

Basics of Administrative Law

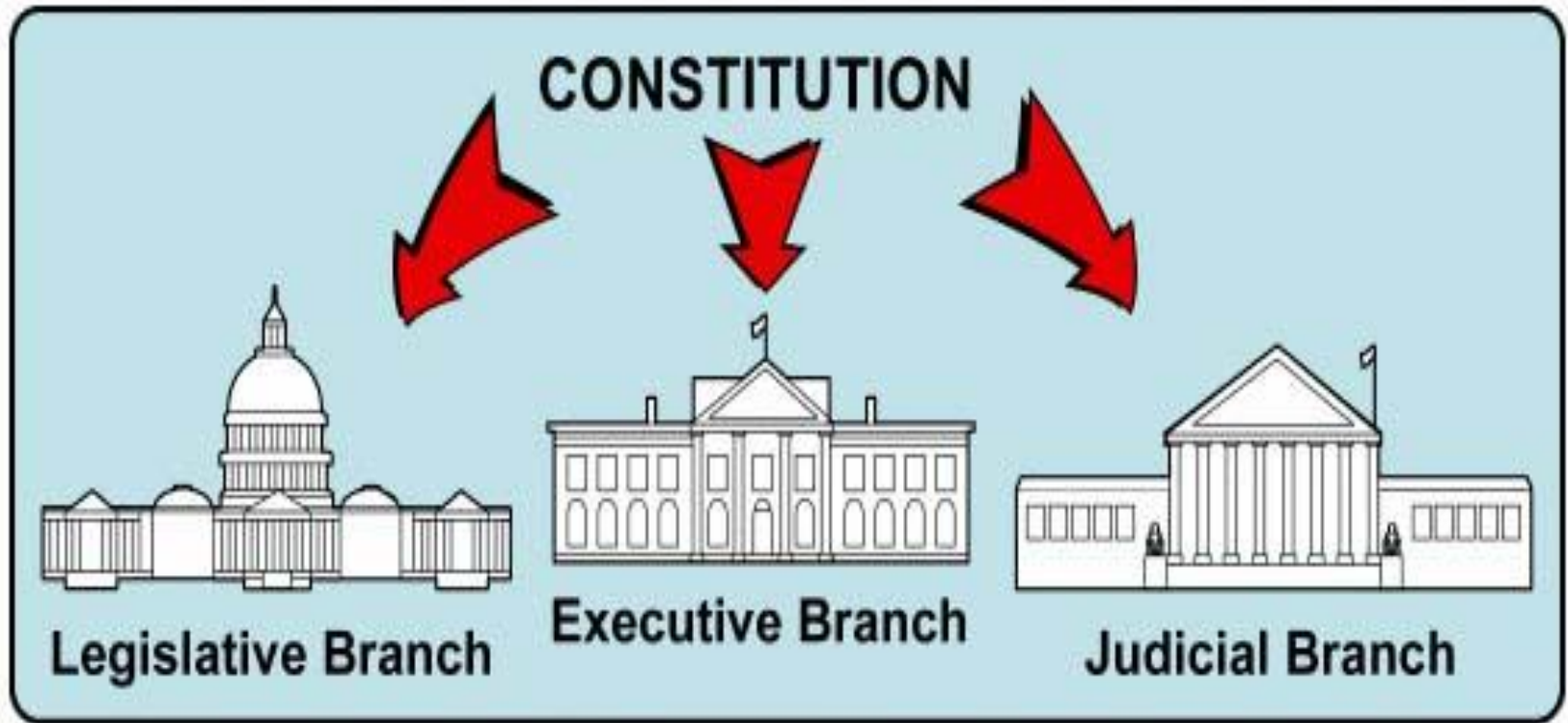
UC Santa Barbara Bren School

September 2011

What we will cover

- 1 - History of Admin Laws
- 2 – Theories
- 3 – Agency Enabling Statute
- 4 – Police Power
- 5 – Types of Agency Actions
- 6 – Rulemaking
- 7 – Statutory Interpretation
- 8 – Varieties of Regulatory Standards
- 9 – Estoppel
- 10 – Due Process
- 11 – Privileges
- 12 – Standing
- 13 - Jurisdiction
- 14 – Exhaustion
- 15 – Ripeness
- 16 – Liability
- 17 – Judicial Review
- 18 – Administrative Record
- 19 – Inspections, Subpeonas and Agency Adjudication

US Constitution and Admin Law



FRANK & ERNEST by Bob Thaves



Delegation Doctrine

- When an administrative agency is created, it is delegated certain powers.
 - Legislative powers
 - Executive powers
 - Judicial powers
- If an administrative agency acts outside the scope of its delegated powers, it is an unconstitutional act.

Administrative Law

- Administrative Law is a combination of *substantive* and *procedural* law.
- Each federal administrative agency is empowered to administer a particular statute or statutes.
 - These statutes are the *substantive law* that is enforced by the agency.

