

ADMINISTRATIVE LAW COURSE OUTLINE

I. Overview

- A. Exam Attack Strategy:
 - i. Who decides what; whose call is it; who has the power; what does congress have to do to be clear enough?
 - ii. When a court makes a decision, it is inserting itself immediately into a sep of powers problem – one branch of gov't invariably making a choice as to whether one matter is constitutionally suited for the exec or the legislature.
- B. Administrative Procedure Act (1946)
 - i. Agency Powers:
 - 1. Rulemaking (§ 553)
 - a. Devoted to exercise of public power that permits agency to create rules.
 - b. Publicly vetted policy making decision that results from issuance of notice and comment procedure.
 - 2. Adjudication (§ 554)
 - ii. Formalized Procedure (§ 556)
 - 1. Rules for informal adjudication comes from common law – use precedents to shape process and advocate type of procedure governing a particular admin law case.
 - iii. Judicial Review of Agency Action (§§ 701 – 706)
- C. Argument for Regulatory Law by Agencies
 - i. Make rules in accordance w/ specialized knowledge
 - ii. Agencies can function in times of crisis – more fluent, don't require a case in controversy or jurisdiction to be brought to it.
 - 1. Can be active, not reactive.
 - iii. Agencies have access and continuity, expertise, and can handle large volumes of cases.
 - iv. Congress is a policy-making body, not empowered w/ police powers even under 9th, 10th and 11th amendments.
- D. Risk of Agencies
 - i. No accountability – not up for election.
 - 1. Only political accountability is to the Executive through cutting of budgets and firing of agency senior staff.
 - ii. “Capture” – when an agency becomes so overidentified w/ industry it purports to regulate that it can't maintain independence. Employees become more sympathetic for the people it regulates than the public.
- E. Regulatory Negotiation Committees
 - i. Every agency has or should have one by law.
 - ii. Evaluates whether agency can formulate rule or regulation through negotiation as opposed to formal rulemaking procedure.
 - iii. Rationale – favors negotiation over command and control situation

- iv. Cost of resisting regs that are resisted are higher than the substantive value of the regulation.
- F. **No stare decisis** in administrative law – regulatory standards are always changing.
- G. Sources of Administrative Law
 - i. US Code dominates
 - ii. Federal Register – place in which fed gov’t gives notice of anything it proposes to do.
 - iii. CFR – codification of adopted regs that are implemented.
 - 1. CFR is much stronger than Federal Register related to precedent.
 - iv. Presidential Documents – Executive Orders and Memoranda
- H. Types of Agencies
 - i. Executive Agencies – single administrator serves at the pleasure of the President (much more politically accountable to both President and public opinion).
 - ii. Independent Agencies (Commissions) – Collegial decisionmaking, appointed by President typically of fixed political parties – could only be removed “for cause.”
 - iii. Also have Privatized Agencies – implement public policy through private institutions.
 - 1. port authority, Nasdaq, Medicare plan B, accounting board
- I. Case History re: Power of Agencies and Delegation of Power
 - i. Two Rules:
 - 1. **Congress can only delegate the power that it has AND**
 - 2. **Congress must delegate w/ precision.**
 - a. If not violates, sep of powers
 - ii. *Panama Refining* – Dealt w/ expansive delegation of authority at time of National Industrial Recovery Act
 - 1. **When Congress delegates, at the minimum, it must delegate w/ some level of precision, certainty, and clarity. Otherwise, President would be exercising legislative powers. Must have standards in the Act to guide the President’s exercise of discretion– if not, unconstitutional delegation.**
 - iii. *Schechter Poultry* – Struck down law based on rationale that Congress was giving authority to private industry to regulate itself, i.e., that large companies might succeed in having rules adopted that would harm their competitors.
 - 1. **Empowering Act must have standards to guide the President in deciding what regulations to impose upon the various industries.**
 - iv. *Carter Coal (1936)* – invalidated a delegation of power to coal companies and unions to make contracts that would bind other coal companies.

1. Since that time though, courts have upheld such delegations, but *only where there proper safeguards in place against private abuse of power.*
- v. **When Congress does delegate vaguely, agencies must fill in the gaps** – but must be careful b/c should not be formulating broad public policy.
 1. **What is Congress Not Allowed to Delegate?**
 - a. Enforcement directives
 - b. Specific instructions related to enforcing criminal prosecutions
 - c. Can't give the Treasury the power to identify tax structure b/c Constitution requires that tax be levied in Congress.
 2. Separation of powers says either these must remain w/ Congress or that Executive cannot be instructed by Congress how to act on a particular issue.

J. **Strategic Approach Once Something is in an Agency:**

- i. How do you determine what agency can do? Ask two questions:
 1. What is the *nature of the individual or institutional interests* involved and what about the nature of the *interests on the government's side*?
 2. What does the *enabling act say about the content of the process*? Legislative history of that law? APA? Prior agency practice historically (not bound by stare decisis though)? Agency case precedent and judicial precedent?
- ii. **Identify P's and gov't's rights and interests within this context.**
 1. *Gov't interest* – almost always one of the following:
 - a. Speed and efficiency (if essential to achieving its objective)
 - b. Credibility (needs to appear fair and just)
 - c. Accuracy
- iii. What are the gov't's regulatory goals?
 1. Different initiatives carry different weight.
- iv. What is the risk of the decisionmaking process itself in terms of probability of error?
 1. How likely overturned?
 2. Status of client's interest?
 - a. Seeking something new (hard to make argument that that gov't is trying to take something away) OR
 - b. Seeking to continue something
 3. What fundamental questions of justice and fairness exist?

II. **Distinguishing b/w Rulemaking & Adjudication**

A. **GENERAL RULE**

- i. When general facts are at issue, rulemaking will be permitted.
- ii. Where specific facts are at issue, adjudication is necessary.

- B. **Adjudication** – gov’t action that affects identifiable persons on the basis of facts peculiar to each of them
- i. Procedural due process is an issue here.
 - ii. Hearing may be required.
 1. Not required on issues of law and policy (common to large groups of people or businesses, where documentary or statistical evidence could suffice), or for the determination of “generalized” or “legislative” facts – only for “individualized” facts.
 - iii. ***Londoner v. Denver***
 1. Importance: Establishes basis for adjudication where gov’t is in conflict w/ an individual!
 2. Holding: Where legislature didn’t fix the tax itself, but delegated to a subordinate body to determine the division of costs b/w particular owners, the taxpayer has a right to be heard as part of 14th amendment due process.
 3. **Foundation for Conceptualizing Adjudicatory Rights:**
 - a. Small number of people
 - b. Not equally affected
 - c. Interests are fairly specific
 - d. Effect is essentially retroactive
 4. When dealing w/ small number of ppl, Constitution requires process by which each person affected can state a claim – DP does not allow for property be taken from you.
 5. Rule - ***If agency is going to do something to you specifically, you have a right to hearing.*** Definition of hearing can vary though.
- C. **Rulemaking** – gov’t action directed in a uniform way against a class of persons
- i. Procedural due process not a factor here.
 - ii. *No hearing required.*
 - iii. ***Bi-Metallic Investment Co. v. State Board of Equalization***
 1. Holding: Where a rule of conduct applies to more than a few people, Constitution DOES NOT require that each be given a direct voice in its adoption. Impracticable.
 2. *The power of re-election is the basic protective right* against such public acts in a complex society, whether that elected individual be immediate or remote.
 3. This Case: Though held that proceeding need not be a strict judicial proceeding, Ct held that requirement of a hearing was not satisfied by mere opportunity to submit objections in writing.
- D. **Notable Distinction b/w Rulemaking & Adjudication**
- i. Proceedings for purpose of policy promulgation v. adjudication of disputed facts in particular cases.
 - ii. Legislative facts v. Adjudicative facts

1. Legislative facts do not usually concern the immediate parties but are the general facts which help a tribunal decide questions of law and policy and discretion. (*Bi-Metallic* case)
 2. Adjudicative facts are intrinsically the kinds of facts that ordinarily ought not to be determined w/o giving parties a chance to know and to meet any evidence unfavorable to them, that is, w/o providing the parties an opportunity for trial. (*Londoner* case)
- E. **THEME – There must be some limit on rights of individuals if gov't is to be able to properly function, but must balance that against need for individual rights under certain circumstances.**
- F. *Bowles v. Willingham* (*Emergency Price Control Act case*)
- i. Importance – Answers question of what process rights are due when gov't believes the need to act based on a perception of public need/interest?
 1. **Competing interests** become the following:
 - a. Gov't – Managerial/ministerial judgment
 - b. Individual – Taking of property (in this case, monetary interest).
 2. Question – Does the existence of war make allowable the holding of a hearing after the fact?
 - ii. **RULE – Delay of a hearing is acceptable in the case of property. Where only property rights are involved, mere postponement of a judicial inquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate.**
 1. Delay in the judicial determination of property rights is not uncommon where it is *essential that governmental needs be immediately satisfied*. Where Congress has provided for judicial review after the regulations or orders have been made effective, it has done all that due process under war emergency requires.
 2. In emergency, gov't had *unbridled discretion* (“act first, ask questions later.”).

III. **SCOPE OF JUDICIAL REVIEW**

A. *Chevron Rule*

- i. Reality of what is at issue in this case: Explicit executive judgment about balancing b/w fiscal incentives to create stronger infrastructure w/o creating strong environmental controls and on other hand, NEPA's goals of improving environment.
- ii. Holding – **Agency regulations resulting from express congressional delegations of authority are given controlling weight unless they are arbitrary and manifestly contrary to the statute.**
- iii. MODERN COURT VIEW – *Strong deference*.

1. **RULE:** *If Congress expressly or implicitly delegated law-
interpreting power to the agency, Court must follow **any
reasonable agency interpretation** of an ambiguous statute.
A court must defer to the agency's interpretation of law.*

iv. **Rationale:**

1. Court's duty - ensure that agency's action is not arbitrary or capricious – determines if new rule falls within scope of delegated authority and does not conflict w/ Congress' expressed intent.

v. **Court Inquiry When Reviewing Agency Construction:**

1. Whether Congress has directly spoken to the precise question or whether statute is ambiguous?
2. If statute is clear, then no issue. Must give effect to Congress' expressed intent.
3. If statute is ambiguous, then ask whether agency's answer is based on a permissible construction of the statute.

vi. **Public Policy Implications of Chevron:**

1. Inconsistency in Regs: Constant new interpretations through agency regs means a *lack of consistency* and affects the public's willingness to follow admin regs.
2. Inconsistency in Agencies: Results in lobbying (about money & info) – right to influence elections. B/c no stare decisis in admin law, support candidate who will change the regulatory program.

IV. **LIMITS OF CHEVRON DOCTRINE**

- A. **AT ISSUE** – Interpretation differs from a rule coming out of rulemaking b/c no public participation and b/c they are w/o a case and controversy, non-reviewable – but once in place and applied, then reviewable.

Question becomes what deference do they get?

- B. **Not every interpretation is entitled to strong deference**

- i. ***Agency Interpretation Issued as Part of Notice and Comment Rulemaking*** Entitled to Full Deference under *Chevron*.

1. Even though merely interpretative, has been exposed to public comment.
 - ii. ***Interpretations Arising Out of Formal and Informal Adjudication*** are Entitled to Strong Deference so long as adjudicating agency also had rulemaking power.
 - iii. ***Agency Interpretation of its Own Regulations Articulated in Litigation*** Entitled to Strong Deference (only when the language of the regulation is ambiguous) if the position taken represents the agency's "fair and considered judgment on the matter in question." (*Auer v. Robbins*).
 1. But if regulation is unambiguous and plainly permissive, deference is unwarranted as such deference would be to permit the agency to create de facto a new regulation.
 - iv. ***Interpretative Rules, Policy Statements, Manuals, and Guidelines*** Not Entitled to Deference (*Christenson v. Harris County* -) – lack the force of law.
 1. Does not mean that the court is free to re-write though.
 - v. ***Internal Guidelines*** Entitled to "Some Deference" – **SKIDMORE DEFERENCE**
 1. Courts are obligated to provide "respect" to internal guidelines, gauged by the power to persuade.
 - a. The more well written it is and persuasive it is, it is owed greater level of respect (*Skidmore v. Olney*).
 - vi. ***Ruling Letters*** are Not Entitled to strong Chevron deference; only weak *Skidmore* deference since they arise in a technical area by low-level personnel and usually furnish only a conclusion w/o reasoning.
- c. **GENERAL RULE SUMMARY:**
- i. Statute
 1. ***Chevron*** – if statute is unambiguous, no agency deference; if unclear, then check for reasonableness.
 2. ***Skidmore*** – Interpretations in opinion letters, interpretative rules, policy statements and guidelines entitled to "respect" and court looks for the "power to persuade."
 - ii. Regulation
 1. ***Auer*** – Deference to agency's interpretation of its own regulation.
 2. ***Christenson*** – if regulation is ambiguous, must deal w/ *Auer* deference (and matter of the agency's judgment). If reg is clear, then NO deference to the agency and look at clear meaning of reg.
 - a. Considerations for Level of Respect to Give Agency Interpretation:
 - i. Amount of agency work
 - ii. Public expectation

- iii. Nature of the interpretation/action – if this the type of day-to-day decision agency makes, then not really entitled to a lot of respect since that would generally be adjudicatory and Chevron thus doesn't apply

D. **Challenging and Setting Aside Agency Action**

i. **Occurs when constitutional due process rights are implicated.**

1. Liberty Interests (speech, vote, travel, association)
2. Interpretative Liberty Interests (work, associate, petition, time and process)
3. Property Interests (grants and justifiable expectation)

DUE PROCESS

- V. **Overview of Due Process (dealing w/ procedural due process)**
- A. **History of Due Process Issues:**
- i. DP only comes into play if there is a Const'l interest
 - ii. Until 1960s – it was a Const'l interest if there was a “right;” but if only a privilege, then DP was not implicated (i.e., working somewhere, immigration, licensing)
 - iii. Late 1960s to present – Whether right or privilege was discretionary, so moved to *liberty or property interest* – if so, const'l interest implicated.
- B. DP Case will always have a Hearing – Question is it necessary before or after?
- C. **5th and 14th Amendment requires the gov't to provide notice and some kind of hearing before depriving a person of liberty or property.**
- D. **Interests Served by Trial-Type Hearings:**
- i. Provides *vital protection against arbitrary gov't action*.
 - ii. Guarantees *right to confront adverse witnesses* and helps to insure *decisions will be based only upon facts developed in the hearing*.
 - iii. *Dignitary function* – Creates feeling of *fair treatment in the affected person*. Affirms value of fair procedure *for its own sake*.
 - iv. Promotes *participation and dialogue by affected individuals in the decisionmaking process*.
 - v. Helps individual to *understand and accept* a negative gov't decision
 - vi. Enhances chances of *accuracy in decision* – find out exactly what happened and apply law and policy correctly
 - vii. *Consistency* – creates system of agency precedents – persons in like circumstances are treated alike.
 - viii. *Empowerment function* – seize the attention of a bureaucratic institution and prevents problems from being ignored.
 - ix. Officials more likely to act *seriously and reflectively*
 - x. Helps gov't exercise *discretion* wisely.
 - xi. *Serves the purpose* of the substantive programs in which they occur.
 - xii. *Facilitates judicial review* – reviewing ct can focus on precisely what agency did and why.
- E. **Attack Strategy for Due Process Consideration:**
- i. Has there been a deprivation of liberty or property?
 - ii. If there is a deprivation of liberty or property, when must notice and a hearing be provided?
 1. Client will typically want hearing *before* the deprivation rather than after. Balancing approach:
 - a. Strength of the private interest affected

