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SOME CRUCIAL ISSUES IN ADMINISTRATIVE LAW

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I. INTRODUCTION

According to Judge Friendly, "there seems to be a kind of spontaneous generation about the federal constitution; the more questions about it are answered, the more there are to be answered."[1] The same is true about administrative law. Indeed, our administrative law is notable not only because of its importance, but also because of its rapidly changing character. In 1943, the Supreme Court referred to a particular area of administrative regulation as one "the dominant characteristic of which was the rapid pace of its unfolding."[2] The same statement could be made about the entire field of administrative law. The paramount characteristic of the administrative law that has developed since the turn of the century has been what we may term its Heraclitean nature: the subject is

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1. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 788 (1963).

2. NBC v. United States, 319 U.S. 190, 219 (1943).

one that has been in a continual state of flux. To one working in administrative law, it may truly be said, "The World's a Scene of Changes, and to be Constant, in [such a field] were Inconstancy."[3]

II. CRUCIAL ISSUES A HALF CENTURY AGO

The extent of change in administrative law can be demonstrated by considering the different issues that have been crucial in the field over the years. We can start our discussion by going back to March 1940, when Dean James M. Landis delivered a noted public lecture on "Crucial Issues in Administrative Law."[4] In it, he dealt with what he considered the principal problems in the administrative-law field, and more particularly, with those posed by the highly controversial Walter-Logan bill, then pending before Congress. Though it has been a half a century since the Landis lecture was published, in terms of the development of administrative law it seems much longer ago than that. The controversy aroused by the Walter-Logan bill was part of the era of extremism in administrative law fostered by the then recent New Deal expansion of agency authority and the almost fanatic efforts of those who resisted the new governmental devices. More recently we have come to see that neither the thrill of the New Dealers nor the chill of their opponents[5] adequately reflected the reality of the administrative process. The irrational hopes and fears of the 1930's have given way to more reasoned attempts to restrain administrative excesses while, at the same time, recognizing and desiring to retain the essentially good features of administration. Such attempts have sought largely to canalize the exercise of agency authority within proper procedural bounds and culminated, as is well known, in the Administrative Procedure Act (APA) of 1946.[6]

What were the crucial issues noted by Landis fifty years ago, and to what extent have they been resolved since that time? The Landis lecture emphasized two primary problems: (1) whether the federal agencies should be subject to a general administrative-procedure statute,[7] and (2) the proper scope of judicial review.[8]

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3. Abraham Cowley, *Inconstancy*, *in* 1 THE COMPLETE WORKS IN VERSE AND PROSE OF ABRAHAM COWLEY 106 (Rev. Alexander B. Grosart ed., 1967).

4. James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077 (1940).

5. *See* Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 110, 1107 (1954).

6. ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

7. Landis, *supra* note 4, at 108.

8. *Id.* at 109.

The first of these questions has, of course, been answered affirmatively by passage of the APA. With that law, the controversy aroused by the question of whether uniform standards of fair administrative procedure should be formulated in statutory form has all but ended. When Congress enacted the APA in 1946, with what Justice Frankfurter termed unquestioning unanimity,[9] the first issue posed by Dean Landis was resolved. Since that time, the basic principles behind the act have gained well-nigh universal acceptance, even from those who had formerly opposed such legislation.

The second crucial issue addressed by Landis, the scope of judicial review, has not, to be sure, been resolved in the same manner as the question of whether there should be an administrative-procedure statute. Yet it cannot be denied that, on this issue too, the situation has changed drastically in the last half century. At that time, the issue of the proper scope of review was one of the most hotly contested questions in our administrative law. Today, as Professor Davis has pointed out, the controversy has become mostly a matter of history: "The long debate about de novo review versus restricted review is about ended; the *Ben Avon* and *Crowell* cases[10] are of little interest except as history; extremists have moved from both ends toward the middle; and the substantial-evidence rule now dominates nearly all judicial review of administrative action in the federal courts."[11]

As a result of the tendency to assimilate review of administrative agencies to appellate review in the judicial process itself, the substantial-evidence rule, which governs judicial review of administrative agencies, has become analogous to the "clearly erroneous" rule that governs appeals under the Federal Rules of Civil Procedure.[12] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[13] The same can also be said of the substantial-evidence test, as interpreted in the now celebrated *Universal Camera* case.[14] Can a finding be other than "clearly erroneous" when the reviewing court, in light of the entire record, cannot conscientiously find that the evidence supporting that finding is substantial?[15] On the

