

I. Agencies Generally

a. Types

i. Single-Headed vs. Multi-Member

1. Single-Headed: a single person the top of the institution
2. Multi-Member: more than one person sharing ultimate decisional authority

ii. Executive vs. Independent

1. Executive: agency heads subject to unlimited presidential removal authority
2. Independent: President cannot remove agency heads at will

II. Separation of Powers

a. Legislative Power

i. Delegation

1. *Panama Refining* (p.55): delegation of legislative power to executive branch with inadequate guidance unconstitutional
2. *Schechter* (p.59): delegation of legislative power to executive branch with “virtually unfettered” discretion in use of delegated power unconstitutional
3. *NBC v. US*: expansive delegation of legislative power with some guidance for use of power constitutional
4. *American Petroleum* (p.74): legislative history used to determine extent of delegation of legislative power to executive branch officer
5. *Mistretta* (p.64): delegation of legislative sentencing power with guidelines to judicial branch constitutional
6. *American Trucking* (p.97): agency cannot “cure unconstitutionally standardless delegation of power by declining to exercise some of that power”

ii. Controlling Delegation

1. *Chadha* (p.101): provision allowing legislative branch resolution to veto decision of executive branch officer outside of constitutional exceptions unconstitutional

iii. Congress can never delegate legislative power to private third parties

b. Executive Power

i. Appointment of Agency Officials

1. Appointment Clause: President appoints “ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for... but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments”
2. *Buckley v. Valeo* (p.126): members of congressionally created commission with enforcement powers beyond those

of Congress had to be officers of the United States to wield such powers; thus the appointment of commission members had to comply with the Appointment Clause

3. *Morrison v. Olson* (p.137): Special Counsel with very limited powers, limited jurisdiction, limited tenure and subject to removal by executive branch officer held to be an inferior officer
 4. *Landry* (p.132): administrative law judges whose rulings were subject to de novo review and who could not render final decisions of the agency held to be employees rather than officers
- ii. Removal of Agency Officials
 1. No explicit constitutional provisions
 2. Decision of 1789: legislative endorsement of implicit presidential power to remove executive officials
 3. *Myers* (p.153): Supreme Court approval of constitutionally-based presidential removal power over executive officers; endorsement of decision of 1789
 4. *Humphrey's Executor* (p.157): limitations on constitutionally-based presidential removal power for officers of independent agencies; look to congressional intent, agency purpose and functions
 5. *Bowsher v. Synar* (p.160): "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment"
- c. Judicial Power
 - i. *CFTC v. Schor* (p.174): limited agency assumption of jurisdiction over common-law counterclaims that does not take any powers away from federal courts and where parties have opted for the agency to hear the case does not violate separation of powers; dissenting opinion that Article III "seems to prohibit the vesting of any judicial functions" in any other branch
 - ii. Article III judges have salary and tenure guarantees

III. Statutory Constraints

- a. Administrative Procedure Act
 - i. General set of requirements applicable to all agencies
 - ii. Covers:
 1. Agency decision-making procedure
 2. Agency disclosure of information
 3. Scope of judicial review of agency decisions
 4. Availability, timing and form of judicial review of agency action
 - iii. Distinguishes between rule-making and adjudication
 - iv. Distinguishes between formal and informal procedures
- b. Organic Statutes

- i. Statute creating an agency
- ii. Assigns a particular responsibility to the agency
- iii. Creates substantive cause of action
- iv. May change otherwise standard procedural rules, for example by providing a mechanism for judicial review