Statutory Law

Definition: Written law established by legislative bodies. Statutory law, sometimes called “codified law” is established by Congress, state legislatures, city councils, etc.

Example: PA Statutes: Title 18 § 3122.1 Statutory Sexual Assault, Title 23 § 1704. Marriage between persons of the same sex.

Case Law

Definition: Judge-made law that clarifies a vague part of a statute, constitution, treaty, or other form of written law. The court’s written opinion establishes precedent & thus new law.

Example: *Atkins* and *Roper* both interpreted the Constitution’s protection against “cruel and unusual punishments”. *Owasso* interpreted FERPA’s protection of “education records”.

Sources of American Law

Constitutional Law

Definition: Case law that clarifies a vague part of a constitution (U.S. Constitution or state constitutions)

Example: *Engel v. Vitale* brought clarity to the meaning of the Establishment Clause. The Court held that teacher-led prayer in public schools violates the Establishment Clause in that it endorses religion.

Common Law

Definition: Law established by judges/courts b/c of the absence of a statute to deal with a particular situation. Incidents were resolved by a judge and the decision would serve as a precedent for future similar cases.

Example: The concept of common law marriage (no longer recognized in PA) is a relic of our early heritage when going through the process of a legal marriage was inaccessible to many.

Administrative Law

Definition: Law that governs the activities of administrative agencies of government, including: rulemaking, adjudication, or the enforcement of a specific regulatory agenda.

Example: In *CBS Corp. v. FCC* the 3rd Circuit Court of Appeals vacated the FCC’s \$550,000 fine levied against CBS for the now infamous Super Bowl “wardrobe malfunction”

Agency Enabling Statute

- Purpose for establishment
- Powers (rulemaking, prosecutorial, research)
 - grant and contract (National Science Foundation)
 - research and report (Bureau of Labor Statistics)
 - search and seizure (Alcohol, Tobacco and Firearms ATF)
 - prosecutorial
 - adjudicatory (can't mix with prosecutorial under APA)
 - Congress can limit – e.g., FTC can't make rules but only adjudicate so can't do much b/c by time hearing is finished, business has changed its practice
- Sanctions
- Procedures – supplement APA
- Organization – subject matter, function, clientele, OR geography
- Placement within government (what department)
 - independent agencies are outside executive branch
- Remedies against agency

Example of Agency Enabling Statute

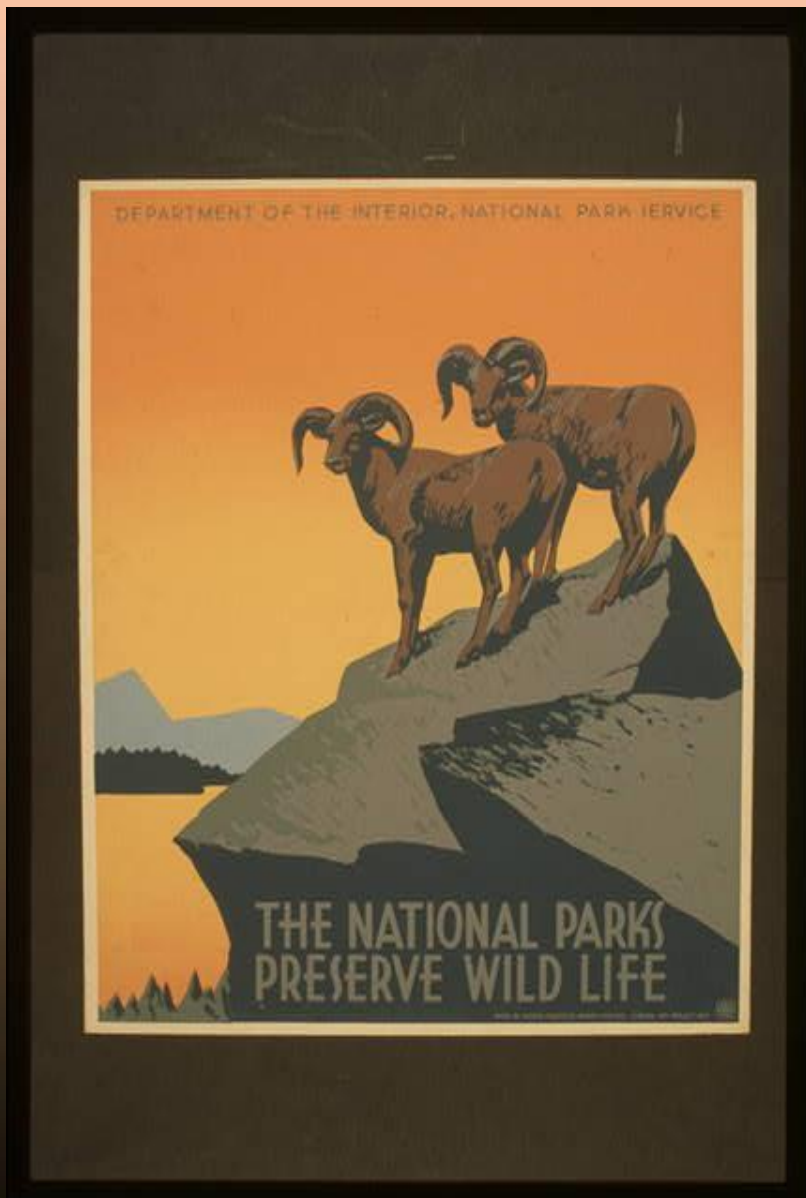
Statutes empower agencies to establish rules to implement the statute