9. Universal Camera Corp. v. NLRB, 340 U.S. 474, 482 (1951).
10. Crowell v. Benson, 285 U.S. 22 (1932); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).
11. Davis, Administrative Law 868-69 (1951).
12. FED. R. CIV. P. 52(a).
13. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
14. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
15. *Id.* at 48.

other hand, if the court determines that a challenged finding is supported by evidence deemed substantial, even after considering the body of evidence opposed to the finding,[16] how can the court be "left with the definite and firm conviction that a mistake has been committed"?

III. CRUCIAL AREAS A QUARTER CENTURY LATER

In 1966, a quarter century after the Landis lecture, I attempted to update his discussion by writing about the crucial areas in administrative law at that time.[17] I noted two crucial questions that had come to the fore. The first question concerned administrative powers of search and seizure and inspection, which had become prominent by then-recent Supreme Court decisions. The second question concerned the legal status of individuals receiving governmental largess. In the area of administrative searches and seizures, the *Abel* case confirmed administrative arrest power.[18] I stressed the need for safeguards over such an anomalous administrative power, but the law has remained much as it was laid down in *Abel*. Fortunately, the administrative arrest power has remained confined to immigration law. The fear I expressed that the *Abel* reasoning might be applied to agencies other than the Immigration and Naturalization Service (INS) has therefore proven groundless.

A. *Administrative Inspection Power.*

My discussion of administrative inspection power was more important, as a practical matter, because it applies generally to agencies. In *Frank v. Maryland*,[19] the Court held that an administrative inspection was not a "search" under the Fourth Amendment.[20] Hence, the power of agencies to inspect without a warrant existed as an adjunct to administrative regulation of both dwellings and business premises.[21] My article stressed the dangers posed by unrestricted administrative inspection power. Unfortunately, at that time, the law seemed settled on the matter by the *Frank* decision.

In the past quarter century, however, the Court overruled *Frank* and laid down the rules governing agency inspection power. *Camara v.*

16. *Id.*

17. Bernard Schwartz, *Crucial Issues in Administrative Law*, 34 GEO. WASH. L. REV. 401 (1966).

18. Abel v. United States, 362 U.S. 217 (1960). *Compare* Reno v. Flores, 113 S. Ct. — (1993) (arrest and detention of alien juveniles).

19. 359 U.S. 360 (1959).

20. *Id.* at 36.

21. *Id.* at 366-67.

Municipal Court[22] and *See v. Seattle*[23] held that, despite *Frank*, administrative inspections were subject to the Fourth Amendment's warrant requirement.[24] These rules were summarized in the 1987 *Burger* case[25] involving administrative inspection of an automobile junkyard. Later cases, however, developed an exception for "closely regulated" businesses.[26] "Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements . . . have lessened application."[27] In the case of such a business, including the *Burger* junkyard, a warrantless inspection is valid if it meets three criteria: 1) "there must be a 'substantial' governmental interest [in the] regulatory scheme;" 2) "the warrantless inspections must be necessary to further the regulatory scheme;" and 3) the inspection program, through the certainty and regularity of its application, "must provide a constitutionally adequate substitute for a warrant."[28] Thus, when a regulatory scheme satisfies these three criteria, it is valid notwithstanding the Fourth Amendment's general warrant requirement. This resolution of the administrative inspection issue appears satisfactory. Private property is protected by the constitutional guaranty, but its requirements are more flexible where closely regulated businesses are concerned because rigid insistence upon the warrant requirement could make effective regulation virtually impossible.

B. *Privileges Versus Rights.*

The most important crucial issue discussed in my 1966 article was that of the legal position of the individual dependent upon government largess. At the time, such an individual was not protected by the requirements of administrative procedure that had been developed by the courts and the APA. The prevailing rule was that no person had any "right" to the largess dispensed by government. On the contrary, such largess was, under the law, considered a mere "privilege" provided by the state. As such, it could be withheld, granted, or revoked arbitrarily by the donor,

22. 387 U.S. 523 (1967).

23. 387 U.S. 541 (1967).

24. *Camara*, 387 U.S. at 534; *See* 387 U.S. at 541.

