Legal and Political Theory

History of Legal Thought

- Formalism: Blackstone. Enacted law trumps common law but is inferior
- Lochner era: judges as policy makers
- Law as policy: Judge should identify the purpose of a statute and then reason toward the interpretation most consistent with that purpose
  - Brandeis: legislators are better policy makers, as are agencies with experts
- Legal process theory: if the legislature creates a standard (as opposed to a rule) they can be seen as delegating rulemaking to courts, agencies, or private institutions
  - Law has legitimacy because the process of creating it was legitimate
- Calabresi: courts should be able to treat statutes like common law, and alter it themselves as if overruling precedent
- Law and economics: assumes community of rational gains maximizers
  - Uses an **ex ante** approach to social problems
  - Public choice theory an outgrowth
- Critical Legal Theory: questions assumptions underlying laws
  - Seeks to expose unconscious patterns of decision-making

Public Choice: statutes not enacted for the general public

- Actors seek their self-interest and legislation is a commodity on a market
  - Legislators seek to maximize their chances of reelection
  - Interest groups maximize their well-being
  - Regulation and legislation is subject to supply and demand
- Problematic because groups face collective action problems that make willingness/abilty to spend resources for legislation an inaccurate proxy for the degree of group interest
  - Costs: free-riders, especially for large diffuse groups in which benefits are very spread out and the failure to contribute won't be noticed (at least without resources to monitor the free-riding)
    - Organizational costs for large groups: identifying members
- Large groups will be underrepresented
  - With fewer members and thus resources, large diffuse groups will have trouble monitoring and evaluating issues, making campaign contributions, keeping members informed, etc
  - Large groups do have some benefits: economies of scale, more votes, more total resources (maybe)
- Supply side problems: issue bundling (when voting, have to go with the issues you care strongest about); pork-barrel politics (constituency influence); committee memberships (often very self-selected based on constituency); agenda-setting has huge influence on what's passed
- **Problems** with this theory: doesn't take into account ideology of legislator
  - A disorganized majority can still influence legislation (**Brown** article on redistribution of educational budgets)

        - Legislators and groups "without bids" in the regulation market can still share common beliefs with legislators like racism
    - There are also agency costs- when the captured legislator still doesn't do quite what the interest group would like
    - There are information problems- the media may portray the situations such that the majority thinks it has more at stake than it really does

Pluralism: Schuck article; idea that legislation is product of a deal-making process

- Interest groups create a higher level of individual participation in the political process- think Putnam social capital
    - Question is interest groups as compared to what? Complete disinterest.
- Interest groups are important sources of information for decisonmakers: both legislative fact information and also to gauge voter preferences and intensity of prefs
    - Sense of public education (interest groups against tobacco have turned around the general public view- and against a powerful industry)
- In order for interest groups to work in beneficial ways, we need an open political process (disclosures of transactions)
    - Basically result is proper as long as the process is fair
    - Schuck also suggests that zero-sum games are good. Cap the total budget and you get more efficient competition for the rationed resources.

Civic Republicanism: Seidenfeld

- state has to further the **common good**: the good for the community as a whole
    - Common good is different than just the aggregate of individual private interests
- The **deliberative process** is the means to arriving at the common good
    - It will reveal commonalties shared by different citizens; unmask self-delusions
        - Critics deem this too idealistic; self-interest is human nature
    - Public discourse by government is needed because it exposes people to different views: both before and after (government should explain how its decisions further the common good)
    - Requires open access to policy making: reps of those affected should have a voice
        - In this sense, interest groups may be necessary
- Provides a justification for assigning policymaking discretion to agencies
    - Delegates to authorities with greater expertise and fewer immediate political pressures (an easier place to implement the civic republican ideal of deliberation)
    - Based on the tension that CR relies on citizens to determine public good but doesn't trust citizens' willingness to pursue the public good
        - Agencies neither too political (Congress) nor too insulated (courts)
- But changes to APA should ensure process is open
    - Congress and White House should reveal all of its contact with agencies
    - Public involvement in rule making should increase
    - Courts should review all agency decision (whether adjudicative or rule-making) for persuasiveness in light of pragmatic limitations

