Administrative Law Outline

1) Non-delegation: agencies have to be lawfully delegated (supreme court has only struck down a delegation of power twice)
   a) court can't make statements of social policy[1] (given that congress is incapable of setting clear standards)
      i) new deal legislation was usually too broad
   b) Exceptions (intelligible principle or **pattern from similar legislation to follow**[2] and principles of accountability) → could be giving the president too much power over certain constituencies over others
      i) Old view: **Primary Standard**: There can be implied standard (e. g. in some cases the court will look to the intent)
      ii) New view: Intelligible principle[3] (can be vague, would like American producers to be able to compete with foreign producers at least on the American Market)
      iii) Usually needs to be a particular delegation to a particular agency
         (1) Congress has a right to make a law, which allows the President to do things if a certain contingency came about[4] (Congress didn't really delegate to the President the power to make a law)
      iv) Can't delegate outside of where there are controverted areas of policy or opinion[5]: (in the original case there was no indication of what the president should do)
         (1) Dissent: If Congress identifies something that needs to be done, and an area for delegation than delegation may be possible[6]
      v) President can't delegate away from himself[7]
   c) If the statute gives too much power: Should be construed so as to avoid too many constitutional questions[8] -- including whether or not the president had been given the right statutory guidance
      i) Delegation of power is unconstitutional if too vague to permit a reviewing court to determine whether the agency had acted beyond the scope of its power[9]
   d) Cost-benefit analysis: (to the extend feasible) – agency must look to whether the statute is zero-risk statute[10]: (agency must make connection if it is vague)
      i) Majority: court will sidestep the validity of a cost-benefit analysis
      ii) Concurrence: statute should be struck down, or sent back if statute vague[11]
      iii) dissent[12]: court should avoid setting social policy
   e) no delegation of public functions to private individuals[13]
      i) even a contract that binds one company by an action of another company is a delegation

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[1] Benzene case
[2] Amalgamated Meat cutters
[3] Hampton
[4] Aurora
[5] Panama Refining Company vs. Ryan
[6] Dissent by Cardozo in Panama
[7] Schechter
[8] Amalgamated Meat Cutters
[9] Yakus
[10] Corrosion proof fitting
[11] Benzene case
[12] Benzene case
[13] Carter Coal

ii) no power to create a fine can be delegated (but the definitions of the criminal behavior can be delegated)
iii) power to tax can't be delegated
(1) difference between taxes and fees:
(2) (agencies can be fiscally self-sustaining)
(a) was there a valid delegation to the initial agency
(b) can be valid, if it was just a fee (fee is something that is based on the services returned)

f) two steps questions
i) whether the delegation was valid
(1) need to have some paraphrasing of statutory language)
ii) whether the agency acted ultra vires (things can be a valid delegation, but still ultra vires)
(1) there could be a mathematical relationship that would make it not a tax:
(2) e. g. not within the power of the state department to deny passports, or using the draft for punishing war protesters

g) vagueness (not really delegation): can look to history of interpretation of word (defines whether a delegation of rulemaking or adjudication)
i) if it is so vague, it may really be a delegation of adjudicative power, and not legislative power

2) prohibition of legislative vetoes: (Committees are part of congress, but they are not under the APA)
a) Congress does have the power to investigate and hold people up to public scrutiny
i) There is executive privilege (if they are purely an arm of the executive branch)
ii) Power to advise and consent is basically limited to appointment itself
iii) Sunset clause: limits the life of an administrative agency (absolute or conditional)
iv) Congress can control the purse strings?
(1) Can do this very indirectly (and increase and decrease diligence of agencies)
v) President can control the personnel of an agency especially when making interim appointments, and it gives the president some power over the agency

b) Congress can't taketh back what they giveth away[14]
i) bicameralism required[15] and presentment (note: in Chadda, there was no debate or recording of the voice vote → but it was implied to be a legislative action)
(1) concurrence in Chadda says that the congress was acting as a court, as was its language (and hence, the congress was being adjudicator)[16]
(2) dissent in Chadda says that there can be a legislative veto retained in a delegation[17]
ii) Chadda does say that Congress can force agencies to institute a "report and wait" – the agency has to report to Congress the rules, for Congress to review
iii) Contract with America: Rules have to be submitted to congress and the GAO (for CBA)
(1) Major rules: GAO is required to submit a report to Congress in 15 days
(2) There is now a delayed effective date of 60 days from federal register or report from GAO
(3) If Congress passes a joint resolution, and tries to override a rule, courts are not supposed to take this effort into account

c) Legislature can't imbed legislative functions inside executive branch (removal power) may be an indication of who is controlling an official[18] in Bowsher -- will look to statute and to the function of the agency (e. g. allowing the president to fire its officers would give him the power to influence the agency)
i) Can't have the Senate appoint Officers[19] (only really heads of agencies)
(1) special prosecutors are not officers[20] (treated like an independent agency which results from negotiation, yet appointed by president, to do legislative work)

[14] Chadda
[15] Consumer's Union, Consumer Energy Counsel
[16] Powell in Chadda
[17] Chadda
[18] Bowsher v. Synar
[19] Buckley
[20] Morrison v. Olsen

      (a) courts can appoint officers
    (2) inferior officers can be appointed by non-president (e. g. tax court judges)
    (3) nothing in constitution regulates how employees have to be appointed)
  ii) Formalistic (majority) seperation of powers approach subordinate officials can't be subject to approval of senate[21]. Removal of officials for non-illegal activities can't be left with congress
    (1) Concurrence: it is possible to have obligations to two branches at once, and Congressional removal of the comptroller would be veto power
    (2) Dissent: these problems can be worked out during the legislative process
  iii) Modern view: can have the president restrict if the terms of a appointee (e. g. special prosecutor) was the result of negotiations between president and senate, and doesn't restrict the president
d) Removal for political reasons (Executive functions that are not exclusive in the domain of the president (as per the constitution) cannot fired by president for non-cause reasons[22][23])
  i) If the officer does not use the power that is vested in the president by the constitution, than the president cannot remove for political reasons (e. g. FTC is a quasi-legislative and quasi-judicial)[24]
    (1) President doesn't need to have a reason to fire people in an "executive branch agency"
  ii) Independent agencies there needs to be cause
    (1) They maybe should be thought of as arms of the legislative branch (e. g. they fulfill legislative dictates)
  iii) Reorganizational powers
    (1) President has the power to, in the face of certain statutes reorganize an agency to make a certain person chair (e. g. FCC)
e) Congressional restrictions on executive power to remove (e. g. independent counsel) One view is that there is bargaining that goes on between the president and congress
  i) Court will read the statute in a way that is constitutional
  ii) Real question is whether the removal restrictions are of such a nature that they impede the president's ability to perform his constitutional duty and the functions of the official must be analyzed in that light[25] → majority used what the minority called a balancing test
    (1) In fact, the balancing test may be deferring to a bargaining that went on during the lawmaking processing when the law was passed
f) Dual role of judges in executive and in judicial branch will not be considered to be a compromising position[26] -- if a functional view is taken, it doesn't matter where the commissions physically sit
  i) Independent counsels are exercising purely executive functions, but they cannot be dismissed by the president[27]
    (1) Scalia (by himself): independent counsel is unconstitutional
g) Executive review
  i) Clinton executive order draws distinction between important an unimportant executive orders
    (1) Reagan
      (a) If OMB was dissatisfied with the OMB in rulemaking, the OMB could leverage agency[28]
        (i) President controls this – and its stays there until it is certified that the president would get past this
        (ii) By requiring the preparation of economic impact reports, the president imposed a set of other requirements
      (b) 12291 never applied to independent agencies (some followed voluntarily)

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[21] Myers
[22] Humphry's
[23] Weiner
[24] Humphry's
[25] Morrison
[26] Mistretta
[27] Morrison
[28] Executive or 1291

(2) Clinton: 12291 has a more flexible notion of costs and benefits, OIRA reviews
(a) Can take into account more qualitative
(b) Vice president has greater role
ii) Reagan and Bush orders required CBA for anything
h) Formalistic view of legislative usurpation: Even if there is a delegation of power, if it is the legislature aberrantly acting as an executive it will be struck down
3) Creation and maintenance of Rights
a) Congress can create new rights – and the adjudication of rights can be given to an agency[29] (e. g. workmen's comp) (common law)
i) Old law (Crowell) was based on distinction between public and private rights
ii) Adjudication of rights (e. g. acting as courts): distinction of public v. Private rights is less and less
(1) Public is defined as which arises between government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments
(2) Private is defined as rights between citizens
b) Inquiry into reassignment of jurisdiction
i) three means to allocate judicial power
(1) purposes underlying the constitution's allocation of judicial power to article 3 courts
(2) how consistent with these powers is reallocation to agencies
(a) should the courts acquiesce to legislative choice
(3) Schor test to determine whether or not the delegation is proper
(a) Particularized area of the law[30]
(b) Is there judicial review? [31]
(c) Public rights v. Private rights are a non-dispositive factor? [32]
(d) efficiency[33]
(e) is it an independent agency – executive branch agencies can't adjudicate[34]
(f) consent of parties[35]
ii) If the agency's jurisdiction is narrow than it adjudicate private rights that were pre-existing given a transactional relationship to a congressionally created right[36]
(1) If there is an opportunity for the petitioner to chose the form his is filing in,, he can waive that in federal court[37] -- and hence waive a right to a jury
(a) appellate review isn't enough
(i) Background: Congress can't give away power to adjudicate common law rights to non-article 3 judges[38]
1. Old exceptions to constitutional rights to courts in article III[39]
a. Military[40]
b. Territorial [41]
c. Public rights[42] (government v. private party)
i. Public rights can deal with private parties[43]

