ADMINISTRATIVE LAW

Professor Volokh
Spring 2011, Emory Law School
Casebook : Rogers, Healy, Krotoszynski

1. Agencies - are they allowed to make rules?
   a. Some grant of rulemaking authority (statute)
      i. If not, cannot infer such a power (ICC)
   b. If yes,
      i. Exact power -> OK (Cincinetti Railway)
      ii. Some power :
          1) Southwest Cable
             a) Broad, purpose
          2) Brown v. Williamson
             a) If Congress said otherwise, NO

2. What kind of agencies?
   a. Regulatory - FDA
   b. Benefit - distributing - SSA
   c. Enterprise - Armed forces

3. What do agencies do? Different ways in which agencies act
   a. Rulemaking - Bimetallic
      i. NO constitutional requirement when RULE applies to more than a few ppl
         ii. No difference between state and agency
   b. Adjudication - Londoner
      i. State assessed - no procedure necessary
      ii. Agency assessed - need opportunity heard (more than writing, argument however brief, proof however informal)

-> What PROCEDURE is required when an agency acts? Depending on Rulemaking / Adjudication!

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ii. Mead/Chevron/Skidmore + Brand X
   c. Discretion - hard look? 702 (2) (A) arbitrary & capricious

Claims
   a. Beyond scope of authority
   b. Arb & Capr, appropriate construction of statute
   c. Unsupported by admin. Record (proc C E + subst A)

4. Availability & Timing of JR
   a. Availability
      i. Reviewable (cause of action)
         1) 701
         a) Presumption for JR
         b) Ag discretion
         2) 703, 704
      ii. Jurisdiction
         1) Federal Q
         2) Standing
            a) Article 3
            b) Prudential - zone of interests
      iii. Immunity
   b. Timing
      i) Finality
      ii) Ripeness
      iii) Exhaustion

STRUCTURAL : AGENCIES

-Formation
-Separation of Powers

a. Article III : Can the executive exercise JUDICIAL power?
   i. Crowell v. Benson
      What is important is public rights v. public rights
      1) For Public rights (Govt v. X) - non-Article III tribunal was OK. Congress may establish "legislative" courts
      2) For Private rights (employment, much like torts, property) - Constitutional courts required (Article III tribunals), but can have adjuncts (NLRB was more like an adjuct to Art III court, b/c you could still raise legal issues and fight facts, etc) -> This tribunal is OK
         a) Whether Congress has exceeded the limits of its authority to prescribe procedure
            i) Limited application
            ii) Findings of fact closely analogous to familiar practice
      ii. Northern Pipeline Co. v. Marathon Pipeline Co. (bankruptcy. Plurality said non article III not okay)
         1) Factors
            a) State vs federal law
            b) Essential attributes of courts
               i) Subject matter
               ii) Jurisdiction
               iii) Powers of district courts (enforcement, etc)
               iv) Deference (factual findings - trial de novo or conclusive)
               v) Public v. private (just a factor, unlike Crowell)
               vi) Why congress departed from article III (efficiency, etc)
      iii. CFTC v. Schor
         1) Factor
            a) Voluntariness - personal right : waived
            b) Structural right - separation of power does not cover this : not unconstitutional
         2) Depending on these factors, Non-A3 tribunal may or may not be more / less likely to be constitutional
         3) Argument : shouldn't you want MORE impartiality if against government?
iv. Thomas
1) A right can be public if "closely intertwined with public regulatory scheme" (the more it looks like centers on regulation)
2) Even if it's not against govt, can still be public right.

v. POLICY - Judicial independence (Brennan)
1) judiciary is better protector of individuals' rights

vi. Note on the 7th Amendment
1) If something is validly in an agency, no jury required. Private rights cases are not validly in agency. Atlas Roofing
2) Private rights cases can go either way (Schor or Gran financiera - contradictory cases, unclear)

b. Administrative agencies and CONGRESS
Legislative - 1) creates agencies 2) limits their authority

i. Nondelegation Doctrine: can the executive exercise legislative power? (Congress must ensure that enabling acts do not amount to a delegation of its legislative power)
1) Schechter Poultry case (1935) - delegation unconstitutional
   a) Legislative power is vested in the Congress - Congress cannot delegate its legislative power to any other institution
      i) J.W. Hampton case (1928) - "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform, such legislative action is not a forbidden delegation of legislative power"
   b) BUT if Congress itself establish the "standards of legal obligation" necessary to "perform its essential legislative function" - ok
   c) Justice Cardozo (concurring): "negative" authority (eliminating unfair practice) OK / "positive" authority (whatever promotes fair competition) not OK - Scope of approval power

2) Benzene case (1980)
   a) Plurality: Canon of constitutional avoidance
      i) When the justices are worried that Congress had dangerously approached the outer limits of what the non-delegation doctrine permits, they favor "narrow constructions to statutory delegations," rather than invalidate them.
   b) POLICY - Rehnquist, concurring in judgment
      i) What purpose does the non-delegation doctrine serve?
         One. Ensure that important choices of social policy are made by Congress
         Two. Provide "intelligible principle" to guide the Executive's exercise of delegated authority
         Three. Courts have standards against which to test the exercise of delegated legislative discretion

   a) Sentencing guidelines - upheld
      i) Intelligible principle test: O
      ii) POLICY - Functional approach to non-delegation doctrine: "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." -> can vest administrators with "significant discretion" to decide "matters of policy"
   b) Scalia dissent: structural restriction - sentencing commission has no function except making guidelines (in this case, lawmaking is not incidental to its main executive function)

4) American Trucking Associations
   a) Intelligible principle needs to be more specific if power delegated is great: "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."
   b) POLICY - Congress can delegate lawmaking power (not legislative power), and there are very few constraints on it. (when legislators provide admin's with decisionmaking discretion, they jeopardize their ability to control public
policy --&gt; can it take it back? NO : Chadha
   i) Intelligible principle has only to be the minimum standard necessary for
courts to engage in ultra vires review of agency action, but no more
   (Yakus)
   ii) Courts tweak questionable statutory standards to make them
   constitutionally palatable. (Benzene)
c) POLICY - Soundness of the Nondelegation doctrine
   i) Criticisms of a permissive nondelegation doctrine
      One. Undermines democracy (b/c passes important policy choices to
      unelected administrators)
      Two. Threatens individual liberty (concentration of powers to make and
      enforce laws in the executive)
      Three. Undermines rule of law
   ii) Pragmatic responses
      One. Determinate legal standards are unrealistic for modern regulatory
      legislation (Congress lacks time, information, expertise, prescience /
      Courts lack standards of review to satisfactorily enforce a restrictive
      nondelegation doctrine)