Legal Theory and Statutory Interpretation

The Levels of Scrutiny

- **Rational basis**: does action advance legitimate/permissible interests; is it rationally related to advancing them; does it impose irrational burdens on the Plaintiff class
- Intermediate scrutiny: does action advance important/substantial interests; is it substantially related to advancing those interests; is it substantially more burdensome than necessary to advance interests
- **Strict scrutiny**: state interest must be compelling; relationship between means and goals must be direct; means must be least restrictive to suffice in furthering the government's ends

Learnfare and Public Choice (Gerber): public choice linked to high scrutiny

- Learnfare: truancy or dropping out of school reduces family's AFDC benefits
  - Legislation using proxies for wealth would follow similar analysis
    - Here AFDC membership is a proxy for wealth
- Regulations affecting poor not given strict scrutiny because poor not considered a discrete, insular or politically disadvantaged group (Supreme Court view)
  - Gerber's argument: groups other than discrete and insular minorities are disadvantaged from political process; should be given heightened scrutiny despite not fitting under Carolene's note 4.
  - Poor: large group suffering from free rider problems and collective action costs; lack resources to "buy" votes
    - The rich are also a large group, but not as large and they have the greater resources of time and money
- Classifications on immutable traits, he says, should be suspect
  - Rent-seekers can target this groups without fear of becoming them
  - He considers wealth a quasi-immutable trait

Reaction against public choice theory: no stricter scrutiny required (Elhauge)

- We need a normative baseline from which to judge disproportionate stake in the legislation process
  - Example: small racial minority is intensely against a racist majority law; they prevent it from being passed. Whether this is good or bad depends on normative values.
  - We often use standard that a group's political clout shouldn't exceed the group's economic interest- but this assumes economic efficiency is our normative standard
- Thus public choice theory is useless because it doesn't add to our normative (usually economic efficiency) analysis

The Judges: Statutory Interpretation and Public Choice models

- **Scalia**: pure textualist
  - Subsequent statements and pending bills would be irrelevant
  - Skeptical of legislative history

- Common law basically constructed by aristocratic judges; we should be wary of using it to extrapolate in the realm of statutory interpretation

- **Posner**: legal pragmatist view (US v. Marshall). Judges should enrich positive law (express enactments of legislature) with "the moral values and practical concerns of civilized society."
  - Allows for justice but considerable uncertainty and judicial willfulness
    - In Marshall, a background of rationality, equal treatment, failure of Congress to think about how LSD is produced and sold, and lack of thought about interaction of statute with sentencing guidelines.
  - Contrasts with positivist view, which gives certainty at price of substantive injustice
- **Easterbrook**
  - Judges cannot focus solely on correcting past problems of parties before them; they have to appreciate the consequences of legal rules for future behavior
    - Fairness arguments are ex post; but judge has to be the representative for future parties
    - Judges have to appreciate the effect of their rulings on the margins, not the average (average being ex post view)
  - Effect of public choice on interpretation
    - Approach One: General interest statutes should be interpreted broadly; courts become the decision-makers; private interest statutes should be interpreted narrowly, using a contractual approach
    - Approach Two: Judges should look for signs of rent-seeking: subsidies, barriers to entry,
    - Approach Three: scrutinize the process: was it highly bargained between interest groups? (treat as a contract)
  - Legislative history and public choice
    - Subsequent history or any other abortive attempt to enact a bill is irrelevant because that's the structure of our Congress- lack of time is important.
    - Almost all statutes are compromises that leave certain issues unresolved (on purpose or otherwise). The compromises are a **balance**, and legislators wouldn't intend for courts to alter that balance by filling in the gaps, especially for **pie-slicing** (interest group) legislation
      - Even in **pie-expanding** (public interest) legislation, courts are in danger of filling in the gaps by over-regulating to the point where costs exceed the benefits of the regulation
    - He suggests **a rule**: unless statute plainly hands court power to create/revise common law, domain of statute should be restricted to cases anticipated by the framers and expressly resolved in the legislative process (either have to create delegation or plainly create a rule of decision)
      - When statutes create goals, the court can fill in rules
      - When statues specify rules to meet goals, the courts shouldn't tinker (547)
        - They do so by saying the statute isn't applicable, use common law instead
    - Based on fact that agenda control is key and logrolling occurs: legislatures often have no "intent"

- Why should old legislatures be "resurrected" – doesn't make sense.
  - Why would a judge be expert at what legislature thought in 1890?
- Allows unofficial law to flourish- an issue of liberty