[29] Crowell
[30] Schor
[31] Schor
[32] Schor
[33] Schor
[34] Schor
[35] Schor
[36] CFTC v. Schor
[37] CFTC v. Schor
[38] Northern Pipeline v. Marathon (Bankruptcy)
[39] Northern Pipeline v. Marathon (Bankruptcy)
[40] Northern Pipeline v. Marathon (Bankruptcy)
[41] Northern Pipeline v. Marathon (Bankruptcy)
[42] Northern Pipeline v. Marathon (Bankruptcy)
[43] Thomas v. Union Carbide

(b) Transference of rights
  (i) Pre-existing private right can't be moved around (bankruptcy)
  (ii) If congress created the private right it can be moved around
  (iii) Public rights (can only sue the state when it permits it to) → can be adjudicated wherever
    1. If it was a public right that congress had created, congress can decide where it wants the issues to be adjudicated
(c) If the right was created statutorily and not under the common law (e. g. NLRB) than it is possible to avoid adjudication via juries[44] (e. g. the amendment is no applicable to new causes of action)
  (i) Old rule: if the right to a jury trial existed in 1791 than jury trial right is preserved
    1. Inquiry centers on the identity of the form
    2. Equity, admiralty, and military courts operated without juries
  (ii) New rule: if the quality of the action is similar to a common law action than the right is preserved[45]
    1. 7th amendment is inapplicable when congress assigned public rights to agencies
      a. wholly private, tort, etc. Are not implicated[46]
        i. needs statute
        ii. needs new right
        iii. needs to be public right
      b. one only gets a jury trial in a common law action (e. g. not equitable or injunction)
    2. if congress transfers a matter which used to be subject to the 7th amendment to an agency, the very act becomes a public right free of the 7th amendment[47] -- argument is that this is the "same remedy in a new form"
      a. but, there is no chance that congress can eliminate 7th amendment rights by transferring civil actions en mass to agencies[48]
    3. congress can create remedies that are analogous to common law action and place them beyond the 7th amendment and put them in a place were jury trials are unavailable – but the supreme court still hasn't answered the question of whether an agency can hold a jury trial[49]
      a. this will come up where there are private parties on both sides
    4. criminal matters are right out
      a. can be administrative power to detain or to quarantine
      b. hard to tell the difference between a criminal sanction and a civil penalty
      c. look to the language used by the statute that delegated the power
        i. look at the language of what the statute calls the penalty
(d) If there is a concurrent jurisdiction of the common law courts, the agency can't really hear it (if there is a jury demand)
(e) If a court has to enforce the order of an agency, where there is a jury trial requirement for that remedy, the court has to hold a jury trial

(2) There can be minimal infringement of article III if this is given to an ALJ
  (a) Note: ALJs are not subject to the same protections as federal judges
(3) Courts can still act as a check on the agencies should they be adjudicating too much[50] (e. g. court will uphold a right of a company to go out of business)[51]

[44] BLRB v. Jones and Laughlin
[45] Curtis v. Loether
[46] Atlas roofing
[47] Myron v. Hauser
[48] Atlas Roofing
[49] Granfinanceria SA v. Nordberg
[50] Thomas v. Union Carbide

4) Functional v. Formal[52]
   a) Functional: asks what the purpose of the branches of government is
   b) Formal analyses tends to restrict the powers that congress can delegate
5) information gathering
   a) agencies can inspect (need statutory authority): can say that if no criminal sanctions are possible, than no warrant required
      i) 4th amendment limits unreasonable searches and requires a warrant
      ii) usually need a warrant
         (1) can get a general warrant (doesn't need to have individualized suspicion) – e. g. searching every 11th business
      iii) warrentless requirements
         (1) need a pervasively regulated industry
            (a) can be an industry that wasn't previously held to be pervasively regulated[53]
            (b) all that is required is record keeping[54]
         (2) need a statute that authorizes the search (statute is substitute for the warrant)
         (3) can't be false motive – but needs to be have at least some genuine search for a regulatory violation
         (4) remedies
            (a) generally illegally taken evidence can't be taken – but there is no supreme court authority on point
      iv) reporting and record-keeping
         (1) needs to be statutory authority
         (2) official curiosity (doesn't need to be a strong reason)
         (3) can't be too burdensome
         (4) can't claim fifth amendment
            (a) can claim fifth amendment if it could later be a fifth amendment issue
      v) agency publicity: little that can be done to resist agency publicity
         (1) no one has a liberty interest in their reputation[55]
   b) can require records
   c) subpoenas : specifics can always narrow what an agency can do
      i) testimony
         (1) hard to resist
            (a) can be things that the agency is seeking in connection with something that it does have jurisdiction
         (2) can object to specific questions
      ii) documents
         (1) has to somehow be relevant to the subject matter of the proceeding
         (2) same standards as record keeping
            (a) can be no fifth amendment if one is required to keep them
         (3) need statutory authorization
         (4) need a fair showing of relevance
         (5) can't be outrageously burdensome
         (6) same privilege
         (7) fifth amendment privilege – as there can be criminal exposure
            (a) if the documents along are incriminating it isn't enough
            (b) implicit statement
               (i) authenticate
               (ii) existence
               (iii) show possession
                  1. the fifth amendment applies only to acts of production

[51] Textile Workers Union
[52] Thomas v. Union Carbide
[53] Berger
[54] Berger
[55] Paul v. Davis

(c) corporations don't have a fifth amendment privilege
iii) agencies can draw a negative inference from invocation of the fifth amendment
(1) could be immunity on the criminal side, which forces people to testify
iv) always have the right to have an attorney present

6) Sources for formulation procedure of agency: Note: INS has been excluded from the APA by statute, but is still subject to constitutional requirements
a) Basic sources of procedural requirements
i) Organic statute
ii) Procedural regulations
iii) APA requirements – § 551
(1) Everything that exercises authority of the US government
(2) Definitions of agencies (exclusions – what doesn't count as an agency) –
(a) Congressional committees
(b) Courts
(c) Governments of territories or possessions
(d) DC government
(e) Military courts
(f) President[56]
iv) Federally created common law
(1) Government interest
(a) May be a government interest in keeping people off welfare roles, rather than dismissing them for any reason[57]
(b) once a property interest is conferred by the legislature, it can't be deprived without due process, and due process is defined by the constitution[58]
(2) constitutional procedural due process: sets a minimum on the amount of process that agencies can provide
(a) only applies to governmental actions
(b) only applies to individualized actions:
(i) action has to be directed at a small number of people[59]
1. questions of "who, what where and why" and what a court would decide
2. (see creation of property rights)[60]
(ii) generalized actions[61]: involves legislative facts (kinds of facts a legislature would take into account)[62]
1. e. g. a court couldn't decide "how much more tax revenue would a city need?"
(iii) e. g. can modify a license, without due process, so long as it is a class of people, and it applies to the future[63]
(c) protected interests -- they have to be taken away deliberately
(i) Liberty interest
1. Fundamental liberty interest (in the constitution, or supreme court says it is fundamental) – do not need to find a right under state law
a. Speech (agency can't take away without due process)
b. Voting (agency can't take away without due process)
c. Privacy (agency can't take away without due process)
2. Massive disruption of fundamental liberty interests
a. E. g. being sent to a mental hospital
b. convictions extinguish liberty interests[64]

[56] Franklin v. State of Massachusetts
[57] Cleveland Board of Education
[58] Loudermill
[59] Londoner
[60] Londoner
[61] Bi-Metalic
[62] Professor Davis
[63] American airlines

i. transfers to a solitary confinement situation do not involve a deprivation of liberty

c. Under Paren Patria, it might be that the court can act in the favor of the children

3. state created liberty interests (non-fundamental liberty interests) where we look to state law, agency regulations or non-fundamental liberty interests)
   a. a liberty interest created in a statute, (even for parolees) is protectible by due process[65]
      i. do not have a liberty interest in the prison setting unless it is an atypical and significant hardship[66]
   b. have to inquire into whether or not the statue uses "must" or other liberty-granting words[67][68]
   c. where they take away discretion, there is an interest[69]

(ii) Property rights -- not to be distinguished with civil rights: Court will not impose due process requirements to take the place of civil rights actions post-facto[70] -- **property interests are always dependent on something that is expressed in state law**

