CONSTITUTIONAL RIGHT TO BE HEARD

A. Due Process, hearings and mass justice

\textbf{Goldberg v. Kelly:} widened idea of what is “property and liberty” and the due process clause of 5\textsuperscript{th} and 14\textsuperscript{th} amendments. Said guy had to get hearing before he loses welfare, an entitlement that is now a “property interest.” Post-Goldberg decisions are a retreat from it.

B. Interests protected by due process: liberty and property

\textbf{Board of Regents v. Roth:} Professor who didn’t get contract renewed did not have a violation of due process b/c he had no liberty or process interest. That interest would have been created by independent source such as state law. Interesting point: distinction b/w denial and deprivation

\textbf{Cleveland Board of Education:} Statute can’t create a property right and then limit hearings beyond what due process allows. Don’t have to take the bitter with the sweet. Court has to keep power to define away from legislature.

Liberty interest is much harder to define. Court says it’s really broad, but then won’t enforce loss of reputation. Uses “stigma-plus” test.

C. Timing of the hearing (Now we’ve decided that there’s a loss of liberty or property, next must decide what process is due.)

\textbf{Matthews v. Eldridge:} Doesn’t get pretermination hearing for disability b/c current procedure of sending in med forms beforehand and getting full hearing afterwards is good enough. Balancing factors:
- Individual’s interest
- Extent to which addition procedures would help prevent error
- Government’s interest

This decision helped limit Goldberg: practical considerations were big deal.

D. Elements of a Constitutionally fair hearing

\textbf{Ingraham v. Wright:} No prior notice and hearing needed before school paddling. Yes, this is a liberty interest, but additional procedure wouldn’t help. Tort law ability to sue is good enough.

\textbf{Goss v. Lopez:} Principal must converse with student before a suspension b/c student’s property interest in education is harmed. That current procedure counts as a hearing
Prisoner’s hobby kit loss can be remedied in small claims court.

Court won’t interfere with med student’s dismissal on academic grounds. School’s procedure is good enough. Too nonlegal for court to interfere.

E. Rulemaking versus adjudication

*Londoner v. Denver* (1908) said there had to be hearing before individual tax assessment were changed. This case is important contrast to bimetallic.

*Bimetallic* (1915): Property owners don’t get hearing for increased valuation b/c across-the-board changes are policy changes, protected by legislature. Legislative facts vs. adjudicative facts.

**ADMINISTRATIVE ADJUDICATION**

A. Statutory hearing rights (federal)

§ 554(a) “this section applies…in every case of adjudication required by statute to be determined on the record…”

*Seacoast* had said that any mention of a hearing should be on the record hearing. But *City of West Chicago v. NRC* interpreted the APA to mean that adjudication procedures can be either formal or informal, and formal only apply when statute triggers.

APA’s adjudication procedures are implicated only when some statute outside the APA itself—usually the agency’s authorizing statute—directs the agency to hold a hearing and decide the case on the basis of the record that results from the hearing.

Informal hearings won’t be conducted by ALJ, but are still subject to due process req’s.

B. Statutory hearing rights (state)

Some states and MSAPA: Formal hearing provisions apply in all proceedings in which the “substantial interests” of a party are determined by an agency. So states pretty much always give you a hearing. (Remember, this is not a due process case)

C. Limiting issues to which hearing rights apply:

The disability grid is ruled OK. Just b/c she’s an individual doesn’t mean that her individual facts would make a difference. *Bimetallic* revisited.

Sometimes rulemaking process can supersede right to hearing. Can also be summary judgment: no hearing unless you can show a material issue of fact.
D. Institutional decisions and personal responsibility

Morgan II: Ultimate decision-maker doesn’t have to listen to all the evidence. Only req’d to consider the evidence. Must be a hearing in a “substantial sense.” Can rely heavily on subordinates. Virtually impossible to show that an administrator has given insufficient attention. Presumption of regularity.

Morgan II: there has to be some notice of the issues so you have chance to respond. This is implied in the wording of 554(b).

