**What’s the Nature of the Agency Action?**

*Has the agency actual taken action?* If not, this could be a ***TIMING ISSUE***; If so, ***DISTINGUISH BETWEEN RULEMAKING AND ADJUDICATION***

There are two basic procedural modes that agencies use when they make and apply policy: rulemaking and adjudication. Procedural requirements for these agency actions come from five basic sources: 1) the organic statute creating an agency or vesting it w/ powers, 2) the agency’s own procedural regulations, 3) the APA (requirements of general applicability), 4) federal common law, and 5) Constitutional requirements of due process

|  |  |
| --- | --- |
| ***RULEMAKING*** | ***ADJUDICATION*** |
| Involves ***legislative facts*** – Broad and general facts that contribute to the determination of policy; generalized factual propositions, often consisting of demographical data and statistics that do not pertain to the specific parties | Involves ***adjudicative facts*** - a dispute about facts that have to be found on “individual grounds” must be resolved through adjudication; relate to the specific parties and their particular circumstances; individualized facts peculiar to the parties |
| Forward looking and prospective | Backward looking and retrospective |
| Affects many people | Affects the regulated parties and more through stare decisis |
| Results in a rule with future effect | Results in a specific order |
| ***NO RIGHT TO PROCEDURAL DUE PROCESS*** | ***RIGHT TO PROCEDURAL DUE PROCESS*** |

**State system:**After you’ve determined that you’re dealing with either a rule or an order, then you have to *DISTINGUISH BETWEEN CONTESTED CASE AND OTHER THAN A CONTESTED CASE*

|  |  |  |
| --- | --- | --- |
| **OREGON** | ***FORMAL*** | ***INFORMAL*** |
| ***RULEMAKING*** *(“Rule”)* | Not recognized by state APAs | Standard notice and comment rulemaking |
| ***ORDER*** *(“Order”)* | * Formal adjudication required when a “contested case” * *See* handout for description of a “contested case” | * No formal adjudication required when “other than a contested case” * *See* handout for description of a “contested case: |

**Federal system:** After you’ve determined that you’re dealing with either a rule or an order, then you have to *DISTINGUISH BETWEEN FORMAL AND INFORMAL RULEMAKING/ADJUDICATION*

|  |  |  |
| --- | --- | --- |
| **FEDERAL SYS.** | ***FORMAL*** *(“Substantial evidence”)* | ***INFORMAL*** *(“Arbitrary and capricious”)* |
| ***RULEMAKING*** *(“Rule”)* | § 553(c), 556–557  - Triggered by organic statute requirement of rules on “record” after opp. for “hearing.”  - No notice & comment. ALJ takes evidence, testimony and cross, record, recommend decision, appealable. (similar to the procedures had in a civil trial)  - Note that agency may, when a party will not be prejudiced, take all evidence in written form.  - Ex Parte comm. FORBIDDEN; if occurs, it must go in record | § 553  - Notice & Comment  - APA ingredients: 1) general notice in Fed Reg. 2) opportunity for “int. persons” to make written comment (oral if agency decides), 3) when final rule promulgated, “concise general statement of basis and purpose”, and 4) where substantive rule, take effect after 30 days.  - Exceptions incl.: interpretive rules, gen. statements of policy, rules of agency org., procedure, or practice; or when the agency for “good cause” finds notice & comment impracticable, unnecessary, or contrary to the public int.  - Ex Parte comm. neither forbidden nor required to be in the record  \*Plus Paper Hearing Requirements |
| ***ADJUDICATION*** *(“Order”)* | § 554, 556, 557 (look to the substantive statute to see if it refers to these APA sections)  - Again, triggered by: “Req’d by statute to be determined ***on the record*** after opportunity for hearing”  - Ct. may find this requirement even if the statute does not explicitly invoke if the agency is imposing a sanction or liability on a party, but generally Congress must be VERY explicit to require formal adj.  - Trial type procedures – notice written complaint or equivalent, testimony and evidence presented to hearing officer (usu. ALJ), poss. Evidence and discovery, right to counsel, record, written opinion, no ex parte, appealable.  - All procedures meet constitutional due process requirements | [No APA procedures]  “Arbitrary & Capricious” review  - Typically agencies will adopt procedures for their own informal adjudications  - ALJs rarely preside over informal adjudications; usually it’s instead AJs  - Still need record, expl., base rvw. on record, no post-hoc rationalizations, etc.  - Still subj. to hard look. May remand to compel development of a more adequate record. |

**What is Required of the Agency?**

1. ***Rulemaking*** – **Good statement to use on an exam**: A rule promulgated by an agency that is subject to the APA is invalid unless the agency first issues a public notice of proposed rulemaking, describing the substance of the proposed rule, and gives the public an opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule it must set forth the basis and purpose of the rule in a public statement. These procedural requirements do not apply, however, to “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”
   1. Legislative Rules – Issued by an agency pursuant to an express or implied grant of authority to issue rules with the binding force of law
      1. **Must have statutory authority to adopt such rules**
      2. ***Subject to formal or informal rulemaking***
      3. A rule that turns on a number tends to be arbitrary and is thus legislative
      4. Arbitrary choices in rulemaking is inherently legislative by definition; it is the legislature whom we elect to make those arbitrary choices
   2. Nonlegislative Rules (also called interpretive rules or statements of policy or guidance documents) – agency rules that do not have the force of law because they are not based upon any delegated authority to issue such rules
      1. **No statutory authority required to adopt nonlegislative rules**
      2. ***Generally only subject to some of the requirements of § 553***
      3. Includes:
         1. **Factors to consider whether a rule is an interpretive rule, policy statement, guidance document rule VERSUS a legislative rule**
            1. (Remember the Ligers and Tigons case (picking a number for how high a fence must be ***is*** legislative))
            2. What does the agency call it? Interpretive rule? Policy statement?
            3. What procedure did the agency follow in adopting the rule?
            4. Binding-ness? Look at this with respect to three different entities:

The agency  How does the statement by the agency treat the rule? How do they deal with the rule?

What does the plain language look like? Does it say it’s absolutely binding or does it appear to be more discretionary?

E.g. “Here are the factors that must be considered” vs. “Firefighters may do the following”

How is it used in practice? What is the binding effect?

