

Admin review (part 1)

Prof. Ford
April 23, 2020

Overall structure

- **What agencies do**
 - Adjudication versus rulemaking
 - Adjudication
 - Rulemaking
- **How agency actions are reviewed**
 - Substantive standards of review (i.e., *Chevron*)
 - Other requirements for review
 - Reviewability, timing, standing
- **How agencies fit into the constitutional structure**
 - Agencies and Congress
 - Agencies and the president

Adjudication v. rulemaking

- ***Londoner / Bi-Metallic* factors**
 - Similar facts; different outcomes
 - Multi-factor balancing test
 - No one factor tends to be decisive

Adjudication v. rulemaking

- ***Londoner / Bi-Metallic* factors**
 - Rulemaking tends to be:
 - prospective
 - general
 - applicable to large number of people
 - depend on social facts
 - precedes adjudication
 - protected by democratic process

Adjudication v. rulemaking

- ***Londoner / Bi-Metallic* factors**
 - Adjudication tends to be:
 - retrospective
 - specific,
 - applicable to a small number of people,
 - depends on specific facts,
 - follows a rulemaking,
 - susceptible to discrimination and corruption

Adjudication v. rulemaking

- **Implications: Due process**
 - Adjudication: entitled to due process
 - Rulemaking: no due process; political process is sufficient
- **Implications: Agency choice**
 - Not always clear which is better for an agency!
 - HUD discussion problem, casebook p. 354

Adjudication

- **Due process**

- Fifth Amendment: “No person shall ... be deprived of life, liberty, or property, without due process of law.”
- Fourteenth Amendment: “...nor shall any State deprive any person of life, liberty, or property, without due process of law.”

Adjudication

- **Due process**
 - Government action...
 - that deprives someone of life, liberty, or property...
 - without due process of law...
 - ...is unconstitutional.

Adjudication

- **Due process**

- Government action...¹
- that deprives someone of life, liberty, or property...²
- without due process of law...³
 - ...is unconstitutional.

Adjudication

- **Due process**
 - **Government action:**
 - Mostly pretty obvious — think “state action”
 - One way to reconcile *Wisconsin v. Constantineau* (notice of drunkenness) and *Paul v. Davis* (notice of active shoplifter): who is depriving the citizen of the tangible right?

Adjudication

- **Due process**
 - Deprives someone of life, liberty, or property:
 - *Goldberg v. Kelly* (welfare benefits)
 - shift from “old” property to “new” property
 - state benefits discussion problem, p. 366
 - *Wisconsin v. Constantineau* (notice of drunkenness) and *Paul v. Davis* (notice of active shoplifter)
 - “stigma-plus” test

Adjudication

- **Due process**
 - Deprives someone of life, liberty, or property:
 - *Board of Regents v. Roth* (tenured job) and *Perry v. Sindermann* (nontenured job)
 - firing-teachers discussion problem, p. 383
 - *Kerry v. Din* (husband's visa)
 - TSA discussion problem, p. 392

Adjudication

- **Due process**
 - Without due process of law:
 - *Goldberg v. Kelly* (welfare benefits cutoff)
 - detailed hearing requirement
 - *Mathews v. Eldridge* (disability benefits cutoff)
 - Court backs away somewhat from *Goldberg*
 - Balancing discussion problem, p. 406
 - *Cleveland Board of Education v. Loudermill* (firing of public employee)
 - more-minimalist hearing requirement

Adjudication

- **Adjudication under the APA**

	Adjudication	Rulemaking
Formal	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
Informal	(nothing)	§ 553

Adjudication

- **Adjudication under the APA**
 - Formal adjudication:
 - when statute says “on the record after opportunity for an agency hearing” or similar
 - when statute expressly requires formalities
 - procedural requirements from APA, organic statute, agency rules, and due process

Adjudication

- **Adjudication under the APA**
 - Informal adjudication:
 - other adjudications
 - e.g. *Dominion Energy v. Johnson* (“after opportunity for public hearing”)
 - the majority of adjudications
 - requirements from organic statute, agency rules, and due process

Adjudication

- **Adjudication under the APA**
 - Implications from reviewability: *Overton Park*
 - informal adjudication, so no APA procedures, but APA imposes judicial review
 - § 706: set aside if, inter alia, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
 - so there must be some record from which the court can do that review
 - query how useful a written record is
 - *PBGC v. LTV*: but no more than necessary!