1. Taking away new property requires a hearing[71] (government jobs, social security, rights as a government contractor)
   a. If a new property is subject to a non-adjudicator decision, such decision is not subject to due process[72]
   b. One judges new property by the rights given at its creation[73]: has to be objective (e. g. more than just unilateral expectation, an entitlement)
      i. Ten-day suspension from public school is an example of abridgment of property rights[74]
   c. There are no liberty interests in injuries to To reputation: If the damages come about without due process, than merely tort damages are not enough: must be a "stigma plus"[75]
      i. Transfer to a mental hospital can be stigmatic[76]
      ii. Need to have more than just a loss of job
      iii. Making it hard to get any job (especially under a state law) is indeed a liberty interest[77] (happened to be looking for employment in field where she was blackballed)
      iv. Stigma plus can never be satisfied unless there is not only a stigma, but an additional anticipated (by all parties) detriment[78] (also has to be something that prevents someone from doing something (e. g. buying liquor))
2. Property rights: If a property interest was created by the legislature and then taken away, its effect on a person will be deemed to not be an effect on individuals

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[64] Mechan v. Fano
[65] Allen
[66] Snadun
[67] Kentucky
[68] Wolf v. McDonald
[69] Sandin v. Conner
[70] Sindermann
[71] Goldberg
[72] Goldberg v. Kelley
[73] Roth
[74] Goss
[75] Paul
[76] Vitek
[77] Val Monte (2nd Cir)
[78] Sieger

a. Licensing
b. Government disability insurance
c. Public utilities
d. Reliance on the continuing benefit is objectively reasonable, one is entitled to a hearing on it[79] -- this isn't subjective reasoning

3. Creation of property rights vis-à-vis other members of society (ie overall tax increases)
   a. Even if there is only one member of an effected class, if it is taken away effecting everyone than it is okay[80]
      i. Apportionment of costs requires a hearing[81] (e. g. effect of party on individual grounds)
      ii. Small classes: not the taking away of an overall property right
   b. Process requirements
      i. Overall tax increases do not require hearings[82]
      ii. taking away of a right requires a hearing[83]
4. If property is created by a statute, than you can't separate the restrictions on the property that the statute might have[84] (bitter with sweet)
   a. Once property exists, there needs to be due process[85]
   b. Litigant must accept limitations on the property right (administrative procedures by which the employees are determined) [86]
5. Could be a property interest if an agency granting a license can only grant on license – so those who stand to lose have a right to be at the hearing

(iii) Procedures on their own do not create an interest

(d) Amounts of process an agency can provide

(i) substance of process[87]

1. overall factors according to Justice Friendly
   a. unbiased tribunal[88] (also burden on the government)
   b. notices of proposed actions[89]
   c. opportunity to present reasons[90]
   d. right to present evidence[91]
   e. right to know opposing evidence[92]
   f. right to cross-examine witnesses[93]
   g. decisions based exclusively on the evidence presented[94]
   h. right to counsel[95]
   i. requirement that the tribunal prepare a record of the evidence presented[96]

[79] Sinderman
[80] Soutnern Railway v. Virginia
[81] Londoner
[82] Bi-metalic
[83] McMurtray
[84] Arnett
[85] Arnett
[86] Arnett
[87] Justice Friendly
[88] Justice Friendly
[89] Justice Friendly
[90] Justice Friendly
[91] Justice Friendly
[92] Justice Friendly
[93] Justice Friendly
[94] Justice Friendly
[95] Justice Friendly
[96] Justice Friendly

j. requirement that the tribunal prepare findings of fact and reason in writing[97]

2. balancing test of the current law for **the floor** of procedure
   a. nature of the private interest
      i. e. g. there is a difference between "dire need" in welfare and social security
   b. risk to that interest posed by a challenged procedure and the likelihood that a different procedure would better protect that interest
      i. **if something is an easy question of fact**, (e. g. medical determination), a post deprivation hearing is okay[98]
      ii. whistle-blowing might be given deference as it is necessary to reduce whistle-blowing possibilities[99]
   c. burden on the government
      i. it can be unrealistic to say that the government can sue to get the money back[100]
3. equation increased assurance from additional procedure * interest of claimant > increased burden on government
4. examples
   a. welfare requires advanced hearing because of high risk
   b. disability does not require hearing because of a lower risk[101]
   c. the longer school suspension, the more process needed[102]
   d. procedures the school went though are given deference[103]
   e. no financial interests allowed[104]
   f. if the legislature was the source of the property interest (e. g. Medicare claims, they had the total discretion)[105]
   g. toll-free hearing system may be adequate[106]
   h. arrest can be an objective, reasonable means for suspension
   i. limitation on fee to attorney is constitutional[107]

(ii) adequacy of post-deprivation remedies
1. paddling requires no pre-penalty hearing, but tort or 1983 claims can be made
2. random and unauthorized actions don't require a hearing[108]
3. pre-reinstatement: some procedures
   a. opportunity to present, and evaluate evidence, and cross-examine people

(iii) some say that cross-examination is a critical element

(iv) Procedures for loss of benefit
1. Notice[109] (may be from due process)
2. Cross-examination[110]
3. Counsel (government doesn't have to pay for the lawyer)[111]

[97] Justice Friendly
[98] Matthews v. Eldridge
[99] Brock
[100] Brock
[101] Mathews v. Eldridge
[102] Goss
[103] Horowitz
[104] McClure
[105] McClure
[106] Grey Panthers
[107] Walters
[108] Hudson
[109] Goldberg
[110] Goldberg
[111] Goldberg

4. Oral presentation[112]
5. Neutral decision maker[113]
6. Norm is pre-termination, and burden is on government to prove why they need to do something[114]
    a. Having to pay benefits for a few months is not problem

(3) Agency justification for decisions

v) Judicially defined constitutional requirements

7) General philosophy for rulemaking **(§ 551-5)** one has a rule when it applies to class of person for future effect – it is like rulemaking, so it is very hard to show that they have an unalterable closed mind

a) Requirement of rulemaking: not unconstitutional to base something on something too vague[115] (e. g. dissent by in Schecter – if the problem is identified and there is accountability)

i) Actual notice can take the place of publication – but not in all states

ii) Government has to be bound by standards[116]

iii) Effected people need to know what the standards are[117]

(1) Courts cannot require the agencies to follow additional procedures that are not in the APA[118]

(2) However, there could be certain instances that are extremely compelling, that additional procedures could be required (e. g. a very small number of person would be "exceptionally affected" by a proposed rule) -- individualized facts might be at issue[119]

(a) Note: applying statutory terms to a set of facts, will be regarded as a type of decision of law – and statutory interpretation will be done by the agency for the sake of uniformity[120] (or that the NLRB was experts)

(b) But, when a pure question of statutory interpretation is present, the court must use the traditional tools of statutory interpretation[121][122]

iv) Notice and comment rulemaking is required if it is a fundamental change

(1) E. g. different subject

v) Regulation can't violation constitution (e. g. content-based sliding, capped scale on demonstrations)

(1) Two principles

(a) Treat similar people the same

(b) Treat different people differently

(2) Vagueness, when effecting a constitutional right, can be unconstitutional[123]

(3) Government needs to have some standards in assigning licenses;' Systems that are vague and encourage political favoritism can be unconstitutional[124] (meaning that there is a right to a hearing)

(a) Random standards are OK[125]

(b) Regulation can be a substitute for a case-by-case discretionary analysis[126] (if discretion is granted, regulation can still be made, and no discretion used)

(c) Minority: requires the case by determinations[127]

[112] Goldberg
[113] Goldberg
[114] Goldberg
[115] Boyce
[116] Boyce
[117] Boyce
[118] Vermont Yankee
[119] Vermont Yankee
[120] Hearst Publications
[121] Cardoza
[122] Packard
[123] Sogline
[124] Hornsby
[125] Holmes
[126] Fook Hong Mak
[127] Asimakopolos v. INS

vi) Unfunded mandate reform act
(1) Unless prohibited by law, agencies before promulgating a proposed or a final rule that includes a federal mandate that may result in the expenditure by state, local or tribal government of more than $100 must have a statement that includes a
(a) Enabling statute (organic act of the agency)
(b) CBA
(c) Consideration of disproportionate effects of the mandate on different parts of the country or communities
(d) Estimate of the mandate's effect on the national economy
(e) Description of the agency's consultation with local official
(2) Courts an force an agency is make statement can be grounds for enjoining
(a) Failure to make such a statement

b) Agency is bound by its legislative rules until it changes them[128]
i) Agencies only need to follow their own rules when enforcing or applying their own rules – so other agencies or cases not under agency direction don't count[129]

c) Agency must provide basis for action
i) If grounds are inadequate or improper, court must reverse -- even if there is a ground supporting it, the court won't imply that grounds[130]
(1) The court will show deference[131]
ii) Chenery1: agency must show reasoning (not equity)
iii) Chenery2: agency can decide to decide everything on the basis of adjudication, if it wants

8) Agency Procedures
a) choices of rulemaking or adjudication
i) definitions
(1) 551: adjudication: agency process for an order
(a) an order is anything that is not a rule-making
(2) adjudication apply to specific named persons
(3) if something is a rulemaking, but it is specific enough, it has to have due process like adjudication
ii) record[132]
iii) court will make the presumption that an agency has a legislative power, and is engaged in rulemaking, for fairness sake[133] -- court will allow agency to make "informed discretion" in their choice of rulemaking or adjudication
(1) agencies will be given the power that it seems that congress had assigned it[134]
(a) agencies are bound by their own rules
iv) if the language of the statute itself already had a way of dealing with the problem, than no other implications will be made[135]

b) Rulemaking -- because of the power and convenience of rulemaking, courts imply the power to make substantive, not just procedural rules[136]