E. Separation of functions:

Due process does not require a strict separation of function b/w prosecuting and decisionmaking officials; mere exposure to evidence presented in nonadversary investigation procedures is insufficient to overcome presumption of impartiality.

§554(d): In general req’s a split b/w prosecuting and decision-making.
   ALJ can’t have investigator as his boss, except for the agency head.
   ALJ can’t discuss factual issue w/ anyone in agency.

F. Bias

Generally, all agency decisionmakers have background expertise, so that won’t throw them out.
   ALJ can talk to the press and take public positions on matters of policy, unless they show they’ve prejudged the facts of a particular case.
   Can have no personal/financial stake—due process problem.
   In disciplinary proceeding, even your profession having a financial stake could get you tossed (optometrists v. Pearle)

G. Ex Parte Contacts

557(d)

It’s OK to have business and social relations. But “it’s simply unacceptable for anyone to try to influence decision of a judicial officer outside of the formal proceedings.” Tained agency proceedings are not necessarily void, voidable.
   Endangered species case: White House is barred from spotted owl once they are called formal proceedings.

H. Role of policial oversight

Pillsbury v. FTC: Congress can’t drag agency guy in before committee while proceedings are ongoing. Main thing: Congress can talk on policy level about things but can’t mention particular parties.
PROCESS OF ADMINISTRATIVE ADJUDICATIONS

A. Investigations and discovery

   Corporations don’t have 5th amendment privileges.
   Agencies can do subpoena for documents for “lawfully authorized purpose” that has “reasonableness”—easy standard.
   If law req’s you to keep records, agency can req’ you to turn them over.

B. Evidence at the Hearing:

   In general, can have hearsay evidence. (ALJ has expertise in area.)
   Old residuum rule, still followed by states but not fed, req’d that administrative agency’s findings be supported by some evidence that would be admissible in a civil or criminal trial.
   Instead have unstructured “substantial evidence” rule.

C. Official Notice

   Agency can take “official notice” of facts, especially legislative but also adjudicative (“rule of convenience”).
   Key is noticed material must be specially identified so opposing party has chance to rebut.

D. Findings and reasons:

   § 557(c)(A) Want agencies to write contemporaneous decisions (not post hoc rationalizations) in hopes that increased rigor will improve fairness of decisions. Reasonably detailed report also helps with review.

E. Equitable estoppel:

   Fed will not allow the govenrmnet to be estopped:
   • Would create not more reliable advice, but less
   • Soft-hearted advisor could override will of legislature through bad advice

   States sometimes do allow estoppel.
RULEMAKING PROCEDURES

A. Importance of rulemaking
   Took off in the 60s and 70s.
   Provides broad participation, uniformity, political input, efficiency, fair warning.

B. Definition of rule.

   APA definition is bad. State is better b/c it leaves out “in particular” and “future effect.”

   Bowen said that to make a rule retroactive, there must be
   • Express statutory authority
   • Reasonableness and Fairness (don’t get here often b/c seldom statutory authority)

C. Initiating Rulemaking Proceedings

   Chocolate Manufacturers Assoc: Court found notice inadequate b/c the final rule was not a “logical outgrowth” of the notice. (Agency had said they were looking at fat and sugar but had also included list of foods they were looking at, no chocolate milk.)

   No obvious guideline about notice: frequently litigated.

   Portland Cement says agencies do have to publish data and studies they rely on.

   It’s also standard to publish the proposed rule.

D. Public participation

   1. Informal rulemaking (“notice and comment rulemaking”: the norm)

   2. Formal rulemaking (“trial type hearing” under 556 & 557: the exception)

   Florida East Coast RR:
   Created strong presumption against formal hearing: even the words “after hearing” did not kick it up to formal. This case is closely followed.

   3. Hybrid rulemaking

   Vermont Yankee:
   Courts can’t impose extra procedures in rulemaking beyond the APA. Administrative agencies should be free to fashion their own rules of procedures absent constitutional constraints of “extremely compelling circumstances.” Court can still use APA to give a “hard look” and find something “arbitrary and capricious.” Courts also apply this principle to adjudication as well as rulemaking.
E. Procedural fairness in rulemaking

1. Role of agency heads

   **Morgan I:** person who makes the decision is supposed to consider the evidence, but courts assume agency head is doing what’s god enough.