Regulated parties  What’s the practical effect on the regulated parties?

Is it an absolute—what happens if the parties don’t comply? DO they have an opportunity to argue why they shouldn’t be punished? Or, if they fall into the regulated category, is that the end of the inquiry?

You’re looking at enforcement and

Compliance

Binding-ness on the courts

*Chevron* deference—deference to the agency with respect to what they’re doing?

Whether the agency’s statement has the force of law

* + - * 1. Whether the questioned rule is legally binding on persons outside the agency, by creating rights, imposing obligations, or effecting a change in existing law
        2. Whether the agency is calling it an interpretive rule or not
        3. Whether the agency is intending to speak with the force of law or giving advice
        4. The procedure followed by the agency in adopting the rule
  1. Formal – Rarely used, trial-type procedure governed by § 556-557 (DOES NOT APPLY TO STATE APAs)
     1. Required “when rules are required by statute to be made on the record after opportunity for an agency hearing”
     2. Trial-type hearing: ALJ takes evidence, testimony, cross examination, record, recommend decision, appealable
        1. Basically the same as § 553, but after the notice, instead of receiving written comments, the agency holds a hearing which meets the requirements of § 556 and § 557
           1. HOWEVER, the agency MAY provide only a paper hearing if no party would be prejudiced
     3. In formal rulemaking, the decision *must be made* based on the evidence adduced at the hearing itself
  2. Informal – § 553
     1. **EXCEPTIONS:** § 553(a): Required of all rules, except:
        1. One of the exemptions below (military/foreign affairs exemption or agency management exemption)
        2. When rules are required by statute to be made “on the record” after opportunity for an agency hearing; if you see this, then this requires formal rulemaking of § 556-557
     2. **NOTICE:** § 553(b): Notice of proposed rulemaking issued to public
        1. The notice must include:
           1. A statement of the time, place, and nature of public rulemaking proceedings
           2. A reference to the legal authority under which the rule is proposed
           3. Either the terms or substance of the proposed rule or a description of the subjects and issues involved
        2. **Logical Outgrowth Test (apply when the final rule differs substantially from the rule proposed)**: Notice is adequate if the changes in the original plan are in character with the original scheme and the final rule is a logical outgrowth of the notice and comments already given (chocolate milk case)
           1. Stated differently, if the final rule materially alters the issues involved in the rulemaking or substantially departs from the terms or substance of the proposed rule, then the notice is inadequate
        3. § 553(b), § 553(c), and § 553(d) do *not* apply to nonlegislative rules or rules when the agency finds for ***good cause*** (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
           1. The good cause generally refers to some kind of emergency
           2. APA § 553(b)(B) and 1981 MSAPA § 3-108 – When the agency for good cause finds that notice is impracticable, unnecessary, or contrary to the public interest, notice of rulemaking and public procedure are not required

The agency must make an explicit finding at the time of issuance that good cause exists and give reasons to support its finding

* + 1. **COMMENT:** § 553(c): Agency gives interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation
       1. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose
          1. *When rules are required by statute to be made “on the record” after opportunity for an agency hearing, this triggers formal rulemaking*
    2. **THE FINAL RULE:** The APA requires the agency to incorporate in the rules adopted a concise general statement of their basis and purpose
       1. When an agency adopts a rule, it must at the same time state a reasoned justification for the rule
          1. That is, the agency must explain how and why it reached the conclusions it did. The agency’s order must present its justification in a relatively clear, precise, and logical fashion (*National Ass’n of Independent Insurers v. Texas Dep’t of Insurance*)
       2. In addition to a reasoned justification, the order adopting the rule must include (*Id.*)
          1. A summary of the comments the agency received from interested parties;

In other words, it must summarize the evidence it considered

* + - * 1. A restatement of the factual basis for the rule; and

In other words, it must state a justification for its decision based on the evidence before it

* + - * 1. The reasons why the agency disagrees with the comments

In other words, it must demonstrate that its justification is reasoned

* + - 1. If an order does not *substantially* comply with the above requirements, then the rule is invalid (*Id.*)
         1. An agency’s order substantially complies with the *reasoned justification requirement* if it

Accomplishes the legislative objectives underlying the requirement, and

Comes fairly within the character and scope of each of the statute’s requirements in specific and unambiguous terms

* + - 1. Reasoning for the above rules
         1. Requiring an agency to demonstrate a rational connection between the facts before it and the agency’s rules promotes public accountability and facilitates judicial review
         2. It also fosters public participation in the rulemaking process and allows interested parties to better formulate “specific, concrete challenges” to a rule
         3. Judicial review of administrative rulemaking is especially important because, although the executive and legislative branches may serve as political checks on the consequences of administrative rulemaking, the judiciary is assigned the task of policing the *process* of rulemaking
      2. Modern federal cases have declared that an agency must explain how and why it reacted to *important* comments it received during the course of the rulemaking proceeding
         1. Note that the agency need only respond to arguments that are important and material; The **test** is:

Whether the comment, if true, would require a change in the rule

Comments that are speculative, or that do not show why or how they are relevant to the proceeding, need not be considered or answered

* + - 1. **Cost Benefit Analysis:** Unfunded Mandates Reform Act of 1995 requires that any agency rule that imposes costs of $100mm on state or local governments, or on the private sector, must be accompanied by a cost-benefit statement
         1. Most states require CBA or other regulatory analysis in rulemaking
         2. Benefits of CBA

Consequences of regulations are analyzed

Agencies should generally not promulgate rules for which the costs exceed the benefits, except for certain circumstances where children and the disadvantage are negatively affected

Provides for an efficient allocation of limited resources

More transparency and better presentation of both arguments to the public and relevant officials

Prevents irrational, emotionally charged rulemaking

* + - * 1. Shortcomings of CBA

CBA cannot produce more efficient decisions because the process of reducing life, health, and the natural world to monetary values is inherently flawed

The use of discounting systematically improperly downgrades the importance of environmental regulation

CBA ignores the question of *who* suffers as a result of environmental problems and threatens to reinforce existing patterns of economic and social inequality

CBA treats questions about equity as side issues, contradicting the widely shared view that equity should count in public policy and thus imposes greater environmental burdens on the poor