- **Eskridge**
  - Archeological approach: figuring out what congress intended
    - He argues this traditional view depends on holding a romanticized (pluralist) view of politics, to be able to pretend the result is just
  - Free inquiry approach: functional legitimacy is key- reach best result while being formally unconstrained from the statutory history and text.
  - Effect of public choice theory on interpretation
    - Means that if a statute is asymmetrical (beneficiaries have more or less clout than the cost payers) there is a danger of legislative dysfunction which a court can deal with through a narrow or public-seeking interpretation of the statute
    - Agencies should be monitored when enforcing asymmetrical (wide benefit, concentrated cost) statutes because regulated interests can capture the agency in ways that thwart the original, stated goals of a public-seeking statute
      - They will probably send a lot of these types of bills to agencies:

	Distributed Cost	Concentrated Cost
Distributed Benefit	General taxes, public transport No action expected	Luxury taxes No Bill/ *Delegation* to agency
Concentrated Benefit	Welfare; capital gains tax Bill passed/self-regulation	School funding w/property tax No Bill/Delegation

Use of Legislative History:

- Plain meaning rule: basically no longer strictly followed, if it ever was
  - Plain meaning in its current sense: places a burden on legislative history to prove words don't mean what they say
- **Committee reports** most authoritative
  - They are accessible, but they don't always exist – esp. for floor amendments
  - Committees best-informed members, speak as one voice
    - Goes section-by-section through bill, but most useful as a statement of goals and relative importance to statutory scheme
  - Can be ambiguous because a product of consensus, is condensed
- Committee hearings: given less weight
  - Comments are adversarial and sometimes unreliable
    - Who knows if Congressmen were even in attendance
  - Executive agency witnesses can shed light on the drafting
- Floor debates: given the least
  - Full of sales talk, Congressmen can amend their remarks after the fact
    - Many proponents won't have even read the bill
  - Statements by sponsors and drafters are useful; the sponsors are the most knowledgeable
  - Colloquies are often planned to make a certain point, can be seen as manipulative
    - Try to influence judicial interpretation of a statutory provision, especially if its an amendment that developed after the committee reports were filed
- Subsequent history- proposed amendments

- Risky to use them as congressional intent
- The LSD case views it as useless

The Structure of Government and its Limitations

- Federalist 47 (Madison): separation of powers is necessary because its dangerous to concentrate power in a particular body. Yet there needs to be some interplay: a completely rigid system would be unworkable.
- Hart & Sacks (legal process theory)
  - Courts are the front-line, initial resort for settling problems. They can quickly address emerging problems, and their generalized grounds for decision are "law".
    - Courts become second-line when reviewing agency decisions, but have ability to revise determinations without changing the existing statute
  - Legislature a second-line body; acts as a backstop to change common law or create new techniques of control. It is the forward-looking body.
  - Agencies: first-line. Can adjudicate particular cases, create general interpretation and regulation.

Regulatory Tools

- Why **regulate**? (taken from Breyer reading week nine)
  - To fix market failures:
    - Need to control monopoly power: rate setting
    - Need to compensate for inadequate info: financial disclosure SEC
    - Collective action problems: public goods- national defense
    - Need to correct externalities (seen as transaction costs by Coase): environment
  - Redistribution: benefits, OSHA, lots of stuff
  - Non-market, collective values: aspirational: educational programming, parks
    - Civil rights
- Tools of regulation
  - Economic incentives: can include fees, taxes, tradeable permits,
    - Can create localization of harm, some things shouldn't be purchasable (pollution)
    - Creates incentives for tech innovation
- New Property (Reich)
  - Government creates wealth (largess) in many forms: contracts, occupational licenses, franchises, subsidies, government services
    - Property more often takes the form of rights or status instead of goods
  - History of property
    - Old view of property as liberty: separating the public from the private realm
    - As property separated from land and became wealth-based, it was seen as enemy of liberty; property was powerful and abusive
    - The new public welfare state: no private realm left, everyone dependent on largess
  - As largess becomes more important: Government shouldn't be able to buy up rights with largess; or impose unconstitutional conditions on largess