25. New York v. Burger, 482 U.S. 691 (1987).

26. For a summary, see BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.5, 119-20 (3rd ed. 1991).

27. New York v. Burger, 482 U.S. at 702.

28. *Id.* at 702-03.

regardless of its nature—be it a job,[29] a pension,[30] welfare aid,[31] veterans' disability benefits,[32] a government contract,[33] or any other benefit to which the individual had no preexisting "right." Consequently, an ever-larger area of administrative power was insulated from the safeguards of due process. Further, the individual dependent upon public largess was placed in a legal status subordinate to that of others in the community. Under the prevailing law, such "privileges" could be withheld or revoked without adherence to the procedural safeguards that would otherwise be required by the Due Process Clause before administrative action adversely affecting a particular person could be taken.[34]

My article sharply criticized the law on this matter and urged the repudiation of the right-privilege distinction as the criterion upon which administrative procedure depended.[35] Four years later that call was heeded in *Goldberg v. Kelly*.[36] *Goldberg* does not rank with the landmarks of Supreme-Court jurisprudence, and it remains largely unknown except to specialists. Yet, in its own field, it ranks as a leading case which Justice Brennan, who wrote the opinion, has said was "the opening shot in [the] modern 'due process revolution' "[37] that has transformed our administrative law.[38]

As more recently summarized by Justice Brennan, *Goldberg* held that, under due process, "a hearing was required before a welfare recipient's benefits could be terminated."[39] In his opinion, Brennan enunciated a rationale rejecting the privilege concept that had previously barred welfare recipients from procedural protection. Brennan stated that the recipient's claim could not be answered by the argument that "public assistance benefits are 'a privilege' and not a 'right.' "[40] The opinion characterized welfare benefits as a "matter of statutory entitlement" and

29. *See* Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951) (per curiam) (4-4 decision); McAuliffe. Mayor of New Bedford, 29 N.E. 517 (1892).

30. *See* Lynch v. United States, 292 U.S. 571, 577 (1934).

31. *See* Wilkie v. O'Connor, 25 N.Y.S. 2d 617 (N.Y. App. Div. 1941).

32. *See* Slocumb v. Gray, 179 F.2d 31, 34 (D.C. Cir. 1949).

33. *See* SCHWARTZ, *supra* note 26, at § 5.12.

34. *See e.g.*, Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 896 (1961).

35. *See also* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

36. 397 U.S. 254 (1970).

37. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 19 (1988).

38. *See* SCHWARTZ, *supra* note 26, at § 5.16.

39. Brennan, *supra* note 37, at 19.

40. *Goldberg*, 397 U.S. at 262. Brennan later noted that the Court had "finally rejected the wooden distinction between 'right' and 'privileges.' " Barry v. Barchi, 443 U.S. 55, 71 (1979) (Brennan, J., concurring).

added in a note that it "may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' "[41] Therefore, *Goldberg* introduced the concept of "entitlement"[42] which is fully protected by procedural due process.

IV. CRUCIAL ISSUES TODAY

The crucial issues in administrative law today illustrate the previously quoted Friendly truism:[43] the more administrative-law questions that are resolved, the more they give rise to others still to be answered. Two crucial administrative-law issues today flow directly from the two issues previously discussed. First, does extension of procedural protection to what were considered only "privileges" before *Goldberg* mean that administrative action now must be preceded by the full evidentiary hearings traditionally required by due process? Second, should the substantial-evidence rule be extended to cover all aspects of the scope of review?

A. *Cost-Benefit and Procedure.*

The *Goldberg v. Kelly* "revolution" extended due-process procedural requirements to almost all "privilege" cases that had previously been beyond the procedural pale. This extension is particularly true of those cases involving government largess such as the welfare decision in *Goldberg* itself.[44] The problem is that in these newer areas of administrative procedure, the traditional due-process approach requiring full evidentiary hearings in all cases may do more harm than good. However fair in theory may be the procedure modeled upon the courtroom, fully judicialized procedure may frustrate effective administration in a field such as welfare. Undue judicialization in this area may frustrate effective administration in the interest of those intended as the law's beneficiaries not only because of the nature of the cases involved, but also because of their number. When we move from regulatory agencies such as the Interstate Commerce Commission-type agencies to those administering social welfare programs, we move into mass administrative justice, where cases are measured not in the thousands but in the millions.