- b. Whether agency procedure is likely to produce an inaccurate result and whether the proposed procedure is more likely to produce an accurate result, AND
 - c. The governmental interest in not providing a pre-deprivation hearing.
 - iii. If there is a deprivation, what are the ingredients for the hearing?
 - 1. Look to see if any of above 3 factors are constitutionally required.
 - iv. Is the agency action rulemaking rather than adjudication?
 - 1. If so, procedural due process *does not apply*.
- F. **Approaches to Limiting Due Process Requirement (i.e., Gov't Strategy)**
 - i. Exclude particular interest from the categories of liberty and property.
 - ii. Describe the due process requirements as variable rather than fixed and dependent on the particular context in which they arise.
 - iii. Identify the action in question as generalized, not individualized.
 - 1. Due process does not apply to generalized gov't action such as rulemaking.
- G. **Factors for Assessing Validity of any Administrative Decisionmaking Process (Cited in *Matthews v. Eldridge*):**
 - i. Degree of potential deprivation that may be created.
 - ii. Possible length of wrongful deprivation of benefits
 - iii. Fairness and reliability of the existing pre-termination procedures, and the provable value, if any, of add'l procedural safeguards.
 - iv. Public Interest Factor – Court's view of opening up cts to add'l process → experience w/ the constitutionalizing of gov't procedures suggests that the ultimate add'l cost in terms of money and administrative burden would be substantial. Interest in conserving scarce fiscal & administrative resources.
- H. **Use of the Secret Evidence Doctrine**
 - i. In immigration proceedings where nat'l security is involved and there is a process, evidence that is used to evaluate internally to be held as secret.
 - ii. **RULE - Government interest in national security is dominant to the individual interest (*US ex rel Naught*)**
 - iii. Limitation on Doctrine - *Green v. Mackellroy* (gov't contractor career based on his security clearance; lost clearance and learned from internal report that it was based on wife's communist thoughts – Sup Ct drew the line here and said this deserves a hearing. Stripping clearance is not easily reparable by money.
- I. **Timing of the Hearing:**
 - i. *Fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due*

process is flexible and calls for such procedural protections as the particular situation demands.

- ii. **General Rule (*Goldberg*): Hearing must occur before the deprivation of a constitutional interest (liberty or property) occurs. Important gov'tal interests are promoted by affording recipients a pre-termination evidentiary hearing.**
 1. Timing of the hearing is important b/c if state acts first and holds a hearing later, damage to the person from even a temporary loss of liberty or property may be irreparable (*Goldberg v. Kelly*).
 - a. Trade-off of Pre-Termination Hearing: Requirement that a hearing be held before benefits, employment, or some other entitlement can be terminated may impose substantial financial and programmatic costs upon an agency.
 2. **The State can create and define an interest, but the Constitution is the ultimate arbiter in determining how that property is taken away.**
 - a. Often comes down to a question of timing.
 3. EXTENT OF HEARING – *Pre-termination hearing need not be extensive, but some hearing must be afforded when constitutional interest is being deprived – the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.*
- iii. **Elements of a Full Adjudicatory Hearing:**
 1. Unbiased, impartial tribunal
 2. Notice in advance
 3. Hearing occurs before adverse action
 4. When hearing takes place, opportunity to present sides of the parties which means an opportunity for confrontation
 5. Cross-examination or formal confrontation to assess reliability of both sides
 6. Calling of witnesses (not just a statement)
 7. Evidence and a Record
 8. Right to have counsel present (though not necessarily paid for)
 9. Public attendance
 10. Right of judicial review
- iv. **Emergency Exception: To protect the public health or safety, gov't sometimes must act without providing any procedure at all – even though post-deprivation procedures may not be effective protection (*North American Cold Storage v. Chicago* – destruction of rotting food held in cold storage).**
 1. Gov't must act to protect and guard lives and health of citizenry and protect any dangers that would arise. So long as hearing is provided afterward to determine if gov't

should be responsible for cost, then not violative of due process.

2. Emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts.
 3. **Cafeteria Workers** – Places due process limits on gov't action – had they acted arbitrarily, this would have been an issue, but this was not arbitrary – carelessness of losing security badge here was dangerous. There was no const'l right here to her job. *When private interest is a mere privilege subject to executive's plenary power, notice and hearing are traditionally not const'lly required.*
- v. **Balancing Test – MATTHEWS FACTORS:** Has been used to decide in numerous cases that State is entitled to act first and hold a hearing later (or provide only abbreviated procedures first and a full hearing later) – **Factors (*Matthews v. Eldridge*):**
1. *Nature of the private interest* affected
 2. *Risk of an erroneous deprivation of that interest* posed by the challenged procedure and the likelihood that a different procedure would better protect that interest
 3. *Gov't's interest* in not imposing a different procedure (function involved, fiscal and administrative burdens).
 - a. Monetary interest – justice can have a cost → *Matthews* introduced a cost-benefit analysis. This comes out of *Matthews* today more than any other case.
 4. *Basic Fairness & Justice:*
 - a. Individual experience & public perception
 - b. Credibility of gov't entity and capacity to govern is based on public perception that it proceeds fairly
 - c. Fairness of process is in play
- vi. **MATTHEWS v. ELDRIDGE PROPOSITION: ASK WHAT PROCESS IS DUE AND WHEN IS IT DUE. *All that is necessary is that the procedures be tailored in light of the decision to be made, to the capacities and circumstances for those who are to be heard to insure that they are given a meaningful opportunity to present their case.***
1. *Matthews* holds that Goldberg is the exception – process generally is too expensive and time-consuming.
 2. **EXAM STRATEGY** - *Matthews* should be used to answer every due process question. “Due process comes at a price, and one of the important judgments courts will make is how much will these hearings cost. Becomes a very economic decision.”
- vii. **Application of *Matthews* Balancing Test:**

1. Welfare Benefits: Require trial-type hearing before cut off b/c damage could be irreparable (*Goldberg v. Kelly*).
 2. Disability Benefits: Trial-type hearing not required before cut off of federal disability benefits (*Matthews v. Eldridge*) – distinguished from *Goldberg* based on following criteria:
 - a. Private interest – disability does not equal poor; no “brutal need” if benefits are cut off; can fall back on welfare.
 - b. Risk of error – while welfare turns on credibility disputes, disability cases based on written medical reports.
 - c. Gov’t interest – for both, gov’t has strong interest in cutting off benefits before hearing, otherwise non-entitled ppl can stall termination and practically impossible for gov’t to recoup benefits later.
 3. Employment Discharge: *No full hearing is required in advance* for gov’t to suspend employee from tenured or civil service job, but there *must be an adequate pre-discharge procedure* to establish probable cause exists for discharge (*Cleveland Bd of Ed v. Loudermill*).
 - a. Probable Cause Procedure – Pre-discharge employee is entitled to notice, explanation of employer’s evidence against him, and an opportunity to present his die of the story orally or in writing. In addition, entitled to *full hearing after the discharge w/ in a reasonable time* (*Loudermill*).
- viii. **Two-Step Inquiry for 14th Amendment Prohibition of State Deprivation of Life, Liberty and Property w/o Due Process of Law (*Ingraham v. Wright*):**
1. Whether the asserted individual interests are encompassed w/in the 14th amendment’s protection of life, liberty, or property.
 2. If protected interests are implicated, what procedures constitutes “due process of law?”
- ix. ***Ingraham* holding** – students subjected to disciplinary paddling – ruled such punishment was part of our history and so long as remedies are available after-the-fact if excessive, this is fine; not a deprivation of liberty
- x. ***Ingraham Rule*** – *After balancing test, it is permissible to determine that due process can be satisfied by state tort law remedies. The availability of tort remedies reduces necessity of admin process.*
- xi. **RULE SUMMARY** – 5th Amendment does not require trial-type hearing in every conceivable case of gov’t impairment of private interest. Identification of what procedures may be required must begin w/ determining the precise nature of gov’t

function involved as well as of the private interest that has been affected by gov'tal action.

1. Gov't deprivation of a constitutional right generally requires *at least* a procedure to *determine whether probable cause exists before the deprivation occurs*. Major exceptions include situations where public safety is threatened.
2. TEST FOR DEPRIVATION OF A PRIVILEGE – Under *Cafeteria Workers*, **Facial Fairness Test (so long as not arbitrary and capricious)** – that case was just a privilege, not a right.
3. Historical Movement: In past, looked to see if it was a privilege or a right, but *Goldberg* and *Perry* move away from this.
 - a. *If what's lost is irreplaceable, then you must have a hearing (Dixon v. Alabama* – students thrown out of school for participating in sit-in). If tort action or money damage wouldn't make individual whole, then irreplaceable and hearing req'd.
 - b. *Hearings should not be intrusive though (Tinker v. Des Moines* – exclusion of kids from school).

J. Interests Protected by Due Process – Liberty & Property

VI. **Liberty**

- A. Includes: Right to contract, Engage in Common Occupations, Marry, Establish a Home, Bring up Children, Worship Freely, Acquire Useful Knowledge → Right to Enjoy Qualities of Life Recognized as Essential to Pursuit of Happiness (*Board of Regents v. Roth*).
- B. **Deprivation of Constitutional Rights:**
 - i. *Perry v. Sinderman* – cannot deprive substantive DP rights w/o hearing (nonrenewal of K based on free speech) *if* prof. was able to prove existence of de facto tenure “expectancy of re-employment” based on practice, policy and experience – then would be entitled to hearing to establish grounds for non-retention; 1st amendment violation triggers procedural due process protection
 - ii. *Loudermill* Rule (security guard fired for lying on application about prior felony conviction) – Merely b/c a state has the power to define property rights, does not mean that it has the unrestricted power to take that right away. **Once property right is established, has const'l force and right can only be taken away consistent w/ 14th amendment due process.**
- C. **Imposition of a Stigma**
 - i. Rule re: Good Standing: Gov't action *cannot impose a stigma or other disability that forecloses freedom* to take advantage of other opportunities (*Board of Regents v. Roth* – Decision by a university

not to rehire a non-tenured assistant professor, w/o additional facts, does not impose a stigma).

1. Roth Ruling – Roth loses; no liberty or property interest here, and no stigma.
- ii. *Cafeteria Workers* – dismissal of worker for losing security badge was not stigmatizing; has the right to work anywhere else – nothing bad said about her.

D. **Deportation of Aliens:**

- i. Deportation is deprivation of liberty and triggers right to a hearing.
- ii. Distinguishing “Exclusion” of Aliens from Entering Country:
 1. No right to a hearing even where alien asserts a right to enter (*US ex rel. Knauff* – aliens outside US have no const’l rights).

E. **Deprivation of Physical Liberty:**

- i. Decisions by prison authorities having adverse effects on prisoners are a deprivation of liberty and thus do not implicate any due process rights, *unless the decision lengthens* the prisoner’s term of confinement (*Sandin v. Conner* – sentence of 30 days in solitary confinement w/o a hearing not violative of due process, b/c prison decision did not prolong further deprivation of liberty – disciplinary decision did not present the type of *atypical and significant deprivation in which a State might conceivably create a liberty interest and then deprive that interest*).
 1. Other situations possible – removal of good time credits would be equivalent to increasing time in prison and thus compromise liberty interest.

F. **Expulsion or Suspension from School:**

- i. Expulsion or suspension from public school or college is a *deprivation of liberty* and *triggers appropriate due process protection* (*Goss v. Lopez* – suspension from school is an invasion of liberty legitimate claim of entitlement to a public education as a *property interest* which is protected by DPC and which may not be taken away for misconduct w/o adherence to *minimum DPC procedures*; Court focuses not on weight of interest but on the nature of the interest, consistent w/ *Roth*).
 1. **RULE: As long as a property interest is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.**
 2. Establishes GOSS HEARING, where informal give and take b/w students and disciplinarian before penalty is imposed.
 - a. Purpose of hearing – provide forum for review and due process before deprivation of life, liberty or property.
 - b. *Under Goss, only get a hearing on determination of facts (i.e., did you do it); there is no second*

hearing about sanction – ct held that a reasonably imposed discipline is probably not an interest deserving of hearing.

ii. **Main Points of Goss:**

1. When remedy is generally unavailable, after-the-fact hearing is not workable.
2. Just b/c you have liberty/property claim on which to base an argument, does NOT mean that you will get a *Goldberg* hearing → *Goldberg* was life/death; *Goss* was not.

G. **Nexus Requirement:**

i. Must be a Government Actor:

1. ***No constitutional right to be protected of your liberty interest when that deprivation comes at the hands of a private party (DeShaney v. Winnebago County*** (Poor Joshua case) – b/c not the state who harmed child, Constitution can't govern his protection).
 - a. Clear Action of Causality Required - *To find deprivation of liberty or property interest, there must be a clear nexus b/w State action and the harm.*
2. Private decision makers implementing public programs do not qualify as government actors – seen as *not* acting under color of law (*Schwager v. McCooler* – Medicare Part B implementation – here, insurance ppl making decisions; decision was not public enough to activate state action).