        - The grant or revocation of largess should be subject to constitutional procedure
        - Largess linked to status must be deemed as rights (unemployment, social security)
- Failures of regulatory tools (Sunstein chap 3): they often have perverse consequences
    - Interest group transfers of wealth should be seen as failures per se
    - BATs ignore differences in geographical areas, for example
        - Regulation doesn't take into account changed circumstances, increased knowledge (95)
    - P. 89: a list of tools best matched to particular problems
    - The language of "rights" complicates things because it tends to take it out of the cost-benefit balance analysis
        - Balances are often disguised as technocratic decisions when they should be made by the legislature (p. 97; similar to non-delegation arguments)
    - Failures of coordination, of not anticipating systemic effects of regulation

Cost-Benefit Analysis

- The **non-commodity values** in-depth (Stewart reading week nine). All concern the liberal ideal that individuals choose and realize their own conception of the good
    - Aspiration: provide opportunities for individuals to develop and pursue what they find worthy
    - Diversity: of economic, cultural, physical environments should be fostered. Needed to allow people to develop as individuals.
    - Mutuality: everyone should be able to pursue their own conception of the good.
        - Environmental policy an example- clean air for everyone (assuming that they are developed to avoid the hot spot problems)
        - Similar to positive rights (plays out differently depending on whether we think people have stuff because they've earned it, because they have a right to it, or because they need it- see class notes 4/25)
    - Civic Virtue: taking an active role in collective affairs
        - Interest groups play a role, can be promoted in statutory cods like IRC
    - These are denied by a wealth-maximization view (as done in cost-benefit analysis)
- Risk management: often a 'cost per life saved' measurement is used
    - Political pressure created for 'irrational' regulation because people over-estimate low probability risks and over-estimate high ones (zeckhauser)
    - Affects priority setting because government deals with limited resources (breyer)
- Executive Order 12866 (Clinton) Regulatory Planning and Review
    - Agencies must assess costs and benefits of available regulatory alternatives
        - Includes both quantifiable and qualitative measure
        - Agency should select approach that maximizes net benefits
        - Must assess affects on state and local governments; other federal agency regs
    - OMB has review function

        - Agency submits agenda each year with summary of signification proposed regulatory action; regular conferences held
        - Agency submits list of planned reg actions with cost/benefit analysis
        - OMB reviews for consistency with president's priorities, applicable law, other agency actions and policies
    - Agency must seek involvement of interest parties with at least a comment period of 60 days (sec. 6(a))
- Cost-benefit assumes certain norms (Heinzerling)
    - Especially the worth of human lives saved tomorrow versus today (by discounting lives saved- which says that a life saved today is worth more)
        - This idea is not supported by people's actual preferences
    - There's a general conservative bias toward being pessimistic rather than overly optimistic
    - There are other risks besides death that regulations prevent (health-related other than cancer in OSHA type stuff)
- Often certain industries bear much of the cost (redistributive legislation)

Enacted Law versus Common Law

- Enacted law is more encompassing and can address problems in one fell swoop
    - Legislatures have ex ante approach; can think about proper incentive creation, an eye to the public good
- Common law is ad-hoc, decided on case-by-case basis and accumulation of precedent
    - Courts not in a place to best understand public good or future effects of rules

	Private Law	Public Law	Unofficial Law
Common Law	Tort law	1st amendment cases	Custom, markets
Enacted Law	UCC; private rights of action	Park rules	Union rules Contracts

- Private Law: law made to resolve disputes between private parties
    - Private Unofficial Law: Hart calls this planful private activity that counts on official backing but is unstandardized (contracts, wills).
        - When problems arise with this activity, it plays out in agencies and courts
- Public Law: created by the state to be enforced by the state
- Unofficial Law: not enforceable but very powerful. An alternative to regulation.
    - The Cruelty an example of unofficial actors

Legislative Facts versus Adjudicative Facts

- Legislative facts: not specific to the case
    - Aren't legislatures best able to use these and judge their worth?
- Adjudicative facts:

Non-Delegation Doctrine

- Article 1 Section 1: all legislative powers herein granted shall be vested in a Congress
- Madison 47: we can't have rigid separation of powers or government would be unworkable
- Social policy should be made by legislature, which is most responsive to the people (Rehnquist, benzene case)
  - The legislature can't handle everything

Legislative Lobbying

- Invention of the Progressive Era, shift away from reliance on private action to targeting legislators as sources of reform