Fully judicialized procedure may be ill adapted to the needs of mass administrative justice. What is needed, as the Supreme Court has stated

41. *Goldberg*, 397 U.S. at 262 n.8.
42. *Id.*
43. Friendly, *supra* note 1, at.
44. *Id.* at 254.

in *Richardson v. Perales*, is procedure that not only is fair, but that also works.[45] Procedure that is unduly cumbersome will only serve to frustrate effective administration. In the Court's words in *Goss v. Lopez*, "[t]o impose in each . . . case even truncated trial-type procedures might well overwhelm administrative facilities. . . . Moreover, further formalizing the . . . process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness."[46] Somehow a procedure must be found that can cope with a great volume of cases and that is suited to the relatively small sums of money involved in most of them. In a great many cases the sum at stake may be less than the cost of the record alone. At the same time it must be remembered that the few dollars in issue on a claim may be vitally important to the individual who is completely dependent on the government grant. Somehow a middle ground must be found.

The Court attempted to find such a middle ground in *Mathews v. Eldridge*.[47] The Court ruled that due process did not require a preterminati n hearing before disability payments were ended.[48] The opinion enunciated a three-prong test to determine whether due process has been satisfied.[49] As summarized in more recent cases, the test requires balancing of "the nature of the private interest, the efficacy of additional procedures, and governmental interests,"[50] particularly "the costs that additional procedures would involve."[51]

The *Mathews* test is essentially a cost-benefit test[52] which "requires a comparison of the costs and benefits of giving the plaintiff a more elaborate procedure than he actually received."[53] The procedure should be required if its costs are less than the benefits likely to be produced. Under this approach, due process requirements should depend upon a balancing of the competing interests at stake,[54] with emphasis upon the costs and benefits involved in each additional procedure required. In cases with the most serious consequences, such as welfare termination, "a fairly extensive evidentiary hearing may be constitutionally required."[55] In other cases, due process may demand less. The law should chose less

45. 402 U.S. 389, 399 (1971).
46. 419 U.S. 565, 583 (1975).
47. 424 U.S. 319 (1976).
48. *Id.* at 349.
49. *Id.* at 335.
50. Zinermon v. Burch, 110 S.Ct. 975, 995 (1990).
51. United States v. Raddatz, 447 U.S. 667, 677 (1980).
52. Propert v. District of Columbia, 741 F. Supp. 961, 962 (D.D.C. 1990).
53. Parrett v. Connersville, 737 F.2d 690, 696 (7th Cir. 1984).
54. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).
55. Brock v. Roadway Express, 481 U.S. 252, 261 (1987).

burdensome alternatives where the benefits from the more burdensome procedure would be outweighed by the marginal costs of time and expense.[56] In other words, as the Supreme Court has affirmed, "we have emphasized that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard."[57]

It is, however, one thing to use a cost-benefit approach on the question of how judicialized a hearing is required by due process. It is quite another thing to use a cost benefit approach to determine whether any hearing at all is required by due process. Unfortunately, the Supreme Court has begun applying the *Mathews v. Eldridge* test in the latter manner. In *Connecticut v. Doehr*[58] a state statute authorized a judge to allow the prejudgment attachment of real estate without prior notice or hearing upon the plaintiff's verification that there was probable cause to sustain the validity of his claim.[59] The Court ruled that the statute did not satisfy the due process requirements[60] under the *Mathews* test.[61] All the Justices agreed that it failed that test because: (1) the interests affected were significant; (2) the risk of erroneous deprivation that the state permitted was substantial;[62] and (3) the interests in favor of an *ex parte* attachment were too minimal to justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.[63]

As indicated, *Doehr* used the *Mathews* test to determine whether a hearing was required by due process. This application, however, is a misuse of the test. *Mathews* "established a cost-benefit test for determining whether the Due Process Clause requires a particular type of notice and hearing."[64] Once it is determined that there is a due process right to be heard, *Mathews* tells us what process is due, or in other words, the specific procedures that should be required. The *Mathews* balancing test should not be used to permit summary agency action. The Due Process Clause has already tilted the balance in favor of *some* procedure; *Mathews* only tells us the degree of formality that is demanded in the given case.

