Legislation and the Regulatory State

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**I. LEGISLATION**

**A. The Legislative Process**

* **Importance of legislative process**
  + **Relevance** – understanding the process may help choose an interpretive method
  + **Effect** – Legislative process creates a **status quo bias** making it difficult to pass legislation; prevents both regulation and de-regulation
  + **Overview** – formal rules intersect with practices and politics
* **Procedure** – constitutional requirements mixed with Congress’ rules and practices
  + **Constitutional** – Art. I § 7 requires bicameralism and presentment
  + **House and Senate Rules** –Agenda setting, cloture, filibuster, floor debate
  + **Practice** - committees
* **Models for Politics** – what does and what should influence interpretation
  + **Median Voter** – mainstream preferences drive outcomes; debatable if any exist
    - *Holy Trinity* – Christian nation; would not assign purpose to a law that banned clergy; Today, laws against flag burning is a rare “mainstream preference”
  + **Interest Group** – organizational power per capita
    - Which groups are organized (e.g. unions) and which are unorganized (consumers) drives legislative outcomes (e.g. tariffs)
    - *Allapattah* – Scalia accuses lobbyists of trying to manipulate legislative history
  + **Party Polarization** – contrast unified and divided government
    - Unified government –avalanche, divided government – gridlock (e.g. Obamacare)
    - Separation of Powers heightened in practice if one party has control of only one part of government.
  + **Trustee** – congressmen deliberate and vote with conscience/personal beliefs (e.g. war)

**B. Judicial Roles and Interpretive Methods**

* **Independent** – judges should serve as a check and balance against Congress; judicial review
  + *Fed. No. 78* – Limits on other branches checked by the Courts, whose duty is to declare unconstitutional acts void
  + *Schechter* – Court decides it is unconst’l for congress to delegate power to the president to make “codes of fair competition” because: vague, broad, no procedural safeguards, and industry role. Court drawing a limit and specifying relevant factors
  + *Blanchard* – Scalia rejects legislative history in the concurrence as inconsistent with Congress’ job to enact statutes; fears it allows interest group meddling
  + A gentle connection to Textualism (no textualist would admit being independent)
    - *Marshall* (LSD*)*: “Odd results may occur”; if the dissent’s view of Congress (as having made an oversight that LSD is sold by dose not by weight) is true, then the majority is effectively pushing Congress toward a judicial standard of more careful drafting.
    - *Amalgamated/Spivey*:Less is more; if you are holding congress’ feet to the fire, can you really be a subordinate agent? Judges imposing their idea of how they want to read statutes and how reliable statutes should be.
    - *Casey* (Expert Fees): The dissent (Stevens) argues that the majority (Scalia) is “doing the country a disservice” by needlessly ignoring persuasive evidence of Congress’ actual purpose and requiring it to go back and do better whenever its work product suffers from an omission or inadvertent error. Scalia would respond that LH is not indicative of Congressional purpose—both ascribe to legislative supremacy but disagree about how a subordinate agent properly functions.
* **Partner** – judges should collaborate with Congress to further the public good
  + *Fed. No. 78* – mitigate the severity and confine the operation of unjust and impartial laws
  + *McQuiggin* – habeas case, “equitable exception to statute” heavily based on judicial precedent (presumed to be the backdrop to legislation) and tenuous purpose argument, liberty is at issue, and habeas is a constitutionally protected process
  + Connection to Purposivism
    - *Marshall* (LSD) dissent, Posner: Congress didn’t know that LSD is sold by the dose not by weight. Congress makes some mistakes and the judge is a partner who works with Congress to ensure that the result is not embarrassing for either Congress or the court
    - *Holy Trinity* (Christian Nation): Despite language, court decides contract was not a violation, because Congress did not intend to preclude its type. Functionally similar to the partnership model, but it’s not substitution of the judge’s will in order to support the public good. Rather, court accounting for the fact that the words of a law are an imperfect representation of the will of the legislator under the Legal Process model.
    - *Nova Scotia* – Court importing judicial demands onto §553 not supported by the statute; interpreting APA as a partner generate high quality rules
    - *Chevron* – Court reads APA as allowing deference since it does not explicitly bar it
    - *Vermont Yankee* **–** reads APA 559 to include CL, picks one CL tradition over another based on concerns about judicial expertise and bias and decides APA is a ceiling
    - *Abramski* – court prohibits “straw purchasers” to give full effect to congress’ scheme
  + Presumption in favor of ordinary meaning could be viewed as a partner choice (*Smith, Nix, Perrin*)
    - Subordinate model: the court interpreting what it thinks Congress thinks its role is (the voice of the electorate)
    - Partnership model: the Court imposing how it thinks Congress should operate (the ordinary man should be able to read and understand the law)
* **Subordinate** – follow Congress as its faithful agent (*Fed. No. 78* – rely on nothing but law)
  + **Textualism** – follow text’s objective semantic meaning
    - *Casey*, textualism rising
    - *Nix,* ordinary or specialized meaning
    - *Moskal*, ordinary or specialized meaning
    - *Smith*, dictionary or colloquial meaning
    - *Blanchard*, textualist critique of LH
    - *Continental Can*, textualist critique of LH
  + **Purposivism** – follow Congress’ general goal for the statute
    - LSD dissent, judge smoothing over perceived oversights of Congress
    - *Riggs* – derives purpose from rational conjecture and common-law conformity that trumps statutory text to avoid an outcome legislature could not have desired
    - *Holy Trinity* – mischief act was aimed at, legislative history, and mainstream value
    - *Kirby* (arrested mailman) – used purpose to avoid absurd reading that went against “common sense”
    - *General Dynamics* (age discrimination), purposivism survives
  + **Intentionalism** – follow Congress’ specific intent on this particular issue
    - *Amalgamated* – no legislature could have intended outcome; read less as more
    - *Holy Trinity* – considers legislative history to determine the legislature did not intend to preclude labor contracts with foreign clergy
    - *Train* (radioactive materials) – **on point** legislative history to determine specific intent of Congress
    - *Riggs* (Murder Inheritance): Stands for purposivism, but “the *intention* of the lawmakers could not have been to grant a murderer donee beneficiary rights.”
  + **Sample of mixed approaches** – modern approach places text first; allows purpose if ambiguous
    - *General Dynamics* – secondary dictionary definition of “age” plus evidence of mischief and legislative history to confirm applicability of secondary definition
    - *Smith* (gun-drugs swap) – dictionary usage backed by Congress’ purpose
    - *Moskal* – ordinary meaning of “falsely made” supported by Congress’ purpose
    - *Abramski* – looks to mischief of statute, recording gun ownership, due to ambiguity in colloquial usage of “transferee”; encompasses straw purchasers

