CHAPTER III

THE SCOPE OF JUDICIAL REVIEW

The courts' review of agency action (or inaction) furnishes an important set of controls on administrative behavior; indeed, these are the controls that are most often at issue in administrative law. Unlike the political oversight controls, which generally influence entire programs or basic policies, judicial review regularly operates to provide relief for the individual person who is harmed by a particular agency decision. Judicial review also differs from the political controls in that it attempts to foster reasoned decisionmaking, by requiring the agencies to produce supporting facts and rational explanations. Thus, judicial oversight may work at cross-purposes with the oversight activities of the political branches, which depend heavily on pressure, bargaining, and compromise rather than on reasoned analysis. Yet judicial review can also serve as an essential supplement to political controls on administration: one of its major functions is to assure that the agency is acting in accord with the will of the political branches, as expressed in the enabling legislation. At the same time, judicial review may contribute to the

political legitimacy of bureaucratic regulation, by providing an independent check on the validity of administrative decisions.

Like the regulatory process, judicial review has evolved over a period of years into a complex and not completely coherent system. A series of statutory, constitutional, and judicial doctrines have been 72

developed to define the proper boundaries on judicial oversight of administration. In some areas, the courts may lack institutional competence to review an administrative action because the decision in question is political, or the plaintiff is asking the court to render an advisory opinion; in other instances, the court may decline to intervene until the administrative process has had a chance to run its course. On the whole, however, the trend in modern statutes and judicial decisions is to make judicial review more widely and easily available. This trend, and its limits, will be examined in Chapter 10 of this text.

Where judicial review is available, the question then becomes: how far can the court go in examining the agency decision? Technically, this issue is known as "scope of review" and, as Professor K.C. Davis observed, the scope of review for a particular administrative decision may range from zero to a hundred percent. That is, the reviewing court may be completely precluded from testing the merits of an

agency action, or it may be free to decide the issues de novo, with no deference to the agency's determination. Usually, however, the function of the reviewing court falls somewhere between these extremes.

Inherent in judicial review are many functional limitations. It is designed only to maintain minimum standards, not to assure an optimal or perfect decision. Thus, above the threshold of minimum fairness and rationality, the agencies may still make unsatisfactory decisions or use poor procedures. Even [73]

a judicial reversal may have little impact on administrative policy, if there are strong bureaucratic or political reasons for the agency to persist in its view. On remand, the agency may simply produce a better rationalization for its action, or reach the same result using different procedures. And, of course, there are many decisions in which judicial review is not even sought. Judicial review can be expensive and slow, and the outcome is never certain. These factors often combine to prevent parties from bringing even a meritorious claim, particularly when the person aggrieved is not wealthy or does not have a large financial stake in the outcome. Yet, despite the "limited office" of judicial review, it is generally regarded as the most significant safeguard available to curb excesses in administrative action.

1. A. LAW, FACT, AND DISCRETION

To understand the complex assortment of administrative law doctrines on judicial review, one must begin with the realization that most administrative decisions result from a series of determinations on the agency's part. Typically, an agency *interprets the law* it is supposed to implement; it *finds facts* about the situation it will address; and it *uses discretion* in applying the law to the factual situation that it has found to exist. Each of these types of determinations, when contested, calls for a different kind of inquiry by a reviewing court.

These same categories are reflected in 5 U.S.C. § 706, the Administrative Procedure Act's scope of 74

review provision. Section 706(2) lists a variety of grounds on which an agency decision can be reversed. Two clauses deal exclusively with questions of law: whether the Constitution has been violated (§ 706(2)(B)), and whether the agency has exceeded its statutory authority (§ 706(2)(C)). Two other clauses deal exclusively with fact issues: § 706(2)(E) codifies the "substantial evidence" test, which is most often applied in proceedings in which there has been a formal, trial-type hearing; and § 706(2)(F) provides for de novo fact review (a rarity in administrative law). Section 706(2)(A) contains the APA's "arbitrary and

capricious" test, which, depending on the context, can involve legal, factual, or discretionary issues. Finally, § 706(2)(D) permits a court to reverse an agency because of procedural error. (Procedural issues are discussed in subsequent chapters of this book; the present chapter is concerned exclusively with judicial review of substantive issues.)