H. **Agency Sanctions:**

- i. *Agencies, like courts, must be cautious as a matter of general prudent assessment of their power.*
- ii. ***Criteria for sanctions (Jacob Siegel v. FTC):***
 1. Is the sanction that the agency imposes w/in the statutory and regulatory authority?
 2. Whether the sanction choice is arbitrary or capricious?
 3. Is the sanction supported by the findings? Does the sanction have a real basis?
- iii. *No uniformity requirement for sanctions* (argument that one person goes unpunished and another gets harsh sanction has no merit) – no equal protection claim available in agency unless can prove race, gender, etc (then may have a claim).
- iv. *Nexus requirement is necessary. Sanction must be reasonably connected to violation.*

VII. **Property**

A. Includes: Entitlements, such as welfare or legally protected employment relationships or licenses.

i. **Utilities as a Property Interest**

1. E.g., *Memphis Light v. Kraft* – Receipt of municipal utility service is a “property right” which cannot be cut off w/o a hearing if there is a factual dispute such as whether the recipient made payments. ***Cost of hearing itself is no different before or after termination of service – no other remedies available (can sue in tort, but loss is not money, it’s heat).***
- B. **Attributes of Property Interest in a Benefit:**
- i. Need rules or mutually explicit understanding that support your claim of entitlement to the benefit and that you may invoke at a hearing.
 - ii. Must have a legitimate claim of entitlement; not merely an abstract need or desire for the benefit or unilateral expectation.
- C. How do you determine what process is due if you have a property interest?
- i. **Nature of the interest gets you in the door, and weight of the interest then determines what type of process you are entitled to.**
- D. **Welfare:**
- i. Person receiving welfare benefits under statutory and administrative standards defining eligibility has an *interest in continued receipt* of the benefits. If State wants to terminate benefits, must *provide notice and hearing before (Goldberg v. Kelly – due process protects entitlements).*
- E. **Gov’t Employment:**
- i. Gov’t job *is property where the jobholder is protected by law from discharge w/o cause* (e.g., tenured teaching or civil service job).
 - ii. If holder of gov’t job can be fired at employer’s discretion, the job is *not property and not protected by DPC (Board of Regents v. Roth).*
 1. BUT if holder of unprotected job is fired for *reasons that impose a stigma*, discharge is invasion of liberty and entitles victim to name-clearing hearing.
 - iii. **De Facto Tenure:** Right arising out of implied K that protects profs against discharge w/o good cause (*Perry v. Sinderman – if de facto tenure exists, prof is entitled to hearing to establish grounds for non-retention*).
 - iv. **State Law:** Issue of whether state statutory or K law actually provides job protection is matter of state law.
 - v. **Power of State to Prescribe Procedure:** *Once state creates tenured job, it cannot define procedural protections for that job that fall below minimal protections of due process (Cleveland Board of Ed v. Loudermill).*
- F. **Licenses:**
- i. Professional licenses are *form of “property” protected by DPC - gov’t must provide notice and a hearing before invoking sanctions against a licensee such as suspension or revocation.*

1. RULE - *If a person is entitled to license upon satisfaction of statutory criteria, state must provide a hearing before denial of the license.*
 - ii. **Lack of Standards:** *Gov't violates due process when it denies a license if its system of granting licenses contains no standards – such a system invites corruption or political favoritism (**Hornsby v. Allen** – case used to show strong separation of powers).*
 1. Would otherwise be arbitrary – no hearing, no opportunity to address orally, no opportunity to cross-examine witnesses, and no record to appeal.
 - a. Liberty issue in terms of interest in equal treatment and against arbitrariness.
 2. Problem w/ post-hearing appeal – no record to appeal w/o having standards and criteria to compare against. Just have to argue the const'l issue.
- G. **Five Sources of Property Interest as Defined by State Governments:**
- i. Statutes
 - ii. Contracts where reasonable expectation of performance
 - iii. Regulations
 - iv. Grants of Authority of Power
 - v. Common law of the State

INVESTIGATION

VIII. **Investigation Generally**

- A. Agencies govern through power to acquire information for both adjudicative and rulemaking proceedings.
 - i. Main Issue: Balance b/w Agency power to obtain information and corresponding rights of public to obtain and refrain from giving information.

IX. **Three Themes of Information Gathering:**

A. Agency Seeking Info From Private Sector – Two Methods Available:

i. **Subpoena Information**

- 1. *Reasonability of subpoena* – is for a proper purpose and not excessively burdensome
- 2. *Any constitutional privileges violated* (self-incrim, unlawful search or seizure)
- 3. *Common law privileges violated* (atty-client privilege)

ii. **Conduct a Private Search (Warrant Issue Arises)**

- 1. General Rule on 4th Amendment Applicability: Is gov't interest one that can be achieved w/o privacy interest being compromised? If no, need a warrant.
- 2. If search requires a *warrant* (i.e., no exception applicable and the industry is not pervasively regulated), has it been obtained?
- 3. **Exceptions to Warrant Requirement:**
 - a. Consent (largest exception)
 - b. Emergencies (*American Cold Storage* case – if public safety is genuinely in jeopardy)
 - c. Statutory searches
 - d. Border searches, airplane searches – specifically designated by statute
 - e. Willing engagement in regulated industry – Req.:
 - i. Must be a genuinely regulated industry
AND
 - ii. Has to be some gov't interest in the field to justify warrantless entry (gov't's interest gets argued the most).
 - f. Government trust searches (banks, federally funded events – wherever gov't effectually has trust interest where its money is in play; one's willing engagement in that benefit and gov't interest in its funds makes waiver expected).
 - g. Plain View

4. **Determining Whether Exception is Necessary:**

- a. ***Camara Inquiry*** Must ask not whether the public interest justified the type of search in question, but **whether the authority to search should be**

evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the gov'tal purpose behind the search.

- i. *Camara* (Public health inspector routine Housing Code) – Need search warrant based on Probable Cause b/c probability of error is HIGH – occupant had no way to challenge the inspection other than to refuse and risk criminal charges. Though inspections are important and generally accepted b/c of public interest in prevention of dangerous conditions, intrusion on privacy interest very high.

5. **Elements for Warrantless Inspection of “Pervasively” Regulated Business (meeting of 4th amend reasonableness):**

- a. *Substantial gov't interest* in regulatory scheme.
- b. Warrantless inspection *necessary* to further that scheme AND
- c. Statute must *perform functions of warrant* by advising owner that *subject to periodic searches* and statute must *limit time, place and scope* of inspections.
 - i. *Donovan v. Dewey* – found statute satisfied this criteria for inspection of mines (Congress expressly recognized that warrant req. could significantly frustrate effective enforcement).

6. **EXAM ANSWER** – *Exception from search warrant requirement has been recognized for “pervasively regulated businesses” in Biswell (gun dealer) and for “closely regulated business” in Collonade (liquor store). When an entrepreneur embarks on such a business, he has voluntarily chosen to subject himself to a full arsenal off governmental regulation. (Start w/ Biswell and Collonade whenever arguing that gov't needs leeway to regulate.)*

- a. Required element → Enterprise subject to a long line of close government supervision.
- b. Regulation itself has a mission that is clear and the compromise isn't merely a benefit to the gov't but rather a necessity to carry out the regulatory scheme.

B. **Private Party Seeks Info from an Agency**

- i. Freedom of Information Act

1. Is info *required to be published or made generally available* under FOIA?
 - a. If agency is not required to make such info available, specific docs can still be *requested* unless they fall under exemption in the Act (such as an inter- or intra-agency memorandum exception for pre-decisional, nonfactual documents).
- ii. Sunshine Act
 1. Many agency meetings are required to remain open to the public.

C. **Attorney's Fees**

- i. General Rule: *Private parties cannot recover attorney's fees from the gov't.*
 1. Exceptions to this Rule:
 - a. Are there *specific statutory provisions* providing for award of atty fees (e.g., in civil rights cases or under FOIA)?
 - b. Is there *general authorization* for such an award under Equal Access to Justice Act?

X. **Agency Methods of Obtaining Information**

A. **Agency may compel information through:**

- i. *subpoena* power
- ii. *required reports*
- iii. *physical inspections*
- iv. *hearings*

B. **APA provisions on gathering of information:**

- i. § 555(c) – “Process, requirement of a report, inspection, or other investigative acct or demand may not be issued, made, or enforced, except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.”
- ii. § 555(d) – “Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance w/ law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.”

C. **Agency Power to Subpoena:**

- i. If the agency's demand for information is resisted, can seek judicial enforcement of its request.

1. If the judicial order is ignored, court may hold resisting party in contempt.
- ii. **Modern View** – Broad power to subpoena information.
- iii. **Burdensomeness of Subpoena:**
 1. General Rule – Fact that compliance w/ a subpoena will be expensive and burdensome is not a defense. Court may occasionally scale down request deemed unduly burdensome or require agency to be more specific in the request.
- iv. **Agency Power to Make Physical Inspections:**
 1. Overview - Typically used in enforcement of health, safety, and welfare laws. While generally covered by 4th amend reasonableness, requirements for obtaining warrant are lenient, and often no warrant is required at all.
 2. **Home Inspections:** Warrant required for administrative inspections of homes.
 - a. ***Camara v. Municipal Court*** – Routine periodic searches permitted, but should require a warrant determined by a reasonableness standard (probable cause satisfied if info as to neighborhood indicates a likelihood of violations). For emergencies, no warrant required.
 - i. Warrants for administrative searches are easy to obtain (can be phrased broadly) → *If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.*
 - b. **Exception – Welfare (*Wyman v. James*)**
 - i. Welfare recipients can be forced to submit to unannounced, warrantless inspections (*Wyman v. James* – held inspection was not a “search” and penalty for refusing entry was “merely” loss of benefits, not criminal prosecution.)
 3. **Mines:** Underground mines must be inspected 4 times/yr – regularity & consistency make them distinguishable from OSHA (*Donovan v. Dewey*).
 4. **Warrants Required for Some Business Inspections:**
 - a. General Rule – Early cases applied *Camara* to business inspection situation.
 - b. OSHA Inspection – ***Marshall v. Barlow’s*** - *Warrant showing that specific business has been chosen for OSHA search on basis of general administrative plan for an Act’s enforcement of derived from neutral sources would protect an*

employer's 4th amend right (held OSHA too broad, citing no specific regulated industry).

- c. When Constitutionally Objectionable: Warrantless inspections of commercial property may be constitutionally objectionable if their occurrence is so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by gov't officials (**Marshall v. Barlow's** – Warrant must first be obtained to inspect business premises for compliance w/ safety rules, despite danger that employer might conceal defects while inspector gets warrant).

XI. **Binding Effect on Decisionmakers (Available Options In 553(e) Appeal)**

A. **Limitations on Administrative Decisionmaking:**

- i. Res Judicata
- ii. Equitable Estoppel
- iii. Stare Decisis
- iv. Requirement to Follow Own Agency Procedural Rules (even when they were not required to adopt these rules in the first place)

B. Res Judicata:

- i. “Things should not be litigated twice.”
- ii. When It Applies: In any case where there is identity of claims (it's the same case); identity of parties (same ppl generally); final decision on the merits; type of decision on which one would expect there to be reliance (no appeal pending); hearing is fair jurisdictionally and all due process concerns have been addressed.
- iii. General Rule – *When agency acts in a judicial capacity and resolves issues of fact properly before it, which the parties have had an adequate opportunity to litigate, the decision has **preclusive effect** on future agency and court decisions.*
- iv. NOTE – While gov't is precluded from relitigating *same issue* against *same party* if it loses a case, it can relitigate the *same issue* against a *different party* after it loses.

- 1. Rationale – (1) So as not to make gov't feel compelled to appeal every case it loses, and (2) gov't should be able to relitigate and create conflict b/w circuits so issue percolates to Supreme Court for resolution.

C. Government Estoppel:

- i. Results from agency's furnishing of oral or written advice to public as guidance, about which it later decides to change its mind, that the guidance was wrong, and wishes to issue a subsequent decision that retracts it retroactively.
- ii. Federal Law – *Gov't traditionally immune from estoppel and apparent authority. Unless statute prevents the gov't from*

changing its mind, it is free to do so despite any harm caused by detrimental reliance.

1. Lower courts though have often estopped gov't in particularly compelling fact situations, especially where gov't performs a proprietary function (e.g., making K's).
- iii. Money Judgment Cases: Estoppel cannot be used to obtain money judgment against gov't (*OPM v. Richmond*). Money judgments violate appropriations clause.
1. *Merrill Case* – Exhibits strong hostility towards estoppel. Wheat farmer wrongly advised that fed crop insurance would cover his crop could not recover when the crop was destroyed.
- iv. Immigration Cases: Gov't can be estopped if it is guilty of *affirmative misconduct*. Relief being sought must be nonmonetary (i.e., US residency or citizenship) so appropriations clause is not an issue.
1. Gov't's mere failure to act does not qualify as "affirmative misconduct." (*INS v. Hibi* – gov't not estopped after its failure to advise certain noncitizens that they qualified for naturalization and failed to provide means for exercising that right)
 2. Gov't misinformation can sometimes be "affirmative misconduct" if easily remediable (*Moser v. US* – gov't mistakenly advised alien that applying for draft exemption would not forfeit right to apply for citizenship; alien later permitted to apply for naturalization b/c he had reasonably relied on this advice).

ADJUDICATION

XII. Adjudication Generally

- A. Intro Statement - In addition to the Constitution's due process guarantee requiring a trial-type hearing w/ certain requisite elements, statutes often provide for adjudicatory hearings. Thus, there can be *both statutory and constitutional rights to procedural protection*.
- B. Makes law and policy through case-by-case adjudication, which results in retroactive application of a new principle to parties in the case.
- C. Federal APA
 - i. Provides for formal adjudication *only if some other statute provides for a hearing on the record*.
 - ii. Not applicable in every case of agency adjudication
 - iii. **To determine if APA is applicable must determine:**
 - 1. Whether the action is *adjudication* AND
 - 2. Whether *another statute or the Constitution* requires a hearing on the record.
- D. State Law & Agency Regulations
 - i. Where no external source requires a hearing, agency is free to provide whatever protection it wishes. However, if its regulations provide for a hearing, agency must abide by them.
- E. Agency Policy
 - i. Agencies have discretion to make policy either through rulemaking or case-by-case adjudication unless choice has unfair retroactive effects.
 - ii. Under *Wyman-Gordon*, an agency should not engage in *prospective-only adjudication*.
- F. **Adjudication Not Req'd As a Matter of Right**
 - i. ***Lujan v. G&G Fire Sprinklers* - An adjudication is not required as a matter of right before taking away of property if not provided as the consequence of statutory demand.**
 - 1. *Most important consideration – whether there are facts disagreed upon.*
 - 2. Case - Contractor demanded adjudicatory process to be put into place after state withheld funds for violating wage statute. Ct looked at Matthews elements and said could sue for breach).

XIII. APA Application to Adjudication

- A. Relevant Provisions:
 - i. 5 U.S.C. §§ 554, 556, 557
- B. **Adjudication Defined:** Agency process to formulate an order (§ 551(7)).
 - i. Other Key Related APA Terms:
 - 1. *Rule* – “the whole or part of any agency statement of general or particular applicability and future effect ...,” including prescription on wages or prices (APA § 551(4)).

