# Administrative Law classnotes, Fall 2005. Richard Seamon.

## Table of Contents

**Monday, August 22**

***Introduction***

What is administrative law

- The study of administrative *agencies*
  - This course will focus on the main principles governing all agencies.
  - Characteristics of agencies:
    - Most are associated with the executive branch—and are involved in *executing* the law.
      - Three main activities:
        1. Regulate private behavior (often through licensing).
        2. Hand out government benefits.
        3. Administer public property, services, and people with specialized relationships with the government (e.g., prisoners).
      - Three ways these activities are accomplished:
        1. Make rules (quasi-legislative)
        2. Enforce rules and statutes (executive function)
        3. Adjudicate disputes arising under rules and statutes (quasi-judicial)
    - So, a *procedural* focus, as opposed to a substantive one. Thus, admin law is to agencies as civil procedure is to courts.
- Objectives for this course:
  - Learning substance (which is procedure, here).
  - Learning research skills.
  - Learning professional skills.

***Separation of powers***

- Separation of powers doctrine has seldom been used to strike down an agency-creating statute.
  - However, it is often used in *construing* statutes to avoid separation of powers problems. So, it sort of acts as a canon of statutory construction. (See, e.g., case about Cheney's energy task force, *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004).)
- Separation of powers helps us understand how agencies fit into government.
- At the state level, separation of powers can be very important.
  - See *Idaho Schools for Equal Educational Opportunity*, 140 Idaho 586 (2004).
  - And see Idaho constitution art. 2, § 1: "Departments of government. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to

either of the others, except as in this constitution expressly directed or permitted."

- Note formalism versus functionalism.

**Wednesday, August 24**

Recall—agency types of power:

- Rule-making and -issuing (quasi-legislative power)
- Executive power
- Adjudication (quasi-judicial power)

It's the blending of these powers—in agencies—that has raised separation of powers concerns.

The Executive power

- *Bowsher* (legislature interferes with the executive)
- *Clinton* (legislature gives legislative power to the executive)
- Appointment and removal
- *Morrison* (legislature gives executive power to the judiciary (and other issues))

*Bowsher* (1986) (p23x) -- formalist

- The comptroller geneal:
  - Could require budget cuts.
  - The CG was an executive, but only the Congress could remove him.
- Itc. says that Congress can't retain power to remove an executive branch official.

- Why the insistence on separation? To avoid too much power in one place.
- What about the executive power, then? How meaningful is it? Pretty meaningful, because there's a lot of power in executing the laws.
  - Well, for one thing, the executive gets to interpret the laws.
  - For another, the executive chooses when, how, and how much to enforce (by selecting enforcement policies).
- Removal power—how much control is there here??

*Clinton* (1998) (p25) -- formalist

- Itc. is all about the "finely wrought procedure" for bill passage and enactment. The only way, the Court says, to amend a bill is by the explicit *constitutional* process.
- Note Part VI itc.: the Court is *only* addressing the constitutional process involved here—it is *not* addressing general separation of

powers concerns of holding anything about all forms of delegation of legislative powers.

**Thursday, August 25**

Recall:

- *Bowsher*: the Court concludes that the Comptroller General, is an executive official, noting that the CG interprets the law. (Note, though, that there *are* legislative and judicial agencies.)
- *Clinton*: itc. doesn't address Congress's power to delegate rulemaking, n.b.

Appointment and removal

- Why should a lawyer care about this? Because knowing about this gives you an angle for dealing with specific officials.

*Morrison* (1988) (p34) -- functionalist

- First, the Appointment Clause, A2§2c2:

  > . . . he shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
  >
  > Note the colon—before it are the "principal officers" which much be appointed by the president by and with the Senate's advice and consent; after are the "inferior officers," which the president, the courts, or the department heads can appoint (note that *Congress* can't appoint the interior officers).
- Opinion structure:
  - Part III: appointment of the Independent Counsel (Appointment Clause).
  - Part IV: A3 issues, including the Court's power to define the IC's jurisdiction or terminate the office.
  - Part V.A: separation of powers challenge to the statutory restriction on the AG's power to remove the IC.
  - Part V.B: separation of powers challenge to the overall

scheme.

- The appointment issue:
  - The IC was appointed by a court of law. Olson argues that a court *can't* appoint the IC under the Constitution—i.e., that the IC is a principal officer.
  - The Court disagrees, saying that the IC is an inferior officer, analyzing it using multiple factors:
    - Subject to removal by a higher executive branch official?
    - Limited duties?
    - Limited jurisdiction?
    - Limited tenure?
  - See also *Freytag* (1991) (n3p42): employee-inferior officer distinction (special trial judges of the Tax Court are inferior officers, not employees); based on the fact that the office was established by law and cam with significant duties and discretion.
- The A3 issues:
  - The power to define the IC's jurisdiction: to resolve this, the Court narrowly interprets the statute as requiring jurisdiction to be bounded by the problem that the AG has identified.
  - The power to terminate the office: the Court narrowly interprets this as well, saying it's a very limited power.
- The removal issue:
  - Ultimately, there's a statutory restriction on the president's power to remove—the IC may only be removed for cause.
  - Also, the IC is a purely executive officer.

**Monday, August 29**

Recall: we're looking at the Constitutional foundation of modern administrative law.

- Part V.A (Congress's power to restrict the president's removal power):
  - Here, there's a for-cause restriction—the president (through the AG), could remove the IC only for cause.
  - The Court distinguishes *Bowsher*, where Congress gave *itself* power to remove, from itc., where Congress is only limiting the executive's power to remove.
  - Note the former leading cases here:

- *Humphrey's Executor* (1935) (p34x): Congress *could* limit the executive's power to remove the FTC commissioner.
- *Wiener* (1958) (p39x): Congress *could* limit the executive's power to remove a War Claims Commission member.
- *Myers* (1926) (p34x): Congress could *not* limit the executive's power to remove the postmaster —because the postmaster was a purely executive officer.

- So, applying prior precedent, what result?
  - Is the IC purely executive? YES! Because the IC was a prosecutor, and prosecuting crime is a core executive function.
  - BUT, the Court changes the rule!! "We undoubtedly did rely . . .," but now our "present considered view . . . ."
  - So, there are no rigid categories anymore—the real question is whether removal restrictions impede the president's ability to perform his constitutional duties.
    - So, now things are a matter of degree. This is functional reasoning.
    - And, so now Congress's power is a bit broader (??).
- Scalia's dissent (omitted in the casebook): takes a formalist approach, wanting to have the Court stick to the pure executive means no limit on removal power, or not, approach.
- What would the result be here if the officer in question was a *principal* officer? This would be a very different question, Seamon says.

<u>Practice questions, p8p</u>

- Suppose that a federal statute authorized Congress to remove the Administrator of EPA the same way that Congress could remove the Comptroller General under the statute invalidated in *Bowsher*. thus, Congress could remove the EPA Administrator on specified ground by joint resolution if the president signed the resolution into law or it was enacted over the president's veto. Like the CG, the EPA Administrator is appointed by the president with the advice and consent of the Senate. Unlike the CG, though, the EPA Administrator has quasi-legislative and quasi-judicial powers. Does the statute violate the separation of powers doctrine?

- Yes, this violates separation of powers. This is a *Bowsher* situation, and there you have a bright-line rule: Congress can't reserve power to remove executive branch officials.

- Suppose that a federal statute provides that the president can remove the EPA Administrator only for specified reasons. Does that restriction violate separation of powers?
  - This is a *Morrison* question—does the restriction impede the president's ability to perform his constitutional duties??
    - What's to be taken into account?
      - Principal or inferior?
        - *Morrison* factors:
          - Subject to removal by higher executive officer?
          - Limited duties?
          - Limited jurisdiction?
          - Limited tenure?
        - Probably principal (not cabinet-level, but close). This tends to weigh against the propriety of limited removal powers for the president.
      - The *Morrison* impede-ability-to-perform-constitutional-duties analysis.
      - Traditionally executive agency? (Yes, here.)
      - How central to the executive's functioning? (Central agencies, for sure, are DOD, DOJ, State, Foreign Affairs).

**Wednesday, August 31**

Recall: separation of powers issues:

- Congress reserving removal power over an executive official (*Bowsher* (Comptroller General)).
- Short-circuiting bicameralism and presentment requirements (*Clinton* (line-item veto)).
- Appointment of "officers of the United States" (Appointment Clause; *Morrison* Part III (Independent Counsel); the key is principal versus inferior).
- Congressional restrictions on the president's removal power (*Humphrey's Executor*, *Wiener*, *Myer*, *Morrison* Part V.A).