[128] Arizona Grocery
[129] Caceres
[130] Chenery 1
[131] Chernery 2
[132]

	Yes (formal)	No (informal)
Rulemaking	Formal rulemaking	Notice and comment rulemaking (FCC notice and comments
Adjudication	Formal Adjudication (ALJ an sss)	Informal Adjudication (ranger in park)

[133] National Petrolem Refiners
[134] National Petrolem Refiners
[135] Amalgamated Transit Union v. UMTA

i) Notes on rulemaking
   (1) ratemaking is rulemaking, but it is of particular applicability (note: there are never any internal ex-parte restrictions in rulemaking)[137]
   (2) but can't use the adjudicatory process to make a rule (e. g. in adjudication can't make decision that applies only in the future)[138]
      (a) agency can use its "informed discretion" as to whether to make a rule or adjudicate[139]
      (b) may or may not be an abuse of discretion to make the wrong choice
ii) In general, agencies can't be forced to make rules (could decide whether to work out the problem on a case by case basis)
   (1) Might be required to make a rule, if the decision reversed a long-standing policy[140]
   (2) § 553e: One can petition to have a rule made
iii) Formal – (rarely required) – usually the statutes just say "public hearing"
   (1) no formal requirements where it applies to an entire super-class[141]
      (a) "hearing" can be defined to be just a hearing on paper
      (b) the criteria for a hearing and process would be what triggers a hearing
         (i) hearing can mean different things
      (c) could streamline into
         (i) all evidence, rulings and decision
         (ii) made available to parties
         (iii) ability to be heard
         (iv) objection opportunity
iv) Informal rulemaking §553 (exemptions for military, feign affairs, agency management, personal, loans, grants, contracts, public property - no public procedure necessary)
   (1) requirements
      (a) needs to be in the federal register
         (i) § 553a announcement of proposed rulemaking has to be in federal register
            1. time, place and nature of rules
            2. legal authorization
            3. terms or substance of the subject that are involved in the rule
         (ii) in the case of "substantive" rules, that they won't become effective for 30 days
            1. do not need 30 day restriction for relief of restriction
            2. interpretive and procedural rules don't count
            3. exception for unforeseeable emergencies
            4. do not need to have delay for interpretive rules or statements of general policy[142]
            5. emergency rules – for good cause, the agency can get around the 30 day requirement
               a. "interim final rule" is defined as a rule made under the emergency provision, but the agency later decides to take comments
      (b) opportunity for interested persons to be heard: "interested person may appear so long as the orderly conduct of business permits" (usually just on papers)
         (i) prejudice isn't determined by the rule, but by a lack of opportunity to comment (even if it is a favorable rule)[143]
         (ii) later appearance of executive or legislative documents won't be held to be prejudicial[144]

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[136] National Petroleom Refiners
[137] Chenery, Bell Aerospace
[138] Weiman-Gordon
[139] Chenery 2
[140] Retail Clerks
[141] Florida east coast railway
[142] Community Nutrition Institute
[143] American Medical Association
[144] Sierra Club v. Costle

- (iii) courts have suggested that "limited cross examination" is a way to deal with disputed technical issues[145]
  1. formalizing rules as to informal formal hearings sucked
  2. judges can't add to the procedures required by the APA. courts can't make a agency follow non-APA hearings[146] (notice of disclosure of facts could be held not to be a question of hearing but of notice itself)
     - a. minority view: can still interpret the statute to impose requirements[147] -- **only when interpreting the organic statute**

- (c) § 553c: concise general statement of basis and purpose
  - (i) agency regulation, can however, be defective if there is no discussion of the basis and purpose of the rule[148] -- e. g. there is such a thing as being too concide
  - (ii) some courts say this needs to be very detailed
    1. no need to respond to every comment
    2. can't switch rationales
- (d) court will presume the existence of facts to support (so no requirement of a record)[149] and no rational basis review (needs to have a plausible relationship to any permissible goal)

(2) hybrid rulemaking: if the enabling statutes, or regulations, or agency whim -- could be required by due process **only if** this is an individualized action (if there is a property or liberty interest) – checking the Matthew's balancing test
- (a) can require public hearing or cross examination
- (b) courts have no authority to imply additional procedural requirements
  - (i) note: under the *Ventilation doctrine* which required airing of issues, courts implied more procedure.[150]
  - (ii) Courts need to cite additional sources of law that would grant other procedures
- (c) Still constitutional requirement (e. g. in rate-making)
- (d) Vermont Yankee hints that there May be requirement if the agency goes against its practice

(3) informal notice and comment rule-making (end-run around possibility of a hard-look by courts):
- (a) exceptions for opportunities to be heart by informal notice and comment rulemaking: even within the exceptions, the public needs to be kept informed
  - (i) procedural rules[151]: actions that do not alter the rights or interests of parities[152]
    1. inquiry is made into what the real effect on the regulated industry is[153]
    2. even the manner at which people are paid[154]
    3. if procedure effects the right to an adjudication, the rules are therefore, functionally substantive[155]
       - a. dissent: everything becomes substantive[156]
  - (ii) interpretive rules (descriptive and prescriptive activities of agencies) – note it may be that an interpretive rule by an agency head is binding
    1. descriptive: by example (by reminding)
    2. *by not going through notice and comment rulemaking, a rule, can be interpretive and enforcement of it is, hence not binding*

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[145] International Harvester, Appalachian Power
[146] Vermont Yankee
[147] United States Lines
[148] Weyhauser
[149] Pacific States Box
[150] Vermont Yankee
[151] 553b
[152] American Hospital Association v. Bowen
[153] Pharmaceduical Manufactures
[154] National Association of Home Health Agencies
[155] Air Transport Association
[156] Air Transport Association

3. new requirement heretofore nonexistent, is not interpretive[157]
4. so long as there is discretion it is not a true rule, but an interpretive rule[158]
5. if an agency acts as if a discretionary interpretive rule (e. g. balancing test) is really a strict rule, it will be deemed not to be a interpretive rule[159]
6. four-pronged test of American Mining Congress (if any true than not interpretive)
    a. whether in the absence of a rule there would be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties[160]
    b. whether the agency has published the rule in the CFR[161]
    c. whether the agency has explicitly invoked its general legislative authority[162]
    d. whether the rule effectively amends a prior legislative rule[163]
7. a policy is only a statement of the administrative agency's intent – look to see if the agency had the legal effect[164]
8. interpretation of prior substantive regulations: once a rule is made by notice and comment, than the agency can't turn and vitiate it by interpretation[165]
    a. interpretations can't have substantive effect, and determination is by functional analyses.[166] E. g. : can't broadened effect[167]
    b. Adoption of accounting standards is still interpretive[168]
9. Interpretations of law (including foreign law) by agency will be given deference, even if they conflict with prior rulings[169] (even if they relied on the law wrong)
10. Interpretations should be either of a specific statutory provisions, or explained how they follow from an existing regulations that was adopted from notice and comment[170]
11. Interpretive letters are non-binding[171]
12. arbitration could be employed, provided no serious policy issues and the jurisdictional facts are in line[172]

(iii) general statement's of policy (no definition under APA)

1. inquiry into what the agency will do, and the effect it has on people[173]
2. can't change people's existing rights or obligations
3. have to make showing as to how rights are being effected[174]
4. agencies, if they treat previous actions as being significant and not interpretive, can fall outside purely general statements of policy[175]

(iv) rules of agency organization, procedure or practice

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[157] Chamber of Commerce
[158] Professioanl and Patients fro Customized Care
[159] American telephone association
[160] American Mining Congress
[161] American Mining Congress
[162] American Mining Congress
[163] American Mining Congress
[164] Pacific Gas and Electric
[165] National Family Planning and Reproductive Health
[166] National Family Planning and Reproductive Health
[167] Jerri's Ceramic Arts
[168] Guersey Memorial Hospital
[169] Fifth Eclectus Parrots
[170] Hoctor
[171] NYCER v. SEC (Cracker Barrel)
[172] Thomas v. Union Carbide
[173] Lewis-Mota
[174] Iowa Power and Light
[175] Community Nutrition Institute