Agency rules, procedures, and judicial review

Agency Procedure: necessary because agencies not representative

- Constitutional procedural due process restrictions
  - An adjudicative *Londoner* situation requires a hearing (right to support allegations by argument, however brief, and if need be by proof, however informal)
    - Small number of people substantially affected
  - A rule-making *Bi-Metallic* situation doesn't require a hearing
    - Rule applicable across the board
      - If we allowed hearing government wouldn't be able to get anything done
      - Turns on legislative facts that the public isn't in a better place to argue
    - *Heckler* more recent: legislative facts don't require a hearing even when used in an adjudicative situation (SS benefits)
- Statute-required **hearings**
  - In the realm of adjudicative facts: P should be able to use rebuttal evidence, cross-examination, argument to dispute them
    - The parties know these facts best! (Davis)
  - Hearing in a rule-making type proceeding: depends on statute as to whether a 553 procedure or a 556 full hearing are required
    - Words "after hearing" aren't enough- the default is notice and comment.
- APA establishes basic distinction between law-making through rulemaking and adjudication through cases
- **APA** § 553: Rulemaking (the notice and comment process)
  - §553(b)(A): 553 doesn't apply to **interpretative rules**, general statements of policy, or **rules of agency organization**, procedure or practice; except when notice or hearing is required by statute
  - §553(c): agency gives interest persons opportunity to participate with or without opportunity for oral presentation! But:
  - §553(c): when rules are required by statute to be **made on the record after opportunity for an agency hearing**, §§ 556 and 557 apply instead.
- APA § 556: Hearings
  - §556(d): even under 556, agency can adopt procedures for submission of all evidence in written form if it won't prejudice the party
- APA § 557: Initial Decisions

	Statute requires hearing on record	Statute doesn't require hearing on record
Rule-making	APA 556-57; decision on record; trial-type hearing; cross-examination	APA 553: Notice and Comment; get concise general statement of basis and purpose; Right to petition for issuance of amendment or repeal rule
Review	Substantial evidence review, looking at the record	Hard-look doctrine. There's no record, so use whatever paper is there and go beyond arbitrary and capricious. Focused on fair process more than outcome
Adjudication	APA 556-57	Informal adjudication; no APA procedures required, but there has to be some evidence upon which to review
Review	See above	An arbitrary and capricious review? – on some kind of evidence.

Decision on the Record

- Important because it provides the basis for review of the decision.
  - Facts only exist if you put them there- the record is its own little world

Bases for Review of Agency Actions

- Agency acting outside the scope of its empowering/enabling statute
  - Mandamus action (depends on jurisdiction; article 78 in NY)
    - Zebley case
  - Challenged reg set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Zarr (quoting Overton Park). Needs to be reasonably related to purposes of enabling legislation.
    - Think about this in relation to Chevron deference
- Agency must follow its own procedural rules
  - Mandamus action
- Agency bound by APA or state equivalent (general procedural rules)
  - Legislative proceeding: notice and comment (as found in APA and legislation giving agency its mandate); adjudicative proceeding: hearing
  - Probably a private right of action under the APA
- Common law of agency administration
  - Mandamus action
    - Agencies can't act in arbitrary and capricious manner (Zebley case)
    - Chevron deference

- Constitutional concerns: non-delegation, due process, and equal protection
  - Non-Delegation only found 2 times; though Thomas seems to want change
  - Procedural Due Process required depends on whether agency is adjudicating or legislating
    - Adjudication: notice and hearing
    - Legislation: none may be required
  - Substantive Due Process

Review of Agency Interpretation

- Interpretative rules are exempt from the APA notice and comment under §553(b)(A)
- **Chevron deference**: did Congress speak directly to the question at issue? If not, is the agency's interpretation reasonable?
- The interpretation of statutes can change, agency can be flexible
  - Scalia says that's the doctrine's greatest strength
- Competence argument: agencies are part of executive, more responsive to the people
  - Scalia says its not convincing- courts still think about policy in other situations
- Chevron creates the **default rule** that if a statute is ambiguous, the agency interpretation will rule
  - Scalia says that if a statute is ambiguous because Congress had an intent but didn't make it clear, then its really the court's place to decide (not the agency's)
    - However, having a default presumption will at least tell Congress to make themselves clear

Judicial review of Statutes

Causes of Action

- Common law causes of action (example: negligence of landlord in lead paint cases)
- Implied right of action
- §1983: Congress created a private right of action for violation by state actor of federal rights, privileges, immunities

Carolene Note 4: when rational basis not enough

- Statutes dealing with discrete and insular minorities, because prejudice against them may curtail the political processes ordinarily relied upon to protect them
- The basis of why statutes infringing liberty interests require special scrutiny

