ADMINISTRATIVE LAW

Basics

- Agencies are executive bodies that administer or execute law
  - At the federal, state and local levels
- They are governed by Administrative Procedure Acts (APA's)
  - Local agencies are exempt
  - Agencies can be explicitly excluded by statute
  - Many state APA's are patterned on Model State Administrative Procedural Acts (MSAPA's)
- Agencies are generally created by legislation for the purposes of:
  - Research and publicity
  - Rulemaking
    - Rules have the practical effect of laws
    - Agencies also publish guidelines, interpretations, position statements, and other materials that have varying levels of efficacy
  - Licensing
  - Investigations and law enforcement
  - Ratemaking
- Agencies are checked in the following ways:
  - Judicial Review
    - Agency decisions are usually appealed to judicial courts
  - Executive and legislative review
    - Legislation can expand, contract, or redefine agency powers and duties, and the legislature may be able to delay or veto administrative action
    - The executive usually appoints the head of an agency, and may also have delay or veto powers

Evaluating Administrative Acts

- Do the costs outweigh the benefits?
  - Is the act likely to achieve the agency's goals assuming optimum administration, and what are those goals worth?
  - To what extent will the act interfere with the agency's goals?
  - Given the costs and benefits, does this act maximize the agency's goals?
- What are the costs of administering the act?
  - Is it more expensive than the benefit is worth?
  - Will it unreasonably interfere with the operation of the market?
- How much discretion should the agency have?
- Will the agency be captured by the market or groups it seeks to regulate?

Procedural Due Process

- Where an administrative body (governmental or otherwise) seeks to decide some matter regarding the rights and privileges of a citizen, that citizen may be entitled to a hearing regarding that decision

- Two-part test for determining if an administrative decision triggers Due Process concerns for the party for which the decision affects
    - First: Does the decision deprive the party of "life, liberty, or property"?
        - Property interests are defined by SCOTUS as interests which are given force by statutes, contracts, etc. that create that interest and that would be given force by courts. *See Roth*.
        - Contracts for employment that guarantee job security except for malfeasance
        - State laws that entitle citizens to receive welfare or other benefits
    - Second: If so, what Due Process is required to make the decision-making process constitutional?
        - The *Mathews* framework provides factors to consider in analyzing the sufficiency of existing procedure in administrative decisions, when a suit claims that a more detailed procedure is needed
        - Three Factors
            1. The private interest that will be affected by the administrative action
            2. The risk of erroneous deprivation of such interest through the procedure used, and the alternative procedural safeguards available
            3. The Government's fiscal, administrative, and miscellaneous burdens entailed by a substitute procedural requirement

Rulemaking v. Adjudication

Individuals who's rights are adjudicated by administrative agencies are entitled to Due Process, but what happens when the administrative agency makes a policy decision that affects many people?

Londoner v. Denver
SCOTUS, 1908

- A group of homeowners had an assessment levied on them for the paving of streets. They were allowed to submit written objections, but were not given a hearing prior to the assessment. Londoner objected to many aspects of the assessment, most because he claimed that his share of the assessment did not reflect the benefit he received from it.
- The Court held that the homeowners were entitled to a hearing.

Bi-Metallic Investment Co. v. State Board of Equalization
SCOTUS, 1915

- The Colorado Tax Commission determined that the property tax assessments in Denver were woefully undervalued, and therefore dictated that all taxable property in Denver be assessed 40% higher. There was no opportunity for any citizen to be heard before the decision was made.
- The Court held that no hearing was required.

The Distinction between the Two Cases

- *Londoner* concerned a factual dispute regarding specifically named parties, i.e. the benefit Londoner received from the paving and whether he should be assessed differently. The agency action in this case was disputed on the grounds of **administrative facts**, which are better adjudicated in a trial setting.
- *Bi-Metallic* was a policy decision that affected a massive number of people. It was based on broad swaths of data and on policy considerations unrelated to any individual parties. These are **legislative facts**, which are best adjudicated in the legislative arena.
- These outcomes are basically consistent with a *Mathews* framework analysis.
    - Factor 2: Administrative fact disputes, which can often involve issues of credibility, are much more likely to be adjudicated correctly in a hearing/trial format. On the other hand, legislative fact disputes often do not involve disputes of fact related to isolated events/credibility issues. They are more often policy choices that do not have a "right" answer.
    - Factor 3: whereas allowing the small number of homeowners affected by the assessment in *Londoner* to be heard would be relatively easy, the sheer number of affected parties in *Bi-Metallic* would make a hearing impossible.

Rules aimed at an open-ended class vs. Rules aimed at specific individuals

- What happens when an ostensibly class-based rule is de facto aimed at one or a small group of individuals?
- The best distinction is if the ostensibly open-ended policy is promulgated on class-based reasons or on reasons related to the affected parties.
    - A rule justified on individual-related reasons is an administrative decision, and not a policy one.

Administrative Adjudication

The statutory right to a hearing

Federal Law – The right to a hearing under the APA

- The Federal APA provides for the when and how of administrative hearings (5 USC 554)
- These proceedings are indicated only in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing"
    - When a statute provides that a hearing is "on the record", this usually signals that APA provisions apply
        - This is also sometimes noted as a distinction between "formal" (APA) and "informal" (what the agency decides is expedient) hearings
    - "On the record" means that the administrative adjudicator must consider only facts admitted at the hearing
    - The specifics of the hearing are outlined in 556 and 557
    - Agencies dislike APA hearings in part because they are required to employ administrative law judges
        - ALJ's are highly-paid industry experts that, once hired by agencies, cannot be employed in any other function
        - Agencies cannot evaluate ALJ decisions

        - ALJ's are assigned based on a selection process that does not favor the same factors that the agencies do
        - In non-APA proceedings, Administrative Judges are used. AJ's are simply agency staff who are used for the job, and who the agency can fire if they disapprove of their work
- The APA provides:
    - The administrative agency must separate its prosecuting and adjudicating functions, and have no *ex parte* contact with the administrative judge
    - If the private party wins, they are entitled to attorney's fees under the Equal Access to Justice Act
    - The administrative law judge (ALJ) must be hired and assigned to cases according to strict standards
- There is little in the way of requirements for "informal" procedures
    - Some DC Circuit cases have required agencies to provide minimal safeguards, but the Supreme Court has thoroughly dismissed the contention that courts can create extra-statutory procedure where Due Process does not mandate it
- Comparative Hearings
    - In some cases where several entities are competing for one available and exclusive license, courts have held that they must all be granted a single hearing before the license is issued, because an after-the-fact hearing would be meaningless
- *Wong Yang Sung* held that administrative proceedings that were mandated by the Constitution had the same implications as those mandated specifically by statute, thus triggering the APA procedure rules.
    - However this case has been frequently ignored, with the administrative details of successful Due Process claims being mandated on *Mathews* grounds

State Law – The right to hearing under state APA's

- The 1981 MSAPA provides an inclusive definition of adjudication, requiring all adjudicatory proceedings to be decided according to MSAPA rules regardless of whether or not an external statutory source mandates it
    - However, it still provides no guidance when informal proceedings are indicated
    - Some states require all adjudications to have trial type hearings, with detailed requirements for many different types of adjudication
    - Other states are less rigorous, but still require a hearing anytime a contested issue of fact exists
- **Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth.**
    - Maryland citizens sought to prevent the defendants from building an incinerator for which they required several permits from the Md. Dept. of Environment under the Clean Air Act. The citizens argued that they were entitled to a "contested case" hearing under the Maryland APA
    - The court found that section 2-404 of the Environment Article (of the CAA?) provided the statutory basis for a hearing, and that the particular dispute in this case met the Md. APA definition of a "contested case"
    - Therefore, the citizens were entitled to an APA hearing prior to the defendants receiving a license

- **Metsch v. University of Florida**
    - Metsch applied to UF law school but was denied admission. He requested an administrative hearing pursuant to a Florida statute requiring one any time a state agency adjudicated the substantial interests of a citizen. His request was denied.
    - The second district of FL courts applied the following test for claims for hearings made under the FL statute:
        1. The claimant must show an injury of immediate sufficiency to entitle him to a hearing
        2. The injury must be of a type the statute is designed to protect
    - The court held that Metsch's interest in admission to the law school did not rise to the level of "substantial interest", but rather was a "unilateral expectation."
        - To hold otherwise would entitle every unsuccessful applicant to a hearing, which is clearly impracticable
    - The FL statute provides a specific exemption for university decisions regarding students anyway, meaning Metsch's challenge fails (2) as well.
        - Metsch's argument that he is not yet a student, and therefore eligible, is clearly unreasonable. To believe that the legislature did not want hearings for current students but did want them for potential students is just dumb
    - Metsch clearly does not get a hearing