CBA fails to produce the greater objectivity and transparency promised because it rests on a series of assumptions and value judgments that aren’t objective

* + 1. **PUBLISH:** § 553(d): Must be published not less than 30 days before its effective date in the Fed. Reg.
       1. *Exceptions*:
          1. Good cause (explanation must be published with the rule)

APA § 553(b)(B) and 1981 MSAPA § 3-108 – When the agency for good cause finds that notice is impracticable, unnecessary, or contrary to the public interest, notice of rulemaking and public procedure are not required

The agency must make an explicit finding at the time of issuance that good cause exists and give reasons to support its finding

The “good cause” exception to notice and comment rulemaking is to be “narrowly construed and only reluctantly countenanced”

The exception excuses notice and comment in emergency situations, or where delay could result in serious harm

Nonlegislative rule – Interpretive rules and general statements of policy may be effective immediately (*see* § 553(d)(2))

Otherwise exempted by statute

* + - * 1. If a rule which should have been published but was not, then the rule is unenforceable (APA § 552(a)(1))
  1. Exemptions – Rules which only need be published in the Fed. Reg.
     1. Some rules don’t even require notice and comment, only that the final rule be published in the Fed. Reg.
     2. These are:
        1. Military and Foreign Affairs Exemption
           1. The courts seem to look to whether notice & comment would interfere with our execution of foreign affairs
        2. The Exemption for Matters Involving Agency Management or Personnel, Public Property, Loans, Grants, Benefits, and Contracts
           1. Although broad on its face, in the 1960s many agencies adopted rules which voluntarily waived this exemption and subjected them to the provisions of § 553

Among these are: Depts. Of Housing and Urban Dev., HHS, Transportation, Interior, Agri., Labor

* 1. ***Vermont Yankee –*** Courts may not impose additional requirements on agencies beyond the APA
  2. ***Ex Parte Communications*** – communications not on the public record to which reasonable prior notice to all parties is not given. Excludes requests for status reports.
     1. Formal rulemaking – FORBIDDEN; if occurs, it must go in the record (§ 557)
     2. Informal rulemaking
        1. Communications received prior to issuance of a formal notice of rulemaking do not have to be put in the public file. However, if the information contained in the communication forms a basis for agency action, it must disclosed to the public in some form.
        2. Once a notice of proposed rulemaking has been issued, any agency official or EE who is reasonably expected to be involved in the decisionmaking process of the proceeding should refuse to discuss matters related to the disposition of the rulemaking with any interested party.
        3. If the agency relies on the ex parte communication, then the ex parte communication has to be put on the record (*Sierra Club v. Costle*)
        4. The scope of this is not limited to White House officials or members of Congress—it also applies to lobbyists, law professors, etc.—anyone who submitted a comment of which the agency relied (*Id.*)
        5. Any rule issued must have the requisite factual support in the rulemaking record (*Id.*)
        6. There are **two conditions** that must be met before an administrative rulemaking may be **overturned** simply on **the grounds of Congressional pressure**:
           1. The content of the pressure upon the agency head is designed to force him to decide upon factors not made relevant by Congress in the applicable statute, and
           2. The agency head’s determination must be affected by those extraneous considerations (*Id.*)
        7. ***The 1981 MSAPA*** requires all written materials received or considered by an agency to be included in the record, but does not prohibit oral ex parte communications, nor require disclosure of them in the rulemaking record
        8. ***APA*** – Silent on the matter, but the Sierra Club rule prevails—it must go on the record, regardless of if it’s oral or written, if the agency relies upon it in making its decision
  3. ***BIAS***
     1. In the case of perceived bias in rulemaking, an agency member may be disqualified from such a proceeding only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking (*Association of National Advertisers, Inc. v. FTC*)
  4. ***RULEMAKING PETITIONS***
     1. Members of the public may petition an agency for the issuance, amendment, or repeal of a rule (see APA § 553(e), 1961 MSAPA § 6, and 1981 MSAPA § 3-117)
     2. Both MSAPAs require a statement of reasons upon denial of a rulemaking petition
     3. APA § 555 requires a brief statement of the grounds for denial of any application or petition filed with an agency
     4. An agency’s refusal to initiate enforcement proceedings is ordinarily not subject to judicial review (*Massachusetts v. EPA*)
     5. An agency’s denial of a rulemaking petition, however, is subject to judicial review, but such review is extremely limited and highly deferential (*Id.*)
     6. Agencies have wide latitude as to the manner, content, timing, and coordination of its regulations with those of other agencies, but once an agency has responded to a petition for rulemaking, its reasons for action or inaction must conform to the *authorizing statute* (*Id.*)
  5. ***WAIVERS OF RULES***
     1. Agencies often entertain requests for waivers in cases in which the applicants can demonstrate that the rule does not work appropriately in their cases
     2. An agency does not need to reconsider the entire problem de novo and reconsider policy every time it receives an application for waiver of a rule
     3. When applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action
        1. When this has been satisfied, an agency must give the application a hard look rather than perfunctory (cursory) treatment
     4. Waivers are necessary to correct the rigidity of rules
     5. The advantages of waiver are outlined on pp. 366-67
     6. Courts review waivers under an abuse of discretion standard
  6. Delay – Courts can order agencies that unreasonably delay required actions to issue a rule, but there’s factors laid out in the International Chemical Workers Union, p. 362:
     1. The court should ascertain the length of time that has elapsed since the agency came under a legal duty to act;
     2. The reasonableness of the delay must be judged in the context of the statute which authorizes the agency’s action
     3. The court must examine the consequences of the agency’s delay
     4. The court should give due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources

1. ***Comparing the Federal with the Oregon Rulemaking Process***
   1. Federal
      1. NPRM (in Fed. Reg.)  Notice and comment  Final rule (has to be a response to the comments) (again in Fed. Reg. with response to comments)
         1. Judicial review: Arbitrary and capricious standard, allows the courts to get into the substance of the rule, check the final rule against the record and the final explanation; in Oregon this check does not exist
   2. Oregon
      1. NPRM (in Oregon Bulletin)  Comments? Hearing? Depends on whether interested individuals triggered things which may require a hearing  Agency doesn’t have the same obligation at the end to demonstrate that the final rule is responsive to those comments, so not in Oregon Bulletin as it’s not required
         1. In Oregon, judicial review of rulemaking is VERY limited; the only basis in Oregon is, if it wasn’t promulgated using the right process, if it’s contrary to statutory authority, or if its contrary to constitutional requirements
         2. So what ends up happening, is Oregon rules end up looking like these *direct final rules*; if someone wants to get up and waive their hands and demand comment, the agency may do that; it’s not under obligation to do that
      2. Public comments
         1. State rulemaking is less formalized, as a general matter – The Oregon APA includes similar language—the agency must give notice of its intended action with a reasonable opportunity for interested persons to be notified of the agency’s proposed action
            1. This includes publishing in the Oregon Bulletin
            2. Send out email or mail to those that have requested notice in advance
            3. People specifically identified that must be notified; for instance, you have to tell the relevant, sponsoring legislator that sponsored the legislation for which the rules are being made
            4. Not obliged to give an opportunity for an oral hearing, but a hearing may be requested, if 10 persons or an association of > 10 members request one, at which point a hearing must be granted
2. ***Adjudication Procedures***
   1. ***The Pre-Hearing Phase: Notice***
      1. Due process requires fair notice of *reasonably specific* charges against the defendant so that he or she has an opportunity to prepare and present an adequate defense and be heard
         1. APAs require notice of pending adjudicatory action that is sufficiently detailed to enable the private party to prepare for the hearing, but neither the APAs nor due process require notice of specific details, such as the dates on which the misconduct occurred
      2. **License suspension**: a licensing agency normally has power to suspend a licensee from practice during the pendency of the hearing process if the licensee poses a threat to the public
   2. ***The Pre-Hearing Phase: Investigation***
      1. 4th Amendment Analysis:
         1. A subpoena does not need to comply with the literal 4th Amendment requirements for a criminal warrant; the judicial standard for a subpoena is constitutionally permissible under a standard which is less exacting than that required for a search in a criminal prosecution
         2. Limitations on subpoenas:
            1. The investigation must be for a lawfully authorized purpose, within the power of the legislative or administrative body to command
            2. As long as the subpoenaed documents are relevant to the inquiry, the “probable cause” requirement is met
            3. Reasonableness—particularity and specificity in the documents to be produced must be adequate and reasonable
            4. The subpoenaed party must have the opportunity for judicial review before suffering any penalties for refusing to comply
   3. ***The Hearing Phase***
      1. Bare minimum: You have to be given notice and the opportunity to be heard
      2. *Goldberg v. Kelly* lays out the maximum for informal adjudications
         1. Only function is to produce an initial determination of the validity for discontinuation of benefits; thus, **only minimal procedural safeguards are necessary**
            1. No particular order of proof or mode of offering evidence is necessary; informal procedures will suffice
         2. Must be **at a meaningful time and in a meaningful manner**;Recipient must have
            1. Timely and adequate notice of benefits termination
            2. An effective opportunity to defend by confronting adverse witnesses and orally presenting arguments
         3. Recipient must be allowed to testify orally
         4. Recipient must be given an opportunity to confront and cross-examine the witness relied on by the department
         5. Although counsel need not be provided, the recipient has a right to retain an attorney
         6. The decision maker’s conclusion as to a recipient’s eligibility *must* rest solely on the legal rules and evidenced *adduced at the hearing*
            1. To demonstrate compliance, the decision maker should state the reasons for his determination and indicate the evidence he relied on
         7. The decision maker must be impartial
      3. 5th Amendment
         1. The 5th Amendment privilege is usually inapplicable in agency proceedings
         2. A witness cannot refuse to take the stand and be sworn, but the witness may refuse to answer specific questions
      4. Official Notice
         1. When an agency takes “official notice,” that means that the agency treats a particular fact as proven
         2. Differences between the APA and MSAPA
            1. APA