A general rule of thumb is that a reviewing court takes more responsibility for reviewing an agency's legal conclusions than for reviewing its factual or discretionary determinations. Some of the reasons for this distinction can be briefly stated. The courts' relative independence in declaring the law is a natural outgrowth of their traditional role in the American legal system; in administrative law, as in other subject areas, the judiciary claims to be "the final authority on issues of statutory construction." Chemical Manufacturers Ass'n v. NRDC, 470 U.S. 116 (1985). This posture of judicial independence, however, has to coexist with the reality that Congress regularly delegates broad authority to

administrative agencies. Sometimes Congress does so explicitly; at other times it delegates by merely leaving a statutory term open-ended, in the expectation that the agency will flesh out the legislation. In either situation, broad judicial deference to the administrator's discretionary choices enables an agency to exercise the kind of creativity that the legislature intended. In line with this

reasoning, a court's review of the merits of an agency action typically entails two tasks, performed in sequence: first, to ensure that the agency did not exceed the bounds of the delegation; and second, to ensure, through a more deferential examination of the agency's factual and discretionary determinations, that the delegated power was exercised in a rational fashion.

A court's most intensive scrutiny during judicial review of administrative action is typically directed at questions of whether the agency acted within its authority, considered proper factors in reaching its decision, and complied with all required procedures. If it did, the agency's remaining determinations, relating to its findings of fact and exercise of discretion, should (at least in theory) be reviewed more deferentially.

An agency can write opinions to explain its actions, generate and follow its own precedents, and structure its discretion through rules and standards. Thus, a court can, and often will, hold the agency to observe high standards of "reasoned decisionmaking." This also means, however, that the agency can itself play a lawmaking role, rivaling the

court's role. Questions about the manner in which these two branches of government should share norm-setting authority have

been a major source of debate during the modern history of administrative law.

Some of the respective institutional strengths of courts and agencies suggest further justifications for the above division of labor. For example, the judiciary's ability to interpret constitutional and statutory requirements is commensurate with that of the agencies, and judges also have the advantage of being comparatively disinterested. An agency may tend to misinterpret a jurisdictional limitation in order to expand its power and authority, for example, and close judicial attention to legal issues can counteract this tendency toward bureaucratic empire building. On the other hand, when the agencies are dealing with highly technical issues of fact or policy—whether the airborne pollutants generated by leaded gasoline are absorbed by human beings in sufficient quantities to pose a health hazard, or whether emergency core cooling systems on nuclear reactors are adequate to prevent releases of radiation in certain hypothesized accidents—one would expect the courts, staffed by generalist lawyers, to be less well equipped to make the basic decision. Even if the issue is as simple as whether a welfare recipient has outside sources of income, the agency fact-finder who has heard the testimony and observed the demeanor of the witnesses may be in a better position to assess their credibility and decide where the truth

lies.

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Considerations of economy and efficiency are also pertinent. When a court announces an interpretation of the law, it sets forth a standard that an agency can apply in future cases of the same general type. A one-time decision of this kind consumes few judicial resources. But if, in every individual case, the court were obliged to duplicate the agency's work in finding facts and applying the law to them, the burden on the courts would be enormous and the delays intolerable. The costs to the participants and the government would also be formidable.

Despite these theoretical and practical factors suggesting that courts should review legal issues more intensively than factual and discretionary issues, the differences in rigor among the various standards of review should not be exaggerated. While courts regard themselves as the final authorities on legal questions, they do give significant deference to administrators' views in resolving those questions. On the other hand, judicial review of factual findings and exercises of discretion, although basically quite deferential, includes a significant supervisory role for the courts. Indeed, this latter type of review has become particularly probing in the modern era.

Moreover, whatever the doctrinal rules may say, each of the prevailing standards of judicial review in administrative law is highly flexible, giving the courts ample room to maneuver in the interests of justice as they may define it. Notwithstanding these cautionary considerations, however, distinctions among law, fact, and discretion are vital starting points if one is to make sense out of contemporary case law on scope of review.