The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors...

- Section 4(a)(1), Endangered Species Act.

Types of Agencies

- Executive
 - May not act independently of executive
 - Head serves at pleasure of executive
- Independent
 - May act independently
 - Head appointed by executive and serves for fixed term



- Fish & Wildlife Service
- Geological Survey
- National Park Service
- Bureau of Indian Affairs
- Bureau of Land Management
- Bureau of Reclamation

Department of Interior

Multiple Levels of Agencies

FEDERAL	STATE	LOCAL
US EPA	Air Resources Board	Air Pollution Control District
Dept. of Interior	Dept of Parks and Recreation	Parks & Recreation Department
Dept of Housing and Urban Development	Dept. of Housing and Community Development	City Planning Department; Housing Authority
Health and Human Services	Dept. of Public Health	County Health Department

US Constitution and Admin Law

- Constitution says virtually nothing
 - Article II establishes president and vice president
 - Appointments clause – officers are appointed by the President; inferior officers are appointed by president, heads of departments, or courts

How many times are these terms mentioned in the US Constitution?

- environment
- natural resources
- conservation
- agriculture
- clean air
- clean water
- wildlife





Constitutional Basis for Environmental Administrative Law

- **Commerce power** (U.S. Constitution, Article 1, Section 8)

The Congress shall have power to...regulate commerce with foreign nations, and among the several states, and with the Indian tribes

- **Power over federal property** (Article 4, Section 3)

The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States

- **Treaty, admiralty, taxing, etc.**

Police Power – 10th Amendment



Common Law Basis for Environmental Administrative Law

- “Common law” is based on principles derived from the application of natural reason, an innate sense of justice, and the dictates of conscience.
- Authority is derived solely from usages and customs which have been recognized, affirmed and enforced by the courts through judicial decisions.
- Much common law has been enacted into statutes.
- Common law usually results from civil actions
- “Tort”: a common law civil action for which a court will provide a remedy