The legislative power

- Separation of powers issues:
  - Legislative veto (*Chadha*)
  - Delegation of legislative power to agencies (*Whitman*)

*Chadha* (1983) (p46x)
- Congress wanted to reserve power to overrule a deportation suspension made by the AG (which would be made with AG power delegated by Congress). And it wanted to be able to do it by House resolution, unsigned by the executive, alone.
- It can't do this, the Court says—Congress must follow the Constitutional process.
- Is this really "legislation," though? Yes, the Court says, because it affects a person's rights.

*Whitman* (2001) (p49)
- What are NAAQs? They're rules—if you violate them, you've broken the *law*. So, Congress has sort of outsourced its rulemaking to an expert agency.
- The Court says the delegating statute had enough guidance to be okay.
  - So, at the federal level, almost anything goes. Anything more than *no guidance at all* will fly.

N.b.: there are a lot of checks and public participation opportunities with agency rulemaking. It's a tradeoff, then, between Congress and an agency. This, Seamon says, is (maybe?) why the Court is willing to allow these delegations.

The judicial power

- Separation of powers issues:
  - Congress gives adjudicatory powers to non-A3 entities.
    - The Court almost never strikes this down, but upholds under a variety of theories:
      - "Public rights" theory
      - In aid of legislative goals and functions theory (A1 courts)
      - In aid of courts
      - Private rights
      - *Schor* (1986) (p60x): can Congress provide for adjudication of *state* law compulsory counterclaims in a federal agency rather than in an A3 court?
        - Yes, the Court says, because it's functional—federal courts aren't really threatened by this.

- Congress gives A3 judges non-adjudicatory duties.

**Thursday, September 1**

Recall: delegation:
- Of rulemaking powers—intelligible principle doctrine (*Whitman*).
- Of adjudicatory powers—functional analysis (*Schor*), with two concerns:
  - Effect on the judicial branch
  - Effect on individuals

  - Congress gives A3 judges non-adjudicatory duties.
    - *Mistretta* (1989) (p61)
      - Another functional analysis, with two concerns:
        - Undermining the judicial branch by tainting it with political concerns.
        - Aggrandizing the judicial branch.

[research lecture]

**Wednesday, September 7**

***Agency organic statutes***

- How to read one
  - Well, how do you read a statute?
    1. Top down first—understand the statute as a whole
       - Characterize the agency (e.g., a professional licensing agency).
       - Note significant parts
       - Note definitions
       - Find the *establishing provision*
       - Find the *powers and duties*
         - But do not assume that you've found the *only* powers and duties provisions.
       - Find any *prosecution powers*
    2. Study the provisions you picked out in step one in detail (e.g., with each power, characterize it as executive, legislative, or judicial).
  - [simulation of practice problem 1 on agency organic statutes (h/o)]

**Thursday, September 8**

[missed class]

**Monday, September 12**

- Idaho Board of Medicine [recap from 9/8]:
  - You have to look elsewhere, every time:
    - Idaho APA
    - Medical Board *rules*
    - AG's rules on administrative procedure
  - Your responsibility for the exam, however, is only:
    - The Idaho APA
    - Due Process Clause
    - Medical Board organic statute

***The Federal APA***

- This is a crosscutting statute—it applies to just about every federal agency.
- It was passed without a single dissenting vote, after meticulous crafting by scholars and others.
- It has remained mostly intact.

Organization of the FAPA

- This is a procedural statute—it doesn't grant any rulemaking powers, e.g.
- Purposes:
  - Focuses
    - Make agency rulemaking and adjudication uniform (§§ 553 and 554).
    - Make hearings uniform (§ 556)
      - The presiding officer is usually an ALJ, n.b.
    - Make decisionmaking uniform (§ 557)
    - Set standards for judicial review (§§ 702–706)
  - Also:
    - Public information (§ 552)
    - Ancillary matters (§ 555)
    - Powers and sanctions (§ 558)

Handling and administrative law problem

1. Is it an "agency" under the FAPA? (See § 551 for the definition.)
2. Is the specific agency action covered? (This is trickier—ask, is it rulemaking or adjudication? If not, it might not be covered. Then ask, is the action exempt?)
3. How does the FAPA interact with other statutes?

Rulemaking

- Types:
  - Informal (aka "notice and comment" rulemaking)
    - This is where the FAPA applies, but other statutes are silent.
    - Key provisions are § 553(a) to (d).
    - This is probably the most typical.
  - Formal
    - This is where the FAPA applies and another statute requires the rule to be based on a record made at a hearing.
    - Key provisions are:
      - the other statute
      - § 553, except (c)
      - §§ 556 and 557
  - Hybrid
    - This is where the FAPA applies and another statute imposes procedural requirements that modify or displace FAPA (but does not require a formal hearing).
    - Key provisions? You have to mesh the agency-specific statute and the FAPA.

Adjudication

- Types:
  - Informal (aka "non-APA adjudiation")
    - This is where no statute requires a hearing.
    - Key provisions? The APA doesn't say much, but see §§ 555 and 558.
  - Formal
    - This is where the FAPA applies and another statute requires a formal hearing.
    - Key provisions:
      - the other statute
      - §§ 554, 556, and 557
  - Hybrid
    - This is where the FAPA applies and some other statute imposes additional procedural requirements (but doesn't require a formal hearing).

Also, judicial review (and also agency investigations).

**Wednesday, September 14**

Rulemaking versus adjudication

- Why does this distinction matter?
  - Because which one you've got determines what the rules are. Indeed,

the AGM says the whole APA is built around this distinction.

- How do you make the distinction?
  - Rulemaking:
    - Legislative
    - General applicability
    - Future-oriented
    - Policy-based
    - Persons/classes
  - Adjudication
    - Quasi-judicial
    - Specific application
    - Retrospective
    - Fact/evidence based
    - Parties
- "Rule" (§ 551(4))

  "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

  - Note that "particular" applicability is here—why? Because rate-making is, historically, rulemaking. So, this is here mainly to keep rate-making as rulemaking.
- Practice problems, p30p
  - The EPA establishes the maximum ambient level of ozone in the air that much be achieved in every state to satisfy the CAA.
    - A rule—it has general applicability, and is applicable to persons (rather than parties).
  - The CFTC concludes that a particular broker violated the Commodity Exchange Act in conducting certain transactions involving commodity futures for a specific customer.
    - An order.
  - The NRC grants a license to Vermont Yankee Corporation to operate a nuclear power plant in Vermont.
    - An order—licensing.
  - The Idaho Board of Medicine promulgates criteria defining what types of conduct by non-physicians will constitute the unauthorized practice of medicine within the meaning of the statute that the Board administers.
    - A rule—it's prospective, but...

        - The IAPA says that to be a "rule" it must be promulgated in compliance with the IAPA.
    - The Idaho Board of Medicine interviews a citizen who has filed a written complaint alleging that her physician made unwanted sexual advances toward her during a routine exam.
        - Neither.
    - Finding that the complaint is true, the Board suspends a physician's license to practice medicine.
        - An order.
    - An official from OSHA inspects a particular workplace to determine if it has any conditions that are dangerous for its employees.
        - Neither.
    - After a formal hearing, the NLRB concludes that the Hearst Company has committed an unfair labor practice in violation of a federal statute by failing to negotiate with the newsboys who sell its papers.
        - An order—in fact, this is a formal adjudication (because of the "formal hearing").
    - Without holding a hearing, the Secretary of Transportation decides that a federally funded interstate highway should be located through a municipal park.
        - Order—an informal adjudication, though.
    - the FCC decides on the rates that a long-distance company can charge for interstate, long-distance calls.
        - A rule—ratemaking is rulemaking (note, though, that ratemaking is treated as an adjudication, otherwise).

<u>The Idaho APA</u>

- The IAPA is relatively new for a state APA—it's part of about the fourth generation of state APAs.
- Note that a "contested case" under IAPA is an "adjudication" under FAPA.
    - Many other states use this term—but in some states, it refers only to *formal* adjudications.
- Use the same three-step process for analysis as with the FAPA:
    1. Is the entity an "agency"?
        - Under IAPA, "agency" does not include units of local government (but, the legislature can extend parts of the APA to local entities).
    2. Does the APA apply to the agency action?
    3. How does the APA interact with other statutes and rules?