2. *Rulemaking* – “agency process for formulating, amending, or repealing a rule” (APA § 551(5)).
3. *Order* – “whole or a part of a final disposition . . . of an agency *in a matter other than rulemaking but including licensing...*” (APA § 551(6)).

ii. **How it works:**

1. **If agency output falls w/in definition of a “rule,” then should be resolved through “rulemaking,” not “adjudication.” Only if output is an “order” is it resolved through “adjudication.”**
2. **If agency action has *particular* rather than general applicability → adjudication, not rulemaking (unless prescription of wages or prices).**

XIV. **Formal Adjudication**

- A. **Intro Statement** - Governed by APA, though APA does not require anything itself for adjudication cases. But it does apply “in every case of adjudication required by statute or to be determined on the record after opportunity for an agency hearing” (§ 554(a)). For formal adjudication then, must find another statute besides APA that requires agency to hold “*on the record*” hearing. If no such statute, then APA adjudication procedures *do not apply*, and the adjudication is “informal” rather than “formal” and not controlled by APA.
- B. **Construction of Statute – Determining If Formal Adjudication (“on the record”) is Required:**
 - i. Statutes often use word “hearing” but don’t make clear if it is to be “on the record” (which means that must be written down/taped, and *decisionmaker is confined to that record for factual determinations*).
 - ii. **Rulemaking Situation:**
 1. If statute calls for “**hearing on the record**” in the case of rulemaking, agency must use “formal rulemaking process,” which is highly inefficient. Because of its inefficiency, when agency engages in rulemaking rather than adjudicating, cts will construe ‘hearing’ as *not needing a formal record* (*Florida East Coast Railway* – industry-wide ratemaking proceeding; ‘hearing’ in statute doesn’t mean ‘hearing on the record’).
 - iii. **Adjudication Situation:**
 1. Circuits split on whether ‘hearing’ means ‘on the record.’ Depends on what is at issue and statutory intent (*Seacoast Anti-Pollution League* – Ct req. adjudication b/c of great importance of issues involved, and b/c the statute providing for judicial review appeared to contemplate that formal adjudication be conducted).
 2. **GENERAL RULE – *In determining whether statute involving adjudication calls for a hearing on the record***

(so that the APA adjudication sections apply), consider the importance of the subject of the statute (e.g., its possible impact on public policy or safety issues) and the complexity of the subject. The greater those two things are, the more likely it is that a hearing on the record will be required.

XV. **Informal Adjudication**

- A. Occurs when there is no statute calling for a hearing on the record, and due process does not require a trial-type hearing.
- B. **Applicable APA Provisions:**
 - i. Right to Appear (§ 555(b)) – provides right to appear before an agency and be represented by counsel. Also requires agency to conclude matters in a reasonable time.
 - ii. Enforcement of Subpoenas (§ 555(c), (d)) – provides that subpoenas and reports can be enforced only as authorized by law.
 - iii. Explanation of Denial (§ 555(e)) – agency must give prompt notice and explanation of the denial of any application, petition or other request.
 - iv. Licensing Provisions (§ 558(c)) – requires prior warning and opportunity to correct the problem in cases of license revocation or suspension.
 - 1. Does not apply in cases of willfulness or where public health, interest or safety requires otherwise.

XVI. **Choice Between Adjudication & Rulemaking**

- A. **Choice is Discretionary**
 - i. Agency has broad discretion on how to implement the statutory scheme. Choice lies within agency’s “informed discretion.”
 - ii. **Advantage of Rulemaking:** Rule is *prospective* and thus parties subject to it are on notice and cannot be surprised by retroactive change in the law.
 - 1. **RULE – Rulemaking is generally preferable where possible since it avoids the problem of retroactivity (*SEC v. Chenery*).**
- B. **Abuse of Discretion**
 - i. Where retroactive application of a new policy would have *serious adverse consequences*, reviewing ct may find that agency abused its discretion.
 - ii. ***SEC v. Chenery*** – noted that every case of first impression has a retroactive effect and that making policy by means of adjudication is not per se an abuse of discretion b/c of such effect.
 - 1. **When would abuse be present?**
 - a. Where harm from retroactivity outweighed the harm to the public interest from allowing the problem raised by the instant case to go uncorrected.
- C. **Proper Subject Matter for Adjudicatory Decisions (Policy that can be formulated on case-by-case basis) – SEC v. Chenery**

- i. Problems agency *could not reasonably have foreseen*
 - ii. Problems as to which the *agency has only a tentative judgment*, due to lack of experience in the particular area
 - iii. Problems *so specialized and varied* as to be incapable of resolution by general rule
 - D. **Required Rulemaking**
 - i. Duty to Adopt Rules
 - 1. Typically arises in gov't benefit programs – in some cases, agencies must limit the scope of broad delegated power by adopting their own standards, either by rulemaking or by case-by-case adjudication.
 - E. **Prospective Adjudication**
 - i. **Adoption of *prospective rules through adjudication* is prohibited (*NLRB v. Wyman-Gordon*).** A prospective order should be adopted as a rule under § 553, in compliance w/ statutory provisions for rulemaking.
 - F. **Permitted to Rely on Rulemaking in Adjudicatory Proceeding**
 - i. **Where an agency can predict that a number of adjudicatory proceedings are going to occur, the issue can be resolved through a rulemaking in advance (*Heckler v. Campbell* – agency adopted matrix system for determining whether disabled person could obtain job – ct determined that applicant was not entitled to hearing on issues settled by this rule).**
 - 1. Efficiency and cost substitute for due process here.
- XVII. **Formal Adjudication Process**
 - A. **Three Major Phases:**
 - i. Pre-hearing process
 - 1. Party must receive *proper notice* and any appropriate rights to discovery.
 - ii. Hearing
 - 1. Proponent has burden of proof by preponderance of the evidence normally.
 - iii. Post-hearing
 - 1. Must be findings of basic and ultimate fact and a statement of reasons.
- XVIII. **Prehearing Process**
 - A. Notice - § 554(b)
 - i. Persons entitled to notice of an agency hearing shall be timely informed of:
 - 1. time, place, and nature of hearing
 - 2. legal authority and jurisdiction under which hearing is to be held AND
 - 3. matters of fact and law asserted
 - B. Discovery
 - i. No federal requirement to discovery in agency proceedings.
 - C. Settlement & ADR

- i. Administrative Dispute Resolution Act of 1990 - amended APA to require agencies to explore and use ADR techniques in all agency functions, including adjudication and rulemaking.
- XIX. **Process of Proof at the Hearing**
 - A. APA § 556(d) – Proponent of rule or order has the burden of proof.
 - B. **Burden of proof – Preponderance of evidence (derived from § 556(d)’s reference to burden of persuasion).**
 - C. **Evidentiary Threshold in Administrative Proceedings:**
 - i. **General Rule on Admissibility – Any evidence is admissible provided that it is relevant, material, reliable, probative, and substantive. *Evidence presented must be relevant though.***
 - 1. Hearsay IS admissible (evidence need not be competent).
 - ii. § 556(d) – “Any oral or documentary evidence may be rec’d, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”
 - iii. **Reliance on Inadmissible Evidence:** Federal law says that an agency can rely on hearsay evidence alone in making finding, but on judicial review, a decision based on *unreliable* hearsay evidence may be set aside as lacking support in substantial evidence.
 - 1. ***Carroll v. Knickerbocker*** – if there is not a residuum of collaborative evidence, then decision cannot be supported based on inherent insubstantiality.
 - 2. ***Auscher v. Dressler*** – person’s appearance is not hearsay. *Small amt of collaborative evidence could be supportive of hearsay in administrative hearings – if learn reliability of some evidence, can believe the rest of it.*
 - 3. ***Richardson v. Perales*** (doctor subpoena case) – though weak b/c decided on different grounds that claimant had waived right of cross-exam by failing to subpoena doctors, this case is said to hold that agencies may rely on hearsay alone.
 - D. **Unless Statute Says Otherwise, Hearing Subject to Judicial Review, Must be “On the Record”**
 - i. ***Seacoast Anti-Pollution League v. Costle*** – applicable statute need not explicitly call for an “on the record” hearing to require application of the APA’s formal hearing procedures under § 554(a); rather, **in the absence of contrary congressional intent, ct presumes that adjudicatory hearings subject to judicial review must be on the record.**
 - 1. **Evidence may be sifted and analyzed by competent subordinates/experts, but if they add the evidence that trier of fact uses for decision, that evidence must be made part of the record.**
 - ii. Experts split on whether it is good to require *everything* be on the record as *Seacoast* held. § 556(e) has been interpreted to say you

can use off-record info in adjudication, so long as it does not “substantially prejudice the outcome.”

E. **Exclusive Record Principle:**

- i. ***An agency may not rely on evidence that is outside the record (Seacoast).***
- ii. Relevant APA provision - § 556(e) – “The transcript of testimony and exhibits, together w/ all papers and requests filed in the proceeding, constitutes the *exclusive* record for decision...”
- iii. **Limitations on Exclusive Record Principle:**
 1. *Physical Inspections* – Agency decisions can be based upon physical inspections or tests, provided that these are conducted in a way that is fair to the parties involved.
 - a. ***Cowan v. Bunting Glider*** (smoking bathroom visit) – **Triers of fact may always visit and inspect the locus in quo to secure a better understanding of the evidence and to enable them to determine the relative weight of conflicting testimony, so long as trier recognizes that view *cannot replace testimony* (arbiter cannot become a witness w/o testifying) → only legitimate purpose for inspection is to illustrate evidence and provide base for understanding testimony on record.**
 - i. Must maintain privilege to confront, cross-examine, and refute witnesses, and to have a record of their testimony.
 2. *Assistance to Adjudicators* – ALJ’s and agency heads are entitled to assistance of law clerks and other staff to help them understand the evidence, find testimony in the record, and write the decision (provided that staffer isn’t an adversary in the case). Cannot supplement the facts in the record, but can help understand the record or give policy advice.
 3. *Official notice* (like judicial notice) - APA § 556(e)
 - a. Counterargument – shortcutting of the process b/c doesn’t have to be litigated, and no opportunity to rebut as fact.
 4. *Agency expertise* may be used to evaluate evidence & make predictions.

XX. **Requirements of Findings & Reasons**

- A. APA § 557(c) – “All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of *findings and conclusions*, and the *reasons or basis* therefore, on all the material issues of fact, law, or discretion *presented on the record...*”
 - i. Constitutional Requirement – Whenever trial-type hearing is required by due process, must have statement of findings & conclusions.

- B. Informal Adjudication:
 - i. *Even when APA formal adjudications are not applicable, must still state grounds for denying any written application, petition or other request made in connection w/ agency proceeding (§ 555(e)).*
- C. Rationale:
 - i. Assures that fact finder will carefully evaluate evidence and consider discretionary choices.
 - ii. W/o it, cts would have no way of determining basis on which agency acted and parties could not decide whether to seek review.

XXI. **Ensuring Decisionmaking Process Meets Statutory/Constitutional Req's**

- A. Initial *decision must be made by ALJ and appealed* to agency heads. ALJ must be sufficiently independent consistent w/ APA § 554(d).
- B. Same person *cannot engage in both adversary and adjudicatory* responsibility - § 554(d) imposes strict limitations on mixing of functions.
- C. Must be *free from bias* in the form of prejudgment of factual issues, animus against the party, or economic conflict of interest.
- D. Decisionmaker can have *no illegal ex parte communications*.
- E. Decisionmaker *must be adequately familiar w/ the record* as required in *Morgan I*.
- F. Decision can't be constrained by *res judicata, estoppel, or stare decisis*.

XXII. **Judicial Review of Decisions**

- A. **Is the Agency Determination Committed to Agency Discretion?**
 - i. Agency discretion exception to judicial review is only applicable where statutes are drawn in such broad terms that in a given case there is no law to apply.
 - ii. **Mode of Inquiry:**
 - 1. **Is there law to apply?**
 - a. Is the statute a clear and specific directive? If so, then there is "law to apply" and the exemption for action "committed to agency discretion" is inapplicable - move on to standard of review.
 - b. ***Citizens to Preserve Overton Park – Agency action is committed to agency discretion by law only when there is no law to apply to the facts. When there is law to apply to facts (i.e., statutory criteria), courts may review the whole record (not just part that agency relied upon) to develop a real understanding of the underlying decision and determine if it is reliable and probative (may not though substitute their wisdom and judgment for that of the agency).***
 - 2. **Determine the standard for review in accordance w/ APA § 706.**
 - a. "Reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be **arbitrary, capricious, an abuse of discretion or**

otherwise not in accordance w/ law, or if action failed to meet statutory, procedural or constitutional requirements.”

- b. Also can set aside if **not supported by substantial evidence** (authorized only when agency action is taken pursuant to APA rulemaking provision or when based on formal adjudication.
 - i. Requires having a record that is the basis of agency action.
- c. Can also engage in **de novo review and set aside if unwarranted by the facts**.
 - i. Authorized by § 706(2)(F) in only 2 circumstances:
 - 1. When action is adjudicatory in nature and the agency factfinding procedures are inadequate.
 - 2. Independent judicial factfinding when issues that were not before the agency are raised in proceeding to enforce nonadjudicatory agency action.
 - ii. In practice, will have trial de novo when:
 - 1. *const'l fact question* exists (e.g., is the island in middle of river fed or state property)
 - 2. agency seeking to *impose a remedy* and there has NOT been a previous adjudicatory proceeding (sanction w/o underlying fact finding)
 - 3. can show a *new lawsuit*- based on what agency has done, harm has been created and it is judiciable
 - 4. *statute grants* trial de novo

3. **How to Engage in Substantial Inquiry:**

- a. Delineate scope of agency authority and discretion.
- b. Determine whether on the facts agency decision can reasonably be said to be w/in range of choices Congress authorized.
- c. Consider whether agency properly construed its authority.
- d. Review finding to ensure in compliance w/ § 706(2) – “arbitrary, capricious, abuse of discretion or otherwise not in accordance w/ law.”
 - i. Look at whether decision was based on a consideration of relevant factors and whether there was a clear error of judgment.

- e. Ensure that agency actions followed necessary procedural requirements.

XXIII. **Reasons for Court to Overturn an Agency's Adjudicatory Decision**

A. **Necessity of Record in Informal Adjudications**

- i. ***Overton Park*** – Responsibility of decisionmakers in adjudicatory proceedings to produce a sufficient record for review. Ct remanded case b/c wanted to take “hard look” but had no record to examine.