Rulemaking versus the right to a hearing

- In cases where an agency has created a rule to deal with a class of persons who have the right to a hearing, the rule will usually supersede the right to a hearing
    - The rule must address an issue which does not require a case-by-case determination
    - The rule must comport with the authorizing statute and be neither arbitrary nor capricious
        - **American Hospital Ass'n v. NLRB**: Unless Congress specifically states otherwise, the agency has the authority to rely on rules to deal with issues of general applicability
    - Generally, a "safety valve" exception is required to allows claimants to argue that the rule does not apply to their specific situation
        - **FCC v. WNCN Listener's Guild**: SCOTUS held that such an exception was not required
    - An example is a rule that defines the rights of persons for whom status has been determined at a hearing; i.e. the hearing defines whether a person is an A, B, or C, and then the rule states that "all A's are entitled to X, all B's are entitled to…"
- Administrative Summary Judgment
    - Agencies, like courts under FRCP 56, may dismiss without hearing those claims that do not raise any dispute of material fact
    - The 1981 MSAPA allows agencies to do so where they utilize a **conference adjudicative hearing model**, i.e. one that dispenses with witness testimony and cross-examination, and simply involves the parties submitting their claims to a presiding officer.

- **Weinberger v. Hynson, Westcott, & Dunning**: SCOTUS upheld the FDA's ability to dismiss applications for hearings on the certification of drugs where the manufacturer could not produce any scientific evidence (as defined by the FDA) to factually establish the drug's effectiveness.
- **Connecticut Bankers Ass'n v. Board of Governors**: In order to establish the existence of a materially factual dispute, a party must make a minimal showing beyond a mere claim that such a dispute exists

Institutional versus Judicial Decision-making

The Judicial Model:

- Administrative decisions should be made in a judicial trial setting. The adjudicator should be impartial and unconnected with either party

The Institutional Model

- Administrative decisions, including those involving disputes of fact, are part of the larger goal of the agency's administration, and should be done as in-house as possible to promote efficiency and utilize expertise.

Morgan v. United States
SCOTUS, 298 U.S. 468 (1936)

- The Dept. of Agriculture was charged with rate-fixing for the commissions paid to stockyard agents at a yard in Kansas City. The authorizing statute required the Dept. AG to give a "full hearing" on the issue of the proper rate. Pursuant to statute, the ratemaking decision was made by the Sec. of Agriculture, who had not heard oral arguments, received evidence, or read briefs filed by the agents with a hearing examiner; they claimed he merely rubber-stamped the examiner's decision.
- SCOTUS ruled that the deciding agent must be the same person who received and considered briefs, evidence, argument, etc.
    - "Full hearing" clearly invokes a proceeding of quasi-judicial character that so often safeguards the rights of claimants
    - The weight ascribed by law to the orders of administrative agents rests on the assumption that such orders were arrived at based on relevant evidence
    - This does not forbid an agency from using subordinates to sift and analyze evidence before it
- The agents were entitled to a full hearing before the Secretary.
- Although this advocated a rule of "The one who decided must hear", in practice this was not taken to its logical conclusion of requiring the decision-maker to hear every scrap of evidence put forth
    - In many cases, a hearing officer will take in all evidence and argument, and then consolidate and analyze that information for the decision-maker
- **Morgan II**
    - *Morgan II* held that Due Process required hearing officers to prepare intermediate reports with their recommended rulings
        - **Mazza v. Cavicchia**: Held that the claimants are entitled to see the contents of an intermediate report, and to object to its contents if so moved, before it reaches the final decision maker

- **In Re University of Kansas Faculty**: Where a final decision-maker does not adopt the findings of the hearing officer, he or they must examine the entire record and all available evidence
    - Such is presumed to have occurred unless either party can prove the contrary
    - **Citizens to Preserve Overton Park, Inc. v. Volpe**: Even if an agency fails to explain its decision, the party must make "a strong showing of bad faith or improper behavior"

Separation of Functions in Internal Administrative Decision-making processes

- The same official may not serve in both an investigative/advocating role in an administrative matter, and then act as decision-maker for the same matter.
- **Withrow**: An agency as a whole may perform both investigative/advocating functions and adjudicative functions.
    - ADA 5 USC 554(d): Prevents the same individual from investigating and deciding, but explicitly exempts agencies and boards from such restriction.
- **Lyness**: A Medical Board convened to hear evidence from the Board's prosecutor and voted to allow him to proceed with prosecution of Lyness for molesting patients. The prosecutor obtained a judgment from a hearing examiner suspending Lyness' license. That decision was reviewed by the Board, which still contained several of the same members. They upheld the judgment while increasing the penalty to revocation.
- The Penn. State court held that Lyness' due process rights were violated by the board serving the dual fact-finding and adjudicatory role
    - The court also held that the Penn. state due process statute allowed them to extend due process rights beyond *Withrow*.
    - A provision in the 1981 MSAPA explicitly contradicts this holding.
- APA and *ex parte* contact
    - 554(d)(2): ALJ's may contract non-adversary agency officials for consultation on pending cases
    - However, 554(d)(1): ALJ's may not have any contact with any adversarial parties in a pending matter without the opportunity for all to be present.
        - SCOTUS interprets this to include non-adversarial agency members from advising on *factual* issues
            - However, it does not preclude them from advising on *legal* or *policy* issues

Bias in Decision-making

- Due Process undoubtedly entitles parties in administrative decisions to an unbiased decision-maker
- In order to disqualify an ALJ, actual bias must be shown
    - Where ALJ's are drawn from practicing lawyers, the nature of a lawyer's practice is insufficient grounds for establishing a bias as an ALJ.
- However, there will be some cases where the probability of bias by an official is so great that he or she must be disqualified even without further proof, such as cases where the officer may have a financial stake in the outcome.

- Most often, these cases involve pecuniary interest
  - **Tumey**: The decision-maker had a specific financial interest in the outcome
  - **Ward v. Monroeville**: The mayor who also acted as a traffic judge of a small town was disqualified because the traffic fines he assessed went into the city budget, with more fines meaning fewer taxes
  - **Marshall v. Jerrico, Inc.**: Statutes that allow agencies to have their enforcement costs reimbursed out of civil penalties they assess are okay.
  - **Gibson v. Berryhill**: Where an entire profession has a pecuniary interest in the outcome of decisions, they may not act as decision-makers
    - **Friedman**: the court backed off this position slightly

- Showing bias generally comes from out-of-context statements made by the adjudicator
  - **NLRB v. Donnelley**: Statements made by an adjudicator in deciding a matter do not prejudice him or her from deciding it again on remand.
  - **Hortonville School Dist. v. Hortonville Educ. Ass'n**: A school board that negotiated with striking teachers was not prevented from disciplining those teachers later.
    - Where an agency inevitably becomes acquainted with a matter while pursuing its statutory duty, it is not biased from later adjudicating that matter
  - See 28 USC 144

Ex Parte Contact

- 557(d) of the APA prohibits *ex parte* communication relevant to the merits of a proceeding between a decision-maker and an interested party. This does not include requests for status reports.
- Three Elements determine whether *ex parte* contact makes a decision voidable:
  1. The communication must be relevant to the merits of the matter to be decided
  2. The communication must be an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given
     a. This does not include requests for status reports, however those can be held to be *ex parte* if they are used to exert undue influence
  3. The communication must come from an interested person
     a. Any individual or other person with an interest in the agency proceeding that is greater than the general interest the public as a whole may have.
     b. The interest need not be monetary, nor need a person be a party to the agency proceedings
- If these elements are found, the agency's decision becomes voidable, subject to consideration of the following factors in determining if the decision was irrevocably tainted:
  - The gravity of the communication
  - Whether the communication has influenced the agency's decision
  - Whether the party making the communication benefited from the decision
  - Whether the contents of the communication were known to the opposing parties
    - Also whether those parties had an opportunity to respond to the communication

    - Whether the vacation and remand of the agency's decision would serve a useful purpose
    - These are considered with respect both to the unfairness to the parties involved and to the public interest in the outcome of the proceedings
- *Ex parte* rules do not apply until an official judicial or quasi-judicial proceeding has been instituted
    - This may allow other parties, particularly congressmen, to contact agency members when a litigation is obviously pending *DCP Farms*
    - *Ex parte* rules also do not apply to informal decision-making *D.C. Federal of Civic Ass'ns*
        - However, a decision-maker who relies entirely on external pressure, even when allowed to consider external factors, may still have the decision struck down as "arbitrary and capricious".