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2. B. LEGAL ISSUES

1.GENERAL PRINCIPLES

In most areas of our legal system, the courts enjoy unquestioned preeminence in deciding issues of law, but in administrative law there is a strong tradition of deferring to the legal views of agencies. The doctrinal principles governing this area evolved in a gradual, perhaps erratic, fashion. An early milestone was NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). There the Board ruled that "newsboys" who sold Hearst newspapers on street corners were "employees" within the meaning of the National Labor Relations Act, and hence entitled to bargain collectively under the Act. The Supreme Court upheld that ruling, but not by finding on its own authority that the newsboys

were "employees." Instead, the Court said that its function as a reviewing court was "limited," because "the question [was] one of specific application of a broad statutory term." This holding can be understood as resting on a conclusion that Congress had delegated to the Board the responsibility to determine what types of workers would qualify as "employees" under diverse circumstances. The *Hearst* decision did not, however, oust the judiciary from its law-declaring role entirely. On the contrary, the Court began its analysis by considering whether the NLRB's understanding of its duty was consistent with the congressional mandate. The Court answered this question on its own authority, agreeing with the Board that the correct inquiry was whether the newsboys suffered from economic conditions of a kind that deserved labor law [79]

protection, not whether they would have been deemed "employees" at common law. Only because the Board had applied proper legal standards, in the Court's view, did the Court proceed to the second stage in its inquiry, where its function was "limited." In short, *Hearst* effectively endorsed a model of decisionmaking in which administrators would wield significant norm-setting authority, but only within judicially drawn boundaries.

The Court took a further step towards deference to agencies' interpretations in what is now the leading case on the subject, Chevron

U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). *Chevron* involved a challenge to the EPA's "bubble" policy, a plan designed to reduce the costs to manufacturers of installing pollution controls. The legality of the plan hinged on the validity of an EPA rule that defined the Clean Air Act term "stationary source" to refer to an entire manufacturing plant, rather than an individual device within the plant. The Court upheld the rule, prescribing two inquiries that a reviewing court should conduct when reviewing an agency's construction of a statute that it administers. These two inquiries are sometimes known as "*Chevron* step one" and "*Chevron* step two," respectively. The first was whether "Congress has directly addressed the precise question at issue." If so, the court would have to "give effect to the unambiguously expressed intent of Congress." However, if the statute were to prove "silent or ambiguous with respect to the specific issue," the remaining question was whether the agency's answer was "permissible"—or, as the Court also phrased it, a "reasonable interpretation." Here, 80

Congress itself "did not have a specific intention" regarding the bubble approach, and the EPA's use of that approach was "a reasonable policy choice for the agency to make."

To some extent, the *Chevron* reasoning was simply a restatement of *Hearst*, recognizing that, within judicially defined boundaries, an

agency should have latitude to exercise its delegated authority, subject to only limited oversight by the courts. In other respects, however, the *Chevron* opinion broke new ground. Rather than determine on a case-by-case basis whether to follow the delegation reasoning of *Hearst*, the Court spoke broadly of a test that a court should "always" apply when it reviews an agency's construction of a statute that it administers. Moreover, the logic of the *Chevron* test indicated that, to whatever extent the statute remained ambiguous with respect to a particular controversy, the reviewing court should *presume* that Congress has delegated to the agency the task of filling in the gap in some reasonable way. As the Court remarked, the drafters of the legislation may have actually decided to make such a delegation, or they may have left an ambiguity through inadvertence or inability to reach agreement, but "[f]or judicial purposes, it matters not which of these things occurred."

Over the years, this aspect of the *Chevron* reasoning has given rise to extensive debate and disagreement, even within the Court itself. See, e.g., City of Arlington v. FCC, 133 S. Ct. 1863, 1883 (2013) where Chief Justice Roberts, dissenting from the majority's deference to the FCC's interpretation of a §

provision of the Telecommunications Act of 1996, argued that "before a court may grant [binding] deference, it must on its own

decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."

Defenders of the *Chevron* approach have argued that such deference is supported by a number of policies, including the following: (1) Agencies tend to be familiar with, and sophisticated about, the statutes they administer; they understand the relationships among various provisions, the practical implications of adopting one interpretation as opposed to another, etc. (2) As unforeseen problems develop in the administration of a complex regulatory scheme, the agency needs flexibility if it is to make the program function effectively. (3) As *Chevron* noted, an agency has ties to the incumbent administration, and thus is politically accountable for its choices in a way that a court cannot be. (4) Deference promotes uniformity in the law, because it makes reviewing courts scattered across the country less likely to adopt differing readings of a statute; instead, the view taken by a single centralized agency will usually control. Skeptics have responded to these arguments by recalling traditional justifications for judicial review—for example, that administrative agencies cannot be trusted to be the final arbiters of their own power, that the courts' independence is a necessary check, and that courts are at least as competent as agencies in matters of legal interpretation.