**<u>Thursday, September 15</u>**

***Rulemaking***

- Sources of procedural rules for rulemaking:
  - The Constitution, especially the Due Process Clause
  - The agency organic statute and other statutes
  - The APA
  - The agency's own rules
  - Federal common law (*Vermont Yankee*): but only where there's a "totally unjustified departure" from long-standing, well-settled agency procedures.
- APA rulemaking requirements
  - Exemptions
    - § 553(a)

      This section applies, according to the provisions thereof, except to the extent that there is involved--

      (1) a military or foreign affairs function of the United States; or

      (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

      - Military affairs and foreign affairs
        - Why? It's impractical to subject these to the APA; plus, there's a (mild) separation of powers concern.
      - Agency management and personnel
        - Why? These are internal practices, and the public doesn't care.
      - Public benefits and public property
        - Why? Politics.
        - Note, though, that some large benefits-granting agencies have promulgated rules subjecting themselves to the APA (because they were having a hard time with the courts).
    - Other exemptions--§ 553(b)

      Except when notice or hearing is required by statute, this subsection does not apply--

      (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

      (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

- A functional/general exemption (e.g., for interpretative rules)
- A good cause exemption

- If no exemption applies:
    1. Public notice
    2. Determine what level of procedure is required
        - The default (the lowest level) is notice and comment (informal) rulemaking.
        - The highest level is formal rulemaking—a formal hearing and formal decision requirements apply.
            - Trigger language is required to making this necessary: § 553(c) last sentence:

                > When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
        - There's also hybrid rulemaking.
            - What do these look like? One common one is a Congressional requirement that public comments be allowed orally.

**Monday, September 19**

Recall: rulemaking exemptions

- § 553(a): subject matter exemptions
- § 553(b):
    - (A): rule type exemptions:
        - interpretative rules
        - policy statements
        - procedural rules
    - (B): good cause exemption

§ 553(b) exemptions

- Interpretative rules
    - How do you identify interpretative rules?
        - They explain, clarify, and provide guidance.
        - Substantive rules, on the other hand, implement legislation.
    - Approaches to distinguishing interpretative from substantive rules (from caselaw):
        - (Substantial impact test (this will not be addressed in this course—it is out of favor in the federal system)
        - Legal effect test
            - Two subapproaches:

- Formal
    - Grant of substantive rulemaking power?
    - Did the agency follow the procedures for a substantive rule?
    - Did the agency call/label the rule as substantive?

  If so, it's a substantive rule.
- Functional
    - This looks to agency intent, recognizing the possibility that rules labeled as interpretative may actually be substantive.
    - This is probably the majority approach.

  *Alaska* (D.C. Cir. 1989) (p198)
        - Note *Community Nutrition Institute* (D.C. Cir. 1987) (p200x):
            - Important factors:
                - Exceptions granted
                - Publication
                - Mandatory
                - Language
                - "Classic"ly legislative
        - What substantive rulemaking authority itc.? The Federal Aviation Act, which allows regulation of deceptive advertising with respect to commercial airfare.
        - Note the rulemaking timeline here.
        - Also note that although later rules are labeled "orders," they're still rules, of one kind or another.
        - The later "orders" made were made without notice and comment —and states with stricter advertising rules complain.
        - The Court says these "orders" are substantive rules, and therefore invalid because there was no notice and comment as required by the APA.

- The agency could now still go through notice and comment and pass the rules, but now the states have more bargaining power—and an opportunity to participate.

**Wednesday, September 21**

- General statements of policy
  - What are these? They're explanations of how the agency is going to go about its enforcement duties. E.g., "we're going to be really strict this weekend."
    - The AGM explains them as statements that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."
  - *Lincoln* (1993) (p203x): discontinuance of a discretionary allocation was within the exemption.
- Procedural rules
  - Recall the *Erie* doctrine
  - *ATAA* (D.C. Cir. 1990) (p204x)
- Good cause
  - See the example of a good cause statement posted on TWEN
  - Courts tend not to defer to agencies' good cause justifications when they're challenged.

APA rulemaking procedures

- Four basic steps
  1. Notice
  2. Opportunity for public input
  3. Agency decides on a final rule
  4. Agency publishes the final rule in the Federal Register

Notice

- This is the same for all kinds of APA rulemaking--§ 553(b):

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule

is proposed; and

(3) either the terms or substance of the proposed rule or a description or the subjects and issues involved.

- Two recurring issues, here:
  - Courts hold that agencies should publish underlying data, reports, etc. when relying on it in the notice. This is not technically required by the APA, though.
  - Sometimes, the final rule differs from the rule that was published for comment.
    - *Chocolate Manufacturers* (4th Cir. 1985) (p209x): the logical outgrowth test—parties must ahve notice before an agency makes a significant change to a proposed rule.
- See the Notice of Proposed Rule Making posted on TWEN. Note how long the "concise general statement of basis and purpose" is.

<u>Rulemaking modes</u>

- On the record, hybrid, or notice and comment
  - How do you know which one? You look for trigger language in the agency statutes.
- Informal rulemaking (notice and comment)
  - What kind of public input is required?
    - An "opportunity to participate." § 553(c):

      After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.
    - This just means that written comments is all that's required.
  - What kind of decisionmaking is required?
    - The agency only has to consider relevant input from the public (but it does have to do that).
    - And it must include a concise statement of basis and purpose in the rule. § 553(c):

      After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

*Vermont Yankee* (1978) (p211)

- What's the problem with courts determining agency procedural rules? Separation of powers.
- So, where can procedural rules come from?
  - The Constitution

- Statues (the APA, agency organic statutes, and others)
- The agency's own rules
- Unjustified departures (¶4p216): i.e., an agency might ind itself by following unwritten practice.

**Thursday, September 22**

- N.b. the procedural history itc. (especially p214).
- Even though itc. says that courts can't impose procedural rules on agency rulemaking, a court can still invalidate a rule on substantive grounds:
  - Not supported by the evidence (arbitrary and capricious)
  - Otherwise doesn't make sense (arbitrary and capricious)
  - (See APA § 706(2)(A) and (D) and itc. ¶1p216 for discussions of arbitrary and capricious invalidation.)

*Florida East Coast Railway* (1973) (p221)

- Note the last sentence of § 553(c): "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."
- "After hearing" in Interstate Commerce Act § 1(14)(a):
  - Does it trigger § 556?
    - No.
    - See *Allegheny-Ludlum* (¶3p223): didn't this case decide the trigger language issue? Not necessarily, because the ICA had been amended since *Allegheny*. The Court still holds no, even so.
  - Even if it doesn't trigger § 556, does "hearing" in the ICA mean something more than notice and comment (i.e., does "hearing" create a hybrid rulemaking process)?
    - No. So, "hearing" can be a paper hearing.
- Note that there's a different analysis for adjudications.
  - See *Seacoast Anti-Pollution League* (n2p227), which reaches almost the opposite conclusion from *Florida East Coast*. Why? Note the general difference between the legislature and the judiciary.

Practice problem 3.b, p37p

- The Agricultural Marketing Agreement Act authorizes the

Secretary of Agriculture to issue "marketing orders" for certain fruits and vegetables. One marketing order, for example, governs the marketing of all California peaches. That order prescribes: the quantity of California peaches that can be brought to market during a 12-month period; the minimum size and quality of the peaches that can be marketed; and the procedures for inspecting and packaging the peaches. The main policy underlying the act is to ensure stable market conditions for agricultural goods.

The act provides:

(3) Notice and hearing. Whenever the Secretary of Agriculture has reason to believe that the issuance of [a marketing] order will tend to effectuate the declared policy of this Act with respect to any commodity or product thereof specified in this act, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of a marketing order. After such notice and opportunity for a hearing, the Secretary of Agriculture hall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing . . . that the issuance of such order . . . will tend to effectuate the declared policy of this chapter with respect to such commodity.

- Rule or order? Rule.
- Must the Secretary follow the formal rulemaking procedures (§§ 556 and 557)? Yes, because "upon evidence introduced at such hearing" in (4) is a close-record requirement and triggers formal rulemaking.

**Monday, September 26**

Publication requirements

- Must publish in the Federal Register.
- Note *Merrill* (1947) (p228x): even a farmer who was misled by a federal official was still held to knowledge of publication in Fed. Reg.

Effective date

- § 553(d) requires 30-day notice as a default:

  > The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . . .

- But there are exceptions to this:
  - § 553(a) exemptioins
  - § 553(d)(1): substantive rules that grant or recognize exemptions
  - § 553(d)(2): interpretative rules and statements of policy
  - § 553(d)(3): good cause
- Retroactive rules
  - *Georgetown University Hospital* (1988) (p231x): lack of authority to promulgate retroactive rules—Congress must grant retroactive rulemaking authority in *express terms*.

Petition for rulemaking

- Note First Amendment right to petition for redress

Other procedural requirements for rulemaking

- There are a bunch of crosscutting statutes—see pp234-236.

***Preemption of state law by federal regulations***

- Two kinds of preemption
  - Express: the statute itself expressly addresses its effect on state law.
    - E.g., FRSA, in *Shanklin* (2000) (p48p):

      > A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues and order covering the subject matter of the State requirment.