            (v) when it is against public interest [176]
                1. if would price panic, or the very act would vitiate the rule, an exception can be made. [177]
        (b) don't need oral arguments (e. g. trusts agency's judgment)[178]
        (c) once there is a rule, summary judgment is okay (no hearing) so that the agency is justified in rejecting the proposed contract out of hand[179] -- would have to show some reason why an exception should be made, each time: a decision that there is no adjudicative facts to be determined is always subject to judicial review
            (i) since the sole issue was the rule, administrative summary judgment is possible[180]
            (ii) a rule that defines a grid system, is not an adjuration[181] (sets of facts make them law)
                1. other hand, some grids might be too restrictive to warrant summary judgment in all circumstances[182]
                2. it is forbidden to overburden an ALJ or to mandate a number that has to come out a certain way
        (d) during the rulemaking procedure there needs to be some type of record established, so that the agency itself could figure out what it meant[183] -- official notice is subject to rebuttal
            (i) needs to be notice of data used in the ruling[184]
            (ii) official notice has to be taken on the record.
        (e) one case where less than due process coupled with judicial review post deprivation was ok[185]
    (4) disclosure requirements: courts can award atty.'s fees for failure
        (a) with exceptions, all agencies has to be public
            (i) meetings have to be public
            (ii) purpose has to be published
        (b) no one can be adversely effected by a non-published rule
            (i) Actual notice can take the place of publication – but not in all states
        (c) no person can be adversely effected by a rule, unless it is published
        (d) there may be argument that disclosure is part of notice which could be consistent with Vermont Yankee[186]
        (e) three tiers § 552a1d
            (i) Federal Register
                1. Rules have to be published
                2. Even interpretive rules or statements of general policy
            (ii) Made available
                1. Final opinions have to be made available
                2. Statement of policy that are not covered in federal register
                3. Staff manuals
            (iii) Things on request
        (f) Exceptions: FOIA is reviewed *de novo*
            (i) National security
            (ii) Internal personnel rules and practices exemption
                1. Confidentiality exemptions will be upheld

176 553b
177 DeRieux v. Five smiths
178 FPC v. Texaco
179 FPC v. Texaco
180 FPC v. Texaco
181 Hecker v. Campbell
182 Sullivan
183 Nova Scotia
184 Nova Scotia
185 Barry v. Brakley
186 Vermont Yankee

(iii) Exemption for documents government by statutes that specifically direct nondisclosure
(iv) Confidential business information
(v) Privileged agency materials
1. Internal records of agency about formulation of policy (similar to attorney-client privilege
2. Doesn't cover post-decision documents[187]
a. E. g. a decision not to pursue is an agency document
(vi) Personal privacy
(vii) Investigative records
1. deprivation of a fair trial
2. created warrant invasion of privacy
3. safety
4. if informational is already public, but not compiled, the government can show that it wishes to keep information in relative obscurity[188]
(viii) Financial institution
(ix) Geological exploration
(g) Reverse FOIA: right to challenge disclosure, but the agency doesn't have to notify people that they are asking for it[189]
(5) Sunshine rules
(a) Rule: Open meeting requirements
(i) Exceptions
1. National defense
2. internal personnel rules
3. specifically exempted
4. Trade secrets
5. Personal privacy
6. investigative records
7. Relate to bank of financial institutions
8. Accusation of a crime
9. Frustrate implementation of a proposed action
10. Concern the agency's participation in formal rulemaking or litigation
(ii) Word meeting can be perverted into individual commissioner review[190]
(b) Ex-parte contacts: note, in rulemaking there are no ex-parte restrictions
(i) In rulemaking setting, (after Vermont Yankee), there is nothing wrong with ex-parte contacts – nothing in APA about it[191]
(ii) Hard to claim that someone has an unalterably closed mind
(iii) Competing claims to a valuable privilege will be the most revered[192]
(iv) Entireties should probably be documented[193]
1. On the other hand, some courts take a lesser view, that only if the contacts constitute a clear violation of law should the be deemed to be effecting the judgment[194]
(v) If the ex-parte contacts don't effect the fairness, then okay
(vi) Congress is exempted from ex-parte contract[195]
(vii) Initial licenses are exempted[196]

[187] NLRB v. Sears
[188] Reporter's Committee for freedom of the press
[189] Chrysler Corporation v. Brown
[190] Amerp Corp
[191] Sierra Club v. Costle
[192] Sangamon Valley
[193] HBO
[194] ACT
[195] Sierra Club
[196] HBO

(viii) § 551.4: Rate making for public utilities (note: ratemaking is really rulemaking)
(ix) rules on internal ex-parte contracts don't apply if it is the agency head

(c) If it is just a policy point, than ex-part ok[197]
(d) Informal adjudication have been subject to prohibition against ex-parte contacts[198] -- - but not when outside of policy questions
(i) If the ex-parte communications abridge a public right then it is wrong[199]
(ii) Disallowed when the contacts foreclose judicial review[200]
(e) All ex-parte contact by white house and white house
(i) Restricted where the ex-parte communication effects the outcome of adjudication[201]

(6) promise to abide by negotiated rule-making isn't binding[202]

v) note: can ask for waiver of the rules § 1004e (unless waiver precluded by rules)

c) Adjudication – § 554-8 -- there are no APA provisions from the APA
i) Formal § 554 – one has formal adjudication if the enabling legislation if, and only if provides for a "hearing **on the record**" -- in formal adjudication, the agency can only look to what was compiled on the record. Decision has to be based entirely on what is in the trial record.
(1) Notice
(a) Time, place
(b) Issues of law facts
(c) Legal authority
(d) Whether there are responsive pleading
(i) Whether or not there is discovery (most of the time it is rare)
(e) Has to be issued with due regard
(2) Instead of using an ALJ, the head of the agency, or one of the heads can perform the hearing
(3) court will read into statute in immigration the requirement for a hearing[203]
(a) on the other hand, court reject the presumption that a statute calls for a haring in an adjudicative context that such a hearing has to be on the record[204]
(i) might be able to find the requirement for a hearing in the constitution[205] -- deportation of a citizen is so severe that the constitution can require an on the record hearing (hardly followed outside the deportation context)
(ii) minority: old law was that if the statute just saying "hearing" one might be entitled to formal adjudication[206]
(iii) note: agencies can voluntarily decide to give formal adjudication
(4) due process is not likely to be relevant, because of the rights in adjudication
(5) administrative common law is important as well
(6) hearing
(a) complaint and answer can be done on complaint and answer
(b) all interested person can submit
(c) agency ALJ can make a recommended decision which will be reviewed by the full agency
(d) counsel is possible, it isn't a due process issue (won't be paid for)
(7) Purposes of article III court was a "personal right" to an impartial and independent federal adjudication[207]

[197] Sierra Club v. Costle
[198] United States Lines
[199] United States Lines
[200] United States Lines
[201] Sierra Club
[202] USA group loan services
[203] Wong Yang Son
[204] Chemical Waste Management
[205] Wong Yang Song
[206] 1st Circuit in Seacoast Anti-pollution

(a) Only in one case, has an agency been divested of the power to completely divest of a personal right
(b) This separation is maintained by ALJs – separation of functions is required[208]
    (i) who are appointed by the civil service commission (under the APA) – court will presume an intellectual discipline of an ALJ[209]
        1. background bias is not grounds for challenge (e. g. if they work for an agency it doesn't count as bias)
            a. agency can't pick and chose which ALJ to use
        2. not sufficient that the ALJ has a work background that is favorable to one's client
        3. relations, stock ownership may disqualify
        4. prior statements (this may come up with agency heads)
    (ii) ALJ's will probably not have jurisdiction over constitutional questions[210]
    (iii) ALJ's appointed by OPM
    (iv) ALJ's have to have seven years of qualifying experience – so most of them have qualifying experience in the agency
    (v) § 554d: ALJ can consult with other agency employees (including people in the prosecuting wing, so long as there is no contact with prosecutor)
    (vi) AJ's not subject to these limitations
    (vii) Morgan doctrine: ALJ's must take responsibility for decision (not rely on other employees)
        1. On appeal, it is acceptable for the agency heads to read the briefs
    (viii) Ex-parte contracts: rules kick in when it seems like the decision is coming up
        1. Internal ex-parte contracts prohibitions – § 554d (only apply to formal adjudication)
            a. Initial licenses are exempted[211]
            b. § 551.4: Rate making for public utilities (note: ratemaking is really rulemaking)
            c. if the agency head acts as the trial judge, than rules on internal ex-parte contracts don't apply if it is the agency head
            d. ALJs can talk to other people in the agency, except for prosecutor
        2. external ex-parte contacts problems – § 557d (apply to formal rulemaking and formal and adjudication)
            a. includes president
            b. interested person (almost anyone counts as an interested party)
                i. if you are interested enough to be an agency party)
                ii. communication has to be relevant to the subject to the subject matter
            c. covers law clerks
            d. no exceptions for agency heads or initial licensee exceptions
        3. exceptions to ex-parte
            a. ratemaking
            b. rulemaking
            c. initial license
            d. informal adjudications
        4. remedy for ALJ ex-parte contacts – five factors[212]
            a. may consider the ALJ's refusal to disqualify him or herself
            b. how severe was the communication?

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[207] CFTC v. Schor
[208] Wong Yang Son
[209] Withrow v. Larkin
[210] Chadda at lower court
[211] HBO
[212] Patco

c. To what degree did it influence the decision?
d. Was it beneficial to the person making the communication?
e. Did the other side know it?
f. Would remand make it do any good to remand?
i. E. g. did they lose anyway?