IV. Rule-Making

a. Generally

- i. APA Definition: “agency process for formulating, amending or repealing a rule”
- ii. Action looks legislative
- iii. Results in a rule
 - 1. Functions like a statute in most ways
 - 2. APA Definition: “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing”

b. Formal Rule-Making

- i. Strong presumption against formal rule-making
 - 1. Unless it is absolutely clear from statutory language that formal rule-making is required, courts will infer that Congress intended that the agency be free to use informal procedures
 - 2. *Florida East Coast Railway* (p.210): “after hearing” merely triggers notice and comment procedures
 - 3. To trigger formal rule-making, a formulation such as “on the record after agency hearing” or a reference to the relevant provisions of 15 U.S.C. §§556 and 557 in the organic statute will generally be necessary
 - 4. *Allegheny-Ludlum Steel* (p.220): the provisions of §556 and 557 are applicable “only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be ‘on the record’”

c. Hybrid Rule-Making

- i. Must be a product of either administrative or statutory requirements
- ii. *Vermont Yankee* (p.243):
 - 1. In informal rule-making, courts may not impose procedures in addition to those prescribed by the APA, except to the extent required by the Constitution and the organic statute

2. Judicial policies of predictability and procedural flexibility
 3. Can be raised in all questions regarding procedural issues in rule-making
 4. The APA in effect displaces common-law administrative law
 5. Substantial impact test still remains
- iii. When considering statutory hybrid rule-making procedures, additional procedures are permissible if courts are following Congressional instructions
- d. Informal Rule-Making
 - i. *Connecticut Light & Power* (p.265): an agency adopting final rules that differ from proposed rules is required to re-notice “when the changes are so major that the original notice did not adequately frame the subjects for discussion”; however, re-notice is not required when changes “follow logically from or reasonably develop” the proposed rules
 - ii. Re-notice requires a new comment period
 - iii. Comment period should be meaningful
 - iv. Agencies “must respond in a reasoned manner to [comments] that raise significant problems” (*Reyblatt*, p.287)
 - v. *MCI v. FCC* (p.280): notice of proposed rule-making must be “adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process”; a single footnote in the background section of another notice of proposed rule-making is not adequate notice, even if other parties have commented
 - e. Exemptions from Informal Rule-Making Procedures
 - i. Under § 553(b) and unless the organic statute says otherwise, notice and comment provisions do not apply:
 1. “To interpretative rules, general statements of policy, or rules of agency organization, procedure or practice”
 2. “When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”
 - ii. These exemptions often used to avoid procedural burdens of hybrid rule-making
 - iii. A general statement of policy, unlike a substantive rule, does not establish a binding norm, is not finally determinative of the issues or rights to which it is addressed, and cannot be relied upon as law
 - iv. A policy statement is an indication of an agency’s position on a current regulatory issue
 - v. An interpretative rule is the agency’s construction of a statute that has been entrusted to the agency to administer, and does not purport to modify any legal norms

- vi. A substantive rule modifies or adds to a legal norm based on the agency's own authority
- vii. *Air Transport Association* (p.294): rules substantially affecting the adjudication of civil penalties require notice and hearing under the APA and the Due Process Clause
- viii. *US Telephone Association* (p.305): a detailed schedule of penalties and adjustments that is "intend[ed] to cabin [agency] discretion" is not a policy statement
- ix. *American Mining Congress* (p.315): whether a purported interpretative rule has "legal effect" turns on whether:
 1. In the absence of the rule there would not have been an adequate legislative basis for enforcement or agency action to confer benefits or ensure the performance of duties
 2. Whether the agency had published the rule in the Code of Federal Regulations
 3. Whether the agency had explicitly invoked its general legislative authority
 4. Whether the rule effectively amended a prior legislative rule
 5. If the answer to any of these questions is yes, the rule is legislative rather than interpretative
- x. *Syncor* (p.321): a rule using wording consistent only with the invocation of general rule-making authority to extend regulatory reach and not purporting to construe any language in a relevant statute or regulation is a substantive rule
- xi. *Tennessee Gas Pipeline* (p.326): the exception to notice and comment requirements when impracticable, unnecessary or contrary the public interest should be limited to emergency situations and the grounds justifying the use of the exception must be incorporated within the published rule
- xii. *Hoctor*: a rule is interpretative "only if it can be derived from the regulation by a process reasonably described as interpretation"; if not, notice and comment rule-making is required
- xiii. *Croplife*: a rule reflecting an obvious change in established agency practice in clear and unequivocal language and creating a "binding norm" is substantive
- xiv. *Alaska Packers*: once an agency interprets a regulation, that interpretation can only be changed through notice and comment rule-making
- xv. *Appalachian Power*: provisions significantly expanding the scope of a rule require notice and comment rule-making

