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A Decade of Administrative Law: 1987-1996

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A DECADE OF ADMINISTRATIVE LAW: 1987-1996

Bernard Schwartz†

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INTRODUCTION

In the life of the law a decade is not a long time. It is, nevertheless, long enough to justify a survey of developments in a particular field, such as administrative law. This article will present a survey of the last ten years in administrative law, focusing upon the cases decided during the period.¹

Even a ten-year survey illustrates the rapidly changing nature of administrative law. Indeed, perhaps the outstanding feature of present-day administrative law is its Heraclitean nature: the subject is one in a continual state of flux. During recent years we have been in the midst of a virtual administrative law explosion. In a 1975 article, Judge Friendly asserted, "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution."² The same has been true of other areas covered by administrative law; the entire subject is going through a period of well-nigh unprecedented change. To one working in administrative

1. For a similar decade survey, see Bernard Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 MICH. L. REV. 775 (1953).

2. Henry J. Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1273 (1975).

law, it truly may be said (with Heraclitus), "The world's a scene of changes, and to be Constant [in such a field], were inconstan[t]."³

The cases during the past decade well illustrate this point.

ADMINISTRATIVE AGENCIES

Independence

It is ironic that, though the decade's end saw the demise of the archetype modern agency,⁴ just before it began the Supreme Court reaffirmed the constitutional position of the ICC-type independent commission. That position had been based upon the *Humphrey* case's⁵ limitation upon Presidential removal power, which enabled the ICC-type agency to be independent of Presidential control. For the first time in decades, however, both *Humphrey* and its position as the charter for agency independence have been subjected to challenge. Just before his elevation to Olympus, Justice Scalia asserted, "It has in any event always been difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government."⁶

This Scalia statement was based upon the assumption that "the rationale . . . of *Humphrey's Executor* requires, that the presidential removal for cause permitted under the statute upheld there did not include removal because of the appointee's failure to accept presidential instructions regarding matters of policy or statutory application delegated to him by Congress."⁷ This rationale has, of course, been the foundation for agency independence, since it denies presidential power to remove agency members for failure to follow White House instructions.

But Scalia went further and questioned the very concept of agency independence underlined by *Humphrey* as "stamped with some of the political science preconceptions characteristic of its era and not of the present day."⁸ According to Scalia, "It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies [or] that it is even theoretically desirable to insulate them from the democratic process."⁹

During the Reagan Presidency, leading members of the administration carried the Scalia animadversion to its logical extreme. In a widely reported speech, Attorney General Meese challenged the very foundation of the ICC-type agency, asserting that its independence from Presidential control was contrary to

3. Abraham Crowley, *Inconstancy*, in BARTLETT'S FAMILIAR QUOTATIONS 266 (15th ed. 1980).

4. See *infra* notes 802, 804-08 and accompanying text (discussing the abolition of the Interstate Commerce Commission).

5. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

6. *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

7. *Id.*

8. *Id.*

9. *Id.*

the separation of powers. Indeed, according to Meese, the entire system of independent agencies is of questionable constitutionality. "It should be up to the President to enforce the law," Meese declared.¹⁰ "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government."¹¹

Despite the Scalia and Meese doubts, however, the Court went out of its way in *Bowsher v. Synar*¹² to confirm the constitutionality of the ICC-type independent agency. At issue in *Bowsher* was a statute that was to be carried out by the Comptroller General — an officer removable not by the President but by a joint resolution of Congress. The *Bowsher* decision ruled that Congress might not vest executive power in an officer subject to its removal power.

During the *Bowsher* oral argument, the Solicitor General told the Justices that the proponents of constitutionality of the challenged statute were trying to "scare" them with the argument that upholding the lower court on the constitutional issue would endanger the independent agencies such as the Federal Trade Commission and the Federal Reserve Board. At this, Justice O'Connor interposed, "They scared me with it."¹³

As I have shown elsewhere,¹⁴ Chief Justice Burger's original *Bowsher* draft would have cast doubt on the constitutionality of the independent agencies because of the limitations on the President's removal power over them. However, the Justices refused to accept the draft until the offending passages were modified. In addition, a footnote was added to the opinion, which specifically distinguishes the ICC-type agencies from the Comptroller General. According to it, "Appellants . . . are wide of the mark in arguing that an affirmance in this case requires casting doubt on the status of 'independent' agencies because no issues involving such agencies are presented here."¹⁵ That is true because "statutes establishing independent agencies typically specify either that the agency members are removable by the President for specified causes . . . or else do not specify a removal procedure."¹⁶ There is "no independent agency whose members are removable by the Congress for certain causes short of impeachable offenses, as is the Comptroller General."¹⁷

In a June 6, 1986, letter to Justice Brennan, the Chief Justice referred to the *Bowsher* footnote and stated, "I think I've made it clear we are casting no doubt on the SEC, FTC, EPA, etc."¹⁸ The *Bowsher* footnote was thus intended

10. BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 45 (4th ed. 1994).

11. *Id.*

12. 478 U.S. 714 (1986).

13. Argument Before the Court, 54 U.S.L.W. 3709, 3710 (Apr. 29, 1986).

14. See Bernard Schwartz, *An Administrative Law "Might Have Been"* — Chief Justice Burger's *Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221 (1990).

15. See *Bowsher*, 478 U.S. at 725 n.4.

16. *Id.*

17. *Id.*

18. Schwartz, *supra* note 14, at 231.

to inter the doctrine of the unconstitutionality of the independent agencies because they are not subject to the President's unlimited removal power. In a case the next year, the Ninth Circuit relied directly upon *Bowsher* in rejecting a claim that the FTC Act was invalid because it vested executive power in an agency whose members do not serve at the pleasure of the President.¹⁹

Then the 1988 decision in *Morrison v. Olson*²⁰ finally put to rest the Scalia assertion that *Humphrey* was wrong in holding that Presidential removal power over the ICC-type independent agencies could be limited. *Morrison* upheld the law that restricted the President's power to remove an independent counsel (appointed to investigate and prosecute high-ranking officials for criminal violations) to removal for cause. *Morrison* contains the complete legal answer to the claim that the independent agencies are unconstitutional because their members are not subject to unlimited Presidential removal power. Under *Morrison*, statutes limiting the President's removal power to removal for cause are clearly valid. *Morrison* states expressly, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority."²¹ There is no doubt about the impact of this statement upon the independent agencies. With regard to them, *Morrison* finally confirms the *Humphrey* holding that Presidential removal power over the ICC-type agencies may constitutionally be restricted to removal only for cause.

The President and the APA

As the leading case on its applicability points out, a primary purpose of the Federal Administrative Procedure Act (APA) was to introduce "uniformity of procedure and standardization of administrative practice."²² In accordance with this purpose Congress defined "agency" in the APA in a broadside manner, as "each authority of the Government of the United States [other than] Congress [or] the courts."²³ The Supreme Court itself has stated "that any exception that we may find to its applicability would tend to defeat this purpose."²⁴

Despite this, *Franklin v. Massachusetts*²⁵ held that the President is not an "agency" within the meaning of the APA, saying, "The President [may not be] explicitly excluded from the APA's purview, but he is not explicitly included either."²⁶ Congressional silence on the matter did not, however, bring the President within the APA definition. "Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."²⁷

19. See *FTC v. American Nat'l Cellular, Inc.*, 810 F.2d 1511, 1513-14 (9th Cir. 1987).

20. 487 U.S. 654 (1988).

21. *Id.* at 691.

22. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

23. 5 U.S.C. § 551(1) (1994).

24. *Wong Yang Sung*, 339 U.S. at 41.

25. 505 U.S. 788 (1992).

26. *Id.* at 800.

27. *Id.* at 800-01.

Instead, said the Court, “[w]e would require an express statement by Congress before assuming it intended”²⁸ to include the highest officer in the APA definition.

Whether a federal officer or authority is an “agency” within the APA definition is more than a matter of semantics.²⁹ Only if it comes within that definition is the agency action subject to the APA’s provisions. If the APA provisions do not apply to the given action, neither do the APA requirements. Thus, the Court has ruled that a deportation proceeding is not an adjudication governed by section 554 of the APA.³⁰ The case arose out of an application for attorney’s fees under the Equal Access to Justice Act (EAJA) by an alien who had prevailed in an INS deportation proceeding. The immigration judge had awarded attorney’s fees under EAJA.³¹ The Court reversed, holding that EAJA did not apply to administrative deportation proceedings. By its own terms EAJA applies only to “adversary adjudication,” which it defines as “an adjudication under section 554 of [the APA].”³² Although deportation hearings are now required by statute to be determined on the record after a hearing (i.e., the normal criterion for section 554 applicability), the Court had ruled that deportation proceedings are not subject to the APA.³³ Even if deportation proceedings come within the definition for adjudications in section 554(a), they are not “under section 554” within EAJA because they are not governed by the procedural provisions in the body of section 554.

Similarly, if the action at issue is not by an “agency” within the APA definition, it may not be challenged under the APA review provisions. The Court so held in *Franklin v. Massachusetts*, ruling that since, as seen, the President is not an “agency” within the APA meaning, his actions are not subject to APA requirements, including its provision for judicial review: the President’s acts, unlike all other executive and administrative acts, are not reviewable for abuse of discretion under the APA.³⁴ His judicially imposed exemption from the APA gives the President a unique status of review immunity, not restricted to review under the APA. Instead, *Franklin* and a more recent case³⁵ lay down a rule of virtually unlimited Presidential immunity from review, whose implications will be discussed at a later point.³⁶

28. *Id.* at 801.

29. *See* *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 971-72 (1995) (holding Amtrak is not an agency under APA, but is an agency for purpose of First Amendment).

30. *See* *Ardestani v. INS*, 502 U.S. 129 (1991).

31. *See id.* at 131.

32. *Id.* at 138-39.

33. *See* *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

34. *See* *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).

35. *See* *Loving v. United States*, 116 S. Ct. 1737 (1996).

36. *See infra* notes 564-70 and accompanying text.

Agencies versus Courts

The APA definition of "agency" excludes Congress and the courts.³⁷ Most modern administrative agencies, of course, exercise both legislative and judicial powers. It is easy, nevertheless, to distinguish between agency and Congressional action. The dividing line may not be so clear-cut between agencies and courts. Congress may assign to agencies functions traditionally performed by judges. Indeed, Justice White has referred to "those Art. I courts that go by the contemporary name of 'administrative agencies.'"³⁸

The Supreme Court has recognized that administrative proceedings that are "judicial in nature" should "in proper circumstances command the respect due court proceedings."³⁹ Hence, the *Younger* abstention doctrine,⁴⁰ under which a federal court should not enjoin a pending state judicial proceeding, also applies to a pending state administrative proceeding, so long as plaintiff will have a full and fair opportunity in the course of that proceeding to litigate his constitutional claim.⁴¹

Similarly, *University of Tennessee v. Elliott*⁴² held that in federal court actions under civil rights statutes, the resolution by a state agency, acting in its adjudicatory capacity, of disputed issues of fact which are properly before it and which the parties have had adequate opportunity to litigate, has the same preclusive effect to which it would be entitled in the state's courts. In the Court's view, traditional principles of preclusion should be applied to "the burgeoning use of administrative adjudication in the 20th century."⁴³ Hence, "it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity."⁴⁴

Still, as the Tennessee Supreme Court points out, an agency such as the Public Service Commission is not a "court";⁴⁵ the fact that it performs adjudicatory functions does not make it something other than an administrative agency. Thus, in a leading case almost half a century ago, the New Jersey Supreme Court ruled that an agency vested with adjudicatory authority was not an "inferior court" within the meaning of the relevant constitutional provision.⁴⁶

However, the legislature does have the power to transform an administrative agency into a court. The outstanding example is the United States Tax Court. But is that tribunal really a "court" or, despite its change in name, still only an administrative agency? That was the core issue in *Freytag v. Commis-*

37. See 5 U.S.C. § 551(1) (1994).

38. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 113 (1982) (White, J., dissenting).

39. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986).

40. See *Younger v. Harris*, 401 U.S. 37 (1971).

41. See *Ohio Civil Rights Comm'n*, 477 U.S. at 628.

42. 478 U.S. 788 (1986).

43. *Id.* at 797.

44. *Id.*

45. See *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986).

46. See *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 66 A.2d 726 (N.J. 1949).

sioner of Internal Revenue.⁴⁷ The immediate question in *Freytag* was whether the authority granted the Tax Court Chief Judge to appoint special trial judges to preside over any proceedings was constitutional. It was argued that the delegation to the Chief Judge violated Article II's Appointments Clause, because a special trial judge is an "Officer" of the United States who must be appointed in compliance with the clause. The Court agreed that a special trial judge is an "inferior officer" whose appointment must conform to the Appointments Clause,⁴⁸ but it held that the appointment by the Chief Judge did not violate the clause.

Under the Appointments Clause, power to appoint an inferior officer not appointed by the President may be vested by Congress "in the courts of law, or in the heads of departments."⁴⁹ The Commissioner argued that the Tax Court was a "department" because it had been an agency in the executive branch before Congress designated it as a "court," and the change in name did not remove it to a different branch. The Court, however, rejected the view that the Tax Court was a "department," and said, it "would defy the purpose of the Appointments Clause, the meaning of the Constitution's text, and the clear intent of Congress to transform the Tax Court into an Article I legislative court."⁵⁰

If the Tax Court was not a "department," it had to be one of the "courts of law" to avoid violation of the Appointments Clause. The Court held that the term "courts of law" in the clause was not limited to Article III courts.⁵¹ The opinion emphasized the discretion given Congress to assign the judicial power to non-Article III tribunals.⁵² An Article I court, which exercises judicial power, can be a "court of law" within the meaning of the Appointments Clause, and the Tax Court comes within this principle. Article I courts, such as the Tax Court, which exercise judicial power and perform exclusively judicial functions, are thus to be treated as "courts," not agencies.

Justice Scalia disagreed, urging that "the courts of law" in the Appointments Clause "are Article III courts, and the Tax Court is not one of them."⁵³ In Scalia's view, it is the identity of the officer, not the type of function performed, that tells us whether judicial power is being exercised.⁵⁴ Thus, for Justice Scalia, the Tax Court is not a court of law.⁵⁵ Instead, he concluded that the court's "Chief Judge is the head of a department."⁵⁶ In his view, "'Heads of Departments' includes the heads of all agencies immediately below the Presi-

47. 501 U.S. 868 (1991).

48. Cf. *Pennsylvania v. United States Dep't of HHS*, 80 F.3d 796 (3d Cir. 1996) (HHS Appeals Board members are "inferior" officers whose appointment by HHS Secretary does not violate Appointments Clause).

49. U.S. CONST. art. II, § 2, cl. 2.

50. *Freytag*, 501 U.S. at 888.

51. See *id.*

52. See *id.* at 889.

53. *Id.* at 902 (Scalia, J., concurring).

54. See *id.* at 907-08.

55. See *id.* at 901.

56. *Id.*

dent in the organizational structure of the Executive Branch."⁵⁷ This includes the Tax Court, since that tribunal, to Scalia, is not a court of law within the meaning of the Constitution.

The difference between Justice Scalia and the *Freytag* majority is not a mere matter of academic theory. On the contrary, it goes to the very essence of our administrative law. If the Scalia view is correct, it means that all governmental organs other than Article III courts are "departments." If Article I courts are "departments," *a fortiori* this is also true of administrative agencies, including independent agencies. Justice Scalia himself is frank that this is the consequence of his approach: "It seems to me, the word must reasonably be thought to include all independent establishments."⁵⁸

The Scalia *Freytag* opinion thus reinforced the Justice's position on the constitutional anomaly of independent agencies. In *Freytag*, Justice Scalia repeated his antipathy toward *Humphrey*, saying, "I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor."⁵⁹ Instead, once again, the Justice expressed his censure of what he calls "the distorting effects of later innovations that this Court has approved,"⁶⁰ *i.e.*, in *Humphrey* and its progeny. To most of us, on the other hand, *Humphrey* was correctly decided and remains, under *Freytag* and other decisions during the decade, the bastion of the necessary independence of agencies such as the FTC, which can be insulated from political pressures because they are not subject to direct Presidential control.

DELEGATION OF POWERS

Intelligible Principle

It is administrative law cliché that the Supreme Court has not invalidated a federal delegation in over sixty years.⁶¹ The Court's delegation decisions during the past decade confirm its post-1935 jurisprudence. At issue in *Mistretta v. United States*⁶² were mandatory guidelines by the U.S. Sentencing Commission to control imposition of sentences in criminal cases. The Court rejected the contention that Congress had granted the commission excessive legislative discretion, stating that all that is required for a valid delegation is that Congress lay down an "intelligible principle" to which the delegate is directed to conform.⁶³ As more recently explained, "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules

57. *Id.* at 918.

58. *Id.*

59. *Id.* at 921.

60. *Id.* at 922.

61. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

62. 488 U.S. 361 (1989).

63. See *id.* at 372.

that implement its statutes."⁶⁴ At the same time, it is clear that the "intelligible principle" test permits Congress to delegate power under very broad general directives. Indeed, since 1935, "[the Court has] upheld, without exception, delegations under standards phrased in sweeping terms."⁶⁵

According to *Mistretta*, there is "no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements."⁶⁶ *Mistretta* then shows specifically how the statute meets the "intelligible principle" requirement. The goals to be pursued by the commission were set forth, as well as the sentencing "purposes."⁶⁷ "In addition, Congress prescribed the specific tool — the guidelines system — to be used in regulating sentencing."⁶⁸ The commission was told to develop a system of "sentencing ranges," and the statute required the maximum for prison terms not to exceed the minimum by more than a specified amount.⁶⁹ The commission was also directed to use current average sentences as a "starting point." Moreover, Congress directed the commission to consider seven specific factors in formulating offense categories and eleven factors in establishing defendant categories.⁷⁰

In light of the post-1935 cases upholding broad delegations, the decision in favor of the Sentencing Reform Act is scarcely surprising, nor is a different result called for by the fact that "significant discretion" was vested in the commission. The delegations upheld by the Court since the *Panama* and *Schechter* cases all suggest that modern delegations may "carry with them the need to exercise judgment on matters of policy."⁷¹ Congress is not confined in its grant "to that method of executing its policy which involves the least possible delegation of discretion."⁷² The key factor is the specification of criteria, broad though they may be, to guide the delegate, not the fact that "significant discretion" is conferred.

Other Federal Cases

Cases in the lower federal courts may, however, interpose a caveat for those who have thought that the Supreme Court jurisprudence means that "the principle that the Constitution prohibits Congress from delegating its legislative authority is essentially nugatory."⁷³ It is true, as a federal court points out, "that since the New Deal era, in which the relationship between the executive and legislative branches of our government was dramatically transformed, the

64. *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996).

65. *Id.*

66. *Mistretta*, 488 U.S. at 374.

67. *See id.* at 379.

68. *Id.* at 374.

69. *See id.* at 374-75.

70. *See id.* at 375.

71. *Id.* at 378.

72. *Id.* at 379.

73. *United States v. Mills*, 817 F. Supp. 1546, 1552 (N.D. Fla. 1993).

delegation doctrine has fallen into disfavor.⁷⁴ Yet this does not mean that there is now *carte blanche* on delegation: "The fact remains, however, that the delegation doctrine safeguards the integrity of the separation of powers principle upon which our tripartite system of government was designed, and cannot be allowed to slip irretrievably into obscurity."⁷⁵ At least in the lower courts, in fact, the balance may be starting to shift in favor of the delegation doctrine.

The federal court just quoted struck down a statute giving the Secretary of State authority to determine an alien's deportability if he "has reasonable ground to believe" that the alien's presence or activities in the U.S. "would have potentially serious adverse foreign policy consequences."⁷⁶ This, the court held, was an invalid delegation, since there was no "recognized standard" upon the Secretary's otherwise "totally unrestricted freedom of choice."⁷⁷ The "potentially serious" standard was "wholly illusory. . . it imposes no floor or balancing equation to guide the Secretary."⁷⁸ It is striking that the court invalidated a delegation relating solely to foreign affairs, where, as Justice O'Connor put it at a recent oral argument, *Curtiss-Wright*⁷⁹ held that "delegation standards are much more lax."⁸⁰ According to the district court, however, *Curtiss-Wright* does not mean that such a delegation may be completely unlimited. Indeed, in *Curtiss-Wright*, the delegation, though broad, was specific "when compared to the blanket grant of discretion"⁸¹ in the instant statute.

The Eighth Circuit has also ruled that a federal statute constituted an invalid delegation.⁸² At issue was the Secretary of the Interior's acquisition of commercial land in trust for an Indian tribe. The relevant statute authorizes the Secretary "in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians."⁸³ In the Eighth Circuit's view, this provision was an unconstitutional delegation of legislative power because the statute provides no legislative standards or boundaries governing the Secretary's acquisitions. The Secretary's argument that the statutory purpose of "providing land for Indians" sufficiently defines the policy and boundaries of the delegated power was rejected. Even under the relaxed post-1935 approach, "[a] delegation is overbroad . . . 'if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to

74. *Massieu v. Reno*, 915 F. Supp. 681, 707 (D.N.J. 1996).

75. *Id.*

76. *Id.* at 698 (quoting 8 U.S.C. § 1251(a)(4)(C)(i) (1994)).

77. *Id.* at 708-09.

78. *Id.* at 709.

79. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

80. Petitioner's Oral Argument, 1996 WL 13954, at *17 (Jan. 9, 1996), *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966).

81. *Massieu*, 915 F. Supp. at 708.

82. See *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded on other grounds*, 117 S. Ct. 286 (1996).

83. *Id.* at 882 (quoting 25 U.S.C. § 465 (1994)).

ascertain whether the will of Congress has been obeyed.”⁸⁴ That, the Eighth Circuit concluded, was true of the instant delegation:

By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible “boundaries,” no “intelligible principles,” within the four corners of the statutory language that constrain this delegated authority — except that the acquisition must be “for Indians.”⁸⁵

In a case such as this, the nondelegation doctrine requires “that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition.”⁸⁶ Here, there is a “legislative vacuum”: “when Congress authorizes the Secretary to acquire land in trust ‘for Indians,’ it has given the agency no ‘intelligible principle,’ no ‘boundaries’ by which the public use underlying a particular acquisition may be defined and judicially reviewed.”⁸⁷

State Cases

Federal law is, of course, not the only law on delegation. State courts continue to take a stricter approach to delegation than the U.S. Supreme Court. Typical is a 1992 Illinois decision ruling that a delegation of power to issue certificates of appropriateness of external appearance required for building permits did not contain an adequate standard.⁸⁸ The statute provided that the certificate was to be granted “unless the Commission finds . . . that the proposed building . . . will be inappropriate to, or incompatible with, the character of the surrounding neighborhood.”⁸⁹ This, the court said, used “precisely the sort of criteria held inadequate.”⁹⁰ If anything, however, the standard at issue is more defined than the “public interest” standard upheld in federal cases.⁹¹

There are other state cases that involve out-of-the ordinary delegations. A Utah decision struck down a statute allowing a public utility to veto an incentive rate regulation plan adopted by the Public Service Commission on the ground that it was an unconstitutional delegation of legislative power to a private party.⁹² Though there has not been a comparable federal case since 1936,⁹³ the decision appears correct; to allow the regulated company to decide whether it is to be bound by the Commission’s rate plan is to vest it with the very regulatory power that should be given to the regulatory agency alone.

84. *Id.* at 881 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

85. *Id.* at 882.

86. *Id.* at 883.

87. *Id.*

88. See *Waterfront Estates Dev., Inc. v. City of Palos Hills*, 597 N.E.2d 641, 647 (Ill. App. Ct. 1992).

89. *Id.* at 647.

90. *Id.*

91. See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 2.7 (3d ed. 1991).

92. See *Stewart v. Utah Pub. Serv. Comm’n*, 885 P.2d 759 (Utah 1994).

93. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

More questionable is an Oklahoma decision⁹⁴ invalidating the state's Prevailing Wage Act — popularly known as the Little Davis-Bacon Act, since it was the state counterpart of that federal law which requires the payment of prevailing wages on federally financed construction projects. The Oklahoma law also required the prevailing wage in the locality to be paid under state construction contracts. For purposes of the statute, the prevailing wage already determined by the U.S. Department of Labor for federally funded projects under the Davis-Bacon Act was to be adopted. The court ruled that this was an invalid delegation. First, “the Act has provided no definite standards or articulated safeguards for the United States Department of Labor to follow in implementing the legislative policy declared in the Act. The current Act leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats.”⁹⁵ Yet, the Davis-Bacon Act itself provides standards that have never been questioned, and it is difficult to see why the state should have to provide its own standards in addition to guide exercise of the power to determine prevailing wages.

According to the court, however, the Oklahoma law suffers from an even more fundamental delegation defect: “Worse, it delegates to an administrative arm of the federal government. As a result, the federal agency which actually determines the prevailing wage is less answerable to the will of the people of Oklahoma than is the [comparable state official].”⁹⁶ It is hard to see why state enlistment of aid by a federal agency constitutes an unconstitutional delegation to that agency. States and nation are complementary parts of a federal system, not competing nation-states. If what Justice O'Connor terms “cooperative federalism”⁹⁷ permits the federal government to use state officers to carry out its laws, the same should be true of use of data compiled by federal officers in the operation of state laws. Would the Oklahoma court strike down the use of federal cost-of-living data to provide annual adjustments to state employees to match the rate of inflation?

“Core” Legislative Functions?

In several cases during the decade, the argument was made that there are certain “core” functions that must be reviewed under a stricter standard when they are delegated. Thus, in *Touby v. United States*,⁹⁸ it was claimed that something more than an “intelligible principle” was required when Congress authorized regulations that contemplated criminal sanctions. The contention was that regulations of this sort posed a heightened risk to individual liberty and that Congress must therefore provide more specific guidance. The Court did not

94. See *City of Oklahoma City v. Oklahoma ex rel. Okla. Dep't of Labor*, 918 P.2d 26 (Okla. 1995).

95. *Id.* at 30.

96. *Id.*

97. *New York v. United States*, 505 U.S. 144, 166 (1992).

98. 500 U.S. 160 (1991).

resolve the issue, saying, "Our cases are not entirely clear as to whether more specific guidance is in fact required."⁹⁹

More recently, however, the Court has affirmed the validity "of a delegated authority to define crimes."¹⁰⁰ According to *Loving v. United States*, the delegation doctrine does not bar

. . . Congress' delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations "confine themselves within the field covered by the statute."¹⁰¹

The *Touby*-type argument was specifically rejected in *Skinner v. Mid-America Pipeline Co.*¹⁰² A law directed the Secretary of Transportation to establish pipeline safety user fees for persons operating hazardous pipelines. Plaintiffs argued that "the assessment of these pipeline safety user fees must be scrutinized under a more exacting nondelegation lens" because, though labeled "user fees," the assessments were actually tax assessments.¹⁰³ *Skinner* rejected this argument, saying, "[W]e find no support . . . for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power."¹⁰⁴ Even if the user fees were a form of taxation, the delegation under Congress' taxing power was subject to no constitutional scrutiny greater than that applied to other delegation challenges.