Common Law Basis for Environmental Administrative Law

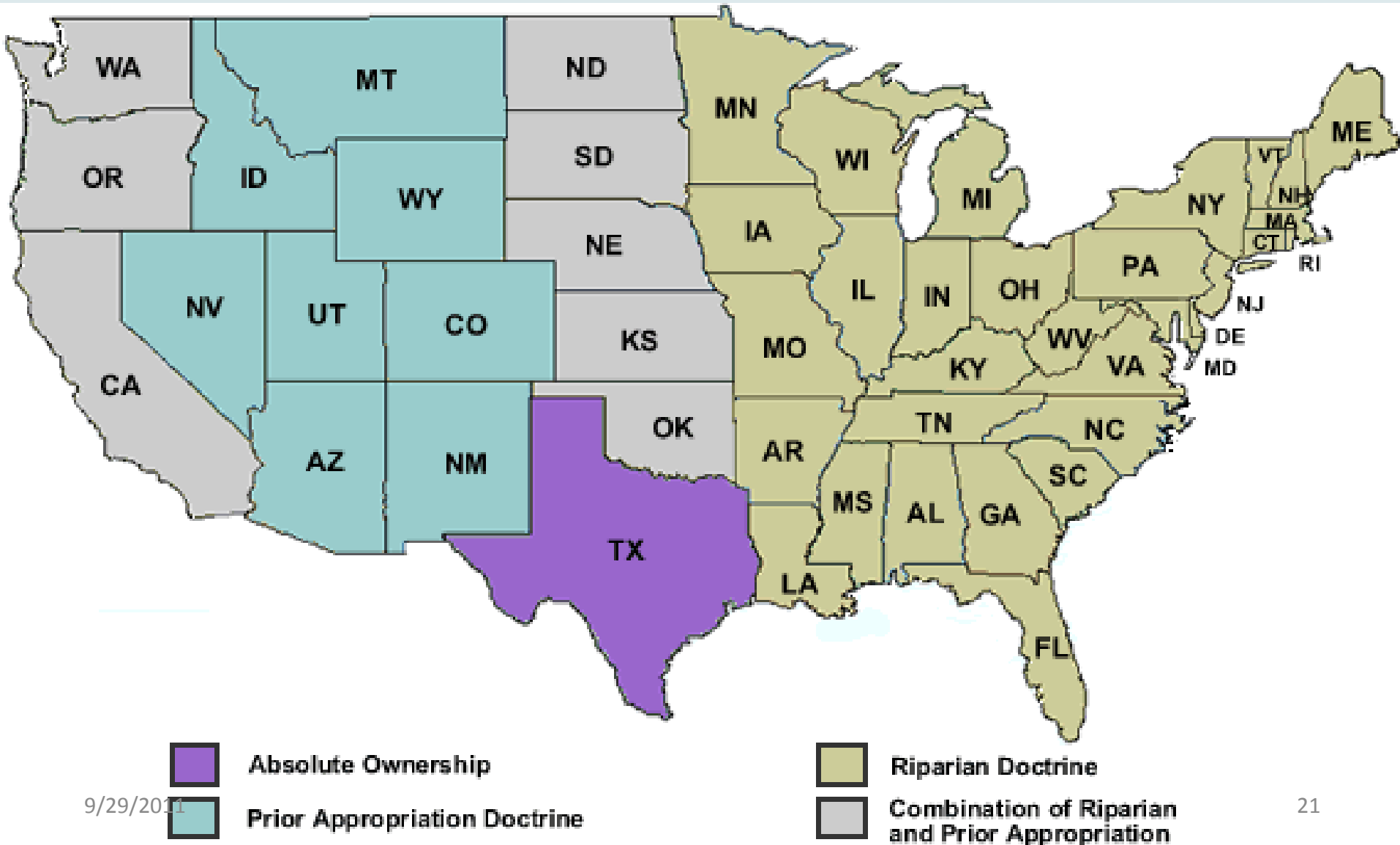
Nuisance = the unreasonable, unwarranted and/or unlawful use of property, which causes inconvenience or damage to others, either to individuals and/or to the general public

Trespass = entering another person's property without permission of the owner or his/her agent and without lawful authority and causing any damage, no matter how slight

Negligence = failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not

Strict liability = automatic responsibility (without having to prove negligence) for damages due to possession and/or use of equipment, materials or possessions which are inherently dangerous

Common Law – Water Rights



History of Administrative Law

- Efficacy v. Liberty - tension between efficacy (any problem solved by nat'l govt.) and liberty (no nat'l govt)
- New Deal - some activity post-Civil War but really began with New Deal
- Great Society Era (1964-1973) – outpouring of regulation especially antidiscrimination law, externalities regulation (e.g., air quality) and consumer regulation
 - political and legal accountability
 - delegated regulation (to agencies)
- Participatory rulemaking – FOIA, Govt. in Sunshine Act
- Reduction and Reform (1980s-current)
 - deregulation and reduction in size
 - micromanagerial behavior of Congress
 - role of oversight by president and Congress has grown substantially
- National Environmental Protection Act – environmental impact statements
- Paperwork Reduction Analysis
- Analysis of Effect of Regulation on Small Entities (businesses)
- Federalism Analysis
- Mashaw's Negative View on Current State
- Paralysis by analysis – so many analyses required slows down activity; lots of Congressional management