The courts have nevertheless continued to misuse the cost-benefit

56. *Id.* at 263.
57. Walters v. National Ass'n. of Radiation Survivors, 473 U.S. 305, 320-321 (1985).
58. 111 S. Ct. 2105 (1991).
59. *Id.* at 210.
60. *Id.*
61. *Id.* at 211.
62. *Id.* at 2112-13.
63. *Id.* at 2115.
64. Propert v. District of Columbia, 741 F. Supp. 961, 962 (D.D.C. 1990).

approach to determine whether a due process right to be heard exists in the given case. The courts have also used cost-benefit analysis (CBA) to determine whether other procedural rights exist in a given case. The leading case is *Immigration and Naturalization Service v. Lopez-Mendoza*[65] where the Court used CBA to hold that the exclusionary rule is not a due process requirement in an administrative hearing.[66] *Lopez-Mendoza* arose out of a deportation proceeding where the alien objected to the introduction of evidence at a deportation hearing. The alien contended that the evidence should have been suppressed because it was the fruit of an unlawful arrest.[67] In holding that the evidence was validly introduced, the Court followed a CBA approach that weighed the benefits secured from the exclusionary rule in a deportation case against the costs of applying the rule in such a case.[68]

Justice O'Connor, who wrote the *Lopez-Mendoza* opinion, found the benefit of the exclusionary rule to be significantly reduced in a deportation case.[69] Justice O'Connor noted several factors that significantly reduce the likely deterrence value of the rule.[70] First, deportation is still possible when there is other sufficient evidence not related to the arrest, and, second, every INS agent knows it is highly unlikely that a particular arrestee will challenge the proceedings.[71] Justice O'Connor added that "[t]he deterrence value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights."[72] On the other hand, Justice O'Connor said that an application of the exclusionary rule "would require the courts to close their eyes to ongoing violations of the [immigration] law."[73]

Under the *Lopez-Mendoza* decision, it is not enough to ask whether a right guaranteed by the Constitution has been violated in the given case. An affirmative answer is not enough to lead to a decision in favor of the individual. Instead, CBA must be applied to determine whether the right itself is guaranteed in the particular proceeding. If the CBA balance tilts against the right in the given case, the government action will be upheld even though it has violated the right concerned.

65. 468 U.S. 1032 (1984).
66. *Id.* at 1041.
67. *Id.* at 1037.
68. *Id.* at 1041.
69. *Id.*
70. *Id.* at 1042-43.
71. *Id.* at 1043-44.
72. *Id.* at 1045.
73. *Id.* at 1046.

Both federal and state courts have followed *Lopez-Mendoza*.[74] Whether its CBA approach should be applied generally to procedural rights is one of the current crucial issues for our administrative law and, indeed, for our public law as a whole.[75] Using CBA as a due-process lodestar could lead to serious dangers. CBA has a delusive aura of scientific objectivity that may be justified in the field of economics. As a public-law tool, however, it is as subjective as the Benthamite "felicific calculus"[76] that was its primitive progenitor. Just as each utilitarian would apply the "greatest happiness of the greatest number"[77] principle according to his own subjective judgment of the pains and pleasures involved, so each judge employing CBA will use his own individual calculus in weighing the procedural rights at issue.

CBA in the law reduces our basic rights to the level of the counting house. It "invites members of the Bar to dust off their calculators and dress their arguments in quantitative clothing. The resulting spectacle will perhaps be entertaining."[78] However, when CBA becomes the measuring rod for the protection of constitutional rights, the inevitable result is their dilution. When we deal with a constitutional right such as that protected by the exclusionary rule, it is much easier to quantify costs than it is benefits. It is all but impossible to measure most constitutional rights in monetary terms. It is not difficult, however, to measure the costs of protecting those constitutional rights in given cases. How much is freedom from illegally seized evidence worth?

In cases such as *Lopez-Mendoza*, it is much easier to measure the costs than the benefits. Since a constitutional right cannot really be quantified in monetary terms, the cost-benefit approach will always tend toward a heavier weighing of the cost side of the scale. The result in a *Lopez-Mendoza*-type case is that the law is "drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand."[79] A system that values basic rights in more than dollars-and-cents terms should hesitate before following an approach under which *priceless* may too often mean *worthless*.

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74. *See* SCHWARTZ, *supra* note 26, at § 7.12.

75. *See* United States v. Leon, 468 U.S. 897 (1984).

76. 3 ENCYCLOPEDIA BRITTANICA 486 (1969 ed).