Adjudication

- **Implications for agency structure**
 - Due process requires a neutral decision maker, but expertise and policy judgment are expected
 - Not okay:
 - direct financial interest in case
 - adjudicator who participated in same matter before becoming adjudicator
 - Okay:
 - *Winthrow v. Larkin*: Wisconsin Medical Board both investigated and adjudicated
 - minds aren't "irrevocably closed"

Adjudication

- **Judicial review of agency fact finding**
 - APA § 706:
 - formal rulemakings/adjudications are evaluated to see if supported by “substantial evidence”
 - all agency actions are evaluated to see if they are “arbitrary and capricious”

Adjudication

- **Judicial review of agency fact finding**
 - *Universal Camera*: court must review whole record, including supporting and opposing evidence
 - arbitrary-and-capricious review has some teeth!
 - *Allentown Mack*: Court strikes down NLRB determination based on NLRB fact finding, which was inconsistent with the “good-faith reasonable doubt” standard
 - (the NLRB standard!)
 - may reflect Court’s skepticism of policymaking through gradual adjudication

Adjudication

- **Judicial review of agency fact finding**
 - *Richardson v. Perales* (disability determinations)
 - reasons hearsay might be disfavored
 - Factors:
 - highly technical issue → more deference
 - credibility determination → more deference
 - hearsay → less deference
 - dissent → less deference
 - background knowledge is fine
 - policy preference is fine if explicitly stated

Rulemaking

- **Agency power to issue rules**

	Adjudication	Rulemaking
Formal	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
Informal	(nothing)	§ 553

Rulemaking

- **Agency power to issue rules**

	Adjudication	Rulemaking
Formal	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
Informal	(nothing)	§ 553



Notice and comment!

Rulemaking

- **Agency power to issue rules**
 - APA doesn't grant power to issue rules
 - comes from organic statute
 - *Petroleum Refiners*: courts generally read ambiguity in favor of rulemaking authority

Rulemaking

- **Agency choice between adjudication and rulemaking**
 - Generally within agency discretion
 - agency motivation discussion problem, p. 533
 - Individualized versus nonindividualized facts
 - *Heckler v. Campbell* (disability and jobs in the national economy)
 - *Bowen v. Yuckert* (disability and method of analyzing medical claims)

Rulemaking

- **Making rules through adjudication**
 - *Chenery II* (SEC)
 - agencies are typically free to do through adjudication what they might do through rulemaking
 - so prospective adjudication is generally okay!
 - akin to common-law decision making
 - (*Bowen v. Georgetown Hospital*: agencies cannot generally issue retroactive rules)

Rulemaking

- **Making rules through adjudication**
 - *Chenery II* (SEC)
 - note: even though the court had rejected the same decision from the SEC before
 - “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency”

Rulemaking

- **Making rules through adjudication**
 - *Chenery II* (SEC)
 - problems:
 - mediocre notice
 - less-efficient judicial review
 - might let agencies hide the ball and change the rules through adjudication over time

Rulemaking

- **Making rules through adjudication**
 - *Chenery II* (SEC)
 - benefits:
 - lets agencies see how rule is affecting parties on the ground
 - lets agencies consider complex technical facts in context
 - lets agencies prioritize
 - makes it harder for clever lawyers to evade complex rules

Rulemaking

- **Formal and informal rulemaking under the APA**
 - *US v. Florida East Coast Railway*
 - a “hearing” need not be a public hearing; it can be on paper
 - *Vermont Yankee v. NRDC*
 - APA provides the exclusive set of procedures; courts can’t add more
 - DC Circuit can’t short-circuit *Florida East Coast Railway* by grafting procedural requirements on notice-and-comment procedures
 - hearings discussion problem, p. 569