Allows official notice of any material fact

* + - * 1. MSAPA

Allows official notice only of technical or scientific facts

* + 1. Other specifics about the hearing
       1. The standard of proof depends on the statute granting authority
       2. In formal adjudication, the burden of proof lies with the proponent of an order (whoever wants the order to succeed)
  1. ***The Decision Phase***
     1. Fundamental to any system of adjudicatory procedure is a requirement that the decisionmaker state findings of fact and reasons for the decision (*Goldberg v. Kelly*)
     2. A decisional document is appropriate if a statute requires reasoned decisions, but due process does not require an agency to explain and defend every decision it makes; ***a decisional document:***
        1. Reflects the facts and premises on which an agency decision is based,
        2. Should indicate the determinative reason for the final action taken,
        3. Should contain a statement of reasons which should inform the court and the private party of both the grounds of decision and the essential facts upon which the agency’s inferences are based, although detailed findings of fact are not required, and
        4. Should respond to any serious objections, if any were raised in relation to the action that the agency proposes
     3. **Requirements of a Decisionmaker**
        1. There is a right that’s vested in interested individuals to have the appropriate decisionmaker decide the relevant administrative question
        2. A decisionmaker is not required to have the same familiarity with the facts of the case, but it does require a good faith effort by the decisionmaker to evaluate the critical information and make sure that the right decision is made
  2. ***Effect of Decision: Res Judicata, Stare Decisis, Collateral Estoppel***
     1. Res Judicata and Collateral Estoppel
        1. Under res judicata, a valid and final personal judgment is conclusive of a claim
           1. If the judgment is for the defendant, the plaintiff is barred from reasserting the claim; if it’s for the plaintiff, the claim is extinguished and merged in the judgment
        2. Under collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *even on a different claim*
           1. This arises more frequently than res judicata in administrative law because the second case generally concerns a different claim, but depends upon a matter determined in the first case; the key question is whether an administrative adjudicatory hearing provided the private party with a full and fair opportunity to litigate the claim in question
     2. Stare Decisis
        1. While an agency is not bound by stare decisis, it can only jettison its precedents if it has “adequately explicated the basis of its new interpretation” (*United Auto Workers v. NLRB*)
  3. ***Estoppel*** (detrimental reliance)
     1. SCOTUS has consistently rejected estoppel arguments when asserted against the federal government because:
        1. Sovereign immunity principles
        2. Separation of powers (to recognize estoppel based on the misrepresentations of the Executive Branch officials would give those misrepresentations the force of law, and thereby invade the legislative province reserved to Congress)
     2. Advice giving
        1. If the government could be estopped by mistaken advice, agencies would be deterred from giving such advice
     3. Declaratory orders
        1. The administrative equivalent of judicial declaratory judgments, declaratory orders normally apply the law to stipulated facts, thus rendering a trial-type hearing unnecessary and allowing the matter to be disposed of swiftly
        2. Unlike an agency advice letter, these bind all parties, including the agency, thus a party can rely on a declaratory order without concern of equitable estoppel
        3. § 554(e) of the APA authorizes agencies to issue declaratory orders
  4. ***Ex Parte Communications***
     1. Why do we not like ex parte communications? ***Due Process – The other side doesn’t have an opportunity to refute the ex parte communication***
     2. ***General rule:***
        1. Oral or written communications not on the public record with respect to which reasonable prior notice to all parties is not given (definition of ex parte communications) are prohibited; ex parte communications limited to requests for a status report of a proceeding are exempted
        2. Ex parte communications relevant to the merits of the proceeding between any interested person outside the agency and a member of the body comprising the agency, an ALJ, or any other employee who may reasonably be expected to be involved in the decision-making process are prohibited
        3. If an insider communicates with outsider, or vice-a-versa, on an issue relevant to the merits, the insider must place on the public record any such written communications, memoranda describing the substance of any oral communications, and any written responses and memoranda describing the substance of any oral responses to prohibited communications (*see* § 557(d)(1)(C))
        4. If the ex parte communication is not discovered until after the proceeding is concluded, which would make it impossible to use the curative step of giving the uninformed parties notice and an opportunity to respond before decision, a court could reverse the agency decision if the court believed there was any reasonable likelihood that the ex parte communication may have affected the agency decision
     3. **Courts are generally more concerned about ex parte communications in the context of adjudications rather than rulemaking because it raises due process concerns**
     4. If there’s a serious, facially plausible argument that there were improper ex parte communications or improper bias within the agency head, then the agency head may be deposed, but this is very rare
     5. There certainly could be situations where a request for a status report could really mean something more and thus would be an ex parte communication
     6. If there’s ex parte communication, the agency is supposed to put it on the record, there may be an order to show cause regarding dismissal
        1. If it wasn’t put on the record and was relevant, that’s a basis for reversal of the decision
  5. ***Bias*** *(remember* Cinderella Finishing Schools*)*
     1. ***A decisionmaker should be disqualified when a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it***
        1. Definition of adjudged: To consider or declare to be true
     2. To some degree, even if the decisionmaker is biased, there are still some decisions that could withstand appeal
     3. The fact that he’s represented farmworkers before may not be, by itself, enough to prove bias
     4. The threshold for showing bias is relatively high

1. ***Agency’s Discretion to Choose Between Rulemaking or Adjudication***
   1. An agency has the discretion to choose between adjudication and rulemaking, and courts will generally defer to agency discretion (*NLRB v. Bell Aerospace*)
      1. Default rule is that agencies can regulate by adjudication rather than by rulemaking, even if it makes all the sense in the world to do rulemaking
   2. An agency’s decision to engage in adjudication rather than rulemaking is not reviewable, unless there's something very specific in relevant statutes that gives you traction to challenge the agency's decision to take one route, rather than another.
2. ***What Does Due Process Require***
   1. Due process does NOT apply to rulemaking; HOWEVER, you can apply the due process clause to the *substance* of the rule itself, but not to the rulemaking process
   2. ***First*** – Whether the asserted individual interests are encompassed within the 14th Amendment’s protection of “life, liberty, or property”
      1. The requirements of 14th Amendment procedural due process apply ***only*** to the deprivation of liberty and property (*Roth*)
      2. Although “liberty” and “property” have historically been interpreted liberally rather than literally, there are finite boundaries that must be observed (*Id*.)
      3. **Liberty** – In *Roth*, re-employment was not a right of liberty because
         1. The State did not damage his standing and associations in his community by refusing to rehire based on dishonesty or immorality
            1. If the state *had* done this, he would have been entitled to a hearing (**“Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential”**)
            2. Stigma – what happens if the gov’t says something mean about you? Not good enough for the due process clause to apply; you need a “stigma-plus”

A specific change in legal status that goes along with that stigma in order for there to be a deprivation of the due process (Paul v. Davis, guy is deemed a shoplifter)

For instance, being charged a fee for using too much water (*Constantineau*) as opposed to just being put on a list for using too much water (*Paul v. Davis*)

* + - 1. The state did not limit his opportunities to seek employment elsewhere
    1. **Property** – To have a property interest in a benefit, a person must have a legitimate claim of entitlement to it, rather than an abstract need or a desire for it
  1. ***Second*** – *Mathews v. Eldridge* balancing test to determine what process is due
     1. You have to evaluate and compare the status quo vs. what it is that the plaintiff wants
        1. Comparing what the procedure you get now versus what the procedure you get if the plaintiff’s claims for relief are granted
     2. Due Process requires consideration of **three factors:**
        1. The **private interest** that will be affected by the official action (the degree and length of deprivation);
           1. If you’re improving things a lot, and it makes a big difference to not make mistakes, then that’s a good case for imposing additional cost to the government
        2. The **risk of an erroneous deprivation** of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards (fairness and reliability of existing procedures and the value of alternatives/greater safeguards); and
           1. How much of a difference is the additional process going to make? Plaintiff has a much better case if the additional process will make a huge difference
        3. The **Government’s interest**, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail (administrative burden and other societal costs)
           1. The strongest government interests are those involving collateral consequences of delay rather than simply the cost of the hearing

If it’s really expensive to provide these add’l procedures and it either doesn’t make a big difference or the cost to the individual isn’t that significant, then the courts will probably leave things where they are