B. **Substantial Evidence Required to Support Decision:**

- i. **Substantial evidence is ‘more than a mere scintilla; such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’** (*Richardson v. Perales*).
- ii. **Reliability and Probative Worth of Written Testimony – Admissibility of Hearsay in Adjudications:** Though has hearsay character, it fulfills practicality exception to hearsay rule b/c sheer magnitude of administrative burden results in the necessity for written reports w/o elaboration through trad'l facility of oral testimony (*Richardson v. Perales* – medical reports permitted – can be cross-examined by contrasting medical reports).
 - 1. **Other Hearsay:**
 - 2. ***Carroll v. Knickerbocker*** – if there is not a residuum of collaborative evidence, then decision cannot be supported based on inherent insubstantiality.
 - 3. ***Auscher v. Dressler*** – person's appearance is not hearsay. *Small amt of collaborative evidence could be supportive of hearsay in administrative hearings – if learn reliability of some evidence, can believe the rest of it.*
- iii. **Importance of Evidence on Record that Can be Cross-Examined and Refuted – Site Visit:** Permissible so long as it complements testimony as providing a base for understanding; cannot be a substitute (*Cowan v. Bunting Glider* – bathroom visit case).
- iv. **Requirement to Substantiate Data Presented:** Proponent of rule or order maintains burden of proof, *documents supporting tables must be introduced or made available to opposing party to extent necessary for purposes of rebuttal and cross-exam so that it is able to be considered full and fair hearing* (***Wirtz v. Baldor Electric***).
 - 1. Gov't Options When Relying on Summary Data: (1) hold back confidential material and take risk of not being able to prove case, or (2) produce material and allow it to be cross-exam'd.
 - 2. **Battle Over Hearsay** - numbers are manipulable. In *Richardson v. Perales*, were able to establish info's credibility; but in *Wirtz*, had another set of conflicting info.
 - 3. **How to Attack Hearsay:**

- a. Show there is cross-examinable info (i.e., supporting data) available, that it is easy to produce and that you have a right to cross-examine and rebut it.
 - b. Offer independent evidence that calls into question hearsay credibility (dominant approach).
 - v. **Must Have Substantial Evidence in the Record: Allentown Mack Sales v. NLRB** – Ct ruled that NLRB’s ruling that Allentown Mack did not have an objective reasonable doubt about the union’s majority support was not supported by substantial evidence in the record. NLRB had improperly discredited certain probative circumstantial evidence that would have supported Allentown Mack’s contention.
 - 1. Decision goes hand-in-hand w/ Morgan
- C. **Obligation of Decisionmaker to be Familiar w/ the Record:**
 - i. ***Morgan I*** – “**The one who decides must hear.**” *Although decisionmaker need not personally preside at the taking of evidence, his decision must be based upon the evidence and argument presented at the hearing.*
 - 1. Evidence can be taken by examiner and sifted and analyzed by subordinates, but ultimate decisionmaker must be **familiar** with the record.
 - 2. Rationale – Inherent Safeguard in Hearings – designed to ensure that one who decides is bound in good conscience to consider the evidence, be guided by that alone, and to reach conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action
 - ii. **How Can Agency Comply w/ Morgan I?**
 - 1. Agency head can *delegate power to make final decisions* to someone else.
 - a. Two problems – (1) not always legally permissible; (2) adjudication sometimes a vehicle for making new law/policy, and thus cannot be carried out by staff below agency head level.
 - 2. Person conducting hearing and hears evidence could decide case. That decision would become final unless agency head decides to consider an appeal.
 - 3. Decision of hearing officer could be subject to appeal to an *intermediate review board* w/in agency.
 - 4. Agency head might consider only a highly *condensed summary of evidence and arguments* in a case that is prepared by law clerks.
- D. **Must be Free from Bias - Personal Interest (Pecuniary Bias), Prejudgment, Personal Animus:**

- i. Relevant APA provision - § 556(b) – requires that where an affidavit of personal bias or other disqualification is filed, “agency shall determine as part of the record and decision in the case.” Contemplates that upon complaint of bias, ALJ will recuse herself. If fails to do so, agency heads (and reviewing ct) will consider ALJ’s failure to recuse herself as one of the issues in the case.
 - ii. **Complete Indifference Not Required for Trier of Fact:**
Andrews v. Agricultural Labor Rel. Bd. - Right to an impartial trier of fact is not synonymous w/ claimed right to a trier completely indifferent to the general subject matter of the claim before him – the word ‘bias’ does not refer to any views judge may entertain re: subject matter involved.
 - 1. *Andrews* – Ct held that ALJ appointed to review alleged unfair labor practices case was not bias merely b/c he had worked on behalf of Mexican-Americans before. Decision was supported by substantial evidence in the record.
 - iii. **Standard of Proof – whether the findings of fact are supported by substantial evidence on the whole record.**
 - 1. Record preserves fairness.
 - iv. **Must have “actual existence of bias” to disqualify – 2 grounds:**
 - 1. **Prejudgment of the individualized facts of a case OR**
 - 2. **Animus (prejudice) against particular litigant**
 - v. **Mere appearance of bias is not sufficient to violate due process.**
 - vi. Personal interest (i.e., financial) of adjudicator or family is automatic disqualifying, whether actually biased or not.
- E. **Ex Parte Communications as Influence or Pressure on Fact Finder:**
- i. Defining **Ex Parte Communication** – oral or written communication not on the public record to which reasonable prior notice to all parties is not given, but not including requests for status reports on any matter or proceeding (§ 551(14)).
 - ii. APA § 557(d) - prohibits ex parte communications relevant to the merits of the proceeding b/w any interested person *outside* the agency and agency decisionmaker.
 - 1. Congress says should be construed broadly.
 - 2. *Rule applies to formal rulemaking and formal adjudication, but not to informal.*
 - iii. **RULE – When interests of openness and opportunity for response are threatened by an ex parte communication, communication must be disclosed. Does not matter whether it comes from someone other than a formal party or if clothed in guise of procedural inquiry.**
 - iv. **Rationale for Disclosing Ex Parte Communications:**
 - 1. Prevent appearance of impropriety from secret communications in proceeding req. to be on the record.

2. For fair decisionmaking, parties should know the arguments presented to a decisionmaker so can respond effectively.
- v. Administrative Remedies Available Under § 557(d):
 1. Disclosure of communication and its content.
 2. Violating party must show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.
 3. No specific judicial remedy available under Gov't in Sunshine Act.
 - vi. Common Law Remedy: Does not automatically void agency decision, but rather, makes it *voidable*.
 - vii. Defining **Interested Person**: Anyone outside the agency whose interest in the proceedings is greater than that of the public.
 - viii. **Ex Parte Communications Not Fatal to Decision – Must See If Decision was Irrevocably Tainted: Professional Air Traffic Controllers** (union head urged agency member over dinner and urged him not to revoke PATCO's exclusive recognition status over strike) – **PROPER INQUIRY - Whether as a result of improper ex parte communications, agency's decisionmaking process was irrevocably tainted so as to make ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect.**
Relevant Considerations:
 1. *Gravity* of the ex parte communication
 2. Whether contacts may have *influenced* agency's ultimate decision
 3. Whether party making improper contacts *benefited* from ultimate decision
 4. Whether content of the communications were *unknown to the opposing parties* who had no chance to respond
 5. Whether vacation of decision and remand for *new proceedings would serve a useful purpose*.
 - ix. **Attorney-Firm Disqualification: LaSalle Nat'l Bank – Disqualification depends on whether it could reasonably be said that during the former rep. the atty might have acquired info rel. to the subject matter of the subsequent rep.**
 1. **Attorney DQ - Substantial Relationship Test: 3 – Level Inquiry**:
 - a. Look to scope of representation
 - b. Determine whether it is reasonable to infer that confidential info allegedly given would have been given to an atty representing a client in those matters.
 - c. Determine whether that info is relevant to the issues

2. **Firm DQ:** Rebuttable presumption that the knowledge possessed by one atty is shared w/ other attys in the firm. Could be rebutted by proving that “infected atty” was “screened” from all participation in and info rel. to the case
 - a. Screening must have been in place at the time when the potentially DQ’ing event occurred.
 - b. How do you screen?
 - i. Deny atty access to docs or files
 - ii. Deny profit or fee sharing from case
 - iii. Disallow any discussion of case w/ atty
3. **THIS IS NON-RECORD INFO AFFECTING ADJ. - *If atty has prior substantial involvement in a matter, he brings non-record info w/ him and if such info was disclosed, it would be suppressed as part atty-client privilege***

XXIV. **ALJ ‘s – The Central Panel Issue**

A. Simeone

- i. Favors ALJ corps assigned to particular cases rather than a singular agency – need to be like federal judges.
- ii. On Efficiency – Some agencies have a lot of hearings and others don’t have many. Could spread out more this way.
 1. Argument against – would not develop expertise.
 - a. Counter to that – expertise is a myth (could figure it all out).

B. Verkuil

- i. Adheres to initial Congressional goals –
 1. Specialized expertise; less formal and less expensive means of resolving some types of disputes; higher degree of interdecisional consistency; allow agencies to control policy components of admin adjudications.
- ii. Criticism – this is exactly the problem – don’t want ALJ in position of making policy.

RULEMAKING

XXV. Rulemaking Generally

- A. Differs greatly from adjudication
- B. Advantage of Rulemaking:
 - i. *Prospective* ordinarily (promulgate rules that apply to the future) – less likely to disappoint well-founded reliance interests.
 - ii. *Apply across the board* so no one singled out for special treatment
 - iii. *Broad public input* comes out of informal rulemaking design, which *improves quality of rules* (compare w/ adjudication that only takes info from case parties).
 - iv. Few restrictions – ex parte contacts permissible.
 - v. Proposed and final rules published in Fed Reg and CFR, making them *more accessible than adjudicatory opinions*.
- C. Rationale behind Rulemaking Process – making a decision b/w conflicting policies would be best achieved by having trial over questions that the public has.
- D. Two types of Rules:
 - i. Legislative Rules – rules made pursuant to a legislative delegation of rulemaking authority; has the power of statute.
 - ii. Nonlegislative Rules – Interpretative rules (interpretation of statutes or prior legislative rules) and policy statements (sets forth manner in which agency intends to exercise discretion); no binding effect.

XXVI. Distinguishing b/w Formal, Informal, & Hybrid Rulemaking

- A. Formal Rulemaking – occurs if some *external statute* requires a *hearing on-the-record* (no notice and comment period) – Highly inefficient and rarely used
 - i. Employs an adjudicatory trial-type hearing w/ right to present evidence, cross-examine and rebut evidence
 - ii. Substantial evidence test, must be a direct correlation b/w evidence presented on the record and decision made.
 - iii. Ex parte communications not allowed (557(d)) – if they do occur, agency must disclose their substance on the record.
- B. Informal Rulemaking – if *no external statute* requires on-the-record hearing, then APA § 553 informal rulemaking provisions apply.
 - i. Must have notice in the Federal Register (553(b)) and comment period w/ incorporation of concise general statement of basis and purpose (553(c)) into the final published rule.
 - 1. Opportunity for *comment* must be available through submission of written data, views or arguments w/ or w/o opportunity for oral presentation.
 - ii. Criticism – process is expensive and time consuming

- iii. **When rule doesn't go through the whole process (which can be long and expensive), end up with: Manuals, guidelines, policy statements, interpretative rules.**
 - C. **Hybrid Rulemaking** – When in rulemaking *statutes applicable to specific agencies*, Congress calls for specific procedures (i.e., cross-examination) that are not required by APA's informal rulemaking provisions, and Congress hasn't converted it into formal rulemaking.
 - D. *Vermont Yankee* provides that **courts are not free to supplement the APA procedures.**
- XXVII. **Attacking Rulemaking**
 - A. Legislative or Executive Controls
 - i. Do any legislative or executive controls apply, such as requirement to provide a regulatory impact statement?
 - B. APA Procedures
 - i. Were various APA procedures complied w/?
 - 1. *Notice* of proposed rulemaking
 - a. Watch for excessive variance b/w proposed and final rule and for agency failure to disclose critical documents or studies.
 - 2. *Public participation* through written comments or oral legislative-type hearings
 - 3. A concise *statement of basis and purpose*, which must respond to material comments
 - 4. *Publication of the rule* in the Federal Register
 - 5. *30-day grace period*
 - 6. *Right to petition* the agency or revise a rule
 - C. Exceptions to APA Procedures
 - i. Military or foreign affairs function
 - ii. Agency management or personnel
 - iii. Procedural rules
 - iv. Interpretative rules or policy statements
- XXVIII. **Nature of Rulemaking**
 - A. **Presumption Against Retroactivity of Rules** - *Bowen v. Georgetown Univ. Hospital*
 - i. **Absent an express grant of authority from Congress, agencies are not authorized to adopt retroactive legislative rules.** If Congress is going to do it, must be clear. Even where some substantial justification is presented, courts should be reluctant to find such authority absent express statutory grant.
 - ii. Scalia concurrence in *Bowen* – APA by its own terms prohibits retroactive rules (§ 551(4)) defines rule as agency statement of *future effect*.
 - iii. Difference b/w Primary & Secondary Retroactivity:
 - 1. Primary – past consequences flowing from prior regulatory activity

2. Secondary – present consequences or even in the future of things you had done in the past.

B. **Presumption Against Formal Rulemaking - Florida East Coast Railway**

- i. **Statutory requirement of a “hearing” or a “rulemaking of general applicability” does not mean “hearing on the record,” and thus agencies are not required to go beyond informal notice and comment procedures of § 553 unless the statute explicitly states that the rule must be made after a hearing on the record or uses very similar language.**
 1. While not mandated, agency has option of upgrading proceedings to be more formal. Argument against trial-type hearing:
 - a. Perceived inefficiency
 - b. Obstruct agency action and frustrate agency regulatory goals
 2. Unsuitable for determining most issues presented in rulemaking proceedings.
- ii. Notice & comment can be sufficient so long as it is determined that parties had *fair notice* of proposed action and had opportunity to comment, object, or make some other form of written submission.
- iii. Applies under circumstances specified in 553(c) – “when rules are required by statute to be made on the record after opportunity for an agency hearing, 556 & 557 are applicable.” → requires trial-type hearings, including right to present evidence, cross-examine witnesses, and submit rebuttal evidence.
 1. Record made before agency is exclusive basis for agency action
 2. Ex parte communications are prohibited
 3. Separation of functions provisions (554(d)) n/a.

C. **Notice and Comment Procedures Do Not Apply to “General Statements of Policy” and “Interpretative Rules (§ 553(b)(A)) – Pacific Gas & Electric Co. v. Fed Power Commission**

- i. **RULE - An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of general statement of policy. If want it to be binding, then it must be a rule, which requires an overt standard against which substantive facts can be measured.**
 1. Policy statement scope of judicial review:
 - a. Policy statement adopted w/o public participation has broader scope of judicial review than substantive rule, b/c this is first stage where may be subject to parties’ criticism.
 - b. *Entitled to less deference than decision expressed as a rule or adjudicative order.*

- i. If someone objects to policy statement, it is non-binding and court can set it aside.
 - ii. **If agency creates a policy and then creates an exception to getting around that policy, it must be a rule.**
 - iii. Policy Statement defined – indicates manner in which agency intends to exercise discretionary function, i.e., future prosecutions, investigations, or adjudications.
 - 1. Rationale – Congress recognized certain admin pronouncements don't require public participation in their formulation.
 - 2. Benefits – Acts as an informational device; encourages public dissemination of agency policy prior to actual application (initial views are not secret but instead are disclosed well in advance); facilitates long-range planning w/in regulated industry and promotes uniformity in areas of national concern.
 - iv. Distinction b/w Substantive Rule & Policy Statement:
 - 1. Policy Statement does not establish “binding norm” – not finally determinative of issues/rights it addresses.
 - 2. ***Agency can't apply or rely on a general statement of policy as law b/c it only announces what agency seeks to establish as policy.***
- D. Need Only Comply with the Statutory Minima – Vermont Yankee
- i. **RULE - In a notice and comment rulemaking, an agency need only comply w/ the statutory minima of the APA § 553, unless the APA, circumstances of the case, nature of the issues being considered, past agency practice, or statute under which that agency operates indicates otherwise.**
 - 1. *If procedures are facially valid, cannot contest the rulemaking.*
 - ii. **Court's Inquiry in Rulemaking:** Whether the agency followed the APA's statutory mandate or that of other relevant statutes? Has the agency employed at least the *statutory minima*?
 - iii. So long as complied w/ procedural min., agency won't be found to have behaved in a procedural arbitrary or capricious manner, *provided that the record shows a sufficient basis for the rule it promulgated.* Court won't probe agency wisdom so long as it does notice/comment. Agency nearly must fulfill following criteria:
 - 1. Issue is related to the rule.
 - 2. Some way to understand context of the rule.
 - 3. No evidence of fraud or public deception.
 - 4. Can tell what agency relied upon.
 - iv. **Courts are not free to require the agencies to follow additional rulemaking procedures not prescribed in the APA (*Vermont Yankee*). § 553 established “maximum procedural protections**

which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.”