Hence, as the Court has more recently confirmed, "Congress may delegate authority under the taxing power."¹⁰⁵ Yet it may be doubted that the reach of *Skinner* is as broad as some of the Court's language. There, the delegation at issue was a narrow one, authorizing user fees subject to a stated limit that ensured they would more or less cover the administrative costs of the regulatory program.¹⁰⁶ This does not mean that any delegation of the taxing power would be valid if it otherwise met the requirements of the nondelegation doctrine. For example, it is hard to see how a delegation to the Secretary of the Treasury to fix income tax rates could be upheld no matter how specific a standard to guide administrative discretion in the matter was contained in the enabling statute.

99. *Id.* at 166.

100. *Loving v. United States*, 116 S. Ct. 1737, 1748 (1996).

101. *Id.* (quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911)).

102. 490 U.S. 212 (1989).

103. *Id.* at 220.

104. *Id.* at 222-23.

105. *Loving*, 116 S. Ct. at 1748.

106. *See Skinner*, 490 U.S. at 219-20.

Loving and Presidential Delegations

Legal rules, unlike those in the physical sciences, do not have fixed areas of strain and stress; instead, too often, they may be pushed to the breaking point permitted by expediency. To this observer, the 1996 decision in *Loving v. United States* may do just that to the delegation doctrine.

At issue in *Loving* was the delegation of authority to the President to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the armed forces convicted of murder. Under *Furman v. Georgia*,¹⁰⁷ which concededly applied to the military capital punishment scheme, court-martial members were required to “specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty.”¹⁰⁸ The President had issued an Executive Order providing that, before a military death sentence may be imposed, at least one aggravating factor must be present; it then enumerates 11 categories of aggravating factors sufficient for imposition of the death penalty.¹⁰⁹ The Court held that Congress had delegated to the President the authority to prescribe the aggravating factors in military murder cases.¹¹⁰ But petitioner claimed that the separation of powers requires that Congress, not the President, make the “fundamental policy determination” on the factors that warrant capital punishment.¹¹¹ In effect, this was repeating the “core functions” argument — that Congress cannot delegate authority to prescribe aggravating factors. Instead, that was a “core” function that Congress had to perform itself. Only Congress was given the power “To make Rules for the Government and Regulation of the land and naval forces,”¹¹² and the determination of aggravating factors governing military capital cases was a “quintessential policy judgment” for the legislature.

In rejecting this claim, the Court conducted an extensive excursus into the history of military capital punishment in England.¹¹³ The excursus, though learned, was irrelevant.¹¹⁴ If there was one thing the Framers sought to avoid, it was to create their Executive in the image of the English King. What is clear, however, is the Court’s reaffirmation of the *Skinner* holding that there are no inherently nondelegable functions.¹¹⁵ *Skinner* so ruled with regard to the taxing power; *Loving* holds the same for the power to govern the military, including rules for capital punishment. “This power,” says the Court, “is no less plenary than other Article I powers . . . and we discern no reasons why Congress

107. 408 U.S. 238 (1972).

108. *Loving*, 116 S. Ct. at 1741-42.

109. *See id.* at 1742.

110. *See id.* at 1750.

111. *See id.* at 1742.

112. U.S. CONST. art. I, § 8, cl. 14.

113. *See Loving*, 116 S. Ct. at 1744-47.

114. This point was stressed in the concurring opinions of Justices Scalia and Thomas. *See id.* at 1752 (Scalia, J., concurring); *id.* at 1753 (Thomas, J., concurring).

115. *See id.* at 1748 (citing *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989)).

should have less capacity to make measured and appropriate delegations of this power than of any other."¹¹⁶

Loving pushes the Court's post-1935 abnegation on delegation to the edge. The Court holds that, despite *Mistretta's* "intelligible principle" requirement, the *Loving* delegation was valid even though Congress provided no principle (intelligible or otherwise) telling the President how to select aggravating factors. In fact, *Loving* indicates, no such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority.¹¹⁷ The implication is that no standard — not even an "intelligible principle" — is needed for a delegation to the President, particularly when it involves his duties as Commander in Chief. Indeed, the Court goes so far as to assert, "It is hard to deem lawless a delegation giving the President broad discretion to prescribe rules on this subject."¹¹⁸

Administrative law heresy perhaps — but it fits in with the dominant theme of the decade's high Court jurisprudence vis-à-vis Presidential power.

Nondelegable Policy-Making

The argument rejected in *Skinner* and *Loving* — that there are "quintessential policy judgments" that may not be delegated — was accepted in a New York case.¹¹⁹ The Public Health Council (a state agency authorized to "deal with any matters affecting the . . . public health") issued "regulations prohibiting smoking in a wide variety of indoor areas open to the public, including schools, hospitals, auditoriums, food markets, stores, banks, taxicabs and limousines."¹²⁰

The New York court ruled the PHC smoking ban invalid. In the court's view, "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed."¹²¹ In issuing these regulations, "the PHC has usurped the Legislature's prerogative, all of these circumstances, when viewed in combination, paint a portrait of an agency that has improperly assumed for itself '[t]he open-ended discretion to choose ends' . . . which characterizes the elected legislature's role in our system of government."¹²²

According to the court, "Striking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function."¹²³ In this case, "the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost."¹²⁴ Here, "it was 'acting solely on [its] own ideas of sound public policy' and was there-

116. *Id.*

117. *See id.*

118. *Id.* at 1751.

119. *See Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

120. *Id.* at 1352.

121. *Id.* at 1355.

122. *Id.*

123. *Id.*

124. *Id.*

fore operating outside of its proper sphere of authority."¹²⁵ The delegation to the agency, broad though it is, "cannot be construed to encompass the policy-making activity at issue here without running afoul of the constitutional separation of powers doctrine."¹²⁶

To this writer, the New York court's decision is both sound and consistent with administrative law principles. It is basic in our system, as then-Justice Rehnquist stated, "that important choices of policy are made by Congress, the branch of our Government most responsive to the popular will."¹²⁷ Thus, a broad "public interest" delegation to the FPC did not authorize the Commission to issue a rule prohibiting discriminatory employment practices by regulated companies.¹²⁸ A similar delegation to the FCC did not empower it to require cable TV operators to allow free access to certain channels by public, educational, governmental, and leased access users.¹²⁹ The decision to eradicate employment discrimination by power companies, or to impose common-carrier obligations on cable operators, is, in Rehnquist's phrase, "quintessentially one of legislative policy."¹³⁰ Such decisions should be made by the elected representatives of the people, not appointed bureaucrats — however well-meaning their intentions. The same is true of the decision to ban smoking in public places. It too, involves the type of basic change in public policy that should be made by the legislator and not an administrative delegate. After all, as Justice Brennan reminds us, "formulation of policy is a legislature's primary responsibility."¹³¹

Adjudicatory Authority

It is by now a truism that "not . . . all adjudication is judicial."¹³² The power to decide contested cases is an integral part of today's administrative process;¹³³ at least since *Crowell v. Benson*,¹³⁴ it has not been doubted that the power to decide cases may be delegated to agencies other than courts. In recent years, however, the Supreme Court has needlessly confused the question of what adjudicatory authority may be delegated to administrative agencies. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹³⁵ Justice Brennan's plurality opinion revived the public rights-private rights distinction as the criterion upon which delegations of adjudicatory authority to agencies may turn. The Brennan opinion permits the administrative exception to the rule of

125. *Id.* (quoting *Matter of Picone v. Commissioner of Licenses*, 149 N.E. 336 (N.Y. 1925)).

126. *Id.* at 1356.

127. *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

128. *See NAACP v. FPC*, 425 U.S. 662 (1976).

129. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

130. *Industrial Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring).

131. *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring).

132. *Mulhearn v. Federal Shipbuilding & Dry Dock Co.* 66 A.2d 726, 730 (N.J. 1949).

133. *See Matter of Carberry*, 556 A.2d 314, 319 (N.J. 1989).

134. 285 U.S. 22 (1932).

135. 458 U.S. 50 (1982).

Article III adjudication only for "decisions involving 'public' as opposed to 'private' rights."¹³⁶

*Granfinanciera, S.A. v. Nordberg*¹³⁷ shows that those of us who had concluded that *Thomas v. Union Carbide Agricultural Products Company* had interred the public rights-private rights distinction as the basis of agency adjudicatory authority may have been too hasty. In *Granfinanciera*, Justice Brennan again relied upon the distinction, this time speaking through an opinion of the Court.

On its face, *Granfinanciera* involved only a bankruptcy issue — "whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer."¹³⁸ The Court answered in the affirmative, asserting, "Congress may only deny trials by jury in actions at law . . . in cases where 'public rights' are litigated."¹³⁹ It may consequently assign cases "involving public rights" to agencies free from Seventh Amendment strictures, "[b]ut it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury."¹⁴⁰ Conversely, "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial."¹⁴¹ The same is true of Congressional power to assign the adjudication of a statutory cause of action to a non-Article III tribunal.

To limit agency adjudicatory authority to cases involving only "public rights" is, however, to turn back the administrative law clock almost a century. The distinction between public and private rights was bypassed long ago by workers' compensation laws. This has been clear ever since *Crowell v. Benson*; as Justice O'Connor points out, "the statute in *Crowell* displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus, it clearly fell within the range of matters reserved to Article III courts under the holding of *Northern Pipeline*."¹⁴²

The workers' compensation example shows that the point under discussion is an intensely practical one. If agencies may be given only the power to adjudicate matters of public right, the implication is that the whole host of agencies vested with adjudicatory authority over cases involving rights between private parties, starting with workers' compensation, is constitutionally suspect. That would, as indicated, mean going back almost a century in administrative law development.

136. *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 585 (1985).

137. 492 U.S. 33 (1989).

138. *Id.* at 36.

139. *Id.* at 51. *Cf. Crude Co. v. FERC*, 923 F. Supp. 222, 234 (D.D.C. 1996) (cases involving public rights may be adjudicated by agencies without implicating Seventh Amendment).

140. *Granfinanciera*, 492 U.S. at 51-52.

141. *Id.* at 53.

142. *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 587 (1985).

One who has had to weave with the Supreme Court from *Northern Pipeline* to *Thomas* to *Granfinanciera* is bound to turn with relief to the straightforward approach of what is now the leading state case on delegation of adjudicatory authority. At issue in *McHugh v. Santa Monica Rent Control Board*¹⁴³ was the power to decide complaints that landlords had charged excess rents in violation of maximum allowable rents. Respondents claimed that administrative adjudication of excess rent claims was invalid because it permitted the agency to exercise judicial powers in violation of the state constitutional provision confining "judicial powers" to the courts.¹⁴⁴

The California court rejected this claim and upheld the delegation although the case clearly involved "private" rights between landlord and tenant. The court did not, however, devote its time to the public rights-private rights distinction. To the contrary, it expressly rejected a "suggested test incorporating the high court's 'public rights' doctrine."¹⁴⁵ Instead, it stated, "a more tolerant approach to the delegation of judicial powers has emerged out of a perceived necessity to accommodate administrative adjudication of certain disputes and thereby to cope with increasing demands on our traditional judicial system."¹⁴⁶

After describing the holdings of sister states that "such remedial power as is involved here does not constitute an impermissible exercise of judicial power,"¹⁴⁷ the California court stated what it considered the proper guidelines:

An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief — including certain types of monetary relief — so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the "essential" judicial power . . . remains ultimately in the courts, through review of agency determinations.¹⁴⁸

The California court's approach, which does not depend at all upon any public rights-private rights distinction, is to be preferred to the Supreme Court's indication that the distinction may be crucial in adjudicatory power delegations. The correct rule is that even in cases of private right there is no requirement that, in order to maintain the essential attributes of judicial power, all determinations shall be made by judges. There is no constitutional obstacle to employment of the administrative method that experience has shown essential to deal with the plethora of cases involved. The review authority of the courts preserves the essentials of their judicial power.

143. 777 P. 2d 91 (Cal. 1989).

144. *See id.* at 94.

145. *Id.* at 116.

146. *Id.* at 102.

147. *Id.* at 103.

148. *Id.* at 106 (emphasis omitted).

Remedies and Sanctions

Adjudicatory authority is more than the power to decide cases. It also includes the power to grant appropriate remedies. According to a state judge, nevertheless, a law "which grants an administrative body the power to assess economic damages constitutes an unconstitutional usurpation of judicial power."¹⁴⁹ Such a view may have had some basis years ago. It has, however, been bypassed by this century's developing administrative law. Starting with workers' compensation, agency authority to make money awards has become increasingly common. Despite the assertion of the state judge, the Supreme Court has affirmed that delegation to agencies of such authority "itself is of unquestioned constitutional validity."¹⁵⁰ Typical during the decade was a Montana case rejecting the claim that a statute allowing an agency to award damages in discrimination cases constituted an unconstitutional delegation.¹⁵¹

It has also been settled, at least since the FTC Act, that agencies may be vested with the cease-and-desist power — which gives them authority to issue what are, in effect, administrative "injunctions."¹⁵² An Alabama case goes further and upholds the exercise by an agency of the power to issue cease-and-desist orders, even though the legislature had not delegated that authority to the agency. The court ruled that the agency had implied authority, under a catch-all statutory grant of power, "to take such measures as will prevent the violation of any provision" of the agency's enabling act.¹⁵³ Such a decision is administrative law heresy; it is a patent violation of the principle requiring agency authority to be grounded in an express delegation. The correct approach was stated in a 1993 federal case, in answer to an agency claim of implied rulemaking authority: "It remains a fundamental principle of administrative law that agencies may not self-levitate their power to promulgate regulations — they must rather find any such power in a source conferred by [the legislature]."¹⁵⁴

Court injunctions are, of course, enforced by the contempt power. Since the *Brimson* case¹⁵⁵ a century ago, it has been assumed that contempt power is limited to courts and may not be conferred upon administrative agencies. According to the Court in *Brimson*, a body such as the ICC, "could not, under our system of government, and consistently with due process of law, be invested with" contempt power.¹⁵⁶ This was also the view taken by a Louisiana court, which held that "[t]he powers of adjudicating and punishing for contempt are

149. *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 522 So. 2d 852, 856-57 (Fla. Dist. Ct. App. 1987) (Nesbitt, J., dissenting). See also *United Farm Workers of Am. v. Agricultural Labor Relations Bd.*, 48 Cal. Rptr. 2d 696 (Cal. Ct. App. 1995) (holding no agency power to award damages).

150. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986).

151. See *Vainio v. Brookshire*, 852 P.2d 596 (Mont. 1993).

152. See SCHWARTZ, *supra* note 91, § 2.26.

153. *Alabama Sec. Comm'n v. American Bus. Club*, 612 So. 2d 1237, 1238 (Ala. Civ. App. 1992).

154. *Respect Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1123 (N.D. Ill. 1993). See also *In re Advisory Opinion*, 627 A.2d 1246 (R.I. 1993) (agency power only from statutes defining powers); *Ross v. Highlands Ins. Co.*, 590 So. 2d 1177 (Ga. 1991) (no agency inherent power to enforce orders).

155. *ICC v. Brimson*, 154 U.S. 447 (1894).

156. *Id.* at 485.

essentially judicial in nature. . . . [A]n administrative agency does not have power to impose punishment for contempt, unless constitutional provisions expressly give the agency that power."¹⁵⁷

The established *Brimson* rule notwithstanding, two state cases during the decade uphold agency exercises of contempt power.¹⁵⁸ In the first case, a California statute empowered the Workers' Compensation Appeals Board or any member to "issue . . . all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record."¹⁵⁹ The delegation was ruled valid.¹⁶⁰ The second case goes even further. The California court held that a statutory delegation is necessary for agencies to be vested with contempt power. The Rhode Island court ruled that a workers' compensation commissioner possessed criminal contempt power even without any statutory delegation: "We believe that the power to hold persons in criminal contempt is also inherent in performing the duties of the workers' compensation trial commissioner."¹⁶¹ This holding was supported by no reasoning or authority; neither *Brimson* nor any other case was cited. Instead, by its laconic ipse dixit, the Rhode Island court rejected one of the fundamental limitations on administrative power that has heretofore prevailed in our system.

The conclusion of the California and Rhode Island courts that agencies may be vested with contempt power is contrary to our basic public law conceptions. The contempt power itself is so drastic that legal systems outside the common-law world have refused to confer anything like it even on courts. To vest it in administrative officials utterly ignores the separation of powers by allowing agencies to exercise a power that is so inherently judicial.

In both the California and Rhode Island cases, the agencies imposed fines as the contempt penalties. Yet if, as the California statute says, the agency has the same contempt power as courts of record, the agency power should also include that to commit for contempt. But that plainly violates the basic principle laid down in *Wong Wing v. United States*,¹⁶² which has been termed "one of the bulwarks of the Constitution"¹⁶³ and has never been questioned in later cases. It is the absence of nonjudicial powers of imprisonment that sharply distinguishes our legal system from those we disparagingly describe as totalitarian.¹⁶⁴

Though agencies may not be vested with imprisonment powers, they may be given the criminal-law power to impose fines. Here again there has been a

157. *In re Investigation of Lauricella*, 546 So. 2d 207, 210 (La. Ct. App. 1989).

158. *See Morton v. Workers' Compensation Appeals Bd.*, 238 Cal. Rptr. 651 (Cal. Ct. App. 1987); *Kennedy v. Kenney Mfg. Co.*, 519 A.2d 585 (R.I. 1987).

159. *See Morton*, 238 Cal. Rptr. at 653.

160. *See id.*

161. *Kennedy*, 519 A.2d at 586.

162. 163 U.S. 228 (1896).

163. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387 (1953).

164. *But see Reno v. Flores*, 507 U.S. 292 (1993) (administrative power to arrest and detain alien juveniles).

quantum change from the earlier view that fines may be imposed only by criminal courts, not administrative agencies.¹⁶⁵ The present-day approach is illustrated by a 1993 Texas decision that statutes which authorize agencies to assess fines for violations of environmental laws are valid.¹⁶⁶ In particular, they do not violate the constitutional right to a jury trial. The court stressed the societal changes since the earlier cases holding that there was a right to a criminal jury trial before money penalties might be imposed.

To hold that [the law today must] merely parrot common law and statutory rights triable to a jury in 1876 would turn a blind eye to the emergence of the modern administrative state and its profound impact on our legal and social order. In the late 19th century, ours was primarily a sparsely-populated agrarian society. . . . By contrast, concentrated industrial activity and its by-products, including the wide-spread emission of pollutants, with their resulting potential for significant damage to our natural resources are phenomena of relatively recent origin. [T]he legislature delegated the power to assess these civil penalties to the [agency] as a manifestation of the public's interest in preserving and conserving the state's air and water resources.¹⁶⁷

INVESTIGATORY POWER

Required Records

It is now almost half a century since *Shapiro v. United States*¹⁶⁸ laid down the required-records doctrine, under which records required to be kept by an agency are not protected by the Fifth Amendment privilege against self-incrimination. *Shapiro* has been criticized, particularly because of its scope in an era of pervasive record-keeping requirements which cut across every aspect of the economic and social spectrum.¹⁶⁹ The Supreme Court itself has not explicitly followed *Shapiro* since its pronouncement, which has led Justice Mosk to characterize its rule as "of questionable vitality."¹⁷⁰ But Mosk spoke in dissent in *Craib v. Bulmash*, where the *Shapiro* rule was expressly adopted by the California court.

In *Craib*, the agency suspected that an employer had failed to pay overtime wages and issued a subpoena directing production of time and wage records for all persons employed the previous three years.¹⁷¹ The lower court held that enforcement of the subpoena would violate the privilege against self-incrimination, because "both the contents of the records and the compulsory act of pro-

165. See SCHWARTZ, *supra* note 91, § 2.28.

166. See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993).

167. *Id.* at 451.

168. 335 U.S. 1 (1948).

169. See SCHWARTZ, *supra* note 91, § 3.3; Akhil Reed Amar & Renee P. Lettow, *First Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 868 (1995).

170. *Craib v. Bulmash*, 777 P.2d 1120, 1133 (Cal. 1989) (Mosk, J., dissenting). See also *Baltimore Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 557-59 (1990) (distinguishing *Shapiro*).

171. See *Craib*, 777 P.2d at 1123.

duction amounted to incriminating testimony of . . . failure to pay the appropriate wage.”¹⁷² The California Supreme Court reversed, holding, “The privilege does not apply where, as here, the reporting requirement is intended to promote a legitimate regulatory aim, is not directed at activities or persons that are inherently ‘criminal,’ and only requires . . . disclosure of information of a kind customarily kept in the ordinary course of business.”¹⁷³ Indeed, the court asserts, the enforcement of the wage requirements would be rendered ineffective if the state were foreclosed from compelling the type of information sought here. Hence, *Shapiro* was followed and the result was, as the caustic Mosk comment put it, “importing the questionable federal required-records exception into our state constitutional privilege against self-incrimination.”¹⁷⁴ Anomalous though it may be, at least until *Shapiro* is overruled, agencies possess “virtually the unchallengeable power to enforce its regulations by criminal prosecution based on compelled self-disclosure.”¹⁷⁵

Inspection Power

New York v. Burger,¹⁷⁶ decided at the beginning of the decade, marks the culmination of the Supreme Court jurisprudence on administrative inspection power. During the prior twenty years, in a series of cases from *Camara*¹⁷⁷ to *Dewey*,¹⁷⁸ the Justices had worked out the legal principles governing administrative inspections. *New York v. Burger* applied those principles and sums up the federal law on the matter. *Burger*, the Court tells us, “presents the question whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries.”¹⁷⁹ To the Court, the question called for an affirmative answer. Though *Camara* held that administrative inspections are normally subject to the Fourth Amendment’s warrant requirement, later cases developed an exception for “closely regulated” businesses.¹⁸⁰ The *Burger* opinion analyzed the regulatory statute and concluded without difficulty that “the operation of a junkyard, part of which [was] devoted to vehicle dismantling,” was a “closely regulated” business in New York.¹⁸¹ In determining this, the mere volume of statutory material on regulation is not dispositive.¹⁸² The focus should be on whether the regulation was sufficiently comprehensive to come within the exception.¹⁸³ In

172. *Id.*

173. *Id.* at 1122.

174. *Id.* at 1131 (Mosk, J., dissenting).

175. *Id.* at 1134 (Kaufman, J., dissenting).

176. 482 U.S. 691 (1987).

177. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

178. *Donovan v. Dewey*, 452 U.S. 594 (1981).

179. *Burger*, 482 U.S. at 693.

180. *See Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972).

181. *Burger*, 482 U.S. at 703-04.

182. *See id.* at 705 n.16.

183. *See id.*

this case, the regulatory provisions were extensive enough to support the "closely regulated" status of the business.¹⁸⁴

The highest New York court has, however, declined to follow *New York v. Burger*, holding instead, in *People v. Scott*,¹⁸⁵ that the *Burger* statute violates the New York Constitution's guaranty against unreasonable searches and seizures. In *Scott*, police officers, acting under the statutory authorization, conducted a warrantless inspection of defendant's business premises.¹⁸⁶ They discovered stolen automobile parts and defendant was charged with criminal possession.¹⁸⁷ Under the Supreme Court's *Burger* decision, the warrantless search should have been upheld. According to the New York court, nevertheless, *Burger* was based upon too narrow a view of the constitutional protection against governmental intrusion on privacy: "Given . . . the potential similarity between [colonial] writs of assistance and . . . administrative searches, the constitutional rules governing the latter must be narrowly and precisely tailored to prevent the subversion of the basic privacy values embodied in our Constitution."¹⁸⁸ In the New York court's view, "the principles and standards set forth in *New York v. Burger* . . . do not adequately serve those values."¹⁸⁹

To the administrative lawyer, the most important part of the *Scott* opinion is its rejection of the *Burger* approach to "the essential element of pervasive governmental supervision."¹⁹⁰ *Scott* stressed that a close analysis of that requirement was justified because "the administrative search exception should remain a narrow and carefully circumscribed one."¹⁹¹ *Scott* did not try to define what constitutes a "pervasive" regulatory scheme, but it did assert that "such minimal regulatory requirements as the obligations to register with the government, to pay a fee and to maintain certain prescribed books and records are not, in themselves, sufficient. Indeed, in modern society, many trades and businesses are subject to licensing, bookkeeping and other similar regulatory measures."¹⁹²

Cases like *Scott* add new life to the Brandeis concept of the states as legal laboratories.¹⁹³ Independent state constitutional construction can point out deficiencies in federal decisions and point the way to improvements that can be adopted in federal administrative law itself: "by recognizing greater safeguards as a matter of State law, [states] can serve as 'laboratories' for national law."¹⁹⁴

184. See *id.* at 704.

185. 593 N.E.2d 1328 (N.Y. 1992).

186. See *id.* at 1339.

187. See *id.*

188. *Id.* at 1343.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1344.

193. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

194. *Scott*, 593 N.E.2d at 1348.

Subpoena Power

The cases confirm that an agency subpoena has no legal effect until it is enforced by a court. "[W]hile the subpoena may be issued and served by the agency, the subpoenaed party must have the opportunity for judicial review before suffering any penalties for refusing to comply."¹⁹⁵ Hence pre-enforcement court challenges to agency subpoenas must be dismissed.¹⁹⁶ The respondent has a full opportunity to raise any challenges in the subpoena enforcement proceeding.

There has been a major change during the century in the judicial attitude toward administrative subpoena power, culminating in the current court acquiescence in broad agency subpoena power.¹⁹⁷ The Second Circuit summarizes this development: "Until the 1940s, the Supreme Court narrowly interpreted the scope of an agency's investigative authority. An administrative subpoena was valid only if the agency sought evidence of a specific breach of law."¹⁹⁸ Under this earlier approach, "courts would routinely disallow a general investigation conducted solely to determine policy, make rules, recommend legislation, or ascertain whether administrative or other action was even appropriate."¹⁹⁹

All this changed with *Endicott Johnson Corp. v. Perkins*.²⁰⁰ Beginning with that case, "the Supreme Court underwent a change and significantly loosened the shackles on an agency's power to conduct administrative investigations."²⁰¹ As the Second Circuit sums it up, "The Supreme Court . . . held that in the first instance, an agency could decide whether persons/entities were covered by the relevant statute and could exercise its subpoena power to investigate whether a cause of action existed."²⁰² *Endicott Johnson* has been characterized by the Second Circuit as "a watershed in administrative investigations."²⁰³ It established, first of all, "that an agency could conduct an investigation even though it had no probable cause to believe that any particular statute was being violated."²⁰⁴ This made for a basic change, since agency subpoenas were once enforced only if issued upon probable cause to suspect "a specific breach of the law."²⁰⁵ Now, a state court tells us:

[I]t is . . . clear that such a restrictive view of the administrative process is not constitutionally compelled. As regulatory schemes have become increasingly important in enforcing laws designed to protect the public's

195. *Craib v. Bulmash*, 777 P.2d 1120, 1124-25 (Cal. 1989). See also *United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 3 (1st Cir. 1996) ("administrative subpoena is not self-executing").

196. See *Texas Lawyers Ins. Exch. v. RTC*, 822 F. Supp. 380 (W.D. Tex. 1993).

197. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 4.1 (3d ed. 1994).

198. *United States v. Construction Prod. Research, Inc.*, 73 F.3d 464, 469 (2d Cir. 1996).

199. *Id.* at 470.

200. 317 U.S. 501 (1943).

201. *Construction Prod. Research*, 73 F.3d at 470.