Investigation and Discovery

Civil Investigative Demands (CID's)

- Orders by administrative agencies that compel disclosure of information or that seek to obtain evidence
- The administrative equivalent of a subpoena/search warrant
- Two-part inquiry as to validity:
    1. Is the CID seeking to investigate a matter for which the agency is statutorily authorized, and in a way in which the legislature has the power to enforce?
        - No specific complaint is necessary, as with ordinary warrants
        - Must comply with the procedural requirements of the enabling statute
    2. Does the CID target materials that are relevant to the investigation?
        - A showing of probable cause is not necessary to obtain an administrative warrant
        - The CID must be sufficiently specific about what is to be produced
        - However, if the CID seeks to search and or seize private property without consent of the owner, it must meet a higher, quasi probable cause standard *Barlow's*
            - The choice to search must be based upon reasonable and neutral standards
            - Can be obtained *ex parte*
            - Does not apply to businesses with a reduced expectation of privacy, such as liquor stores and gun shops, where there is:
                1. A substantial gov't interest in regulating the business
                2. Warrant-less searches are necessary to the enforcement scheme
                3. The owner is advised of the enforcement program
                4. The searches are limited in time, place and scope
- CID's must be judicially enforced
- Privileged information receives the same protections as it would in court
    - However, administrative defendants cannot refuse to testify, and decision-makers may draw negative influences from the assertion of privilege
    - Privilege does not extend to corporations and partnerships, even if the records might incriminate the custodian
    - The person asserting privilege must be in physical possession of the documents subpoenaed

- Privilege does not apply to documents seized pursuant to a valid search warrant
- Privilege only applies to documents that were produced at the compulsion of the state
  - Voluntarily produced documents are fair game
  - However, privilege may be asserted where producing the documents would "admit" that the party produced or possessed them

Admissibility of Evidence in Administrative Adjudications

Hearsay and other forms of normally inadmissible evidence are generally admissible for administrative adjudications

- Administrative adjudicators, unlike juries, are presumed to understand the inherently unreliable nature of hearsay, and to be able to consider it appropriately
  - Administrative adjudicators are also experts in their field, and presumably bring that expertise to bear on evidence before them
- See APA 556(d)
- Some specific agencies are required by statute/CFR/internal rule to observe certain evidentiary standards

To what extent can an administrative decision-maker rely entirely upon inadmissible evidence?

- Residuum Rule: Although an administrative decision-maker may accept any evidence that is put before it, the decision rendered must be based upon a residuum of normally admissible evidence. *Carroll v. Knickerbocker Ice Co.*
  - Even if the admissible evidence by itself does not meet the burden of proof
  - However, when the alternative to relying on hearsay is to get the better evidence that is readily available, refusing to rely on the hearsay is appropriate.
  - Federal courts do not follow this rule *Richardson v. Perales*
- Some jurisdictions permit exclusive reliance on inadmissible evidence *Reguero*

Burden of Proof

- The burden of persuasion in administrative cases falls on the party initiating the claims
- Most administrative decisions are decided based upon a preponderance of the evidence standard *Steadman v. SEC*
- Most administrative decisions are reviewed under the Substantial Evidence Test
  - The substantial evidence inquiry necessarily is case specific: in assessing the substantiality of the evidence or lack of it, variable circumstances may be considered, such as:
    - The alternative to relying on the hearsay evidence
    - The importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy
    - The state of the supporting or opposing evidence, if any
    - The degree of lack of efficacy of cross-examination with respect to the particular hearsay statements
    - The consequences of the decision either way.
- In some cases, allowing an agency to rely on hearsay violates an individual's right to confront witnesses against him
  - In such cases, the agency must show why it was unable to procure the witness
- Administrative judges are expected to take an active role in developing the record

Official Notice

- Administrative bodies may take notice of any fact or proposition which is very likely to be true
    - APA 556(e)
- This is especially useful where an adjudication requires the special expertise of the agency
    - However, when in an adjudication an agency intends to rely on members' expertise to resolve factual issues issues, due process requires that:
        - It notifies the parties and provides an opportunity for rebuttal.
            - This can be done by introducing expert testimony, but is not required to be done as such
            - This is not required where even a law jury would know the fact or proposition up for notice
            - Opportunity for rebuttal is available where a party can move to re-open a case upon learning of notice in an agency decision
        - Establish the notice on the record for meaningful judicial review
            - Reviewing non-administrative judges may not have the expertise necessary to effectively evaluate the use of notice

Finding facts and stating reasons

- When adjudicating any matter, an agency must engage in fact-finding to the extent required by statute or regulation, and provide notice of those facts to all interested parties.
    - This ensures that agencies act within the scope of their authority
    - This also provides for a reviewable record for appeals
- If an appellate tribunal determines that a decision is not accompanied by the necessary findings of fact, it will remand the matter to provide such record
    - Courts cannot impose procedural rules on administrative agencies beyond those found in controlling statutes and the APA. *Vermont Yankee Nuclear Power*.
        - However, a number of courts have found creative rationales for mandating basic findings to facilitate judicial review. *Dunlop v. Bachowski*
    - Agencies cannot provide post-hoc rationalizations on appeal *SEC v. Cherney*
- Especially in complicated matters, it is insufficient for the agency to simply state its ultimate conclusions of fact; it must also state its rationale

Res Judicata & Collateral Estoppel

- When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*/issue preclusion.
    - However, where a controlling statute explicitly subjugates an administrative proceeding to the outcomes of judicial remedies, such preclusion is not appropriate.
- The government can be precluded from relitigating an issue against the same party, even where that issue arises in a different forum. *US v. Stauffer*.
    - However, non-mutual collateral estoppel does not apply to the gov't. *US v. Mendoza* 464 US 154.

        - The gov't should not be forced to excessively appeal every single trial case in the interests of completeness
        - Political changes might dictate different trial strategies on certain issues
        - The gov't should be encouraged to press an issue in multiple forums, in order to force circuit splits and percolate cases to SCOTUS
    - Intracircuit Non-acquiescence: Where the gov't attempts to relitigate the *same* issue in the *same* circuit against different parties.
        - Heavily disfavored. *Lopez v. Heckler*.

Stare Decisis

UAW v. NLRB

- A CBA provided that National Lock Co. would "discuss" any relocation plans it had for its factories with the Union. An ALJ found that this waived the Union's preexisting right to "negotiate" relocations. This ran counter to a great deal of precedent that waiver of a statutory right must be explicit. The ALJ's decision did not mention the precedent decisions.
- Held: Although Stare Decisis does not strictly apply to administrative bodies, an administrative body can only go against precedent where it adequately explicates the basis of its new interpretation.
    - Although this reduces an agencies power to make common law, this encourages agencies to use their unique rulemaking functions to establish clear and consistent statements of law and policy
    - This also provides an additional check against the less-regulated hybrid powers agencies possess.
- Judgment: Reversed and remanded.
- Conversely, statements of precedent supplied to justify a decision, without further explanation, are also insufficient. *Flagstaff Broadcasting v. FCC*.

Equitable Estoppel

- Four elements are necessary to permit an estoppel defense:
    1. The party to be estopped must know the facts
    2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended
    3. The latter must be ignorant of the true facts
    4. He must rely on the former's conduct to his injury.
- However, SCOTUS has never permitted an estoppel claim against an agency. *Office of Personnel Management v. Richmond*.
    - Short of collusion by multiple government officials, the government cannot be compelled to act contrary to statute for any reason.
        - This doesn't completely foreclose the possibility of estoppel, but for all practical purposes it can't happen
    - Allowing these type of claims would give even low-level civil servants the *de facto* power to contradict any branch of government.
        - By giving contrary advice, a civil servant could entitle a citizen to a benefit which congress has explicitly rejected.