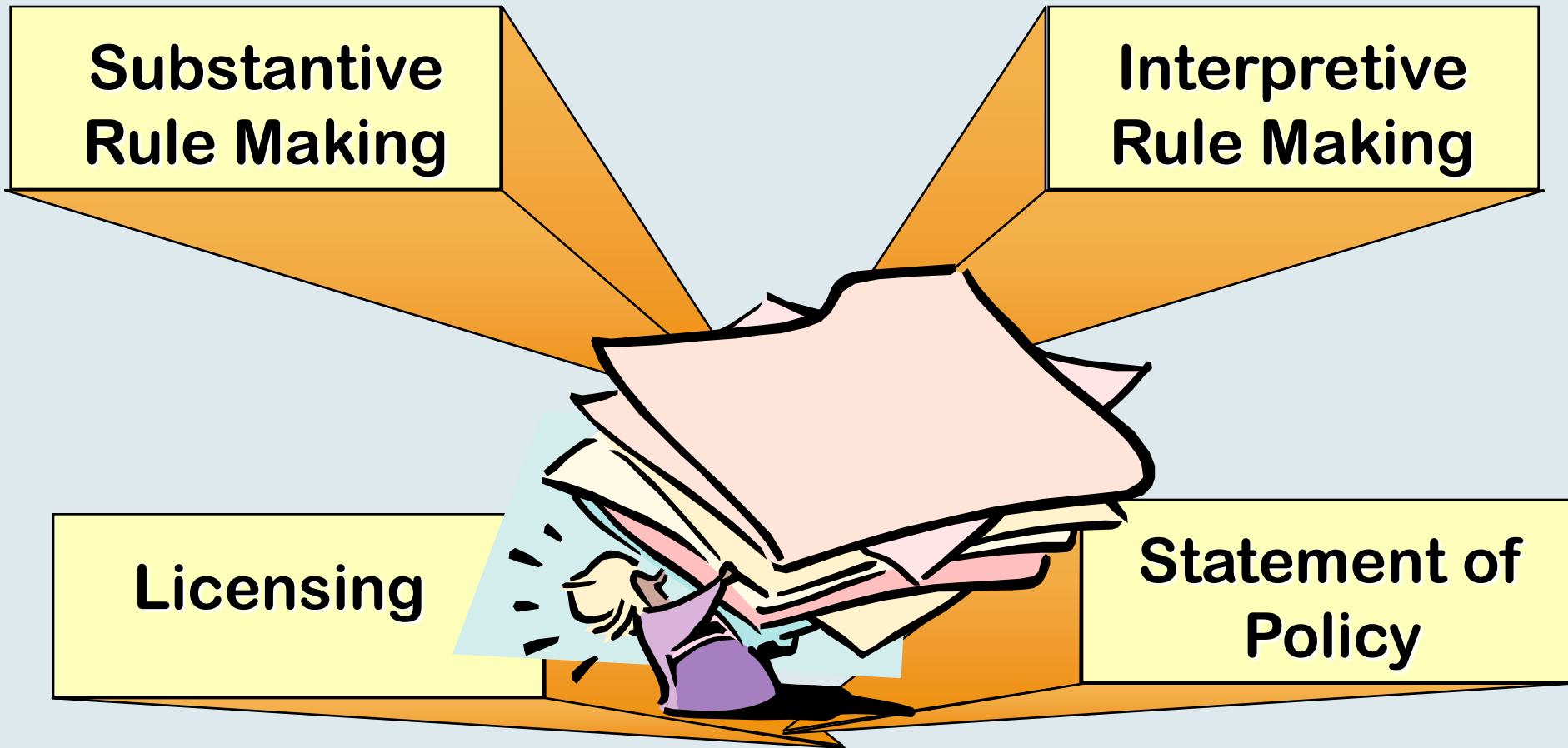
Theories

- o legal idealists – about defining public values and designing institutions to implement them; value transparency and process
- o democratic liberalism – concerned w/ rule of law, so emphasizes accountability
- o normative pluralism – concerned w/ ensuring access to diverse groups of policy/interest groups (shift here post new deal)
- o realist – question whether public-oriented goals of legal ideologists can be instituted and question behavioral motivation of agency heads
- o critical theory – admin about power dynamics of socio-economic class (lesser focus on dynamics of race and gender)
- o public choice/positive political theory – legislation embodies the interest of groups with proper incentives to mobilize and wield influence
 - ☐ politics is a market for legislation
 - ☐ based on assumption that all actors behave rationally to maximize wealth, status and power
- o lobbying when there are narrowly dispersed benefits or costs

Types of Agency Actions

- Quasi-Legislative
 - Rulemaking
 - Statutory Interpretation
- Quasi-adjudicatory
 - Decisions in disputes
 - Permit issuance and revocation
 - Enforcement orders
- Executive
 - Investigations

Legislative Powers



Executive Powers

- Powers that administrative agencies are granted.
 - i.e., such as the investigation and prosecution of possible violations of statutes, administrative rules, and administrative orders.
- Administrative subpoena
- Administrative searches

Judicial Powers

- Many administrative agencies have the judicial authority to adjudicate cases through an administrative proceeding.
- Initiated when an agency serves a complaint on a party the agency believes has violated a statute or administrative rule or order.
- In adjudicating cases, an administrative agency must comply with the *Due Process Clause* of the U.S. Constitution.

RULE VERSUS ADJUDICATION

- **Rule or Regulation:** Prescribes future patterns of conduct. A determination of general applicability; it's addressed to indicated but unnamed and unspecified persons or situations.
- **Adjudication:** Determines liabilities based upon present or past facts. It applies to specific individuals or situations.
- **Types of Rules:**
 - **Substantive Rules**
 - **Procedural Rules**
 - **Housekeeping Rules**
 - **Interpretive Rules/Opinions/Guidance Documents**
 - **Policy Statements/Executive Orders**

Adjudication

- Article III – Separation of Powers problem?
- 7th Amendment – right to jury trial
- SCt – has approved agency adjudication
 - Public Rights – claims against the government
 - Private Rights – disputes betw private parties
 - Particularized Area of Law: Agency adjudication is more likely to be constitutional if it involves a particularized area of law closely related to a fed regulatory scheme and doesn't cut across an entire class of traditionally judicially cognizable cases.