202. *Id.*

203. *Id.*

204. *Id.* See also *Greer v. New Jersey Bureau of Sec.*, 671 A.2d 1080, 1085-86 (N.J. Super. Ct. App. Div. 1996) (no probable cause needed for agency to issue subpoena).

205. *Construction Prod. Research*, 73 F.3d at 470.

health and welfare, reliance on "probable cause" as a means of restraining agency subpoena power has all but disappeared.²⁰⁶

That is true because, "[a]t the investigatory stage, the [agency] does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated . . . and wants to determine whether or not to file a complaint."²⁰⁷ It can investigate upon such suspicion in a manner "analogous to the Grand Jury"; like the latter, the agency "too, may take steps to inform itself as to whether there is probable violation of the law."²⁰⁸

In addition, *Endicott Johnson* established that the issue of jurisdiction or coverage may not be raised as a defense to agency subpoena enforcement. As the Second Circuit states the governing rule, "at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party."²⁰⁹

A typical case was decided by the Eleventh Circuit, which held that the district court had prematurely resolved the jurisdictional issue.²¹⁰ "It can no longer be disputed," the court of appeals declared, "that 'a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute.' . . . 'The initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena.'"²¹¹ This means "that an individual or entity may not generally resist an administrative subpoena on the ground that the agency lacks jurisdiction."²¹² The party resisting compliance with the subpoena may not challenge the applicability of the agency statute to the conduct being investigated.²¹³ The agency itself is free to investigate whether the subject of the subpoena comes within the agency's authority.²¹⁴

In addition, the recent cases show that agencies may possess authority to investigate beyond strict jurisdictional limits. An illustrative case involved a Federal Home Loan Bank Board (FHLBB) subpoena.²¹⁵ The board was conducting an investigation of a bank, including certain loans. It subpoenaed the records of a bank customer who had received disbursements from the amount loaned. Though the customer was not subject to FHLBB regulation and the board had no jurisdiction over it, FHLBB could investigate the relationship

206. *Craib v. Bulmash*, 777 P.2d 1120, 1123 (Cal. 1989).

207. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1190 (D.C. Cir. 1992).

208. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

209. *Construction Prod. Research*, 73 F.3d at 470.

210. *See EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991).

211. *Id.* (quoting *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985)). *See also United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 5 (1st Cir. 1996) ("scope of agency's substantive authority [is] not to be resolved in subpoena enforcement proceedings").

212. *OTS v. Ernst & Young*, 786 F. Supp. 46, 50 (D.D.C. 1992).

213. *See Shulansky v. Rodriguez*, 669 A.2d 560, 561 (Conn. 1995).

214. *See Ernst & Young*, 786 F. Supp. at 50. *See also NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996) (subpoena not unduly burdensome because it requires production of 4,000 documents).

215. *See Sandsend Fin. Consultants, Ltd. v. Federal Home Loan Bank Bd.*, 878 F.2d 875 (5th Cir. 1989).

between the customer and the loans that were the target of the board's inquiry.²¹⁶ Agency subpoena power is not confined to those over whom it may exercise regulatory jurisdiction, but extends to any persons from whom it can obtain information relevant and material to its legitimate inquiry.²¹⁷ As another federal court put it in a similar case, "In order to conduct an investigation an agency may properly seek information from parties not ordinarily subject to the agency's jurisdiction."²¹⁸

*Fishing License Revoked?*²¹⁹

As already noted, this century has seen a major shift in the judicial attitude toward administrative subpoena power. The early *American Tobacco*²²⁰ requirement of an actual case (or at least probable cause) has given way to the *Morton Salt-Endicott Johnson* reliance on the investigatory grand jury²²¹ as the proper analogy. In effect, this meant Supreme Court approval of administrative "fishing expeditions."²²² During the past decade, however, some federal courts have indicated that the fishing license thus given to agencies may be subject to at least partial revocation. These courts have relied upon *American Tobacco* to limit agency subpoenas calling for production of personal financial records.²²³ Their view was best stated in *Parks v. FDIC*,²²⁴ by a First Circuit panel, which held that "although the FDIC [subpoena] met the lenient standard of reasonableness for administrative subpoenas of *corporate* records, it failed to meet the stricter standard of reasonableness that applied to administrative subpoenas of *personal* papers and records."²²⁵ In the court's view "the lenient *Morton Salt* test for enforcement of an administrative subpoena" may require neither probable cause nor individualized suspicion of wrongdoing as a prerequisite for an agency subpoena, but a stricter standard should apply to agency subpoenas of a private citizen's private papers than of corporate papers.²²⁶

The First Circuit panel's approach in *Parks* was, however, rejected in the most recent case on the matter. The Second Circuit stated, "we are not persuaded by the majority's reasoning in *Parks* that *Morton Salt's* reasonable relevance

216. *See id.* at 882.

217. *See id.*

218. *Belle Fourche Pipeline Co. v. United States*, 554 F. Supp. 1350, 1360 (D. Wyo. 1983).

219. *See* Jack W. Campbell, Note, *Revoking the "Fishing License": Recent Decisions Place Unwarranted Restrictions on Administrative Agencies Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395 (1996).

220. *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924).

221. *See supra* text accompanying accompanying note 208.

222. *See* 1 DAVIS & PIERCE, *supra* note 197, at § 4.2, at 163.

223. These cases include *RTC v. Walde*, 18 F.3d 943 (D.C. Cir. 1994), and *Freese v. FDIC*, 837 F. Supp. 22 (D.N.H. 1993).

224. No. 94-2262, 1995 WL 529629 (1st Cir. Sept. 13, 1995). The *Parks v. FDIC* panel opinion was reported in the advance sheets and was withdrawn from the bound Federal Reporter after a rehearing en banc was granted. The opinion is discussed in *In re Gimbel*, 77 F.3d 593 (2d Cir. 1996).

225. *Parks*, 1995 WL 529629, at *3.

226. *Id.* at *5.

standard cannot apply to administrative subpoenas for directors' personal financial records."²²⁷ Instead, the Second Circuit specifically ruled that, even in a case involving personal financial records, the *Morton Salt* approach would apply.²²⁸ The court conceded that there was language in *Morton Salt* indicating that corporations enjoy less protection than individuals in these cases.²²⁹ Such language, however, "is at least in the context of administrative subpoenas, representative of an era that was still coming to terms with the modern regulatory state."²³⁰ The "more modern view of the regulatory state"²³¹ recognizes "that there is no reason to categorically restrict this [*Morton Salt*] standard to corporate financial records."²³² Hence, "the Fourth Amendment requires no showing beyond the standard articulated in *Morton Salt* where the FDIC seeks the personal financial records of a director of a failed bank."²³³ The agency need not articulate probable cause or even an individualized "suspicion" of wrongdoing to obtain enforcement of its subpoena. It "need only make a showing that the materials sought are, in its view 'reasonably relevant' to its investigation."²³⁴

RIGHT TO BE HEARD

Waiver and Emergency

According to a recent book, "Administrative law is a procedure-oriented field."²³⁵ The first procedural question in any case is that of whether the private party has a due process right to be heard. However, that right does not require a hearing to be held in every case. More accurately, the due process right is the right to an *opportunity* to be heard.²³⁶ Like other rights, the right to be heard can be waived, and it is the widespread waiver of the right that makes the administrative process workable in practice. *Reno v. Flores*²³⁷ confirms this point. It concerned the INS procedure for dealing with juvenile aliens who are detained prior to deportation.²³⁸ The INS notifies the juvenile alien of the commencement of a deportation proceeding by a form that notifies the alien of the allegations against him and the date of his deportation hearing. The INS officer checks a box indicating whether the alien will be detained in INS custo-

227. *In re Gimbel*, 77 F.3d at 598.

228. *See id.* at 600.

229. *See id.* at 598.

230. *Id.*

231. *Id.*

232. *Id.* at 599. *See also* Greer v. New Jersey Bureau of Sec., 671 A.2d 1080 (N.J. Super. Ct. App. Div. 1996) (allowing subpoena of personal documents).

233. *In re Gimbel*, 77 F.3d at 600.

234. *Id.*

235. SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA* 40 (1992).

236. *See* Heft v. Racing Comm'n, 592 A.2d 1110, 1117 (Md. App. 1991). *Cf.* Sandin v. Connor, 115 S. Ct. 2293, 2310 (1995) (no right to be heard where no factual dispute).

237. 507 U.S. 292 (1993).

238. *See id.* at 294-95.

dy, released on recognizance, or released under bond. The form then states: "You may request the Immigration Judge to redetermine this decision." The alien must check a box stating "I do" or a box stating I "do not request a redetermination by an Immigration Judge of the custody decision."²³⁹

Respondents claimed that the INS procedures were faulty because "they do not provide for *automatic* review by an immigration judge of the initial deportability and custody determinations."²⁴⁰ According to the Court, however, "due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge."²⁴¹ That right can be waived here as in other cases.²⁴² It is enough that the form gives the opportunity to assert or waive the right to the hearing before the immigration judge.

The Supreme Court has also confirmed that there is no constitutional right to be heard in cases where, because of an emergency, the luxury of a hearing cannot be afforded. *FDIC v. Mallen*²⁴³ arose out of the FDIC power to suspend an indicted bank official if continued service poses a threat to depositor interests or impairs public confidence. The FDIC suspended a bank president after he was indicted for false statements.²⁴⁴ There was no presuspension hearing, but provision was made for a later hearing.²⁴⁵ The lower court held the statutory procedure unconstitutional. The Supreme Court reversed even though it recognized that the interest to continue as bank president was a property right protected by due process.²⁴⁶ In this case the "emergency" exception applied. The emergency arose from the nature of banking and the overriding need for public confidence.²⁴⁷ Postponement of the hearing was justified by "the congressional finding that prompt suspension of indicted bank officers may be necessary to protect the interests of depositors and to maintain public confidence in our banking institutions."²⁴⁸

Mathews Misapplied

*Mathews v. Eldridge*²⁴⁹ had adopted a cost-benefit approach²⁵⁰ to the due process right to be heard. Under *Mathews*, three factors are to "be considered in determining whether . . . due process . . . [has] been satisfied."²⁵¹ Justice O'Connor has summarized the three factors as "the nature of the private interest, efficacy of additional procedures, and governmental interests."²⁵² In

239. *Id.* at 308.

240. *Id.*

241. *Id.* at 309.

242. See SCHWARTZ, *supra* note 91, § 5.3.

243. 486 U.S. 230 (1988).

244. See *id.* at 238.

245. See *id.* at 238-39.

246. See *id.* at 240.

247. See *id.* at 241.

248. *Id.*

249. 424 U.S. 319 (1976).

250. See *Propert v. District of Columbia*, 741 F. Supp. 961, 962 (D.D.C. 1990).

251. *United States v. Raddatz*, 447 U.S. 667, 677 (1980).

252. *Zinerman v. Burch*, 494 U.S. 113, 148 (1990) (O'Connor, J., dissenting).

Mathews, the balancing of these factors led to the holding that, though due process required a hearing, a post-suspension hearing was enough to satisfy due process.²⁵³

The *Mathews* test was called forth by one of the crucial problems presented by the *Goldberg v. Kelly*²⁵⁴ revolution — that of the extent to which nonregulatory administration should be subject to the judicialized procedural requirements that have governed traditional regulatory administration. The *Mathews* balancing approach was developed to help resolve the problem.

The Court, however, has not used the *Mathews* test only to determine what procedure is required when there is a due process right to be heard. In *Connecticut v. Doehr*,²⁵⁵ it employed the test to determine whether due process *requires* a hearing, rather than simply to identify *what kind of hearing* due process demands. *Doehr* arose under a state statute that authorized a judge to allow prejudgment attachment of real estate, without prior notice or hearing, upon plaintiff's verification that there was probable cause to sustain the claim.²⁵⁶ The Court determined the statute's validity by applying the *Mathews* test. All the Justices agreed that it failed that test: (1) the interests affected were significant; (2) the right of erroneous deprivation that the state permitted was substantial; and (3) the interests in favor of an *ex parte* attachment were too minimal to justify burdening *Doehr*'s ownership rights without a hearing to determine the likelihood of recovery.²⁵⁷ On the other hand, under the *Doehr* approach, if a court were to conclude that under the *Mathews* test, "the private interest . . . affected [and] the risk of an erroneous deprivation were not substantial enough to overcome the burden that would be placed on the government were a hearing to be required,"²⁵⁸ a hearing would not be required.

Doehr uses the *Mathews* test to determine whether a hearing is demanded by due process. That is, however, a misuse of the test, which was developed only to determine what type of notice and hearing is required. Once it is determined that there is a due process right to be heard, *Mathews* tells us what process is due — i.e., the specific procedures that should be required. The Due Process Clause has already tilted the balance in favor of *some* procedure: *Mathews* only tells us what kind of hearing is demanded in the given case.

Doehr is but an instance of the Court's recent tendency to reduce due process rights to the level of the countinghouse. Until recently, the question to be determined in this type of case was whether a given constitutional right, such as the due process right to be heard, had been violated. In administrative law, this meant that there was a due process right to be heard whenever an agency act affected a particular individual adversely in rights or entitlements. No cost-benefit test to determine whether there was a right to notice and hear-

253. See *Mathews*, 424 U.S. at 910.

254. 397 U.S. 254 (1970).

255. 501 U.S. 1 (1991).

256. See *id.* at 5-6.

257. See *id.* at 11-18.

258. *Id.* at 9 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

ing existed. The *Mathews* approach was used only after a right to be heard was found, to determine *what* process was due. Under *Doehr*, this is changed: *Mathews* has become the measuring rod as well on whether there *is* a due process right to be heard.

Too Flexible Due Process?

Not long ago, when due process demanded a hearing, a full evidentiary hearing was required. This approach has been giving way to the *Mathews v. Eldridge* test, under which due process becomes a “flexible concept that varies with the particular situation.”²⁵⁹ In effect, as seen, this makes for a cost-benefit approach to due process, with its balancing of gains versus losses for each additional procedure required. The key question is “whether the [additional] incremental benefit could justify the cost.”²⁶⁰

Justice Stevens, however, has reminded us that the flexible cost-benefit approach may be pushed too far.

It is wrong to approach the due process analysis in each case by asking anew what procedures seem worthwhile and not too costly. Unless a case falls within a recognized exception, we should adhere to the strongest presumption that the Government may not take away life, liberty, or property before making a meaningful hearing available.²⁶¹

The Stevens statement was made in dissent in *Brock v. Roadway Express, Inc.*²⁶² It arose under a statute that forbids discharge of employees for refusing to operate motor vehicles that do not comply with safety standards or for filing complaints alleging noncompliance.²⁶³ The statute provides for initial investigation of a discharge and authorizes the Secretary of Labor to order temporary reinstatement. The lower court held that the authorization to order temporary reinstatement without first conducting an evidentiary hearing violated due process.

The Supreme Court reversed, holding that, balancing the interests at stake, all that was required was written notice and opportunity for written response; an evidentiary hearing was not required.²⁶⁴ This holding led to Justice Stevens’ dissent. He disagreed with the Court’s assertion that cross-examination was not necessary, asserting “this reasoning unduly minimizes the critical role that cross-examination plays in accurate factfinding.”²⁶⁵ “The flexibility on the fringes of due process,” Stevens declared, “cannot ‘affect its root requirement’ — i.e., that of ‘a hearing [which] necessarily includes the creation of a public

259. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

260. *Ingraham v. Wright*, 430 U.S. 651, 680 (1977).

261. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 277-78 (1987) (Stevens, J., dissenting).

262. 481 U.S. 252 (1987).

263. *See id.* at 255.

264. *See id.* at 263.

265. *Id.* at 276 (Stevens, J., dissenting).

record developed in a proceeding in which hostile witnesses are confronted and cross-examined.²⁶⁶

In other words, the courts must be vigilant in ensuring that flexible due process does not result in dilution of due process. The danger is that, by a legal counterpart of Gresham's law, second-class procedures that provide only paper hearings²⁶⁷ will be permitted to take over the administrative field. The Stevens admonition gains added impact from the recent trend to apply cost-benefit analyses to the details of administrative procedure — particularly with regard to the use of illegal evidence by agencies.²⁶⁸

ADJUDICATORY PROCEDURE

Our law is procedure dominated:²⁶⁹ "Procedure, not substance, is what most distinguishes our [system] from others."²⁷⁰ It is, therefore, to be expected that any ten-year period will see a plethora of administrative procedure cases. So many and so diverse are the cases, indeed, that it is possible here to discuss only the more significant ones: the treatment will be episodic rather than encyclopedic.

Vermont Yankee

The Supreme Court has applied the *Vermont Yankee* rule²⁷¹ that the APA "establishes the maximum procedural requirements a reviewing court may impose upon agencies"²⁷² to administrative adjudications. As stated by the Court, "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA."²⁷³ *Vermont Yankee* itself concerned additional procedures imposed by the reviewing court when the agency was engaging in informal rulemaking. The decision under discussion held that the informal adjudication process should be governed by the same principles.²⁷⁴ The lower court had held the challenged action invalid because the agency had not apprised the private party of the materials on which it based its decision. Such a holding would be correct if the case involved a formal adjudication subject to the trial-type procedures set forth in the APA. Here, however, the determination was lawfully made by informal adjudication and only the minimal requirements set forth in section 555 of the APA have to be followed.²⁷⁵ They do not include the elements required by the

266. *Id.* at 278.

267. *See* Gray Panthers v. Schweiker, 652 F.2d 146, 165 (D.C. Cir. 1980).

268. *See infra* notes 417-42 and accompanying text.

269. *See* ROSE-ACKERMAN, *supra* note 235, at 40.

270. Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1482 (9th Cir. 1992).

271. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

272. Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 653 (1990).

273. *Id.* at 654.

274. *See id.* at 655.

275. *See id.*

lower court. "A failure to provide them where the Due Process Clause itself does not require them . . . is therefore not unlawful."²⁷⁶

One may go further and state that the *Vermont Yankee* principle applies to administrative procedure in general. This means that courts may normally not fashion procedural obligations beyond those expressly enumerated in the governing statutes. Courts "are not free to impose our own notions of procedural propriety upon [agencies]."²⁷⁷ Instead, "[c]ourts must be reluctant to mandate that a federal agency step through procedural hoops in effectuating its administrative role unless such procedural requirements are explicitly enumerated in the pertinent statutes or otherwise necessary to address constitutional concerns."²⁷⁸ Where a given procedure is not demanded by due process, a court may not require the agency to provide it unless it is imposed by the APA or some other statute. The APA thus imposes maximum as well as minimum procedural requirements in the cases to which it is applicable.

Telephone Hearings

The agency hearing is, of course, the administrative equivalent of the trial in a court. Unlike the latter, however, agency hearings are sometimes conducted in ways that could not pass muster in the judicial process. Thus, in some states agencies have developed the practice of holding telephone hearings in which cases are presented to hearing officers over the telephone. Such hearings, without a doubt, deprive the hearing officer of the opportunity to observe witness demeanor. Despite this, there are cases that uphold telephone hearings. A state court holds that they do not violate the rules governing hearings because of alleged violation of the right to confront witnesses or the inability of the parties or the hearing officer to view the witnesses and observe their nonverbal reactions.²⁷⁹ There is a similar federal case holding that such a hearing by a state agency does not violate due process.²⁸⁰ Even if the court is correct, the holding should be applied with caution; telephone hearings should be the exception, not the norm, in the administrative process. At a minimum, a telephone hearing over objections should be ruled invalid without regulations protecting the parties' rights.²⁸¹

What about telephone hearings in federal agencies?

It may be doubted that federal agencies will be permitted to hold telephone hearings. According to the Ninth Circuit, telephone hearings violate a statute that provides that deportation determinations shall be made in proceedings

276. *Id.* at 655-56.

277. *Wilderness Society v. Tyrrel*, 918 F.2d 813, 818 (9th Cir. 1990).

278. *Id.*

279. *See Detroit Base Coalition v. Dep't of Soc. Serv.*, 405 N.W.2d 136, 140 (Mich. App. 1987). *See also Conforti v. United States*, 74 F.3d 838, 840 (8th Cir. 1996) (agencies may notice such matters as are noticed by courts).

280. *See Casey v. O'Bannon*, 536 F. Supp. 350, 356 (E.D. Pa. 1982).

281. *See Weston v. Pennsylvania*, 520 A.2d 953, 954-55 (Pa. Commw. Ct. 1987).

“before” an immigration judge.²⁸² This requires that deportation hearings be conducted in person rather than by telephone. The fact that telephone hearings are used in Hawaii and Guam because of their distance from the mainland cannot justify depriving parties of their statutory right to a hearing in the physical presence of the hearing officer.²⁸³ The same approach should be applied generally to hearings under the Federal APA, which states that an administrative law judge “shall preside at the taking of evidence.”²⁸⁴ It is hard to see how one can “preside” at a hearing conducted outside his physical presence. “Until Congress chooses to change the wording of the [APA], telephonic hearings . . . simply are not authorized by statute.”²⁸⁵

Administrative Judiciary

Perhaps the most significant Federal APA improvement has been the development of a virtual administrative judiciary.²⁸⁶ The present administrative law judge corps is the direct descendant (and, indeed, the logical outcome) of the hearing examiner system established by the APA in 1946. The hearing officers provided under the APA have evolved into administrative judges, endowed with authority to make binding initial decisions in adjudicatory proceedings. The change of title to administrative law judge (ALJ) has only confirmed this development.

The evolving system of administrative justice brings to mind an opinion of Justice Jackson, which referred to the distinction between American law, in which one system of law courts applies both public and private law, and the practice in a Continental country such as France, which administers public law through a system of administrative courts separate from those dealing with private law questions.²⁸⁷ The French administrative courts are specialized tribunals that review the legality of administrative acts.²⁸⁸ Although proposals have been made for establishment of comparable American administrative courts, the French concept of administrative reviewing courts has largely remained foreign to American administrative lawyers.²⁸⁹

Under the APA, however, our system has taken its own path toward establishment of an administrative judiciary — but, in the American version, an administrative trial judiciary. The history of hearing officers under the APA,

282. See *Purba v. INS*, 884 F.2d 516, 517 (9th Cir. 1989).

283. See *id.*

284. 5 U.S.C. § 556(b) (1994).

285. *Purba*, 884 F.2d at 518. For a discussion of the recent pilot project in Maryland to conduct hearings by video, see Patricia Salkin, *Current Developments in Maryland — Video Hearings*, ADMIN. & REG. L. NEWS, Spring 1996, at 10-11.

286. See Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L.J. 203, 209-11 (1996).

287. See *Garner v. Teamsters, Chauffeurs and Helpers Union Local No. 776*, 346 U.S. 485, 495 (1953).

288. See generally BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 42-50 (1954).

289. Compare Pennsylvania Commonwealth Court Act of 1970 (codified as amended at 42 PA. CONS. STAT. ANN. §§ 561-564 (West 1981 & Supp. 1997)), establishing the Commonwealth Court to review most state agency acts.

culminating in their present judicial status, has set the pattern for the developing system of American administrative justice. In particular, we can project a continuing increase in the size of the administrative judicial corps. When the APA provisions went into effect, the federal agencies employed 197 examiners. In March 1996, there were 1,343 ALJs in thirty federal agencies;²⁹⁰ over 75% (1,092) were in the Social Security Administration, reflecting the impact of that agency's mass justice upon the administrative process.²⁹¹ Only the fiscal squeeze of recent years has prevented the number from rising substantially higher. In the next century, we can predict that there may well be a federal administrative judiciary running into the thousands and ALJs in ever-increasing numbers dispensing both regulatory justice and the mass justice of the Welfare State.

Under the Federal APA, the ALJs are appointed by and work within the different agencies vested with adjudicatory powers subject to APA formal hearing requirements. An increasing number of states, on the other hand, have followed the example first set by California in 1945²⁹² and set up a central pool of independent ALJs, who are assigned to different agencies as they are needed. During the past decade, eight states have established central ALJ panel systems under which the ALJs are an independent cadre of judges, who are in an autonomous agency, not subject to or part of the agencies for which they render adjudicatory decisions.²⁹³ By the end of 1995, twenty states had adopted central panel ALJ systems.²⁹⁴ Bills have been introduced to establish an independent federal ALJ corps,²⁹⁵ but they have thus far only crossed Woodrow Wilson's Congressional "bridge of sighs to dim dungeons" of committee inaction.²⁹⁶

A primary purpose of the APA was to increase the importance of agency hearing officers — now the ALJs.²⁹⁷ The cases during the decade have continued the trend in that direction. In particular, despite the *Allentown* holding²⁹⁸ that agencies reviewing ALJ initial decisions are not limited to appellate power, but instead have all the decisionmaking powers of a tribunal of first instance, the cases have increasingly relied on an emerging rule of agency deference toward ALJ decisions. Under them, the ALJ or other hearing officer is the primary judge of the evidence presented at the hearing.²⁹⁹ The federal cases

290. See Schwartz, *supra* note 286, at 213.

291. See *id.*

292. For the current version, see CAL. GOVT. CODE §§ 11370.3, 11502 (West 1992 & Supp. 1997).

293. See Julian Mann, III, *Striving for Efficiency in Administrative Litigation*, 15 J. NAT'L ASS'N ADMIN. L. JUDGES 151, 157 (1995).

294. See *id.*

295. See *Administrative Law Judge Corps Act, 1990: Hearings on S. 594 Before the Subcomm. on Courts and Admin. Practices of the Senate Comm. on the Judiciary*, 101st Cong. 467 (1990). Recent bills include H.R. 1802, 104th Cong. (1995) and S. 486, 104th Cong. (1995).

296. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (10th prtng. 1894).

297. See *Butz v. Economou*, 438 U.S. 478, 513 (1978).

298. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65 (1955).

299. See *Diaz v. Chater*, 55 F.3d 300, 307-09 (7th Cir. 1995). See also *Guentchev v. INS*, 77 F.3d 1036 (7th Cir. 1996); *Prado-Gonzalez v. INS*, 75 F.3d 631 (11th Cir. 1996) (summary agency affirmance of hearing judge).

hold that, where there are disagreements between the agency head and the ALJ on questions of fact and credibility, the reviewing court may examine the evidence more critically in deciding whether the agency decision is supported by substantial evidence.³⁰⁰ Thus, where the agency rejects the ALJ's findings of fact, the evidence supporting the agency's conclusion may be viewed as "less substantial" than it would be if the agency had reached the same conclusion as the ALJ.³⁰¹

There are state cases that reverse where the agency substituted its judgment for that of the hearing officer on factual findings or reversed such findings that were supported by substantial evidence.³⁰² A Florida case goes even further, holding that an agency may not reject a hearing officer's finding unless there is no competent substantial evidence from which the finding could reasonably be inferred.³⁰³ In effect, the cases have moved toward assimilating the ALJ role to that of a trial judge. At the least, the agency is required to explain why it has rejected ALJ findings.³⁰⁴

Agency review power over the ALJ may, of course, be altered by statute. In a D.C. Circuit case,³⁰⁵ the statute empowered the agency head to "affirm, modify, or vacate" the ALJ decision. According to then Judge Ginsburg, "Whatever else Congress meant by the phrase 'affirm, modify, or vacate,' we hold, it did not mean to disarm the agency head when the ALJ incorrectly reads the law in the charged party's favor."³⁰⁶ The agency head must retain the power to correct the ALJ's legal errors in order to remain "the final administrative arbiter of legal questions."³⁰⁷ The same was not true with regard to findings of fact. While the agency head bears the ultimate responsibility for legal interpretations, he must follow the ALJ's key findings of fact, including the ALJ's determination of sanctions. Where facts are concerned, there is an "incongruity [in] allowing an agency official who has seen only the paper record to substitute his judgment for that of an adjudicatory officer 'with independent status, who saw the witnesses' demeanor and gauged their truthfulness."³⁰⁸

300. See *Aylett v. Secretary of HUD*, 54 F.3d 1560, 1565 (10th Cir. 1995); *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995).