**C. Interpretation in Practice**

* **Word meanings** – individuated analysis, but requires choices between different meanings
  + **Ordinary meaning presumed for undefined words** – meaning that a reasonable person would assign, as a matter of social convention within a linguistic community. *See also Perrin* (1979).
    - **Dictionary meaning** – proper standardized definitions of words
      * *Smith* (gun-drugs swap) – dictionary defined “use” as “to convert to one’s service” which, backed by purposivism, was favored over colloquial “use a gun”
      * *MCI* – rejects use of dictionaries that adopt “common misuses” of “modify”
      * *General Dynamics*– defined “age” as number of years and as “old age”
    - **Colloquial meaning** – common informal usage
      * *Nix* – common use of tomato as vegetable
      * *MCI*: “word in sentence” French Revolution v. AT&T breakup = “modification”
      * *McBoyle* (stolen airplane): In everyday speech, vehicle calls to mind land despite broader dictionary definition
      * *Moskal* – ordinary usage of “falsely made” included genuine documents; overcame presumption of using common law definition
      * *Abramski* – colloquial usage of “purchaser” made statute ambiguous
      * *Smith* (guns-drugs swap): colloquial meaning of “use”
      * *General Dynamics* (age discrimination): competing illustrations
      * *Bass* (Firearms in commerce)
      * LSD colloquial meaning of “substance” and “mixture”
  + **Specialized meaning, terms of art** – trade or commercial meaning used within a subcommunity (e.g. scientists, lawyers, industry)
    - *Moskal* – recognizing criminal statutes generally use established meaning of common-law terms (like “falsely made”) although court ultimately finds evidence to point the other way
    - *Nix*: Court looks for trade usage but finds none.
    - *Casey* (1991): “Attorney’s fees” and “expert fees” where legal terms of art. Other statutes divided out the two types of fees and prior to the civil rights statute being enacted judges separated the two types of fees in their opinions.
  + **Overcoming the presumption for ordinary meaning**
    - Target audience – *Nix*, trade meaning would have trumped since traders regulated
    - Structural inferences from other provisions – *B&W* and *Marshall* (LSD)
    - Actual use in a subcommunity – *Casey*, use by attorney’s and judges
    - Legislative history – *Continental Can*, “substantially all” means 85% because that was the meaning in the minds of the legislators (LH); *General Dynamics*
* **Structural inference** – draw meaning based on one part’s relationship to others
  + **Sentence structure** – grammar, punctuation, etc.
    - *Bass* (firearms in commerce) – third antecedent rule and argument over comma
  + **Other provisions** – relationship with other parts of the same statute seeking coherence in semantics or purpose
    - *Marshall* (LSD) – PCP provision would have surplus if “mixture or substance” meant pure
    - *Nova Scotia*: reading 553(b) in conjunction with the “opportunity” requirement in 553(c) and importing a standard into the former to make the latter meaningful
    - *B&W* ***–*** FDCA required outright bans of “unsafe” drugs; FDA erred by considering the remedy; statute indicated FDA could consider only safety for intended use
    - *Smith* (gun swap): “use” in non-weapon context used elsewhere in statute; consistent with purposeof addressing the dangerous combination of drugs and guns
    - *MCI* majority (importance within the statute)
    - *MCI* dissent (FCC’s modification authority explicitly allowed for “particular” circumstances or “general” orders—broad delegation)
  + **Other statutes** – relationship with other statues to further same goals as above
    - *Casey* – other statutes showed pattern of separating “expert fees” and “attorney fees”
    - *B&W* – congress enacted cigarette-specific legislation against the backdrop of the FDA not having the jurisdiction to do so
* **Canons** – factors and arguments; can be “semantic” representing actual usage or “substantive” representing a policy choice by the Court, but these categories are debatable
  + **Specific over general provisions** – presume that specific provisions control general ones
    - *B&W* – congress enacted more specific statutes than FDCA to regulate tobacco
    - *But Holy Trinity* – The statute title “labor” is more general (can argue “labor” doesn’t mean church work); operative provision says “labor of any kind”; purpose trumps
    - *But Benzene* – used general definitional section to create a threshold standard of significant risk that then limited the specific provision dealing with toxic materials
      * Court was driven by nondelegation canon; decided to adopt a construction that avoided serious nondelegation problems
  + **Expressio unius** – inclusion of one implies exclusion of others, although lists may be nonexhaustive
    - *Silvers* (copyright claims) – two types of ownership listed (as having the standing to sue) at the exclusion of others, 6 types of exclusive claims
    - Dissent in *Riggs*
    - Dissent in *Church Unionization*