Abstention Doctrine: Burford different doesn't require an on-going state proceeding

- **Burford** Doctrine: shows reluctance to intrude in state proceedings when there's a complex state regulatory system
  - When timely and adequate state-court review is available, a fed court must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case at bar; or (2) where exercise of fed review of question in a case in and in

similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern
    - So **requires** (1) timely and adequate state court review available; (2) forum standing in special relationship to evaluation of claims available; (3) involve difficult areas of special concern to state
        - Article 78 seen as an adequate, special remedy in the state system
  - Bertelli and Lynn argue that fed courts should abstain when an admin agency proactively creates an extensive new scheme of operation for the purpose of addressing the inadequacies of performance that gave rise to P's suit
    - Allows for energy in the executive and innovative solutions to policy problems
  - Burford doesn't require an on-going state proceeding, and can be used even if P hasn't tried the other state-court means of review (like the NY Supreme Courts?)
- Younger: abstain when (1) fed claims have been or could be presented in (2) ongoing state judicial proceedings that (3) concern important state interests
  - Look at p.18 n.60
  - *Younger* requires that a federal court refrain from hearing an action over which it has jurisdiction "when [the] federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests and (3) affords an adequate opportunity to raise the federal claims."
    - Once the conditions are met, abstention is mandatory (not discretionary)
  - State court proceedings that Lynn article is talking about are the Article 78/mandamus cases directly against the agencies?
  - *Marisol* didn't abstain on Younger because the doctrine requires proceedings *against* the youth services or whatever agency is involved
    - Proceedings within the agency are not part of a Younger analysis
    - Contrast with NM case: which used Younger because biannual reviews in family court were considered on-going proceeding
- Pullman: fed courts should avoid decision of fed constitutional question where the case can be disposed of on questions of state law
  - To use Pullman have to be dealing with a federal constitutional question
- Lynn/Bertelli argument: abstention is useful when state ?

Mandamus/Article 78

- Mandamus to review an agency's exercise of judgment exercised in the absence of a trial-type hearing is exercised in NY under Article 78 of NY Code
- Questions P can raise: whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (in Lynn)
  - Arbirary and capricious means lacking a rational basis
- Decision challenged has to be final and the P has to have exhausted all remedies
- Article 78 is used to determine if a statute in a specific instance has been applied in an unconstitutional manner
  - It is not the way to test the general constitutionality of legislative enactments

Due Process

Procedural Due Process

- J. Friendly: where's the limit? We can't have hearings for everything
  - He would limit cross-examination, which can be counter-productive and basically requires counsel to be effective
  - Right to counsel doesn't make sense: counsel drags stuff out
  - He questions the right to have a record in mass justice cases: too much paper; though written statement of reasons makes sense
  - He suggests moving away from adversary model in mass-justice situations and using an "investigatory" model where the judge calls experts and asks questions.
    - Suggestion that a truly independent decision-maker would render other types of safeguards unnecessary
- There's evidence that formalized procedures for AFDC appeals make things at least slightly harder for self-represented people (Wisconsin study); a lot of people didn't show up to hearings, and many clients are uninformed about the process.
  - Difficult to achieve fairness in a mass justice system with few resources
  - Mediators not helpful in the eligibility process, but may allow opportunities for compromise in a placement-type situation (class notes)
- Historical progression: after Southern Railway, the court burdened agencies with fewer procedural requirements (maybe got more comfortable with agencies, less worried about them being undemocratic)
- Mathews test: private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
- Possibilities: In Goldberg: notice with stated reasons, trial-type hearing (right to present testimony orally; right to confront and cross-examine witnesses; right to be allowed counsel); impartial decisionmaker; statement of reasons (though less than a formal finding of fact);
  - Court looked at nature of proceeding: the welfare recipients probably couldn't' write well and determinations might be based on the P's veracity – so oral arguments were better. The welfare recipients would also be deprived of their very means of living
  - Can argue about the type of process required for adjudicative vs. legislative hearings (remember the Londoner cases)

Substantive Due Process

- Involves either a property/new property interest or a liberty interest
- Invoking a SDP claim gets around the need for efficiency balancing that takes place in the *Mathews* test.
- Court has said that there's no special right to an education; but there is a right for parents to control their child's education
- Right to family started in the Lochner era; transformed to right of privacy in Roe era