Perhaps reflecting this clash of views, cases have applied *Chevron* in a variety of ways over the years. In one group of decisions, courts have upheld agency interpretations with little elaboration, simply declaring that a statute is ambiguous and the agency's view is not unreasonable. It is sometimes hard to tell how closely the court examined the parties' contentions before drawing this conclusion. Other cases, however, have taken full advantage of the flexibility that is built into the *Chevron* doctrine. When carefully applied, the formula leaves open a number of avenues for active court intervention, as the following discussion explains.

a. Framing Issues That Congress Has "Directly Addressed." Generally, the first task in applying the *Chevron* test is to identify the "precise question" that Congress may have "directly addressed." The most straightforward argument a challenger can make is that the statute categorically prohibits the agency from taking the action in question, but this is not the only possible option. Many statutory delegations of power "directly address" an agency by instructing it to take account of particular factors or interests in making its decisions. One issue for the court to resolve during review, therefore, will be whether the agency applied the legally permissible factors. A classic

case in which this sort of judicial inquiry led to reversal is Addison v. Holly Hill Fruit Prods., 322 U.S. 607 (1944): The Court remanded a regulation of the Wage-Hour Administrator classifying companies on the basis of size, because the underlying statute had required the Administrator to classify them on the basis of geography only.

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Furthermore, ambiguity is usually a matter of degree. Enabling legislation that is acknowledged to be vague in some respects may nevertheless contain enough specificity to convince a court that a statutory term cannot possibly mean what the agency claims it means. For instance, in a well-known post-*Chevron* case, the Immigration and Nationality Act provided that an alien was eligible for discretionary relief from deportation if she could show that she had a "well-founded fear of persecution" in her native land. The Board of Immigration Appeals interpreted this phrase to mean that the alien must show a "clear probability" of persecution. The Court rejected that interpretation, noting that the Act elsewhere used the "clear probability" test as a basis for *automatic* relief from deportation. According to the Court, the language, history, and structure of the Act unequivocally demonstrated that Congress intended the discretionary provision to be less demanding than the

automatic one. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); see also City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994) ("EPA's interpretation . . . goes beyond the scope of whatever ambiguity [the legislation] contains.").

Ultimately, there is no single preferred way to frame the "precise question" presented in a given review proceeding. The challenger is entitled to a free choice of statutory theories against which the agency action will be measured—but the challenger has the burden of showing that the statute "clearly" supports some such theory (as opposed to being ambiguous on that score).

b.Resolving Questions Using "Traditional Tools." Once a court has identified an issue that Congress may have "directly addressed," it must decide whether the statute contains a "clear" answer to that question. Sometimes judges find such an answer in the language of the statute. In MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218 (1994), for example, the FCC announced that it would exempt all long-distance telephone carriers, except the most dominant one (AT&T), from having to submit tariffs to the agency specifying the rates they would charge. The Commission relied on its statutory power to "modify" the filing requirements of the Communications Act. Quoting from dictionary definitions, however, the Court concluded that the word

"modify" connotes moderate change, and the agency's wholesale dismantling of its rate regulation program for the smaller carriers was too sweeping to qualify as a "modification." Of course, as the Court's 5–3 vote in *MCI* suggests, statutory clarity is often in the eye of the beholder. In *Chevron* terms, a court's conclusion that the legislature's intent is "clear" seems to mean only that the court finds a particular interpretation (either the challenger's or the agency's) to be very convincing, not that the interpretation must be beyond debate.