ii. Legislative veto
  1) DEF - Statutory provisions empowering Congress to invalidate agency action on its
     own
  2) Congress must not venture beyond its legislative role by attempting to administer the
     enabling acts they have passed.
     a) POLICY - You can't have it both ways : administrative flexibility - broad
     authority / administrative accountability - control that authority
  3) INS v. Chadha - formalistic approach
     a) Cf.
        formalist | Govt is power-seeking
        Pragmatist(functional) | Not hermetically sealed
                                Government work well
                                cooperative
     b) "When one House of Congress purports to act, it is presumptively acting
        within its assigned sphere."
     d) "Whether actions taken by either House are, in law and fact, an exercise of
        legislative power (subject to bicameralism and presentment) requirements of
        Art. I
        depends not on their form but upon "whether they contain matter which is
        properly to be regarded as legislative in its character and effect"
        i) Legislative purpose and effect : altering status quo
        ii) "Congress must abide by its delegation of authority until that delegation is
        legislatively altered or revoked"
     e) Even "two-house veto" would violate presentment requirement (b/c that is "the
     whole point of a legislative veto: exclusively legislative check on executive
     power")
     f) White's dissent
        i) functional defense of legislative veto
        ii) delegation of veto power to HR? (can delegate to govt or pvt person)
            &gt; (S.V.) HR/committees is not valid delegates of executive power
            because Congress cannot provide HR with "intelligible principle" if
            delegating to someone acting as legislators. It is an inherent principle of
            democracy that legislators cannot be asked for the reasons for the way
            they vote
     g) Evaluation
        i) POLICY - Legislative veto : procedurally defective + Congress executing
           law violates Separation of Powers

c. Administrative Agencies and the PRESIDENT
   i. DEF - Executive -- execution of the general rules
Means of overseeing agency action and "taking care" that the laws are "faithfully executed"

ii. Executive power to appoint

1) Appointment Clause (Art II Section 2)
   a) The President shall nominate and by and with the Advice and Consent of the Senate, shall appoint Officers of the US
   b) But Congress may vest appointment of inferior officers in the President alone, in the Courts of Law, or in the Heads of Departments (NOT Congress: it can create federal offices, but it may not appoint just as it cannot execute the statutes it enacts)

2) Buckley v. Valeo (1976)
   a) Officer of the US: "Any appointee who exercises significant authority pursuant to the laws of US -> must be appointed in the manner prescribed by [Article II of the Constitution]"
   b) Viewpoint - "confirmed by both houses" -> unconstitutional because extra constraint on Presidential nominating power?
   c) Commission: investigative, informative functions (Cg is free to appoint legislative officers on its own) / more substantial powers like enforcement power (Apptmt Clause)

3) Freytag v. Commissioner
   a) Department Heads is a narrow concept, refers to "Cabinet-level department"
      i) b/c Limited in number and easily identified
      ii) Fosters political accountability - subject to the exercise of political oversight
   b) "Courts" in Appt Clause includes Art I Courts (The head of a non-art III court is included)
   c) whether someone is an inferior officer / employee? - "exercise significant authority" on the basis of job description
      i) Special Trial Judge is an "inferior officer"

4) Landry v. FDIC
   a) Appt Clause does not apply to a merely employee
   b) ALJ - no power to make a final decision -> employee

5) Morrison v. Olson
   a) Inferior officer v. principal officer? 4 factor test
      i) Removable by higher official -> important factor (coast guard - only has this, and is inferior officer: Edmund case)
      ii) Limited duties
      iii) Limited in jurisdiction
      iv) Limited tenure
   b) Diss - ambassador to Luxemburg is principal officer
   c) Removal power - significant interference with president's authority to manage the executive branch

iii. Executive power to remove

1) NO removal clause
2) Meyers (1926)
   a) Postmaster / Removal: Pres + Senate Confirm -> NOT OK (Invalid)
      i) Pres must be able to remove executive official (Constitution vests the president with the "exclusive" and "unrestricted" power to remove "executive officers") - focus of Meyers, formalistic approach
      ii) OR, Senate involvement is invalid b/c intruding on executive (like Chadha, threaten "congressional usurpation" of the executive power)

3) Humphrey's Executor (1935)
   a) FTC Commissioner / Removal: Pres "for cause" -> OK
   b) Postmaster: "purely executive"
   FTC Comm'r: quasi-legislative, quasi-judicial - independent agencies
      i) "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President" is not included in Myers
      ii) "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power will depend upon the character of the office"
SOURCE OF REQUIREMENT FOR AGENCIES

A. CONSTITUTIONAL - Procedural Due Process

1. AGENCY action within LONDONER
   a. Londoner and Bi-Metallic distinction
      i. PDP: opportunity to speak up in their own defense - applies only in Londoner
      ii. Londoner: "some kind of oral, evidentiary hearing, however informal"
      iii. Bi-Metallic :
         1) a) Relatively small number of persons - more than a few people
         2) Nature of the effect on individuals
            a) "Exceptionally affected" - "all" were "equally" affected
            b) But, even if a rule applies equally to all, the effect on each person will vary depending on their circumstances
         3) Nature of the decisions
            a) On individual grounds - a generalized determination (S.V. -IMPORTANT!)
            b) Different types of factfinding (Prof. Davis)
               -> Functional justification for Londoner-Bi-Metallic distinction

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<th>Particular to the parties to a proceeding</th>
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<td>-&gt; parties know more about the facts than anyone else</td>
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<td>Legislative facts</td>
<td>General, help decide law, policy, and discretion</td>
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<td>-&gt; evidentiary hearing would not improve agency</td>
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b) The Sarbanes-Oxley Act not only protected Board members from removal except for good cause, but withdrew from the President any decision on whether that good cause existed. That decision was vested instead in other tenured officers--Security and Exchange Commissioners--none of whom was subject to the President's direct control. The result was a Board that was not accountable to the President, and a President who was not responsible for the Board.

Morrison v. Olson (1988)

a) Removal by AG for good cause, or term ends
   i) No Congressional role in removal (unlike Bowsher / Myers / Chadha), only removal FOR CAUSE -> OK (RULE)
   ii) "unduly trammel test" (balancing test) - functional approach
       - Does the limitation "sufficiently deprive" Pres of control to "interfere impermissibly" with his constitutional obligation to ensure the faithful execution of the laws?
 c) Does Act as a whole violate SOP?
    i) Court: no

b) Cg can't interfere with removing ppl (legislative means: bicameralism + presentment only)
   c) Stevens (concurrence) - cg shouldn't self-aggrandize
   d) White (dissent) - efficiency -> allow! POLICY


b) Does removal provision violate SOP?
   i) No Congressional role in removal (unlike Bowsher / Myers / Chadha), only removal FOR CAUSE -> OK (RULE)
   ii) "unduly trammel test" (balancing test) - functional approach

Court : no

i) Congress has in effect retained control over the execution of the act and has intruded into the executive function" (Chadha: congressional control over the execution of the laws is constitutionally impermissible)
b. If Bi-M (many ppl, general grounds) -> You lose

c. If Londoner,
   i. Legislature : no DP req (POLICY : Leg < Ag)
   ii. Agency -> Step 2