  - Implied: two subkinds:
    - Field preemption
      - See *Fidelity Federal* (1982) (p39p) at p42p:

        > Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

    - Conflict preemption: two sub-subtypes:
      - "Physical impossibility" to comply with both federal and state law.
      - "Obstacle": state law is an obstacle to fulfillment of Congress's purposes and objectives.

**Wednesday, September 28**

- Implied preemption: an agency can promulgate rules with preemptive effect *even if* it doesn't have express authority to do so.
- Do federal regulations have "no less preemptive effect than federal statutes" (see *Fidelity Federal* at p42p)?
    - Well, for substantive federal regulations, this is true. It's an open question as to whether this is true for federal interpretative rules (because substantive rules have the force of law whereas interpretative rules do not).

*Fidelity Federal* (1982) (p39p)

- Itc., a mortgagor sues an S&L that's accelerating his loan under federal regulations.
    - The S&L raises the administrative law (preemption) issue as a defense (viz., that it included the acceleration clause pursuant to a federal regulation.
    - This regulation was promulgated under HOLA, a federal act.
    - But the regulation conflicts with state case law (*Wellenkamp*), which limits the enforceability of such acceleration clauses.
    - The Court determines that this is obstacle preemption.
        - (It's not impossibility preemption because the federal regulation merely *permits* such acceleration clauses.)
- But, even though there's a conflict, and the Court finds preemption, the regulation must still be *valid* to actually preempt.
    - See Part IV (p44p): a good example of rule validity analysis.
    - The Court determines that the promulgation of the rule was not arbitrary and capricious.

*Shanklin* (2000) (p48p)

- Here, we have express preemption.
- Note that the Court rejects the agency's interpretation of its own regulations. This is rare—but here the agency has changed its position since an earlier case (*Easterwood*). This change may have been due to change in administration (as hinted at by the dissenters).

- When, if ever, do state agencies have to follow federal procedural requirements? Do they ever have to follow the FAPA?
    - The federal APA, by its terms, does not apply to state agencies.
    - *But*, sometimes state agencies do have to follow federal procedural requirements:
        - Provisions int he U.S. Constitution (e.g., the Due Process Clause of the Fourteenth Amendment)

- Valid federal statutes
  - Medicaid, e.g.: you apply in the state, but 80% of the money comes from the federal government (the carrot approach).
  - OSHA, e.g.: if the state inspects, and follows federal procedures, the federal government won't come in; otherwise, it will (the stick approach).
  - SSD, e.g.
  - All of this is cooperative federalism—which is, for the most part, well-established as constitutional.

**Thursday, September 29**

[research lecture]

**Monday, October 3**

***Rulemaking under the Idaho APA***

- The focus here:
  - How does the process work for substantive rules?
  - How does this process compare to the FAPA?
  - What rules are exempt?
  - How do exemptions compare to the FAPA?
  - Other important aspects of rulemaking under IAPA.
- Recall the three-step process for APA applicability:
  1. Is it an APA "agency"?
  2. If so, is the agency's action subject to the APA?
  3. How do the APA and other statutes and rules (e.g., the organic statute) interact?
- Also recall the four rulemaking steps under the FAPA:
  1. Notice
  2. Public participation
  3. Decision
  4. Publication
- Idaho rulemaking
  - Note negotiated rulemaking—which is discretionary.
  1. Notice
     - Notice of intent—an agency can do this even if it's not doing negotiated rulemaking.
     - Notice and comment rulemaking
       - Notice of Proposed Rulemaking is published in the Administrative Bulletin (see IC § 67-5221(1)).

2. Public participation
    - Written comments
        - But an oral hearing is required if 25 people request it (IC § 67-5222).
        - Note the misleading language in § 67-5222(1): "shall afford . . . orally." The "shall" isn't true.
    - Interim legislative review
        - The legislature can request a cost-benefit analysis, hold legislative hearings, and submit written comments.
3. Decision
    - See IC § 67-5224:
        - The agency *shall* consider comments.
        - The IAPA lays out what the "concise statement" must include (more so than the FAPA does).
4. Pulication
    - Rules must be published in the Administrative Bulletin
    - Retroactivity: the law in Idaho is (probably) the same or very similar to the federal law here, Seamon thinks.

- The rule at this time is only a "pending" rule
    - No significant variance is allowed—the IAPA has an explicit "logical outgrowth" test (§ 67-5227).
    - § 67-5224(5)(a): a rule cannot take effect until the current legislative session ends (!!!).
        - Under § 67-5291, the legislature gets to review all rules to see if they comply with legislation. (This is very unusual, Seamon says—perhaps unique.) It can approve, reject, or amend the rule by concurrent resolution (*not* submitted to the governor for signature (!!)).
        - And the legislature can still reject *final* rules (!!!!) under § 67-5291.
        - § 67-5291 has been challenged on separation of powers grounds—and survived.
    - Also, under § 67-5292, every rule automatically sunsets unless extended by statute.
- Types of rules under IAPA
    - Procedural: in the end, these are exempt under IAPA just as under FAPA. But, they are not identical to FAPA procedural rules. See § 67-5201(19)(b)(i). They're comparable, though.
    - Interpretative: these are also comparable and have the same effect as under FAPA.
    - Temporary/emergency: see § 67-5226. The governor himself must make the exigency finding.
    - Typos: see § 67-5228. There's no analogous FAPA provision.
- Initiating rulemaking

        - See § 67-5230. This has a FAPA analogy.
            - Note the timing element here—the agency must respond to the petition (this isn't true under FAPA).
            - Also, these are explicitly subject to judicial review.
    - Declaratory rulings: see § 67-5232. This has no FAPA analog (although a lot of federal agencies do this).

**Wednesday, October 5**

***Rulemaking versus adjudication***

- Differences
    - Notice
        - Rulemaking: general notice
        - Adjudication: just to parties
    - Hearings
        - Rulemaking: interested public
        - Adjudication: evidence, witnesses, limited to parties
    - Post-decisional notice
        - Rulemaking: general notice
        - Adjudication: index of decisions only
    - Scope of review
        - Rulemaking: arbitrary and capricious
        - Adjudication: substantial evidence
    - Binding effect
        - Rulemaking: force and effect of law
        - Adjudicate: stare decisis
- When would an agency prefer adjudication over rulemaking?
    - Fact intensity
    - Complexity
- The *Chenery* principle
    - *Chenery* (1947) (p125)
        - N.b.: what authority does the SEC have to approve reorgnization itc.? It has authority under the Public Utility Holding Company Act of 1935 (see p126).
        - First rejection: the SEC relied on judicial precedents on fiduciaries. The Court said that the SEC misread the precedents, reversed and remanded.
        - Second rejection: the SEC relied on statutes (not judicial precedents).
            - Note that these statutory standards are very vague (p130): "fair and equitable" and not "detrimental to public." From these, the SEC is developing a "rule," that will be announced in an order.
        - So—the *Chenery* principle: the choice between rulemaking and

adjudication is within the agency's discretion (¶3p129).
    - Exceptions:
        - Abuse of discretion (n4p132)
        - Contrary to law
- Note that the Court must rely only on the agency's grounds (p126)--and those grounds must be set forth understandably.

**Thursday, October 6**

- Exceptions to the *Chenery* principle:
    - Abuse of discretion (see § 706(2))
    - Contrary to law: e.g., a statutory mandate to address a situation by rulemaking only.

Exercise on agency choice, p32p

- "Regular and punctual attendance"
    - Adjudicative standard:
        - Advantages:
            - Total flexibility
        - Disadvantages:
            - Total flexibility
            - No standards available on review
            - Students have no standard to conform to
    - Legislative standard:
        - Advantages:
            - Conduct is conformable
        - Disadvantages:
            - Administrators hands are tied
    - Also, you'll need an enforcement policy:
        - Advantages of having a uniform enforcement policy:
            - Predictability
            - Equitable (with respect to uniformity)

***Initiating adjudication***

- Types of agency activities:
    - Control the everyday conduct of individuals and entities
    - Distribute benefits
    - Licensing

Nonenforcement

*Heckler* (1985) (p242)

- Executioners are using drugs not approved by FDA for execution. Π wants FDA to take enforcement actions—but FDA refuses, stating its enforcement policy (¶1p243).
- N.b.: what statute authorizes this lawsuit? The APA (§§ 702 and 704).
- § 701(a)(2) says that there's no judicial review of decisions committed to agency discretion, though.
    - And the FDCA puts not limits on FDA discretion here (¶1p247).
    - *Dunlop* (p246x) is different, the Court says, because there are limits on agency discretion within LMRDA, the statute involved there.
        - Also, Seamon notes, in *Dunlop*/LMRDA the only relief available was to petition the secretary to file a civil suit.
- Is it permissible for FDA to assign relatively low priority to the health and safety of death row inmates (q4p57p)? Well, there's a possible Constitutional problem here—Equal Protection.