Rulemaking Procedures

Advantages of Rulemaking as opposed to adjudication

- All interested parties may participate
- Rules are superior to administrative adjudication precedent
    - Rulemaking procedures are better equipped to deal with policy considerations
- Rules apply prospectively only (and not retroactively), thus not interfering with reliance interests
- Rules are uniform and application, whereas adjudications are fact-specific
- Rulemaking allows for political input
- Gives agencies more control over setting policy
- Prevents agencies from having to relitigate an issue multiple times
- Rules are easier for interested parties to research
- Gives other branches of government a better opportunity to exercise oversight

Disadvantages

- Rules aren't as fact-specific or flexible
- Less responsive to new developments

The difference between a rule and an order

- Rule: The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting. *APA 551(4)*
- Order: The whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing. *APA 551(6)*
- The main distinction is between generalized and particularized effect
    - Whether it effects a class of unnamed individuals or a named party
        - A rule requires an adjudication to be effected against an individual However, the definition above would tend to include individualized ratemaking procedures
        - Under the 1981 MSAPA, specific ratemaking is an "order" subject to adjudicative procedures
    - Also, between retroactive (adjudication) and prospective (rulemaking) effect
        - A focus on past versus future events
- Non-legislatively authorized interpretations and guidelines are not rules

Initiating Rulemaking

Notice, comment, and revision of rulemaking

- APA 553(b)(3): The Federal Register of a proposed rulemaking must contain:
    - either the terms or substance of the proposed rule; or
    - a description of the subjects and issues involved

        - The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking.
- An agency may promulgate a final rule that differs in some particulars from its proposal.
    - An agency, however, does not have carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the comment period.
    - An interested party must have been alerted by the notice to the possibility of the changes eventually adopted from the comments.
    - All technical data that the agency relies upon in making a rule, insofar as it is obtained at the time, must be made available during the comment period. *Portland Cement Ass'n*.
        - However, information added to the rulemaking record after the comment period, so long as it is not heavily relied upon by the agency in justifying the final rule, is not subject to comment. *Rybachek, Idaho Farm Bureau*.
- **The Logical Outgrowth Test**: In determining whether a substantially revised final rule is promulgated in accordance with the APA:
    - The changes in the original rule must be "in character with the original scheme" and "a logical outgrowth" of the notice and comment already given.
        - The final analysis each case must turn on how well the notice that the agency gave serves the policies underlying the notice requirement.

Informal Rulemaking: Any rulemaking that does not trigger 553(c) requires only that the public be given notice that a rule is pending and be allowed to submit written comments to the agency

- However, agencies frequently use their discretion to allow more and different types of submissions

Formal Rulemaking: Section 553(c) defines formal rulemaking as when rules are required by statute to be made on the record after opportunity for an agency hearing

- Sections 556 & 557 then apply to define what procedure is required.
- Although the words "on the record" and "after a hearing" in an enabling statute usually trigger 553(c), they are not magic words, and 553(c) may be triggered by sufficiently similar language
    - Courts are extremely reluctant to interpret an enabling statute as requiring a formal rulemaking proceeding
- Courts may not impose additional procedural requirements on agencies, other than those contained in enabling statutes or triggered by APA provisions. *Vermont Yankee*.

Hybrid Rulemaking: Also involving cases where rules do not trigger 553(c), but where an enabling statute requires some type of procedure beyond the minimum APA requirements of notice and comment

- In such cases, only the additional statutory requirement need be met

Ex Parte Contacts and Political Influence

Once an agency begins rulemaking procedures of whatever type, *ex parte* contact by any interested party must be noted on the record and given time for comment by any other party

- *Ex parte* contact is an everyday reality of administrative functioning, and such contact should be made public only where they form the basis of agency action.
    - However, once a proposed rulemaking has been announced, agency decision-makers should avoid discussing the pending issue off the record.
- *Ex parte* contact is forbidden in formal rulemaking under 557(d), but not in informal
    - The President and his aids may engage in *ex parte* contact not noted in the record
        - Contacts must be docketed in cases where they concern the outcome of judicial proceedings that adjudicate the rights of others, or where required by statute.
    - Congressmen may also do so
        - Two conditions must be met before an administrative rulemaking may be overturned simply on the grounds of Congressional pressure.
            - First, the content of the pressure upon the agency must be designed to force him to decide upon factors not made relevant by Congress in the applicable statute.
            - Second, the Secretary's determination must be affected by those extraneous considerations.

Bias and Disqualification

- Rulemaking disqualification: A Commissioner shall be disqualified only when there is (1) a clear and convincing showing that the agency member has (2) an unalterably closed mind on matters critical to the disposition of the proceeding.
    - The *Cinderella* Standard: The standard for disqualifying an administrator in an **adjudicatory** proceeding because of prejudgment is whether a disinterested observer may conclude that the decision-maker has in some measure *adjudged the facts* as well as the law of a particular case in advance of hearing it.
    - This standard is very lenient; it recognizes the political nature of the modern administrative head's position and encourages the agency head as a component of an Administration's policymaking to advocate for proposed rules.

Findings and Reasons

Judicial Review of Rulemaking

1. Did the agency act within the scope of its delegated authority?
2. Did the agency employ fair procedures?
    - Informal as required by 553
    - Formal (556 & 557), if the statute requires decision to be made on the record after opportunity for an agency hearing (triggering 553(c).
3. Was the agency action reasonable?

An administrative decision must be supported by a statement of basis

- The statement should reflect the factual, legal, and policy foundations for the action taken
    - It should address salient public comments, and address potential alternatives
- However, it is not equivalent to a finding of fact by a court, and will necessarily vary depending on the material supporting an order and the terms of the order.

Administrative rules must be published in the *Federal Register*, and take effect no sooner than 30 days after publication

- See APA Section 552(a)

Regulatory Analysis

Agencies are instructed, by Exec. Order 12866, to engage in a basic economic cost-benefit analysis before promulgating a rule

- Includes analyzing feasible alternatives, and the CBA of not regulating at all
- This EO is not rigorously enforced by courts on review
- Some statutes requires special types of CBA

Rules as Policymaking

Exemptions from rulemaking procedure

- Federal and state APA allow agencies to forgo notice and comment proceedings if "good cause" can be shown
    - APA 553(b)(B) – exempts agencies when notice and comment would be unnecessary, impracticable, or contrary to the public interest
    - Must be supported by specific findings and rationale
    - Judicial review construes this provision narrowly
    - 553(d)(3) allows agencies to dispense with the 30 day effectiveness restriction in similar circumstances
        - Often invoked in tandem
- Unnecessary
    - When the agency has no discretion about the substance of the rule
    - When the rule is simply correcting a factual error
    - When a federal agency adopts a state rule that has already been vetted
- Impracticable or contrary to the public interest
    - Usually justified by the specter of irreparable harm in the near future
    - Imminent statutory deadlines for agency action
        - Unlikely to succeed if the agency has been dilatory
    - Where a notice and comment period would defeat the goals of the rule
    - "Interim-Final Rules" Agencies will usually accept comments for revision after a rule promulgated under these prongs takes effect
        - Not applicable to "unnecessary" scenarios
- Agencies can also invoke Direct Final Rulemaking
    - Under such procedure, an agency publishes its proposed rule in the fed. reg. and notes that unless it receives a negative comment within a specified time, the rule will take effect.
        - A single negative comment will trigger a reissue of the proposed rule under standard notice and comment proceedings
        - A useful alternative when the "unnecessary" prong is met
- Subject Matter exemptions provided by the Federal APA
    - 553(a)(1) exempts all military and foreign affairs rules

- 553(a)(2) exempts all rules pertaining to public property, loans, grants, benefits, and contracts; management of agency personnel
- 553(b)(A) exempts rules of "agency procedure, organization, and practice"
  - To qualify for such exemption, a rule must:
  1. Be procedural, in the sense that it does not have the force of law in court
  2. Not depart from existing practices
  3. Not exert a substantial impact on the industry or group of individuals that it seeks to regulate

- General statements of policy are exempt under 553(a)(A)
  - Two Part Test:
    1. The rule must operate prospectively
    2. The rule must not establish a binding norm or be finally determinative of the issues or rights to which it is addressed, but must instead leave the agency officials free to consider the individual facts in the various cases that arise
  - The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged directive leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the announced policy in an individual case.
  - In such case, notice and comment proceedings would be of limited utility
  - In contrast, to the extent that the directive narrowly limits administrative discretion or establishes a binding norm that so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion, it effectively replaces agency discretion with a new binding rule of substantive law.
  - An agency directive's or rule's effect on agency decision-making, not upon the public, should be the focus of any inquiry.
- Interpretive Rules are also exempt under 553(a)(A)
  - A rule is an interpretive rule only if it can be derived from the regulation
  - An "arbitrary" rule is one, usually assigning a numerical requirement, for which there is no valid rationale explaining why it must be that number and not some other
    - These will almost never be interpretive
- Some agencies waive these exemptions and institute notice and comment anyway

Required Rulemaking

An agency cannot declare a rule in adjudication

- Such would clearly sidestep the APA procedural requirements for rulemaking
- However, an agency can engage in a form of quasi-rulemaking by adjudication
  - If an agency consistently rules on certain facts in a certain manner, it can create a precedent which the qualified *Stare Decisis* of administrative adjudication will recognize
    - Moreover, the agency can use this precedent to enforce the rule as if it were made under 553