2. **Does DP clause apply? = Is it deprivation of LLP?**

   a. Goldberg v. Kelly : does not question this
      i. "GRIEVIOUS LOSS"?
         The extent to which procedural due process must be afforded - influenced by the extent to
         which he may be "condemned to suffer grievous loss"
         Balance recipient int. w/ govt interest (govt resources) -> may be #2, may be #3.

c. Property : claim to government benefit?
   i. Board of Regents v. Roth
      1) To have a property interest in a benefit, need more than a unilateral expectation.
      2) LEGITIMATE CLAIM OF ENTITLEMENT from independent source, such as state
         law, is needed.
      3) POLICY - Criticism : permits legislative and executive control in applying
         constitutional norms
      4) Support : balance btw right-privilege distinction and Goldberg's "grievous loss"
         approach -> fix meaningful boundaries, foster democratic values
      5) Marshall's dissent
         DP is a general constraint against arbitrary action by govt
         Property right + Liberty to work -> all proceed to step 3
         All 99 applicants that were rejected => reasons & opportunity to respond
         It is not burdensome to give reasons when reasons exist
         <-> S.V.
         words of constitution are important
         Substantial burdens on government

d. Perry v. Sindermann
   1) independent source such as state law can include implicit contracts
   2) If he can prove property interest, step 3 -> grant a hearing (not automatic
      reinstatement)
   3) Roth and Sindermann redirects DP trigger back toward the text of 5A and 14A
      a) Requiring deprivation of interest in "liberty" or "property"

iii. Town of Castle Rock v. Gonzales
   1) Enforcement of temporary restraining orders issued in domestic abuse cases : NOT a
      property interest
   2) Even if the enforcement of restraining orders were mandatory, it doesn’t necessarily
      mean that the respondent was given an entitlement to the enforcement of the mandate
      (Common law x / Contractual x / No indication of statutory entitlement to
      enforcement / no constitutional right against private violence)

iv. cases not assigned
   **Goss v. Lopez**
   What happens when you want to suspend a public school student
   -> Property interest O
   Do you have to have a hearing before suspension? O/ but doesn’t have to be formal at all.

   **Ingraham v. Wright**
   Corporal punishment
   Liberty interest O
   No hearing is necessary -> good post-deprivation remedy (tort action) sometimes means that pre-
   deprivation remedy is not necessary
   Dissent - 1) you can’t be un-paddled (liberty interest) 2) in some cases the teacher has good-faith error
   he is immune -> post-not very effective

   **Hamdhi v. Rumsfeld**
   DP in times of war
   Cannot be held indefinitely
   4 : immediately release - habeas corpus
   3 : even in the context of terrorism, DP applies
3. How much process is due?

a. Goldberg v. Kelly: requires "minimum procedural safeguards"
   i. essentially trial-type hearings
      1) Notice
      2) Pre-termination
      3) Confront witness (x-exam)
      4) Present evidence orally
      5) Counsel (allowed)
      6) On-the-record
   ii. POLICY - Black's dissent: govt might choose to be less generous in the future (underinclusive)

b. Mathews v. Eldridge: balancing test
   i. "due process is flexible and calls for such procedural protections as the particular situation demands"
   ii. Balancing test factors
      1) Private interest
      2) Accuracy: The risk of erroneous deprivations of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards
      3) The government's interest, including administrative burden and other societal costs
   iii. Evaluation
      1) Consideration of economic cost
      2) Skepticism toward benefits of "judicial model of an evidentiary hearing" in the administrative process
      3) POLICY - COST vs BENEFIT, OSSIFICATION

c. Cleveland Board of Education v. Loudermill: Is the property right defined by and conditioned on the legislature's choice of procedures for its deprivation?)
   1) "Bitter-with-the-Sweet"? REJECTED.
      - once DP applies to an entitlement, the question of what process is due is not answered by statute.
      - Any SUBSTANTIVE limitation on your R is OK -> defines scope of R PROCEDURAL limitation of property R -> always subject to DP (otherwise there would never be LLP w/o DP as long as govt writes DP waiver into the law)
            Definition of property - conferred by legislative grace
            Protection of that right - constitutional guarantee!
   2) Something less than a full evidentiary hearing is sufficient (notice, opp to respond, post-deprivation proc ≠ Goldberg: full evidentiary hearing)
   3) Justice Rehnquist (dissent)
      Property right is defined by the procedures as well
      Balance is ad hoc, subjective, unpredictable - lack of principled standards

d. N. Am. Cold Storage.
   1) If you are going to have minimal process pre-deprivation, then you need to have a more in-depth post deprivation process.
   2) emergency situations: When state’s police power is exercised in a health emergency give broad deference but follow with meaningful post action process.
   3) This is especially applicable when:
      1) monetary damages are sufficient remedies, and
      2) during emergencies.

C. APA

a. Distinction btw Rulemaking and Adjudication
   i. Adjudication - past and present rights and liabilities
   ii. Rulemaking - regulate future conduct

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<th>Adjudication</th>
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b. Distinction between formal and informal
   i. Seacoast (adjudication): "hearing" in adjudicatory proceeding context triggers 554, 556, 557 of APA
      APA governing adjudicatory hearings - whether APA is triggered depends on the substantive nature of the hearing!
      a) In rule making - hearing does not necessarily form the only source of evidence on which agency decisions are based -> OTRAOFAH necessary
      b) In adjudication - if hearing is required by statute (even if it doesn't say "on the record"), it means the decision should be made on the basis of the evidence adduced at the hearing -> triggers APA
   ii. Chemical Waste Management: deference to ag's interpretation of the hearing req

 c. Agency Decision Making - choosing Rule or Order
    - Must an Agency Promulgate Rules? (Is there any constraint in choosing R or A?)
      1) Chenery II
         a) Cf. Chenery I
            i) **You can only uphold what the agency did based on the reasons given by the agency at that time.**
            ii) Separation of powers -> the proper thing to do is **remand** (not let other side win)
         b) POLICY reasons for possibly preferring flexibility of adjudication
            i) When an agency could not reasonably foresee
            ii) Not sufficient experience to warrant a hard and fast rule
            iii) Specialized and varying problems
         c) "The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."
         d) Rulemaking cannot be retroactive (Georgetown University Hospital), whereas adjudication is naturally retroactive -> can you have adjudication where standard announced is not applied to the case on hand?

      2) NLRB v. Wyman-Gordon
         a) Adjudication must be retroactive (new requirement must be applied to the case on hand - if not, it's just a statement of "future effect", which is a "rule," which I was supposed to adopt in accordance with 553 - so it's invalid. But, if you violate it the agency will sue you and there it will be applicable)
b) But when it is applied in the future, you can't do anything. (Adjudication 1 is as though it never happened. And there's nothing wrong with inventing a new requirement for the first time in an adjudication, according to Chenery II and Bell Aerospace)

c) Harland (only 1 vote, + S.V.) : Adj 2 should be invalid because the agency gave reason "Adj 1" (and they have to judge agencies on the reasons agencies themselves give - Chenery I) and that reason is invalid. Should have copy-pasted!