301. See *NLRB v. Stor-Rite Metal Prod., Inc.*, 856 F.2d 957, 964 (7th Cir. 1988). See also *Gibson-Jones v. Chater*, 926 F. Supp. 747, 752 (N.D. Ill. 1996) (ALJ credibility determination not to be disturbed unless patently wrong).

302. See *Goin v. Commission on Ethics*, 658 So. 2d 1131 (Fla. Dist. Ct. App. 1995); *Berger v. Department of Prof'l Regulation*, 653 So. 2d 479 (Fla. Dist. Ct. App. 1995); *Moran v. Shotgun Willies, Inc.*, 889 P.2d 1185 (Mont. 1995).

303. See *Crawley v. Department of Highway Safety and Motor Vehicles*, 616 So. 2d 1061 (Fla. Dist. Ct. App. 1993). See also *Reyes v. Bowen*, 845 F.2d 242, 245 (10th Cir. 1988) (stating an agency "must give specific, legitimate reasons" for rejecting finding).

304. See *Appeal of Dell*, 668 A.2d 1024 (N.H. 1995); *Coates v. Unemployment Compensation Bd. of Review*, 676 A.2d 742 (Pa. Commw. Ct. 1996). See also *Justice v. North Carolina Dep't of Transp.*, 465 S.E.2d 554 (N.C. Ct. App. 1995) (statute requires agency reasons for declining to adopt ALJ decision).

305. See *Iran Air v. Kugelman*, 996 F.2d 1253 (D.C. Cir. 1993).

306. *Id.* at 1260.

307. *Id.*

308. *Id.* at 1261 (quoting *Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988)). Compare *Halbrook v. Chater*, 925 F. Supp. 563, 575 (N.D. Ill. 1996) (weight of ALJ credibility determination in view of "cold

An interesting variation of the problem of agency review power over hearing officers was presented in a Pennsylvania case.³⁰⁹ The agency had adopted a policy of suspending the licenses of all drivers convicted of exceeding a speed limit by 31 or more miles per hour. All hearing officers were required to recommend such suspensions.³¹⁰ The court held that this requirement violated the hearing officer's obligation to exercise discretion based upon the individual facts of each case.³¹¹ "If a hearing examiner must always recommend a suspension regardless of the totality of the circumstances in a case, the discretion of the hearing examiner is really no discretion."³¹²

To be sure, the decision process of the agency in reviewing ALJs is primarily for the agency heads themselves. Thus, as far as the agency decision itself is concerned, it is settled that agency heads need not personally read the record.³¹³ "Indeed," as a federal judge puts it, "common sense dictates otherwise. If the Superintendent reviewed the record underlying every disciplinary hearing conducted by the Department, he would have little time for anything else."³¹⁴ One may go further and say that, because of the *Morgan IV* rule,³¹⁵ it is impossible to depose agency heads or require them to answer interrogatories on how much attention they devoted to the record or the case in general.³¹⁶

According to another D.C. Circuit case,³¹⁷ discovery of the agency decisionmaking process will be allowed in only two circumstances: 1) when "there has been a strong showing of bad faith or improper behavior" and 2) "when such examination provides the only possibility for effective judicial review and when there have been no contemporaneous . . . [agency] findings."³¹⁸ The second is present "[o]nly in the rare case in which the record is so bare as to frustrate effective judicial review."³¹⁹ One may wonder whether even in such a case the proper posture is not to remand to the agency to have the record completed rather than to probe the decider's mental processes.

The cases have been holding that agencies must provide reasoned explanations, not only when they reject ALJ findings and decisions, but also when they do not follow their own precedents. While an agency is not bound by its precedents, the courts are increasingly requiring that it must provide a reasoned explanation for departing from them: "Agencies do not have the same freedom as courts to change direction without acknowledging and justifying the change."³²⁰ An agency may not abandon an earlier position by simply terming

record").

309. See *Pennsylvania Dep't of Transp. v. Bankston*, 625 A.2d 1333 (Pa. Commw. Ct. 1993).

310. See *id.* at 1335.

311. See *id.* at 1337.

312. *Id.*

313. See *Fisher v. Department of Soc. Serv.*, 600 So. 2d 1368 (La. Ct. App. 1992).

314. *B.A.M. Brokerage Corp. v. New York*, 718 F. Supp. 1195, 1203 (S.D.N.Y. 1989).

315. See *United States v. Morgan*, 313 U.S. 409 (1941).

316. See *Montgomery Nat'l Bank v. Clarke*, 703 F. Supp. 1161 (D.N.J. 1989).

317. See *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992 (D.C. Cir. 1990).

318. *Id.* at 997.

319. *Id.* at 998.

320. *Salameda v. INS*, 70 F.3d 447, 450 (7th Cir. 1995). See also *ANR Pipeline Co. v. FERC*, 71 F.3d

the earlier case in which it was applied "*sui generis*."³²¹ Instead, the agency must provide "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."³²² Indeed, where the FCC had failed to explain or even recognize its departure from agency precedent and appellant suggested that it was the target of a personal grudge held by senior officials in the agency, a concurrence declared, "Normally I would discount such a claim, but the agency's handling of this case is so inexplicable otherwise that appellant's suggestion is troubling."³²³

It should, however, be stressed that the requirement of reasons, both in the cases just discussed and in general, is not interpreted in an over-technical manner. In the recent words of a federal court, the decision "need not be a trail emblazoned . . . with signposts detailing every minute fact that went into the . . . decisional process."³²⁴ The courts do not require that, before they will approve an agency decision, "every i must be dotted and every t crossed."³²⁵ At the same time, there must be an adequate agency explanation. It is, the Ninth Circuit says, not enough for the agency to rely on "boilerplate" opinions which set out general legal standards but do not adequately apply them to the case's individualized circumstances.³²⁶

Bias

It is hornbook administrative law that "a fair trial in a fair tribunal is a basic requirement of due process."³²⁷ As the Ninth Circuit tells us, "This requirement applies not only to courts, but also to . . . administrative agencies."³²⁸ An administrative decision may not stand if either the hearing officer³²⁹ or the agency was infected with legal bias. One can go further and state that the principles governing disqualification for bias are essentially the same for agencies and courts.

There are, however, state cases that refuse to follow this rule. In a Mississippi decision³³⁰ involving disqualification of a hearing officer in a school personnel termination case, the lower court had applied the disqualification standard applicable to judges and ruled that the hearing officer should have recused himself. The state supreme court held that this was erroneous. Because "admin-

897 (D.C. Cir. 1995) (reversing agency departure from precedent without reasoned explanation).

321. *Trunkline LNG Co. v. FERC*, 921 F.2d 313, 320 (D.C. Cir. 1990).

322. *WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). See also *Western States Petroleum v. EPA*, 87 F.3d 280 (9th Cir. 1996) (agency did not provide any explanation for departure from prior norms).

323. *WLOS TV*, 932 F.2d at 998 (Silberman, J., concurring).

324. *C.K. v. Shalala*, 883 F. Supp. 991, 1004 (D.N.J. 1995).

325. *Id.* at 1005 (quoting *Aguayo v. Richardson*, 473 F.2d 1090, 1107 (2d Cir. 1973)).

326. See *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995). See also *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) (finding decision improper when "agency merely parrots the language of a statute").

327. *Withrow v. Larken*, 421 U.S. 35, 46 (1975) (quoting *In re Murchinson*, 349 U.S. 133, 136 (1955)).

328. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995).

329. See *Pastrana v. Chater*, 917 F. Supp. 103 (D.P.R. 1996).

330. See *Byrd v. Greene County Sch. Dist.*, 633 So. 2d 1018 (Miss. 1994).

istrative hearings 'are not trials and . . . are not governed by the same rules which apply in courts of law,'" the disqualification standard for judges was not applicable.³³¹ Instead, an agency adjudicator will not be disqualified when "[t]here is no evidence that he had any personal or financial interest in the outcome of the case or that he had any feelings of personal animosity toward [a party]."³³²

This, too, is administrative law heresy. If there is one principle that governs administrative procedure, it is that stated by a Tennessee court: "When agency members are performing adjudicatory functions, they must abide by the same disqualification standards that are applicable to judges."³³³ If anything, indeed, as the Third Circuit points out, the bias requirement should be stricter in an agency: "The due process requirement of an impartial decisionmaker is applied more strictly in administrative proceedings than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings."³³⁴

The ruling of another state court also appears inconsistent with the proper bias posture.³³⁵ The case arose out of a telephone rate hearing before the state regulatory commission. The company sought a court order disqualifying a commissioner after he revealed that he had been secretly acting as an informant in an ongoing FBI investigation into allegedly improper conduct by company employees involving his fellow commissioners. The Oklahoma court recognized that it might have the power "to disqualify a corporation commissioner, if he were sitting in a *judicial* capacity."³³⁶ That, however, was not the case here because "[r]ate hearings are legislative in nature."³³⁷ To support that proposition, the court relied on the 1908 *Prentis* case³³⁸ and the more recent Supreme Court reaffirmation of its holding that ratemaking is a legislative act.³³⁹ Because this was not a judicial proceeding in which the commissioner was performing an adjudicatory function, "due process requirements, including neutrality,"³⁴⁰ were not demanded. Instead, the proceeding was legislative in nature. "Commissioner Anthony was acting in a legislative capacity which did not require him to comply with judicial standards of conduct. Accordingly, this Court is without jurisdiction to disqualify Commissioner Anthony from participation in this or any other SWB rate hearing."³⁴¹

331. *Id.* at 1022-23 (quoting *United Cement Co. v. Safe Air for the Environment, Inc.*, 558 So. 2d 840, 842 (Miss. 1990)).

332. *Id.* at 1023.

333. *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 164 (Tenn. Ct. App. 1992).

334. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

335. *See Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001 (Okla. 1994).

336. *Id.* at 1008.

337. *Id.* at 1005.

338. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

339. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 371 (1989).

340. *Southwestern Bell*, 873 P.2d at 1006.

341. *Id.* at 1007.

It is undoubtedly true that the strict adjudicatory rule against bias does not apply in rulemaking proceedings,³⁴² and that ratemaking is legislative in character.³⁴³ Yet that should be the beginning, not the end, of the inquiry into the matter. Ratemaking may be legislative in character, but it is also particular in applicability. When an agency fixes telephone rates, there is only one company whose rates are being fixed. Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency opposing parties who can best present their sides in a trial-type format.

In particularized ratemaking, due process requires an evidentiary hearing similar to that required in adjudicatory proceedings. Particularized rate-making requires adversarial, trial-type hearings, governed by due process procedural safeguards — including the rule against bias. That has been the established law since the decision in *Spring Valley Water-Works v. Schottler*.³⁴⁴ In that case, both the opinion of the Court and the dissent by Justice Field proceed upon the principle that “the rates shall be established by an impartial tribunal”³⁴⁵ — one whose members are not infected by bias. To hold the contrary is to make a decision that, to put it charitably, is contrary to both established administrative law principles and all the jurisprudence on the matter. In rate-making, as in purely adjudicatory proceedings, “appellant was entitled to an impartial decision-maker who had not prejudged the issues.”³⁴⁶

In another important respect, the decade's bias cases took important steps forward. The cases have long recognized disqualifying bias where the adjudicator has a financial interest in the case or is tainted by personal bias.³⁴⁷ What happens, however, when there is prejudgment by the adjudicator? The leading case on the matter used to be *FTC v. Cement Institute*,³⁴⁸ which ruled that prejudgment alone does not constitute legal bias, since it “did not necessarily mean that the minds of [the agency] members were irrevocably closed.”³⁴⁹

The difficulty with *Cement Institute* is that, as the Davis-Pierce treatise points out, “as a practical matter, it makes proof of closed minds virtually impossible.”³⁵⁰ It is scarcely surprising then that no adjudicator has been “held disqualified on account of closed minds, because proof of closed minds is normally impossible and because an allegation of closed minds is likely to bring the response the Court gave in the *Cement Institute* case.”³⁵¹

Cement Institute has never been overruled by the Supreme Court. Despite that, the lower courts have substituted for its strict rule for the rule recently

342. See *Organized Fishermen v. Franklin*, 846 F. Supp. 1569 (S.D. Fla. 1994).

343. See *supra* text accompanying note 337.

344. 110 U.S. 347 (1884).

345. *Id.* at 363.

346. *Michigan Intra-State Motor Tariff Bureau v. Public Serv. Comm'n*, 504 N.W.2d 677, 682 (Mich. Ct. App. 1993). See also *New England Tel. & Tel. Co. v. Public Util. Comm'n*, 448 A.2d 272 (Me. 1982).

347. See SCHWARTZ, *supra* note 91, §§ 6.17-6.18.

348. 333 U.S. 683 (1948).

349. *Id.* at 701.

350. 2 Davis & Pierce, *supra* note 197, § 9.8, at 84.

351. *Id.*

stated by the Ninth Circuit — that legal bias exists when a plaintiff can “show that the adjudicator ‘has prejudged, or reasonably appears to have prejudged, an issue’”³⁵² The changed law in the matter can be seen in a 1990 New York decision which held that public statements made by the Chairman of the State Liquor Authority (SLA) concerning charges then pending in an SLA proceeding disqualified the Chairman from participating in the administrative review process.³⁵³ Both the accused killer and the victim in the highly publicized so-called “preppie murder” case had been in petitioner restaurant shortly before the crime.³⁵⁴ Petitioner had then been charged by the SLA with selling liquor to underage patrons.³⁵⁵ Just before the hearing the SLA Chairman testified before a legislative committee.³⁵⁶ His statement indicated that petitioner was guilty and “I am going to bring [petitioner] to justice.”³⁵⁷ The Chairman refused to disqualify himself from sitting on review of an ALJ decision.³⁵⁸

The SLA Chairman may have prejudged the case, but it had not been shown that he had the “irrevocably closed mind” required by *Cement Institute*. The New York court, nevertheless, ruled that the SLA decision must be annulled. The Chairman’s testimony evidenced his “belief that petitioner had in fact violated the law regarding the sale of alcohol to minors.”³⁵⁹ Where an agency official evinces such prejudgment, he must disqualify himself. In such a case, “a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”³⁶⁰ That prejudgment is enough to demonstrate legal bias.³⁶¹

It is, of course, by now settled law that the mere combination of functions in an agency does not make its procedure unfair.³⁶² However, there is a distinction between combining functions in an agency and the exercise of inconsistent functions by the same person. For example, where an adjudicator refers charges against a police officer, he must recuse himself from sitting on the panel that adjudicates those charges.³⁶³ The same is true where the same person participates at different levels of the adjudicatory process.³⁶⁴

352. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (quoting *Kenneally v Lungren*, 967 F.2d 329, 333 (9th Cir. 1992)).

353. *See 1616 Second Ave. Restaurant, Inc. v. New York State Liquor Auth.*, 550 N.E.2d 910 (N.Y. 1990).

354. *See id.* at 911.

355. *See id.*

356. *See id.*

357. *See id.* at 913.

358. *See id.* at 911.

359. *Id.* at 913.

360. *Id.* at 912.

361. *See Antoniu v. SEC*, 877 F.2d 721 (8th Cir. 1989); *Wilmer-Hutchins Indep. Sch. Dist. v. Brown*, 912 S.W.2d 848 (Tex. Civ. App. 1995). On the rule of necessity, see *General Motors Corp. v. Rosa*, 624 N.E.2d 142 (N.Y. 1993).

362. *See Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1385 (5th Cir. 1996); *Swafford v. Dade County Bd. of Comm’rs*, 469 S.E.2d 666 (Ga. 1996); *Artman v. State Bd. of Registration*, 918 S.W.2d 247 (Mo. 1996).

363. *See Scalzi v. Altoona*, 583 A.2d 1150 (Pa. Commw. Ct. 1987).

364. For a more recent case, see *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988).

To administrative lawyers today the principle just stated is an all but obvious aspect of the right to a fair adjudication, but the law has only recently become settled to that effect. Not long ago, the leading case on the matter was *Eisler v. United States*,³⁶⁵ which refused to disqualify a judge who had been legal adviser to the FBI in the very investigation out of which the case arose. According to the court of appeals, "Impersonal prejudice resulting from a judge's background or experience is not . . . within the purview of the statute" providing for disqualification.³⁶⁶

Years ago I urged that *Eisler* should not be followed in cases involving administrative agencies.³⁶⁷ Cases during the past decade show that the courts now accept this view. Another New York case strikingly illustrates this.³⁶⁸ The SLA had served notices of proceedings to revoke and suspend a license, charging violations of the liquor law. The notices were issued with the stamped signature of "Sharon L. Tillman, Counsel to the Authority."³⁶⁹ After hearings, the ALJ sustained the charges factually and, referred the matter to the SLA (composed of five Commissioners) for final determination.³⁷⁰ In the interim, Tillman left her position as Counsel to become an SLA Commissioner.³⁷¹ The Commissioners then voted to adopt the ALJ's findings, sustain the charges and, impose a penalty of revocation and a bond forfeiture.³⁷² Commissioner Tillman concurred in the dispositions.³⁷³ The New York court ruled that the SLA decision was invalid: "The challenge here is not to the dual investigatory/adjudicatory role of the agency. Rather it concerns an individual's participation, as advocate for the agency's position, in the very matter over which she is later required to pass impartial judgment."³⁷⁴ The agency, as such, may investigate, prosecute, and adjudicate, but that does not mean that the same individuals within the agency may exercise both prosecutorial and judicial functions. "Tillman's role as Beer Garden's 'prosecutor' in this case was inherently incompatible with her subsequent participation as its Judge. . . . That circumstance and fundamental fairness require that she recuse herself."³⁷⁵

Despite *Eisler*, then, the recent cases hold that an agency official who participates in the investigation or prosecution of the particular case should be disqualified from hearing or deciding. A Michigan court states this principle as an aspect of prejudgment, ruling that bias exists where the adjudicator "might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker."³⁷⁶ In administrative agencies today,

365. 170 F.2d 273 (D.C. Cir. 1948).

366. *Id.* at 278.

367. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 312 (1st ed. 1976).

368. See *Beer Garden, Inc. v. New York State Liquor Auth.*, 590 N.E.2d 1193 (N.Y. 1992).

369. See *id.* at 1194.

370. See *id.* at 1195.

371. See *id.*

372. See *id.*

373. See *id.*

374. *Id.* at 1198.

375. *Id.* at 1199.

376. *Michigan Intra-State Motor Tariff Bureau v. Public Serv. Comm'n*, 504 N.W.2d 677, 682 (Mich.

participation by the same person at different levels of the adjudicatory process is not permitted.

Counsel

Counsel is, of course, recognized as a right in the administrative process as it is in the courts. There are, however, limitations upon that right in agencies that would not be permitted in the courts. Just before the period covered by this article, the Supreme Court upheld a statutory \$10 limitation upon attorney's fees in veterans' benefit proceedings.³⁷⁷ According to Justice Scalia, the decision was based upon the determination that the government should administer benefits in a nonadversarial fashion so that claimants would receive the entire award without having to share it with an attorney.³⁷⁸ *United States Department of Labor v. Triplett* concluded that the government had the same legitimate interest in a statute prohibiting attorney's fees in black lung cases except as approved by the Department of Labor.³⁷⁹ The Department's regulations invalidated all contractual fee arrangements. Respondent attorney violated the fee scheme when he agreed to represent claimants on a contingent-fee basis and collected fees without the required approval. The state court ruled the fee restriction unconstitutional because it effectively denied access to counsel.³⁸⁰ The ruling was based upon the statements of three attorneys before a congressional committee that many lawyers would not take black lung cases.³⁸¹

In reversing the Supreme Court declared:

This will not do. . . . [T]his sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled. . . . The impressions of three lawyers that the current system has produced "few" lawyers, or "fewer qualified attorneys" (whatever that means), and that "many" have left the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely un rebutted.³⁸²

Moreover, there were statistics showing that claimants were represented by counsel in most cases—nonanecdotal evidence that, according to the Court, "suggest[s] that claimants whose chances of success are high enough to attract contingent-fee lawyers have no difficulty finding them."³⁸³ One may, however, wonder if there is not a discrepancy here. In view of the regulations invalidating all contractual fee arrangements, how can such claimants secure contingent-fee lawyers? The Court notes that the lower "court did not explain why the Keynesian imperative of cash-on-the-barrelhead has not eliminated the contin-

App. 1993).

377. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

378. See *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

379. See *id.* at 721-26.

380. See *id.* at 719.

381. See *id.* at 723.

382. *Id.* at 723-24.

383. *Id.* at 724.

gent fee."³⁸⁴ But neither did the Court opinion that nevertheless relied upon the presumption that claimants could attract contingent-fee lawyers.

Evidence

The cases during the decade continue to rule that agencies are not bound by the courtroom rules of evidence.³⁸⁵ This means, the Sixth Circuit tells us, that "relevant evidence not admissible in court, including hearsay, is admissible at an administrative hearing."³⁸⁶ There is, however, a fundamental difference between the admission of incompetent evidence and reliance upon it in reaching a decision. This is, of course, the basis of the legal residuum rule,³⁸⁷ which has been rejected by the Oregon court,³⁸⁸ but continues to be followed by the other state courts that have considered the matter.³⁸⁹

*Richardson v. Perales*³⁹⁰ refused to require the legal residuum rule in federal agencies. However, the Court there stressed the right to subpoena and cross-examine the reporting physician.³⁹¹ Despite this, the Sixth Circuit upheld an agency refusal to issue a subpoena to a supplemental security income claimant to cross-examine the examining physician whose report had been used by the agency in denying the claim.³⁹² The court held both that the claimant had failed to comply with a regulation requiring the subpoena applicant to provide the agency a timely explanation of why the subpoena was necessary and that the doctor's testimony was not in fact necessary.³⁹³ It may, nevertheless, be questioned whether the latter determination can really be made before it is known what the testimony will be. And what of the *Perales* implication of the right to a subpoena in such a case? The Sixth Circuit answered by stating, "We do not read *Perales* as suggesting that the right to subpoena witnesses is 'absolute' in the sense that a party who requests a subpoena is automatically entitled to its issuance whether or not he has complied with the published rules governing such matters."³⁹⁴ The court assumed that, if the *Perales* claimant

384. *Id.* at 725. See also *Brock v. Chater*, 84 F.3d 726 (5th Cir. 1996) (ALJ heightened duty to virtually represent pro se SSI claimant). For a case where the agency violated the right to counsel, see *Crimi v. Droskoski*, 630 N.Y.S.2d 337 (App. Div. 1996).

385. See, e.g., *Espinoza v. INS*, 62 F.3d 395 (9th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995).

386. *Tyra v. Secretary of HHS*, 896 F.2d 1024, 1030 (6th Cir. 1990). See also *Felzgerek v. INS*, 75 F.3d 112 (2d Cir. 1996); *Mosby v. Louisiana*, 672 So. 2d 246 (La. Ct. App. 1996).

387. See SCHWARTZ, *supra* note 91, § 7.4.

388. See *Reguero v. Teacher Standards and Practices Comm'n*, 789 P.2d 11 (Or. Ct. App. 1990). It has also been rejected in New York. See *EJG Corp. v. New York State Liquor Auth.*, 624 N.Y.S.2d 68 (App. Div. 1995).

389. See SCHWARTZ, *supra* note 91, § 7.4; 2 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 406-10 (2d ed. 1965). For a recent case, see *Wagstaff v. Department of Employment Sec.*, 826 P.2d 1069 (Utah Ct. App. 1992).

390. 402 U.S. 389 (1971).

391. See *id.* at 402, 404-05.

392. See *Calvin v. Chater*, 73 F.3d 87 (6th Cir. 1996).

393. See *id.* at 91.

394. *Id.* at 92. See also *Feliciano v. Chater*, 901 F. Supp. 50 (D.P.R. 1995).

had filed a request that failed to demonstrate need as required by the regulation, the result in the case would have been the same.³⁹⁵

The basic principle governing agency use of evidence is that of exclusiveness of the record. It prohibits an agency from relying upon evidence outside the record. Thus, where the ALJ in a disability case relies on a post hearing report, the decision is invalid; the claimant has the right to a supplemental hearing and must be notified of that right.³⁹⁶ The exclusiveness of the record principle depends upon the existence of an adequate record in the given case. There is an agency duty to provide such a record in an adjudicatory proceeding. However, there is no *Griffin v. Illinois*³⁹⁷ constitutional right to a free transcript in an administrative proceeding.³⁹⁸ The record itself used to consist of the stenographic transcript of the evidence and arguments presented at the hearing. In recent years, more and more agency hearings have been recorded on tape.³⁹⁹ What happens, however, if the tape recording is incomplete or inaudible?

Where the entire tape recording of the hearing is destroyed, a new hearing is required.⁴⁰⁰ However, according to the Ninth Circuit, unavailability of the testimony of two witnesses because of recorder malfunction is not harmful error, where the record is still sufficient for meaningful review.⁴⁰¹ More debatable is a Seventh Circuit decision where the electronic transcript of the hearing before the immigration judge contained 292 notations to the effect that a word or words in testimony were "indiscernible" or "inaudible."⁴⁰² In consequence, said the court, "we can assume for purposes of this appeal that the government breached its duty to prepare a reasonably accurate, reasonably complete transcript."⁴⁰³ Despite this, the court refused to invalidate the INS action. It invoked the harmless error rule, saying that petitioner's lawyer "made no effort to show that the testimony that was not transcribed was material. The lawyer could have submitted an affidavit based on his own recollections, or those of his client, or [other witnesses]."⁴⁰⁴ One wonders if this does not place too great a burden upon the private party. The large number of gaps in the tape appear to have made it most difficult for petitioner to show how the record's deficiencies "affected the outcome." In spite of its criticism, the court, in effect, affirmed an agency's "sloppy handling of the record."⁴⁰⁵

395. See *Calvin*, 73 F.3d at 92 (noting that claimant in *Perales* had not requested a subpoena at all).

396. See *Gauthney v. Shalala*, 890 F. Supp. 401 (E.D. Pa. 1995).

397. 351 U.S. 12 (1956).

398. See *Smith v. Department of Health & Rehabilitative Serv.*, 573 So. 2d 320 (Fla. 1991); *Abdullah v. INS*, 921 F. Supp. 1080 (S.D.N.Y. 1996).

399. See *Gearan v. Department of HHS*, 838 F.2d 1190 (Fed. Cir. 1988).

400. See *Pida v. Department of Motor Vehicles and Safety*, 803 P.2d 229 (Nev. 1990).

401. See *Morales v. Merit Sys. Protection Bd.*, 932 F.2d 800 (9th Cir. 1991).

402. *Ortiz-Salas v. INS*, 992 F.2d 105, 106 (7th Cir. 1993).