        - *Wyman-Gordon* involved Justice Fortas scolding the NLRB quite vehemently for basically declaring a new rule in adjudication. However, he ultimately upholds the exercise of the rule in a new case as a valid exercise of precedent.
    - However, agencies must limit the scope of the orders issued to address the facts and parties before them in the particular adjudication
    - Moreover, a precedent rule cannot have retroactive effect on parties who engaged in good faith conduct prior to the adjudication, specifically if such effect would:
        - Result in substantial adverse consequences for such good faith parties
        - Result in new liability sought to be applied retroactively
        - Result in fines or damages for prior conduct
    - Such an outcome will usually be declared by reviewing courts to be an arbitrary and capricious exercise of agency discretion
    - The Retroactive Effects Test (factors used to assess whether an agency's application of a new case-law precedent against any party's acts occurring before the establishment of the rule would be arbitrary and capricious):
        1. Whether the particular issues addressed in the case are of first impression
        2. Whether the new rule represents an abrupt departure from established practices
            - As opposed to merely filling a void in established law
        3. The extent to which the party against whom the new case-law would be applied has relied on the prior law
        4. The degree of burden imposed on the party
        5. The statutory interest in applying the new rule to the case at hand despite the reliance of a party on the old standard
    - The big issue here is whether an agency can use precedent to hold someone liable for conduct that violates a case-law rule
        - One issue is notice that the rule exists and what conduct violates it
            - FTC statute, and others, seek to provide notice requirements
        - Another issue is whether a party held liable for violating a case-law rule may attempt to re-adjudicate the precedent set by the rule
            - Agencies certainly have an amount of discretion in interpreting the applicability of its own precedent
            - However, a reviewing court may find that an agency's refusal to hear or consider evidence that prior adjudicative precedent is inapplicable or should not be continued is arbitrary and capricious
            - Moreover, a party subject to a case-law precedent established in a proceeding in which it was not a party has a due process right to relitigate the matter

Rulemaking Petitions and Waivers

APA 553(e) allows the public to petition for the issuance, amendment, or repeal of a rule

- Under 555(e), an agency must issue a brief statement of the grounds for denial of a petition

    - As a matter of agency discretion, such denial is judicially reviewable under the "arbitrary and capricious" standard
    - Such review is construed *extremely* narrowly by courts, and will almost never be applied
        - An agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed.
- Parties may also apply for waivers from certain agency rules
    - Subject to the same "arbitrary and capricious" standard of review
    - Also narrowly construed by the courts
        - An applicant must plead with particularity the facts and circumstances which warrant the waiver they request
    - An agency must only articulate with clarity and precision its findings and the reasons for its dispensation of waiver requests.Courts reviewing the validity of rules have a strong presumption towards requiring a provision for waiver applications

Political control of Agencies

The Non-delegation Doctrine

- A constitutional doctrine that holds that Congress is limited in its ability to delegate its legislative power to other branches of gov't
    - 1892-1930 (*Field*): SCOTUS held that Congress could delegate power where it has established an intelligible principle or primary standard by which the power was to be exercised by another branch
    - 1933 (*Panama Oil*): SCOTUS held New Deal legislation in violation of the doctrine. Section 9 of NIRA allowed the President to ban the transport of oil produced in violation of any state law by making it a federal crime. SCOTUS held that there was no primary standard.
    - 1935 (*Schecter Poultry*): Section 3 of NIRA allowed the President to adopt codes of fair competition for any industry. SCOTUS held that this was an invalid delegation of the Commerce power because there was no primary standard governing the President's discretion.
    - 1942-present: SCOTUS went back to allowing vague standards in the delegation of power. *Yakus* allowed the Emergency Price Control Act of 1942, giving the executive Price Administrator the power to fix maximum prices that were "generally fair and equitable"
- Current Rule: There is no forbidden delegation of legislative power if Congress shall lay down by legislative act an intelligible principle to which the official or agency must conform.
    - These standards may be found in the language of the statute delegating power, or in the legislative history of such act
    - The more fundamental the right that the delegation of power affects, the more rigorous courts have been in requiring a standard

    - Still applied *very* leniently, but occasionally used to apply pressure on courts to provide relief from an administrative action for other grounds
- State courts are more rigorous in their enforcement of the Doctrine
    - Courts examine delegations to administrative bodies, private parties, and to the Federal Government
    - Some courts consider whether procedural safeguards (such as notice and comment procedures for rulemaking) offer sufficient guidelines

Legislative and Executive Review of Agency Action

The Legislative Veto

- A means for the legislature to suspend or overturn agency action without going through the cumbersome and time-consuming process of changing the agency's enabling statute or passing a new law
    - Specifically, by requiring less than a majority of both houses/executive approval
- The *Chadha* decision invalidated a unicameral legislative veto, on the grounds that it was a legislative action and thus subject to the Constitution's procedural requirements of Bicameral passage and Presentation to the President.
    - Although the dissent feared that such a decision would wipe out similar provisions in hundreds of other delegating acts, in practical effect legislative vetoes have continued to be put into laws
        - Occasionally, these vetoes are structured differently

Alternatives to the legislative veto

- The Congressional Review Act (5 USC 801-808) requires that all major rules adopted by virtually all agencies be submitted to Congress before taking effect
    - Major Rules are rules of generally applicability as defined by the OIRA
        - A very broad definition
    - Such rules cannot take effect until at least 60 days after submission to Congress
        - Congress may still issue a disapproval resolution after the rule takes effect, and such a rule must be treated as if it never existed
        - If Congress disapproves a rule, the agency may not re-pass it in substantially similar form unless Congress authorizes such action by statute
    - Congress can block a rule with a resolution from both Houses and the President
- Legislative Oversight Committees, generally composed of members of both houses, may review potential and recently enacted rules
    - Generally, the hear comments from the public, advise agencies, and propose legislative action to overcome rules they deem unwise
    - Federal oversight committees take on more diffuse tasks, usually involving investigation and oversight of agency spending for the use of the Appropriations Committee
    - The GAO, as a legislative investigative agency, has some measure of authority to investigate executive branch activities for efficiency and fiduciary soundness
        - However the GAO has little authority to compel disclosure of information
- Some states use an Ombudsman, who takes private party complaints about state administrative agencies

    - Ombudsmen usually use the publicity that their investigations and recommendations generate
    - Useful where state legislators do not have the time, resources, or expertise to exercise oversight
    - Since Congressmen take complaints from their constituents, most federal agencies have Ombudsmen
- State and Federal appropriations bills can contain provisos altering the funding an agency receives for specific tasks
- Congressional floor debate may contain admonitions to agencies to behave particular ways
- Congressmen may contact agencies directly for status reports in an effort to achieve positive results for constituents

Appointments

- Any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must therefore be appointed in the manner prescribed by the Constitution's Advice & Consent Clause (Art. II, Section 2, cl. 2).
    - Officers must be appointed by the President with the approval of both houses
    - "Inferior Officers" may, at Congress' behest, be appointed only by the President, the Judiciary, or an executive Department Head.
        - *Edmond v. United States* stood generally for the position that an inferior officer was one who had a superior, i.e. someone who controlled the officer's discretion and could terminate them
- *Morrison v. Olson* allowed for inter-branch inferior officer appointment (in this case, the appointment of an executive-type prosecutor by the judiciary) where such other branch had expertise in the area/where such appointments were not incongruous
    - A good test for whether an appointment may be made by the executive only is:
        1. Does the officer have a superior?
        2. Would the appointment be incongruous?
- Whether ALJ's are appointed by Courts or Department Heads is the subject of some debate
        - *Freytag v. Commissioner* held (narrowly) that Tax Judges were inferior officers, appointed by Chief Tax Judges acting as Court appointers
            - The concurrence held that the Chief Tax Judges appointed them as agency heads
    - Some cases question whether ALJ's are even officers at all
        - *Landry v. FDIC* (D.C. Cir.) permitted the FDIC to appoint its ALJ's as employees, as they could not issue binding decisions (Tax Judges could), and their decisions were reviewed *de novo* by the FDIC.

Removal of Officers

Humphrey's Executor v. United States
295 U.S. 602 (SCOTUS, 1935)

- The Federal Trade Commission Act provided that the commissioner of the FTC could only be fired for inefficiency, neglect of duty, or malfeasance. President Roosevelt discharged Humphrey, the FTC commish, because they did not agree on policy matters. Humphrey's estate sued for back pay.
- Held: The President does not have the unlimited power to remove officers whose duties extend beyond the mere execution of laws, but instead involve legislative and judicial functions.
    - Officers of this type perform their duties without direct oversight by the President.
    - Congress undoubtedly possesses the power to require officers of this type to act independently of executive control.