(c) Background is – separation of adjudicatory functions
(i) Exception: congress can grant (within constitutional bounds) exceptions to the requirement for separation of adjudicatory function[213]

(d) ALJ can
(i) Depositions
(ii) Oaths
(iii) Subpoenas
1. ALJs can, but rarely issue deposition subpoenas
(iv) Discovery is rare
(v) § 556c.6: Pre-hearing conferences (can't happen in inform adjudication)
(vi) Can rule on procedural matters

(e) Note: doesn't have to be any discovery

(f) Admissible evidence
(i) Everything is admissible – heresy okay
1. Legal residual rule doesn't apply: doesn't even need to be a non-hearsay basis
(ii) ALJ can keep things out (irrelevant)
(iii) Privileged can be kept out
(iv) Can take official (or judicial) notice
1. Opportunity rebut

(g) Can be no sanction imposed, without reliable, probative and documented evidence
(i) ALJ must allow for adequate cross-examination of the evidence

(h) Parties can make proposed findings, and both can rebut

(i) Plenary review by agency

(8) Burden of proof is on the side seeking the action
(a) Getting benefits back is considered to be an action

(9) Intervenors in formal adjudication
(a) Agency can allow 3rd party participation by third parties in terms of cross examination
(b) There can be a right if to not do so would leave an interest unrepresented[214]

ii) informal adjudication (anything that is not formal adjudication, and that isn't rulemaking) -- § 555
(1) still get due process
(2) agencies may adopt their own hearing regulations
(3) organic (enabling) statutes may often impose procedures for informal adjudication on agencies
(4) administrative common law
(5) hybrid adjudication: technically informal adjudication, with a lot of formal procedures brought in
(a) e. g. the agency doesn't want to hire an ALJ
(6) orders (within the meaning of the APA) result from an adjudication within the APA
(a) have to be retrospective
(b) judges past conduct
(7) scant requirements (often impractical) for informal adjudication
(a) can have a lawyer in all informal adjudication (but the adjudication may be over before you can get one)[215]
(b) interested person can appear[216]

[213] Marcello
[214] United Church of Christ Case
[215] § 555

(c) witnesses that is compelled to testify, one can review the transcript[217]
(d) prompt notice for the denial, along with a statement of purpose for it, unless self-explanatory[218]

(8) sanctions can only be imposed with in the jurisdiction delegated to the agency (agency has to be operating within the delegation of the agency)[219]
(9) the APA doesn't cover most informal adjudication that go on
(10) If the agency isn't required to formally adjudicate, it can informally adjudicate and decide its methods, and not be subject to arbitrary and capricious[220]
(11) "exceptions" to adjudication hearings where there is no explicit reasons[221] -- ok to have informal, if no explicit provision
(12) Informal adjudication have been subject to prohibition against ex-parte contacts[222]
(a) If the ex-parte communications abridge a public right then it is wrong[223]
(b) Disallowed when the contacts foreclose judicial review[224]
(13) (Overton park)
(a) review under arbitrary and capricious standard
(b) if the agency doesn't explain what it is doing, it is under the arbitrary and caprcious test[225]
(i) court can ask for a statement of reasoning – court can have the power to get the record filled out

9) Bindingness of decisions: agencies must make finding of fact, or must explain how it is they reached the decision (may apply to informal as well)
a) Stare Decisis: Agency must explain and announce when it is changing position
i) Inconsistency isn't enough
b) Res Judicatta: designed to prevent the relittigation of an identical cause of action (once the decision is final, the same cause of action can't be decided again) -- in general it doesn't
i) Where existing politics may make changes necessary[226]
ii) Administrative agencies can't really re-open agencies every couple of years[227]
(1) Relitigation of tax liability[228]
iii) Can be relitigated in the courts – because there is a different set of burden of proof in the agencies
(1) Finding of the court will not be afforded the right in administrative proceedings
(2) Differences in evidentiary requirements will make the difference
c) Collateral Estoppel
i) More flexibility than Red Judicatta
ii) because the same issue had been decided by one agency, it couldn't be decided by the other (has to be final order)[229]
(1) no two parties have the power to stay other agency
(2) there can be a race to reach a final order
d) Agency estoppel (identical)
i) Affirmative may misconduct will be enough to bind the government[230] but following to follow a real law (not a claims manual) is enough for affirmative misconduct[231]

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[216] § 555
[217] § 555
[218] § 555
[219] § 558
[220] PBGV v. LTV
[221] Seacoast anti-pollution league
[222] United States Lines
[223] United States Lines
[224] United States Lines
[225] American trucking
[226] Rock Island
[227] International mine Works
[228] Soonan
[229] FPC v. Texaco

ii) Most case, money judgments won't be awarded against the government based on estoppel[232] (note this was based on the appropriations clause)
iii) Equitable estoppel for unions when rules in bargaining changes[233]
iv) Interpretations of law (including foreign law) by agency will be given deference, even if they conflict with prior rulings[234] (even if they relied on the law wrong)
v) Agreements and procedures that the government enters into vis-a-vis civil matters are not bining to prevent it from witholding it from criminal matters[235]
vi) Best test (1st circuit)
(1) Statement by government official
(2) Reasonable reliance
(3) Change of position
(4) No risk of waiving Congressional policy
(a) If law changed no problem

e) Agency adjudications are entitled to same collateral effect as court ones do
i) Res judicatta: Non-mutual collateral won't apply to the government, because it is not compelled to appeal every case that it loses[236]
ii) Collateral Estoppel

f) Adjudication retroactivity
i) least offensive, is when the agency had never taken a position[237]
(1) most offensive is a balancing test if no one could see it coming (e. g. if there could be a reasonable anticipation)[238]
ii) Balancing test between retroactive rule-making and hardship[239]
(1) because there was a property right (according to the supreme court), and evictions that happened before the rule was created, it was necessary and proper for a rule to be given retroactive effect[240]
iii) If recognition of violation was recognized only after it occurred, than this might an ex-post-facto penalty[241] (when a a contract is voided by law by an administrative agency, the court will not necessary enforce the restitution of funds based on the voids of the contract (based on a notion of ex-post-factors laws)[242]
(1) Court can balance hardship vs. Congressional intent and public benefit[243]
iv) Equitable estoppel for unions when rules changes by vote of commission[244] -- lambasted for not informing other parties

g) Rulemaking retroactively
i) If a rule is invalidated based on process grounds, the agency, absent a specific legislative grant the agency can't make a retroactive rule
ii) Scalia distinguishes between primary and secondary retroactivity
(1) Primary is defined as future effect that affects past transactions might not be against the APA
(2) Secondary is defined as completely making some transactions worthless is against the APA

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[230] Schweiker v. Hansen
[231] Schweiker v. Hansen
[232] Richmond – week!
[233] Leedom v. IBEW
[234] Fifth Eclectus Parrots
[235] Cisserias
[236] Mendoza
[237] NLRB v. Majestic weaving
[238] HF Binch and Company
[239] NLRB v. Guy F. Atkinson
[240] Thorpe v. HUD
[241] NLRM Local 167
[242] NLRB v. Local 167
[243] NLRB v. E&B Brewing Company
[244] Leedom v. IBEW

10) Judicial Review § 706
- a) Old ways of brings court actions against the government
  - i) Private property or tort against government officials (private law model of public law)
    - (1) Court would review for a lack of power to impose the fine
  - ii) Asking a court to issue a prerogative write
    - (1) Old writ of cert: asking a court to preserve the record
      - (a) Only quasi-legislative action is reviewable on a basis of certiorari
    - (2) Mandamus
      - (a) Injunctions and mandamus are available to compel administrative acts
      - (b) Issuance of mandamus is compelable by equitable principles
        - (i) Note: courts can still compel action on the part of an agency
        - (ii) Courts can compel a rulemaking[245] if the interpretation of the law is found not to be in concordance with the law[246] § 706(1)
  - iii) Defending a criminal prosecution or civil enforcement that government on the ground that it was unlawful
- b) Courts cannot require the agencies to follow additional procedures that are not in the APA[247]
  - i) However, there could be certain instances that are extremely compelling, that additional procedures could be required (e. g. a very small number of person would be "exceptionally affected" by a proposed rule) -- individualized facts might be at issue[248]
- c) Possibilities of review of agency adjudications
  - i) Jurisdictional facts will always be reviewed de novo (e. g. questions of citizenship will be reviewed denovo to see if the INS has jurisdiction in the fits place[249])
    - (1) Note: applying statutory terms to a set of facts, will be regarded as a type of decision of law – and statutory interpretation will be done by the agency for the sake of uniformity[250]
      - (a) But, when a pure question of statutory interpretation is present, the court must use the traditional tools of statutory interpretation[251]
  - ii) Jurisdictional problems based on concurrent jurisdiction of common law courts
    - (1) Jury trials: If there is a concurrent jurisdiction of the common law courts, the agency can't really hear it (if there is a jury demand) **is this a lack of jurisdiction?**
    - (2) Congress cannot delegate the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising understate state law, without consent of the litigants and subject only to ordinary appellate review in federal court[252]
- d) Preclusion of review
  - i) Preclusion of review by a statute is possible
    - (1) Implied preclusion is possible based not only on express langauge by also from the statutory scheme[253]
    - (2) Preclusion of reviewability[254]: Remedy for improper interpretation of statute is not damages, but changing action[255]
    - (3) Some people say that something that is committed to discretion is non-reviewable

11) Limits to judicial review
- a) A statute must grant a court jurisdiction to hear a case
  - i) Presumption is reviewability unless specifically cut off by Congress[256] (Abbot Labs was on pre-enforcement review) – court allows for challenge of the rule before it has been applied.