* + 1. This decision narrows *Goldberg*; an evidentiary hearing is required in *Goldberg* because a welfare recipient so desperately needs the government money; a disability beneficiary, on the other hand, while not wealthy, is not in as dire a situation, and thus an evidentiary hearing is not required prior to the termination of disability benefits
  1. ***Pre-Hearing***
     1. Due process requires fair notice of *reasonably specific* charges against the defendant so that he or she has an opportunity to prepare and present an adequate defense and be heard
     2. **License suspension**: a licensing agency normally has power to suspend a licensee from practice during the pendency of the hearing process if the licensee poses a threat to the public
  2. ***Hearing Requirements***
     1. At most – *Goldberg v. Kelly*
     2. Bare minimum – Notice and an opportunity to be heard, with some kind of impartial decisionmaker, although they may be intimately involved with the facts

**Challenging an Agency’s Decision - Reviewability**

1. ***Standing*** – First, a party must have standing to seek judicial review; under the constitution, it must be a case and controversy
   1. **RULE:** The plaintiff must have suffered an injury-in-fact that is fairly traceable to the challenged conduct and is redressable by a favorable judgment. Further, the plaintiff must be in the zone of interests of the statute under which relief is sought. (The zone of interests test is additional and comes after satisfying the constitutional injury-in-fact requirements and only applies when complaining of a statutory right)
      1. Injury in fact;
         1. Actual and imminent; and
         2. Concrete and particularized.
      2. Causation
         1. There must be a causal connection between the injury and the conduct complained of
         2. The injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court
      3. Redressability
         1. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision
         2. Must fix the injury-in-fact
      4. Zone of Interests (as a practical matter, this is usually applied in APA Judicial Review cases; this test only applies when the plaintiff is complaining of a statutory right)
         1. The Supreme Court has held that to have standing the plaintiff must establish that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question”
         2. This test applies to cases in which the plaintiff seeks to challenge agency treatment of someone else (such as a competitor) and asks whether the plaintiff’s interests were considered by Congress or the regulatory body in the decision to regulate the third party)
2. ***Timing Issues*** – Second, certain timing issues must be met (APA § 704)
   1. **Finality** – Because courts review only final agency action, a litigant must generally (but not always) complete the entire administrative process before a court will review decisions that the agency took along the way
      1. **Test** for determining if an agency action is final:
         1. The action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature; and
         2. The action must be one by which rights or obligations have been determined or from which legal consequences will flow
   2. **Exhaustion** – Generally, but not always, a court will not hear the case until the party has first exhausted all administrative remedies
      1. Example of a situation when an agency decision may be final but exhaustion may not be met: When an ALJ renders an initial decision—the losing party has the opportunity to appeal the decision to the agency before appealing to the courts
      2. **Exceptions** to the exhaustion requirement:
         1. **Delay**: Unreasonable or indefinite delay threatens unduly to prejudice the subsequent bringing of a judicial action
            1. And relatedly, if the situation is such that a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim, exhaustion may be excused even though the administrative decisionmaking schedule is otherwise reasonable and definite
         2. **Authority to grant relief**: If a substantial doubt exists about whether the agency is empowered to grant meaningful redress
            1. For example, an agency may lack authority to grant the type of relief requested
            2. Sometimes, agencies lack authority to decide constitutional issues, or agencies may not have authority to grant relief that plaintiff is looking for
         3. **Bias**: Where there are clear, objectively verifiable indicia of administrative taint
            1. Refers to bias or predetermination
         4. **Futility**: When further agency proceedings would be futile, anchored in a demonstrable reality rather than a pessimistic prediction or hunch
   3. **Ripeness** – If agency action which would be adverse to a litigant but has not yet occurred, a court may declare it to not be ripe for review
      1. **Balancing test:** When the decision isn’t quite ripe for review, if it looks like the agency still has more to do, you need to balance the fitness of the issues for judicial decision against the hardship to the parties of withholding court consideration; the more significant the injury is to the parties, the more effort the court will make deciding a case early on as opposed to letting it drag on
         1. **Fitness of the issues for judicial decision prong**
            1. Look at the nature of the claims – are the claims “purely legal” rather than factual?
            2. This prong asks whether the court has the information and skills necessary to adjudicate the case
         2. ***Challenges to legislative rules that impose duties or restrictions requiring persons immediately to change their conduct or be in violation of law are virtually always ripe under* Abbot Labs*; legislative rules that do not impose such duties or restrictions, however, are often found unripe under* Toilet Goods**
   4. **Primary Jurisdiction** – Sometimes the agency has primary jurisdiction, which means that the trial court refrains from acting so the matter can be resolved by the agency first
      1. This is not a judicial review doctrine, because it is not a defense raised by agencies to avoid judicial review of agency action; rather, it is an issue raised in a suit between to non-federal parties
      2. Plays a role when national uniformity is important and one court decision would have the potential to disrupt that uniformity
      3. Differentiating between exhaustion and primary jurisdiction doctrines:
         1. **Exhaustion applies where** a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its court
            1. **Rationale**: Administrative autonomy and judicial efficiency
         2. **Primary jurisdiction, on the other hand, applies where** a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views
            1. **Rationale**: Enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws
3. ***Reviewability*** – The availability of judicial review of administrative decisions (APA § 701)
   1. There is a long-standing presumption that judicial review of agency action is available
   2. **Exceptions to reviewability**, APA § 701(a)(1)-(2) specifies two situations in which APA judicial review is unavailable – when “statutes preclude judicial review,” and when “agency action is committed to agency discretion by law”
      1. *Statutory Preclusion*, APA § 701(a)(1)
         1. For a statute to preclude judicial review it should explicitly mention judicial review and either preclude it completely or provide for a particular form of judicial review and preclude all others
         2. To preclude judicial review, there must be ***clear and convincing evidence*** [presumably in the statute] of an intent to withhold it; the mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review
            1. There must be specific language or specific legislative history that is a reliable indicator of congressional intent to preclude judicial review
      2. *Agency action committed to agency discretion*, APA § 701(a)(2)
         1. **“Agency action”**
            1. What about agency inaction? *See Norton v. Southern Utah Wilderness Alliance*:

An agency’s failure to act is reviewable agency action only if it involves failure to take a “discrete” action that is legally “required”, under APA § 706(1)

Discrete seems to refer to discretion

When an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be

* + - * 1. The petitioner must identify a particular agency action being challenged, rather than a general manner in which the agency regulates
      1. **“Committed to agency discretion by law”**
         1. In *Overton Park*, federal statutes prohibited the Secretary of Transportation from using federal funds to finance construction of highways through public parks if a “feasible and prudent” alternative existed