Rulemaking

- **Formal and informal rulemaking under the APA**
 - So exclusive sources of procedural requirements:
 - APA
 - organic act
 - agency rules
 - (due process, if adjudication)
 - *Overton Park* is not an exception or violation; it is an application of the APA review procedures

Rulemaking

- **Mechanics of informal rulemaking**
 - § 553: three steps
 - notice of proposed rulemaking
 - opportunity for public comment
 - publication of the final rule
 - In practice, agencies often provide more
 - *Shell v. EPA*: “Notice of Intent to Develop Rulemaking” and “Advanced NPRM”

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice-and-comment procedures:
 - procedural rules
 - substantive rules that grant exemptions
 - interpretive rules
 - policy statements
 - other rules with “good cause”

Rulemaking

- **Mechanics of informal rulemaking**
 - Notice of proposed rulemaking must have:
 - “(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 of the subjects and issues involved.”**

Rulemaking

- **Mechanics of informal rulemaking**
 - Did notice of proposed rulemaking provide enough notice?
 - “logical outgrowth” test: final rule must be the logical outgrowth of the proposed rule
 - *Shell v. EPA*: demanding version
 - Tension:
 - notice must provide enough notice for people to submit meaningful comments, but
 - agency must be able to change rule in response to comments

Rulemaking

- **Mechanics of informal rulemaking**
 - Contents of the notice of proposed rulemaking
 - *Portland Cement / American Radio Relay League* (disclosure of scientific information)
 - conflict with *Vermont Yankee*?
 - Contents of the publication of the final rule
 - APA: “concise general statement of [the rule’s] basis and purpose”
 - *Nova Scotia Food Products*: agency must respond to substantive comments
 - comments discussion problem, p. 592

Rulemaking

- **Mechanics of informal rulemaking**
 - So several reasons the notice-and-comment process might be inadequate:
 - *Portland Cement; American Radio Relay League:* notice fails to disclose all relevant data, denying an adequate opportunity to comment
 - *Shell Oil:* final rule covers subject that was not adequately noticed or that differs from proposal
 - *Nova Scotia:* Agency fails to provide adequate statement of basis and purpose, responding to major points raised in comments

Rulemaking

- **Mechanics of informal rulemaking**
 - Bias: *Association of National Advertisers*
 - no due process in rulemaking
 - bias is fine as long as mind isn't "unalterably closed" on matters critical to the rulemaking
 - policy views on issues are a feature, not a bug, of agency rulemaking
 - OSHA discussion problem, p. 623

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice and comment
 - Subject matter: military or foreign affairs function
 - Good cause: when impracticable, unnecessary, or contrary to public interest
 - Procedural rules: *Mendoza v. Perez* (herders)
 - whether or not substantive rights of parties are affected
 - FCC discussion problem, p. 647

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice and comment
 - Interpretive rules: *American Mining Congress* (mine safety rules)
 - DOJ guidance:
 - Substantive rules: force and effect of law
 - Interpretive rules: advise public of agency's construction of statutes/rules
 - Policy statements: advise public of agency's prospective plans to exercise discretion

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice and comment
 - Interpretive rules: *American Mining Congress* (mine safety rules)
 - Force and effect of law:
 - When agency wouldn't otherwise have basis for action
 - ~~When agency has published rule~~
 - When agency has explicitly invoked general legislative authority
 - When rule effectively amends prior notice-and-comment rule

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice and comment
 - Interpretive rules: *American Mining Congress* (mine safety rules)
 - incentives to write vague rules?
 - possibly policed by courts
 - parties should love interpretive rules
 - so why challenge them?

Rulemaking

- **Mechanics of informal rulemaking**
 - Exemptions from notice and comment
 - Policy statements:
 - *PG&E v. Federal Power Commission* (“we will look favorably upon”)
 - *Community Nutrition Institute v. Young* (tying agency’s hands)
 - discussion problems, p. 664