Remedies

- REMEDIES AND PENALTIES
- Agencies can adjudicate fines and penalties, but agencies can't collect \$.
- INJUNCTIONS
- Agencies don't issue injunctions, but cease and desist orders.
- No agency has the authority to arrest, except the INS.

Rulemaking

Administrative Procedures Act (1946)

Establishes certain administrative procedures that federal administrative agencies must follow in conducting their affairs.

- notice and hearing requirements
- rules for conducting agency adjudicative actions
- procedures for rule making
- State administrative procedural acts govern state administrative agencies.

Negotiated Rulemaking

- Informal, workshops
- Interested parties reach consensus on text of regs
- Issue - communication
- Pros
- Cons

Ex parte rules

- Governs communications with administrative officials
- Transparency in government
- Cold Turkey

<http://www.youtube.com/watch?v=900sUtjbIN0>

Statutory Interpretation

- Where do the ideas come from?
 - bottom-up (lower level workers in agency make suggestion to supervisor)
 - (political pressure from agency head, Congress, President)
 - outside the agency

Varieties of Regulatory Standards

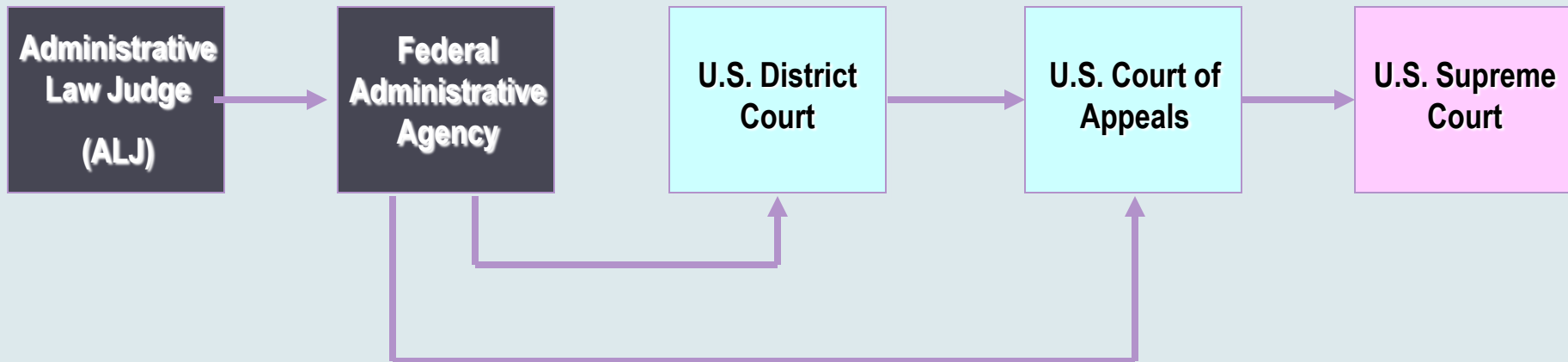
- Managerial . . . design . . . Performance
- So-called “command and control” (use of a particular process or technology specified by the regulator)
- “Market” or “incentive based” (allowing the regulated entity to determine the best way to reduce pollution).

Varieties of Regulatory Standards

- Command and control
 - more expensive for the regulated community
 - easier and cheaper for govt to enforce and administer
- Incentive regulation
 - cheaper for the regulated community
 - More difficult to administer or enforce
 - Cheating > penalties if caught

CASE STUDY – GHG Cap and trade regulation

Appeal of a Federal Administrative Agency Rule, Order, or Decision



Whether the appeal from the Federal Administrative Agency is to the U.S. District Court or the U.S. Court of Appeals is determined by the federal law in question.

Administrative Law Judge

Preside over administrative proceedings

- Decide questions of law and fact concerning the case.
- No jury
- The ALJ is an employee of the administrative agency

Judicial Review

- Goal – to protect individuals from arbitrary exercises of government power
- Jurisdiction
- Reviewability
 - Agency interpreted statute wrongly
 - Agency violated the law
 - NOT – exercise of agency discretion (e.g. enforcement action)
- Standing – *do trees have standing?*

Prerequisites to Judicial Review

1. The case must be *ripe for review*.
2. The petitioner must have *exhausted all administrative remedies*.
3. The decision of the administrative agency *must be final* before judicial review can be sought.

Standing

- Public Lawsuit
- Third Party Lawsuit
 - Injury in fact (Unfair Biz Practices v. Prop 65)
 - Concrete and particularized
 - Actual and imminent
 - Causation (Dow case)
- Citizen Suits – private attorney general
- Associational Standing

Exhaustion

Challengers must exhaust remedies w/in the agency before seeking judicial review.

UNLESS

- Undue prejudice to the protection of the rights at issue;
- Time delay too great
- Agency prejudice or inadequate remedies.
- Exhaustion would be futile b/c the admin body is biased.