When the Secretary approved funds, his action was challenged, and he defended saying that it was not judicially reviewable because it was committed to his discretion

SCOTUS disagreed, saying this is a very narrow exception which applies “in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply”

* + - * 1. This test was later restated in *Heckler v. Chaney*, which held that review is precluded if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion

A classic **example** of this is when an agency chooses *not* to enforce: absent some specific statute, the decision whether or not to enforce a particular law or rule is committed to agency discretion by law and therefore unreviewable

* + - * 1. Key question: Is it a situation where there’s no law to apply?
        2. In certain situations, where congress has been clear it’s handing over a discretionary determination to the agency, but it’s just a pure discretionary handover

E.g. “This decision needs to be made in the sole discretion of the agency director”

**Judicial Review**

1. ***Judicial Review of Questions of Law*** – a question of law involves claims as to the meaning of a constitutional, statutory, or regulatory provision
   1. Examples of a question of law under § 706
      1. An agency’s rule or order is unconstitutional
      2. An agency’s rule or order is beyond the agency’s statutory authority
      3. An agency’s interpretation of law within a rule or order is wrong
         1. E.g., in informal adjudication, a USDA inspector saying the law only allows you to build a fence 8 feet instead of 9 feet
      4. An agency did not follow all the procedures required by law, whereas the agency would argue those procedures weren’t required by law
   2. **Statutory interpretation**
      1. *Chevron* Analysis
         * 1. **STEP 0** – Is this a case where Congress has delegated authority to the agency to speak with the force of law and the agency’s interpretation at issue is an exercise of that authority?
           2. **Explanation**

Force of law?

This generally requires that the agency be able to issue legislative rules

The agency is called for by statute to issue statements via formal adjudications or formal rulemaking

*Chevron* does not apply to nonlegislative rules (such as a ruling letter)

Is the agency statement at issue an exercise of that authority?

* + - * 1. ***IF YES…***

Go to Step 1

Public policy: The implicit delegation to the agency to make law

* + - * 1. ***IF NO…***

*Skidmore* deference (weak deference) applies: Under *Skidmore*, the courts defer to agency statutory interpretations on a sliding scale based on the formality of the process, the importance of agency expertise, and the degree to which the agency’s reasoning is persuasive

In *Skidmore* deference, the following factors are considered:

How careful was the agency?

Thoroughness

Validity of the reasoning

Consistency with prior statements made by the agency

Technical or significant policy calls—is it the agency’s core area of expertise (if yes, more deferential to agency interpretation)

There are two approaches:

Majority (75%): The “sliding scale” approach, in which the court does generally owe deference to an agency interpretation, but the extent of that deference depends on contextual factors such as those identified in *Skidmore* itself (consistency, thoroughness of consideration, etc.)

*Christensen* follows this

Minority (25%): The “independent judgment” approach, in which the court can treat the agency interpretation as relevant but need not uphold it unless the court itself is ultimately persuaded that it is correct

*Mead* follows this

* + - 1. **STEP 1** – Has Congress clearly spoken to the precise question at issue?
         1. **Explanation**

In other words, this prong asks whether the statutory language being interpreted is ambiguous, or whether the meaning of the provision is clear; the purpose of this question is legislative intent

* + - * 1. **Factors to consider:**

Look at the plain language of the statute itself

Look at the plain language of the context of all statutory provisions

Look at the plain language of the entire act, or even look outside at other statutes

Look at legislative purpose—why a given statute was enacted

Legislative history

Canons of construction; there’s a few different categories

There are things specific to linguistic interpretation

Policy canons

Constitutional avoidance (avoiding difficult constitutional problems)

E.g. If reading a statute a particular way would create substantial 1st amendment problems, then it’s probably not meant to be interpreted that way

Nondelegation canon

You can’t hand over legislative authority to someone that’s not the legislature

Rules against retroactivity

Statutes should not be retroactive

Lenity

* + - * 1. ***IF YES…*** (if the meaning of the statute is clear)

Then the court announces the meaning and the analysis ends

* + - * 1. ***IF NO…***

Go to Step 2

* + - 1. **Step 2** – Defer to *reasonable* agency interpretations of law
         1. This is basically arbitrary and capricious review

1. ***Judicial Review of Questions of Fact***
   1. *Formal rulemaking/adjudication: Substantial evidence* – APA § 706(2)(D)
      1. **Test**: Whether such relevant evidence exists as a reasonable mind might accept as adequate to support a conclusion in consideration of the *whole record*
         1. In other words, Could a rational decisionmaker reach the same conclusion in light of the entire record?
         2. The “whole record” requirement means that a decision might fail the substantial evidence test even though it is supported by some evidence, when that evidence is overwhelmed by evidence to the contrary
   2. *Informal rulemaking/adjudication: Arbitrary and capricious* – APA § 706(2)(A)
      1. **WHEN IS HARD LOOK REVIEW APPLICABLE?**
         1. **What is “hard look review”?**
            1. *The agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made”*
            2. *In reviewing this explanation, the court considers “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment*
         2. Use hard look review in all federal court decisions except where it deals with highly technical stuff
         3. Federal courts; state courts are much more deferential
         4. In *State Farm*, the agency got in trouble due to failure to consider all the facts; **agencies are vulnerable when the fail to consider reasonable alternatives**; ultimately, it boils down to whether the agency has articulated its decision
      2. **WHAT IS SOFT LOOK REVIEW?**
         1. *A plaintiff must prove “the absence of any conceivable ground upon which the rule may be upheld”*
      3. This is the most deferential standard of review
      4. Under the A&C test, agencies must make decisions:
         1. Based on a consideration of the relevant factors, including alternatives to the agency’s proposal;
         2. Without a clear error of judgment; and
         3. Under the correct legal standard
      5. Moreover, while the A&C inquiry is “searching and careful,”
      6. The standard of review is “a narrow one [and t]he court is not empowered to substitute its judgment for that of the agency” (*Overton Park*)
      7. An agency rule is arbitrary and capricious if the agency has:
         1. Relied on factors which Congress has not intended it to consider,
         2. Entirely failed to consider an important aspect of the problem,
         3. Offered an explanation for its decision that runs counter to the evidence before the agency, or
         4. Is so implausible that it could not be ascribed to a difference in view or the product of agency expertise (*State Farm*)
   3. *Challenging ANY Agency Action – The Default Rule*
      1. Use the **arbitrary and capricious** standard, per APA § 706(2)(A)
      2. ***ANY*** agency action should be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
      3. The A&C test contains no limitation on its applicability, and thus it applies to all reviewable administrative actions
      4. Because it is the ***most deferential*** standard of review, parties challenging administrative action prefer de novo or substantial evidence review
2. ***Discretionary Determinations*** – Arbitrary & capricious is used in review of agency discretionary determinations