2. Ex parte contacts

   **HBO** said agency officials should refuse to discuss matters with anyone, but if it happens, should disclose and put in file so that interested parties may comment.
   Consensus is that this is too restricts: political agencies need to be able to sell.

   **Sierra Club:** Court now seems to be saying that ex parte contacts are not only permissible but desirable. But agency does have to put record of both written and oral communication in the file. This isn’t adjudication.

3. Bias and prejudgment

   While adjudication DQs decision making for having prejudged any fact issue, in rulemaking there must be “clear and convincing evidence” of an “unalterably closed mind.”
   Also can’t have “personal animus.”
   It’s expected that people will have strong opinions on policy issues.

F. Statement of basis and purpose

   Agency must issue findings and reasons in rulemaking. This is not a violation of Vermont Yankee b/c this is just spelling out the statute. § 553: “agency shall incorporate int eh rules adopted a concise gen’l statement of their basis and purpose.”
   Facilitates judicial review.

G. Issuance and publication

   Rules must be published in *Federal Register:* rules don’t become effective until 30 days following publication.

H. Regulatory Analysis

   Executive orders or statutory mandates can make agencies do intensive, formal examinations, often a “cost benefit analysis” or maybe “impact on family values.”
   Can courts hold them to the analysis? MSAPA says if they “make good faith effort.” Not much review—don’t want businesses to be able to force endless review.
   Sometimes these orders are just here to informally help agency focus on certain presidential priorities.
VI. RULES AS PART OF THE AGENCY POLICYMAKING PROCESS

A. Rulemaking exemptions

1. Good cause exemptions

APA 553: Notice and comment are not necessary when “unnecessary, impracticable, or contrary to the public interest.”

Agencies use this about 25% of time: little technical changes.

Interim-final rules can request comments after they become effective: used for the sake of public interest.

2. Exempted subject matter

553(a): “military or foreign affairs,” “matter relating to agency management of personnel or to public property, loans, grants, benefits or contracts.’

Sometimes line is blurry: some courts say that if there’s a “substantial effect” on people outside the agency, then exemption doesn’t apply.

3. Procedural Rules

553(b): “subsection does not apply to interpretative rules, gen’l statements of policy, or rules of agency organization, procedure, or practice.”

Kast: Agency decision to look at certain companies first is procedural and thus exempt. Plus, no “substantial impact” (thus procedure, not substance).

4. Nonlegislative rules

Do not have force of law.

(Legislative rules are issue pursuant to grant of authority: binding on private persons, the agency, and the courts.)

Divided into “interpretive rules” and “gen’l statements of policy.”

Statement of policy (states how agency intends to use power in the future):

Mada-Luna (Gov’t can deport suspected drug guy, even though new agency guidelines—adopted w/o notice—were tougher than old ones.

Two req’s to be a statement of policy:
  • Must operate only prospectively
• Must not establish a binding norm, leaving officials free to look at individual facts

If agencies weren’t allowed to issue guidelines w/o notice and comment, public would be hurt by increased uncertainty. If FCC always uses a penalty schedule and talks about how the model isn’t open for consideration, then that schedule needs to go through notice and comment, or they need to reconsider the individual’s position without the schedule.

Interpretive Rules (states the agency’s view of existing law):

*Hoctor:* (my case about acceptable fence height)
Posner and most courts just say that as long as it’s a modest interpretation of what you can get by reading the statute, it’s exempted. But if it’s a bolder interpretation, it must go through notice and comment.
Problem: Who can say where the line of “logical extrapolation” is?

But Levin says that the fact that this is a binding norm, not a tentative guideline, is the important part. People should get a chance to comment. (Hard to see difference b/w this and policy statement.)

Deferential standard of review: provided an agency interpretation does not violate the constitution or a federal statute, it must be given controlling weight.”

B. Required Rulemaking

*Chenery* says that agencies should have discretion whether they want to use rulemaking or adjudication.
But if they do decide on adjudication, people in later cases can argue that those precedents don’t apply and aren’t binding.
In many states, courts do tell agencies to use rulemaking.