V. Adjudication

a. Generally

- i. APA Definition: "agency process for the formulation of an order"
- ii. Action looks judicial

- iii. Results in an order
 1. Functions like a court judgement in most ways
 2. Legally enforceable
 3. APA Definition: “whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing”
- b. Formal Adjudication
 - i. *Seacoast Anti-Pollution League* (p.223):
 1. Precise words ‘on the record’ are not necessary to trigger the APA; instead, look to the type of hearing that Congress intended to provide
 2. Presumption that if a statute imposes an adjudicatory hearing subject to judicial review, it must be on the record
 3. Opening phrases of § 554 were intended to exclude “governmental functions... which traditionally have never been regarded as adjudicative in nature and as a rule have never been exercised through other than business procedures”
 4. Pre-dates Chevron
 - ii. *Chemical Waste Management* (p.235): under *Chevron*, procedural rules providing informal adjudication in cases where a “public hearing” is required but where Congress hasn’t spoken as to whether adjudication should be formal or informal are acceptable so long as agency interpretation of the statute is reasonable
- c. Informal Adjudication
 - i. *Overton Park* (p.329):
 1. Formal findings are not required in informal adjudicatory proceedings
 2. Judicial review based on litigation affidavits alone is inadequate; the APA requires the agency’s “whole record” as the basis for review
 3. “[P]ost hoc rationalization[s]” (such as litigation affidavits) are viewed critically
 - ii. *Pension Benefit Guaranty Corporation* (p.335):
 1. Overton Park only imposes a general procedural requirement under § 706(2)(A) for an agency to take whatever steps it needs to in order to provide an explanation that will enable a court to evaluate the agency’s rationale at the time of the decision
 2. This general procedural requirement is not inconsistent with *Vermont Yankee*
 3. Failure to provide formal adjudicatory proceedings where the organic statute, the Due Process Clause and the APA does not require them is not unlawful

VI. The Choice between Rule-Making and Adjudication

- a. *Chenery I* (p.340):
 - i. Agency decision “cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”
 - ii. Agency decisions can only be defended based upon the reasons offered with the decision, rather than on *post hoc* rationalization given by agency lawyers
- b. *Chenery II* (p.349):
 - i. An “agency must be equipped to act either by general rule or by individual order”
 - ii. Agencies can create new principles of law through adjudication as well as through rule-making
 - iii. The choice between rule-making and *ad hoc* adjudication lies primarily in the discretion of the agency

VII. Other Agency Actions

- a. Licensing
 - i. APA Definition: “includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification or conditioning of a license”
 - ii. A license is a form of order, hence involves adjudication
 - iii. See *Adjudication*
- b. Interpretive Rules
 - i. An interpretative rule is the agency’s construction of a statute that has been entrusted to the agency to administer, and does not purport to modify any legal norms
 - ii. See *Exemptions from Informal Rule-Making Procedures*
- c. Policy Statements
 - i. A policy statement is an indication of an agency’s position on a current regulatory issue
 - ii. See *Exemptions from Informal Rule-Making Procedures*