1. Absent const'l constraints or extremely compelling circumstances, agencies should be free to fashion own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties. Agencies, not courts, should decide.
2. Rationale: Otherwise, hearing req's would be so uncertain as to cause agencies to hold full trial-type hearings in all cases in fear of judicial review and that would impair admin process.

E. **When Making Rules, Agencies Must Comply w/ Own Internal Procedures and Relevant Congressional Directives – Morton v. Ruiz**

i. **Two Rules:**

1. **Where the rights of individuals are affected, agencies must follow their own procedures, even if those procedures are more rigorous than would otherwise be required.**
2. **If Congress directs an agency to delineate rules (particularly eligibility rules for benefits) that require ppl to make choices in advance, deliberation through an ad hoc adjudicatory process is insufficient, no matter how rational or consistent w/ Congressional intent that decision may be. Such rules MUST be promulgated in advance and be made public.**
 - a. Use of interpretative rules or policy statements to establish such guidelines ok permissible, even if issued in an adjudication, UNLESS the relevant legislation mandates some other rulemaking process.
 - b. NOTE – APA § 552(a)(1) – requires that substantive rules of general applicability adopted as authorized law and policy statement/interpretative rules must be published in the Fed Reg.
 - i. Rationale – Equal, fair opportunity associated w/ awarding of benefits.

ii. **Agency's Role of Filling Legislative Gaps** - The power of an agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to **fill any gap left**, implicitly or explicitly, by Congress.

F. **Ex Parte Communications Not Permitted During Rulemaking After Notice Has Already Been Made Public – HBO v. FCC**

- i. **RULE – Ex parte communications rec'd prior to issuance of a formal notice of rulemaking do not have to be made public UNLESS such the info from such communications forms the**

basis for agency action (then must be put on public file). Once that notice is issued, however, NO ex parte communications b/w those involved in rulemaking process and interested party may occur. If they do, any written doc or a summary of any oral communication must be publicly disclosed immediately so that interested parties may comment thereon.

- ii. *Overton Park* Mandate – The public record must reflect what representations were made to an agency so that relevant info supporting or refuting those reps may be brought to reviewing ct’s attention.
- iii. Rationale – secrecy of ex parte communications is inconsistent w/ fundamental notions of fairness implicit in DP and w/ the ideal of reasoned decisionmaking on the merits. Courts recognize importance of such contacts, however, to the admin process → thus completely appropriate so long as they don’t frustrate judicial review or raise serious questions of fairness.

1. Problem in *HBO* – here, the communications were discrete.

G. Intra-Executive Ex Parte Communications Are Permitted During & After Notice & Comment Period w/o Required Disclosure So Long as They Are Not Outcome Determinative – *Sierra Club v. Costle*

- i. **RULE – Unless otherwise provided by Congress, intra-exec ex parte communications may take place during and after the comment period and are not req. to be docketed or disclosed UNLESS info from them forms all or part of the basis for the rule the agency promulgates.**
- ii. Necessary Inquiry – Was the intra-executive ex parte communication outcome determinative?
 - 1. **Congressional Pressure**: Rulemaking may be overturned if (1) the content of the pressure upon the agency is designed to force the agency to decide upon factors not made relevant by Congress in the applicable statute, AND (2) the agency’s determination is affected by those erroneous considerations.
- iii. Rationale – This is the way gov’t works, but of course, there must be limits. Part of the theme of judicial deference to the executive.
 - 1. Permits exec to monitor the consistency of exec agency regs w/ exec policy.
 - 2. Safeguard in place – Rule coming out of notice and comment rulemaking must have requisite factual support in the record and it may not be based, in whole or in part, on any info which is not in the record.

H. Statement of Basis Requirements – *California Hotel v. Indust’l Welfare*

- i. **RULE – Rulemaking must be supported by a concise and general statement of purpose, that (1) considers salient comments filed during the rulemaking; (2) addresses alternatives to the rule itself (what other ways exist for**

achieving this objecting w/o issuing this rule); and (3) must take into account those who are clearly going to pay a price for the rule's issuance.

1. Any of these three requirements can be used to challenge an agency rule after this case. NOTE – *Vermont Yankee* statutory minima requirement still viewed as the stronger proposition – that case more in favor of judicial deference, while this case seeks to probe agency's wisdom (as shown below).
- ii. **Statement of Basis MUST do the following** (all useful in challenging a rulemaking, but *Vermont Yankee* requirement of only statutory minima poses counter argument):
 1. Reflect the factual, legal, and policy foundations for the action taken.
 2. Show that the rule adopted is reasonably supported by evidence on the record.
 - a. If terms of the rule turn on factual issues, statement MUST demonstrate reasonable support in the record for the factual determinations
 - b. If the terms of the rule turn on policy choices, an assessment of risks or alternatives or predictions of economic or social consequences, the statement of basis MUST show how the commission resolved conflicting interests and how that resolution led to the rule chosen.
 - i. NOTE – if enabling statute mandates consideration of alternatives, then published rulemaking must consider them under *Seacoast* and *Overton Park*. After this case, even if statute is silent on whether alternatives should be considered (as was the case here), there is an obligation on the agency's part to consider them in order to reach a decision that inspires public confidence (this is controversial).
 - c. If the order differentiates among classes of industries, the statement MUST show that the distinctions drawn are reasonably supported by the record and are reasonably related to the purposes of the enabling statute.
 3. Show that the order is reasonably related to the purposes of the enabling statute.
- iii. **Dissent in this Case:** Cannot believe the court adopted this *substantive test standard* to evaluate the *wisdom of an agency*.
- iv. **EXAM ANSWER** - Effective statement of basis fulfills several functions, including:

1. Addresses legislative mandate that permitted the agency to react
 2. Facilitates meaningful judicial review of agency action
 3. Exposition requirement subjects the agency, its decisionmaking process, and its decisions to more informed scrutiny by legislature, regulated public, lobbying and public interest groups, the media and citizenry at large
 4. Induces agency action that is reasonable rather than arbitrary, capricious, or lacking in evidentiary support
 5. Predictability of admin process
 6. Stimulates public confidence in agency action
- I. **Executive Order Regulatory Assessment – Check on Rulemaking:**
- i. Background – Screening process before a rule ever issues is subject to considerable controversy; is NOT subject to judicial review; and is the place where the electoral process is the fundamental driving force.
 - ii. Four Measures:
 1. Regulatory Impact Analysis
 2. Paperwork Reduction Act
 3. Regulatory Flexibility Act
 4. Unfunded Mandate Legislation
 - iii. ***Executive Order 12,866*** – Requires agencies to adopt a “regulatory assessment” early in the process of adoption of a “significant regulatory action” (i.e., rule would have an annual effect on the economy of over \$100M or adversely and materially affect the economy, a sector of the economy, jobs, the environment or state or local gov’t) and submit to OMB. The regulatory assessment must make a careful examination of alternative approaches and perform a *cost-benefit analysis* to see if value of the rule exceeds its costs. Occurs at least 60 days before public pronouncement of a rulemaking. If OMB rejects, decision is final; decision is NOT reviewable (this is a major check at the substantive level – ensures that proposed rule is consistent w/ exec policies, and that its values exceeds its cost).
 1. Applies only to Exec Branch agencies, not independent agencies.
 2. Order is enforced by Office of Info and Regulatory Affairs (OIRA) in OMB, who also examines the proposed rulemaking under the **Paper Reduction Act**. Determines if rule is consistent w/ exec’s policies and if its value exceeds costs.
 3. *End product of the reviews become a matter of public record.*
 - iv. **Regulatory Flexibility Act** – Slows down rulemaking process and permits opportunities for small businesses.

- v. **Regulatory Right-to-Know Act** – Requires agencies at one level or another to evaluate and reevaluate the costs and benefits of rules.
- vi. HOW TO USE: Can be used to challenge rulemakings.

J. **Retroactive Rulemaking Through Adjudication**

- i. Background: Adjudication is, by definition, retroactive. During the course of adjudication, you can suddenly realize that there is no standard to apply to something believed to be wrongful. Could happen under the following circumstances:
 - 1. Agency action was unnecessary
 - 2. agency action is truly unexpected
 - 3. individuals/entities engaging in the behavior in question justifiably relied on agency indications that such behavior was permissible.
 - 4. agency invented new regimes (fines, penalties, etc that didn't exist before) that caused the entity to conform their behavior accordingly
 - 5. congress explicitly prohibited this particular agency from engaging in retroactive rulemaking
 - 6. retroactive adjudication did not further a statutory goal.
- ii. If any of these things happen, there will ALWAYS be a notice problem to deal w/.
- iii. COUNTERARGUMENT – Argue injustice, public policy, and equity arguments at play.
- iv. *SEC v. Chenery*
 - 1. **RULE – From time to time, agencies can issue rules retroactively (even when such power is not expressly granted by Congress) through adjudicatory proceedings w/o public participation. BUT such retroactivity MUST be balanced against the mischief of producing a result which is contrary to a statutory design or contrary to legal and equitable principles. IF that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity, which is condemned by law.**
 - 2. Rationale – Flexibility: Must be capable of dealing w/ many of the specialized problems that arise. Problems could arise that agency could not have reasonably foreseen, that it did not have sufficient expertise to deal w/ at the time, or that it previously couldn't have captured in a hard and fast rule – such problems may require case-by-case analysis.
 - 3. Countering Retroactive Rulemaking Through Adjudication:
 - a. There were and are available means of communication

- b. Statutory goals are not frustrated by disallowing such a rulemaking
 - c. Disallowing such rulemaking will not encourage law breaking.
 - 4. *Always preferable for agency to use notice and comment rulemaking or interpretative rules/policy statements, so there is some prior public notice.*
 - 5. This case: SEC denied Corp's request for reorg after concluding that proposal was inconsistent w/ standards of governing statute. This was despite fact that no general rule or reg existed for governing the situation.
 - 6. Holding: Agency decision was based upon substantial evidence and consistent w/ authority granted by Congress; relied on equitable principles, public confidence in markets, expertise, congressional intention, and fact it would take too long for Congress to pass specific statute disallowing this practice.
- v. ***NLRB v. Wyman Gordon***
 - 1. **Two Rules:**
 - a. **APA Rulemaking provisions may NOT be avoided by the process of making rules during the course of adjudicatory proceedings.**
 - b. **Commands, decisions, or policies in adjudication are NOT rules in the sense that they must, w/o more, be obeyed by the affected public.**
 - 2. Case: WG was a party in earlier *Excelsior* case where NLRB announced the policy behind that order as being *prospective only*, and did not apply to the parties in that case. Ct held that the rule from that case was invalid b/c a prospective order should be *adopted as a rule* under § 553, in compliance w/ statutory provisions for rulemaking. Ct in this case still ruled against WG ironically b/c WG was a party in that adjudication and that case stood on its own and did not depend on validity of this prospective rule.
- vi. **Potential Abuse of Discretion - *NLRB v. Bell Aerospace***
 - 1. **RULE – While agency is NOT precluded from announcing new principles in an adjudication and the choice b/w proceeding by general rule or by case-by-case adjudication generally lies within agency's "informed discretion," a court will find that an agency abuses that discretion when it adopts new policy retroactively in an adjudication whose adverse consequences exceed its benefits, violative of *Chenery*.**
 - 2. **Factors to Consider:**
 - a. Where adverse consequences of industry reliance on agency's past decision is substantial.

- b. Where a new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on agency pronouncements.
 - c. Where fines or damages are involved.
 - 3. Rationale – Flexibility, and parties most adversely affected are afforded opportunity to be heard in an adjudication.
 - 4. Agency’s judgment entitled to great weight – E.g., despite statutory grant of rulemaking power, NLRB has traditionally chosen to formulate policy on a case-by-case basis rather than by rulemaking. Where this choice is appropriate to the problem, and no substantial adverse consequences result, it is not an abuse of discretion (this case - NLRB can determine buyers are “managerial ee’s” under NLRA by means of adjudication, and thus notice and comment not req’d).
- vii. *FTC v. Ford Motors*
 - 1. **RULE – Retroactive rulemaking in an adjudication will only be permitted when enforcing a discrete violation of law, not when the potential cost would be so great or when essentially creating new law.**
- viii. Current Approach to Retroactivity - *Clark-Howlis v. FDRC* – **Factors for Determining if Equitable:**
 - 1. Is the retroactive application *manifestly unjust*?
 - 2. Is the retroactive enforcement (b/c these are adjudicatory proceedings) something that really gives the agency more credibility and thus helps the enforcement model (i.e., if the agency lets the practice pass, future enforcement will be more difficult)?
 - 3. Was the action truly *unexpected*?
 - a. Most retroactivity cases come down to this question
 - 4. Was there genuine justifiable reliance on an existing system (equity argument) – would the parties who would be hurt by this retroactively *justifiably rely* on an agency policy in place?
 - 5. When agency goes forward w/ that retroactive application, is that which the agency is doing *genuinely new* (i.e., new legal obligations)?
 - a. This is a way of measuring whether something is truly unexpected.

XXIX. **NEGOTIATED RULEMAKING**

- A. How it works: Agency w/ assistance of one or more neutral advisors known as “convenors” and a “facilitator” assembles a reasonable number of individuals (12-20) who represent the primary interest groups at a neutral location and begin to negotiate a proposed rule.
 - i. Notice of proposed rulemaking, comment period and judicial review of the rule itself still all apply.