3) NLRB v. Bell Aerospace Co.
   a) "The board is not precluded from announcing new principles in an adjudicative proceeding"
   b) "The choice between rulemaking and adjudication lies in the first instance within the Board's discretion."
   c) FACTORS : Reliance on adjudication may be abuse of discretion or violation of the act, due to possible reliance on established requirements . (Balancing approach - "retroactive effect" of adjudicatory order exceeds an ag's strong interest in administering its enabling act as it deems proper)
      i) Adverse consequences that are so substantial
      ii) New liability is sought for past actions which were taken in good-faith reliance
      iii) Fines or damages are involved
      iv) N.B. Supreme court has never found that it is abuse of discretion to go with adjudication instead of rulemaking when agency wants to have a change of policy
   d) If problem is diverse is diverse and complex -> justifies case-by-case

- Avoiding Adjudication through Rulemaking (OPPOSITE SITUATION)
   1) Heckler v. Campbell
      a) Substantive : "Even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration."
         -> (1) NOT exceed statutory authority (2) NOT arbitrary and capricious
            i) The types and numbers of jobs that exist in the national economy: efficiency, uniformity (not unique to each claimant)
      b) Procedural : Due process is inapplicable when the agency has promulgated valid regulation. "When the accuracy of the facts already has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection."

   c. Adjudication
      1) Requirements for formal APA adjudications
         Presiding officer
         Notice
         Counsel
         Oral and written evidence, x-examination (less than in court) 556 d - hearsay (out of court statement that is meant to prove the truth of the matter asserted) is admissible in administrative tribunals
         Exclusive record
         Limitations on ex parte communication
      i. Evidence
         1) Richardson v. Perales (Evidence in formal adjudication)
            i) all evidence is admissible including hearsay (excluding irrelevant, immaterial, unduly repetitious) - 556.
            ii) "substantial evidence" means that a reasonable person can be capable of coming to that conclusion
            iii) Can a pile of hearsay be more persuasive than the guy himself and his witnesses? Yes (due to factors making the process already reliable + pragmatic concern)
         2) Steadman v. SEC
            a) standard of proof – "substantial evidence" meaning, preponderance of evidence (not clear and convincing evidence)
ii. Combination of Functions
   1) Withrow v. Larkin
      a) Combining investigatory and adjudicatory func in Ag is OK (bias X)
      b) "Minds of its members were irrevocably closed"?
   2) Nash v. Bowen
      a) Agency policies designed to insure a reasonable degree of uniformity - OK

iii. Bias & Ex Parte Contacts
   1) Applies to adjudications and OTRAOF1 rulemaking
   2) Bias
      a) Antoniu v. SEC
         i) Even if he wasn't actually biased, "just must satisfy the appearance of justice"
         ii) DP case (not APA) - Even if you are on APA you can sometimes still win on DP
   3) Ex Parte Contacts
      a) Analysis for ex parte: 554(d)(1) and 557(d)(1)(C)
         (Formal Adjudication or Formal Rulemaking) - what can we do?
            i) reverse
            ii) don't reverse, unless people can show harm
            iii) CURE - put everything on record
            iv) AND § 557(d)(1)(D) - justify to ALJ why you shouldn't dismiss case.

   d. Rulemaking
      i. POLICY - PROS?
         1) time
         2) Efficient
         3) Fair to everyone
         4) Clear standard
         5) Broader policy discussion
      ii. Bowen v. Georgetown U Hosp (POLICY- Leg < Ag)
         1) Ags can't pass retroactive rules unless Cg says expressly that they can
         2) Scalia - APA "rule = Future effect"
      iii. Notice and Comment Rulemaking 553
         1) Chocolate Milk case: increased NOTICE burden
            a) APA 553(b)(3) requires General notice of proposed rule making to include either the terms or substance of the proposed rule or a description of the subjects and issues involved.
            b) final rule has to be "logical outgrowth" of proposed rule - if not, new notice needed! (fair opportunity to present their views on the contents of the final plan)
            c) POLICY - flexibility of agencies (again new notice? And again? And again?) vs. notice to regulated community
         2) Whitefish (Nova Scotia)
            a) interpretation of "notice" "consideration of the relevant matter"
            b) The reviewing court, looks to administrative record already in existence.
            c) Notice must include scientific data and the methodology upon which the agency relied
               i) "if the failure to notify scientific research actually prevented the presentation of relevant comments, the agency may be held not to have considered all "the relevant factors"
               ii) "when the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment"
            d) Concise general statement of basis and purpose must respond to important comments
               i) TEST: cannot leave vital questions, raised by comments which are of cogent materiality, completely unanswered.
               ii) "major issues" of policy and why the agency reacted to them as it did is needed
iii) "agencies do not have quite the prerogative of obscurantism reserved to legislature"

e) Note: a duty to explain final agency rules facilitates judicial enforcement of both procedural(553c) and substantive(706(2)(A)) statutory requirements

f) POLICY : Legs < Ags
   i) Nova Scotia
   ii) Londoner
   iii) Bowen v. Georgetown

iv. Exceptions to Informal Rulemaking Reqs (Statements of Policy, Interpretive Rules)
   1) Reason - POLICY : why have exception? rationality v. flexibility/costs
   2) Policy statement v. interpretive rules?
      a) Interpretive rule - Purporting to require a new requirement, or saying what the statute meant all along?
      b) Policy statement - how govt plan to use the enforcement discretion, not making anything newly illegal, not interpreting anything, not imposing new burdens on the regulated community
   3) Statements of Policy
      a) Mada-Luna - GSP REQ -only prospective, not establish a binding norm
   4) Interpretive Rules
      a) Warder v Shalala
         i) Is the rule substantive or interpretive? - authority (clarifying?), substantial change (novelty), consistency w previous regs, binding on the outside world?

v. Formal / Hybrid Rulemaking
   1) Florida East Coast Railway - (formal v. informal)
      a) In rulemaking, informal unless statute fairly clearly states OTRAOFAH
      b) Formal rulemaking would require oral hearing (556, but can be in written form if a party will not be prejudiced)/ Informal rulemaking (553) doesn't in itself require oral hearing
         - POLICY - Courts, don't impose extra requirements!
   2) Vermont Yankee
      a) Courts are not allowed to make up new procedural requirements for the agencies. 553 is all there is(APA)!!!
         i) what about Nova Scotia and Chocolate Milk? these are interpretations of APA whereas there is no basis for requiring X-exam. in APA
      b) POLICY reasons
         i) Unpredictable
         ii) We have to look at whether the procedure was good ex ante, not in hindsight
         iii) Having more number of procedures will not necessarily give you better records for determining substantive part (arbitrary and capricious)
   3) Hybrid : rulemaking between Formal and Informal
      a) Extra procedure by statute
      b) Administrative common law? NO, Vermont Yankee : this category does not exist

vi. Must an Agency Adhere to its rules?
   1) Sameena Inc. v. US Air force
      a) "An agency's failure to follow its own regulation may result in a violation of an individuals' constitutional right to due process."
         i) It is a free-standing rule of PDP that agency has to follow its own rules
            -> No LLP / Matthew v. Eldridge test
         ii) Cf. Due Process clause