    - *But Holy Trinity* – *expressio* not applied despite broad term (“labor of any kind”) with express exceptions in the statute due to purpose arguments
    - *But McQuiggin* (Habeas) – *expressio* not applieddespite specific exceptions to the habeas limitation in the statute due to judicial precedent in habeas cases (partnership)
  + **Consistent use** – presume a term has the same meaning in the same statute, and in other statutes on the same subject
    - *Gustafson* (securities sale) – to ensure “prospectus” is used consistently, adopts narrow definition used in § 10 which only applied to IPOs
    - *Casey* – other statutes showed pattern of separating “expert fees” and “attorney fees”
    - *But General Dynamics* – overcomes presumption through use of the surrounding words canon. Interpreting age as “old age” made the bonafide occupational qualification exception incoherent. “Age” given different meaning within statute depending on context.
  + **Surrounding words** – presume a term draws meaning from words around it, based on some common characteristics
    - *Gustafson* (securities sale) – documents of wide dissemination
      * *Ejusdem generis*– if “communication” included every written communication then preceding words in the list would be redundant; is public communications
      * *Noscitur a sociis* – specific terms in the list point to widely disseminated documents; communication should be read as public communication
    - *McBoyle* – “any other self-propelled vehicle” is a catchall which, interpreted by words in preceding list, means only land vehicles
    - *General Dynamics* – “discrimination” provided context to “age” which, along with purpose, supported using the secondary definition of “old age”
    - *Smith* dissent: “use” informed by proximity to “firearm” and its intended purpose.
  + **Surplusage** – presume no superfluous or redundant words; if possible give meaning to every word
    - *Gustafson* (securities sale) – reading “communication” to mean only public gives every word in the list a purpose, which is defining the scope of “communication”
      * Left a problem of redundancy, but gives every word in the list a function
    - *But Moskal* dissent – due to specialized meaning of forgery, dissent argued that the redundancy of equating “falsely made” to “forgery” was appropriate
  + **Constitutional avoidance** – three types
    - **Classical** – (1) decide merits of constitutional issue (2) if found unconstitutional, interpret statutes to avoid constructions that are actually unconstitutional (not actually avoiding)
    - **Modern** – (1) does issue raise a “serious doubt” of constitutionality? (2) If yes, opt for another construction of the statute if fairly possible; do not actually decide on the merits
      * *Ashwander*/Brandeis – establishes the modern doctrine
      * *Catholic Bishop* dissent – must first determine if another construction is “fairly possible” before applying constitutional avoidance canon; argues that it’s not
    - **Strong version** – in absence of clear expression of affirmative intent by Congress to decide the (constitutional) issue raised, court should adopt another construction
      * *Catholic Bishop* – statute lacked a clear expression of affirmative intent by Congress to address First Amendment issue regarding religious schools unionization
      * No requirement of finding a “fairly possible construction” before the canon is applied
  + **Preemption** – presume no implied preemption (field, conflict, obstacle) and read express provisions narrowly unless there is clear evidence of congressional intent to the contrary
    - *Rice* – presumption rebutted; applied field preemption due to amendment history and statutory text indicating Congress intended to preempt entire field of regulation for warehouses
    - *Cipollone* (scope of express) – express preemption provision that defined range of preemption was constrained by canon; ambiguity of “requirement or prohibition” read narrowly to include some, but not all, common law duties
      * Dissent criticizes this approach – how can you allow implied preemption and read express preemption narrowly?
  + **Retroactivity** – check whether Congress expressly prescribed the law’s temporal reach, then presume no retroactive civil liability absent clear legislative intent.
    - *Landgraf* – amended civil rights statute allowing new kind of damages did not permit an employee to receive damages for harassment that happened before the effective date
  + **Lenity** – after using other tools of interpretation, residual ambiguity in criminal statutes is resolved in favor of the defendant
    - *Bass* (firearms in commerce) – applied due to ambiguity regarding if “in commerce” should be applied to “possesses” or just “transports”; applied to both
    - *McBoyle* – applied due to ambiguity on whether the statute included airplanes; a desire to provide fair warning to defendants regarding criminal liability
    - *But Moskal* – rejected use of rule of lenity because ordinary meaning and congress’ purpose supported reading that “falsely made” included genuine documents