Selective enforcement

*Universal-Rundle* (1967) (p249)

- Selective enforcement claims will basically succeed only with a showing of invidiousness—that's the bottom line that this case illustrates.

**Monday, October 10**

Recall: *Heckler*

- q6p58p: should the *Heckler* principle apply to an agency's refusal to undertake a rulemaking proceeding?
    - Well, it doesn't. Judicial review is available, but the agency has plenty discretion here.
- q7p58p: what if FDA refused to enforce in *Heckler* based on an unwritten policy of refusing to enforce its statutes for the benefit of prisoners—is this nonenforcement or selective enforcement?
    - It's nonenforcement. Court classify by asking: is the complaint about a *failure* to enforce? If so, it's nonenforcement. Selective enforcement is the "why me?" situation.

Private enforcement

- What do you do when an agency is not enforcing?
    - Sue the agency to make it enforce.
    - Sue the violator directly.

- In this case, among other issues, you have to find a cause of action.
  - Sometimes, you'll have an express one (see the Clean Air Act, ¶2p253x).
  - Or, you might have an implied one.
  - Or, there are general civil rights actions (e.g., § 1983).
- Implied causes of action
  - *Alexander v. Sandoval* (2001) (h/o)
    - Π is suing under Title VI and the regulations under Title VI.
    - Title VI:
      - § 601: the substantive provision—construed to bar intentional discrimination only.
        - This section has been held to contain a cause of action.
      - § 602: the grant of rulemaking authority.
        - The Court itc. says there's no cause of action here for disparate impact claims.
          - In fact, itc. says a regulation *cannot* create a cause of action. If Congress doesn't do it, the agency can't do it on its own (¶1col2p10h/o).
            - Why not? The majority says that it's simply not an agency's job to create causes of action.
              - But how is creating a cause of action that much different than the ordinary substantive interpretation that agency's do?
                - Is this about clogging the courts??
                - If private parties can do this, lots of legal theories will float around, and you end up with *judges* deciding these things.
                  - But do we want an agency monopoly on enforcement

?

- Plus, here, the agency has lots of limits on how it can enforce (which private parties wouldn't), which might suggest Congress didn't intend for private enforcement.

- How do you view itc.?
  - Π's point of view: what else could he do?
    - He can't get the agency to enforce (*Heckler*).
    - He can't go on his own (itc.).
  - Agency's point of view: the agency loses power if there are private rights of action.
    - But itc. the agency argued in favor of a private right of action.

**Wednesday, October 12**

Recall: private rights of action—the key question is whether congress intended it.

***Adjudication***

- Types of adjudication:
  - Enforcement
  - Benefits (application and revocation)
  - Licenses (application, modification, and revocation)
- The legal question here is: what procedures are required? (see p59p, II)
  - Procedural Due Process
  - Statutes other than the APA
  - The APA
  - Procedural regulations
  - *Vermont Yankee*
- APA adjudication procedures
  - There are four potentially applicable APA provisions here: §§ 554, 556, 557, and 558.
    - Yet, about 90% of federal agency adjudications are *not subject* to these requirements—because of the § 554(a) exceptions.
  - Trigger language: "after opportunity for a hearing" is enough, courts say (*Seacoast* (1st Cir. 1978) (p266x)).

- Even so, not many statutes have this language.
- When would Congress likely require formal adjudication? (I.e., when would it require a hearing?)
    - Well, *not* with individual benefits (e.g., welfare). These folks weren't at the table when the APA was being formulated.
        - Except for revocation of benefits—there, there's a property interest, and Due Process will often require some kind of hearing (see *Wong Yang Sung* (1950) (p267x) (but the source there was the Due Process Clause, not the APA)).
    - With licensing—especially when there are a limited number of licenses available (e.g., FCC licenses).

**Thursday, October 13**

- APA adjudication procedures:
    - Informal adjudication: see *Overton Park* (1971) (p266x): no procedures specified in the statute.
    - Formal adjudication: §§ 554, 556, and 557 (also 558).
        - *Grolier* (9th Cir. 1980) (p280)
            - See 15 USC § 45: contains "hearing," thus triggering APA formal adjudication.
            - Process:
                - A consumer will often file a "complaint" (not anything formal).
                - FTC commissioners ultimately consider these complaints.
                - Investigation of viable complaints—may include subpoenae.
                - FTC issues a complaint (an actual complaint, as in 15 USC § 45).
                - The case is assigned to an ALJ.
                    - The ALJ conducts a pre-hearing, then a hearing (conducted pursuant to §§ 554 and 556).
                    - In many agencies, the agency's General Counsel (GC) will prosecute. Opposing counsel will be Δ's lawyers.
                - The ALJ issues a recommended or initial decision.
                - The losing party can appeal to the FTC commissioners.
                    - The commissioners conduct "agency

review" (APA term) pursuant to § 557.
    - FTC issues a final decision for the agency.
- Itc., "attorney advisors" are sort of like judicial clerks for the FTC commissioners.
- Concerns itc. are:
    - Ex part information
    - Will to win
- Note the discovery issue.
- And note that the moving party bears the burden of proof.
- § 554(d):
    - The "employee who presides" is pretty much always an ALJ.
    - There are three commands here:
        1. No ex parte information on a *fact* in issue (as distinguished from issues of law).
        2. ALJs must be a separate component of the agency.
        3. Investigators and prosecutors must be separate from adjudicators.
    - Exceptions
        - Including an exception for "the agency": this is what enables heads of agencies (e.g., FTC commissioners) to be involved in all aspects of a proceedings.

**Monday, October 17**

- § 554(d): three commands:
    1. Restricts ALJs' ability to consult ex parte.
    2. Requires that ALJs not be supervised by agency's investigatory or prosecutorial components.
    3. Prohibits those involved in investigation or prosecution from participation in decisionmaking.
    - But, there's an agency head exemption.
        - Does this comport with the Due Process Clause??
- *Withrow* (1975) (p287)
    - The Wisconsin State Medical Board wants to suspend (or maybe revoke) a physician's license.
        - The board holds an investigative hearing (¶0p288).

        - Then it notices an adjudication.
    - This is all okay, the Court says, because it presumes honest decisionmakers.
        - Bias may arise, though, the Court suggests, such as (¶2p289)
            - When the decisionmaker has a pecuniary interest in the outcome.
            - When the decisionmaker has been the target of personal abuse or criticism from the party before him.
        - But, mere nonseparation, like itc., is not enough.
            - Rather, itc. is "very typical" (i.e., Seamon notes, the Court would be striking down prevalent practice to rule the other way).
    - Note that the Court mentions the APA (p291).
- Practice questions on ex parte contacts, h/o.

**Wednesday, October 19**

- Try to complete this:
    - When does each provision apply?
        - § 554(d)
        - § 557(d)
        - Due Process Clause
        - Idaho APA
    - What does each provision prohibit?
        - § 554(d)
        - § 557(d)
        - Due Process Clause
        - Idaho APA
- Note that §§ 556 and 557 haven't been discussed in detail—deliberately.

***Adjudication under the Idaho APA***

- (Remember to do the applicability analysis.)
- Definitions (§ 67-5201)
    - "Contested case": these are IAPA adjudications.
        - Are these more like formal or informal FAPA adjudications?
            - They're kind of like both. IAPA does not divide into two types:
                - First, IAPA wants agency to try to do it informally.
                - If that can't be done, go formal, the IAPA says.
        - Note that "contested case" may mean something different in other state

APAs. Often, for instance, it means formal adjudication (e.g., in Oregon).

- Note interactions with other statutes
    - E.g., the Idaho Board of Medicine—see § 54-1806A(6)(b):
        - Board
            - The Board must come up with rules for committee and hearing officer proceedings—and the rules must comply with IAPA.
        - Committee
        - Hearing officer
- Actual adjudication (when informal adjudication doesn't work)
    - Who presides? The agency head or hearing officers—the agency head gets to pick (§ 67-5242(2)).
    - Although it's not clear in IAPA, the presiding officer supervises and oversees prehearing proceedings (see AG's rules).
    - Evidence: not governed by rules of evidence (this is the majority rule, nationwide).
    - "Official notice" (§ 67-5251(4)):
        - Any facts can be officially noticed that could be judicially noticed.
        - Technical and scientific fats within the agency's specialty can be officially noticed, too.
    - Disqualification (§ 67-5252): this is a (uniquely, perhaps) broad provision. The presiding officer can be disqualified for being employed by the agency!!!
    - Types of orders: these are kind of similar to the types under FAPA.
    - Ex parte communications (§ 67-5253):
        - Applies only to:
            - Ex parte communication with parties.
            - Presiding officers.
        - There's an exception for commissions authorized by statute.
    - Time limits: there are some here (there are none in FAPA).