VIII. Judicial Review

a. Scope

- i. Governed by APA § 706
- ii. Courts shall “compel agency action withheld or unreasonably delayed”
- iii. Courts shall hold unlawful and set aside agency action, findings, and conclusions found to be:
 1. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
 2. contrary to constitutional right, power, privilege, or immunity
 3. in excess of statutory jurisdiction, authority, or limitation, or short of statutory right
 4. without observance of procedure required by law
 5. unsupported by substantial evidence in a case subject to §§ 556 and 557 of the APA or otherwise reviewed on the record of an agency hearing provided by statute
 6. unwarranted by facts to the extent that the facts are subject to trial de novo by the trial court
- iv. Agency legal conclusions are generally reviewed deferentially
- v. Agency factual conclusions are generally reviewed deferentially
- vi. Agency exercises of discretion are generally reviewed deferentially
- vii. The level of deference may vary with context
- viii. Deference is not necessarily the same as the abuse of discretion standard

b. Findings of Fact

i. Formal Proceedings

1. “Substantial Evidence” Test

- a. Assess the reasonableness of the agency’s finding, not the “right” or “true” facts
- b. “Substantial evidence” is “enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury” (*Columbian Enameling*)
- c. “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” (*Consolidated Edison*)

2. *Universal Camera* (p.375):

- a. A reviewing court is not barred from setting aside an agency decision if it can not conscientiously find “substantial evidence” supporting that decision
- b. Courts reviewing agency findings under “substantial evidence” must review the whole record
- c. “Substantial evidence” test only applies to agency decisions, not to other decisions such as those made

by an ALJ; however, other decisions may still be part of the record

3. *Allentown Mack* (p.383): “substantial evidence” test formulated as “whether on [the] record it would have been possible for a reasonable jury to reach the [agency’s] conclusion”
4. *Kimm v. Treasury* (p.385): agency reversal of an ALJ’s findings based upon disagreement with the ALJ’s assessment of witness credibility not be sustained unless the agency articulates “sound reasons, based on the record, for its contrary evaluation of the testimonial evidence”
5. *Laro Maintenance* (p.391): even if a different finding would be reasonable, deferential review requires the court to uphold an agency decision supported by substantial evidence considering the record as a whole

ii. Informal Proceedings

1. APA § 706(2)(E) by its terms only applies to formal proceedings
2. Organic statute may prescribe a standard of review
 - a. Usually “substantial evidence”
3. Even if no standard of review is given in the organic statute, courts may still overturn agency factual findings in informal proceedings if they are “arbitrary or capricious”
4. *Data Processing* (p.400):
 - a. The distinction between the “substantial evidence” test and the “arbitrary or capricious” test is “largely semantic”
 - b. “Substantial evidence” and “arbitrary or capricious” criteria converge into a test of reasonableness
 - c. A “substantial evidence” provision in a statute does not have the effect of requiring increased factual support beyond that demanded by the normal “arbitrary or capricious” standard of review

c. Review of Agency Legal Conclusions

i. *Chevron* (p.441):

1. Has Congress directly spoken to the precise question at issue?
 - a. If so, then the court and the agency must “give effect to the unambiguously expressed intent of Congress”
 - b. Also look to the legislative history
2. If Congress has not spoken directly addressed the precise question at issue – i.e. the statute is silent or ambiguous with respect to the specific issue – then is the agency’s answer a permissible construction of the statute?

3. “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail”
- ii. *Brown & Williamson* (p.500):
 1. When the agency action at issue is contrary to congressional policy, looking at the regulatory scheme as a whole, such agency action is not a permissible exercise of agency power
 2. Courts must interpret a statute “as a symmetrical and coherent regulatory scheme” and “fit, if possible, all parts into an harmonious whole”
 3. Courts “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency”
 - iii. Statutory Interpretation
 1. *Bowles v. Seminole Rock & Sand* (p.458): an agency’s construction of its own regulation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”
 2. *Wagner Seed* (p.459): “Chevron calls for deference only when a court reviews an agency’s construction of a statute ‘which it administers’” (dissent)
 3. *Rapaport* (p.464):
 - a. Deference is not inappropriate simply because more than one agency is involved in administering a statute
 - b. “The question of whether deference is due... depends on the nature of the statute and how Congress has decided it shall be administered”
 - c. While “consideration [may] be given to the fact that more than one agency administers [a] statute... deference may nonetheless be appropriate where only expert... agencies administer the statute and there is no disagreement among them about their respective responsibilities or the agency position”
 4. *Texas Municipal Power* (p.515): “a silent statute cannot preclude its reasonable interpretation by the agency that administers it”
 5. *AT&T v. Iowa Utilities* (p.517): if an agency disregards a command from Congress to interpret statutory language and essentially does nothing, such action will be an unreasonable interpretation of the statute