C. Petitions

Party can petition to force agency to implement a rule and examine status quo.

*WWHT* issue is about whether court can make agency institute rulemaking proceedings after they’ve denied a petition. (Horse folks want new regs).
Court can do it if “significant factual predicate of prior decisions has been removed: but “judicial intrusion…should be severely circumscribed.”
Only way for plaintiff to win is if secretary’s explanation shows him to be “arbitrary and capricious.”

D. Waivers

Agencies can grant individuals exemption from rule.
WAIT decision said applicants face “high hurdle.” But agency does have to “articulate with clarity and precision its findings and the reasons for its decisions.” Court remanded, heard the reason, and then said OK.
VII. POLITICAL CONTROL OF AGENCIES

A. Intro: b/c agencies have all three powers, they can be worrisome under separation of powers. So, all branches keep an eye on them.

B. Nondelegation doctrine (legislature can’t give lawmaking power away).

   Plays almost no role in fed law; plays some role in state.
   No case declared unconstitutional under this doctrine since 1935 “sick chicken” case.

   Operative test is whether law “contains an intelligible principle.”

   Benzene case shows three possible responses to vague statute:
   • Majority lets court ascribe a meaning to it.
   • Liberal dissenters say let the agency interpret it.
   • Rehnquist dissent says find the statute unconstitutional under the nondelegation doctrine and let Congress do it over.

   American Trucking: Scalia goes ahead and ascribes a meaning that regulations promulgated under the Clean Air Act must have a sound scientific basis.

   Courts may be less inclined to “read in” at the state level b/c there’s less published legislative history and less sophisticated drafting. Wants to kick back to legislature.

C. Rationale for political review

   Courts can’t properly control policy: exec and legis have finger on popular pulse.

D. Legislative controls:

   1. Legislative veto

      SC struck it down in Chadha, saying it was unconstitutional to legislate without bicameralism and presentment. (formalism)

      This ended an effective check on the agencies, but you might argue that allowing it gave too much power to legislature. So best rationale is separation of powers (functionalism).

      Some states don’t follow Chadha.

   2. Alternatives to legislative veto

      Suspensive veto:
Wisconsin statute let a legislative committee suspend a regulation for a list of reasons, then the committee had to introduce a bill to repeal. If neither house passed, then reg went into effect.

   Under Chadha, this would not be OK, but that’s fed.

Congressional Review Act of 1996:

   Part of Contract w/ America. Agencies must submit rules to GAO before they take effect. Then Congress can write new statute to get rid.

3. Other legislative controls

   Oversight committee, investigation, hearing, funding, direct contact.

E. Executive Controls

1. Appointment Power

   **Buckley v. Valeo** Unanimous SC decision to strike down Federal Election Commission statute on basis of Article II: President has to nominate all principal officers with advice & consent of Senate.

   Congress can invest the appoint of **in inferior officers** to president, courts, or agency heads. **Morrison** Independent Counsel case. She’s inferior officer b/c she’s subject to removal by AG and scope of her duties is limited to single case. She’s nominated by court.

   Employees aren’t covered at all: **Freytag.** OK for chief judge of tax court to appoint special trial judges. Majority said tax court was a “court of law”; concurrence said tax court is “head of department.” Didn’t want them to be just employees.

2. Removal Power

   **Myers:** Congress can’t limit President’s power to remove anyone he appointed. **Humphrey’s Executor:** President does not have illimitable power to remove heads of independent agencies.

   These two cases don’t logically fit together if you think president should get to control the executive branch. Humphrey’s court distinguished by calling some “purely executive” and some “quasi-legislative and quasi-judicial.”

   Court abandoned Humphrey’s reasoning in Morrison. Court said proper inquiry was whether removal restrictions “impede the President’s ability to perform his constitutional duty.” Good cause req’t was ok for independent counsel.

   Congress can’t remove anyone: can only write statute saying president can only remove “for good cause” the heads of independent agencies, or that they serve for a fixed term of
years not congruent with presidents. Yet, presidents still have a lot of control over independent agencies.

