies that have to be followed in dealing with inmate complaints. There are also rapid filing and response timetables. This inmate hasn't followed all of the procedures, and has filed a complaint that the prison has violated his 8th amendment right by not paying attention to his medical condition.
- b. **Held**, the inmate in this case does not have to exhaust all remedies.
 - i. Doctrine of Exhaustion
 - 1. Of paramount importance to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.
 - 2. Exhaustion is required b/c it serves the two purposes:
 - a. Protecting administrative agency authority; and
 - i. Agencies, not the courts, ought to have primary responsibilities for the programs that Congress has charged them to administer
 - ii. Exhaustion is particularly concerned where the agency has to use its expertise
 - b. Judicial Efficiency
 - i. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal litigation can be avoided
 - ii. Administrative action may produce a complex record
 - ii. Federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion of remedies
 - iii. Three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion:

1. Requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action.
 2. An administrative remedy may be inadequate b/c of some doubt as to whether the agency was empowered to grant effective relief.
 3. An administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue
- iv. Here, McCarthy's interest outweighs the institutional interests
1. Congress didn't REQUIRE exhaustion if a prisoner's Bivens claim
 2. The filing deadlines are likely to trap an unsophisticated inmate
 3. The grievance procedures don't mention monetary relief, which the inmate seeks in this case

2. **NJCSA v. State**

- a. Our principal aim in avoiding premature review of administrative determinations has been to protect the Court from becoming entangled in abstract disagreements over administrative policies, and also to refrain from judicial interference until an administrative decision has been formed and its effects felt in a concrete way by the challenging parties.
 - b. The directors' failure to appoint any of the individual appellant's as an ALJ, following the attorney general's recommendation, is tantamount to final agency action. That is directly felt by appellants
 - c. We have frequently held that in a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply.
 - d. Our concern is with underlying considerations such as the relative delay and expense, the necessity for taking evidence and making factual determinations, thereon, the nature of the agency and the extent of the judgment, discretion and expertise involved, and such other pertinent factors . . . as may fairly serve to aid in determining whether, on balance, the interests of justice dictate the extraordinary course of bypassing the administrative remedies made available by the legislature.
3. **Portela-Gonzales v. Secretary of the Navy**
- a. Was fired by the Navy secretary. Filed a grievance and appealed her discharge through three levels. One more was left to appeal to. The court held that she didn't exhaust her remedies and she had to do so.
 - b. "A pessimistic prediction or a hunch that further administrative proceedings will prove unproductive" is not enough.
4. Factors in the Judicial Balance
- a. Nature and Severity of the harm to P from delayed review;
 - b. The need for agency expertise in resolving the issue
 - c. The nature of the issue involved (of law, constitutional, jurisdictional issue, application of law to fact).
 - d. The adequacy of the remedy in light of P's particular claim

- e. The extent to which the claim appears to be serious rather than a tactic for delaying the agency process
 - f. The apparent clarity or doubt as to the resolution of the merits of P's claim
 - g. The extent to which exhaustion would be futile b/c an adverse decision is certain
 - h. The extent to which petitioner has a valid excuse for its failure to exhaust.
 - 5. Myers v. Bethlehem Shipbuilding (SC 1936)
 - a. Leading case for the proposition that under federal law, a party must exhaust remedies even though the dispute concerns a question of law or of the agencies jurisdiction or its authority.
 - b. State law differs, as NJCSA shows
 - 6. Model Act provisions
 - a. 1981 MSAPA §§ 5-107, 5-112
 - 7. Constitutional Issues
 - a. The general rule is that an agency lacks authority to determine the constitutionality of statutes.
 - i. The principal applies to both substantive and procedural attacks
 - b. However, exhaustion is required in several constitutional issues:
 - i. If a statute requires exhaustion, a court is likely to insist that even on the fact constitutional claims be first presented to the agency
 - ii. Exhaustion may be required if the constitutional challenge is to the statute or regulation or other agency action as applied to the P as opposed to an on the face attack
 - 8. Actions under § 1983
 - a. In Patsy v. Florida Board of Regents, the court held that a § 1983 P is never required to exhaust state remedies no matter how adequate or easily exhausted those remedies might be.
- iv. Primary Jurisdiction
1. **Farmers Insurance Exchange v. Superior Court**
 - a. California Attorney General sued Farmers to require it to offer a good driver discount. The second count was based on the Unfair Practices Act, in which the Attorney General has the power to enforce through an injunction action and an action for civil penalty. Farmers wants this count dismissed under the doctrine of primary jurisdiction
 - i. Two related policies behind the primary jurisdiction doctrine:
 1. It enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws
 2. Primary and Exclusive Jurisdiction
 - a. The issue in primary jurisdiction is the problem of concurrent trial jurisdiction
 - b. Sometimes, the legislature precludes judicial jurisdiction. If not precluded, then the question is "who goes first?" If the agency goes first, then the court has applied primary jurisdiction