Ripeness

Has the ax fallen? *Must have a tangible injury.*

Purpose of Ripeness Doctrine: *To avoid litigating in the abstract before admin policy has been applied in a concrete way*

Facial Challenge v. As Applied

A rule may be ripe for judicial review upon promulgation of a reg (but before enforcement) if the issues are fit for judicial review and the party seeking review would suffer substantial hardship if review was delayed until after enforcement. If the fitness and hardship tests aren't met, a party subject to a rule must wait to challenge the rule as a defense in an agency-initiated enforcement proceeding.

Administrative Record

- The record on review consists of the material the agency had before it when it made its decision.
- The reviewing court looks at the whole record, not just the evidence supporting the agency's decision.
- Excerpt from “Yes Minister”

<http://www.youtube.com/watch?v=jNKjShmHw7s>

Standards of Judicial Review

- Arbitrary and Capricious – highly deferential
- Substantial Evidence
- Fair Argument – CEQA v. NEPA
- De Novo
- The Chevron Test
 - Has Congress spoken?
 - Is agency interpretation reasonable?

CASE STUDY – US EPA's Tailoring Rule



Due Process

- *We will sell to no man, we will not deny or defer to any man either justice or right. — Magna Carta (1225)*

Procedural Due Process

- Adequate notice of hearing
- Hearing
- Unbiased decision
- Sworn witnesses
- Opportunity to introduce evidence and opportunity for cross-examination
- Decision based on record supported by reasons and findings of fact

Substantive Due Process

- A. 14TH Amendment prohibits governmental action that deprives person of life and liberty without due process of law
- B. Violation: when governmental action clearly arbitrary and unreasonable, with no substantial relationship to public health, safety and welfare
- C. Land use controls must further legitimate government purposes

Due Process

- Fundamental rights of individuals
 - Life
 - Liberty
 - Property
- Requires government treat people with “fundamental fairness.”

Due Process

- Due process is found in 5th and 14th Amendments
- 5th Amendment applies to federal action
- 14th Amendment applies to state action

Federal Civil Rights Act of 1871 (Section 1983)

- Two elements:
 - Deprivation of right, privacy or immunity secured by Constitution or laws of US
 - Committed by person acting under color or state law (deprivation resulted from official policy or custom)
 - Have to show course of conduct (not single incident) involving conscious choice among competing alternatives by those in position to formulate municipal policy

Equal Protection

- 14th Amendment: No state shall deny to any person within its jurisdiction the equal protection of the laws, referring to the right of all persons to enjoy life, liberty and property and bear no greater burdens than are imposed on others under like circumstances
- Local government must show that class. in land use regulation is justified by legitimate governmental purpose and administered fairly

Three tier federal review

- Strict Scrutiny
- Middle or Intermediate Tier
- Rational Relationship

Strict Scrutiny

- When a classification affects a fundamental constitutional interest (privacy, right to travel, right to vote on Constitutional guarantee) or when a classification is suspect (race, national origin)
- Standard reverses presumption of constitutionality: burden shifts to local government to show that classification advances compelling governmental interest (never found)

Middle Tier

- When a classification affects quasi-suspect interests, such as gender or illegitimacy
- Standard modifies presumption of constitutionality: classification must have substantial rather than necessary relationship to an important rather than a compelling governmental interest (not used in land use)

Rational relationship

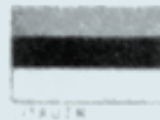
- When economic interests and property are affected
- Applies in most land use cases, such as use classifications and application of zoning to land (although basis of race moves to strict scrutiny)
- Must have rational relationship to legitimate governmental purpose
- Land use regulations are presumed constitutional (“anything goes” test)

Wie stehen nicht allein

In diesen Ländern
bestehen ähnliche
Gesetze



folgende Länder
ertrügen ähnlichen
Schicksal



1927

Buck v Bell

1942

Skinner v.

Oklahoma

Tripartite Test

1. Did the government have a public purpose?
2. If government can act, did it select means that are rationally related to public purpose to be achieved?
3. If government had public purpose and chose property means, is resultant public benefit commensurate with private loss caused by action?

Due Process Balancing Test

- Federal courts also use balancing test:
 - Private interest affected by official action
 - Risk of erroneous deprivation of such an interest and probably value of additional or substitute safeguards
 - Government's interest, including function involved and the fiscal and administrative burdens that the additional or substitute procedures require

Due Process – Goldberg v. Kelly

Notice: Advance notice of the issues and the time and place of any hearings;

Oral Hearing

Confront the Evidence: The right to confront the evidence against one's position-this includes the right to cross-examine adverse witnesses and the right to present evidence to undercut the gov's case; and

Neutral Decisionmaker: The right to a neutral decisionmaker who isn't biased and who hasn't prejudged the case in advance of hearing it.