6. *National Federation of Federal Employees*: an agency decision based on a claim that a statute is unambiguous when the statute is not clear on the issue will not be upheld; under *Chenery I*, the agency must offer a different rationale
7. *Brand X*:
 - a. If a court finds that an agency interpretation of its statute is reasonable and consistent with the law, the court may adopt that interpretation even if precedent is to the contrary, so long as the precedent constituted deferential review of agency decision making
 - b. If precedent holds either that the agency decision was unreasonable or the only possible interpretation of the statute, then the prior court's construction trumps the agency's interpretation
8. *Skidmore* (p.435):
 - a. Deference can be appropriate even when an agency does not have formal responsibility for administering a statute
 - b. Establishes a sliding scale for the amount of deference that agency judgements are given, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"
9. *Cristensen v. Harris County* (p.468): interpretations such as those contained in policy statements, agency manuals, and lacking the force of law do not warrant deference under *Chevron*; however, they "are 'entitled to respect' under [*Skidmore*], but only to the extent that those interpretations have the power to persuade"
10. *US v. Mead* (p.473):
 - a. *Chevron* deference will apply if the agency has had a formal or informal rule-making or a formal adjudication
 - b. Even if Congress does not intend an agency ruling to carry the force of law, "the ruling is eligible to claim respect according to its persuasiveness" under *Skidmore*
11. *INS v. Cardozo-Fonseca* (p.449): whether Congress intended "two standards to be identical is a pure question of statutory construction for the courts to decide", rather than a question of interpretation; thus the agency is not entitled to deference on this issue

12. *General Dynamics v. Cline*: courts may look to the text, structure, purpose and history of a statute when determining whether an agency interpretation of a statute is reasonable

d. Review of Agency Discretion and Policy Making

i. Agency decisions may be attacked on the following grounds:

1. Procedural grounds: hard after *Vermont Yankee*
2. Factual grounds: *Universal Camera*
3. Legal questions: *Chevron et al*
4. Arbitrary or capricious grounds

ii. A court reviewing an agency decision can evaluate:

1. The agency's decision-making outcome: whether the agency conclusion satisfies a certain threshold of consistency with the record
2. The agency's decision-making procedure: whether the decision is procedurally defective; how the agency reached and issued its conclusion
3. The agency's decision-making process: why the agency reached the conclusion it did; was the agency conclusion arbitrary or capricious

iii. *Motor Vehicle Manufacturers v. State Farm* (p.552):

1. Scope of review under the "arbitrary or capricious" standard is narrow
2. An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational basis between the facts and the choice made; in reviewing that explanation, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement
3. An agency rule will normally be arbitrary and capricious under any of the following circumstances:
 - a. The agency has relied on factors Congress has not intended it to consider
 - b. The agency has entirely failed to consider an important aspect of the problem
 - c. The agency offered an explanation for its decision that runs counter to evidence before the agency
 - d. The agency explanation is so implausible it could not be ascribed to a difference in view or the product of agency expertise
4. "an agency must cogently explain why it has exercised its discretion in a given manner" and that explanation must be "sufficient to enable [a court] to conclude that the [agency's action] was the product of reasoned decision-making"