    - *But Smith* (gun-drug swap) – relied on dictionary usage and purpose to avoid creating an ambiguity in the statute; “use a firearm” including swapping it for drugs
* **Purpose** – statutes are enacted for reasons (e.g. mischief) and purposivism directs judges to help solve problems based on T1 Congress’ general purpose
  + **Classic approach** – spirit trumps letter
    - *Riggs* (murderer inheritance) – despite enumerated provisions for will rescission, etc. no reasonable legislator could have meant for a murderer to inherit
    - *Holy Trinity* – mischief the act was designed to remedy was foreign labor harming the domestic market; legislature could not have intended to include clergy
    - *Casey* dissent – purpose was to remedy gaps in civil rights law and increase civil rights litigation; should resolve expert fees questions to further that purpose
  + **Modern approach**– if meaning of statutory text is unclear, purpose may be used to resolve vagueness or ambiguity. Critics argue statutes often lack a single general purpose that can or should be pursued by judges. Purposivism demoted but never eliminated.
    - *Casey* – statutory text was clear so court rejected use of purpose
    - *General Dynamics* – statute was ambiguous regarding meaning of “age,” but purpose showed Congress intended to prevent age discrimination against only older workers (purpose used to bolster narrow meaning)
    - *Abramski* – statute ambiguous regarding who was a “transferee” but purpose was to create a comprehensive scheme of gun records, so statute applied to straw purchasers (purpose used to bolster broad meaning)
  + **Absurdity** – statutes should not be interpreted to yield absurd results
    - **Normative** – contradicts common sense/deeply held values; independent/partner role
      * *Kirby* – applying statute making it illegal to obstruct passage of mail to a sheriff who made a murder arrest “contradicts the common sense of man”
    - **Political** – no congress would accept the result; faithful agent role
      * “Drawing blood in the streets” law could not be applied to a surgeon
      * *Riggs* – no legislature could intend for a murderer to benefit from his wrongdoing
  + **Scrivener’s errors** – judges may correct transcription errors
    - *Amalgamated Transit* – less was read as more because legislative history showed congress clearly intended it and that it was a transcription error
    - *Spivey* – Easterbrook refuses to apply Scrivener’s error to same statute because legislative history should not be used to “turn clear text on its head”
    - Scalia – Scrivener’s errors should apply only “where on the face of the statute it is clear to the reader that a mistake of expression has been made”
* **Legislative History** – source of legislative intent associated with Intentionalism, but may be used by other methods. Justified by constraint, reflection of intent, and respect for delegation.
  + **Post-New Deal use** – regardless of how clear statute appeared, used as evidence for the subjective collective intent of Congress
    - Constrain judges by reflecting intent and respecting delegation in Congress
    - *Train* – Committee report, colloquy and defeated amendment showed, contrary to plain meaning, “radioactive materials” did not include those regulated by AEC
    - *Blanchard* – committee report cited three cases that correctly applied *Johnson* factors for determining attorney’s fees; showed private fee arrangement not dispositive cap
  + **Textualist critique of Post-New Deal justification of legislative history**
    - Narrow empirical objections
      * Unclear/costly to check; unreliable on intent
      * Speaks to LH justifications of constraint and reflection of intent
    - Deep and Broad Empirical Challenges (also judicial willfulness, but that is weak)
      * Collective intent is fiction; delegation is unconstitutional circumvention Art. I § 7
      * Speaks to LH justification of reflection of intent and respect for delegation.
  + **Contemporary treatment** 
    - 1) If the meaning of statutory text is unclear, LH may be used to resolve vagueness or ambiguity (*Casey*)
    - 2) Regardless, LH should be evaluated with care, *e.g.*, *Exxon* (2005)
      * *Allapattah* – relied on text; legislative history was “murky” and potentially intended to mislead because lobbyists tried to manipulate the committee report to circumvent Art. I § 7
    - 3) But possibly used uncontroversially if used with externally verifiable mischief or terms of art
      * *General Dynamics* – externally verifiable mischief of discrimination against old
      * *Continental Can* – floor statements made by bill sponsor after debate and after presentment were not valid legislative history; substantially all meant 85%
      * Statement by Representative was accepted because it was externally verifiable
  + **Hierarchy of sources**
    - Committee reports – most reliable since congressmen actually read them; Congress delegates authority to committee members as experts on the statute
    - Sponsor statements – members defer to sponsors, effectively delegating authority
    - Floor debate, hearing testimony, amendment history, T2 ratification and acquiescence