403. *Id.*

404. *Id.* at 107.

405. *Id.*

Official Notice

The most important exception to the exclusiveness of the record principle is the doctrine of official notice. Under it, "Notice is a way to establish the existence of facts without evidence."⁴⁰⁶ Official notice is, of course, the administrative counterpart of judicial notice.⁴⁰⁷ Yet, as Judge Kleinfeld points out, "The appropriate scope of notice is broader in administrative proceedings than in trials."⁴⁰⁸ That is true, he says, because "A case before an administrative agency, unlike one before a court, 'is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases [which] often involve fact questions which have frequently been explored by the same tribunal'. . . . The tribunal learns from its cases."⁴⁰⁹

In addition, Judge Kleinfeld refers to a practical consideration not previously considered in cases and commentaries on the matter. As he puts it:

[V]olume and repetition affect peoples' ability to pay attention. Because of the quantity of similar cases before an agency such as the INS, if notice is not taken more broadly in administrative hearings, litigants may have an uphill battle maintaining the attention of the administrative judges. Even if the law allows people to tell officials the exact same and obvious thing hundreds of times, the officials may find it very hard to listen attentively after the first dozen or two repetitions. Hearings may degenerate into an empty form if the adjudicators cannot focus attention upon what is noteworthy about the particular case. The broader notice available in administrative hearings may, if properly used, facilitate more genuine hearings, as opposed to hearings in which the finder of fact hears, but cannot, because of the repetition, listen.⁴¹⁰

The Kleinfeld statements were made in a Ninth Circuit case where the issue was the taking of official notice in a Nicaraguan applicant's asylum application proceeding of the change in government with the assumption of control by an anti-Sandinista coalition after a free election in Nicaragua.⁴¹¹ The court held that notice may be taken of the free election and change in government since they were "not debatable. It would be a waste of time to allow evidence regarding them."⁴¹²

Nevertheless, the agency could not conclude summarily that the anti-Sandinista applicants did not have a well-founded fear of persecution were they to return to Nicaragua:

[T]he administrative desirability of notice as a substitute for evidence cannot be allowed to outweigh fairness to individual litigants. Unregulated notice, even of legislative facts, gives finders of fact "a dangerous

406. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992).

407. *See, e.g., In re Griffith*, 585 N.E.2d 937 (Ohio Ct. App. 1991).

408. *Castillo-Villagra*, 972 F.2d at 1026.

409. *Id.*

410. *Id.* at 1027.

411. *See id.* at 1020-21.

412. *Id.* at 1027. *Compare Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

freedom.” . . . Notice of facts without warning may deny “the fair hearing essential to due process,” and amount to “condemnation without trial.”⁴¹³

In this case, the agency had erred in taking notice without offering the applicants an opportunity to present rebuttal evidence.⁴¹⁴ Despite the election, the Sandinistas might have retained sufficient power to persecute petitioners, so that petitioners would still have a well-founded fear of persecution if they should return to Nicaragua.⁴¹⁵ While the official notice is permitted, it is subject to the fundamental safeguard that notice facts may not be taken of debatable facts without warning and an opportunity for rebuttal.⁴¹⁶ That is required both by the Federal APA⁴¹⁷ and, according to the Ninth Circuit, by due process as well.

Exclusionary Rule

Soon after *INS v. Lopez-Mendoza*⁴¹⁸ used a cost-benefit approach to hold that the exclusionary rule did not apply in an administrative proceeding,⁴¹⁹ I expressed the hope that the state courts would follow the example of the Oklahoma Supreme Court⁴²⁰ and reject the *Lopez-Mendoza* approach.⁴²¹ During the decade, however, the trend has been the other way, with the state courts that have considered the matter following the *Lopez-Mendoza* ruling that the exclusionary rule does not govern in an agency hearing.⁴²²

The most important of these state cases has been *Boyd v. Constantine*,⁴²³ where the New York court adopted the *Lopez-Mendoza* balancing approach. *Boyd* arose out of an unlawful search of a police officer's car, in which a bag of marijuana was found.⁴²⁴ The evidence was suppressed in a criminal case but found admissible in an administrative proceeding that resulted in the officer's dismissal.⁴²⁵ Under the balancing approach, the evidence obtained through an illegal search and seizure was ruled admissible by the New York court. As the court saw it, “there would be no secondary deterrent effect in applying the exclusionary rule to this administrative proceeding, and the burden of excluding the evidence outweighs the benefit to society of obtaining the truth regarding a State Trooper's possession of marijuana.”⁴²⁶

413. *Castillo-Villagra*, 972 F.2d at 1027.

414. *See id.* at 1029-31.

415. *See id.* at 1031.

416. *See Gonzalez v. INS*, 82 F.3d 903, 912 (9th Cir. 1996). *But see Gonzalez v. INS*, 77 F.3d 1015 (7th Cir. 1996); *Man v. INS*, 69 F.3d 835 (7th Cir. 1995) (agency not required to give opportunity to rebut similar taking of official notice).

417. *See* 5 U.S.C. § 556(e) (1994).

418. 468 U.S. 1032 (1984).

419. *See id.* at 1033. *Lopez-Mendoza* itself was a deportation case.

420. *See Turner v. City of Lawton*, 733 P.2d 375 (Okla. 1986).

421. *See* SCHWARTZ, *supra* note 91, § 7.12.

422. The one exception has been the Illinois court in *People v. Krueger*, 567 N.E.2d 717 (Ill. Ct. App. 1991).

423. 613 N.E.2d 511 (N.Y. 1993).

424. *See id.* at 511-12.

425. *See id.* at 512.

426. *Id.* *See also* *Juan C. v. Cortines*, 647 N.Y.S.2d 491 (App. Div. 1996) (exclusionary rule applies when

My writings on the subject⁴²⁷ indicate my agreement with the dissenting opinion of Judge Titone, who asserted that "the 'balancing' approach, which has no real objective criteria, can lead to result-oriented decision-making and, ultimately, to the devaluation of the exclusionary rule as an important component of our system of constitutional enforcement."⁴²⁸ The Titone dissent parallels my own criticism. As one writer summarizes my view, "To Schwartz . . . [i]t is anomalous to enforce opposite rules in administrative and criminal proceedings concerning evidence blighted by the same pollution; an unlawful search violates the identical privacy, whether its fruits are used to convict in a criminal case or to forfeit a personal right in an agency proceeding."⁴²⁹

Even more important, as Judge Titone stresses, "the 'balancing' approach is inherently weighted against application of the exclusionary rule, since it focuses on the facts in the individual situation before the court rather than the broader societal concerns that led to the development of the suppression principle."⁴³⁰ The *Lopez-Mendoza* cost-benefit approach allows an agency to avail itself of the fruits of unlawful activity. It is "straining constitutional discourse through a . . . sieve in which the 'costs (usually tangible and visible) are supposedly 'balanced' against the 'benefits' (usually ephemeral and diffuse) of treating [the Fourth Amendment right] seriously."⁴³¹

Almost needless to state, this writer agrees with the Ninth Circuit that "the right to invoke the exclusionary rule at an administrative proceeding would carry a reassuring aura of fairness."⁴³² Hence, even those courts that follow *Lopez-Mendoza* should recognize the important Ninth Circuit exception to the rule that the exclusionary rule is not applicable in agency proceedings. In *Gonzalez-Rivera v. INS*,⁴³³ the immigration judge had found that border patrol officers had stopped an alien in a car solely because of his Hispanic appearance.⁴³⁴ The Ninth Circuit held that such a stop was not based on reasonable suspicion and thus constituted a Fourth Amendment violation.⁴³⁵ Under *Lopez-Mendoza*, that alone would not require the evidence obtained by the officers to be excluded. The court noted, however, that *Lopez-Mendoza* had specifically stated, "we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."⁴³⁶ *Lopez-Mendoza* then

evidence was obtained by same agency that seeks to use it in an administrative hearing).

427. See SCHWARTZ, *supra* note 91, §§ 7.11-7.12.

428. *Boyd*, 613 N.E.2d at 517 (Titone, J., dissenting).

429. KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 571 (2d ed. 1988).

430. *Boyd*, 613 N.E.2d at 517 (Titone, J., dissenting). For other cases holding that the exclusionary rule is not applicable in administrative proceedings, see SCHWARTZ, *supra* note 91, § 7.12. For more recent cases, see *Krueger v. Iowa Dep't of Transp.*, 493 N.W.2d 844 (Iowa 1992); *Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1988); *Green v. Director of Revenue*, 745 S.W.2d 818 (Mo. Ct. App. 1991); *Merrifield v. Motor Vehicles Div.*, 807 P.2d 329 (Or. Ct. App. 1991).

431. LAWRENCE H. TRIBE, *CONSTITUTIONAL CHOICES* viii (1985).

432. *In re Establishment Inspection of Hein Iron Works, Inc.*, 881 F.2d 722, 729 (9th Cir. 1989).

433. 22 F.3d 1441 (9th Cir. 1994).

434. See *id.* at 1442.

435. See *id.* at 1443.

436. See *id.* at 1448 (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)).

cited *Rochin v. California*,⁴³⁷ where the police had forcibly extracted narcotic pills with a stomach pump. The police conduct, said the *Rochin* Court, “shocks the conscience.”⁴³⁸ According to the Ninth Circuit, it was not only such conduct that constituted “an egregious constitutional violation”⁴³⁹ for purposes of the exception to the *Lopez-Mendoza* rule. “Instead, . . . all ‘bad faith violation[s] of an individual’s Fourth Amendment rights’ are considered sufficiently egregious to ‘require[] application of the exclusionary [rule].”⁴⁴⁰ In this case, the Ninth Circuit concluded, the stop based solely on race was a bad faith constitutional violation: “[W]hen an INS officer makes a stop based solely on race, he or she has deliberately violated the law or has acted in conscious disregard of the Constitution.”⁴⁴¹ That being the case, *Lopez-Mendoza* notwithstanding, “we conclude that the officers’ conduct in this case constituted a bad faith, egregious constitutional violation that warrants the application of the exclusionary rule.”⁴⁴²

Burden of Proof

The accepted rule governing the burden of proof in agency proceedings—both before and under the APA—has been “the traditional preponderance-of-the-evidence standard.”⁴⁴³ It was, therefore, surprising that there was a conflict in the circuits on whether the APA prohibits the “true doubt” rule followed by agencies in federal black lung and workers’ compensation cases. The rule was applied when the evidence in favor of and the evidence against a claimant’s disability were equally balanced; the rule required the agency to resolve “all true doubts” in favor of the claimant and to hold in his favor. The Supreme Court has, however, resolved the matter in *Director, Office of Workers’ Compensation Programs, Department of Labor v. Greenwich Collieries*,⁴⁴⁴ holding that the rule violated section 7(c) of the APA.

Despite the circuit decisions the other way, the issue does not appear difficult. Under section 7(c), a decision may not be made unless the case is proved by a preponderance of the evidence.⁴⁴⁵ As the *Greenwich Collieries* opinion put it, “Under the . . . true doubt rule, when the evidence is evenly balanced the claimant wins. Under § 7(c), however, when the evidence is evenly balanced, the benefits claimant must lose. Accordingly, we hold that the true doubt rule violates § 7(c) of the APA.”⁴⁴⁶

437. 342 U.S. 165 (1952).

438. *Id.* at 172.

439. *Gonzales-Rivera*, 22 F.3d at 1442.

440. *Id.* at 1449 (quoting *Adamson v. Commissioner of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984)).

441. *Id.* at 1450.

442. *Id.* at 1452.

443. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). *See also* *Goff v. Dailey*, 991 F.2d 1437 (8th Cir. 1993); *Casper Iron & Metal, Inc. v. Unemployment Ins. Comm’n*, 845 P.2d 387, 391 (Wyo. 1996). For a case where a higher standard of proof is required, see *Bottles v. State*, 917 P.2d 471 (Okla. 1996).

444. 114 S. Ct. 2251 (1994).

445. *See Steadman*, 450 U.S. at 102.

446. *Greenwich Collieries*, 114 S. Ct. at 2259. *See also* *Consolidation Coal v. McMahon*, 77 F.3d 898

RULEMAKING

Procedure

"In the not-so-distant past," Judge Kozinski tells us "a government agency in the Soviet Union could impose controls on the production of commodities without bothering to involve the public in the decisionmaking process. By contrast, a government agency in the United States must usually give notice to, and accept comments from, the public before undertaking to place manacles on the invisible hand."⁴⁴⁷

The notice and comment requirement applies, of course, only to agency acts that can be classified as "rules." Justice Scalia confirms that "the most significant portions of the APA are based" upon the rulemaking-adjudication dichotomy.⁴⁴⁸ Since enactment of the APA, the courts have been troubled by the question of whether a given agency act is a "rule" and hence subject to the notice and comment requirement. Determining whether an agency's statement is a rule or an order "can be a difficult exercise."⁴⁴⁹ The cases continue to hold that the label used by the agency is not determinative. They have "rejected the notion that the nature of the agency's proceedings might depend upon their form."⁴⁵⁰ Thus, the fact that the agency called its regulation a "standard" did not excuse its failure to follow APA rulemaking requirements.⁴⁵¹

In *Lincoln v. Vigil*,⁴⁵² the Supreme Court had to decide whether agency action was a rule. At issue was the action of the Indian Health Service in terminating a clinical services program for handicapped Indian children.⁴⁵³ Petitioner claimed that before terminating the program, the Service had to follow the notice and comment rulemaking provisions of the APA.⁴⁵⁴ The Service argued that its decision to terminate did not qualify as a "rule" within the APA.⁴⁵⁵ The Court held that, even if the statement terminating the program would qualify as a "rule," it came within the exemptions contained in section 553 of the APA — either as a rule of agency organization or as a general statement of policy.⁴⁵⁶

The crucial question on applicability of the APA notice-and-comment requirements is whether agency acts have the effect of substantive rules; if they

(6th Cir. 1996) (following the *Greenwich Collieries* holding).

447. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1482 (9th Cir. 1992). Cf. *Hadson Gas Systems, Inc. v. FERC*, 75 F.3d 680 (D.C. Cir. 1996) (notice and comment not required to abolish obsolete regulations).

448. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988).

449. *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993). See also *Hocort v. United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996); *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 160 (Tenn. Ct. App. 1992).

450. *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989).

451. See *Cordero v. Corbisiero*, 599 N.E.2d 670 (N.Y. 1992).

452. 508 U.S. 182 (1993).

453. See *id.* at 189.

454. See *id.* at 195.

455. See *id.* at 196.

456. See *id.* at 197.

do, they are subject to the requirements even though they are not issued as substantive rules. Thus, the INS policy of requiring carriers to pay for the detention of stowaways prior to deportation was ruled a legislative rule that had to be promulgated subject to APA notice-and-comment requirements, though it was only an agency policy never formally included in any regulation.⁴⁵⁷ The same was true of the Interior Department's royalty-valuation procedure which keyed gas product valuations to spot market prices even though it had been set forth only in an unpublished internal agency paper.⁴⁵⁸

The key in these cases is the binding effect of the agency act, regardless of how it is characterized by the agency. In a D.C. Circuit case, the FCC claimed that a schedule of base forfeiture amounts for violations of the Communications Act was a mere "general statement of policy" rather than a legislative rule.⁴⁵⁹ In rejecting the claim, the court stressed that the schedule was intended "to cabin [the FCC's] discretion."⁴⁶⁰ As such, "It simply does not fit the paradigm of a policy statement, namely, an indication of an agency's current position on a particular regulatory issue."⁴⁶¹ In effect, then, the alleged "policy statement" was a "rule in masquerade"; the Commission "has sought to accomplish the agency hat trick"⁴⁶² to avoid APA notice-and-comment. Even if the schedule of fines was not a regulation in form, it "was intended to bind, no matter what 'policy statement' clothing it wore."⁴⁶³

Rulemaking Power

"Administrative law, it is said, has entered an age of rulemaking,"⁴⁶⁴ in which, in Justice Scalia's words, "Agency rulemaking powers are the rule rather than, as they once were, the exception."⁴⁶⁵ It is, however, basic that agencies do not possess inherent substantive rulemaking power. Where a commission had issued substantive rules although the legislature had not conferred substantive rulemaking authority on the agency, the rules were held beyond the commission's power: "[a] rule is upheld only if the legislative [delegation] expressly authorizes it."⁴⁶⁶

The courts have, at the same time, continued their generous approach to delegations of rulemaking power.⁴⁶⁷ Thus, the Supreme Court has held that agency failure to exercise substantive rulemaking authority for over sixty years

457. See *DIA Navigation Co., Ltd. v. Pomeroy*, 34 F.3d 1255 (3d Cir. 1994).

458. See *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994).

459. See *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

460. See *id.*

461. *Id.*

462. *Id.* at 1235.

463. *Id.* See also *Gulf States Utilities Co. v. Public Util. Comm'n of Texas*, 784 S.W.2d 519 (Tex. Civ. App. 1996).

464. William F. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38 (1975).

465. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

466. *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 847 F. Supp. 178, 186 (D. Mass. 1994) (emphasis added).

467. See *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973).

did not affect possession of the power. The agency in question was the NLRB; "Despite the fact that the NLRB has explicit rulemaking authority, . . . it has chosen-unlike any other major agency of the federal government — to make almost all its policy through adjudication."⁴⁶⁸ Though it was established in 1935, it was not until 1989 that the NLRB promulgated its first substantive rule, which was promptly challenged in *American Hospital Ass'n v. NLRB*.⁴⁶⁹ The rule defined appropriate collective bargaining units; it provided that, except for cases presenting "extraordinary circumstances," eight, and only eight, defined employee units were appropriate for collective bargaining in acute care hospitals.⁴⁷⁰ The rule was challenged on the ground that the National Labor Relations Act requires the Board to make a separate bargaining unit determination "in each case" and therefore prohibits the Board from using general rules to define bargaining units.⁴⁷¹

The Court rejected the challenge. According to it, the more natural meaning of the "in each case" requirement is simply to indicate that whenever there is disagreement about the appropriateness of a bargaining unit, the Board shall resolve the dispute.⁴⁷² In doing so, it is entitled to rely on the rules it develops to guide its discretion either in case-by-case adjudication or by exercise of rulemaking authority. The governing principle is "that, even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority."⁴⁷³ No such intent had been expressed here.

Adjudication versus Rulemaking

This aspect of *American Hospital* brings us to the relation between rulemaking and adjudication — what I have called "Adjudication versus Rulemaking."⁴⁷⁴ One aspect of that subject was dealt with in *Shalala v. Guernsey Memorial Hospital*,⁴⁷⁵ where it was claimed that an HHS Medicare reimbursement guideline was void because of failure to issue it in accordance with APA notice-and-comment provisions. The Court held that the guideline "is a prototypical example of an interpretive rule 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'"⁴⁷⁶ That being the case, the failure to follow the APA does not affect validity: "Interpretive rules do not require notice-and-comment."⁴⁷⁷

468. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 819 (1990).

469. 499 U.S. 606 (1991).

470. *See id.* at 606.

471. *See id.*

472. *See id.* at 611.

473. *Id.* at 612.

474. SCHWARTZ, *supra* note 91, § 4.18.

475. 115 S. Ct. 1232 (1995).

476. *Id.* at 1239 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)).

477. *Id.*

The relation of rulemaking to adjudication was also discussed by the Court, when it noted that the Secretary's regulations did not deal with every conceivable reimbursement question.⁴⁷⁸ Instead, as to particular reimbursement details not addressed by her regulations, the Secretary relied upon an adjudicative structure which includes both administrative and judicial review. That the regulations did not resolve all reimbursement questions did not render them invalid.⁴⁷⁹ The second *Chenery* case⁴⁸⁰ stands for agency discretion in choosing whether to proceed by rulemaking or adjudication. Hence, "The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication."⁴⁸¹ To the contrary, the Secretary's mode of determining benefits by both rulemaking and adjudication was wholly proper.

The *Chenery* problem is essentially that of retroactive lawmaking by adjudication that occurs when an agency decides a case on the basis of a new rule of law. Should the agency be required to lay down the new rule by rulemaking and so give fair notice of it in advance? *Chenery*, of course, answers in the negative. An agency is not barred from applying a new legal principle in an adjudicatory proceeding simply because it had the power to announce that principle in advance by using its rulemaking power. Thus, retroactive application of agency rules of law developed through adjudication is not unlawful. Under *Chenery*, "agencies have broad legal power to choose between adjudication and rulemaking proceedings as vehicles for policymaking."⁴⁸² In other words, it is up to the agency to develop its law "either through case-by-case decisionmaking . . . or through rule-making."⁴⁸³

Some courts have, however, refused to follow *Chenery*, where they have felt that it leads to unjust results. Foremost among them have been the courts in Oregon. Their approach is illustrated by *Dinkins v. Board of Accountancy*,⁴⁸⁴ a case in which the agency denied an application for a certified public accountant certificate. The statute required an applicant to "[h]ave had two years' public accounting experience or the equivalent thereof satisfactory to the board *under its rules*."⁴⁸⁵ The instant applicant had the two years' experience, but the agency denied her application on the ground that her experience was too "old," since it was obtained more than eight years before the application.⁴⁸⁶ The court held that the agency had erred because it had no rule when the application was made on the time that the accounting experience was obtained.⁴⁸⁷ In such a case, according to the court, the agency was required to have a rule adopted

478. *See id.* at 1237.

479. *See id.*

480. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

481. *Guernsey Memorial Hosp.*, 115 S. Ct. at 1237.

482. *Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992).

483. *AT&T Co. v. FCC*, 978 F.2d 727, 731 (D.C. Cir. 1992).

484. 846 P.2d 1186 (Or. Ct. App. 1993).

485. *Id.* at 1186.

486. *See id.*

487. *See id.* at 1186-87.

under the statute before it might consider the remoteness of petitioner's experience.⁴⁸⁸ The agency might not make that consideration through its order in the contested application case. Instead, an otherwise permissible agency interpretation of requirements must be expressed by a duly promulgated rule.⁴⁸⁹

Judicial Review

The broad rulemaking power of agencies is now an administrative-law truism. The Supreme Court has, however, laid down the general proposition that, absent a specific delegation, retroactive rules will be held ultra vires on judicial review.⁴⁹⁰ Court review of agency rules is, in general, based upon the ultra vires doctrine.⁴⁹¹ Regulations governing veterans benefits were ruled ultra vires in *Brown v. Gardner*⁴⁹² because they were inconsistent with the controlling statute. After respondent veteran had back surgery in a Department of Veterans Affairs facility, he developed pain and weakness, which he alleged resulted from the surgery.⁴⁹³ He claimed disability benefits under a statute that requires compensation for "an injury, or an aggravation of an injury" that occurs "as the result of" VA treatment.⁴⁹⁴ The claim was denied on the ground that a VA regulation covered the injury only if it resulted from negligent VA treatment.⁴⁹⁵ The Court held that the regulation went beyond the statute which contains not "so much as a word about fault on the part of the VA."⁴⁹⁶ In such a case, the fact that the law was reenacted does not ratify the regulation in view of the Court's "clear textually grounded conclusion."⁴⁹⁷ Congressional reenactment has no interpretive effect where a regulation clearly contradicts the requirements of a statute. "In sum," the Court concludes, "the text and reasonable inferences from it give it a clear answer against the Government, and that, as we have said, is 'the end of the matter.'"⁴⁹⁸ Nor did the VA regulatory interpretation deserve deference because of its undisturbed endurance for 60 years. "A regulation's age is no antidote to clear inconsistency with a statute."⁴⁹⁹ This is particularly true of VA regulations which have aged so long because there was no review of VA decisions until 1988.

Review of administrative rules has, like review of other agency action, been governed by the *Chevron* doctrine.⁵⁰⁰ Since the *Chevron* case itself in-

488. *See id.* at 1187.

489. *But compare* Jackson County v. Land Conservation & Dev. Comm'n, 888 P.2d 98 (Or. Ct. App. 1995) (*Dinkins* applies only when statute requires agency to act "under its rules").

490. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

491. *See* SCHWARTZ, *supra* note 91, § 4.4. *See also* Davis County Solid Waste Management v. EPA, 101 F.3d 1395 (D.C. Cir. 1996) (rulemaking power limited to authority delegated).

492. 115 S. Ct. 552 (1994).

493. *See id.* at 554.

494. *See id.*

495. *See id.*

496. *Id.* at 554-55.

497. *Id.* at 556.

498. *Id.*

499. *Id.* at 557.

500. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

volved rulemaking, it is clear that agency rules and regulations are entitled to *Chevron* deference. Thus, a regulation classifying annuities according to their functional characteristics was upheld as “at least reasonable.”⁵⁰¹ Where Congress had not expressed a clear intent and “the administrator’s reading fills a gap or defines a term in a way that is reasonable,”⁵⁰² *Chevron* requires the regulation to be upheld. That is true, says Judge Easterbrook, “because the delegation of the power to make substantive regulations is the delegation of a law-creation power, and interpretation is a vital part of the law-creation process.”⁵⁰³ The result is *Chevron* deference, which upholds the reasonable reading in agency interpretations in regulations. At the same time, the agency “reading must of course be reasonable — must be an *interpretation* — else the rulemaker is revising the law.”⁵⁰⁴

Chevron was also the foundation for a recent decision⁵⁰⁵ upholding a regulation defining the Endangered Species Act provision that makes it unlawful to “take” any endangered species to include “significant habitat modification or degradation where it actually kills or injures wildlife.” The statute defines the term “take” to include “to harm” and the regulation’s interpretation of “harm” as including indirect injuries such as habitat modification comes within *Chevron*: “We need not decide whether the statutory definition of ‘take’ compels the Secretary’s interpretation of ‘harm,’ because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents’ view and that the Secretary’s interpretation is reasonable suffice to decide this case.”⁵⁰⁶ *Chevron* requires “deference to the Secretary’s reasonable interpretation.”⁵⁰⁷

According to Judge Posner, however, review of rules is not the same as review of legislation itself. The courts, he writes, should not “treat an administrative rule as courts treat legislation claimed to deny substantive due process, and thus ask whether on any set of hypothesized facts, whether or not mentioned in the statement accompanying the rule, the rule was rational.”⁵⁰⁸ According to Posner, that is not the standard for judicial review of rules:

It is not enough that a rule *might be* rational; the statement accompanying its promulgation must show that it *is* rational — must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving.⁵⁰⁹

Judge Posner concluded that the challenged FCC “rules flunk this test”:

501. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995).

502. *Id.* at 813.

503. *Kurz v. Commissioner of Internal Revenue*, 68 F.3d 1027, 1030 (7th Cir. 1995).

504. *Id.*

505. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

506. *Id.* at 2416.

507. *Id.*

508. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992).

509. *Id.* (emphasis added).

The Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated.⁵¹⁰

Judicial review of rulemaking power is, without a doubt, an essential part of our administrative law. What happens, however, if the legislature provides an administrative remedy for challenges to agency rules? Does such a remedy deprive the courts of their otherwise inherent jurisdiction to determine the validity of agency rules and regulations?