- *Humphrey's Estate* stood for the position that Congress can create "independent agencies", free from executive control and designed to regulate purely for the benefit of the public.
    - Heads of independent agencies may not be removed by the President except for good cause
- *Wiener v. United States*: the President could not remove a member of the War Claims Commission, even though its enabling statute made no reference to independence.
    - The Court found that the Commission was entrusted with adjudicating matters according to the law, and as such was quasi-judicial in nature. *Humphrey's Estate* therefore put the WCC beyond the reach of the President.
- Ultimately, because agencies (independent or otherwise) work so closely with the White House in formulating policy, true independence is more of a political than legal matter
- *Morrison v. Olson* distanced itself from the "purely executive" vs. "quasi-legislative/judicial" distinctions of *Humphrey's/Myers*. Instead, the Court focused on whether a restriction on the President's ability to remove an officer would interfere with his "executive power" and his ability to ensure the "faithful execution" of laws.
    - The Court applied something of a balancing test on this issue, weighing the control the President retained over the officer against the interference that the officer's independence would cause to the President's powers.
- Congress cannot retain the power to remove officers. *Bowsher v. Synar*.
    - There are also considerable limits on the term which Congress can fix for an officer
    - Lengthy fixed terms can interfere with the President's ability to ensure faithful execution of the laws

Executive Oversight

Exec. Order 12866 directs agencies to submit proposed rulemaking to the Office of Information and Regulatory Affairs for approval

- OIRA's job is to ensure that proposed rulemaking comports with existing law, the President's priorities, and with decisions made by other agencies
- OIRA may only review "significant agency actions"
- OIRA can kick a proposed rulemaking back to an agency to amend any issues OIRA finds
    - Any conflict between OIRA and an issuing agency is resolved by the President

- However, the President cannot step in to resolve a conflict where Congress has made any provision to establish the independence of the agency's discretion
    - An agency decision backed by language from Congress instructing independence falls into Jackson's third category
    - A statute with no such language falls into the second, and therefore the President can resolve conflicts using his "faithful execution" power

Independent agencies

- The authority for this program is widely attributed to the constitutional directive to the President to ensure faithful execution of the laws

The President cannot use his oversight power to make law

- *Kendall v. United States*: The President cannot forbid an executive officer to execute a valid law
- *Youngstown Sheet & Tube v. Sawyer*: The President cannot direct executive officers to act in ways not supported by a valid statute
    - Justice Jackson's concurrence examined three scenarios: where Congress (by statute) directs the executive to act on a matter, where Congress offers no direction at all, and where Congress and the President seem to have roughly equal Constitutional authority to act. Jackson suggested that any evidence of Congressional direction should be given deference.

Judicial Review of Administrative Findings of Fact

Generally, agencies have unreviewable discretion to find fact and to make policy, but not to determine the legality of an action

- Review of findings of fact
    - Most cases involve review under the substantial evidence test, APA 706(2)(E)
        - If a reasonable person could have found as the agency did, then the finding of fact is upheld
        - Applicable only in reviewing formal adjudication or formal rulemaking
    - Informal adjudications and rulemakings are reviewed under the arbitrary and capricious standard, APA 706(2)(A).
    - Other standards in use, in order of scope from widest to narrowest:
        - *De Novo* review
        - Independent judgment on the evidence
        - Clearly erroneous
        - Some evidence (the scintilla test)
        - No review allowed
- Courts must affirm findings of fact which are supported by substantial evidence on the record *considered as a whole*.
    - Evidence that supports the finding by itself is insufficient; the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
    - Where an agency disagrees with its ALJ's finding of fact, a reviewing court will take into account the findings of both.
        - Some courts impose heightened scrutiny on the agency's decision when it countermands theALJ's findings. *Aylett v. HUD*.

        - Some states impose more stringent standards for agencies that adopt findings contrary to an ALJ's. *Pieper Electric v. Labor & Ind. Comm'n, Johnston v. Dept. of Prof. Reg.*
    - In reviewing a Court of Appeals application of the substantial evidence test, SCOTUS will rarely reverse
        - An exception was *Allentown Mack v. NLRB*

Judicial Review of Administrative Conclusions of Law

The Chevron Test: When a court reviews an agency's construction of a statute, it must look to:

1. Whether the statutory meaning with respect to the precise issue at hand is clear
    i. If Congress has spoken directly on the issue, whether in statutory language, in legislative history, or otherwise, the agency must conform to that mandate
    ii. Courts may use any of the traditional tools of statutory construction to determine this
        1. The Court has extended this to the examination of other, related statutes. *FDA v. Williamson Tobacco Corp.*
2. If the statute is ambiguous or silent on the issue, the court then examines whether the agency has applied a permissible construction of the statute.
    i. Considerable weight should be accorded by courts to an executive department's construction of a statutory scheme it is entrusted to administer.
    ii. Courts usually examine the same tools of legislative construction to determine if the agency's interpretation has a basis in those materials
    iii. In addition to that (or sometimes in lieu of), courts examine whether the agency has reasoned from the legislative basis in a fundamentally solid way.
    iv. Agency actions that forgo a statutory mandate to provide some regulation in a given area (and do not regulate at all) have been found to be unreasonable. *AT&T Corp. v. Iowa Utilities Board*.
        1. Similarly, agency action that relies on a general statutory mandate but that refuses to act within a specific provision limiting discretion within that mandate has been found unreasonable. *Whitman v. American Trucking Ass'n*.

- *Chevron* stands for the strong deference approach, and has been applied a great deal by lower federal courts.
    - The 2-step test infers a legislative intent to delegate discretion to resolve an interpretation where the legislature has not spoken explicitly to the issue
    - This results in deference to administrative interpretation in cases that Congress may never have intended
- *Mead*: However, administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.

    - Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.
    - However, formal (or informal) procedure is not critical to apply the *Chevron* test. *Barnhart v. Walton*.
    - Administrative actions falling short of the standard in *Mead* will usually receive weak deference under the *Skidmore* standard
        - However, the two standards tend to blend together
- Other exceptions:
    - Administrative interpretations of generically applicable statutes (such as the APA) are accorded no deference. *Collins v. NTSB, United Airlines v. DOT*.
    - Neither are administrative interpretations that limit one private party's statutorily-authorized cause of action against another private party. *Adams Fruit Co. v. Barrett*.
    - Agency interpretations of scope of jurisdiction. *Mississippi Power & Light Co. v. Mississippi*
    - Basic legal questions with wide import. *FDA v. Brown & Williamson Tobacco*.

Three potential scopes of review that a court may apply in determining if a construction is permissible:

1. Weak deference: A court reviews with some weight given to the agency's conclusion
2. No deference: The court reviews conclusions of law *de novo*
3. Strong deference: A court must accept an agency's interpretation of a law if such interpretation is "reasonable".
    a. Similar to the substantial evidence test applied to findings of fact

- A majority of state courts apply the weak deference test, using these factors to determine if an agency's interpretation should trump:
    - The agency has superior technical expertise or experience
        - As opposed to courts, which will have more experience with common-law and constitutional considerations
    - The agency is interpreting its own rules and procedures
    - The agency has gone through extensive procedures in coming to adopt the interpretation, such as formal rulemaking or formal adjudication
    - The agency's interpretation is backed by substantial consideration
    - The agency's interpretation was arrived at contemporaneously with the adoption of the statute
    - The agency has applied its interpretation over a long period of time
    - The interpretation has been applied consistently over time
    - The interpretation has created reliance interests in members of the public
    - The legislature has endorsed the interpretation
        - Where a legislature reenacts a statute unchanged with knowledge of an agency's prior interpretation of the statute, endorsement can sometimes be inferred
            - Hard to prove that the legislature knew
- A few apply no deference. *See Celebrezze v. National Lime & Stone Co.* (Ohio)

Review of Discretion in Adjudication

- Review of an agency adjudication begins by determining whether the agency has acted within its statutorily described authority
    - This inquiry will involve a *Chevron*/*Skidmore* analysis
- The decision is then assessed on its standard of review
    - Formal rulemaking and adjudication is reviewed on the substantial evidence standard. APA 706(2)(E)
    - Informal rulemaking and adjudication is reviewed on the arbitrary and capricious standard. APA 706(2)(A)
        - If an agency has taken into account a factor that the statute forbids, or conversely has not considered a statutorily mandated factor, than it should be set aside as arbitrary & capricious. *Overton Park*.
            - In reviewing a decision, a court may draw relevant factors only from the agency's enabling statute, and not from other, related statutes. *Pension Benefit Guarantee Corp. v. LTV Corp.*
    - ABA-recommended list of agency errors constituting an arbitrary & capricious action:
- An agency's decision can only be affirmed based on the rationale put forth by the agency at the time the case was decided. *SEC v. Cherney*.
    - Prevents the agency from utilizing post-hoc rationalizations
- An agency's decision is reviewed based only on the contents of the record before the agency at the time the case was disposed of. *IMS, P.C. v. Alvarez*.
    - Some cases allow courts to take additional evidence in highly technical matters, in order to better understand the issues on review. *Ass'n of Pacific Fisheries v. EPA*.