**II. Administration**

**A. The Administrative State**

* **Agencies as rulemakers and adjudicators**
  + **Development** – true for a long time but became more frequent and broad post New Deal. *E.g.*, SEC authority under a 1934 statute to adopt, enforce, and interpret its own rules.
  + **Explanation** – high stakes modern problems, perhaps not reflected by Constitution
* **Separation of powers arguments** 
  + **Simple objections** – branches are strictly separated; legislative “makes general rules,” executive “executes these general rules,” and judiciary “interprets and applies rules”. *But see* presidential veto.
  + **Deeper objections** – constitutional text, with history, form an inference into a principle
    - Vesting and Blending clauses, with *expressio* suggest no blending other powers
    - Separating clauses imply separation and checking as a principle to achieve liberty
    - Reinforced by Fed No. 51 and Montesquieu who embraced the principle
  + **Responses**
    - No Separation of Powers clause, and Necessary and Proper clause gives Congress power to model government as needed to carry out its specific powers
    - Separating clauses trigger *expressio*, excluding all other separation of branches
    - Blending clauses can be built into a separate and contradictory principle
    - Functionalist – should try to create a modern government that divides labor efficiently, balances power of branches, and ensures good law

**B. Delegation of Rulemaking Power**

* **Nondelegation doctrine** – Congress cannot delegate its “legislative power,” but if a “intelligible principle” is provided agency action is “executive”. Allows Congress to rely on agency expertise, speed, clarity, and presidential power – with risks.
  + **Permissible delegations**
    - *Hampton* – factors for setting a tariff, despite lack of instruction for applying them, provided a sufficiently “intelligible principle” and a “clear policy and plan”
    - *Whitman* – Congress need only provide “substantial guidance” not “determinative criteria;” discretion to set nonthreshold pollutants higher than 0ppm was valid
  + **Impermissible delegation**
    - *Schechter* – delegation lacked an intelligible principle because it was “vague, broad, lacked administrative process, and allowed an industry role”
    - *But NBC* – vague standard of “public interest, convenience, necessity” upheld
    - *But Yakus* – vague and broad power to set “fair and equitable” wartime prices upheld
* **Nondelegation Canon** – interpret narrowly to avoid serious nondelegation concerns
  + *Benzene* plurality – invoked a general definitional provision, despite a specific provision on “toxic materials”, to create requirement of a threshold finding of “significant risk” for regulations to limit agency’s ability to effect the industry broadly

**C. Congressional Influence Following Delegation**

* **Tools –** committee oversight process, Art. I § 7 to overturn regulations (status quo bias) or alter appropriations, Art. 2 § 2 to ex ante screen appointments, impeachment, holding hostage
* **Exceptions: legislative vetoes** *Chadha* – relying on exclusivity of A1 § 7 for exercise of the “legislative power,” plus categorization of what the House did (on its own) as legislative.