- ii. Agency *does not* participate in the negotiation – neutral mediator.
 - iii. Action of the negotiation is NOT BINDING on the agency.
- B. 5 USC § 561 – Every fed agency has to consider whether to convene a negotiated rulemaking prior to the issuance of any rule.
- C. Benefits:
 - i. First meaningful different response to endless judicial review
 - ii. Saves billions in theory b/c by time it is done, likelihood of litigation is significantly less
 - iii. Positive reinforcement idea – those most affected by the rule would feel more comfortable w/ it by taking ownership of it - way of getting to a rule more likely to be accepted at the outset.
 - iv. Shows ppl how hard this process is.
 - v. Creative solutions are possible
 - vi. Increase probability of compliance
- D. Criticisms:
 - i. Ppl believe this process is a charade
 - ii. Incentive for groups to keep cards close to their chest, learn about issue and then challenge in ct – plus learn about interests of competitors.
 - iii. Difficult to ID who all the interested parties are and limit to a reasonable number.
 - iv. Alters dynamic of trad'l admin rulemaking from search for public interest (best rule) to search for consensus among private parties representing private interests
 - 1. If parties to the rule are happy w/ it, doesn't matter if the rule is rational or lawful
 - 2. Discretion delegated by Congress to agency is effectively exercised by group of interested parties
 - v. Expensive and Half of these negotiations fail.
 - vi. Due process issues
 - vii. Strong, powerful and organized interests stand to gain more than interests that are not well defined.
- E. **Considerations for potential negotiated rulemaking:**
 - i. Whether there is genuine need for a rule.
 - ii. Whether there are a limited number of identifiable interests that will be significantly affected by the rule (no more than 25 usually)
 - iii. Whether a balanced committee could be convened that can adequately represent the various interests and negotiate in good faith to reach a consensus on a proposed rule.
 - iv. Whether the negotiation process will not unreasonably delay issuance of the rule
 - v. Whether the agency has adequate resources to support the negotiating committee
 - vi. Where there is some likelihood of success
 - vii. Whether the agency will use a committee consensus as the basis for a proposed rule

- viii. Notice
- F. Seventh Circuit – Transcript of a negotiated rulemaking is NOT discoverable.

AGENCY CONTROL AND DELEGATION

XXX. Agency Control and Delegation Generally

- A. Delegation Issue
 - i. What is Congress is saying that prompts (i.e., delegates) agency action?
 - ii. There's a presumption here that there is a lack of Congress in what Congress says – that is the core problem here.
- B. Authority Issues
 - i. Is Congress delegating power that it actually has?
 - ii. Is Congress delegating power that is Congressional duty, and that cannot be delegated to another branch of gov't?
- C. Delegation discussion is a debate b/w formalism and functionalism.
- D. **Two Ways for Congress to Attempt to Increase its Power** – (1) increase its own power (*Chadha*) or (2) weaken President so much that by default, Congress becomes stronger (*Morrison*).
- E. **Two Basic Rules of Delegation Theory** – **Delegate clearly and delegate the power that you have.**

XXXI. Non-Delegation Doctrine

- A. Functions:
 - i. Ensures to the extent consistent w/ orderly gov'tal admin. That important choices of social policy are made by Congress.
 - ii. Guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient off that authority w/ an “intelligible principle” to guide the exercise of the delegated discretion.
 - iii. Ensures that courts charged w/ reviewing the exercise of delegated legislative discretion will be able to test that exercise against a standard.
- B. Two Contrasting Views:
 - i. Agency should be constrained by what Congress passes as legislation. Congress must be precise and cannot leave things wide open. Here, Congress was ducking the problem – executive should not be allowed to just regulate whatever it wants; Congress should decide the specifics.
 - 1. Constitutional Argument – Sep of powers prohibits the exec and agencies in particular from legislating, and the exec does just that when it doesn't receive sufficient guidance from Congress.
 - 2. Necessary and Proper Argument – permits creating agencies and giving them the power which is just enough to do their job (essence of deference)
 - 3. Checks and Balances Argument – Congress must have power to control the exec and it does that through precise delegation. Under republicanism theory, Congress should

decide these major policy decisions – checks and balances will fail if Congress gives up too much power.

- a. Counterargument – Congress can be active and reactive in giving and taking away of power – this is inherent in checks and balances. Congress is more powerful here.
4. Formalist Argument – Congress must follow Constitution and delegate precisely.
- ii. Agency should not be constrained – should have latitude. Congress shouldn't have to know the minutia – should just delegate power to regulate in that area and then permit executive to make these decisions. Deference.
 1. Const'l Argument – Necessary and Proper clause gives agencies the power that is necessary and proper for them to implement and enforce legislation. Essence of deference. Framers didn't intend for Congress to be involved in the minutia of gov't.
 2. Checks and Balances Argument – Congress has almost an unlimited power to protect itself by changing mandates – can be proactive by est. authority and retroactive by taking it away. So Congress still most powerful branch in this area.
 3. Republicanism Argument – Expertise/complexity. Don't elect reps to decide technical, complicated matters. Republicanism not jeopardized by having duly appointed and delegated ppl in agencies making decisions.
 4. Functionalist Argument – This is what works best.

XXXII. Delegation

- A. **Congress Must Set the Policy Standard When Delegating Authority - *Industrial Union Dept v. American Petroleum (Benzene Case)***
 - i. Background - In compliance w/ broad statute, OSHA construed legislation to require it to set standards at safest possible level that was technologically feasible – set a standard that may have been lower than necessary based on this interpretation.
 - ii. At issue – whether Congress intended to require a cost-benefit analysis when it included term “feasibility” in legislation?
 - iii. Holding – OSHA's rule was not valid b/c didn't make necessary threshold finding first. Unreasonable to assume that Congress intended to grant such sweeping authority.
 - iv. Rehnquist Concurrence: Statute was so imprecise that no one knows what Congress intended re: “feasibility,” thus that it cannot be implemented at all.
 1. This was an area where not unreasonable or impracticable for Congress to make detailed rules here – field was not sufficiently technical and ground to be covered was not sufficiently large.

- B. **Intelligible Principle Required in Congress' Delegation** – *Whitman v. American Trucking Ass'n*
- i. Proper Inquiry – Does the statute delegate legislative power to the agency?
 - ii. RULE – When Congress confers decision-making authority upon agencies, it **MUST** lay down by legislative act an *intelligible principle* to which the agency is directed to conform. An agency cannot cure an unlawful delegation of legislative power by adopting in its discretion what is a limiting construction of the statute.
 1. Ct here observed that a certain degree of discretion, and thus of lawmaking, inheres in most exec or judicial action.
 2. **Intelligible principle rarely found to be lacking** - In the history of the ct, it has found requisite intelligible principle lacking only twice (one in which there is literally no guidance for the exercise of discretion, and the other where authority was conferred to regulate the entire economy on the basis of assuring “fair competition.”)
 - iii. Background: Clean Air Act req. EPA to promulgate air quality standards for dif. air pollutants for which it issued “air quality criteria.” In setting standards, EPA considered implementation costs.
 - iv. Holding: Act did not delegate authority to consider implementation costs b/c relevant provision did not include such text while other parts of the Act explicitly directed those costs to be incorporated in other calculations. Expressio.
- C. **Delegation of Adjudicatory, Art. III Power to Agencies** – *Commodities Futures Trading Commission v. Schor*
- i. **There MUST be a significant incursion by one branch into the rights and powers of another before a court will get involved. (here, into the powers of the judiciary before an agency will be stopped from resolving a dispute).**
 1. If hit a point where nature of what agency is doing in the aggregate so overwhelms the ordinary function of what the judiciary is supposed to do, then ct has no choice but to intervene.
 - ii. Factors to Consider:
 1. Extent to which the essential attributes of judicial power are reserved for Art. III cts
 2. Extent to which the non-Art. III forum exercise the range of jurisdiction and powers normally vested only in Art. III cts.
 3. The origins and importance of the right to be adjudicated.
 4. The concerns that drove Congress to depart from the requirements of Art. III.
 - iii. How cts differ structurally from agencies?

1. Art III judges are politically insulated by lifetime tenure; not subject to pressure from other agencies; don't work in same bldg as parties before them.
- iv. Functionalism v. Formalism:
1. Formalism – Constitution clearly gives Art III cts and not agencies these powers.
 2. Functionalism – ALJs have experience and expertise in certain matters and are thus better qualified to adjudicate such matters.
 3. Balancing Argument – Want separation of powers, but need to recognize value of factfinding in cts of admin agencies; can't ignore as a matter of functionalism the value an agency has to a court. Need good factfinding to develop record – purest argument for sep of powers has to respect that.
- D. **Legislative Veto (Congress can't do job of exec) – INS v. Chadha**
- i. **RULE – Congress is said to be legislating whenever it alters the rights, duties and relations of persons – can only do this if there is “bicameralism and presentment.” Legislative veto of executive action is unconst'l.**
 - ii. Holding – House resolution vetoing the INS's suspension of Chadha's deportation violated sep of powers, b/c it counted as a legislative action, which must have bicameralism and presentment under Art. I. Efficiency is not compelling reason for avoiding Art I req. Congress was denying President right to veto legislation here, which takes over the role of the exec.
- E. **Congressional Power over Executive Officers – Morrison v. Olsen**
- i. **RULE - A statute can prevent the President from removing an exec branch officer (inferior officers) w/o good cause and still be permissibly within separation of powers if the removal restrictions do not impede the President's ability to perform his const'l duty. As such, Congress may not retain the power to remove (or share in the process of removing) officials engaged in executive functions.**
 - ii. Holding – Ct upheld statute b/c IC has a relatively brief tenure, limited powers, lacks policymaking authority power, and therefore is not “so central to the functioning of the Exec branch” as to require that the IC be terminable at will by the President.
 1. Act did not aggrandize Congressional power as Congress retained no powers of control or supervision over the IC.
 2. Act didn't result in any judicial usurpation of exec functions.
 - a. Appt of IC by special ct was essential to ensuring necessary independence of IC.
 3. Act did not impermissibly undermine exec powers.
- F. **Line-Item Veto (Exec doing the job of Congress) – Clinton v. NY**

- i. **RULE – Line item veto is unconstitutional – equivalent to President rejecting Congress’ policy judgment and relying on his own. By President’s canceling of a duly-enacted law, he is technically amending and repealing a law, which can only be done through bicameralism and presentment. Formalist.**
 - 1. Admin Law Argument for Line-Item Veto – Functional argument → Exec does this all the time through rulemaking (both formal and informal) – agency rulemaking is legislating, even though it is subject to judicial and congressional review.
 - ii. Delegation Problem:
 - 1. Congress must delegate clearly and only power it has
 - 2. Congress cannot change duly-enacted legislation w/o bicameralism and presentment and thus cannot delegate that power to the Exec.
 - iii. While President traditionally possesses authority to decline to spend appropriated funds, the line item veto goes beyond this, by giving Presidents the unilateral power to change the text of duly-enacted statutes. Constitution’s silence on this should be interpreted as an express prohibition.
 - i. Scalia Dissent: Congress has often given President authority to decide whether or not to spend appropriated funds. This is no different than allow President to cancel spending or a tax break.
 - iv. Question that Arises After Decision Rel. to Agencies – Can an agency enforce parts of legislation and not others as part of its discretion?
- G. **Chevron Deference Applies to Agency Delegation Interpretation – *FDA v. Brown & Williamson Tobacco Corp.***
- i. **RULE – *Chevron* applies to questions of an agency’s interpretation of its own jurisdiction, i.e., interpretation of its own authorizing legislation. Agency cannot expand its own jurisdiction; that is clearly w/in legislative domain.**
 - ii. Background: FDA had authority to regulate “drugs” and “devices.” Determined that nicotine was a “drug” and cigarettes and smokeless tobacco were “drug delivery devices” and thus it had J under empowering act to regulate tobacco, so it promulgated regs.
 - iii. Holding: FDA does not have J to reg tobacco as Congress had directly spoken to the issue (1st prong of *Chevron* – thus agency entitled to no deference), and that legislation precludes such J.
 - 1. Based this on earlier statute recognizing marketing of tobacco as one of US’s greatest basic industries and had Congress itself had directly addressed problem of tobacco and health through legislation. Agency reg then would have contradicted cong’l intent.

Judicial Review

XXXIII. Judicial Review Generally

- A. Matters that are reviewable identified in §§ 701-706. Judicial review is generally available except where:
 - i. Statute precludes judicial review - § 701(a)(1).
 - ii. Agency action is committed to agency discretion by law - § 701(a)(2).
- B. Standard of Review for Rulemaking and Rule-Like Decisions – **Can be overturned if Arbitrary, Capricious, or an Abuse of Discretion (cts cannot use jud review to substitute their judgment for that of the agency).**
 - i. Looks at (1) *process* and (2) *quality of the decision*.
 - ii. *Record must contain support* for the rule (different from substantial evidence).
 - iii. Doctrinal Expansion - Rulemakings and Rule-like Decisions Must have:
 - 1. Legally sufficient basis
 - 2. Credible enabling statute
 - 3. Statement of purpose (rule must explain itself)
 - 4. Record that supports the data (need to have a sense of the data itself – what was used to come up w/ determination – could come from the public record or not)
 - 5. Statement showing that the agency considered standards, alternatives, set out by the legislature (*Morton v. Ruiz*)
 - 6. (And something resembling a history)
- C. Standard for Review of Adjudicatory Decisions – **Substantial Evidence (more than a mere scintilla of evidence, but bigger than a breadbox)** – this is stronger standard than for Rulemaking – data supporting the decision must be more articulated in adjudicatory decision than in rulemaking).
 - i. Adjudicatory Decisions Must Have:
 - 1. Cannot be arbitrary and capricious
 - 2. Legally sufficient basis for its decision
 - 3. Clear goal or purpose for the decision.
- D. Under *Citizens to Preserve Overton Park*, cts are expected to give agency decisions a “hard look,” meaning that they should not be acting as a mere rubber stamp to agency decisions.

XXXIV. Scope of Judicial Review

- A. Substantial Evidence Test / Whole Record Review Req’d – *Universal Camera v. NLRB*
 - i. RULES – An adjudicatory decision **MUST** be supported by **SUBSTANTIAL EVIDENCE** in the record (§ 706(2)(E) – “shall set aside...action...unsupported by substantial evidence”). That evidence’s substantiality **MUST** take into

account the WHOLE RECORD, including anything w/in the record that detracts from its weight (§ 706 – “shall review the whole record”).