Review of Discretion in Rulemaking

- An agency's discretion in promulgating a rule is generally reviewed under the arbitrary and capricious standard
    - The scope of such review is narrow and a court is not to substitute its judgment for that of the agency.
    - The "Hard Look" aspects of federal review
        - Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.
        - In reviewing that explanation, the court must consider whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.
            - SCOTUS has suggested that exercised of discretion based on extremely technical and scientific info should be accorded wider deference. *Baltimore Gas & Elec. v. NRDC*.
    - The "Soft Look" standard:

        - The party challenging the regulation must show that the record does not affirmatively show facts which support the regulation. *Borden, Inc. v. Commissioner*.
        - A plaintiff must prove the absence of any conceivable ground upon which the rule may be upheld
        - This relies on the federally-rejected presumption that regulations get the same deference as statutes, and is popular among states
- Examples: An agency rule will be arbitrary and capricious if:
    - The agency relies on factors which Congress has not intended it to consider
        - *Motor Vehicles Manufacturing Ass'n*: The Court noted that that the agency was directed by its enabling statute to consider one factor as preeminent
    - Entirely fails to consider an important aspect of the problem
    - Offers an explanation for its decision that runs counter to the evidence before the agency
        - An agency is justified in refusing to regulate where substantial uncertainty exists as to potential results
            - However the agency must provide explanation of the evidence available, and how the rational connection between that evidence and the choice the agency ultimately made
    - Is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.
- The reviewing court should not attempt itself to make up for deficiencies in the agency's reasoning
    - The court may not supply a reasoned basis for the agency's action that the agency itself has not given.
    - The court will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Other Review Issues

The basic questions of judicial review:

1. Does the court have jurisdiction to hear the appeal?
2. Has the claimant plead a recognized cause of action?
    a. Does that cause of action ask for a recognized remedy?
    b. Will that remedy provide recognizable relief>

Jurisdiction

- Enabling statutes often contain provisions for judicial review
    - Which court a petition for review goes to
    - Who has standing to petition for review
    - The statute of limitations for petitioning
- Most federal review is done by appellate courts, unless additional evidence must be gathered
    - However states tend to use trial courts more
    - Some matters that pop up a lot and involve small claims are handled by federal district courts

    - Some State APA's dictate review procedures
- Without a statutory grant of reviewability, a petitioner must file a civil suit to show an alleged invasion of legal rights by the agency
    - Federal courts have jurisdiction under good ol' 1331
    - Alternately under 1361 if the claimant is seeking mandamus
    - Under 1343(3) if the action arises out of a 1983 claim
- Once jurisdiction is established, the particulars are set out by APA 701-706.
    - APA 702 sets out the right to review
- *City of Chicago v. International College of Surgeons*: The gov't can remove state court cases to federal court normally under 1367

Damages

- The most useful and sought-after remedies are declaratory judgment and injunction
    - Declaration that an agency action is illegal/has to stop, which are functionally the same thing
    - Jurisdiction under 1331
- A plaintiff may also seek a writ of mandamus, to compel an agency to take an action it refuses to take
    - Normally, a plaintiff must show that the agency has a "clear legal duty" to take a "ministerial" (not discretionary) action
    - Generally allowed only where no other remedy is available
    - Jurisdiction under 1361, however APA 706(1) allows for the same practical effect, without all of the potholes that trying to get mandamus has

Preclusion of Review

- Under APA 701(a)(1), judicial review may be precluded by language in the enabling statute
    - There is a strong presumption that Congress intends judicial review of agency action; only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review; where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.
    - Not "Clear and Convincing" in the strict evidentiary standard, but in the more conceptual sense that the presumption of reviewability is strong
- Under APA 701(a)(2), agency actions that are "committed to agency discretion by law" are not reviewable
    - This applies where the enabling statute has been written in such broad terms that in a given case there is no law for the agency to apply. *Overton Park v. Volpe*.
        - However, this exception is usually applied where substantive policy reasons can be shown to support it
            - *Doe v. Webster*, where the CIA Director's right to discharge any employee in the interests of national security was held unreviewable. Scalia points out that "national security" is a minimal standard against which discretion could be judged, however in the opinion, Rehnquist noted a host of national security interests supporting unreviewability.

- An agency's refusal to take an authorized action has traditionally been committed to its absolute discretion, and is presumed unreviewable. *Heckler v. Chaney*.
    - This is different from (a)(1).
        - (a)(1) statutory preclusion of review applies when Congress has expressed an intent to preclude judicial review.
        - (a)(2) discretionary preclusion of review applied where the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion, even where Congress has not affirmatively precluded review.
        - Essentially, the statute has committed outright the decision making involved to the agency, with no guidelines on how to decide
- Petitioners in cases of inaction have several remedies
    - They can argue that the enabling statute uses "shall" language to encourage enforcement as opposed to merely authorizing it
    - Erroneous legal interpretation

- Under APA 706(1), an agency's failure to act is reviewable only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required by law to take.
    - Two Requirements for Judicial Compulsion:
        - The action not taken must be discrete, in that it cannot merely be an omission of one of a multitude of possible actions that an agency could have conceivably taken, but rather must be a specific refusal to take a suggested or required action
        - The action must also be required by law to be taken, such that the court can compel an agency to take the action.
    - Where a statute calls for mandatory action but leaves the content of that action to the discretion of the agency, the court can compel the agency to act, but cannot tell the agency *how* to act. *Norton v. SUWA*

Standing to Seek Review

- The requirement of standing derives from Art. III of the Constitution, which limits the judicial power to deciding "cases or controversies" arising under US law.

Can an individual or entity seek the aid of a court to review the legality of government action?

- APA 702: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. *ADPSO v. Camp* imposes a two-part test for standing:
    1. Has the plaintiff alleged that the challenged action has caused him injury in fact, economic or otherwise?
        - First, the plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical."
            - The injury must be concrete and particularized, in that the injury must affect the plaintiff in a personal and individual way. *Lujan v. DOW*.
                - A general interest that a plaintiff claims in seeing the Constitution and its laws properly enforced does not generate standing

        - The injury must be actual or imminent, and not conjectural or hypothetical *Lujan v. DOW*.
            - Even a strong historical commitment to protecting an interest at stake is insufficient to establish standing. *Sierra Club v. Morton*.
    - Second, there must be a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.
    - Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
2. Is the interest the plaintiff wants protected by the complainant within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?
    - Generally enforced very leniently, as any effect that the operation of the statute has on the interests of the petitioner is usually sufficient. *NCUA v. First National Bank*.
    - The Court has at times looked to what parties are *intended* to be effected by the law, and noted that any law will have a wide variety of incidental effects on the interests of parties who should not have standing. *Air Courier Conference of America v. American Postal Workers' Union*.
    - Congress may abolish the Zone of Interest test by statute, such as when it grants private citizens the right to sue to enjoin the violation of an act. *Bennett v. Spear*.
    - The requirement is designed to prevent suits that are more likely to frustrate than further the goal of a statute. *Clarke v. Securities Industry Ass'n*.

- The party filing suit bears the burden of proving these elements of standing
    - The must be proven to the same standard as any other element of the plaintiff's case
    - The issue of Art. III standing must be resolved before any other substantive issue in the case. *Steel Co. v. Citizens for a Better Environment*
    - A plaintiff cannot assert the rights of third parties, called *jus tertii*
- *Lujan* tended to suggest that citizen suit provisions in Acts were invalid absent a showing of specific injury
    - However in *FEC v. Adkins*, the Court backed off that position by allowing a party to bring suit alleging an injury for lack of information as a voter, a general and particularized injury.
    - In general, Congress cannot create a new means of enforcing a law. The pressing example here is the citizen suit provision that ignores the specific harm requirement inherent in Art. III.
        - It can, however, create a new legal interest by broadening the existing acceptable causal chains that an existing enforcement means recognizes, as Kennedy's concurrence notes. This is done by specifying new injuries that a law seeks to vindicate and new classes of people entitled to bring suit. This is a sizeable exception to the ostensibly stringent restriction *Lujan* implies.

- *Lujan* also noted that where a procedural right is coupled with a discrete injury, causation and redressability do not need to be proven.