- c. When the case is brought against the regulatory agency, the case is usually one of finality or exhaustion of remedies, not primary jurisdiction
 - 3. Two types of primary jurisdiction
 - a. If a court finds that the agency should go first, and the agency proceeding will dispose of all the issues in the case, the court dismisses the action. The matter returns to the court only upon judicial review of the agency action
 - i. This is primary jurisdiction of the whole case
 - b. If the court finds that the agency can't dispose of the entire case, the court stays the action, sends the parties to the agency, and retains jurisdiction to try the remaining issues after the agency has finished.
 - i. This is the primary jurisdiction of an issue.
 - 4. Rationale for Primary Jurisdiction:
 - a. Need for Uniform Results
 - b. Need for the Agency's Expertise
 - c. Possibility that agency approval of a challenged practice may immunize that practice from judicial challenge, or at least alter the legal status of the practice.
 - d. Court cannot offer remedy desired
 - 5. Private Rights of Action
 - a. Though many statutes provide admin and criminal remedies, they are unclear about whether there is a civil right of action. Often, the question before the court is whether to imply one. The four factor test:
 - i. Is the P one of the class for whose special benefit the statute was enacted?
 - ii. Is there evidence of leg intent to create such a remedy or deny it?
 - iii. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?
 - iv. Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?
 - b. Recent cases are very reluctant to infer private rights of action from federal statutes, absent some indication that Congress intended that this remedy exist.
- e. Recovery of Fees
 - i. The American Rule
 - 1. Wilderness Society v. Morton
 - a. Public Interest environmental groups were entitled to an award of attorney's fees for their efforts, b/c they had served as a private attorney general in vindicating important Congressional policies protective of the environment.
 - 2. Alyeska Pipeline Service Co. v. Wilderness Society
 - a. Reversed abovementioned case. Under the American Rule, each party in litigation bears its own attorney's fees, absent a statute or something else providing for fees. No exception for suits from a private attorney general
 - 3. Not all states follow the American Rule

- a. California
4. Some statutes provide for fees
 - a. Civil Rights Statutes (a prevailing P in a § 1983 action)
 - b. Clean Air Act
- ii. Calculation of Fees
 1. Lodestar Method: Number of hours by reasonable hourly rate
- iii. Equal Access to Justice Act
 1. Departure from the American Rule
 2. A prevailing party is entitled to attorneys' fees and other expenses unless the government's position was "substantially justified" or special circumstances make an award unjust
 3. Similarly, fees can be awarded whenever the demand by an agency in an adversary adjudication or a civil action brought by the United States is "substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such a decision."
 4. Awards can only be made to an individual whose net worth doesn't exceed \$2 million or a business who doesn't exceed \$7 million and has less than 500 employees
 5. Tax exempt charitable organization and so do small local gov'n't units, regardless of their net worth
- iv. Burden
 1. Government has the burden to show that its position is substantially justified.