Due Process – Mathews v. Eldridge

In determining the amount of process due, the court should weigh three factors:

- The interests of the individual in retaining their property, and the injury threatened by the official action
- The risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards;
- The costs and administrative burden of the additional process, and the interests of the government in efficient adjudication

Overbreadth

- Extent to which language of regulation sweeps too broadly
- May encompass subject matters or behaviors constitutionally protected
- Or which are not necessary to carry out goals of regulation

Void For Vagueness

- A. Derived from procedural due process requirement for notice
- B. Issue: lack of clarity or certainty in language of regulation
- C. Standards:
 - Does individual of ordinary intelligence have sufficient notice of what the law is and reasonable opportunity to comply with law?
 - Does administrative body have sufficiently explicit standards for applying regulation?

5th Amendment

No person{shall be} deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Takings

When is an Agency Action a Government Regulation Versus Compensable “Taking” of Property?

The government may use its powers of **eminent domain** to acquire private property for public purposes.

- The **Due Process Clause** of the U.S. Constitution requires the government to allow the owner to make a case for keeping the property.

Takings – Just Compensation Clause

- Requires that the government must compensate the property owner when it exercises the power of eminent domain
 - Anyone who is not satisfied with the compensation offered by the government can bring an action to have the court determine the compensation to be paid.

Public Disclosure of Agency Actions

Freedom of Information Act

Government in the Sunshine Act

Privacy Act

NEPA/CEQA



FOIA/PRA

- Public has access to most agency records.
- Agency Records: Those records created or obtained by the agency in the course of doing the agency's work and in the control of the agency at the time of the FOIA/PRA request.
- Not Agency Records

National Security

Statutory exemption

Internal drafts, letters and memos

Personnel and medical files

Trade Secret

Interagency Letters or Memos

Law enforcement records

Geological and Geophysical Info

Banking regulatory agencies

Open Meetings Acts

- Meetings open to public
 - No serial meetings
- Sunshine Act – 10 day notice in California
- Federal Advisory Committee Act (FACA) – special rules for advisory committees

NEPA/CEQA

- Agencies required to analyze and disclose potentially significant environmental impacts of their decisions
- *Friends of Mammoth (1972)*

Privacy Laws

- Requires that administrative agencies maintain only information about an individual that is relevant and necessary to accomplish a legitimate agency purpose.
- Gives individuals access to these records and a right to correct the records

Privileges

- 5th Amendment - Self-incrimination
- Attorney-Client Privilege
- Doctor-Patient Privilege
- Husband-Wife Privilege

Estoppel

- What is estoppel?
- Erroneous Advice Doesn't Estop an Agency
- Affirmative Misconduct

CASE STUDIES – Pesticide enforcement and lead plumbing cases

Sovereign Immunity/Liability

Federal

Federal Tort Claims Act – torts

Tucker Act – contracts

State – 11th Amendment

Local – no immunity

BUT scope of duties, Civil Rights Act

Inspections, Reports and Subpeonas

- Types of power to obtain information:
 - Subpoena
 - Compel filing of reports by regulated bodies
 - Inspection

Inspections

- Agency must have statutory authority
- Administrative Search Warrant required – no probable cause needed, but need a problem *Camara v. Municipal Ct.*
- Pervasively Regulated Businesses
 - There must be a substantial gov interest underlying the regulatory scheme;
 - Warrantless searches must be necessary to advance the gov interests;
 - The regulatory scheme must supply standards regarding the occurrence and scope of inspections that provide an adequate substitute for the safeguards of the warrant procedure.

Inspections and Subpoenas

- The Agency Must Have a Statute Giving It Subpoena Power
- Within Agency Authority
- Not Too Indefinite or Burdensome of a Demand:
 - o *US v. Sullivan*
 - o *Shapiro v. US*
 - o *US v. Morton Salt* - “fishing expeditions”

Back to Theory Again

Two basic promises of liberal democracy are **democratic accountability** and **liberty**.

Bulwark for ideas is **rule of law**

- Is exercise of an agency's power legitimate?
 - Consent
 - Impersonality (apply same law to everyone)

Recommended Reading/Viewing

- *US Constitution (1787)*
- *The Federalist Papers (1788)*
- De Toqueville, *Democracy in America (1835)*
- Woodrow Wilson, *The Study of Administration (1887)*
- *California Constitution (1879)*
- Hayek, F. *The Road to Serfdom. (1944)*
- *Yes Minister/Yes Prime Minister (PBS - 1980-1988)*
- Osborne/Gabler, *Reinventing Government (1993)*
- Bowman, *State and Local Government; The Essentials (2008)*
- *Dystopia Fiction – Brave New World, Hand Maid's Tale, Hunger Games, Soylent Green, 1984, Utopia*