**Thursday, October 20**

***Due process***

- Three questions here:
    1. Is the Due Process Clause primarily concerned with adjudicative or legislative actions?
    2. Does the Due Process Clause apply to all adjudicative actions?
    3. When the Due Process Clause applies, what process is due?
- Note that in administrative law, we'll be talking only about procedural due process.

1. Is the Due Process Clause primarily concerned with adjudicative or legislative actions?

- *Londoner*
    - Ordinance assesses a tax on property owners abutting a praving project.
    - This is an adjudicative action, the Court says.
    - So, there must be a hearing—and it must occur before the tax is assessed (a "predeprivation" hearing).
    - The Court seems to have an oral hearing in mind.
- *Bi-Metallic*
    - Order to increase value of all property in Denver by 40%.
    - A legislative action, the Court says, because everyone's affected.
    - So, the Due Process Clause does not apply.
        - It wouldn't be pragmatic to apply it ("government could not go on" if everyone got a hearing).
        - Maybe Due Process isn't needed as much here, anyway.

- Practice questions, h/o
    - 1a. Legislative: individualized procedure not required.
        - Lots of people
        - Can't identify everyone affected
    - 1b. Legislative
        - Across the board, lots affected, etc.
    - 1c. Legislative
    - 1d. Adjudicative
    - 1e. Adjudicative
    - 1f. Adjudicative
    - 1g. The case says legislative

2. Does the Due Process Clause apply to all adjudications?

No.

- To trigger due process, deprivations must be:
    1. Adjudicative
    2. Intentional: e.g., negligence isn't enough (because, the Court says, "deprivation" implies some kind of intentionality).
    3. Direct: e.g., a suit by residents of a nursing home that was put out of business because of Medicare/aid denial was not direct enough for due process entitlement.
- Practice questions, h/o
    - 2. Too indirect—no deprivation.
- Deprivations under the Due Process Clause must be of life, liberty, or property.
    - Property
        - *Roth* (1972) (p350)
            - The contracts here didn't provide for contract renewal absent cause—if the contract had said renewal was

expected, then there would be a property interest.
- And, this provision could have come from *outside* the contract's four corners (see *Perry* (n6p362)).

- Practice questions 3c, h/o.

**Monday, October 24**

Recall:

- Does the Due Process Clause apply?
  - Government action?
  - Deprivation?
  - Of a protected interest?
    - Property?
      - Practice question 3c, h/o:
        - Yes, this is a property interest. The DPC gives a right for you to be sure your GPA has in fact fallen below the threshold. (However, the process due might be very minimal—but at least you can dispute whether you're below 2.0 or not.)
      - Practice question 3a, h/o:
        - Probably not a property interest, because you're only an applicant.
      - Practice questions 3b, h/o:
        - Yes, a property interest.
    - Liberty?
      - For property interests, we look *outside* the Constitution.
      - For liberty interests, though, most are established inside the Constitution itself.
        - Bill of Rights interests (speech, cruel and unusual punishment, etc.)
        - Unenumerated personal autonomy rights (e.g., personal integrity)
        - Reputational interests, where employability or legal status is affected (see *Roth* (¶2p353) and *Paul* (n4p365) (reputational injury alone is not enough)).
      - Practice question 4, h/o:
        - Yes (see *Goss*).

3. What process is due?

- For legislative actions, all that's due is notice of rule and (generally) no

retroactivity.

- Adjudicative actions
  - Predeprivation notice and hearing
    - This needn't be as elaborate as trial, generally, though.
    - In close cases, the courts will defer to the states or the political branches as to what's due.
  - Exceptions
    - *North American Cold Storage* (1908) (p372)
      - No hearing is necessary here:
        - The government interest is so strong.
        - There's an emergency.
      - What about the risk of erroneous deprivation?
        - The party has a right to a postdeprivation hearing (i.e., a tort suit for damages).

**Wednesday, October 26**

- *Goldberg* (1970) (p377)
  - This is the other end of the spectrum from *North American Cold Storage*—almost a judicial trial is required here.
    - What's really driving the opinion is a concern over erroneous deprivation.
  - Itc. we have deprivation of a property interest (in welfare payments).
  - Note that an early version of the *Mathews* balancing comes out here.
  - Black, dissenting:
    - Too much discretion to judges.
    - Additional procedures are too costly.
    - (Note how Rehnquist, Black's clerk, takes this torch in his *Loudermill* dissent.)
  - Later Courts have cut back on procedural due process, distinguishing and limiting *Goldberg*.
- *Goss* (1975) (p383)
  - A school suspension—the right to go to school is a *property* interest here, because of an Ohio statute that creates it.
    - There's also a liberty interest in reputation.
      - See also *Paul* (1976—one year later) (p365x).
      - It's unlikely that the Court would find such a liberty interest today.
  - The Court says that some process is due—at least an "informal give and take."
- *Mathews* (1976) (p391)

- *Goldberg* prompted the "due process explosion," where there were lots of due process claims with respect to the "new property."
- Itc. is important because:
    1. The blackletter: *Mathews* balancing.
    2. Three important changes in the Court's attitude:
        - Consideration of procedural costs.
        - Recognition that judicial procedures aren't always appropriate.
        - Deference to agencies on what process is due (i.e., on Constitutional law (!!!).

- *Ingraham* (1977) (p400)
    - This case is a counterpoint to *Goss*—it's hard to square, except for the impact of history (of corporal punishment in schools, which the Court explicitly notes).
- *Loudermill* (1985) (p409)
    - A middle ground for what process is due: more than *Goss*, less than *Goldberg*.
    - Itc. is especially important because about 20% of the workforce is employed by the government.

**Thursday, October 27**

***Availability of judicial review***

- Getting in to court—what do you need?
    - Personal jurisdiction: this isn't usually a problem in administrative law.
    - Venue: see 28 USC § 1391(e).
    - Process: FRCP 4(i) (service on U.S.).
    - Subject matter jurisdiction: this can be tricky, here.
    - Standing: quite challenging.
    - Cause of action: also important.
    - Defenses:
        - Finality
        - Ripeness
        - Exhaustion

Availability of judicial review

- Pre-APA (see pp536-37)
    - Causes of action
        - Mandamus
        - Tort

- Some statutes ("specialized statutes")

- APA
  - Provides a broad, fallback right of judicial review--§§ 701 to 706
    - §§ 701 to 705: availability and logistics
      - § 701(a): presumption of judicial review, with exceptions
        - Exceptions:
          - Another statute precludes review (*Michigan Academy of Family Physicians* (1986) (p544).
          - Action is committed to agency discretion by law.
      - § 702: *who* is entitled to judicial review—two categories of people:
        - Persons suffering a "legal wrong"
          - This is where the government violates individual rights granted by the Constitution, common law, or statute (other than the APA) (e.g., someone who's been fired because of race; ADA claims).
        - Persons "adversely affected or aggrieved"
          - This is where someone suffers an injury that a statute was arguably enacted to prevent, even if that statute doesn't expressly create those rights.
          - See *Overton Park* (1971) (p266x)
            - A statute says "don't build highways through public parks if there's a feasible and prudent alternative." And that's all it says.
            - Citizen users of parks suffered no "legal wrong," but were "adversely affected" when the agency decided to build through a public park—because who else could Congress have had in mind to protect?
      - § 704: what actions are reviewable—two categories:
        - Actions made reviewable by statute
        - Final actions where there's no adequate remedy in a court
    - § 706: scope
  - Subject matter jurisdiction: the Court has said that the APA gives a cause of action, but not subject matter jurisdiction.

        - Usually, however, § 1331 (federal question jurisdiction) does give subject matter jurisdiction.
    - "Specialized statutes": see, e.g., 29 USC § 160(f).