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<tr>
<th>Type</th>
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<tbody>
<tr>
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<td>Agencies must follow own rules</td>
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<td>Rules of evidence</td>
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<td>Substantive</td>
<td>SDP - abortion, contraception, sex privacy</td>
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<td>Incorporation - 1A, 2A</td>
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SCOPE of Judicial Review

Overview

1. Fact
   a. 706 (2) (A) arbitrary or capricious - all
   b. 706 (2) (E) - formal
      i. Substantial evidence
      ii. Whole record rule

2. Law
   a. Ag interprets own regulation
      i. Auer deference : high deference
      ii. EXCEPT if reg. parrots statute -> NOT Auer deference
   b. Ag interprets statute - "when a court reviews an agency's construction of the statute which it administers"
      i. Mead/Chevron/Skidmore doctrine
      ii. Mead: Step 0 - Did Cg implicitly delegate interpretive authority to Ag?
         1) If sufficient formality + force of law -> Yes -> Chevron.
            a) Delegation meriting Chevron treatment
               i) Relatively formal administrative procedure
               ii) Fairness
               iii) Deliberation
               iv) Force of law
         2) If No -> Skidmore (persuasive)
            a) Is there ambiguity?
            b) Thoroughness
      iii. Chevron
         1) Step 1: Is there ambiguity? If Yes, Step 2
            a) If a court, employing traditional tools of statutory construction, can ascertain Congress's intention, that intention is the law and must be given effect.
         2) Step 2: Is Ag's interp. Reasonable construction of the statute?

3. Discretion
   a. Arbitrary & Capricious
   b. Reasonable basis
   c. Hard look
      i. Overton Park
      ii. State Farm

I. Framework
1. Courts review agency action only on the grounds invoked by the agency (because Congress entrusted agencies with the primary role of deciding how to administer an enabling act.)
2. Courts determine the validity of agency action by considering only "the grounds upon which the agency itself based its action"
3. Once a reviewing court invalidates agency action, its recourse is to remand the matter back to the agency for further consideration. (Chenery I)
4. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable.(Chenery II)
5. Unable to review informal adjudication without a contemporaneous explanation of the agency's decision - post hoc rationalizations are an inadequate basis for review (Overton Park)

II. Scope of Review
1. Agency Findings of Fact - invalidated if:
   a. 706(2)(A) applies to all - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ("arbitrary or capricious")
      i. Is it more lenient than the substantial evidence review? (small issue)
         1) Yes - Cg's decision to limit substantial evidence standard to formal proceedings
         2) No (Scalia, Data Processing, Ct of Appeals)
            a) difference is not degree of deference, but the nature of the record that the court reviews for evidentiary support (formal - must be present in formal hearing record / informal - may appear anywhere in the info that ag decisionmakers
b. Agree because APA requires agencies to engage in reasoned decisionmaking in informal as well as formal proceedings.

b. 706(2)(E) applies to formal adjudication and rulemaking
   i. **Unsupported by "substantial evidence"**
      1) Agency findings of fact are upheld when the evidence in the administrative record could satisfy a reasonable factfinder - ensure "reasonableness and fairness" of administrative findings
   ii. A reviewing court must consider the "whole record" - "whole record rule (APA 706)"
      1) What happens when ALJ reversed by Ag? -> ALJ decision is part of the whole record.

c. Agencies are primary factfinders in administrative proceedings, courts simply ensure agency handled its role responsibly.

2. **Law**
   a. Ag interprets **own regulation**
      i. **Auer deference**: high deference
         1) Controlling unless "plainly erroneous or inconsistent with the regulation"
      ii. **EXCEPT if reg. parrots statute** -> NOT Auer deference
         1) BC interpretation reflects the agency's understanding of Cg's language, not its own language
   b. Ag interprets **statute**: ATTENTION! Scope of the problem - "when a court reviews an agency's construction of the statute which it administers" / enabling acts
      i. **Mead/Chevron/Skidmore doctrine**
         1) Before Mead: strong presumption that whenever Congress makes an agency administer a law (which is an explicit delegation), it's implicitly delegating interpretive authority.
         2) After Mead: If sufficient formality + force of law -> Yes -> Chevron
            a) whether the agency has been delegated the power to make rules with the force of law;
            b) whether in doing so, the agency acts with some amount of deliberation or formality.
            c) Also, the challenged interpretation has to be an exercise of that power.
            d) "interpretations contained in policy statements, agency manuals, and enforcement guidelines" - not Chevron deference
      3) **If No** -> **Skidmore (persuasive)**
         a) Is there ambiguity?
         b) The "weight" of any particular administrative interpretation would vary depending on:
            i) The **thoroughness** in consideration
            ii) The validity of reasoning
            iii) Its consistency with earlier and later pronouncements
            iv) And all those factors which give it power to persuade, if lacking power to control
         c) POLICY - factors considered by courts in exercising Skidmore
            i) Consistency - settled expectations of interested parties
            ii) Congressional approval (explicit or implicit)
            iii) Relative competencies of judges and agencies (technical, scientific expertise / broad terms with intent of flexibility) INSTITUTIONAL ADVANTAGE
      iii. **Chevron**
         1) **Step 1**: Is there ambiguity? If Yes, Step 2
            a) If a court, employing traditional tools of statutory construction, can ascertain Congress's intention, that intention is the law and must be given effect.
            b) (if no ambiguity, court independently decides whether interpretation is consistent with the clear meaning of the statute)
            c) **STANDARD**: Whether the contested provision has only one "plausible interpretation"
i) Traditional tools of statutory construction
One. Expressio unius est exclusio alterius (expression of one is exclusion of the others)
Two. Ejusdem generis (of the same type)
ii) POLICY - NB. Judicial activism - considering broader statutory and regulatory schemes, legislative intent (legislative history, common usage, technical meaning, dictionary definitions, traditional canons of statutory interpretation, economic and political magnitude)
One. CRITICISM: Courts have manufactured statutory clarity with the traditional tools of statutory interpretation, to limit the scope of administrative authority

2) Step 2: Is Ag's interp. Reasonable interpretation of the statute?
   a) Is the agency's interpretation "permissible construction"? - statutory analysis
   b) Cf. revisionist challenge: should it also inquire whether the interp was the product of "reasoned decisionmaking"? (arbitrary or capricious - propriety of ag's decision to exercise its statutory authority. I think no. S Ct no.)