These questions were presented in a Florida case where the legislature provided an administrative remedy for challenging agency rules.⁵¹¹ Such challenges may be initiated by filing petitions seeking determinations of invalidity of rules with the Division of Administrative Hearings. If a petition to invalidate a rule is filed with the Division, a hearing officer presides in proceedings that typically culminate in a final order, which is then reviewable in an appropriate court. The statute specifically prohibits judicial scrutiny of an administrative rule to determine whether it constitutes an invalid exercise of delegated legislative authority except to review an order of the Division of Administrative Hearings on a petition challenging a rule filed with it, unless the sole issue presented to the court is the rule's constitutionality.

An action was brought by appellants who alleged that they were adversely affected by rules relocating a coastal construction control line. Appellants attacked the statute providing for administrative review of rules, claiming that its prohibition of direct judicial review was unconstitutional as a denial of access to the courts.⁵¹² The claim was rejected by the Florida court. To require resort to the administrative remedy as a prerequisite to judicial consideration is not a denial of access to the courts. "The requirement that appellants pursue an administrative remedy that can be fully efficacious and more expeditious, before resort to the courts, in no way diminishes judicial authority to remedy any wrong."⁵¹³

In effect, the exhaustion-of-administrative-remedies requirement trumps the otherwise basic right to obtain judicial review of the legality (not only constitutionality) of agency rules. The result is a further diminution of the role of the courts as ultimate overseers of the rulemaking process. Absent the Florida statute, a court reviewing an agency rule decides for itself whether the rule is *ultra vires* or unreasonable. Now, under the statute, the court can only review the Division of Administrative Hearings' decision whether the rule constituted an

510. *Id.* at 1050.

511. *See* *Baillie v. Department of Natural Resources*, 632 So. 2d 1114 (Fla. Dist. Ct. App. 1994).

512. *See id.* at 1118.

513. *Id.* at 1119.

invalid exercise of delegated authority — that is, decide only whether the Division's decision that the rule was or was not reasonable was itself reasonable — intrinsically a dilution of the normal scope of judicial review over agency rules and regulations.

AVAILABILITY OF REVIEW

My characterization of judicial review as the “balance wheel of administrative law”⁵¹⁴ has been termed “a utopian image” which can be found “only in Saint Augustine's heavenly city.”⁵¹⁵ It is, nevertheless, true that judicial review remains the great safeguard against improper exercises of administrative authority. Without judicial review, indeed, limitations upon agency power would only “keep the word of promise to our ear.”

Preclusion

Giving effect to the importance of judicial review, the courts have started with a strong presumption in favor of review.⁵¹⁶ Thus, it is settled that the availability of review does not depend upon statutory review provisions. Judge Posner has succinctly summarized the law on the matter: “In the federal system, when no specific method of obtaining judicial review of final orders by administrative agencies is prescribed by statute, an aggrieved party can still obtain judicial review, by bringing a declaratory or injunctive suit against the agency.”⁵¹⁷ In the states, too, there are remedies by which judicial review is secured when review is not provided by statute.⁵¹⁸

The judicial posture here may be seen in a 1995 case, where it was claimed that action of the Attorney General was not subject to review.⁵¹⁹ Petitioners' complaint alleged damage from an accident in Colombia caused by a federal employee's negligence.⁵²⁰ The U.S. Attorney certified on behalf of the Attorney General that the employee was acting within the scope of his employment.⁵²¹ Petitioners sought court review of the scope-of-employment certification. The lower courts held the certification unreviewable. This meant that petitioners could not recover. In the ordinary case of such a certification, the United States would be substituted as defendant, and the case would proceed under the Federal Tort Claims Act. But in this case, substitution would cause the action's demise: petitioners' claims arose abroad, and thus fell within an exception to the FTCA. Hence, the lower courts dismissed the suit.

514. See SCHWARTZ, *supra* note 91, § 8.1.

515. WARREN, *supra* note 429, at 42.

516. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Timus v. D.C. Dep't of Human Rights*, 633 A.2d 751, 780 (D.C. 1993).

517. *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1320 (7th Cir. 1995).

518. See SCHWARTZ, *supra* note 91, § 9.11.

519. See *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995).

520. See *id.* at 2229.

521. See *id.* at 2230.

The Supreme Court reversed. The opinion by Justice Ginsburg contains strong language in favor of review availability. First of all, she writes, "when a government official's determination of a fact or circumstance — for example, 'scope of employment' — is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'"⁵²² Nonreviewability "runs up against a mainstay of our system of government"⁵²³ — the rule that no man may be a judge in his own cause. Here, absent review, "the Attorney General sits as an unreviewable 'judge in her own cause'; she can block petitioners' way to a tort action in court, at no cost to the federal treasury."⁵²⁴ Perhaps the statute may be subject to different interpretations. Where a fundamental such as judicial review is involved, however, "we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review."⁵²⁵

What is the effect, however, of a statutory provision that appears to preclude review — what Judge Posner has called a "door-closing statute"?⁵²⁶ Even in such a case, it is basic that the door to review is not closed. It is clear, in the first place, that constitutional claims are not barred by even the strongest preclusion provisions. A provision making the agency decision "(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise"⁵²⁷ was held by the Seventh Circuit not to "close the door to constitutional claims."⁵²⁸ The preclusion provision does not affect the right "to an administrative proceeding uncontaminated by a violation of the Constitution."⁵²⁹

The Seventh Circuit was only applying the accepted rule in the matter, recognized most recently by the Supreme Court in *Webster v. Doe*,⁵³⁰ which also held that a preclusion statute could not be read to bar review of constitutional claims. The Court stated that it reached its decision in favor of review of constitutional claims "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."⁵³¹ Justice Scalia, in a dissent, took issue with the implication of doubt about the constitutionality of denying all judicial review to a "colorable constitutional claim."⁵³² According to Scalia, the issue

522. *Id.* at 2231.

523. *Id.* at 2233.

524. *Id.*

525. *Id.* at 2236.

526. *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435, 1438 (7th Cir. 1996).

527. *Id.* at 1437 (citing 5 U.S.C. § 8103(b) (1994)).

528. *See id.* at 1442.

529. *Id.* at 1443.

530. 486 U.S. 592 (1988).

531. *Id.* at 603.

532. *Id.* at 611 (Scalia, J., dissenting).

here was not denial of all judicial review, but only the denial of review in federal district courts, and it has long been settled that Congress had complete control over the jurisdiction of the lower federal courts.⁵³³ One may wonder, however, whether the Congressional power in this respect may be pushed so far as to deny any judicial forum for cognizance of constitutional claims.

Justice Scalia states that that problem was not presented in *Webster*, for even if Congress had eliminated federal judicial cognizance of constitutional claims, it had not deprived the state courts of jurisdiction over such claims.⁵³⁴ It is, however, to be feared that Justice Scalia is ignoring the basic principle that state courts have no jurisdiction over federal officers and agencies.⁵³⁵ Hence, eliminating review in the federal courts means eliminating all review over a federal agency.

Justice Scalia goes further and denies that judicial review of all "colorable constitutional claims" arising out of respondent's dismissal may be constitutionally required. In fact, Scalia asserts, there is no "general principle that all constitutional violations must be remediable in the courts."⁵³⁶ As Scalia sees it, not all constitutional claims require a judicial remedy and it is up to Congress to determine those that do not.

As a general proposition, the Scalia view is constitutional blasphemy. Congressional power over federal-court jurisdiction should not permit it to go to the extreme of eliminating all judicial fora for resolution of a constitutional claim. This is particularly true where review of administrative action is at issue. To adopt the Scalia view is to give the agency concerned a standing invitation to disregard the statutory requirements and to exceed the powers conferred. One can go further and state that a preclusion provision should be interpreted so as not to bar judicial review on the legality of a challenged administrative act. The proper approach is shown by a New York case,⁵³⁷ where the statute provided that the agency decision "shall be final and conclusive and not subject to further review in any court." According to the court, nevertheless, "however explicit the statutory language, judicial review cannot be completely precluded."⁵³⁸ In addition to the *Webster v. Doe*-type review on constitutional issues, "judicial review is mandated when the agency has acted illegally . . . or in excess of its jurisdiction."⁵³⁹ The key principle is that stated by the D.C. Circuit: an agency cannot "expect to escape judicial review by hiding behind a finality clause."⁵⁴⁰ The preclusion provision is thus trumped by the requirements of the rule of law: "Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted

533. *See id.*

534. *See id.* at 611-12.

535. *See Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

536. *Webster*, 486 U.S. at 612 (Scalia, J., dissenting).

537. *See New York City Dep't of Envtl. Protection v. Civil Serv. Comm'n*, 579 N.E.2d 1385 (N.Y. 1991).

538. *Id.* at 1387.

539. *Id.*

540. *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

in excess of the grant of authority given . . . by statute or in disregard of the standard prescribed by the legislature."⁵⁴¹

King for Four Years?

The Rehnquist Court has been more deferential toward Presidential power than any Court in recent memory. In two important cases, the Court has gone far in the direction of insulating Presidential power from judicial review. The first case, *Franklin v. Massachusetts*,⁵⁴² arose out of a challenge to the method by which Congress apportioned seats in the House of Representatives. Under the relevant statute, after the Secretary of Commerce takes the census, he reports the tabulation to the President.⁵⁴³ He, in turn, sends Congress a statement showing the number of persons in each state, based on data from the census, and he determines the number of Representatives to which each state will be entitled.⁵⁴⁴ The Census Bureau allocated federal overseas employees to particular states for reapportionment purposes in the 1990 census, using an allocation method that it determined most closely resembled "usual residence," its standard measure of state affiliation.⁵⁴⁵ Massachusetts filed an action against the President and the Secretary of Commerce, alleging that the decision to allocate the overseas employees was inconsistent with the APA and the Constitution.⁵⁴⁶

The Court held that the action failed to meet the APA requirement of "final agency action," which alone is subject to review.⁵⁴⁷ In this case, the final action complained of was that of the President. The action that creates an entitlement to a particular number of Representatives and has a direct effect on the reapportionment is the President's statement to Congress. Hence, there is no "final" action until the President acts and the fact that the final act was that of the highest officer was considered by Congress to be "important to the integrity of the process."⁵⁴⁸

In addition, the Court went on to say that the President's acts, unlike all other executive and administrative acts, are "not reviewable for abuse of discretion."⁵⁴⁹ Even though the Court indicates that Presidential acts may be challenged on constitutional grounds,⁵⁵⁰ that still gives the President a unique status of immunity, which permits him to violate the law where the violation does not raise any constitutional issue.

541. *New York City Dep't of Envtl. Protection*, 579 N.E.2d at 1387.

542. 505 U.S. 788 (1992).

543. *See id.* at 797.

544. *See id.*

545. *See id.* at 794.

546. *See id.* at 795.

547. *Id.* at 796 (quoting 5 U.S.C. § 704 (1994)) (emphasis added).

548. *Id.* at 800.

549. *Id.* at 801.

550. *See id.*

Franklin lays down the rule that Presidential discretion may not be reviewed unless a constitutional claim is presented. That raises the question of how review in the latter case is to be secured. The lower court had granted an injunction against both the President and the Secretary of Commerce. *Franklin* declared, "the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows."⁵⁵¹ But the lower court injunction did more than raise the Justices' eyebrows. It led them strongly to reaffirm the over-a-century-old holding that "this Court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."⁵⁵² More than that, Justice Scalia went out of his way, in a concurrence, to assert that the same rule applied to issuance of a declaratory judgment against the President.⁵⁵³ The President is thus rendered immune from suits for declaratory or injunctive relief that challenge his performance of executive functions, even in cases raising constitutional claims. *United States v. Nixon*⁵⁵⁴ is thus relegated from its position as a constitutional cause célèbre to one of legal landmark passé, which does not affect Presidential immunity in all other cases.

Franklin tells us that the *Nixon* case was *sui generis* and that the Court has no jurisdiction to order declaratory or injunctive relief against the President in other cases. The potential implications of this holding may be seen in *Franklin* itself. On the merits, the Court held that the inclusion of overseas employees did not violate the Constitution.⁵⁵⁵ Suppose, however, that the Court had held the other way on the constitutional issue. It would still not be able, under its decision on the matter, to grant any remedy against the President. Since there is no other effective relief, the result would be unconstitutional executive action immune from judicial review — ordinarily the very negation of what we mean by the rule of the law.

Despite this, the Court strongly reaffirmed *Franklin* in *Dalton v. Specter*.⁵⁵⁶ *Dalton* arose out of an action to enjoin the Secretary of Defense from carrying out the President's decision to close the Philadelphia Naval Shipyard.⁵⁵⁷ The court of appeals held that judicial review of the closure decision was available to ensure that the Secretary and the Defense Base Closure and Realignment Commission, as participants in the closure selection process, had complied with the procedural mandates specified by Congress.⁵⁵⁸ The Supreme Court reversed, holding that *Franklin* required a decision that review was not available.⁵⁵⁹ Here, as in *Franklin*, the actions of the Secretary and the Commission are not reviewable "final agency actions" within the APA, because their

551. *Id.* at 802.

552. *Id.* at 802-03 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867)).

553. *See id.* at 824 (Scalia, J., concurring).

554. 418 U.S. 683 (1974).

555. *See Franklin*, 505 U.S. at 806.

556. 114 S. Ct. 1719 (1994).

557. *See id.* at 1722.

558. *See id.*

559. *See id.*

reports recommending base closings carry no direct consequences.⁵⁶⁰ Rather, the action that "will directly affect" bases is taken by the President when he submits his certificate of approval of the recommendations to Congress.⁵⁶¹ It is thus the President, not the Commission, who takes the final action that affects the military installations.

This holding should have disposed of the case. As in *Franklin*, however, the Court did not stop with it. Instead, it once again decided the question of reviewability of Presidential action. It reaffirmed the *Franklin* holding that action of the President may not be reviewed unless a constitutional claim is presented.⁵⁶² In *Dalton*, the claim raised was "a statutory one" — that the President violated the statute by accepting procedurally flawed recommendations.⁵⁶³ Hence the *Franklin* exception for review of constitutional claims did not apply. "Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."⁵⁶⁴

The *Franklin-Dalton* bottom line is effective immunization of the President from judicial review. To the assertion that this virtually repudiates *Marbury v. Madison*⁵⁶⁵ and two centuries of constitutional adjudication, the Chief Justice's opinion of the Court declared, "The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."⁵⁶⁶ In other words, judicial abnegation in the face of ultra vires executive action upholds the rule of law as much as the assertion of the review power delegated by Article III. Orwell! thou should'st be living at this hour.⁵⁶⁷

Before the Rehnquist Court, the classic statement of the rule of law was that in *United States v. Lee*:⁵⁶⁸ "No man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."⁵⁶⁹ In England, on the other hand, "the monarch is looked upon with too much reverence to be subjected to the demands of the law."⁵⁷⁰ Under cases such as *Franklin and Dalton*, have we now reached the stage stated over a century ago by William H. Seward, "We elect a king for four years"?⁵⁷¹

560. *See id.* at 1724.

561. *See id.*

562. *See id.* at 1726-27.

563. *See id.* at 1727.

564. *Id.* at 1728.

565. 5 U.S. (1 Cranch) 137 (1803).

566. *Dalton*, 114 S. Ct. at 1728.

567. With apologies to Wordsworth: "Milton! thou should'st be living at this hour: England hath need of thee." Wordsworth, London (1802).

568. 106 U.S. 196 (1882).

569. *Id.* at 220.

570. *Id.* at 208.

571. EDWARD S. CORWIN & LOUIS W. KOENIG, *THE PRESIDENCY TODAY* 61 n.41 (1956) (quoting 1863 statement of William H. Seward).

Primary Jurisdiction

Two doctrines have been developed to deal with the timing of judicial review. They are succinctly summarized by Justice Scalia: "Primary jurisdiction . . . is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency."⁵⁷² On the other hand, under the exhaustion rule, "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed."⁵⁷³

A federal judge tells us that the oft-stated factor — "whether the issues of fact raised in the case are not within the conventional experience of judges"⁵⁷⁴ — is not determinative on primary jurisdiction: "the primary jurisdiction doctrine may be applicable even if the questions raised in a case are within the ordinary experience of the judiciary."⁵⁷⁵ Instead, the judicial experience factor is but one of the four factors upon which application of primary jurisdiction turns: 1) whether the question raised is within the conventional experience of judges; 2) whether the question lies peculiarly within the agency's discretion or requires exercise of administrative expertise; 3) whether there is any danger of inconsistent rulings; and 4) whether there has been a prior application to the agency.⁵⁷⁶

Perhaps the most striking primary jurisdiction decision during the decade was rendered by the California court. The primary jurisdiction doctrine itself is, of course, one of the foundations of modern administrative law. Yet, in *Farmers Insurance Exchange v. Superior Court*,⁵⁷⁷ Justice Mosk asserts that this was the first case applying the doctrine in California.⁵⁷⁸ It is hard to believe that a developed system of administrative law could function without primary jurisdiction as a basic principle. Yet Justice Mosk appears to be correct in his assertion that primary jurisdiction was not a part of his state's administrative law before 1992. We leave it to California administrative lawyers to explain the anomaly of a functioning system of administrative law that operated for so many years without so fundamental a doctrine as primary jurisdiction. At any rate, in *Farmers Insurance Exchange*, the California court, however tardily, adopted the doctrine as an essential part of the state's administrative law.⁵⁷⁹

Farmers Insurance arose out of an action by the state against insurance companies for violations of a statutory requirement to offer a Good Driver Discount Policy. The complaint sought injunctive relief, a civil penalty, and

572. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

573. *Id.*

574. *Total Telecommunications Serv., Inc. v. AT&T Co.*, 919 F. Supp. 472, 478 (D.D.C. 1996) (quoting *MCI Communications Corp. v. AT&T Co.*, 496 F.2d 214, 223 (3rd Cir. 1976)).

575. *Id.*

576. *See id.*

577. 826 P.2d 730 (Cal. 1992).

578. *Id.* at 747 (Mosk, J., dissenting).

579. *See id.* at 732.

“such other relief as this Court deems just and proper.”⁵⁸⁰ The court held that prior resort to the administrative process was appropriate. The statute established an administrative scheme under which any person aggrieved by any rate may file a complaint with the Insurance Commissioner, who may determine whether the statute has been violated and penalize violators.⁵⁸¹ This was the administrative remedy which, under the primary jurisdiction doctrine, had to be resorted to before access might be had to the courts.⁵⁸²

In *Farmers Insurance*, “considerations of judicial economy, and concerns for uniformity in application of the complex insurance regulations here involved, strongly militate in favor of a stay to await action by the Insurance Commissioner in the present case.”⁵⁸³ In particular, the decision on whether the companies had violated the statute mandates the exercise of expertise presumably possessed by the Insurance Commissioner. There would be “a risk of inconsistent application of the regulatory statutes if courts are forced to rule on such matters without benefit of the views of the agency charged with regulating the insurance industry.”⁵⁸⁴

On the other hand, “a court would benefit immensely, and uniformity of decisions would be greatly enhanced, by having an expert administrative analysis available before attempting to grapple with such . . . potentially broad-ranging and technical question[s] of insurance law.”⁵⁸⁵ The court concluded that “a paramount need for specialized agency review militates in favor of imposing a requirement of prior resort to the administrative process.”⁵⁸⁶ Hence, the primary jurisdiction doctrine was applied in California for the first time, though it is now presumably an established part of California administrative law.

Exhaustion

The Eighth Circuit tells us that primary jurisdiction “is often confused with the doctrine of exhaustion of administrative remedies.”⁵⁸⁷ A D.C. Circuit case illustrates the relationship (and often confusion) between the two doctrines — what Judge Ginsburg terms the “confluence of concerns about exhaustion and primary jurisdiction.”⁵⁸⁸ A district court action was brought against the FCC challenging the procedure under which the Commission imposed forfeitures for broadcast of indecent material.⁵⁸⁹ It was claimed that the Commission violated the Communications Act by relying on unadjudicated forfeiture orders to increase penalties in later proceedings against the same broadcasters.⁵⁹⁰ The

580. *Id.* at 733.

581. *See id.* at 734.

582. *See id.* at 743.

583. *Id.*

584. *Id.* at 744.

585. *Id.* at 745.

586. *Id.* at 746.

587. *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995).

588. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1257 (D.C. Cir. 1995).

589. *See id.* at 1252.

590. *See id.* at 1255.

court refused to consider the statutory claim, stating that the governing principle was that the courts should allow an agency to interpret the law before they determine whether the agency has violated it.⁵⁹¹ The parties and the district court had addressed the question of the court's jurisdiction as the reciprocal of the Commission's primary jurisdiction. According to Judge Ginsburg, "they would have been more appropriately concerned with the plaintiffs' failure to exhaust their administrative remedies."⁵⁹²

In this case, plaintiffs were "trying to shortcut the administrative process,"⁵⁹³ and that was barred by the exhaustion requirement. It was true, the court conceded, that the case raised a question of first impression for the FCC, often the case where primary jurisdiction applies.⁵⁹⁴ However, that did not remove it from the ambit of the exhaustion requirement. To the contrary, "the novelty of the question of statutory interpretation is an additional reason that the court should allow the administrative process to run its course before taking the matter into its own hands."⁵⁹⁵ At any rate, the proper holding in this case "is clear: it would be premature for a court to interpret the statute in a void, i.e., without the agency itself — as opposed to the lawyers defending the agency in court — having done so first."⁵⁹⁶

During the decade, the Supreme Court decided two important exhaustion cases. The first, *McCarthy v. Madigan*,⁵⁹⁷ marks a forward step, the second, *Darby v. Cisneros*,⁵⁹⁸ a backward one. *McCarthy* was a *Bivens*⁵⁹⁹ damages action by a federal prisoner alleging that prison officials "had violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his needs and medical condition."⁶⁰⁰ The lower courts dismissed his complaint on the ground that he had failed to exhaust the Federal Bureau of Prisons' administrative remedy procedure, rejecting the argument that exhaustion was not required because he sought only money damages, which the Bureau could not provide.⁶⁰¹ The Supreme Court reversed. The Blackmun opinion stressed the importance of "the exhaustion doctrine [which] recognizes . . . that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."⁶⁰² Exhaustion enables the agency "to apply its special expertise" and "acknowledges the commonsense notion . . . that an agency ought to have an opportunity to correct its own mistakes . . . before it is haled into federal court."⁶⁰³

591. *See id.* at 1257.

592. *Id.* at 1256.

593. *Id.*

594. *See id.* at 1257.

595. *Id.*

596. *Id.*

597. 503 U.S. 140 (1992).

598. 509 U.S. 137 (1993).

599. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

600. *McCarthy*, 503 U.S. at 142.

601. *Id.* at 144.

602. *Id.* at 145.

603. *Id.*

However, Justice Blackmun tells us, the Court has recognized exceptions to exhaustion in cases where "the litigant's interests in immediate judicial review outweigh the government's interests in efficiency or administrative autonomy."⁶⁰⁴ According to the Blackmun opinion, there are three such exceptions: (1) Where "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action."⁶⁰⁵ An example is where there is "an unreasonable or indefinite timeframe for administrative action."⁶⁰⁶ (2) Where there is "some doubt as to whether the agency was empowered to grant effective relief."⁶⁰⁷ This exception arises where the "agency . . . may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute"⁶⁰⁸ or the adequacy of the agency procedure itself, or where the agency, though "competent to adjudicate the issue presented . . . lack[s] authority to grant the type of relief requested."⁶⁰⁹ (3) "[W]here the administrative body is shown to be biased or has otherwise predetermined the issue before it."⁶¹⁰

In effect, these are cases in which the agency remedy is inadequate. Such inadequacy existed in *McCarthy* for plaintiff's claim for money damages. The absence of any monetary remedy in the administrative procedures weighed heavily against imposing an exhaustion requirement. As the Chief Justice succinctly put it in a concurrence, "in cases such as this one where prisoners seek monetary relief, the Bureau's administrative remedy furnishes no effective remedy at all, and it is therefore improper to impose an exhaustion requirement."⁶¹¹

Few, it is believed, will disagree with the *McCarthy* exhaustion holding. An agency remedy can scarcely be adequate if it cannot provide the remedy plaintiff seeks. There are, however, broader implications for the timing of review in the Court's decision. According to it, lack of agency power to award money damages is enough to allow access to the courts even though the administrative process has not been exhausted.⁶¹² If this is true of the requirement of exhaustion of agency remedies, why is it not also true of the primary jurisdiction requirement of first-instance resort to the administrative process? If that result follows, it will make for an important change in the federal law of judicial review. The federal courts have refused to read an exception into the primary jurisdiction doctrine "even if the [agency] has no power to award damages or

604. *Id.* at 146.

605. *Id.* at 146-47.

606. *Id.* at 147.

607. *Id.*

608. *Id.* at 147-48. Compare *Horrell v. Department of Admin.*, 861 P.2d 1194, 1199 (Colo. 1993) (holding exhaustion not required when agency lacks authority to decide issue raised).

609. *Id.* at 148.

610. *Id.*

611. *McCarthy*, 503 U.S. at 156 (Rehnquist, C.J., concurring). See also *General Atomics v. NRC*, 75 F.3d 536 (9th Cir. 1996) (no exhaustion exception because of costs of appearing before agency).

612. See *McCarthy*, 503 U.S. at 149.

otherwise grant the relief sought."⁶¹³ *McCarthy* may foreshadow a change in this rule that will make for an exception to the primary jurisdiction requirement where the agency is powerless to grant the relief requested.

Yet, if *McCarthy* thus represents a forward step, the same is not true of *Darby v. Cisneiros*,⁶¹⁴ the Court's other important exhaustion decision. *Darby* arose out of a Department of Housing and Urban Development (HUD) proceeding to debar petitioners from participating in federal programs. A hearing was held before an ALJ who issued an initial decision debarring petitioners for 18 months.⁶¹⁵ Under HUD regulations, any party may request a review of the hearing officer's determination.⁶¹⁶ Petitioners did not seek review of the ALJ's initial decision, but instead filed suit, claiming that the sanction imposed was not in accordance with law within the meaning of section 10(e) of the APA.⁶¹⁷ HUD moved to dismiss on the ground that petitioners had failed to exhaust administrative remedies.⁶¹⁸

Darby appears to present the classic *Sing Tuck*⁶¹⁹ type of case calling for simple application of the exhaustion rule. If there has been a decision in the agency that is subject to an appeal within the administrative hierarchy, the well-established rule has been that, so long as there is a legal right to appeal, access to the courts is not available until after the appellate agency remedy has been exhausted. The courts should not permit premature interruption of the administrative process by intervening before the final decision at the highest agency level.⁶²⁰

This is elementary exhaustion doctrine, but *Darby* held that it is inapplicable to review actions brought under the APA.⁶²¹ That is true, the Court stated, because of the last sentence in section 10(c) of the APA.⁶²² That provision, the Court said, "by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates."⁶²³ Indeed, asserted the opinion, "the last sentence of § 10(c) would make no sense" if courts imposed additional exhaustion requirements beyond those provided by Congress or the agency.⁶²⁴ As the Court saw it, "Section

613. *ICC v. Baltimore & Annapolis R.R. Co.*, 398 F. Supp. 454, 468 (D. Md. 1975). See also SCHWARTZ, *supra* note 91, § 8.30.

614. 509 U.S. 137 (1993).

615. See *id.* at 141.

616. See *id.* (citing 24 C.F.R. § 24.314(c) (1992)).

617. See *id.* at 142.

618. See *id.*

619. *United States v. Sing Tuck*, 194 U.S. 161 (1904).