**Monday, October 31**

- Exceptions to the presumption of review:
    - § 701(a)(1): statutory preclusion
        - Can be express (pp552-54)
        - Can also be implied:
            - *Michigan Academy* (1986) (p544)
                - Note that the fact that some acts are expressly reviewable does *not* impliedly preclude review of others (¶1p547).
                - § 1395ii: the Court gives "decision" a narrow reading here—a regulation is not a "decision." "Decision," rather only means amount determinations, the Court says.
                    - The narrowness of this reading illustrates the strength of the review presumption.
        - Constitutional preclusion: it's unsettled whether Congress could cut off all judicial review of Constitutional claims.
        - N.b., the possibility of limiting the scope of review.
    - § 701(a)(2): committed to agency discretion by law—two situations:
        - "No law to apply"
            - *Overton Park* (1971) (p554x): there is law to apply here, the Court says—so itc. is a counterexample of this situation.
            - *Webster* (1988) (p560x):
                - Unlike *Overton Park*, this statute isn't a restriction on what the secretary can do—it is a grant of authority.
                - *But*, judicial review of the constitutional claims here is availabl.
                    - But note Scalia's dissent.
        - "Decisions traditionally committed to agency discretion"
            - I.e., some agency actions are not appropriate for judicial review.
            - *Lincoln* (1993) (p555)

- These Πs are "adversely affected" (§ 702) (but they probably have no other grounds for standing), under (¶0p556):
  - The Snyder Act
  - The Indian Health Care Improvement Act

  So, this is "law to apply."
- Still, though, this is a lump sum allocation—which the Court says is left to the agency's discretion.
  - Congress could restrict that discretion (¶0p559), but it did not.
  - See also *Dunlop*.
- What about a claim that the agency didn't even spend some of the money for Indian use? Would that be reviewable?
  - Yes—see ¶0p559—the decision here is committed to agency discretion only to the extent that the agency allocates the money to meet "permissible" statutory objectives.

- § 703 (see p561): a reminder to always look for specialized statutes.
  - Form of proceeding:
    - See the specialized statute.
    - If nothing specified there, it can take any form.
  - Last sentence: "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."
    - This is for when an agency brings an enforcement action—the Δ can have judicial review of agency action.
    - Exception: where statute says there's only one way to get review (but this exception is read very narrowly).
      - See *Adamo Wrecking*.

**Wednesday, November 2**

***Standing***

- Two components:
  - Prudential
  - Constitutional (from the "case or controversy" requirement in A3)
    - *Lujan* (1992) (p642)
      - Itc. is primarily about the constitutional component of standing.
      - Agency action: promulgation of a rule—the ESA doesn't apply to actions overseas.
      - Constitutional standing requirements (p643):
        1. Injury in fact
        2. Causal connection between injury and Δ's conduct (traceability)
        3. Redressability
      - Itc., no standing:
        - The majority says no injury in fact.
          - Π's theories for injury:
            - Individual members' desires to observe
              - What's the problem here?
                - No concrete plan—so, no "actual or imminent" injury.
                  - But isn't this petty? Because wouldn't just buying an airplane ticket cure this?
                    - Yes, but then again, without such a requirement, anyone could sue over this.
              - (Dog hypo: a dog you pass by every day would be removed by an agency rule—standing? Seamon thinks yes (see ¶0p644).)
            - Ecosystem nexus
            - Animal nexus
            - Vocational nexus
              - With the nexus theories, the problem is that they don't relate to a *perceptible* harm.

- A plurality says no redressability.
    - Here, the agencies doing stuff overseas aren't Department of Interior agencies, and so aren't bound by DOI requirements—so, even if the rule changes back, there's still no guarantee that the projects overseas will be killed.
- Procedural injury (Part IV, p647)
    - ESA citizen suit provision—"any person may commence civil action for violations."
    - The plurality says that the government's failure to follow procedures is too abstract an injury for standing—you must have a concrete, real world injury (compare *Bennett*).
    - So, this provision doesn't solve the standing problem, but it does create a cause of action.

**Thursday, November 3**

[missed class]

**Monday, November 7**

***Timing doctrines***

- There are four timing doctrines:
    - Finality
    - Ripeness
    - Exhaustion
    - Primary jurisdiction (this one is more common in state administrative law)
- Why do we have them?
    - They conserve judicial resources
    - They allow agencies to apply their expertise and processes without judicial interference
    - They respect Congress's decision to entrust matters to agencies
- But what about the people? These doctrines are often applied at the expense of the people affected.

Finality

- Basically, finality is about the idea that an agency's processes should be finished before judicial review begins.
    - Why? See the purposes for the timing doctrines generally, above.

- Rules—when are they final?
    - When published in the Federal Register as a final rule.
        - So, finality is usually not a problem with agency substantive rules.
- Adjudications—when are they final?
    - When a "final"and/or unreviewed decision is made.
- Overlap with exhaustion: once you've exhausted your remedies, you'll have a final agency action, generally...
    - *But*, there are some complexities:
        - Finality does not always coincide with exhaustion.
            - E.g., if a Π doesn't take advantage of intra-agency appeal and a decision becomes final with the passage of time—then it's final, but not all remedies were exhausted.
            - Often, agency actions don't take the form of rules or adjudications (see, e.g., *Ciba-Geigy* (D.C. Cir. 1986) (p693)).
            - Finality doesn't always exists even when an agency has finished all of its processes.
                - See, e.g., *Dalton* (1994) (p699x)
                    - Base closing and realignment—the commission makes *recommendations* and Πs sue at that point, before the president has adopted them. That's not final, the Court says.

<u>Ripeness</u>

- Where do finality and ripeness come from? From the courts—these are common law (equity) doctrines.
    - Today, they often have a statutory basis, though.
        - § 704 first sentence: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."
        - Specialized review statutes: these often require finality too (see, e.g., 29 USC § 160).
    - Yet, there's nothing in the APA about ripeness.
        - But see § 702 last sentence: "nothing here (1) affects other limitations on judicial review . . . ." This, arguably, incorporates the common law ripeness doctrine—but the Court has never said so.

*Abbott Labs* (1967) (p684)

- Ripeness is "best seen in a twofold aspect":
    1. Fitness
        - Finality?

- Would judicial review benefit from a concrete setting?
- Is the issue purely legal?

Having just one or two of these may not be enough—see *Toilet Goods* (p689x): there, the concrete setting factor was not satisfied and thus there was no ripeness.

2. Hardship
   - Direct effect on challenger's day-to-day business?
   - Other factors??

**Wednesday, November 9**

- Ripeness analysis:
  - Ripe?
    - Fit for review?
      - Final?
      - Purely legal?
      - Would review benefit from a concrete factual setting?
    - Hardship to parties of delaying review?
      - Direct effect on party's day-to-day operation ("primary conduct")?
      - Choice between costly compliance and significant sanctions?
      - Interest of government?
        - See *Abbott Labs* at ¶4p688, where the Court noted that review would not delay agency enforcement, and at ¶1p689, where it noted that there was no motion for a stay of enforcement (see § 705 re: stays).

*Ciba-Geigy* (D.C. Cir. 1986) (p693)

- Agency actions:
  - A mailgram to the entire industry
    - This looks like a rule.
  - A letter to C-G only
    - This looks like an adjudication.
- The Court looks for (¶2p696):
  - Definitiveness: does it look like the agency is done, or has made up its mind?
  - Direct and immediate effect: both practical (¶2p696) and legal (¶1p697) effect.
- See also *National Automatic Laundry* (D.C. Cir. 1971) (p698x)
- So, with finality, we have:

        - Substantive rules: promulgation.
        - Traditional adjudications: final agency decision.
        - Weird stuff: *Ciba-Geigy* and *National Automatic Laundry*.

- N.b.: preliminary and intermediate actions (see pp700-01).
- Statutory modification of ripeness:
    - See pp702-03.
    - The Court has suggested that a case could still be unripe even where a statute authorizes review (!).

Exhaustion

- Why is exhaustion required?
    - To protect agency authority.
    - For judicial efficiency.
- Common law exhaustion:
    - *McCarthy* (1992) (p703)
        - No exhaustion required—the result of a balancing between individual interests and institutional interests (viz., the agency and the courts).
            - Categorical situations where individual interests are greater than institutional interests—see pp706-07.
            - Why no exhaustion required itc.?
                - (Congressional silence on exhaustion.)
                - Individual burden:
                    - Short deadlines
                    - Money damages not available within the agency, and that's all that Π wants (this could be called "futility," but the Court doesn't say it here).
                - Institutional interests:
                    - It's just a medical issue
                    - There would be no factual record even if exhaustion were required
            - Note how the Court notes that Congress could overrule the ruling itc.--and Congress did after itc. (PLRA).