Child Welfare

Psychological Parent Theory

- Primary caregiver becomes the psychological parent; breaking the bond for even a short time is traumatic
  - Based on theoretical work (though PCD says it's a set of hypotheses based on clinical observation)
- Implications: once a child is removed from home, we don't want to remove the child from the new bond and "break the other leg"
  - Also calls for quick adoption time periods
- **Child network theory** argues against the theory
  - Children dependent on networks, not single figures
    - Important to preserve the network as much as possible, even after the child is removed from the original home
    - Trauma from loss of part of network causes impaired character development
  - PP theory culturally determined- ignores extended family care and sibling care

Family Welfare History

- Colonial times: kids were sent to almshouses, kept from being idle
- Late 1800s: social orgs like the NY and MA Society for the Prevention of Cruelty to Children were developed (parallel with urban development, influx of immigrants)
  - Investigated abusive parents, even went out looking for abuse;
    - Prosecuted the parents, took the children and committed them to city institution
  - Not a state agency- originally run by social elites; abuse was a vice of poor people
    - Became a lobbying agency for legislation against child labor, etc.
    - Got the ability to place children themselves
- 1910s-20s: professionalization. Began using a more scientific approach- casework
  - Work became a job- switch from Boston Brahmin wives to working people- mostly male and middle-class
  - Americanization of immigrants was a not-so-subtle context of help in the homes; middle-class Anglo-Saxon values were inculcated as much as possible
- 1930s-60s: government became involved directly
  - Shift to issues of neglect; de-emphasis on family violence
  - Out-of-home placement the focus
- 1970s-1990s: shift to helping the family of origin
  - Preventive and reunification services
  - **1980 Adoption Assistance and Child Welfare Act**
    - Introduced reasonable efforts and reunification service
    - Emphasis on adoptive homes if reunification impossible
- **ASFA** (1997): main emphasis on child safety and expedited permanency
  - Corresponds with political focus on individual responsibility and ending reliance on government-sponsored programs
  - Main changes

- Clarification of reasonable efforts, so as to preclude reunification with dangerous parents
- Shortening of timeframe for terminating parental rights
- Limits all reunification services to no more than 15 months (Promoting Safe and Stable Families Act)

Child Welfare System Today (Hofferth)

- Care centers are increasingly popular, except among working poor families. Why?
  - Less availability of center care in working poor neighborhoods
    - Also less availability nights and weekends, when the poor work
  - Most care centers don't take infants, who usually go with relatives
  - PW parents unable to qualify for direct subsidies given to non-working poor (Head Start) or tax refunds that middle-class workers take advantage of
- Regulatory tools
  - Tax credits for parents; Medicaid and head start
    - But direct subsidies to parents don't always increase quality
      - Parents make choices based on price or convenience
  - Child Care Development Fund: fed funds to states for child care subsidies to working families
  - Family and Medical Leave Act: working with employers to be more flexible
  - Direct funding to programs for subsidizing care quality (through CCDF?)
    - Quality usually measured by child-staff ratios, training, group size, staff turnover
  - Regulation of health and safety conditions; frequent inspections
    - Provides info to parents about unmeasured quality
    - Question of which government is best suited to make regs
      - Fed govnerment standards often become ceilings (Gormley)
    - Increase enforcement, which is lacking in most states (Gormley)
  - Licensing; funding only for licensed programs
    - Only 22 states license family child care providers (non-centers)
    - Make stricter licensing programs- weeds out poor quality at least (Morris)
      - Can be combined with giving information to parents on choosing quality
    - Increases incentives for programs to get up to code
      - But does it increase cost of service or decrease supply? (Gormley)
  - Public provision: other countries (France)
- Problems parents have in choosing high quality care
  - Info problems: they may not know what to look for because they're inexperienced buyers
    - Cannot monitor services easily; private centers have an incentive to hide things: improve the observable aspects of their center only (Morris)
  - Lack of accessibility and availability act to narrow choices
    - Especially in poor urban areas, in rural areas; night and weekend care
  - For-profit centers have to compete with subsidized centers, family care providers
    - The low-profit margin leads centers to skimp on quality (Morris)
- What is child care?
  - Private benefit to the parents

- Services to children's well-being and development: creates benefits to society
  - Treats care as early-childhood education
  - Important for cognitive development: quality of care based on measurable factors does matter (Burchinal)