**D. Agency Personnel – Appointment and Removal**

* **Appointments** – mixture of constitutional text (Art. II § 2) and common law
  + **Mere employees** – no restrictions on appointment process for “lesser functionaries subordinate” to Officers of the United States (*Buckley*)
  + **Inferior officers** – Art. II § 2 is exclusive (*Buckley*); Congress may vest appointment power in President alone, in the Courts of Law, or the Heads of Departments
    - *Morrison* – provided factors for determining if an officer is inferior
      * Subject to **removal** by a higher ranking official (e.g. by Attorney General)
      * **Limited duties** (e.g. restricted to investigation/enforcement; no policy power)
      * **Limited jurisdiction** (e.g. limited to a single individual or event)
      * **Limited tenure** (e.g. office ends after completion of a task; no ongoing powers)
    - *Edmond* – focus on supervision, with factors for determining supervision (purported to apply *Morrison* factors but gave dispositive weight to supervision)
      * **Procedure** – higher official prescribes rules or procedures to follow
      * **Removal** – higher official has removal power over
      * **Review** – decisions are subject to review by a higher official
  + **Officers of the United States** – Art. II § 2 is exclusive, President appoints with Senate advice and consent; “exercise significant authority pursuant to the laws” test
    - *Buckley* – despite having legislative and judicial functions, because FEC had enforcement power (bringing civil suits) they were Officers of the United States
      * Congress cannot use Necessary and Proper clause and its regulatory powers to create different appointment process, even if it enhances balance of power
* **Removal** – no removal clause in the Constitution except impeachment
  + **At first, President’s exclusive executive power***–* for principal Officers
    - *Myers* – Senate could not restrict removal for first class postmasters to require advice and consent of the Senate
  + **Next, quasi-legislative and quasi-judicial categories** – allows for independent agencies
    - *Humphrey’s* – statutory removal limit (inefficiency, neglect, malfeasance) was permissible because FTC commissioners were quasi-legislative and quasi-judicial
      * **Purely executive** – e.g. postmasters; only have investigate/enforcement power
      * **Quasi-legislative** – e.g. conduct investigations, report findings, or make recommendations at behest of Congress
      * **Quasi-judicial** – e.g. remedy recommendations
  + **Today, standard (interfere impermissibly) plus a rule (novel two-tier restriction)**
    - *Morrison* – Congress cannot “impermissibly interfere” with President’s duty to “take care that the laws be faithfully executed” as determined by a multi-factor test:
      * ***Humphrey’s* categories** – purely executive, quasi-legislative, quasi-judicial
      * **Function’s importance** – limited duty, limited jurisdiction, limited tenure
      * **President’s control** – e.g. removal for “good cause;” discretion over appointment
      * **Congress’ Reasons** – e.g. impartial investigations; not an attempt by Congress to aggrandize its own power
    - *Free Enterprise Fund* – novel two tier restriction combing *Humphrey’s* standard (SEC removal) with an “unusually restrictive” willful standard (Board removal)
      * Decision is strengthened by reading “willful” narrowly (e.g. excluding insubordination); if it included insubordination two-tier could still allow removal

**E. Presidential Oversight of Agencies**

* **Presidential directives** – subject to review for lawfulness; cannot compel an agency to take action that requires disregarding statutory criteria
* **OIRA regulatory review** – CBA and review for significant regulatory action; other statutes may impose additional tests. *See E.O. 12,866* (Clinton); *See also* *E.O. 13,563* (Obama)
  + **Structure** – agency must submit rule proposals in an annual regulatory agenda, and some proposals are identified as “significant” and require OIRA review with possible return for further homework
  + **Significant regulatory action** – annual effect of $100 million; inconsistent or interferes with another agency action; materially alters entitlements/grants; raises novel legal issues
  + **CBA** – quantify anticipated present and future benefits and costs and choose alternative with greatest net benefit; consider qualitatively equity, human dignity, fairness, distributive impacts; a statute may override requirement that decision be based on CBA

**F. Judicial Review of Agency Action**

**1. Court Access – Elegibility for Judicial Review APA § 701(a)**

Presumption in favor of judicial review under APA for both rules and orders, but exceptions