77. JEREMY BENTHAM, 10 THE WORKS OF JEREMY BENTHAM 142 (John Bowring ed. 1962).

78. American Hospital Supply Corp. v. Hospital Products, 780 F.2d 589, 610 (7th Cir. 1985) (Swygert, J., dissenting).

79. United States v. Leon, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

B. Chevron *Doctrine.*

Legal rules, unlike those in the physical sciences, do not have fixed areas of strains and stress. Instead, legal rules are too often pushed to the breaking point permitted by expediency. A crucial issue for administrative law today is whether the *Chevron* doctrine,[80] which Justice Scalia has proclaimed the most important administrative law doctrine in recent years,[81] will be pushed to the breaking point.

Chevron itself was a direct result of the resolution of the scope-of-review issue noted by Dean Landis half a century ago. As previously discussed, the predominance of the substantial-evidence rule in judicial review of administrative action resolved the issue of the scope of review. The *Universal Camera* case[82] interpreted the substantial-evidence rule as a test of the rationality of agency findings of fact. Thus, courts may determine the *reasonableness* not the *rightness* of such findings.[83]

The scope of review in administrative law is based upon the law-fact distinction, with application of the substantial-evidence rule limited to agency findings of fact. The distinction between "law" and "fact" is, however, by no means clear-cut. It is not always easy to detect the line between legal and factual issues in an administrative proceeding.[84] For example, is an administrative finding that involves statutory interpretation one of law or one of fact for purposes of scope of review? That question, as Judge Friendly points out, is an old one.[85] Traditionally, the answer was that it was a question of law. *Chevron*, on the other hand, answers that it is to be treated like a finding of fact.

The *Chevron* opinion begins with the hornbook principle that interpretation of a federal statute depends upon Congressional intent: "If the intent of Congress is clear that is the end of the matter."[86] The court applies this principle when it reviews an agency's construction of a statute as in other cases involving statutory interpretation. What happens, however, when Congress has not indicated any intent on the matter?

The lower court, in *Chevron*, had held that when Congress does not express its intent, the reviewing court might impose its own construction,

80. Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

81. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512.

82. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

83. *See* SCHWARTZ, *supra* note 26, at § 10.8.

84. Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 914 (3d Cir. 1981).

85. NLRB v. Marcus Trucking Co., 286 F.2d 583, 590 (2d Cir. 1961).

86. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984).

just as it would do in the absence of any administrative interpretation.[87] The Supreme Court reversed.[88] If a court determines that Congress has not directly addressed the precise question at issue, it may not simply impose its own construction on the statute, as would be the case in the absence of an administrative interpretation. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[89] In other words, the principle of deference is fully applicable where Congress did not have any intent on the precise question at issue. In *Chevron*, once the court of appeals determined that Congress "did not actually have an intent regarding the applicability of the bubble concept [at issue],[90] the question before it was not whether in its view the concept was 'inappropriate,' but whether the Administrator's view that it is appropriate . . . was a reasonable one."[91] Because the agency's use of the concept was a reasonable policy choice, its choice had to be upheld upon review.[92] As more recently explained by Justice Scalia, *Chevron* holds "that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent."[93] Therefore, the "courts should determine whether an agency's interpretation of a statute is *permissible*, not *correct*."[94]

The agency in *Chevron* was engaged in rulemaking. Hence, *Chevron* stated a principle that governs review of administrative regulations. The cases since *Chevron*, however, 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 in rules or adjudicatory decisions.[95] For example, in *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Commission (FERC)*,[96] Judge Bork stated that, "in *Chevron*, the delegation of power to the agency was implicit . . . . By contrast, the delegation of adjudicative authority to an agency

87. *Id.* at 841-42.

88. *Id.* at 842.

89. *Id.* at 843.

90. The EPA regulations allowed all the pollution-emitting devices within the same industrial grouping to be treated as though they were encased within a single "bubble." *Id.* at 837.

91. *Id.* at 845.

92. *Id.*

93. INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987).

94. Scalia, *supra* note 81, at 512 n.7.

95. *See* National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.D. Cir. 1987) (holding that courts must defer to an agency's reading of a settlement agreement even where the issue involves proper construction of language).