620. See SCHWARTZ, *supra* note 91, § 8.30. For a recent statement of the reasons for the exhaustion doctrine, see *N.B. ex rel. D.G. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1378-79 (11th Cir. 1996).

621. See *Darby*, 509 U.S. at 146.

622. See *id.* (citing 5 U.S.C. § 704 (1994)). The last sentence of § 704 provides:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (1994).

623. *Darby*, 509 U.S. at 146.

624. *Id.* at 147.

10(c) explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule; it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals as well.⁶²⁵

The result is that, in actions brought under the APA, "an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review."⁶²⁶ What *Darby* means, the Second Circuit explains, is "that federal courts do not have the authority to require a plaintiff to exhaust administrative remedies before seeking judicial review under the APA, where neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review."⁶²⁷ Unless a statute or rule expressly requires it, exhaustion is not a prerequisite to nonstatutory review actions (since all such actions can be framed in terms of APA review actions). This removes a major part of judicial review cases from any exhaustion requirement. All that the courts have said about the compelling reasons for the exhaustion requirement — that it is both an expression of administrative autonomy and a rule of sound judicial administration — militate against the *Darby* gutting of that requirement.

The practical effect of *Darby* will be a proliferation of appeals from ALJ decisions by agencies themselves. If they do not take such appeals on their own motion, *Darby* tells them that parties who lose at the ALJ stage can go directly into court. That would make the ALJs the final deciders, which would make it difficult for the agency heads to ensure conformity with their policies in the agency decision process. The alternative is for the agencies to provide in their rules for mandatory appeals — a result inconsistent with the APA's intent to elevate the ALJ to the status of an administrative trial judge.

Standing

Justice Brennan urged that the sole test for standing should be injury in fact.⁶²⁸ But he spoke in dissent. As more recently explained by the Court, it has adopted a bipartite test, with a second prong that amounts to an additional gloss on standing law.⁶²⁹ "The Court supplied this gloss by adding to the requirement that the complainant be 'adversely affected or aggrieved.' i.e., injured in fact, the additional requirement that 'the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"⁶³⁰ In the case in which this statement was made, a trade association of securities brokers brought an action challenging the Comptroller of the Currency's approval of

625. *Id.*

626. *Id.* at 154.

627. *Howell v. INS*, 72 F.3d 288, 291 (2d Cir. 1995).

628. *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 172 (1970) (Brennan, J., dissenting).

629. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987).

630. *Id.* at 395-96 (quoting *Association of Data Processing*, 397 U.S. at 153).

national bank applications for the establishment of discount securities brokerage offices.⁶³¹ In this case, both prongs of the Court's bipartite standing test were met: the plaintiff not only suffered actual injury, but suffered injury from the competition that Congress had arguably legislated against by limiting national banks' permitted activities.⁶³²

Though the second standing prong was thus satisfied in the case, that prong does impose an additional restriction which may bar standing even where plaintiff shows injury in fact. This is shown by *Air Courier Conference of America v. American Postal Workers Union*.⁶³³ Acting under the Private Express Statutes (PES), the Postal Service had issued regulations suspending its monopoly over carriage of letters to allow private couriers to deposit with foreign postal services letters destined for foreign addresses.⁶³⁴ Postal workers' unions brought an action challenging the adequacy of the rulemaking record.⁶³⁵ The Court ruled that the unions did not have standing.⁶³⁶ It did not challenge the finding that the unions had satisfied the injury-in-fact test because increased competition through international remailing services could have an adverse effect on postal workers' employment opportunities. Under the two-prong standing approach followed by the Court, the question then became whether the adverse effects on the employment opportunities fell within the zone of interests protected by PES. That question was answered in the negative.⁶³⁷ In enacting PES, the Court stated, Congress was concerned not with protecting postal employment, but with the receipt of necessary Postal Service revenues.⁶³⁸ The PES enables the Service to fulfill its responsibilities to provide service to all communities at a uniform rate by preventing private couriers from competing selectively on the Service's most profitable routes. The monopoly, therefore, exists to protect the citizenry at-large, not postal workers.⁶³⁹

One may, nevertheless, wonder whether the Court's standing approach is not too narrow. After all, as a federal judge points out:

The APA standing section, 5 U.S.C. § 702, does not contain a "zone of interests" test. The Supreme Court supplied this gloss as a means of implementing what it described as Congress' intent to broaden remedies, but not to allow suit by every person suffering injury in fact. . . . How Congress indicated this intention, not found in the language of the statute, has not been disclosed. So much for plain meaning when the shoe is on the other foot.⁶⁴⁰

631. *See id.* at 392.

632. *See id.* at 403.

633. 498 U.S. 517 (1991).

634. *See id.* at 519-20.

635. *See id.* at 520.

636. *See id.* at 530.

637. *See id.* at 529-30.

638. *See id.* at 528.

639. *See id.*

640. *NRDC v. Patterson*, 791 F. Supp. 1425, 1429 & n.6 (E.D. Cal. 1992).

The purpose of the standing requirement is to ensure that there is a real "case" or "controversy" brought by a plaintiff who has a direct interest in the challenged agency act. That purpose is met where the plaintiff has suffered harm from the challenged act. In addition, *Air Courier Conference* presents an important factor that should make for a more liberal standing approach. If the postal workers are barred from bringing the review action, who would have standing to challenge the allegedly illegal agency act? One must conclude, with one commentator, that, "in *Air Courier Conference*, the Court used standing doctrine to prevent highly interested plaintiffs from challenging regulations that threatened their livelihood."⁶⁴¹

Statutory Standing

In *Lujan v. Defenders of Wildlife*,⁶⁴² even the Brennan injury-in-fact test was not met. The Endangered Species Act divides responsibilities for endangered species protection between the Secretaries of the Interior and Commerce. The Act requires each to "insure that any action authorized, funded, or carried out by [an] agency . . . is not likely to jeopardize the continued existence [or habitat] of any endangered . . . or threatened species."⁶⁴³ The Secretaries promulgated a joint regulation extending the Act's coverage to actions in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas.⁶⁴⁴ Respondents — wildlife conservation and other environmental organizations — filed an action for declaratory judgment that the new regulation erred on the Act's geographic scope and "an injunction requiring the Secretary [of the Interior] to promulgate a new regulation restoring the initial interpretation."⁶⁴⁵

The Court held that the action must be dismissed for lack of standing. Respondents had failed to demonstrate that they suffered an injury in fact. The desire to use or observe an animal species may be a cognizable interest for purpose of standing, but "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."⁶⁴⁶ Respondents failed to show "through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be 'directly' affected."⁶⁴⁷ Affidavits of members claiming an intent to revisit project sites at some future time, at which they would presumably be denied opportunity to observe endangered animals, do not suffice, for they do not demonstrate any "imminent" injury.⁶⁴⁸

641. Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 452.

642. 504 U.S. 555 (1992).

643. *Id.* at 558 (quoting 16 U.S.C. § 1536(a)(2) (1994)).

644. *See id.* at 558-59.

645. *Id.* at 559.

646. *Id.* at 563.

647. *Id.* at 563.

648. *See id.* at 564.

Respondents had also raised what the Court calls "a series of novel standing theories."⁶⁴⁹ These theories were the "animal nexus" approach, under which anyone who has an interest in studying or seeing endangered animals anywhere has standing,⁶⁵⁰ and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue.⁶⁵¹ These theories, however, pushed the concept of standing beyond reasonable bounds. Under respondents' theories, any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use. This would mean that "anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason."⁶⁵² Indeed, the Court declares, it is "pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."⁶⁵³ Or, as the Chief Justice strikingly expressed it during the oral argument: "This is beginning to sound like the 'House That Jack Built.' We're talking about the secretary of the interior and World Bank contributions to something in Thailand. There seems to be so much distance."⁶⁵⁴

For our purposes, *Lujan* is even more important because it holds, for the first time, that there may be limits upon statutory standing. Despite the constitutional basis of the standing requirement, it has been generally assumed that Congress may provide for standing in a person or class where none would otherwise exist. In such a case, as Justice Harlan once put it, the private litigants whom Congress permitted to bring the review action "acting as private attorneys-general, may have standing as 'representatives of the public interest,'"⁶⁵⁵ despite their lack of economic or other personal interests. The *Lujan* opinion indicates, however, that the "private attorneys-general" theory may itself be subject to Article III limitations.⁶⁵⁶ The court of appeals had held that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to challenge the Secretary's action, notwithstanding their inability to allege any separate concrete injury from that failure. The Court ruled that this was error. The opinion notes that the cases have consistently ruled that a plaintiff claiming only a generally available grievance

649. *Id.* at 565.

650. *See id.* at 566.

651. *See id.* at

652. *Id.* at 566.

653. *Id.* at 567.

654. Oral Argument, *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 3451 (Jan. 7, 1992).

655. *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting).

656. *See Lujan*, 504 U.S. at 580.

about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy.⁶⁵⁷

Lujan indicates that Congress may not confer standing in such a generalized grievance case. As the Court sees it, “[v]indicating the *public* interest . . . is the function of the Congress and the Chief Executive.”⁶⁵⁸ To allow that interest to be converted into an individual right by a statute that denominates it as such and to permit all citizens to sue, regardless of whether they suffered any distinctive harm, would authorize “Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”⁶⁵⁹

One need not agree with this justification to agree with the result. As more pithily summarized in a concurrence by Justice Kennedy, *Lujan* holds that

there is an outer limit to the power of Congress to confer rights of action [that] is a direct and necessary consequence of the case and controversy limitations found in Article III. . . . [I]t would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.⁶⁶⁰

This means that, even in statutory standing cases, “the concrete injury requirement must remain.”⁶⁶¹ Even where Congress provides for citizen standing, “the party bringing suit must show that the action injures him in a concrete and personal way.”⁶⁶²

Ripeness

The requirement of ripeness for review has been explained by the Ninth Circuit:

Under the ripeness doctrine, an agency must have taken “final” action before judicial review is appropriate. . . . Indicia of finality include: the administrative action challenged should be a definitive statement of an agency’s position; the action should have a direct and immediate effect on the day-to-day business of the complaining parties; the action should have the status of law; immediate compliance with the terms should be expected; and the question should be a legal one.⁶⁶³

Where the challenged administrative act does not have immediate adverse effect, it is not ripe for review. Thus, a public utilities commission decision that a company was a public utility subject to the commission’s jurisdiction was not

657. *See id.* at 576.

658. *Id.* at 576.

659. *Id.* at 577 (quoting U.S. CONST. art. II, § 3).

660. *Id.* at 580-81 (Kennedy, J., concurring).

661. *Id.* at 578.

662. *Id.* at 581 (Kennedy, J., concurring).

663. *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990).

ripe; further action would have to be taken for there to be adverse impact upon the company.⁶⁶⁴

The courts have continued to follow the ripeness test laid down in the leading *Abbott Laboratories* case.⁶⁶⁵ In another case, the Ninth Circuit explains the two elements in that test: "The fitness element requires that the issue be primarily legal, need no further factual development, and involve a final agency action. . . . To meet the hardship requirement, a party must show that withholding judicial review would result in direct and immediate hardship and would entail more than possible financial loss."⁶⁶⁶ The case before the Ninth Circuit involved a challenge to an FDA regulatory letter that a dietary supplement co-enzyme was an unapproved food additive. The court held that the informal letter did not meet the ripeness test. In the first place, the issue was not primarily legal, since it needed agency factual determination applied to plaintiff's particular product.⁶⁶⁷ In addition, plaintiff had not shown that withholding review would result in direct and immediate hardship.⁶⁶⁸ The risk of seizures and injunction actions were found "too speculative to warrant judicial intervention."⁶⁶⁹ At most, there was only potential financial loss which was not sufficient hardship to require bypassing final agency action.

In *Reno v. Catholic Social Services*,⁶⁷⁰ the Supreme Court imposed an important limitation upon the *Abbott Laboratories* test. A law created an alien legalization program, under which an alien unlawfully in the United States could apply for resident status by showing continuous residence in this country since 1982.⁶⁷¹ The INS issued regulations providing that "brief, casual, and innocent absences" from the United States would not break the required continuity.⁶⁷² However, the INS stated that it would consider an absence "brief, casual, and innocent" only if the alien had obtained INS permission, known as "advance parole," before leaving the country.⁶⁷³ Plaintiffs brought a class action challenging the advance parole regulations.

The key question in *Catholic Social Services*, according to Justice Souter's opinion of the Court, was ripeness, said to be drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.⁶⁷⁴ The Court conceded that a statutory source of jurisdiction was not lacking.⁶⁷⁵ Nor was it fatal that the Reform Act was silent about judicial review. Here, the opinion reaffirmed the *Stark v. Wickard*⁶⁷⁶ rule that legisla-

664. See *Keystone v. Flynn*, 769 P.2d 484 (Colo. 1989).

665. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

666. *Dietary Supplemental Coalition, Inc. v. Sullivan*, 978 F.2d 560, 562 (9th Cir. 1992).

667. See *id.* at 562-63.

668. See *id.* at 564.

669. *Id.*

670. 509 U.S. 43 (1993).

671. See *id.* at 50.

672. See *id.* at 47.

673. See *id.*

674. See *id.* at 58.

675. See *id.* at 56.

676. 321 U.S. 288 (1944).

tive silence is not to be construed "as a denial of authority to [an] aggrieved person to seek appropriate relief in the federal courts."⁶⁷⁷ Indeed, Justice Souter affirmed, the *Stark v. Wickard* rule has been reinforced by enactment of the APA, with its basic presumption of judicial review.⁶⁷⁸

The presumption of review may, nevertheless, be overcome where the ripeness requirement is not met. *Abbott Laboratories* indicated that the promulgation of a regulation may itself affect parties concretely enough to satisfy the requirement.⁶⁷⁹ But that was true because the *Abbott Laboratories* regulations presented plaintiffs with an immediate dilemma — to choose between complying or risking penalties for violation. Other cases indicate that this is not true of all regulations; in some cases, the regulation may not be ripe for review until it has been applied to the plaintiff by some concrete action.⁶⁸⁰ In the Court's view, the INS regulations "fall on the latter side of the line."⁶⁸¹ As Justice Souter put it, "They impose no penalties for violating any newly imposed restriction, but limit access to a benefit created by the Reform Act but not automatically bestowed on eligible aliens."⁶⁸² An alien desiring the benefit had to take further steps—namely to apply for resident status. "In these circumstances, the promulgation of the challenged regulations did not itself give each [alien] a ripe claim; a . . . claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him."⁶⁸³

Catholic Social Services distinguishes, for ripeness purposes, between a duty-creating rule and a benefit-conferring rule. The Court held that the *Abbott Laboratories* ripeness approach does not apply to a benefit-conferring rule, but only to a duty-creating rule.⁶⁸⁴ The difference between the two types, so far as ripeness is concerned, was explained by Justice O'Connor: "Even if he succeeds in his anticipatory action, the would-be-beneficiary will not receive the benefit until he actually applies for it; and the agency might then deny him the benefit on grounds other than his ineligibility under the rule. By contrast, a successful suit against the duty-creating rule will relieve the plaintiff immediately of a burden that he otherwise would bear."⁶⁸⁵

Under *Catholic Social Services*, an action challenging a benefit-conferring rule is unripe where the plaintiff has not applied for the benefit. But that is inconsistent with *Abbott Laboratories*, under which a rule is subject to immediate review — even before it is applied in a specific case — if it has an immediate adverse effect by imposing a burden upon plaintiff. The same should be true of a benefit-conferring rule, where its effect will be to deny the benefit should

677. *Catholic Soc. Serv.*, 509 U.S. at 56.

678. *See id.* at 57.

679. *See id.*

680. *See, e.g., Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 165 (1967).

681. *Catholic Soc. Serv.*, 509 U.S. at 58.

682. *Id.* at 58.

683. *Id.* at 59.

684. *See id.* at 70.

685. *Id.* at 68 (O'Connor, J., concurring).

plaintiff apply for it. This does not mean that a benefit-conferring rule is automatically subject to anticipatory challenge. The key ripeness requirement of adverse effect would still have to be met. But that does not justify a categorical rule that would-be beneficiaries cannot challenge benefit-conferring regulations until they apply for benefits. *Catholic Social Services* should be considered an aberration that is inconsistent with the trend toward ripeness relaxation that has characterized our administrative law.⁶⁸⁶

Criminal Enforcement

Administrative lawyers have been concerned by the lacuna in the law of review created by *Yakus v. United States*,⁶⁸⁷ where the Court found an important exception to the basic principle that one criminally charged with violating an administrative order may raise the order's invalidity as a defense. Unlike other criminals, the defendant whose crime resulted from the violation of an administrative order could be convicted on what amounted to a trial in two parts or, in the alternative, a trial which shut out what might be the most important of the issues material to guilt.⁶⁸⁸

Yakus has been questioned in two cases decided during the decade. The first was *United States v. Mendoza-Lopez*.⁶⁸⁹ Respondents had been prosecuted for violating a statute making entry by an alien who had been deported a felony. They moved to dismiss on the ground that they had been denied fair deportation hearings. The Court held that respondents could challenge their previous deportation orders as a defense to the prosecutions. That Congress did not intend the deportation order to be contestable in the subsequent prosecution was not determinative.⁶⁹⁰ Where the defects in an administrative proceeding foreclosed judicial review, an alternate means of review had to be made available before the administrative order might establish conclusively an element of a criminal offense.⁶⁹¹ In this case the lack of fair deportation procedures meant that respondents' waivers of their appeal rights were not intelligent and this "amounted to a complete deprivation of judicial review."⁶⁹² Because of this, the deportation proceeding could not be used to support a criminal conviction.

Justice Marshall, who delivered the *Mendoza-Lopez* opinion, went even further in a 1991 concurrence and indicated that, despite *Yakus*, review in the criminal enforcement proceeding is a constitutional necessity. In *Touby v. United States*,⁶⁹³ the Attorney General was given power to schedule controlled substances upon a temporary basis, which subjected those manufacturing the drugs to prosecution. The statute provided that a temporary scheduling order

686. See SCHWARTZ, *supra* note 91, §§ 9.4-9.5.

687. 321 U.S. 414 (1944).

688. See *id.* at 478.

689. 481 U.S. 828 (1987).

690. See *id.* at 837.

691. See *id.* at 838.

692. *Id.* at 840.

693. 500 U.S. 160 (1991).

was not subject to judicial review. It was argued that the review bar was invalid. The Court answered this argument by stressing that, since the statute authorizes judicial review of a permanent scheduling order, the effect of the bar is merely to postpone legal challenges to a scheduling order until the administrative process has run its course.⁶⁹⁴ What makes *Touby* pertinent to the *Yakus* issue was the Court's statement that the statutory review bar did not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to prosecution.⁶⁹⁵

Justice Marshall dealt specifically with this point in his concurrence. "Because of the severe impact of criminal laws on individual liberty," Marshall declared, "I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law."⁶⁹⁶ Hence the instant statute must be read as "preserving judicial review of a temporary scheduling order in the course of a criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality."⁶⁹⁷ Despite *Yakus*, "the use of the result of an administrative proceeding to establish an element of a criminal offense is troubling."⁶⁹⁸ In Justice Black's phrase years ago, there is still no satisfactory answer to the view that the Constitution bars insulation of an agency order from review in a prosecution for its violation.⁶⁹⁹ To the contrary, "a requirement in a criminal case that the defendant challenge administratively the validity of administrative rules would impinge on his right[s]."⁷⁰⁰

SCOPE OF REVIEW

Chevron Doctrine

The scope of judicial review during the past decade has largely turned upon application of the *Chevron* doctrine.⁷⁰¹ It is, however, amazing how frequently administrative lawyers find it necessary to reinvent the wheel. A few years ago, Attorney General Meese made the "discovery" that the independent agency violated the separation of powers⁷⁰² — an issue that had been fully discussed and decided years earlier in the passage of the FTC Act and the *Humphrey* case.⁷⁰³ Now *Chevron* has suddenly become the doctrine of the hour. Justice Scalia has proclaimed *Chevron* the most important administrative

694. *See id.* at 161.

695. *See id.* at 168.

696. *Id.* at 170 (Marshall, J., concurring).

697. *Id.* (Marshall, J., concurring). *See also* *United States v. Meza-Soria*, 935 F.2d 166 (9th Cir. 1991) (holding deportation order not conclusive proof of alienage in criminal proceeding).

698. *Mendoza-Lopez*, 481 U.S. at 839 n.15.

699. *See* *United States v. Spector*, 343 U.S. 169, 174 n.2 (1952).

700. *State v. Berger*, 605 So. 2d 488, 490 (Fla. Dist. Ct. App. 1992).

701. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

702. *See supra* notes 10-11 and accompanying text.

703. *See supra* note 5 and accompanying text.

law decision in recent years.⁷⁰⁴ But as Judge Starr points out, *Chevron* is really only a reprise of the doctrine applied “[a] generation ago in the landmark case of *NLRB v. Hearst Publications*.⁷⁰⁵ Yet, though *Chevron* may only supply a new rubric for *Hearst*, it is treated by both judges and the Bar as a new administrative law revelation.

The Supreme Court has summed up *Chevron* as follows: “Under *Chevron* . . . if a statute is unambiguous the statute governs; if, however, Congress’ silence or ambiguity has ‘left a gap for the agency to fill,’ courts must defer to the agency’s interpretation. . . .”⁷⁰⁶ The Ninth Circuit points out that, under *Chevron*, “[j]udicial review of an agency’s construction of a statute that it administers is a two-part process.”⁷⁰⁷ Another opinion contains a more detailed explanation of the *Chevron* doctrine:

When a court reviews an agency’s construction of a statute the agency has been entrusted to administer, the court’s analysis is two-fold. If Congress has spoken to the precise question at issue, the analysis is complete. This court, as well as the agency, must give effect to the unambiguously expressed intent of Congress (*Chevron* Prong I). . . . But where, as here, the court determines that Congress has not spoken directly to the issue, the court may not impose its own construction of the statute. Rather, the court’s analysis is limited to whether the agency’s construction of the statute was permissible. . . . Since the agency was vested with policy-making power, it is authorized to fill in the gaps that may have been left by Congress and this court cannot substitute its judgment for that of the agency, . . . unless the court finds the agency’s construction inconsistent with the statutory mandate or that it frustrates the purpose of Congress (*Chevron* Prong II).⁷⁰⁸

Chevron thus has two prongs. Prong I requires the court to determine whether the statute is ambiguous; if it is, “*Chevron* requires that we defer to an agency’s interpretation of its organic statute once we determine that that statute is ambiguous.”⁷⁰⁹ Prong II requires the court “to determine whether the agency’s interpretation is ‘permissible,’ that is to say, reasonable;”⁷¹⁰ if it is, *Chevron* deference demands affirmance of the agency construction.

The first step in applying *Chevron* is to determine whether the relevant statute is unambiguous. If it is, there is no room for the deference doctrine. A statute is plainly not ambiguous where it has been given a specific interpretation by the Supreme Court. That is true even though the interpretation in question was contained in a decision rendered more than eighty years ago.⁷¹¹ Judicial

704. See Scalia, *supra* note 465, at 512.

705. *Investment Co. Inst. v. Conover*, 790 F.2d 925, 932 (D.C. Cir. 1986) (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)).

706. *Stinson v. United States*, 508 U.S. 36, 44 (1993).

707. *Valenzuela v. Yeutter*, 988 F.2d 977, 979 (9th Cir. 1993).

708. *Sierra Club v. Davies*, 955 F.2d 1188, 1193 (8th Cir. 1992).

709. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

710. *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). For an agency interpretation that conflicts with a recent Supreme Court precedent, see *Neal v. United States*, 116 S. Ct. 763 (1996).

711. See *Maislin Indus.*, 497 U.S. at 130.

interpretation eliminates the statutory ambiguity and makes *Chevron* deference inappropriate regardless of the time lag between the decision and the challenged agency action.⁷¹² On the other hand, if the statute is not unambiguous, *Chevron* deference requires the courts to allow the agency decisionmaker a range of discretion limited only by the reasonableness test. Agency interpretation must be upheld if it is reasonable, even if not necessarily the same construction that the reviewing court would have adopted on its own independent judgment.

Chevron deference may require a reviewing court to uphold an agency decision with which it strongly disagrees. In *ABF Freight System, Inc. v. NLRB*,⁷¹³ an employee fired for tardiness filed an unfair labor practice charge. The ALJ concluded that the employee had lied when he testified that car trouble had made him late to work and found that he had been dismissed for cause.⁷¹⁴ The Board reversed. Though it agreed that the employee had lied, it found that the real reason for the discharge was his union activities.⁷¹⁵ Though the Court indicated that, if it had been the tribunal of first instance, it might have decided that the false testimony disqualified the employee from profiting, the Court held that the Board had the discretion to decide otherwise.⁷¹⁶ Citing *Chevron*, the Court said, "When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" ⁷¹⁷ In such a case, "the Board's views merit the greatest deference."⁷¹⁸

Perhaps the deference doctrine requires the courts to sustain even what Justice Scalia calls "unintelligent (but nonetheless lawful) executive action."⁷¹⁹ But should the same be true where the agency exercise of discretion relates to the very integrity of the administrative process? To Justice Scalia, the agency's action was not "eminently reasonable."⁷²⁰ On the contrary, "it is at the very precipice of the tolerable."⁷²¹ Yet even Scalia did not vote for reversal, indicating that the Board could "decide 'to rely on 'other civil and criminal remedies' for false testimony."⁷²² Does the Justice really believe that there is the slightest chance for prosecution of an employee who lied about his lateness for work in an NLRB hearing, particularly where the Board decided in his favor?

Chevron deference may even go so far as to apply when the agency gives a statutory term a meaning different from that in any dictionary. In *Smiley v. Citibank (South Dakota), N.A.*,⁷²³ an 1864 federal statute provided that a na-

712. See *Investment Co. Inst. v. Conover*, 790 F.2d 925, 932 (D.C. Cir. 1986).

713. 510 U.S. 317 (1994).

714. See *id.* at 319.

715. See *id.* at 320.

716. See *id.* at 325.

717. *Id.* at 324.

718. *Id.*

719. *Id.* at 326 (Scalia, J., concurring).

720. *Id.* at 329.

721. *Id.*

722. *Id.* at 331.

723. 116 S. Ct. 1730 (1996).

tional bank may charge its loan customers "interest at the rate allowed by the laws of the State . . . where the bank is located."⁷²⁴ The Comptroller of the Currency issued a regulation that included flat late fees⁷²⁵ that banks charged credit card holders in the definition of "interest." This is contrary to the meaning of the word in every dictionary, in which "interest" is uniformly defined as "Money paid for the use of money lent (the *principal*), or for forbearance of a debt, according to a fixed ratio (*rate per cent*)"⁷²⁶ — a meaning that it has had since a statute of Henry VIII.⁷²⁷ Despite this, the Court held that *Chevron* deference required the Comptroller's interpretation to be upheld as a reasonable one. One may doubt that the *Chevron* Prong I requirement of ambiguity is satisfied when a statute uses a term with so consistent a meaning only because there was a lower-court "conflict that has prompted us to take this case."⁷²⁸ But it is the Court's application of *Chevron* Prong II that gives one the most pause. Under Prong II, *Smiley* states, "the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one. The answer is obviously yes."⁷²⁹

724. *Id.* at 1732 (quoting 12 U.S.C. § 85 (1994)).