* **“Statutes preclude judicial review,**” APA § 701(a)(1)
  + *Heckler* – demand clear legislative intent to restrict access to judicial review (dicta)
* **“Committed to agency discretion by law,”** APA § 701(a)(2) narrow exception for when there is no law to apply or no meaningful standard.
  + **Agency Action** – presumption is for judicial review unless no meaningful standard
    - *Overton Park* - “shall not approve any program … [unless] no feasible alternatives were available” was sufficient to create a meaningful standard for agency action
  + **Agency Inaction** – despite APA text, presumption is against judicial review for refusals to investigate or enforce
    - *Heckler* – no review for failing to investigate “misbranded” lethal injection drugs because statute had no meaningful standard against which to review
      * Possible exceptions if agency refuses to act due to belief it lacks jurisdiction; agency expressly adopted a policy so extreme as to abdicate its statutory duties
    - *Dunlop* – “shall investigate … if he finds probable cause” was a sufficient to overcome presumption against judicial review
    - Compare: refusal to initiate rule making, which is reviewable but with strong deference.

**2. Types of Judicial Challenges**

**i. § 706(2)(D) – Procedural Challenges**

Courts are authorized to set aside agency action “without observance of procedure required by law,” APA § 706(2)(D), including by the APA itself

* **APA ceiling** – court will not apply additional procedure, unless required by other statutes
  + *Vt. Yankee* – reviewing court cannot impose specific procedural steps (e.g. discovery) that an agency must follow to create a reviewable record; design standards prohibited
* **APA categories** – procedural requirements partly depend on categorizing agency action
  + **Adjudication** – involves an “order,” § 551(6)-(7); broad category that means a “final disposition of an agency in a matter other than rulemaking”
  + **Rulemaking** – involves a “rule” with “future effect designed to implement, interpret, or prescribe law or policy” § 551(4)
  + *Chenery II* – agency has discretion to choose rulemaking or adjudication as the means for promulgating rules
* **APA mandates**
  + **Formal** – adjudication or formal rulemaking is triggered if a statute explicitly requires a decision on the record after a hearing §§ 553(c), 554(a), 556-557 (peanut butter)
  + **Informal adjudication** triggers practically no procedure under the APA
  + **Informal rulemaking** triggers § 553 notice-and-comment rulemaking requirements:
    - **Notice** – “either the terms or substance of the proposed rule or a description of the subjects and issues involved” § 553(b)
      * *Nova Scotia* – duty to disclose evidence on which the proposed rule relied before the comment period, even if they are publicly available despite no explicit text
    - **Comment** – “interested persons an opportunity to participate … through submission of written data, views, or arguments with or without … oral presentation” § 553(c)
      * *Vt. Yankee* – cannot require agency to conduct discovery or cross-examination
    - **Explanation** – if a final rule is issued, “after consideration of the relevant matter presented” agency must provide a “concise general statement of their basis and purpose” § 553(c)
      * *Nova Scotia* – significant comments that raise “vital issues with cogent materiality to the regulation” must be addressed by the agency in its response
* **Agency alternatives to notice-and-comment rulemaking**
  + **General statements of policy** § 553(b)(A) expressly exempts -- do not establish binding norms
    - May include agency memos, speeches, manuals, and official declarations of agency agenda, policy priorities, or plans to exercise discretionary authority
    - *PG&E* – force of law test and related factors for determining whether an order established a rule or a statement of policy (i.e. if a binding norm is established); SOP will receive less deference by reviewing court
      * **Force of law** – is the order binding on agency personnel in subsequent proceedings or can it be challenged in subsequent proceedings
      * **Behavioral effects –** did the order have an immediate and significant effect on the behavior of regulated parties; is it subject to immediate withdrawal or reversal
      * **Agency labels** – does the agency call the order a rule or policy
      * **Flexibility** – does the order allow exceptions or case-by-case discretion
    - *CBS* – behavior effects, regulation caused wholesale cancellation of contracts, and force of law, and no assurance of ability to challenge in subsequent adjudications
  + **Case-by-case-adjudication** – agencies can promulgate rules as precedent
    - *Chenery II* – agencies may use its expertise and discretion to decide if it will proceed by rulemaking or individual ad hoc adjudication; both may be treated as binding
  + **Inaction**

**ii. § 706(2)(A) & (C) – Challenges to Agency Statutory Authority**

Courts may “hold unlawful and set aside agency action … found to be … otherwise not in accordance with law [or] … in excess of statutory … authority”