- iv. *Puerto Rico Sun Oil* (p.563): an agency decision does not meet the arbitrary and capricious standard when it fails to give a discussion of the relevant issues, fails to show consistency with past practice, and fails to avoid unexplained discrimination; even if procedurally valid, agency decisions must make sense to reviewing courts
- v. *Nova Scotia Food Products* (p.571):
 - 1. an agency cannot be held to have considered all the relevant factors when it fails to notify interested persons of the research upon which it bases its decision and thus prevents presentation of relevant comments
 - 2. an agency is required to respond to significant comments or other criticism when making its decision; these are always relevant factors in the decision-making process
- vi. An agency acts in an arbitrary and capricious way when it considers prohibited factors
- e. Review in Practice
 - i. *Verizon v. FCC* (p.599):
 - 1. When deciding reasonableness of agency action, courts must decide whether such action falls “reasonably within the pale of statutory possibility”
 - 2. Agencies should be given “every reasonable opportunity to formulate [appropriate] methods of regulation”
 - ii. *USTA v. FCC* (p.590): when an agency fails to consider a factor required by statute in an order and fails to explain its reasoning, such action is arbitrary and capricious
 - iii. *Center for Auto Safety* (p.582):
 - 1. An agency must articulate a rational connection between its factual judgments and its ultimate policy choice
 - 2. An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by “substantial evidence”
 - iv. *Bureau of Engraving and Printing* (p.580): an agency decision that is inconsistent with prior decisions and where no intelligible explanation of the shift in agency policy is given is arbitrary and capricious
- f. Grant and Preclusion of Review
 - i. Standing
 - 1. Statutory Limits
 - a. Express Preclusion
 - i. The terms of a statute preclude judicial review
 - b. Implied Preclusion
 - i. The statutory scheme implicitly precludes judicial review
 - ii. *Block v. Community Nutrition* (p.777): when there is a complex statutory scheme that

does not include a provision for judicial review, congressional intent to preclude judicial review may be fairly discernible where such review would disrupt the statutory scheme

iii. *Bowen v. Michigan Academy* (p.782): matters that Congress intended to bar from judicial review by leaving them to be determined in a “fair hearing” are implicitly insulated from judicial review

c. Committed to Agency Discretion by Law

i. The statute confers such enormous discretion on agencies that judicial review is impossible

ii. *Webster v. Doe* (p.788): statutory claims (for example, that an agency decision was arbitrary and capricious) may be precluded if such decisions are committed to agency discretion; however constitutional claims are not precluded unless there is express congressional language to the effect

iii. *Lincoln v. Vigil* (p.800): a lump-sum appropriation is a congressional determination that the agency, within broad parameters, should determine how to spend the money; in effect the agency’s decision as to how the money should be spent is committed to agency discretion

2. Constitutional Limits

a. *Lujan v. Defenders of Wildlife* (p.807):

i. Plaintiff must have suffered an injury in fact which is:

1. Concrete and particularized
 2. Actual or imminent, not ‘conjectural’ or ‘hypothetical’
- ii. There must be a causal connection between the injury and the conduct complained of
 - iii. When an asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, standing is not precluded but is “substantially more difficult” to establish
 - iv. Parties seeking to establish standing must also demonstrate redressability
- b. *Friends of the Earth v. Laidlaw* (p.821):
- i. Those seeking to sue must demonstrate standing for each form of relief sought
 - ii. Court actions that serve as a deterrent to continued harm rather than compensating plaintiffs for that harm constitute a form of redress
 - iii. Injury is not redressable where any action the court could take would be of a quantum insufficient to provide redress
- c. Zone of Interest Standing
- i. APA § 702: “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to seek judicial review thereof”
 - ii. *Kansas City Power & Light* (p.832): “any person suffering legal wrong” does not encompass those whose only injury would result from lawful competition
 - iii. *Scenic Hudson* (p.835): those who by their activities and conduct have exhibited a special interest in areas a statute is seeking to protect must be held within the class of “aggrieved parties” under the review provisions of the statute
 - iv. *United Church of Christ* (p.836): “the concept of standing is a practical and functional one designed to ensure that only those with a genuine and legitimate interest can participate in the proceeding”; “persons affected or aggrieved” encompasses more than direct economic injury