3. Executive Oversight

Agency gets to make decision bc it’s got expertise and Congressional mandate, but president can threaten termination and cajole at will. (Just like AG can take reapportionment to court against governor’s will—no good answer.)

Lots of people think agency should have to disclose if president says kill a rule.
VIII. SCOPE OF JUDICIAL REVIEW

Courts can review law, fact, and discretion (policy choices). Rule of thumb is they give least deference to agency’s legal conclusions.

A. Issues of basic fact:

Gradations of review (may make no practical difference):

- Trial de novo
- Independent judgment on the evidence
- Clearly erroneous
- Substantial evidence (a prominent standard in admin--codified in APA)
  - Court can’t reverse if a reasonable person could have found the same way that the agency did based on the record
- Some evidence
- Facts not reviewable at all

**Universal Camera:** Court is deciding whether agency’s action is reasonable based on substantial evidence test. Says that evidence may be less substantial if the ALJ’s decision was different from the board’s. Remands so that lower court can take into consideration the ALJ as part of its review of substantial evidence.

In general, fed court will defer to agency on facts.

States may be less deferential (?). Court used dictionary definition of foot, overturning med society’s definition and substituting its own. Court said it was purely a question of law, but that seems like just a way of balancing the podiatrists vs. the AMA.

Hard to see difference b/w law and fact.

B. Issues of the law

**Chevron:** Issue is whether bubble view of plant is consistent with Clean Air Act. Court says yes.

Two-step analysis:
- If Congress’s intent in statute is clear, and agency’s interp conflicts, strike down.
- If statute is ambiguous, defer to agency unless its regs are unreasonable, or “arbitrary and capricious”

This seems really deferential, but smart judges are always able to see a way that Congress’s intent in the statute clearly conflicts if they want to.

C. Exceptional cases
**Mead** (question of whether day planners are diaries and thus subject to tariffs) Court rules that Customs can’t make this change, saying that *Chevron* deference should only apply where agency has gone through some process and put some thought behind its regs (legislative rules). Congress could not have intended *Chevron* deference b/c it didn’t give customs power to engage in adjudication or rulemaking. Customs puts out a bjillion classification a year, so they are best treated as “interpretations” and thus be beyond the *Chevron* pale.

Court goes on to say that *Skidmore* also calls for some deference because agency’s have lots of expertise.

If it’s applying *Skidmore*, court has to be persuaded that the agency decision was the right decision. Under *Chevron*, court just had to say that the decision was reasonable. (Huh?)

*Mead* only works if you take the position that a decision that’s binding n somebody is within *Chevron*, but if it’s binding on no one, then not. Even then, it’s dubious.

Law is really messed up. Two views:

- Currently authoritative view: Interpretive rules and policy decisions are squarely within *Mead* and therefore subject to *Skidmore* deference. Binding decisions are covered by *Chevron*. That’s at least administrable.
- Levin/Scalia view: *Mead* is a complete mistake: difference b/w *Skidmore* and *Chevron* is almost inarticulable, so should have just stuck with *Chevron*. *Mead* calls for judicial substitution of judgment.

D. Issues of discretion in adjudication

If court stays within its statutory mandate (Chevron first step), we still have the question of whether they abused the discretion that they had (second step in Chevron is “reasonableness, which is just like arbitrary and capricious in APA).

**Salameda v. INS:** Court said INS was *arbitrary and capricious* b/c it didn’t look at the right factors when it deported—“abuse of discretion.”

Seems simple b/c we can’t really conflate the steps. Part of what could make something unreasonable is starting from an illegitimate legal basis.

E. Judicial Review in Rulemaking

**State Farm** Agency rescinds its rules on passive restraints when Reagan admin comes in. Court, on appeal from insurance industry says rescission was arbitrary and capricious.

First, agency had to at least consider airbags (may not have had to if they hadn’t been req’d by original rule, but can’t just yank them without consideration)

Second, agency’s analysis was flawed b/c it didn’t look at inertia factor in seatbelts.
This is “hard look” review (nickname for using “arbitrary and capricious”), which is possibly dangerous.