- *Hunt v. Washington State Apple Advert. Comm'n*: An organization has standing when:
  1. One or more of its members would otherwise have standing to sue in their own right
  2. The interests the association seeks to protect are germane to the organization's purpose
     - Theoretically protects members of advocacy groups from being precluded from litigating an issue by a prior suit filed by an organization not directly involved in the issue
       - For example, the NAACP litigating an environmental issue
     - Not policed very stringently
  3. Neither the claim nor the relief requested required the participation of individual members in the lawsuit
- State rules
  - In many states, any citizen has standing to bring a suit to enjoin the enforcement of any law not being executed
  - In many states, any citizen has standing to bring suit to enjoin environmental damage
  - In many states, any taxpayer has standing to bring suit alleging misappropriation of public funds

Timing of Judicial Review

When can a litigant engage a court in the review of an agency action?

- There are four doctrines which can apply to questions of timing, and all must be satisfied

The Final Order Rule

- Generally, courts can only review an agency's final order; all appeals processes within the agency must be exhausted to create a final order. APA 704.
  - Courts can also review non-final orders where irreparable harm caused by postponement outweighs the public benefit. APA 704, *EDF v. Hardin*.
    - Grant or denial of a preliminary injunction is generally reviewable, given the temporal nature of the relief it provides
  - Although most statutes explicitly require courts to only review final orders, statutes without explicit reference are treated the same way. *Carolina Power & Light*.
- *Bennett v. Spear*, There are two conditions that must be satisfied for finality:
  1. The agency must have consummated its decision making process, and not have issued an order of tentative or interlocutory character
  2. The action must have made a determination of rights and obligations, from which legal consequences are generated.
     - An agency action must have legal force or have an effect on the daily business/activities of a petitioner *FTC v. Standard Oil*.
- Agency action which must be submitted to and approved by the President is often deemed unreviewable under the APA, because the agency cannot issue a final

order and the President is not an agency. *Franklin v. Massachusetts*, *Dalton v. Specter*.
    - If a party petitions an agency to review an ostensibly final order, the order becomes non-final until the petition is resolved. *ICC v. Brotherhood of Locomotive Engineers*.

Ripeness

- The problem of ripeness of a controversy is best evaluated in two parts, requiring a court to evaluate both:
    1. The fitness of the issues for judicial decision, and
        i. Fitness includes whether the issue is purely legal, and thus not dependent on concrete factual situations to resolve
            1. Courts may also consider, in a pre-enforcement proceeding, whether the record justifies the need for the rule, provided the claimant meets the hardship standard
        ii. Whether additional administrative actions or other factual scenarios will change the legal issues presented for decision
            1. particularly, where enforcement by the agency might play out in a variety of different ways, such as frequency of enforcement and severity of the penalty
    2. The hardship to the parties of withholding court consideration
        i. Whether the parties day-to-day business will be substantially effected by the regulation
        ii. Whether waiting to challenge the regulation when the agency seeks to enforce it would be overly burdensome
    - The overall goal is to avoid adjudicating speculative controversies in which no party has yet been harmed (i.e. which are unfit). *State Farm v. Dole*.
- This doctrine is generally enforced in favor of allowing pre-enforcement review of agency rules
    - Occasionally, non-legislative rules (such as interpretive rules and policy guidelines have been found ripe for review where a party can demonstrate substantial hardship imposed by the rule. *Better Government Ass'n v. Dept. of State*.
        - The key issue is whether the non-legislative rule is a final, definitive position affecting rights and interests of regulated parties.
            - Informal rules issued by the board, commission or head of an agency (i.e. the superior decision making body) are presumptively reviewable. *National Automatic Laundry v. Shultz*
- Recent SCOTUS limitations on pre-enforcement review:
    - Where a rule limited access to a statutory benefit but provided no penalty for any sort of non-compliance, the Court did not allow pre-enforcement review. *Reno v. Catholic Social Services*.
        - The case involved a rule that restricted access to amnesty for illegal aliens who had ever left the country during a specified time. The Court held that review was only possible where an alien had been denied amnesty on those grounds *and* had been ordered deported.

        - The Court did allow aliens whose amnesty applications had been rejected but not processed to challenge preemptively.
    - Where a statute provided extensive administrative means for regulated parties to challenge the validity of the regulation, and where legislative history indicated that prompt enforcement of the rule was mandated by public interest, the Court held that pre-enforcement review was statutorily precluded. *Thunder Basin Coal v. Reich*.
        - Regulations required coal mine owners to allow union safety inspectors to access non-union mines. The mine owners could either allow access and risk unionization of the workforce, or risk stratospheric penalties for non-compliance to challenge the rule.
    - Congress generally frequently imposes very short windows of time for bringing a pre-enforcement challenge after the promulgation of a rule
        - Substantive, but not procedural challenges may be brought to a rule outside of this window. *JEM Broadcasting v. FCC*.
        - Courts generally enforce these windows with ripeness in mind, allowing challenges outside the window if no ripe issue could have existed within it. *Louisiana Environmental Action Network v. Browner.*
- Courts have discretion to grant stays of agency rules while the review process plays out, generally in the form of temporary injunctions.
    - *Cuomo v. NRC*: In assessing a request for a stay, federal and state courts generally look at:
        - The likelihood that the applicant will prevail on the merits
        - Whether the applicant will suffer and irreparable injury
        - Whether relief will substantially harm other parties to the proceeding
        - Whether the threat to public health and welfare relied on by the agency is sufficiently serious enough to justify immediate application
    - Courts should try to get the stay and the merits dealt with at the same time.

Exhaustion of Remedies

- The litigant must exhaust all other administrative remedies (above and beyond appeals) that might resolve the issue
    - Exhaustion protects administrative agency authority
        - Exhaustion is particularly relevant when agencies must apply their special expertise in reviewing a decision
        - Exhaustion also allows an agency to correct its own mistakes
    - Exhaustion promotes judicial efficiency
        - Administrative corrections on appeal make judicial review moot or more limited
        - Administrative review also produces a fuller and more well-considered record for any eventual judicial review
- Where Congress specifically mandates it, exhaustion is required.
    - However where it is not specifically mandated, courts ***balance*** the individual's interests in retaining prompt access to a federal judicial forum against the agency's institutional interests in autonomy and efficiency

- Where Congress has provided an optional avenue of administrative appeal, a plaintiff does not need to attempt it before seeking judicial remedy. *Darby v. Cisneros*, APA 704.

- *McCarthy v. Madigan*: Three sets of circumstances where individual interests trump exhaustion:
  1. Where resorting to administrative remedies will prejudice future judicial review
     a. Where agency review occurs in an unreasonable or indefinite time frame
     b. Where a plaintiff will suffer irreparable harm if unable to secure immediate judicial review
  2. Where an agency cannot grant effective relief
     a. Where an agency lacks institutional competence to resolve the plaintiff's issue
        i. Such as the constitutionality of a statute
     b. Where the plaintiff challenges the agency procedure itself
        i. Plaintiffs must still raise jurisdictional issues and purely legal questions in administrative proceedings. *Myers v. Bethlehem Shipbuilding Corp.*
     c. Where the agency simply does not have the power to grant the requested relief
  3. Where the agency is biased or has predetermined the issue
- Other factors to consider in assessing whether additional agency remedies must be exhausted:
  - Whether an agency's expertise is needed
  - The nature of the issue involved
    - Issues of law, constitutionality, etc, are better suited for judicial, rather than administrative review
  - Whether the plaintiff's suit is merely a dilatory tactic to avoid agency action
- The most common claim for exemption from exhaustion is that additional appeals to an agency would be futile
  - To qualify, an appeal by the plaintiff to the agency must be futile, and not merely unlikely to be successful, no matter how bleak the prospects. *Portela-Gonzales v. Sec. of the Navy*.
- Constitutional challenges almost always qualify for exemption from exhaustion
  - Constitutionality must still be brought before an agency where:
    - Exhaustion is required by statute. *Massieu v. Reno*.
    - Where a constitutional claim also presents non-constitutional issues
    - Where a plaintiff claims that application of an agency action to him personally is unconstitutional, as opposed to the rule or action being unconstitutional on its own
- Failure to exhaust by reason of not raising an issue at an administrative hearing or missing deadlines to appeal is irrelevant in an exhaustion inquiry, and the plaintiff is treated as having waived the issue. *United States v. L.A. Trucker Truck Lines*.
  - 1983 claims are never precluded by exhaustion deficiencies. *Patsy v. Florida Board of Regents*.

Primary Jurisdiction

- Where an agency and a court have original jurisdiction to decide a matter, this doctrine directs the court to defer to the agency in handling the matter