3. Exercises of Discretion
   a. Application of the law - exercise of administrative discretion
   b. Ag is not allowed to make up post hoc rationalizations (Chenery I)
   c. 706(2)(A) arbitrary or capricious
      i. Traditional : Reasonable basis for the agency's judgment? (Chenery II)
         1) After consideration of relevant actors, clear error of judgment?
      ii. Hard Look judicial review
         1) review the substantive rationality of decisions more closely - INTENSIFICATION OF SUBST JUDICIAL RW (cf. Intensification of procedural judicial review - hybrid rulemaking - Vermont Yankee: NO!)
            a) POLICY
               i) Levant  - supervisory role of courts over ags / while acknowledging institutional advantage (expertise, accountability) of ags, close substantive judicial review (quality of agency's reasoning, thoroughness of agency's explanation) -> expose reasoning process to close judicial inspection, improving administrative decisionmaking, promote well-documented and reasoned decisions
               ii) Bazelon - use PROCESS to establish procedures that would likely ensure the rationality of an agency's work product(1) judges are not competent 2) legitimacy of judges involving themselves in the substance of administrative decisionmaking is questionable 3) (recent critics) contributes to an "ossification" of the regulatory process, making it burdensome, expensive, and time consuming for ags to issue rules (flexibilit, efficiency)
   2) Citizens to Preserve Overton Park v. Volpe
      a) "searching and careful" review
         i) S Ct - Embraces hard look judicial review ("The generally applicable standards of 706 require the reviewing court to engage in a substantial inquiry" " thorough, probing, in-depth review")
         ii) At the same time, remain deferential to the decisions of administrators ("The Ct is not empowered to substitute its judgment for that of the agency")
            b) Post hoc rationalizations are inadequate basis for review, and do not constitute the "whole record" (706) - internal memos, oral dialogues, testimonies to agency's reasons at the time
      3) State Farm - leading case on hard look review: The scope of review under the "arbitrary and capricious" standard
         a) Is NARROW, and a court is not to substitute its judgment for that of the ag
         b) Nevertheless, the agency must EXAMINE RELEVANT DATA & articulate A SATISFACTORY EXPLANATION
         c) in reviewing this explanation, we consider whether IT CONSIDERED RELEVANT FACTORS? whether there was CLEAR ERROR OF
JUDGMENT?
  i) Relied on factors which Cg has not intended it to consider
  ii) Entirely failing to consider an important aspect of the problem
  iii) Explanation runs counter to the evidence before the agency
  iv) "So implausible that it could not be ascribed to a difference in view or the product of agency expertise" - clear error of judgment

d) State Farm applies to both Rulemaking and Adjudication

AVAILABILITY of Judicial Review

1. Reviewability (cause of action)
   a. APA 701(a) NO APA review available if
      i. statutes preclude judicial review - Read narrowly
         1) Presumption of JR : To preclude judicial review, "clear and convincing" evidence of congressional intent to withhold JR is required
            a) statutory silences do not necessarily imply a congressional intention to preclude judicial review : Abbott Laboratories
         2) Canon of Constitutional Avoidance : "ascertain whether a construction of the statute by which constitutional questions may be avoided is fairly possible"
            a) constitutional questions should be allowed to raise in court - > EVEN MORE important that we read statute narrowly, because if not, might make statute unconstitutional
      ii. Agency action is committed to agency discretion by law
         1) When an enabling act provides complete decisionmaking discretion to administrators
         2) "If the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" "statutes are drawn in such broad terms that in a given case there is no law to apply"
         3) Scalia dissent (Webster v. Doe) : really means "of the sort that is traditionally unreviewable", including wider range of areas - political question, whether the decision involves "a sensitive and inherently discretionary judgment call," area of traditional judicial abstention, etc. - propriety of reviewing the type of agency action at issue
            a) APPLICATION : Military, diplomacy, national security cases, when executive acts as a prosecutor
      4) Heckler v. Chaney - Agency decisions not to commence enforcement actions
         a) Rehnquist- a decision not to bring an enforcement action is committed to agency discretion -> not reviewable
            i) Complicated balancing of a number of factors peculiarly within its expertise
         b) Marshall Dissent - reviewable, but make standard (A&C) very deferential
         c) Difference : evidence / jury trial not necessary (Rehnquist)
      5) Webster v. Doe - Constitutional Claims
         a) "to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," only deny constitutional review when Congress makes such a denial clear

   ii. Cases

<table>
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<tr>
<th>Johnson v. Robison</th>
<th>Bowen</th>
<th>Gay spy case (Webster v. Doe)</th>
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<tr>
<td>Constitutional claims</td>
<td>Statutory claims</td>
<td>Statutory claims + Constitutional claims</td>
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<tr>
<td>1. Presumption of JR</td>
<td>Presumption of JR</td>
<td>1. Presumption of JR - not enough to overcome subst. discretion</td>
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<td>2. Canon of const’l doubts</td>
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<tr>
<td>NO preclusion JR</td>
<td>NO preclusion JR</td>
<td>(2-&gt;) NO preclusion of Const’l claims</td>
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<td>(1-&gt;) YES preclusion of Statutory claims</td>
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b. If you get past 701(a) - > APA 703, 704
i. On prosecution (703)
   1) Defense in enforcement proceeding against you
2) Problem: a) JR of statute may be limited to particular things b) collateral estoppel or issue preclusion c) problematic if everyone raises this defense with every prosecution (statute may say it has to be raised early)

ii. Agency action made **reviewable by statute (704)**

iii. **Final agency action for which there is no other adequate remedy in a court (704)**
   1) Ex. Chocolate milk - if statute says nothing about JR -> APA 703: catch-all provision
   2) FINAL action?
      a) Regulation O / notice of proposed rulemaking X / prosecution X (conviction O)

2. **Jurisdiction**
   a. Federal question (Article III) -
      i. Case arising under federal law (the Constitution, the laws of the United States)
      ii. Controversies where US is a party
      iii. Diversity (Controversies btw 2 or more states; between a State and Citizens of another State; between Citizens of different States, etc.

   b. **STANDING**: But even if federal question O, jurisdiction only in "cases or controversies" (Article III) appropriate for resolution by the judicial bbranch = **Limitation on jurisdiction** (who?)
      i. derived from Article III - limitation on only federal courts! State courts are not bound by standing -> can give advisory opinions

   Cf. 3 different areas of the law
   1) PDP
      a) Ex. Goldberg v. Kelly
      b) Based on 5th Am, 14th Am -> apply equally to states and federal courts (not limited)
      c) Supremacy clause: federal is the law even in state court - you can argue PDP in state and federal courts

   2) Separation of Power
      a) Ex. Non-delegation, appointments Clause
      b) Based on Art. I, II -> assert ONLY to federal government (substantively limited)
      c) State and federal courts