725. For one credit card held by petitioner, \$15 was charged for failure to make minimum monthly payments within 25 days of due date; for a second card, \$6 for payment not made with 15 days, and additional charge of the greater of \$15 or 0.65% of balance if payment was not made by next monthly payment due date. *See id.* at 1732.

726. 5 OXFORD ENGLISH DICTIONARY 394 (1970). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1981); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 993 (1987).

727. "Be it also enacted . . . that no person . . . by way or means of any corrupte bargain, loone . . . interest . . . accept or take . . . above the sume of ten pounds in the hundred. 37 Henry VIII, c.9, § 3 (1545)." OXFORD, *supra* note 726. According to OXFORD, "Interest in the modern sense was first sanctioned by law" in this statute. *Id.*

728. *Smiley*, 116 S. Ct. at 1732.

729. *Id.* at 1735. It is not my practice to nit-pick Supreme Court opinions, but I was intrigued by *Smiley*'s citation of contemporary law dictionaries and a Supreme Court opinion to support the Comptroller's definition. The authorities cited by the Court do not really support its decision. It quotes the definition in *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1873) — "Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention. . . ." — but neglects to point out that this statement was made with reference to a loan that called for "interest at the rate of twenty per cent a year." *Id.* at 178. Similarly, the law dictionaries cited do not support the decision. Thus, the quote from JOHN BOUVIER, LAW DICTIONARY 652 (6th ed. 1856), the standard American law dictionary of its day, according to JULIUS MARKE, A CATALOGUE OF THE LAW COLLECTION AT NEW YORK UNIVERSITY 1201 (1953), is similar to that in *Brown v. Hiatts*, but again the opinion does not mention that in its discussion of how interest is computed. BOUVIER makes reference only to interest as a percentage of principal. In particular it lists the rate of interest allowed in the different states, all stated in percentage terms. *See* BOUVIER, *supra*, at 656-58. BURRILL'S LAW DICTIONARY and THE ENCYCLOPEDIA OF LAW, both cited by the Court, contain general definitions similar to that in BOUVIER; but that alone scarcely endorses the *Smiley* definition — particularly since THE ENCYCLOPEDIA OF LAW also later lists the rate allowed in the different states as only a percentage of principal. *See* THE ENCYCLOPEDIA OF LAW, *supra*, at 411-13. More important is the fact that the leading English law dictionary of the day defined "interest" as the "*rate per cent.*" *See* J. WHARTON, LAW LEXICON OR DICTIONARY OF JURISPRUDENCE 391 (2d Am. ed. 1860) (cited as "But see" in *Smiley*, 116 S. Ct. at 1735). Also the leading dictionary when the federal statute was passed defined "interest" as "Premium paid for the use of money; the profit per cent derived from money lent." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 615 (1856 ed.). Even if, as *Smiley* notes, some courts have defined "interest" the way the Comptroller of the Currency does, that alone does not make his definition reasonable, contrary as it is to all the dictionary meanings of the word. After all, as Lincoln once put it, "If you call a tail a leg, how many legs has a dog? Five? No; calling a tail a leg don't make it a leg." BARTLETT'S FAMILIAR QUOTATIONS 458 (Morley ed. 1951). To the contrary, if the Supreme Court calls a tail a leg, the tail apparently *does* become a leg.

To the contrary, what the agency did here calls to mind a statement some years ago by the Chief Justice: “[Congress] did not empower the Administrator [to act] after the manner of Humpty Dumpty in Through the Looking Glass”⁷³⁰ and make a word mean “just what I choose it to mean.”⁷³¹ It is hard to support an interpretation of *Chevron* that would require the courts to uphold an agency that follows the Lewis Carroll method. Of course, the broader question in our public law is another Humpty Dumpty query: “The question is . . . which is to be master — that’s all”⁷³² — the agency or the law?

Chevron Expansion

The *Chevron* case involved review of rulemaking and, strictly speaking, its doctrine of deference governs only review of regulations. Yet *Chevron*, like the power of which Madison speaks,⁷³³ has also proved to be of an encroaching nature. The cases during the decade indicate that *Chevron* cannot be limited to review of regulations alone. Instead, the *Chevron* doctrine applies to review of all statutory interpretation by agencies — whether the agency has exercised a legislative or judicial function. As summarized by the Ninth Circuit, “[W]e review with deference an agency’s interpretation of the statute that it has responsibility to enforce, whether that interpretation emerges from an adjudicative proceeding or administrative rulemaking.”⁷³⁴

Thus, all review of statutory interpretations by an agency — whether in a rule or adjudicatory decision — is governed by *Chevron* deference. A D.C. Circuit case supports what has just been said. According to it, a court is required to give deference to an agency’s reading of a settlement agreement even where the issue only involves the proper construction of language.⁷³⁵ According to Judge Bork’s opinion, this conclusion is required by *Chevron*, which rejected the view that a court may fully review an agency’s statutory interpretation. Judge Bork notes that the construction of a statute has always been considered a “pure” question of law.⁷³⁶ Despite this, *Chevron* held that, unless it is clear that Congress had directly addressed the precise question, the court should defer to the agency’s construction of the statute. Judge Bork concedes that *Chevron* reviewed rulemaking.⁷³⁷ In his view, however, where adjudicative authority has been delegated to an agency, it is even clearer that *Chevron* should be followed. The explicit delegation to the agency “compels a court to give deference to the agency’s conclusions even on ‘pure’ questions of law

730. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978).

731. BARTLETT’S FAMILIAR QUOTATIONS 519 (16th ed. 1992).

732. *Id.* See also *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996) (deferring to agency interpretation despite contrary Second Circuit precedent on matter).

733. See THE FEDERALIST NO. 48 (James Madison).

734. *Pfaff v. United States Dep’t of HUD*, 88 F.3d 739, 747 (9th Cir. 1996).

735. See *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir. 1987).

736. See *id.* at 1569.

737. See *id.*

within that domain."⁷³⁸ The court's conclusion is "that *Chevron* has implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation"⁷³⁹ — as well as other questions of interpretation, whether in rules or decisions.

The Supreme Court has applied *Chevron* to an NLRB decision that an employer had committed unfair labor practices.⁷⁴⁰ *Chevron* deference was given to a Board determination that the statutory term "employee" covers those who work for an employer while a union simultaneously pays them to organize that employer.⁷⁴¹ *Chevron*, said the Court, gives "the Board . . . a degree of legal leeway when it interprets its governing statute."⁷⁴² Since, in such a case, Congress "intended an understanding of labor relations to guide the Act's application," the Board's interpretation "will be upheld if 'reasonably defensible.'"⁷⁴³

Pure Law and Jurisdiction

Marshall Breger has summarized my attitude toward *Chevron*: "Schwartz suggests that *Chevron* blurs the distinction between law and fact upon which the scope of review had been grounded. He believes that *Chevron* errs by drastically limiting review, not only of agency findings of fact, but also of agency construction of statutory law."⁷⁴⁴

The Supreme Court has indicated that *Chevron* does, indeed, go that far. A 1987 case confirms Judge Bork's view that *Chevron* does apply to "a pure question of statutory construction," where the agency must be "accorded . . . deference . . . as long as its interpretation is rational and consistent with the statute."⁷⁴⁵ This means that *Chevron* deference must be applied to "a pure question of statutory construction," as well as to "the application of a standar[d] . . . to a particular set of facts."⁷⁴⁶ Yet statutory construction is a matter that, under the traditional theory of Anglo-American judicial review, is more legal than factual in nature, and hence for the courts to decide on judicial review.⁷⁴⁷

The cases, however, go further than applying *Chevron* to "pure questions" of statutory construction. In recent administrative law, the jurisdictional-fact doctrine of *Crowell v. Benson*⁷⁴⁸ has also given way to *Chevron*. The defer-

738. *Id.* at 1569-70.

739. *Id.* at 1570.

740. See *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450 (1995).

741. See *id.* at 452.

742. *Id.* at 453.

743. *Id.* In this case, however, "the Board needs very little legal leeway . . . to convince us of the correctness of its decision," *id.* — i.e., the agency interpretation was not only reasonable, but right.

744. Marshall Breger, *Comments on Bernard Schwartz' Essay*, 5 ADMIN. L.J. 347, 371 (1991).

745. *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987).

746. *Id.* See also *Air Line Pilots Ass'n v. FAA*, 3 F.3d 449 (D.C. Cir. 1993).

747. For state cases so holding, see *Tesoros Alaska Petroleum Co. v. Kenae Pipe Line Co.*, 746 P.2d 896 (Alaska 1987); *Massey v. Board of Trustees*, 500 So. 2d 864 (La. Ct. App. 1986); *In re Gruber*, 674 N.E.2d 1354 (N.Y. 1996).

748. 285 U.S. 22 (1932).

ence required by *Chevron* may reach agency extensions of their own jurisdiction, because agency power to act may depend on findings involving statutory interpretation. As a state court put it, "many, if not most, statutory interpretation issues arising in administrative proceedings could be phrased in terms of the agency's 'authority,' 'power' or 'jurisdiction' to take a certain type of action in a specific case."⁷⁴⁹

As the D.C. Circuit points out, the Supreme Court has never directly ruled on the matter of deference on jurisdictional issues. The D.C. circuit itself, however, decided explicitly in favor of *Chevron* deference on such an issue in *Oklahoma Natural Gas Co. v. FERC*.⁷⁵⁰ In rejecting the argument that *Chevron* deference should not govern review of a finding that a federal agency's exercise of power preempted state power, the D.C. Circuit pointed out that, except for negative exercises of federal authority, all legal interpretations by federal agencies have some preemptive effect, because no state law in direct contradiction will survive.⁷⁵¹ Hence, "[p]etitioner's special non-deference principle would therefore have to be applied almost universally, overturning *Chevron*."⁷⁵² Consequently, the court concluded "we review FERC's interpretation of its authority to exercise jurisdiction over transportation with the familiar *Chevron* framework in mind."⁷⁵³ The Fourth Circuit has also rejected the argument that *Chevron* deference should not be applied to an agency's "construction of a jurisdictional rather than a purely administrative . . . issue."⁷⁵⁴

Though, as stated, the Supreme Court has not ruled directly on the relationship between *Chevron* and jurisdiction, individual Justices have indicated their agreement with the D.C. and Fourth Circuits. In a 1990 case, respondents had argued that *Chevron* should not apply because the agency regulations determined the scope of its jurisdiction.⁷⁵⁵ The Court did not deal with this argument, but a dissent by Justice White stated that the Court had never accepted it and "there are good reasons not to accept it."⁷⁵⁶ According to White, under *Chevron*, the cases "have deferred to agencies' determinations of matters that affect their own statutory jurisdiction. . . . The application of *Chevron* principles cannot be avoided on this basis."⁷⁵⁷

Justice Scalia has also gone out of his way to state that "the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction."⁷⁵⁸ A Scalia letter indicates that he had first intended to dissent in the case on the ground that the "FERC [the agency involved] did not have

749. *Maryland Comm'n on Human Relations v. Mass Transit Admin.*, 449 A.2d 385, 389 (Md. 1982).

750. 28 F.3d 1281 (D.C. Cir. 1994).

751. *See id.* at 1284.

752. *Id.*

753. *Id.*

754. *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 258 n.5 (4th Cir. 1991).

755. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 54 (1990) (White, J., dissenting).

756. *Id.* (White, J., dissenting).

757. *Id.* at 54-55 (White, J., dissenting).

758. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring).

jurisdiction to consider the MP&L prudency issue⁷⁵⁹ — i.e., the issue in the case. Consideration of the matter, however, led the Justice to conclude that *Chevron* made his proposed dissent “untenable. Or at least untenable given my views on deference to administrative interpretations of statutes.”⁷⁶⁰

Instead, Justice Scalia issued a concurrence that stated flatly that *Chevron* deference applies in such a case. To Scalia, such deference application is both necessary and appropriate.

It is *necessary* because there is no discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the ‘authority.’”⁷⁶¹

Such an argument, however, is two-edged. If exceeding authority can be involved in “virtually any” *Chevron* deference, it may militate against *Chevron* itself in a system that had its origin in the jurisdictional basis of judicial review.

Justice Scalia also asserted that “deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.”⁷⁶² One may, however, doubt that Congress did have the intention stated by Scalia. Agencies have no special expertise in deciding their own jurisdiction. In addition, statutory provisions confining an agency’s authority manifest an unwillingness to give the agency freedom to define the scope of its own power. To give effect to the confining intent, the ultimate word on jurisdiction should be with courts, not agencies.

The need for judicial control here has been pointedly stated by Cass R. Sunstein:

A cardinal principle of American constitutionalism is that those who are limited by law should not be empowered to decide on the meaning of the limitation: foxes should not guard henhouses. The *Chevron* rule disregards this principle by permitting agencies to interpret laws that limit and control their authority. The need for an independent judicial arbiter is especially urgent here. . . .⁷⁶³

A more recent observer goes even further, asserting, “The Justices in recent years have compromised the rule of law in the administrative state, perhaps most profoundly, by their commitment to the *Chevron* approach to reviewing agency interpretations of their governing statutes.”⁷⁶⁴

759. Letter from Justice Scalia to Justice Brennan (May 23, 1988) (available from the Thurgood Marshall Papers, Library of Congress).

760. *Id.*

761. *Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring).

762. *Id.* at 381-82 (Scalia, J., concurring).

763. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 224 (1990).

764. Werham, *supra* note 641, at 464.

Chevron Ad Absurdum

*Rust v. Sullivan*⁷⁶⁵ illustrates how *Chevron* may skew the result in what would have once been a simple administrative law case. At issue were Department of HHS regulations prohibiting federally funded projects from engaging in counseling concerning, referrals for, or active advocacy of abortion. The statute specified that none of the federal funds appropriated for family planning services "shall be used in programs where abortion is a method of family planning."⁷⁶⁶ Doctors argued that this provision did not authorize the Secretary to interfere with their First Amendment right to counsel their patients by prohibiting them from giving abortion information and advice.⁷⁶⁷

There has been controversy over *Rust's* holding that the regulations did not violate plaintiffs' First Amendment rights. However, the foundation of the *Rust* decision was *Chevron*. Chief Justice Rehnquist starts by finding the statutory language "ambiguous."⁷⁶⁸ In such a case, under *Chevron*, "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it."⁷⁶⁹ As interpreted by *Rust*, this means that "[t]he Secretary's construction . . . may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent."⁷⁷⁰ In *Rust*, the Secretary's construction came within this test; hence, "we must defer to the Secretary's permissible construction of the statute."⁷⁷¹

The *Rust* opinion states that *Chevron* deference requires the agency interpretation to be upheld "if it reflects a *plausible* construction of . . . the statute."⁷⁷² Until *Rust*, it had been assumed that "the *Chevron* yardstick [was] 'reasonableness.'⁷⁷³ In Justice Scalia's words, *Chevron* requires the courts to "give effect to a *reasonable* agency interpretation of a statute."⁷⁷⁴ *Rust* transforms the reasonableness requirement to one of plausibility — a test met by an interpretation that has only an appearance or show of truth⁷⁷⁵ — i.e., it is only superficially fair or reasonable.⁷⁷⁶ *Rust* makes for a dilution in scope of review even beyond that made by *Chevron* itself.

More and more, *Chevron* is resulting in deference to agency decisions in cases involving legal questions that, not long ago, would have been held to be categorically for the courts. Ambiguity in a statute should not be enough to compel the courts to yield to merely "plausible" agency interpretation. "An

765. 500 U.S. 173 (1991).

766. *Id.* at 178 (quoting 42 U.S.C. § 300 (1994)).

767. *See id.* at 192.

768. *Id.* at 184.

769. *Id.*

770. *Id.*

771. *Id.* at 187.

772. *Id.* at 184.

773. *Continental Air Lines, Inc. v. United States Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988).

774. Scalia, *supra* note 465, at 512 n.6.

775. *See* 11 OXFORD ENGLISH DICTIONARY 1011 (2d ed. 1951).

776. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1886 (2d ed. 1951).

ambiguity is not a delegation of law-interpreting power. *Chevron* elides the two."⁷⁷⁷

Ben Avon and Fundamental Rights

*Miller v. Johnson*⁷⁷⁸ was one of the Supreme Court's most noted recent decisions, for it struck down a Congressional district where race was the predominant factor in its drawing. The district had been subject to preclearance under the Voting Rights Act and had received Justice Department preclearance.⁷⁷⁹ It was argued that the preclearance was based upon a determination that there was a compelling interest to support the racial districting and that the Department's determination was entitled to deference.⁷⁸⁰ The argument was rejected. The judiciary, said the Court, retains an independent obligation to decide in such a case whether the challenged action is narrowly tailored to support a compelling interest.⁷⁸¹ To defer to the Department "would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action."⁷⁸² Though the Court has deferred to the Department's interpretation where only the meaning of statutes is involved, "we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions."⁷⁸³

Is it fanciful to treat the Court's approach as a present-day version of the supposedly defunct *Ben Avon* doctrine?⁷⁸⁴ There may still be full review of agency determinations upon which personal rights guaranteed by the Constitution depend — such as First Amendment rights⁷⁸⁵ or, under *Miller*, where it is claimed that voting rights are subjected to equal-protection abridgements. In such a case, *Miller* affirms, it is for the courts, not the Executive, "to say what the law is."⁷⁸⁶

Perhaps the most important expansion in the scope of review has occurred under the California "fundamental rights" doctrine.⁷⁸⁷ The California doctrine has been explained by a member of its highest court. He starts by recognizing that the normal rule governing scope of review in our administrative law "is the substantial evidence rule where the judiciary defers to the factual decisions of the administrators and upholds them unless the findings are unsupported by substantial evidence in the light of the whole record."⁷⁸⁸ In certain cases, however, California "applies a unique rule where the trial court exercises its inde-

777. SUNSTEIN, *supra* note 763, at 143.

778. 115 S. Ct. 2475 (1995).

779. *See id.* at 2485.

780. *See id.* at 2481.

781. *See id.* at 2491.

782. *Id.*

783. *Id.*

784. *See* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

785. *See* SCHWARTZ, *supra* note 91, § 10.24.

786. *Miller*, 115 S. Ct. at 2491 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

787. *See* SCHWARTZ, *supra* note 91, § 10.24.

788. *County of Alameda v. Carnes*, 760 P.2d 464, 469 (Cal. 1988) (Broussard, J., dissenting).

pendent judgment, reweighing the evidence and making its own factual determinations."⁷⁸⁹ The California scope of review depends upon the right affected by the administrative action. "If 'the right has been acquired by the individual and if the right is fundamental, the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review.'"⁷⁹⁰ Under independent judgment review, the reviewing court does not defer to the agency or the ALJ even on the credibility of witnesses.⁷⁹¹

There has been a steady expansion in the class of rights coming within California independent-judgment review. Earlier cases focused on the "vestedness" of the rights involved. More recently, the emphasis has changed to "fundamentalness." Under the cases, a right need not be a constitutional right to be considered fundamental. Thus, the California courts have applied the doctrine of independent review to decisions involving Medicaid applications,⁷⁹² disability benefits,⁷⁹³ motor vehicle licenses,⁷⁹⁴ tavern permits,⁷⁹⁵ and age discrimination complaints.⁷⁹⁶

The crucial element is the importance of the given right to the individual concerned; the effect of the agency decision on the individual is the key factor. Thus, though the California fundamental rights doctrine may have originally been *Ben Avon* in another form,⁷⁹⁷ it has become much broader, since *Ben Avon* was confined to *constitutional* rights. The California doctrine has been criticized,⁷⁹⁸ but the courts have continued, not only to apply, but to extend it to nonconstitutional rights, making it virtually as broad as the concept of "entitlements" enunciated by the U.S. Supreme Court.⁷⁹⁹ Underlying the California doctrine are the factors stated by the judge already quoted:

The practical concerns are that the bureaucracy established to advance valid governmental policy decisions will in carrying out those legislative determinations run roughshod over the individual's fundamental vested rights. . . . [T]he judiciary because of its independence and long tenure, probably can exert a more enduring and equitable influence in safeguarding fundamental . . . rights than the other two branches of government which remain subject to the will of a contemporary and fluid majority.⁸⁰⁰

789. *Id.*

790. *Id.* at 472.

791. See Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1168 (1995).

792. See *Cooper v. Kizer*, 282 Cal. Rptr. 492 (Cal. Ct. App. 1991).

793. See *Frink v. Prod.*, 643 P.2d 476 (Cal. 1982).

794. See *Berlinghieri v. Director of Motor Vehicles*, 657 P.2d 383 (Cal. 1983).

795. See *Goat Hill Tavern v. City of Costa Mesa*, 8 Cal. Rptr.2d 385 (Cal. Ct. App. 1992).

796. See *Kerrigan v. Fair Employment Practices Comm'n*, 154 Cal. Rptr. 29 (Cal. Ct. App. 1979). For seemingly inconsistent cases, see Asimow, *supra* note 791, at 1175-76. For a recent independent judgment review case, see *Glenn v. City of Inglewood*, 50 Cal. Rptr. 2d 633 (Cal. Ct. App. 1996).

797. See *Woodard v. Personnel Comm'n*, 152 Cal. Rptr. 658, 661-62 (Cal. Ct. App. 1979).

798. See Asimow, *supra* note 791, at 1176-92.

799. This concept started with the decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970).

800. *County of Alameda v. Carnes*, 760 P.2d 464, 471 (Cal. 1988) (Broussard, J., dissenting).

When the right at stake is deemed fundamental, full review is appropriate because "abrogation of the right is too important to the individual to relegate to exclusive administrative extinction."⁸⁰¹

CONCLUSION

The decade under review began with the end of Chief Justice Rehnquist's first term in the Supreme Court's center chair and ended with abolition of the archetype independent agency,⁸⁰² as well as the fiftieth anniversary of the Federal Administrative Procedure Act and a new California APA.⁸⁰³ The Federal APA marked the beginning of a new era in administrative law, just as the abolition of the Interstate Commerce Commission marked the end of one. In fact, we can now say (as Judge Bazelon once did), "We stand on the threshold of a new era in the history of . . . administrative [law]."⁸⁰⁴

Certainly, the termination of the ICC signals a new stage in administrative organization and operation. It shows that the administrative law version of General MacArthur's "barracks ballad" about "old soldiers"⁸⁰⁵ is not always accurate: old agencies can die, if there is the legislative will to do away with them when they no longer serve a useful purpose.⁸⁰⁶ More important, the ICC abolition has tilted the balance away from the independent regulatory commission. Not long ago, administrative law dealt with agencies exercising powers of economic regulation, particularly the so-called "big seven" — the seven major independent regulatory organs in the Federal Government.⁸⁰⁷ Three of them are now gone,⁸⁰⁸ and their functions have been transferred to executive departments.

More than ever, the administrative law emphasis has shifted from economic regulation to social regulation and social welfare. Agencies such as the Environmental Protection Agency, OSHA, and the Social Security Administration now dwarf the traditional FTC-type independent regulatory agencies. The changing balance is illustrated by the number of ALJ's in the different agencies: 1,092 in the Social Security Administration alone, as against 75 in the traditional independent regulatory agencies (FCC, FTC, NLRB, and SEC).⁸⁰⁹

801. *Strumsky v. San Diego County Employees Retirement Ass'n*, 520 P.2d 29, 33 (Cal. 1974).

802. See ICC Termination Act of 1995, § 101, Pub. L. No. 104-88, 109 Stat. 803.

803. See CAL. GOVT. CODE §§ 11400 (West 1994); Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297 (1996).

804. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

805. "[O]ld soldiers never die; they just fade away." BARTLETT'S FAMILIAR QUOTATIONS 642 (16th ed. 1992).

806. However, as is often the case with administrative law "reforms," the ICC has been replaced by the Surface Transportation Board, an independent agency in the Department of Transportation, which is not only to perform the ICC's functions, but is to be composed, first of all, of members of the ICC serving the remainder of their unexpired terms. See ICC Termination Act § 201-203.

807. The seven include CAB, FCC, FPC, FTC, ICC, NLRB, and SEC. See BERNARD SCHWARTZ & H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT* 28 (1972).

808. Those are CAB, FPC, and ICC.

809. See Schwartz, *supra* note 286, at 213.

The fact that the decade under review has been the first decade of the Rehnquist Court has also had significant administrative law effects. The Rehnquist Court has been the most pro-agency Court since the New Deal Justices who, starting in 1937, so transformed our public law. The years since those Justices sat have seen a major shift in the attitude, both of the courts and the country, toward agency power.

In the 1930s and 1940s the administrative process was seen as the great hope in the governmental system. Its proponents hoped that it would effect a progressive modification of the economy and society, comparable at the least to the great English reform movement of a century earlier. Many went even further and saw in administration the ultimate supplanter of private industry which would take over the role of economic leadership in the public interest. This was the shining ideal that enthralled the extreme New Dealer. This was the horrid specter that terrified private industry. We now know that neither the thrill nor the chill has been justified by the reality.⁸¹⁰

In recent years, there has been a growing malaise that has replaced the perhaps unwarranted optimism of half a century ago. More and more, administrative lawyers have been voicing doubts about the ability of their administrative law to meet the basic needs of the society that called it forth. The courts, too, became increasingly disenchanted with the claims of administrative expertise. This was reflected in the Burger Court's stricter interpretation of agency enabling statutes,⁸¹¹ as well as the "hard look" doctrine⁸¹² that made for a more searching inquiry into the merits of challenged administrative action.

The "hard look" doctrine, Judge Higginbotham tells us, was part of the "move[ment] to make the administrative process more accountable and responsive." Now, however, Higginbotham has asserted, the courts have all but "abandoned the hard-look doctrine. Instead, [they have] begun to fashion what can only be called the 'quick-glance doctrine.'"⁸¹³

If such a development has occurred, it has in large part been the handiwork of the Rehnquist Court. The cases discussed in this article — particularly *Mistretta*,⁸¹⁴ *Loving*,⁸¹⁵ *Franklin*,⁸¹⁶ *Dalton*,⁸¹⁷ *Catholic Social Services*,⁸¹⁸ and, most of all, *Chevron* and its progeny⁸¹⁹ — have been reversions toward the past that threaten to undo a half century's progress in administrative law. They exalt executive and administrative power and eliminate important legislative and judicial controls. Above all, what the Rehnquist Court has been

810. Compare Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954).

811. See Bernard Schwartz, *Administrative Law and the Burger Court*, 8 HOFSTRA L. REV. 325, 333 (1980).

812. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

813. *Grant v. Shalala*, 989 F.2d 1332, 1359 (3d Cir. 1993).

814. See *supra* notes 62-72 and accompanying text.

815. See *supra* notes 100-01, 107-18 and accompanying text.

816. See *supra* notes 542-55 and accompanying text.

817. See *supra* notes 556-66 and accompanying text.

818. See *supra* notes 670-86 and accompanying text.

819. See *supra* notes 701-77 and accompanying text.

doing “in its holding[s] is effectively to have courts take a back seat to bureaucratic agencies in protecting constitutional liberties.”⁸²⁰ Unless the Rehnquist trend is reversed by future Courts, the consequences for administrative law could be most unfortunate.

820. See *Grant v. Shalala*, 989 F.2d 1332, 1359 (3d Cir. 1993).