Not all rejections of agency interpretations rely as heavily on the "plain meaning" of the statutory language as the *MCI* opinion did. *Chevron* itself said that courts may draw upon "traditional tools of statutory construction," and in our legal system courts have traditionally inquired into the intent of Congress by looking at the overall structure of a

statute, related provisions, the legislative history, and the underlying purposes of the statute. For example, in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), the Court invalidated FDA regulations that would have restricted the marketing of tobacco products to young people. The agency's jurisdiction extends to "drugs" or "devices" that are "intended to affect the structure or any function of the body," and the Court assumed for argument's sake that this wording was broad

enough to apply to tobacco products. Nevertheless, the Court reasoned, the statutory context militated against jurisdiction, because the regulatory scheme contemplates that any product regulated by the agency must be safe and effective for its intended use. Tobacco, however, had not been shown to be safe for any use; thus, a finding that the FDA had jurisdiction over these products would require the agency to ban them outright, a result that even the agency did not seek. Moreover, the FDA had for years assured Congress that it lacked jurisdiction over tobacco products. In the Court's view, the legislature had relied on and effectively ratified these assertions when it adopted several limited regulatory measures on its own, such as laws requiring warning labels on cigarette packages.

Contextual considerations do not always overcome the deference policy of *Chevron*, however. For example, the Endangered Species Act prohibits "taking" a protected species without a permit, and it defines "take" to include "harm." A regulation of the Secretary of the Interior provided that modification of the habitat of a species could qualify as a "harm." [86]

A group of landowners sued for a declaration that the regulation was unlawful. They argued that the word "take" most naturally suggests the direct use of force against an animal, and that other words in the

Act's definition of "take," such as "shoot," "kill," and "capture," confirmed that interpretation. The Court, however, decided that, in light of the ambiguity in the word "take" and the history and purposes of the Act, as well as the breadth of the Act's delegation and the Secretary's expertise, the regulation was sufficiently reasonable to survive scrutiny under *Chevron*. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

Courts also draw freely on canons of construction in administrative cases. For example, they may say that an otherwise tenable agency interpretation must be rejected because it would raise a serious constitutional question. See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (construing Clean Water Act narrowly, in part to avoid possible Commerce Clause problems); see also INS v. St. Cyr, 533 U.S. 289 (2001) (construing immigration statute as prospective only, in part because of a canon that disfavors retroactive legislation). As usual in matters of statutory construction, however, the courts' use of canons in regulatory cases is highly discretionary. Thus, the judicial policy of deferring to administrative interpretations can still outweigh the constitutional avoidance canon in a given case. See, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (relying on *Chevron* to uphold HHS "gag rule" limiting abortion counseling by doctors in federally funded clinics. 8-

despite the constitutional concerns implicated by such a restriction on speech).

c. *Unreasonable Interpretations.* As noted above, the *Chevron* opinion indicated that, even where the applicable statute does not "clearly" foreclose an administrative interpretation, a reviewing court need not uphold the agency's view unless it is "reasonable." By adding this condition, *Chevron* apparently meant to say that, once the court has decided that an agency acted within the terms of its delegated authority, it must go on to determine whether the agency implemented that authority in a reasonable fashion. In AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999), for example, the Court invalidated an FCC rule that required local telephone companies to make their facilities available to competitors on an unlimited basis. The Court said that the FCC's interpretation of the Act was unreasonable, because it did not adequately consider the Act's criteria for granting access; the Commission had failed to prescribe an access policy that was "rationally related to the goals of the Act." In practice, this second step in the *Chevron* formula seems equivalent to, or at least overlaps, the "reasoned decisionmaking" inquiry that courts conduct when they decide whether an agency action is arbitrary and capricious (see pp. 102–103 infra). The courts sometimes recognize this similarity. See, e.g., Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016); Judulang v. Holder, 132 S. Ct.

476 (2011). This phase of *Chevron* review tends to be particularly deferential, because by definition it relates to the agency's exercise of discretion. Indeed, 88

judicial rejections of agencies' statutory interpretations occur much more frequently at the first step of *Chevron* review than at the second.

Nevertheless, the case law is not uniform. Some cases that hold an agency interpretation to be "unreasonable" under *Chevron* echo lines of argument that one can often find in "step one" cases: the statute may be ambiguous in some respects, but the agency's interpretation is clearly contrary to congressional intent. See, e.g., Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014).

d.Summary. In practice, the *Chevron* doctrine has proved to be more complex and subtle than was initially anticipated. To many minds, the case remains closely associated with the theme of judicial deference to administrators; yet *Chevron* has by no means prevented courts from maintaining significant discipline over agency action. Admittedly, the manner in which *Chevron* review will play out in any particular case is often unpredictable; given the plasticity of statutory interpretation principles in our legal system, the situation could hardly be otherwise. At the very least, however, *Chevron* has