**Monday, November 14**

- For a good summary of exhaustion, see ¶¶1-3p712.
- Illustrations of exhaustion—pp713-21 (you needn't know this in great detail):
    - Issue exhaustion
        - The agency generally has to play by the same rules (see

*Chenery* (p125)).
- Irrepairable injury
- Federal courts and state agencies
- Questions of law
- "Futitily": an oft-stated, but ambiguous principle

- APA modification of exhaustion
  - *Darby* (1993) (p721x)
    - Itc. has to do with a HUD "disbarment," which is an action done by HUD staff.
    - This goes to an ALJ, who holds a hearing and renders and initial decision which is partly adverse to Darby.
    - Darby *could have* appealed this decision to the HUD secretary —but he instead goes straight to the district court.
    - This is okay, the Court says, because the ALJ's decision became "final" when the time for agency appeal ran out—by lapse of time.
      - See § 704 last sentence: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section *whether or not* there has been presented or determined an application for a declaratory order, for any form of reconsideration, or . . . for an appeal to superior agency authority."
  - Exceptions in § 704:
    - Where Congress has said otherwise.
    - Agency requires higher appeal *and* the agency decision is stayed pending higher appeal.
      - Note that this did not apply in *Darby* because higher appeal was only permissive, and there was no stay of the initial decision anyhow.
- Practice questions on finality, ripeness, and exhaustion, h/o.
  - (3): note that *Darby* doesn't apply to actions and agencies outside of the APA—i.e., where the cause of action does not arise under the APA.

**Wednesday, November 16**

***Availability of judicial review in Idaho***

- Availability
  - Presumption of review: yes (like federal law).
    - Sources:
      - Due Process Clause in the state constitution
        - "Injury to a legal right" = a legal wrong.
          - In federal law, this comes not from the federal

DPC, but from the FAPA (§ 702: "Any person suffering a legal wrong . . . .") (although there were some pre-APA federal cases suggesting a right to judicial review of agency action from the DPC).

- IAPA § 67-5270
  - This is subject to displacement by special statute (just as in FAPA).
  - See, e.g., the Idaho Board of Medicine statute at § 54-1806(11), which refers to IAPA.

- Review of "agency action"
  - "Agency action" is a defined term, and includes failure to act.
    - However, review can only be of "final" agency action—so a failure to act may not be reviewable because not "final." There is not formula for what's final when it comes to failures to act.
- Who is entitled to judicial review?
  - Orders in contested cases: "parties" aggrieved only.
    - So, all potential intervenors better consider intervening. Denials of intervention are (at least functionally) final decisions subject to judicial review (§ 67-5271(2)).
  - Everything other than orders: "persons" aggrieved.
    - "Aggrieved" = injured in fact.
      - This is a point of difference between Idaho and federal law—federal law imposes a zone of interest test. See FAPA § 702: "within the meaning of a relevant statute" is where the courts say that the zone of interest requirement arises from. See also *Overton Park*.
      - But IAPA does not include this language, and does not appear to impose a zone of interest requirement.
- Delaratory judgments
  - §§ 67-5278 and -5232.
  - You can't escape the finality requirement by seeking a declaratory judgment—either in federal law or in Idaho (see "threatened application" in § 67-5278).
    - But, the IAPA *does* allow people to seek pre-enforcement review of rules (whereas federal law says that only some rules are ripe for pre-enforcement review (*Abbott Labs*), but some aren't (*Toilet Goods*)).
- Ripeness: not significant in Idaho.
- Primary jurisdiction: this tends to come up more in state law than in federal law.
  - Because, in federal law, Congress usually sets out a clear path for all Πs.
  - In state law, though, sometimes a Π can legitimately file with either the agency or a court (sometimes this is due to oversight by the state legislature).

**Thursday, November 17**

- Exhaustion
  - § 67-5271 codifies the common (administrative) law rule, basically.
    - So, if you wait too long and can't exhaust, you're out of luck with respect to judicial review.
      - Unless and exception applies:
        - § 67-5271(2)
        - See Goble article for others.
- Finality: this is wide open in Idaho—there are no decisions.
- Ripeness: unlike in federal law, Idaho provides for immediate review of agency rules by providing for declaratory judgments (§ 67-5278).
- APA time limits: IAPA is full of time limits (unlike FAPA). See the Goble article.
- Stays: same as federal law—no automatic stay.
- Record
  - § 67-5275
  - Note the exceptions that allow supplementing the record.
- Common law right of review (for situations where you need to go outside of the IAPA)
  - The IAPA does *not* displace common law remedies for agency action (e.g., mandamus).
  - And there are a lot of things that you might want to do with these common law remedies, because under IAPA, you can only set aside an agency action, for the most part (see § 67-5279). To get affirmative action of some kind, you probably must pursue a common law avenue.

Monday, November 28

Scope of review

- Questions of law
  - Agency interpretation of a statute (see p64p)
    - Often, there's some deference here.
    - *Chevron* (1984) (p796)
      - (The Court didn't think it was doing anything major here, Seamon says. Rather, itc. is important because the Court for the first time explains why it gives deference to agencies.)
      - Background: EPA interprets the 1977 amendments to the Clean Air Act. Specifically, it determines to have a "bubble rule," treating all pollution from a plant as coming from one "stationary source." This is important because any modification of a "stationary source" requires a hard-to-get permit. So, with the bubble rule, no permit would be required as long as there's no net change under the bubble. (Note that this rule came in

with the Reagan administration.)
- The Court's review of the rule:
  - Step one: did Congress provide a specific answer to the specific question at issue?
  - Step two: if not, is the agency interpretation based on a permissible construction of the statute?

  Or, in other words: (1) Has Congress spoken? (2) Is the agency interpretation "permissible"/"reasonable"?

  The Court will look at all sources (language, legislative history, etc.) for *both* steps.
- Itc., the Court says that the agency interpretation is reasonable, because it balances the purposes of the CAA with reasonable economic growth.

- *Mead* (2001) (p818)
  - Itc. limits the applicability of *Chevron*—*Chevron* applies when:
    - Congress delegated authority to the agency, and
    - The agency interpretation was promulgated under that authority (see ¶3p820).

    Otherwise, the Court will give *Skidmore* respect/deference.
  - Background: the Customs Service has these "ruling letters." It issues one that says that Mead's calendars are actually "diaries" and so subject to a tariff.
  - The Court will not give *Chevron* deference to this ruling letter, saying there's no delegation of authority, looking at:
    - The face of the statute
    - Agency practice (see pp822-23)

    But, the Court does give *Skidmore* respect/deference, which is a sliding scale kind of deference, proportional to the interpretation's "power to persuade."

Wednesday, November 30

- Challenges to agency action taxonomy:
  - Procedural grounds:
    - Constitutional (mainly DPC (see *Perry* (a successful challenge) (p358))).
    - Statutory (mainly APA (see *Alaska* (substantive vs. interpretative rules) (p198))).
    - Regulatory (see *Nixon*)
  - Substantive grounds
    - Constitutional (see *Perry* Part I (am1))

        - Also, delegation doctrine challenges kind of go here, although those are also statutory.
    - Statutory (has the agency acted within its scope of authority?)
        - See *Chenery* (p125) and *Chevron*
    - Regulatory
    - Evidential (is the agency's action not supported by the evidence that was before it?)
        - Note that this applies to both adjudication and rulemaking (see *State Farm*)
    - Logical
        - Again, see *State Farm*, where the Court finds a problem with the agency's *reasoning*.
- *Mead* (2001) (p818)
    - When does *Chevron* apply?
        - See ¶1p822:
            - Notice and comment rulemaking
            - Formal adjudications
            - Formal rulemaking
    - What about *Skidmore*?
        - It does *not* apply to interpretative rules, at least.
    - What about informal adjudications, then?
        - The Court has apparently deliberately left this open. Rather, it probably intends to give *Chevron* deference to some of these but not all of them. Note that *Mead* itself is an informal adjudication.
    - What's the difference between *Chevron* and *Skidmore*?
        - For *both*, if the statute is clear, the statute controls (i.e., there's no deference). So, in other words, *Chevron* step one is also *Skidmore* step one.
        - Where the statute is ambiguous, that's where the two differ:
            - *Chevron*: if the agency interpretation is reasonable, it stands.
            - *Skidmore*: this is variable—see ¶0p821 and ¶0p824 for factors.
- Idaho: see *Simplot* , 820 P.2d 1206—the employs an amalgam of *Chevron* and *Skidmore*.
- Review of agency factfinding
    - There's either the substantial evidence standard or the arbitrary and capricious/abuse of discretion standard.
        - Substantial evidence:
            - Applicable to:
                - Formal adjudications
                - Formal rulemaking

                I.e., to §§ 556-557 proceedings (because this is what § 706(2)(E) says).
            - Involves:
                - The whole record

        - Must be logical and reasonable
        - It's less than a preponderance of the evidence standard
- Arbitrary and capricious/abuse of discretion:
    - Applicable to:
        - Informal rulemaking
        - Informal adjudication
        - Most hybrid proceedings
    - Involves:
        - It's the same as the substantial evidence standard, mostly (although Seamon thinks that the substantial evidence standard is a little more probing—but he says that it would be hard to prove that).
        - See the definition (a good one) in *State Farm* at ¶1p864, setting out four categories.