States differ: feds look at rulemaking record; states rely on facts developed after suit is filed.
AVAILABILITY OF JUDICIAL REVIEW

Statutory review: can go to court under authorizing legislation
Non-statutory review: § 1331 federal jurisdiction federal question

Reviewability
Statutory preclusion:

**Bowen:** Court starts with strong presumption that Congress intends judicial review. Even though act only provided for appeals for Part A, not part B of Medicare, court says attack on validity of regulation is not the same as a determination of the amount of particular claim, which the Act impliedly denies review.

In other words, courts will never allow preclusion of constitutional claim. More likely to review rules than adjudication and law than fact (despite apparent statutory preclusion).

Agency discretion:

**Heckler v. Chaney:** Inmate petitions FDA to say that lethal injection is not a “safe and effective” use of drug. SC says FDA’s decision not to exercise its enforcement authority may not be judicially reviewed.

§ 701(a)(2) “this chapter applies except to the extent that agency action is committed to agency discretion by law.”

Courts: if it’s so discretionary that it can’t be reviewable b/c there’s no standard. Levin thinks this is crap. He thinks it’s more likely that you can’t review decisions “not to act.”

Had Chaney petitioned for rule change. That would likely have been reviewable under arbitrary and capricious, just like horse case.

If court has to look at Constituional, statutory, and abuse of discretion before finding something unreviewable, does Chaney have any force at all?

**Standing**

When courts will review the decision but not from this particular plaintiff.

**Data Processing Service Orgs.**

Test:
1. injury in fact
2. zone of interest

**Lujan v Defenders of Wildlife:** Court says no standing b/c there’s no injury in fact: their intention to go see the animals some day is not concrete.

Test:
1. injury in fact—must be concrete and imminent
   a. causal connection b/w injury & conduct complained of
b. redressability by favorable decision

Congress can’t create a right to sue through citizen suit provisions. Could create an underlying right (like FOIA).
Intangibles can’t satisfy standing req’t.
Courts won’t issue advisory opinions under “case or controversy” article III.

Timing

1. Finality
   Can’t appeal until agency action is final. Use *Bennett v. Spear* test:
   - consummation of decisionmaking
   - legal consequences will flow

*Socal* wasn’t final b/c denial motion to dismiss only results in going to court. *Socal* may end up winning in the end if agency is really picking on it. Helps agency efficiency by not telling every company run off to court immediately.

**DDT**
EPA’s failure to take action on petition to suspend (preliminary injunction) is immediately reviewable b/c of imminent health hazard and irreparable injury.

Split on whether companies could have gotten in to court had it gone the other way.

2. Ripeness

*Abbot Labs:* Tylenol must label acetaminophan. Court says company can go to court immediately b/c issue is ripe: they’ll only be reviewing on the record. If they made companies wait until they broke rule, could cost millions.

Factors:
- fitness of issues for judicial decision
- hardship to the parties of withholding consideration

*Toilet Goods* different b/c only hardship would be to submit to inspection, and having had a couple of inspections might provide more facts that would ripen the issue for judicial determination.

If commissioner writes a letter stating policy, that’s probably final enough to be ripe for review.

3. Exhaustion

Discretionary—courts can pretty much do what they want. Balancing test of individual’s interest vs. institutional interests.

Things that favor individual:
- Undue prejudice to later court action
- Agency not empowered to grant effective relief
- Agency is biased.

*McCarthy* allowed in despite failure to go through prison appeals system b/c he wanted money damages, which agency couldn’t give.

State courts often let you in w/o exhaustion on a “legal” question. No exhaustion of state remedies at all is req’d for a § 1983 civil rights claim (Civil Rights Movement).

In general, shouldn’t charge into court w/o exhausting other options.

**Recovery of Fees**

American rule says each side pays for its own legal fees. But Equal Access to Justice Act says gov’t will refund plaintiffs’ legal fees in suing an agency if

- they prevails (State of CA says you don’t have to prevail, just have to have brought a valuable case)
- AND if gov’t’s case was not substantially justified,
- AND if you needed financial help (think rich beef industries behind the beef association).

Pays $125/hr.