- v. *Data Processing v. Camp* (p.837): those who can show an economic injury in fact attributable to the agency action and who are seeking to protect an interest that is arguably within the zone of interest protected by the relevant statute are entitled to judicial review of the agency action
- vi. *Clarke v. Securities Industry* (p.842):
 1. When determining “zone of interest” standing, courts are not limited to considering the statute under which the plaintiff is suing; any provision that helps the court to understand overall congressional purpose is relevant
 2. The interests at issue should have a plausible relationship to the policies underlying the statute
 3. The “zone of interest” test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute the it cannot reasonably be assumed the Congress intended to permit the suit
- vii. *Air Courier Conference of America* (p.847): when the purpose of a statute is not to protect the interest at issue, those seeking to protect that interest by challenging agency action under the statute are outside the zone of interest and have no standing
- viii. *National Credit Union Administration* (p.853): when applying the “zone of interest” test, Congress need not have specifically intended to benefit the plaintiff; the plaintiff’s interests merely need to be arguably affected by the agency action in question and be among the interests “arguably... to be protected” by the statutory provision at issue
- ix. Congress cannot create standing if the Constitution does not permit it

ii. Timing of Review

1. Exhaustion

a. Statutory Exhaustion

- i. As part of an organic statute, Congress will require parties to present arguments to an agency, occasionally more than once, before those arguments can form the basis of judicial action
 - ii. *McCarthy v. Madigan* (p.865):
 - 1. In determining whether exhaustion is required, federal courts must balance the interest of the individual in obtaining prompt access to forum against countervailing institutional interests favouring exhaustion.
 - 2. There are three situations weighing against exhaustion.
 - a. Undue prejudice to subsequent court action
 - b. Inadequate remedy because of agency's ability to provide effective relief
 - c. Where the agency is biased or has predetermined the issue
 - iii. *Darby v. Cisneros* (p.872): federal courts do not have the authority to require a plaintiff to exhaust administrative remedies before seeking judicial review under the APA where neither the relevant statute nor agency rules specifically require exhaustion as a prerequisite to judicial review
- b. Judicial Exhaustion:
- i. If review is sought while an agency proceeding is on-going, courts will usually dismiss for failure to exhaust administrative remedies
 - ii. "When a claim depends ultimately on the careful gathering and analysis of relevant facts, the interest in full airing of the facts within the administrative system is prominent" (*McGee v. US*)
 - iii. Immediate judicial review is usually permitted when an agency is clearly exceeding its jurisdiction (*Leedom v. Kyne*)

2. Ripeness

- a. Allows the courts to avoid entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial

interference until and an administrative decision has been formalized and its effect felt in a concrete way, by avoiding premature adjudication

- b. Elements
 - i. Fitness of the issues for judicial decision
 - 1. Final order
 - 2. Legal issue fit for the court to decide
 - ii. Hardship to the parties caused by withholding court consideration
 - 1. Does it affect “primary conduct”?
 - iii. These elements may carry different weight
- c. *Abbot Labs* (p.885): where the legal issue is fit for judicial resolution, and where a regulation requires an immediate and significant in the plaintiffs conduct of their affairs with serious penalties attached to non-compliance, access to courts must be permitted absent a statutory bar or some unusual circumstance
- d. *Toilet Goods* (p.889):
 - i. To meet the fitness requirement, the regulation at issue needs to be enforced before it ripens into a reviewable issue because its specific application will make the dispute much more clear than the generalized challenged here
 - ii. The test for ripeness depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation’s present effect on those seeking relief
- e. *Ohio Forestry* (p.895): when too many details of an agency action are left to be worked out, the action is too speculative, and both the court and the agency would benefit from postponement of litigation, the plan is not ripe for review

3. Finality

- a. Final Order Rule
 - i. APA § 704 provides that “judicial review is available for agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court”
 - ii. For finality, the action must be a final order that is the consummation of the agency’s decision-making process rather than being interlocutory or tentative

- iii. The final order rule is frequently set forth in organic statutes
- iv. *FTC v. Standard Oil Company* (p.878):
 - 1. Agency action is final if it is definitive and has legal (rather than merely practical) consequences
 - 2. Issuance of a complaint is not a definitive ruling or regulation