

# Administrative Process: First-Half Review

October 13, 2021



1

## 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

2

# 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

3

# 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

4

# Adjudication v. rulemaking

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

5

# 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

6

# 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

7

# 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

8

# 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

9

# 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.”

10

# Adjudication

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

11

# Adjudication

- **Due process**
  - Government action...<sup>1</sup>
  - that deprives someone of life, liberty, or property...<sup>2</sup>
  - without due process of law...<sup>3</sup>
    - ...is unconstitutional.

12

# 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?

13

# 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

14

# 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

15

# 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

16



# Adjudication

- **Due process**
  - Without due process of law:
    - *Cleveland Board of Education v. Loudermill* (firing of public employee)
      - more-minimalist hearing requirement
      - can be in writing
      - really just about notice and an opportunity to respond

17

# Adjudication

- **Adjudication under the APA**

	<b>Adjudication</b>	<b>Rulemaking</b>
<b>Formal</b>	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
<b>Informal</b>	(nothing)	§ 553

18

# 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

19

# 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

20

# 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!

21

# 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 weren't “irrevocably closed”

22

# 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”
    - these effectively mean the same thing with fact finding

23

# Adjudication

- **Judicial review of agency fact finding**
  - ***Universal Camera***: court must review whole record, including supporting and opposing evidence
    - Congress expressed a mood!
    - arbitrary-and-capricious review has some teeth!

24

# Adjudication

- **Judicial review of agency fact finding**
  - *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

25

# 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

26

# 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

27

# Rulemaking

- **Agency power to issue rules**

	<b>Adjudication</b>	<b>Rulemaking</b>
<b>Formal</b>	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
<b>Informal</b>	(nothing)	§ 553

28

# Rulemaking

- Agency power to issue rules

	Adjudication	Rulemaking
Formal	§ 554 (§§ 555–558)	§ 553 (§§ 556–557)
Informal	(nothing)	<b>§ 553</b>

**Notice and comment!**



29

# Rulemaking

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

30

# Rulemaking

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

31

# 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)

32



# 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”

33

# 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

34

# 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

35

# Rulemaking

- **Formal and informal rulemaking under the APA**
  - *Vermont Yankee v. NRDC*
    - APA provides the exclusive set of procedures; courts can't add more
    - DC Circuit can't short-circuit APA by grafting procedural requirements onto notice-and-comment procedures
    - hearings discussion problem, p. 569

36

# Rulemaking

- **Formal and informal rulemaking under the APA**
  - Four 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

37

# 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”

38

# Rulemaking

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

39

# 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.”**

40

# 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 example
  - Tension:
    - notice must provide enough notice for people to submit meaningful comments, but
    - agency must be able to change rule in response to comments

41

# 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

42

# Rulemaking

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

43

# 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

44

# 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

45

# 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

46

# 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?

47

# 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

48



# Rulemaking

- **Hard-look review**
  - Application of § 706
    - § 706(2)(A): court can set aside agency action that is “**arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law**”
    - factual determinations in adjudications: *Universal Camera, Allentown Mack, Richardson v. Perales*
    - policy determinations in rulemaking: **hard-look review**

49

# Rulemaking

- **Hard-look review**
  - Agencies must:
    - articulate a satisfactory rationale for its action at the time, not *post hoc* rationalizations;
    - supply a reasoned analysis justifying any reversal of course;
    - consider alternative ways of achieving its objectives; and
    - examine the relevant data and consider the relevant factors

50

# Rulemaking

- **Hard-look review**
  - Agency action is arbitrary and capricious if the agency:
    - relied on factors which Congress did not intend it to consider;
    - entirely failed to consider an important aspect of the problem; or
    - offered an explanation for its decision that runs counter to the evidence before the agency

51

# Rulemaking

- **Hard-look review**
  - Demanding example: *National Tire Dealers & Retreaders v. Brinegar*
    - agency has clear authority to enact safety rules
    - agency made clear judgment that requiring retreaded tires to have permanent labels was necessary for safety
    - but the court evaluated the agency's reasoning and decided it wasn't persuasive

52

# Rulemaking

- **Hard-look review**
  - Supreme Court example: *Motor Vehicle Manufacturers v. State Farm*
    - statute requires agency to consider if standards are “practicable,” “meet the need for motor vehicle safety,” and “stated in objective terms”
    - agency said automatic seatbelts would work as well as airbags and then scrapped rule since automatic seatbelts wouldn’t work
    - Court: that makes no sense

53

# Rulemaking

- **Hard-look review**
  - Agency changes in policy
    - *State Farm*: withdrawal of regulation is agency action like any other, subject to review
    - *FCC v. Fox*: but a difference in policy views is a sufficient reason to change the rule, if the new rule is adequately supported by the statute

54