**Delegation and Legislative Controls**

1. ***Nondelegation***
   1. *RULE* – Congress can delegate legislative power as long as it gives the agency or official an “***intelligible principle***” to follow in exercising that power
      1. In other words, executive agencies and officials may take actions that have legislative effect and are based on their own policy judgments, as long as Congress gave them an overarching policy within which to act
      2. An “***intelligible principle***” is an articulated standard that defines what the agency shall do in a given situation
      3. SCOTUS has generally interpreted the “intelligible principle” test to allow Congress to give very broad rulemaking powers to federal agencies
         1. Broad delegations are generally permissible so long as the agencies are given a general public policy to promote
      4. The principle may be very general, such as “regulate in the public interest”
   2. **Policy reasons** for the nondelegation doctrine
      1. Ensures policy decisions are made by Congress
         1. Constitutional structure
         2. Deliberative process
      2. Ensures agencies act within certain constraints
      3. Ensures that courts can test validity of exercise of authority
         1. “No law to apply doctrine” is much more narrowly constrained, although it looks similar to this
   3. How do you make sure you’ve got a statute that doesn’t pose a nondelegation problem?
      1. An “intelligible principle” establishing “a principle of accountability under which compatibility with the legislative design may be ascertained”
      2. You must have an “intelligible principle ‘plus’”
         1. Plusses
            1. Have a nice, clear, administrative interpretation

This especially helps if it’s an area with complicated, technical considerations

* + - * 1. Administrative process
        2. Historical application/use

Is there a history of the agency writing rules with the statute? If so and there have been no problems, then it may be permissible

* + - * 1. Experiences with similar legislation
        2. Exigent circumstances
        3. Limited period of control
        4. Area within presidential/executive authority

If it’s something that the executive should be done anyway

* + - * 1. State implementation
        2. Judicial review

Stronger is better

If there are ways that courts can explicitly review

* + - 1. Minuses
         1. Private involvement

One reason why *Schecter* was a problem

* + - * 1. Particularly broad scope
        2. Legislative history suggesting intentional abandonment

You want Congress to do its job; if there’s something in the legislative history that suggests that Congress decided to leave something to the agency

* + - * 1. Area within legislative authority (though note rejection of “core functions” test in *Synar*)

If it’s a function that generally Congress should be doing

* + - * 1. BUT, *ATA* emphasis on difficulty of identifying standards “We have almost never felt qualified to second guess congress”

As long as you can identify the intelligible principle, chances are it will probably be upheld

* 1. ***Courts will RARELY invalidate a statute on the basis of the nondelegation doctrine* (it hasn’t been done since 1936)**
     1. *American Trucking* concerned a provision in the Clean Water Act that authorizes the EPA to promulgate regulations establishing “national ambient air quality standards” (NAAQS) for certain air pollutants
        1. The Act says that each standard should be set at a level “requisite to protect the public health” with an “adequate margin of safety”
        2. *HELD* – No violation of the nondelegation doctrine

1. ***Legislative Control***
   1. **Appointment Clause**
      1. Congress cannot appoint “principal” officers; the President appoints principal officers with the advice and consent of the senate
      2. “Inferior” officers may be appointed by the President alone, the courts, or department heads
      3. The Appointment Clause conspicuously fails to vest any appointment power in Congress or members of Congress
      4. Policy reason: Framers didn’t want Congress to have both the power to create offices and the power to fill them
      5. Congress *may, however,* appoint officials to help it exercise its legislative powers who can, for example, gather information relevant to determining whether Congress should enact a new law
   2. **Removal of Officers**
      1. Congress cannot restrict the President’s power to remove an officer whom the President had appointed with the advice and consent of the Senate, if that officer exercised “purely executive” powers
      2. Congress may, however, restrict the President’s power to remove a presidential appointee who exercised quasi-legislative or quasi-judicial powers
         1. In analyzing whether a restriction is constitutional, a court will consider whether the restriction impedes the President’s ability to perform his constitutional duties
            1. As part of that consideration, the court will probably continue to take into account whether the official whose removal is at stake exercises purely executive powers and whether the official is a principal or inferior officer

**Key Differences Between Oregon and Federal Administrative Law**

1. Standing
   1. In Oregon, “any person” may actually challenge a rule, for instance, given that the statute provides for such review – there isn’t a separate constitutional standing requirement like in the federal system
   2. There is no organizational standing in Oregon
      1. This means that the Oregon Humane Society, for example, doesn’t have standing in and of itself; but if one of their members sues, they may join
2. “Contested Case”
   1. In Oregon, adjudications give rise to orders in “contested case” or “other than a contested case,” – the procedural differences between these two approaches roughly (but only roughly) track the difference between informal and formal adjudications in the federal system, but there are generally more cases in Oregon that are defined to be within the scope of a “contested case” process than is true for formal adjudications in the federal system.
   2. A “contested case” is analogous to a formal adjudication, whereas “other than a contested case” is analogous to informal adjudications; triggered by whether the statute specifically grants for an “evidentiary hearing” or a hearing where evidence is to be presented
3. Rulemaking – Formal vs. Informal
4. In Oregon, there are no differences between formal and informal rulemaking – there are just rules, all of which are subject to the procedural rulemaking requirements of the Oregon APA.
5. Judicial Review
   1. Judicial review standards are different
   2. In particular, review of rules is done only for
      1. Procedural compliance, and
      2. Consistency with statutory and constitutional requirements.
   3. No Arbitrary & Capricious review. That necessarily means that there is much less need in Oregon for an agency to develop a comprehensive record and detailed explanation for the rulemaking choices that the agency makes.