   3) Article III issue
      a) Ex. Standing
      b) Based on Art. III
      c) Applies to all litigation, but only in federal courts (procedurally limited in where you can sue)

   ii. Needs to be proven like everything else

   iii. Constitutional Standing (Article III) - may not be waived / abrogated by statute
      1) 3 Components
         a) **Injury in fact**
            i. Legally and judicially cognizable injury
               a) Concrete, not abstract
                  1. When a harm is sufficiently concrete (ex. Informational injury), though widely shared, there is "injury in fact" (FEC v. Akins)
                  2. *A qui tam* claimant has a "concrete private interest in the outcome of the suit" (bounty - US's injury in fact suffices to confer standing, even though no invasion of legally protected right)

            b. **Particularized**, distinguished interest from those of the public at large
               1. Generalized grievance X: harm to the common concern for obedience to the law - abstract nature of the harm deprives the case of the concrete specificity (advisory opinion)

            c. **Actual or imminent**, not conjectural / hypothetical

         ii) Lujan v. Defenders of Wildlife
            a. The desire to use or observe an animal species is a **cognizable interest** for purpose of standing
1. Not sufficient injury to that interest!
   b. Article III standing is not subject to Congressional fix.
   c. **Procedural injury**: if someone is protected by a *procedure* in the statute, and if 
      Ag action may affect the protection of the person, they may challenge the action (footnote 7)
   d. Justice Kennedy (pivotal): Congress has power to define injuries, but must at the very least 
      *identify the injury it seeks to vindicate* and relate the injury to the class of persons entitled to bring suit. 
      (instrumental rationality argument - gives Congress more slack) - new rights of actions

   iii) Federal Election Commission v. Akins
      a. Voter standing theory - Majority: **Concrete, even though widely shared.** The harm is connected to your 
         being a voter because you are being denied this info.
      b. Cf. Taxpayer standing theory - always lose on standing because everyone is hurt, except for if you sue for 
         establishment clause (you lose for more complicated reasons)

   b) **Causation**
      i) Plaintiff’s injury is "Fairly traceable" to the defendant’s conduct
      ii) Bennett v. Spear: virtually determinative effect -> fairly traceable

   c) **Redressability**
      i) likely (not speculative) to be redressed by the court
      ii) Lujan: whether agency decision is binding is unclear -> redressability X

2) **POLICY** - Why do we have a standing doctrine? (see Werhan)
   a) **Instrumental rationality**
      i) Adversarial system argument
         One. Judge receives only info that parties give them
         Two. We therefore want a degree of concreteness. (Are you looking to become better off by winning?) Good arguments being made.
      ii) Real-world operation produce helpful facts for adjudication
      iii) Prudential argument.
      iv) **BUT why do we have to make it a Constitutional requirement, Art III?** 
         (Lujan- even if Cg makes a statute saying anyone can sue, you need standing)

   b) **Separation of Powers view : Scalia**
      i) Congress passes laws, President has duty to "take care that the laws be faithfully executed (Art II)
      ii) Courts only adjudicate disputes over rights, during which time they may say what the law is.
         One. If courts could always say whether the laws are being faithfully executed, Courts would be taking over a function the Constitution designated for President
         Two. Therefore, we need a threshold inquiry of whether we have a real dispute over the rights of individuals

iv. **Prudential standing**
   1) Combination of statutory and judge-made procedural law
   2) **Zone of interests** - Congress may override by statute
      a) Basis: APA Section 702
         "anyone suffering legal wrong or Adversely affected or aggrieved by agency action **within the meaning of the relevant statute** (= are you in the zone of interests that the statute is **arguably** trying to protect? Different from the merits of the case) is entitled to JR"
      b) Only necessary in the administrative state
         i) In a purely common-law world, you wouldn't be suing unless you had suffered some kind of harm
         ii) In the administrative state, your theory might not have anything to do with the way you have been harmed. (licensing -> competitors, etc.)
      c) **Data Processing case**
         i) "Whether the interest sought to be protected by the complainant is **arguably within the zone of interests** to be protected or regulated by the
ii) Purpose of statute was to limit competition -> bank competitors are arguably within the zone of interests the statute was designed to protect.

d) Postal Workers case
i) It is not about protecting the postal workers' jobs, it's about the interests of the public at large -> their interest is not within the zone of interests
ii) Purposive analysis necessary!
Having an effect is not same as the having a purpose (Court didn't see the statute as giving any protection to postal workers' jobs)

e) National Credit Union Association (NCUA) case
i) Effect of the statute
Competitive injury to the bank was enough
Some reading says postal workers case shut the door a bit and says competition-limiting statute doesn't grant competitors standing, whereas NCUA expands zone of interests
Could argue: direct - indirect injury from competition
ii) Dissent: the effect (limiting competition), but cannot find purpose to limit competition, indistinguishable from the Postal Workers case.

f) Bottom Line: it's a looser test than you'd think (On the constitutional standing, you might have to be strict but with prudential standing once they have constitutional standing, more lenient)

g) Bennett v. Spear
Unanimous court
Biological opinion says your dam will endanger fishes. BOR follows opinion. Ranchers want water. We're unhappy. We claim your Biological opinion is wrong.
i) Jurisdiction
Without standing, it is not legitimate for the federal court to consider the case, -> COURT HAS TO LOOK AT JURISDICTION (standing)
First, even if the parties did not raise the issue.
One. 9th circuit - not within zone of interests
   First. ESA - look at this first (because, APA - authorizes review only when "there is no other adequate remedy in a court")
      1. S Ct: No ZOI test: "any person(standing: who?) may commence a civil suit on his own behalf when agency has done X (reviewability, cause of action: see c. below)"
   Second. APA - ranchers' interest in scientific data is within 1536's concern for scientific data.
Two. Other asserted ground - Article III standing
   First. Gov: You might not have injury in fact (HE might have as much water as he wants)
      1. S Ct: At the pleading stage (complaint stage) you take what the complainant says as true
   Second. Gov: BOR doesn't have to follow the biological opinion of FWS -> your harm is not caused by the FWS' opinion, it's caused by BOR's decision. (causation and redressability)
      1. S Ct: BOR has to justify if it wants to go against FWS's bio op. -> bio op has impose costs to deviate (certain coercive aspect) -> decision of BOR is fairly traceable to FWS-> causation O, redressability O.

ii) Cause of action
   One. ESA: 1533 only. 1536 not reviewable.
      -> no bar going forward with claim # iii.
   Two. Arbitrary and capricious (APA 706(2)(A)) by doing 1536 stuff badly: 706(2)(A) subsumes arguments based on 1536 -> zone of interest under APA (see above)

3) Third party claims (assertion of sb else's legal rights)X

Do NOT confuse with the merits of the case!!!!