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[245] 706(1)
[246] Burlington Northern
[247] Vermont Yankee
[248] Vermont Yankee
[249] Ng Fung Ho
[250] Hearst Publications
[251] Cardoza
[252] Thomas
[253] Block v. Community NutricionInstitute
[254] Abbot Labs
[255] American School of Magnetic Healing
[256] Abbot Labs

Rule passed was ripe for judicial review even though it had not been enforced. A threat of hurt to business can be enough[257]

(1) Old assumption was that statutes were not reviewable[258]
   (a) Dissent was that pure matters of law could be challenged on jurisdictional grounds
(2) Can't review a rule if is still an open question how the agency will exercise its discretion[259]
   (a) E. g. if it is purely legal, can review – if there are factual reason, than no reviability
   (b) If there is some good reason (e. g. it is not ripe if there is some more information that can come out)
   (c) To what extent could the private party be impacted[260]
(3) Exhaustion (like a final order) if the agency has exclusive jurisdiction: one must have taken all the steps that they would have taken (e. g. can't go right to court)
   (a) Futility exception to exhaustion
   (b) Inadequate remedy
(4) Primary jurisdiction: courts may stay remedy if there is something for the agency to determine
   (a) Courts have the power to award damages – which make them an appropriate form[261]
      (i) E. g. breach of contract (if no agreement)
   (b) May refrain from exercising jurisdiction for uniformity[262]

ii) Error in interpretation of law (provided in good faith) would only be remedied by injunction[263]
iii) Note: presumption of reviewability is reversed when the agency doesn't act

b) Review of joinder
   i) Federal courts will review a failure to join
c) If an action is committed to agency discretion by law, something is not reviewable
d) Basis for review
   i) Erroneous finding of facts
   ii) Wrongly applied or violated its own rules
   iii) Wrongly applied the statute
   iv) Abused is discretion
   v) Wrongly interpreted the statute
   vi) Acted unconstitionally

12) Old ways of brings court actions against the government
   a) Private property or tort against government officials (private law model of public law)
      i) Court would review for a lack of power to impose the fine
   b) Asking a court to issue a prerogative write
      i) Old writ of cert: asking a court to preserve the record
         (1) Only quasi-legislative action is reviewable on a basis of certiorari
         (2) Cert is not available as means of review of decision in federal courts
      ii) Mandamus
         (1) Injunctions and mandamus are available to compel administrative acts
         (2) Issuance of mandamus is comparable by equitable principles
      iii) Habeas corpus: not available for discretionary acts, but for ministerial acts
         (1) Court would need to see the validity of the challenged action
      iv) Prohibition: not available for discretionary acts, but for ministerial acts
         (1) Court would need to see the validity of the challenged action
      v) Declaratory judgment
         (1) there can be declaratory judgements, but there are questions about ripeness

[257] Branson
[258] Switchman's Union
[259] Toilet Goods
[260] Gardner
[261] Nader
[262] Ablene
[263] American School of Magnetic Healing v. McAnnulty

vi) statutory review
(1) will have to look at statute
c) Defending a criminal prosecution or civil enforcement that government on the ground that it was unlawful

13) Stays: whether a court will grant stay
a) Possibility of success
b) Irreparable injury (immediate and irreparable)

14) Sovereign immunity: doesn't include non-money constitutional damages
a) No lawsuit can be brought against the government unless there is permission
b) Exceptions
i) Tort claims
ii) Tucker act: breach of contract actions

15) Limits to hearing of a review of a rule: needs to be a final order[264]
a) History: Bell-curve of review
i) Presumption against[265]
ii) Judicial Review of such action will not be cut off unless that is regarded as the function of congress[266]
(1) So long as no statute precludes such relief it is given to agency discression
iii) If committed to agency discretion, have to produce reasons for it[267]
b) Standing for review: because of stare decisis – have to make sure that the person arguing will want to put up a good fight (mere intellectual or philosophical interest[268]
i) Basics has to be fairly traceable
(1) injury in fact
(2) zone of interests
(a) taxpayer: has to be based on the Congressional power to tax and spend the taxpayer
(i) has to be based on a constitutional limitation to tax and spend
(ii) can't be based on the property clause (congress has the power to dispose of State's property)
(3) fairly traced
ii) Competitor standing (government agency has an effect on the industry, and the industry sues)
(1) Old rule: competitors don't have standing to sue based on their status as competitors[269]
(2) New: Can sue if a ruling positively effect a competitor[270]
(a) Have to show injury in fact, and an injury in law, or a legal interest[271]
(i) Can't just be a long time concern[272]
(ii) Has to remedy the problem – can't be a question of wanting to act as a private attorney general[273]
(b) Competition by national banks for the provision, could cause a loss in the future
(3) All you need is "arguably within the zone"[274] (plausible relationship)
iii) Post-modern (Air Couriers)
(1) Will look at the purpose of the statute and who it was to protect (e. g. to protect the postal service is different than protecting jobs)[275] -- this could be a government interest
iv) National Credit Union
(1) Could grant standing because it fell within the zone of interests

[264] FTC v. SoCal
[265] Switchman's Union
[266] Abbot Lab
[267] Overton Park
[268] Sierra Club)
[269] Alabama Power
[270] Association of Data Service Processing Service Organizations v. Camp
[271] Lujan (injury in fact)
[272] Sierra Club v. Morton
[273] Steel
[274] Clarke
[275] Air Couror like Milk case

(a) Possible to eliminate the zone of interst test, but not the injury in fact test[276]
(2) Statute wasn't intended to protect the banks
(3) But there is an arguabilityness, it that it can limit the markets that federal credit unions could serve
(4) Since they were limited about markets, competitors were arguable with in the zone of interests

v) O'Conner said this was eviscerating the zone of interests, and a zone of interests is not the zone of interest protected by the statue

vi) **zone of interest test can be eliminated by granting standing to anyone** and there dog[277]

c) statutory limits of review

i) A statute must grant a court jurisdiction to hear a case

(1) Supreme court creates: Presumption is reviewability unless specifically cut off by congress[278] (Abbot Labs was on pre-enforcement review) – court allows for challenge of the rule before it has been applied)

(a) Old assumption was that statutes were not reviewable[279]

(i) Dissent was that pure matters of law could be challenged on jurisdictional grounds

(b) APA's judicial review provisions must be given a generous review provisions and hospitable interpretation

(2) Error in interpretation of law (provided in good faith) would only be remedied by injunction[280]

ii) Preclusion of review by a statute is possible

(1) Implied preclusion is possible based not only on express language by also from the statutory scheme[281]→ (if there is an statutory alignment of issues, someone else can be deemed to be a surrogate for another, and this can deny standing) (not under the APA directly (because 702 says that statutes can precluded) the APA just says look to the organic legislation) (the court can decide not to decide constitutional or statutory constitutional review)

(a) The court said that it would not make sense that it would just assume that congress meant that it would preclude statutory and constitutional analysis[282] -- the point was to get trivial cases out of the court

(b) If congress precludes judicial review of an agency's determinations, it still doesn't preclude judicial review of the constitutional challenges (because of Marbury)[283] -- congress can never get around Marbury v. Madison

(i) E. g. with the federans, the federal circuit's review is limited to constitution, or a law or regulation applied to the facts (both the facts, and laws applied to facts are still applied to judicial review)

(c) There are some things that can be implied as being precluded, because things need to be done fast

(2) Always limited by standing and ripeness

iii) If an action is committed to agency discretion by law, something is not reviewable (Overton park)

(1) In the modern area, if there is no law to apply, then there is no judicial review

(a) E. g. one does not get judicial review if ther eis no law to apply[284]

(i) A decision not to act, is different form a decision not to act

(ii) In a way like Vermont Yankee in that they don't want to tell them how to act

[276] Bennett
[277] Bennett v. Speer
[278] Abbot Labs
[279] Switchman's Union
[280] American School of Magnetic Healing v. McAnnulty
[281] Block v. Community Nutricion Institute
[282] Bowen v. Michigan Academy of Family Physiciains
[283] Johnson v. Robisnon
[284] Heckler v. Cheney

(b) Can't challenge an official's challenge to prosecute

(2) Presumption of reviability is reversed when an agency doesn't act

(3) Discretion (e. g. firing a gay guy) is a 701 decision (arbitrary, and capricious, and an absue of discretion,) at discretion (by statute) can arbitrary dismiss someone [285] -- 701a2

(a) Scalia: agrees that it is committed to agency discetion, but hints that he can't hear const matters, either.

d) Basis for preclusion of judicial review

i) Basis for preclusion of judicial review

(1) Preclusion by statute[286] (not assumed) -- preclusion is not assumed[287]

(a) Preclusion can be found if the legislative intended is discernible as to the nexus as to who it is supposed to effect (e. g. if a statute effects producers, than consumer's can't sue)[288]