- ii. Background – NLRB hearing on potential wrongful discharge of ee for testimony made against company – company contended that firing was not out of reprisal, but for insubordination in other instance. NLRB believed company’s witness but still reinstated ee – initially upheld on appeal, but ct didn’t take into account the NLRB’s rejection of hearing examiner’s findings.
- B. **Function of Appellate Court Review** – Greater authority up the review chain, narrower the review becomes. Looks to see if they grossly misapplied standard of evidence or are there major const’l issues of the moment.
- i. Sup Ct looks at ct of appeals for application of substantial evidence test, etc.
 - ii. Ct of appeals looks at district ct or agency decision.
 - iii. Prioritization – ppl who observe witnesses have the best sense of determining whether they are telling the truth.
 - iv. **EXAM ANSWER**: Rationale – sep of powers; judiciary not supposed to make policy. Role of exec is to establish agenda and implement public policy as they see it. But ct has upper hand when it comes to interpretation of statutes, front line legal questions. Issue becomes whose opinion counts when.
- C. **Attorney General’s Manual on the APA** – Agency policy depends on who is in the White House. Policy shifts they represent reflected in the outcome of decisions. Judicial review of such decisions is in some way, thus a political process, meaning the consequences of the decision matter for exec policy.
- D. **Chevron Deference** – *Chevron v. NRDC*
- i. **RULE – If statute or statutory term is unambiguous and congressional intent is clear, the agency action is entitled to NO deference b/c there is no judgment call to which a court should defer. If, however, the statute or statutory term is ambiguous or silent re: the specific issue, and Congress’ intent is unclear, agency action is entitled to deference as long as it is reasonable and not arbitrary, capricious, or manifestly contrary to the statute.**
 - 1. What’s ambiguous and unambiguous is mostly a value judgment; reality is that most statutes are ambiguous.
 - ii. **Rationale** – If Congress left a gap to fill, there is an *express delegation* of authority for agency to interpret that gap by regulation.
- E. **Questions of Law & Chevron Deference** – *Connecticut State Medical Society v. Conn. Board of Examiners in Podiatry* (foot/ankle case)
- i. **RULE** – **An agency decision will normally get deference when there is an ambiguous statute; prior judicial scrutiny has been**

applied; and agency can claim the matter in question has been subjected to time-tested interpretations that consistently follow proper construction of the statute. An agency decision will NOT get deference when it concerns a *question of law*.

- ii. Rationale – Cts better suited for determining questions of law.
 - 1. Criticism – Determination of a question of law can have major policy consequences.
- iii. Holding – Statutory term “foot” did not include the ankle – **interpretation of a statutory term is a question of law, so the ct doesn’t give deference to board’s definition of ‘foot.’** Looked at plain meaning, leg intent, interpretation was not time-tested, and never had been subjected to jud scrutiny.
 - 1. Underlying Rationale for Holding - Board had self-interest here; was trying to expand its J. Cts won’t give deference to that.

F. Agency Policy Interpretations and Chevron Deference – *Christenson v. Harris County*

- i. RULES:
 - 1. **Interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines do NOT warrant *Chevron*-style deference; they are \entitled to RESPECT under *Skidmore*, but only to the extent that they have the power to persuade.**
 - 2. **Agency interpretation of its own reg is entitled to deference only when the language of the reg is ambiguous, and not when it is unambiguous.**
 - a. Rationale – To defer to agency’s position on an unambiguous reg would permit the agency, under the guise of interpreting a reg, to create de facto a new reg.
 - 3. **Agency interpretation that is derivative of notice and comment rulemaking is entitled to *Chevron* deference (Popper).**

G. Modifying Chevron - *US v. Mead*

- i. RULE – **Congressional intention drives court’s obligation to provide deference. Agency decisions 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 decision claiming deference was promulgated in the exercise of that authority.**
 - 1. *Mead* only applies to ruling letters, interpretative statements, general policy statements – *Chevron* still applies to formal adjudication, notice and comment rulemaking, and formal rulemaking.
 - 2. *Mead* is said to have increased the power of the cts to review agency action.

ii. **MEAD FACTORS for Determining Whether Agency Decision Gets Deference:**

1. Thoroughness of deliberative process
 - a. This case - fact that 46 different customs offices issued 10K-15K of these rulings each year indicated that they did not have legal force.
2. Existence of prior decisions that reflect a careful decisionmaking process – if the agency has thought it out and done it before, the more likely it will get deference.
3. Congressional intention
 - a. This case – authorizing legislation gave no indication that Congress meant to delegate authority to Customs to issue classification rulings w/ force of law; in fact, they provided for independent review of such classifications showing that it did not intend for it to have deference.
4. Necessity of deference/respect in terms of good faith implementation of the statute
 - a. Deference may be proper if it is necessary for businesses to rely on agency decisions so that they can function properly.
5. Public Expectation
 - a. If public expectation of uniformity in the agency action (that it will become law) is high, the more likely it will get deference.
 - i. This case – customs treated its ruling as only conclusive b/w itself and the particular importer.

H. **Judicial Review of Discretionary Decisions to Rescind Rules – *Motor Vehicle Ass’n v. State Farm***

- i. **RULE – Agency rescission is NOT agency inaction and is thus reviewed under the “arbitrary, capricious or abuse of discretion standard.” Agency, however, MUST offer a rational correlation b/w facts found and the choice made.**
 1. Previously there was no correlation requirement in rulemakings; now must have correlation requirement for data.
 2. APA does not address rescission – only promulgation
 3. Broad political theory doesn’t justify rescission of rule – regs are tantamount to law.
- ii. Court was saying the opposite of *Chevron* here – objective of deregulation had to be in accord w/ a statute and it was not. If agency wants deference, going to have to do things right. Credibility of agencies is at stake here.

xxxv. SUMMARY STATEMENT – *Mead* and *Motor Vehicles* are on side of politics and deference in admin law, and *Chevron* is on the other.

XXXVI. Statutory Preclusion of Jud. Review & Committed to Agency Discretion

- A. APA § 701(a) – Judicial review applies except to the extent that:
- i. (1) statutes preclude judicial review OR
 1. Applies when Congress has expressed such an intent
 2. Scheme/procedure attack may get around this exception
 - ii. (2) agency action is committed to agency discretion by law.
 1. Applicable where statutes are drawn in such broad terms that in a given case there is *no law to apply*.
 - a. Looking at statute and what agency is working w/, there is NO discernible standard against which a ct can evaluate the agency action or exercise of discretion, meaning reviewing ct can't do anything.
 - iii. EXCEPTION to the Exceptions: Judicial review will be permitted if the attack is based on scheme or procedure and claims that such scheme deprives client of DP or does not provide the essential remedy that is the right of client – this is not blocked by § 701.
 1. Heavy burden to prove that Congress wanted to block judicial review in a statute.
- B. Presumption of Reviewability of Agency Action – *Bowen v. Michigan Academy of Family Physicians*
- i. **RULE – There is a strong presumption that Congress intends judicial review of administrative action. Review is foreclosed only where there is “persuasive reason” to believe that Congress intended this result and where there is “clear and convincing evidence” of such intent. Just because a statute makes one type of decision reviewable does not necessarily mean that Congress meant to make other decisions by the same agency nonreviewable.**
 - ii. Holding – Permitted judicial review of a reg denying benefits despite preclusion of review of the denial of individual applications.
 1. **Scheme attacks cannot be precluded; only review of decisions made pursuant to a reg.**
- C. Prosecutorial Discretion & Presumption Against Review of Agency Inaction – *Heckler v. Chaney*
- i. **RULE – An agency’s decision not to take enforcement action is presumed immune from judicial review under § 701(a)(2), but this presumption is rebuttable where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.**
 1. E.g., *Dunlop v. Bachowski* – Ct found statute providing that sec of labor “shall sue to set aside an election if he finds probable cause to believe that a violation has occurred,” clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement.

- a. Certain types of proceedings that if agency does act individuals cannot get into court (e.g., employment discrimination cases) – need a reg on which to rely; when this is case, not so discretionary.
- ii. Rationale – Decision whether to act is strongly vested in agency discretion, who has expertise and presumably balances number of factors. Courts generally defer to procedures agency adopts for implementing a statute. Moreover, when agency refuses to exercise its coercive power over an individual’s liberty or property rights, it does not infringe on areas that courts are called on to protect.
- iii. QUESTION TO ASK – Is it an abuse of discretion which leaves no one a remedy, and b/c its an abuse, thus reviewable under § 706? Or is it committed to discretion by law and thus nonreviewable under § 701(a)(2)?
 - 1. Court resolves by looking at congressional intent.
- iv. EXAM ANSWER – If Congress fails to delegate w/ precision, it means there is an ambiguity in the statute, which would make Chevron applicable. If agency interpretation is reasonable, then Chevron dictates that ct must defer to agency action. But failure to delegate w/ precision is also a violation of nondelegation doctrine (only two things Congress needs to do when creating authority – can only delegate what it has, and can’t delegate so broadly that it gives away its responsibility under the ‘good of the welfare’ clause.
 - 1. Maybe this is a matter where Congress should have been more precise – thus APA calls for general presumption of reviewability. What level of review should occur?
- v. POTENTIAL REMEDY - If there is inaction but no review, still have § 553(e) that says every person has a right to petition an agency to try to get it to do something. Under § 555(e), agency must respond. Agency not immune from getting request for action, but at same time, only have a response obligation; little more.
 - 1. If inaction is not a case for judicial review, does P have any claim?
- vi. If the P is aggrieved by agency action, then they have a right of judicial review. Must have standing though.
 - 1. Is there a liberty or property interest implicated by the agency’s inaction? Is the agency the actor causing the harm? Need a real, personal, concrete injury for standing. Question often is whether the injury is sufficiently linked to the agency’s action or inaction.

STANDING

XXXVII. Standing Generally

- A. § 702 – Grants standing to a person “aggrieved by agency action w/in the meaning of a relevant statute.”
- B. Requirements for Art. III Standing – *Frank Krasner Enterprises Ltd v. Montgomery County*
 - i. P must establish:
 - 1. An “injury in fact” to a “legally protected interest” that is both (1) Concrete and particularized AND (2) Actual or imminent, NOT conjectural or hypothetical.
 - 2. A causal connection b/w injury and conduct complained of that is “fairly traceable” and not the “result of the independent action of some 3d party not before the court” AND
 - 3. A non-speculative likelihood that the injury would be redressed by a “favorable judicial action.”
- C. Zone of Interests Requirement – *Assoc. of Data Processing v. Camp*
 - i. **RULE – P seeking standing under APA must establish that he arguably falls “within the zone of interests protected or regulated by the statute or constitutional guarantee in question.” Interests can be found to reflect not only economic values, but also aesthetic, conservational and recreational (i.e., non-economic).**
 - 1. Importance of case – broadened zone of statute’s protected interests to allow others to gain standing through a broader understanding of the injury-in-fact requirement under § 702
 - ii. This Case – Comptroller of the Currency allowed national banks to perform data processing services, which injured persons in the data processing business. *Competitive injury* satisfied the injury in fact requirement under § 702.
- D. Causation & Remediability (also 3d party) – *Simon v. Eastern KY Welfare Rights*
 - i. Popper calls this case absurd b/c where other parties are acting directly and not the gov’t there is no standing under this case!! Counter to this case – but for the law that initiated this action, this whole pattern of action is never created!!!!
 - ii. **RULE – To have Art. III standing, there must be (1) a causal connection b/w injury and the conduct complained of that is fairly traceable and NOT the result of independent action of some 3d party not before the ct AND (2) a non-speculative likelihood that the injury will be redressed by a favorable judicial decision.**
 - iii. This case – Ct held that P had no standing to sue since denial of services might not have been *caused* by the IRS’s ruling, and a

change in IRS tax treatment of hospitals would not necessarily *remedy* the harm by guaranteeing the P free medical services (i.e., hospital may simply forego its tax-exempt status).

- E. **Absence of Nexus Requirement in Const'l Cases** – *Duke Power Co. v. Carolina Env'l Study Group*
- i. **RULE – Standing requires not only a “distinct and palpable injury” to P, but also a “fairly traceable” causal connection b/w claimed injury and challenged conduct. In an action based on a constitutional violation, however, a P who can meet the requirements of injury in fact, causation and remediability has standing even though there is no “nexus” b/w injury and const'l right being asserted.**
 - ii. Holding – P's injury was fairly traceable to the Act.
- F. **Requirements for Obtaining Art. III Standing** – *Lujan v. Defenders of Wildlife*
- i. **RULE - If P is not the direct object of the agency's action, burden to show standing dramatically increases. P must be more than a general commentator – no more associational standing. Direct harm must be caused by the agency itself.**
 1. Conventional citizen suits are still permissible – Congress' statutory broadening of categories of injury that may be alleged in support of standing is ok, but cannot abandon the requirement that the party seeking review must himself have suffered an injury. That is standing.
 - ii. **Requirements:**
 1. Must have injury in fact, meaning a real injury – something D did caused P's harm. Not the quality of causation here but a real connection.
 2. Legally protectable interest – can be more narrow than *Abbot Labs* or *Data Processing* formulation.
 3. Concrete, particularized and w/in the statute (this is language of limitation)
 4. Injury must be proximate and imminent, not conjectural and hypothetical
 5. Clear traceable injury b/w agency action and injury sustained
 6. Injury must not be responsibility of 3d party
 7. Injury must be likely to be redressed by a favorable decision
 8. P must be someone who is more than just a commentator – cannot merely be someone assuming general authority to critique.
 - iii. Standing is tough position on citizen suits. This case was about a congressional authorization of a citizen suit b/c no Art. III case and controversy and to allow the raising of a general grievance to

permit a citizen P to sue would be extreme violation of sep of powers.

- G. **Zone of Interests Test and Citizen-Suit Provisions** - *Bennett v. Spear*
- i. **RULE – Zone of interests test should be interpreted broadly; (Popper - standing is generally political and used by courts as prudential means for limiting or allowing suits).**
 1. This case – Congress said in statute “allow for challenge,” which Ct interpreted as Congress wanting suits to be brought. Thus only three requirements – injury to you; traceable to action of D; and favorable decision will redress injury.
 - ii. **FINALITY RULE – To be reviewable, action must mark the consummation of the agency’s decisionmaking process (rather than being merely tentative or interlocutory), and be one by which rights or obligations have been determined or from which legal consequences will flow.**
- H. **RIPENESS** – *Abbott Labs v. Gardner*
- i. **RULE – Ripeness requires (1) fitness of the issues for judicial decision and (2) hardship to parties of withholding court consideration.**
 1. Harm in this case would be imminent and more importantly, irreparable.
 - ii. This case – An FDSA rule required brand name on drug labels to be accompanied *every time* it was used by the generic or common name of the chemical. If manufacturer failed to comply w/ the reg, the AG could confiscate its products and seek criminal penalties. P argued that this reg exceeded FDA powers and sought injunction. Hardship was that P was in a **dilemma: either comply w/ the rule (which was costly) or defy it (which entailed risk of confiscation of products and even criminal sanctions)**. Thus was held ripe for judicial review.

XXXVIII. FOIA

A. Scope of FOIA - *Chrysler v. Brown*

i. **RULE – FOIA is not a requirement in and of itself – it is a protective measure. Agency has discretion to disclose info even if that info falls w/in one of FOIA’s exemptions. Unless there is some other law that restricts that agency’s discretion, ct can set aside agency’s disclosure decision only if it is arbitrary and capricious.**

1. If there is another agency-specific regulation that prohibits disclosure of exempt material, its decision is “not in accordance w/ law” under § 706(2)(A). Agency must abide by its own regs.

B. Deliberative Process Privilege - *NLRB v. Sears*

i. **RULE - 2 part test to accommodate competing concerns of frank and open discussion among gov’t officials vs. open gov’t theory behind FOIA:**

1. To be protected by deliberative process privilege incorporated into Exemption 5, an inter-agency or intra-agency communication must be:

- a. Pre-decisional AND
- b. Deliberative.