3. Immunity (sovereign)
a. Rule: YOU cannot sue the government (can only assert invalidity of statute as DEFENSE in prosecution)
   i. But, sometimes you might want to sue them first (ex. Chocolate milk case, eligibility for benefits)

b. APA 702: partial waiver of sovereign immunity
   i. "An action in a court of the US seeking relief other than money damages / and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority / shall not be dismissed nor relief therein be denied / on the ground that it is against the United States"
   ii. Federal Torts Claims Act - can sue for money damages

**TIMING of Judicial Review**

1. **Finality - WHEN? SHOULD YOU WAIT UNTIL AGENCY FINALIZES MORE?** (S.V. - analyze this first, and in ripeness analysis refer to "finality analysis above")

   a. APA section 704 : (ag action reviewable by statute - doesn't require finality in this case - OR) final ag action … reviewable in court
   b. FTC v. Standard Oil Company of California (SOCAL) **Filing the complaint is not a final action.** It's the beginning of a process to determine whether you are liable.
      i. **Factors**
         1) No legal force comparable to that in Abbott Labs, except the burden of responding to a lawsuit. No practical effect on our primary behavior.
         a) The action must be one from which "legal consequences will flow" - Bennett v. Spear
      2) **Definitive statement of position / "consummation of the agency's decisionmaking process" - Bennett v. Spear**
         | NPRM       | Final rule |
         | Complaint  | Final judgment |

      3) **Policy consideration**: likely to interfere with the proper functioning of agency, burden on courts
         a) Every complaint case will become a court case
         b) Fed cts: if you want to appeal something to an appellate court, you have to wait for a final judgment
      4) [irreparable harm?]

c. When complaining about an inaction, (action includes inaction in APA) at what point is a "final inaction?" How do you determine an inaction is final? Note on finality of agency inaction (Cobell v. Norton, DC Circuit 2001)
   i. When an agency is under unequivocal statutory duty to act, failure so to act constitutes an affirmative act that triggers "final agency action" review (DC Cir)
   ii. Four factors in reviewing an unreasonable delay claim
      1) length of time elapsed since ag came under a duty to act
      2) reasonableness of delay judged in the context of the statute
      3) consequences of the delay
      4) due consideration shall be given to administrative convenience, practical difficulty

d. Statutory time limits on JR of ag action
   i. Failure to bring an action within the defined time limit bars later judicial review IF:
      1) The Ag action at issue put the party whose claim would be barred on notice of the content and effect of ag action, AND
      2) judicial review was ripe during the statutory review period.
   ii. Even if 1) and 2) are met, the claim may still be reviewed by a court if an exception to review preclusion is present
      1) when ag reopened its consideration of the matter that gave rise to the claim of illegality, OR
      2) when changed circumstances result in a claim that was not present during the statutory time period
2. **Ripeness** - WHEN? SHOULD YOU WAIT UNTIL ENFORCEMENT?

a. When it is enforced against you, it is ripe.
   i. What if you want to complain about it immediately after regulation is promulgated? What does it take for th to be appropriate for judicial review?
   ii. PRE-ENFORCEMENT CHALLENGES!

b. Basis for ripeness: judge-made prudential doctrine (Abbott Labs)
   i. Vermont Yankee: can’t make up procedural requirements BUT
   ii. Common law about whether JR is available: O

c. Abbott Laboratories (drug labeling requirement)
   i. Strong presumption of judicial review
   ii. Classic rule: wait to be prosecuted -> unhappy options of compliance or risk going to jail
      -> WHEN ARE PRE-ENFORCEMENT CHALLENGES ALLOWED UNDER THE APA?
   iii. FD&C Act doesn’t allow this pre-enforcement action -> APA?
   iv. APA will help as long as
      1) no preclusion of JR(701) and
         Here: no
      2) no adequate remedy in court (704) otherwise / is this action ripe (judge-made prudential concerns)
         a) Factors in deciding RIPENESS (POLICY)
            i. Fitness for judicial resolution (judges’ interest)
               One. Purely legal question (don’t need to wait) vs. factual question
               Two. Final agency action (plug in Finality analysis)
               Three. Impact is direct and immediate
            ii. Hardship to the parties of withholding (gov’t, private interests - fairness to litigants)
               One. Impact is direct and immediate (sensitive industry)
               Two. Doesn’t delay enforcement etc.

d. Toilet Goods Association (you let them in for inspection)
   i. Factual
   ii. Can challenge when the inspector is trying to come in
   iii. Impact isn’t immediate

3. **Exhaustion** - WHEN? SHOULD YOU DO STH IN AGENCY FIRST?

a. A lot of overlap btw ripeness, finality, and exhaustion
   i. Myers v. Bethlehem Shipbuilding Corp (1938)
      early statement of exhaustion - no one is entitled for judicial relief until the prescribed administrative remedy has been exhausted
   ii. McCarthy v. Madigan
      1) Money damage against prison officers - should he have gone to grievance proceeding? Or can he go straight to federal court?
         a) Finality - whatever he’s complaining about is already done.
         b) Can he base arguments on the APA? He is suing for money damages. APA waives sovereign immunity for cases OTHER THAN money damages. APA doesn’t help him here.
      2) Reas. Can go to court w/o invoking the prison’s grievance mechanism because,
         a) The central component, money damages, couldn’t be adjudicated in prison grievance system
         b) AND a decision on the complaint wouldn’t involve important agency interests or special expertise (POLICY)

b. Source of exhaustion requirement?
   i. Two purposes of exhaustion requirement = finality
      1) Agency power+ expertise
      2) Judicial efficiency
   ii. Judge made prudential doctrine
c. **exceptions to exhaustion**
   i. Undue prejudice to subsequent assertion of a court action - delay is too long
   ii. Doubt as to whether agency can grant relief
   iii. Bias
   iv. APA - Darby v. Cisneros
      1) In cases subject to APA, (can be an issue) NO EXHAUSTION REQUIREMENT
      2) Because: 704 says final agency action is reviewable in court
         a) Except for when ag requires by rule and provides that the action meanwhile is
            operative -> narrow case with exhaustion requirement
         b) Even if there is internal agency appeals process, your not following it does not
            prevent you from it being final agency action (exhaustion is not required)

Policy section (past exams)

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<td>Written in broad terms - is there one set of rules suitable for everything?</td>
<td>Ex. Informal adjudication - such a huge part, different from ag to ag can't come up with a single set of rules</td>
<td>Not written with the minute detail, has to be interpreted broadly/flexibly to meet the needs of what the judges think is reasonable in each case (doesn't bind us precisely)</td>
<td>Vermont Yankee</td>
<td>Susceptible to looser, more flexible interpretation.</td>
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Doctrines - fit into strict vs. loose school
All the doctrines - agree? Why? Concern that cut across?
Taking advantage of expertise of agencies vs. need to control them from going wild & staying within constitutional bounds
Connect apparently disparate areas

Validity of agency action
Structural
constitutional
Apa 553, etc
Judicial review