(b) If the statute intended to take trivial cases out of court then

(i) The court said that it would not make sense that it would just assume that congress meant that it would preclude statutory and constitutional analysis[289] -- the point was to get trivial cases out of the court -- if clear meaning of the statute

ii) **constitutional questions will never be precluded[290]**

(1) **must be actual constitutional provision[291]**

iii) Presumption of reviewability is reversed when an agency doesn't act

(1) Discretion (e. g. firing a gay guy) is a 701 decision (arbitrary, and capricious, and an abuse of discretion,) at discretion (by statute) can arbitrary dismiss someone [292] -- 701a2

iv) Scalia: agrees that it is committed to agency discretion, but hints that he can't hear const matters, either.

v) If no law to apply

(1) Review of agency action is precluded if there is no law to apply (rare instances)[293] (courts can't make agency exercise its discretin)[294]

(a) E. g. no legal standards to review the decision by[295]

(2) If there is no law to apply, and there is no "meaninful standard" there will be no *statutory review* under the APA, and discretion will be upheld

e) What can be reviewed -- Rescinding of a rule is subject to the same tests, but Scalia says one doesn't want the administration bound by the previous one[296]

i) Legal decision (default category): firmer hand

(1) Can arise anywhere:

(a) Scopes of review

(i) Pure statute: courts will make an independent decisions, but could defer -- court will look at facts

1. Whether the agency has been consistent in interpretation of law
2. How close in time the interpretation to the enactment
3. If congress knew that congress what was happening, and Congress enacted the law around it
4. Whether the matter was within the agency's expertise

[285] Webster v. Doe
[286] APA 701a1
[287] Block
[288] Block
[289] Bowen v. Michigan Academy of Family Physiciains
[290] Johnson v. Robison
[291] Webster v. Doe
[292] Webster v. Doe
[293] Heckler
[294] Heckler
[295] Heckler
[296] Motor Vehical v. State farm

5. Whether the legislative intent was designed to give the agency some flexibility

(ii) Deference will be given to determine what procedure was appropriate
1. Court can determine that the agency acted outside its own procedural rules

(iii) Procedural determinations (court can't substitute its own judgement)

(b) Chrevron deference: Adjudication of statutes by OBM is not held to the Chevron deference[297] -- but if it is purely a question of statutory interpretation it is for the courts (for rulemaking)

(c) Do the statutes give a clear answer
(i) May look to congressional intent[298]
(ii) Doesn't matter how long the interpretation is[299]
1. Minority: statutes would need to explicitly explain limitations on private property[300]

(iii) Fundamental changes in the statue (e. g. modifying to eliminate) are impermissible[301]
1. Agency can't write in deminimus clauses[302]
2. Cost-benefit analysis isn't required if agency interprets not have require it[303]
a. Cost-benefit analyses can be unreasonable, and hence unlawful[304]

(d) Question is whether or not the agency has been delegated authority: no deference
(i) Usually is held to have been delegated if it is a complex, technical matter
(ii) Agency can't interpret beyond its statutory authority[305]
1. Dissent is functionalist approach[306]

(e) Is the interpretation unreasonable

(f) Interpretations of law (including foreign law) by agency will be given deference, even if they conflict with prior rulings[307] (even if they relied on the law wrong)

(g) Deciding on arbitrary and capricious: -- but there is a question of deference, if something is "committed to the discretion of the agency"
(i) Considered inappropriate factors
(ii) Failed to consider appropriate factors
(iii) Acted arbitrarily

(h) Some people say that something that is committed to discretion is non-reviewable

(2) Split-model agencies (e. g. one agency that does prosecution, and the other does adjudication): enforcement side of agency get deference[308]

(3) For procedural rules: Week deference of Skidmore: would look at other interpretation[309] (would look at how good the ruling was) -- for interpretive rules and policy statement (courts may substitute their own judgment)

ii) Historical facts: if the agency made the determination in a formal adjudication or a formal rulemaking, than the decision on issues of historical fact will only be reversed if the agency lacks substantial evidence § 7062e -- this is the most common

(1) Substantial evidence is defined as whether the evidence would have justified a jury to come to that conclusion

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[297] United Steelworkers
[298] Cardoza Fonseca
[299] Maislin
[300] Babbitt
[301] MCI
[302] Public Citizen v. Young
[303] American textile Manufactures (Cotton Dust)
[304] Corrosion Proof Fittings
[305] American Mining Congress
[306] American Mining Congress
[307] Fifth Eclectus Parrots
[308] Martin v. OHRC
[309] Chevron

(a) Even though the facts relate to jurisdiction, and constitutional rights the level of review will be defined by the statute

(2) Disagreement between an agency and an ALJ detracts from the credibility of an agency's determination

(3) If there is an unreasonable decision (e. g. no evidence, or an arbitrary and capricious)
  (a) Formal rulemaking or adjudication
    (i) On the record: Substantial evidence: limited to record to determine if the decision was reasonable
  (b) informal
    (i) Off the record: arbitrary and capricious can bring in things off the record

(4) Agency gets deference in facts
  (a) In the case of a disagreement between ALJ and agency
  (b) Court must look at entire record (e. g. both sides of record)[310]
    (i) ALJ's determination is part of the record[311]
  (c) Lower courts have founds that decision of an ALJ could not be reversed without evidence by the board[312]

iii) Policy: arbitrary and capricious (week deference) – Hard Look

(1) We have to be able to guarantee that the agency has taken a "hard look" at all of the policy consideration

(2) Week deference of Skidmore: would look at other interpretation[313] (would look at how good the ruling was) -- for interpretive rules and policy statement

(3) Commission has to inquire into all of the facts[314]

(4) Best thing to do is to set up court's procedures to ensure that agencies are looking at all of the necessary facts[315] (form)
  (a) Minority: procedural isn't enough, judges should make actual inquiry[316] (function)

(5) Supreme court doesn't necessarily require findings of fact, but there needs to be some showing that there is consideration of other relevant factors[317] -- even though the secretary's determination is to be searching and careful, the ultimate standard of review is to be a narrow one
  (a) Three points
    (i) Basis of record at the agency at the time of the decision
    (ii) By testimony of the secretary if necessary
    (iii) On the basis of any formal findings the secretary chooses to make
  (b) May be using hard look at the legal points in the case
  (c) Overton park may imply that even in informal cases there may need to be a record[318]
    (i) In a statement of basis and purpose there needs to be a statement of basis and purpose including a discussion of the notices and comments[319]
  (d) Adverse presumption of arbitrariness can be drawn from no record[320]

(6) On remand, agencies can change their rationale[321]

(7) Regulations that are in direct contradiction of the law, but his own policy statements will be struck down[322]

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[310] Universal Camera
[311] Universal Camera
[312] NLRB v. Thompson
[313] Chevron
[314] Scienic Hudson Preservation Conference
[315] Ethyl Corp
[316] Judge Leventh
[317] Overton Park
[318] Overton Park
[319] Overton Park
[320] Overton Park
[321] National Coalition against misue of pesticides v. Thomas
[322] Community Nutrician Institute

(8) In failing to consider important aspects, and in failing to consider what congress meant them to consider it will be found to be arbitrary [323]
(a) Something is arbitrary if
(i) If an agency has relied on factors that were not intended to be considered[324]
(ii) Failed to consider important aspects of the problem[325]
(iii) Offered an explanation that runs counter to the evidence[326]
(iv) So implausible that it couldn't be ascribed to a difference in view[327]
(b) Failure to consider an obvious alternative with better results[328]
(i) There is always a right to comment on proposed decisions, and there must be responses to those comments
(ii) Decisions
1. Recommend decisions: the agency has to adopt
2. Initial decision: has to be appealed
(c) Commission, if something isn't' arbitrary and capricious, and it isn't in the statute, [329]
(i) Will look at the rationale[330]
(ii) Syracuse peace counsel is alleging that the standard is arbitrary and capricious[331]: court will accept the agency's evaluation of how effective its own ruling is
1. Minority: will look at individual prong's of agency's rationale
(d) Arbitrary and capricious can be found if an industry is taken as too large a class, aka – what is good for the goose is not necessarily good for the sub-goose[332] in deciding whether it is arbitrary and capricious, the industry they cover can't be too wide

iv) Discretion: not legal or factual, but some judgment (e. g. determination as to what penalty)
(1) Held to abuse of discretion
(2) Or "shocking penalty"

f) Venue: usually the statute provides
i) Sometimes requirement for DC circuit

g) Usually people seek declaratory relief

h) Damage actions
i) Can seek damages, if there is no other way that it can be done
ii) damages
(1) State government or local government can be done under § 1983 (private action against state or local officials who deny you a federal right)
(a) Government actors will have qualified immunity
(2) Federal Government can sue under Bivens
(a) If there was no other remedy but damages, can due federal officials for violation of constitutional rights
(3) Suing under a common law theory – can sue under federal tort claims act
(a) No strict liability

[323] Motor Vehicle Manufactors Assoication v. State Farm
[324] Motor Vehicle Manufactures Association v. State Farm
[325] Motor Vehicle Manufactures Association v. State Farm
[326] Motor Vehicle Manufactures Association v. State Farm
[327] Motor Vehicle Manufactures Association v. State Farm
[328] Motor Vehicle Manufactures Association v. State Farm
[329] Syracuse Peace Counse
[330] Syracuse Peace Counse
[331] Syracuse Peace Counse
[332] American Dental Association v. Martin