* ***Chevron* deference** – agencies receive deference for their interpretation of the enabling statutes if the statute is unclear and the agency’s interpretation is reasonable. Agencies often prevail despite judicial ideology. *See* Miles & Sunstein (2006)(indicating that judicial ideology is *a* factor at SCOTUS level).
* *Christensen* -excluded interpretations contained in policy statements, agency manuals, and enforcement guidelines from Chevron deference
* **Step 0**– is there express or implied delegation to make rules with the force of law, and did the agency utilize this authority?
  + *Mead* – look to procedure and force of law; if no delegation to make rules with force of law consider *Skidmore* deference
    - **Procedure** – character of the decision (e.g. § 553 or adjudication)
      * Presumption that notice-and-comment rulemaking and adjudications are within *Chevron*’s domain, but is not a necessary condition
    - **Force of law** – character of the decision (factors, not traditional test)
      * Does the decision create a binding precedent (e.g. binding on third parties)
      * Is the decision reviewable (e.g. de novo review by a tribunal/Court)
      * Does the decision have “authoritativeness” (e.g. number of decisions issued and who in the agency issued the decisions)
  + If decision is not entitled to *Chevron* deference, it may still be entitled to a certain level of deference based on *Skidmore* factors; gradations of deference based on multi-factor test
    - Relevance and strength of agency expertise
    - Thoroughness of agency reasoning
    - Logical validity of the reasoning
    - Agency consistency over time
  + *Brand X* – judicial construction of a statute administered by an agency is provisional; if the underlying statutory term is ambiguous court should uphold an agency interpretation despite prior judicial construction
* **Step 1** Is the statute **clear** on the precise issue at hand?
  + **Traditional tools** of statutory interpretation
    - To prevent doctrine from collapsing, necessary to either exclude certain tools or require a “truly clear” statutory meaning, rather than a reasonable one
      * Legislative history, scope of preemption, general purpose typically excluded
    - *Chevron* – Court considered statutory text and legislative history (which was still an acceptable tier 1 tool at the time)
    - *MCI* – considered ordinary meaning, structural inferences and nondelegation canon
      * Dissent – adopted purpose to create uncertainty and allow for deference
    - *B&W* – considered ordinary meaning, structural inferences, specific over general canon, legislative history, and nondelegation canon
      * Ordinary meaning and general purpose suggested deference, but “too big to defer”
  + Nondelegation canon – for **major policy questions**
    - *B&W* – nondelegation canon against deference if it is an “extraordinary question”
      * Affects a significant portion of the economy (e.g. regulation of an entire industry)
      * Politically salient issue that should be decided by Congress (e.g. # of comments)
      * Issue is significant to the statutory scheme (*MCI*)
    - *MCI* – before “too big to defer” but also considered nondelegation canon
      * Issue was significant to statutory scheme – rating filing was “heart” of the statute
* **(Step 2)** If not clear, is the agency’s answer permissible or reasonable?
  + To distinguish from arbitrary and capricious review, should only ask whether the agency acted within the permissible range of the statute; not a substantive policy review.

**iii. § 706(2)(A) – Arbitrary and Capricious Review (Reasoned Decision Making)**

Courts are authorized to set aside agency action found to be “arbitrary and capricious.” This is a substantive policy review, potentially influenced by ideology, but tends to be modest in practice

* **Test** – “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” *State Farm* (1983) (airbags). Review only the actual basis for the agency’s decision. *See Chenery I* (1943*)*; probably invalid if:
  + Agency relied on factors Congress prohibited the agency from considering
    - Is redundant; Courts may already review for this under the APA
  + Failed to consider an important aspect of the problem
    - Significant issue raised in comments or agency previously proposed/considered approach – requires a reasonable response (e.g. inertia in *State Farm*)
  + Explanation is counter to evidence before it, or is so implausible it cannot be attributed to a difference in view or agency expertise
  + *State Farm* – agency failed to consider a reasonable alternative (e.g. airbag mandate) and inadequately explain safety benefit estimate (e.g. inertia theory)
    - Airbag mandate was considered reasonable because agency had already considered airbag technology and deemed it safe
    - Agency had previously endorsed the inertia theory, but failed to apply it to the automatic seatbelts analysis; court is preventing gaps in an agency’s reasoning
* *National Customs Brokers* – decision not to initiate rulemaking only overturned “for compelling cause, such as plain error of law or a fundamental change in factual premise
* *Fox* – for changes in agency policy, no more rigorous review; suffices that “new policy is permissible under the statute, there are good reasons for it, and agency believes it is better”