96. 811 F.2d 1563 (D.C. Cir. 1987).

that is empowered to hear disputes, receive settlement proposals, and enter binding orders is explicit - it closely resembles a direct congressional authorization to implement the provisions of a statute through regulations."[97] The conclusion is that "this explicit delegation of power to an agency compels a court to give deference to the agency's conclusions even on 'pure' questions of law within that domain."[98]

Judge Bork supports his view that *Chevron* applies to review of " 'pure' questions of law" by the assertion that it was really such a question that was involved in *Chevron* itself. "*Chevron* considered the proper standard for judicial review of an agency's statutory interpretation, and the construction of a statute has always been considered a 'pure' question of law."[99] In this respect, Bork's view is supported by Justice Scalia, who said in his concurring opinion in *Immigration and Naturalization Service v. Cardoza-Fonseca* that, "in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase 'stationary source.' "[100] Scalia's statement was called forth by the implication of the majority's opinion in *Cardoza-Fonseca* that *Chevron* deference does not apply to "a pure question of statutory construction" which is "for the courts to decide."[101] More recently, however, the Court confirmed that *Chevron* did 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."[102] This confirmation 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.' "[103]

C. Chevron *and Jurisdiction.*

The extension of *Chevron* to all interpretations, both in rules and adjudicatory decisions, and even to those involving "pure" questions of law, upsets the balance in our administrative law. It blurs the distinction between law and fact upon which the scope of review is grounded. It drastically limits review, not only of "agency findings of 'fact' in the narrow, literal sense,"[104] but also of agency constructions of statutory law.

97. *Id.* at 1569.
98. *Id.*
99. *Id.* at 1569-70.
100. INS v. Cardoza-Fonseca, 480 U.S. 421, 455 (1987) (Scalia, J., concurring).
101. *Id.* at 446.
102. NLRB v. United Food Workers & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987).
103. *Id.* at 134 (Scalia, J., concurring).
104. SEC v. Central Ill. Sec. Corp., 338 U.S. 96, 126 (1949).

The latter, under the traditional theory of Anglo-American judicial review, are matters more legal than factual in nature, and hence, are open for determination by the courts upon review. One can even say, as Professor Sunstein recently has, that "the notion that administrators may interpret statutes they administer is inconsistent with separation-of-powers principles."[105] The "basic principle" in our system is that "[i]nstitutions limited by a legal restriction are not to be permitted to determine the nature of the limitation, or to decide on its scope. The relation of the Constitution to Congress parallels the relation of regulatory statutes to agencies. In both contexts, an independent arbiter should determine the nature of the limitation."[106]

The *Chevron* doctrine presents the danger of undue deference to self-expansion of an agency's jurisdiction. This is particularly true when an agency's power to act may be dependent on findings involving statutory interpretation. If the agency misapplies the statute upon which its power rests, it may be acting beyond its jurisdiction. For example, if a workers' compensation agency is vested with authority to make awards to injured "employees," then the agency's very power to act depends upon its finding that the given claimant is an "employee."[107] The same is true if the agency makes a finding that the injury "arose out of and in the course of employment," or a finding that there had been an "injury" at all, or any finding that makes the statutory scheme apply to the given fact pattern.[108]

The courts have already legitimized agency action that would otherwise be *ultra vires* as shown in *Dole v. United Steelworkers of America*.[109] At issue was a Department of Labor Hazard Communications Standard, which imposed disclosure requirements on employers aimed at ensuring that their employees were informed of the potential hazards posed by chemicals in the workplace.[110] The Department submitted the Standard to Office of Management and Budget (OMB) for approval before it collected the information. OMB disapproved three of the Standard's provisions on the ground that their requirements were not necessary to protect employees. The Department withdrew those provisions.[111] Respondents challenged OMB's disapproval. They argued that *Chevron* should not

105. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 143 (1990).
106. SUNSTEIN, *supra* note 105, at 143.
107. *See* Crowell v. Benson, 285 U.S. 22 (1932) (concerning a workers' compensation claim under the Longshoremen's and Harbor Worker's Compensation Act).
108. *See* SCHWARTZ, *supra* note 26, at § 10.28.
109. 110 S. Ct. 929 (1990).
110. *Id.* at 931-32.
111. *Id.* at 934-35.

apply in this case because OMB's regulations determined the scope of its jurisdiction under the Act. The Court opinion did not deal with this argument, but Justice White stated in his dissent that the Court had never accepted it and "there are good reasons not to accept it."[112] According to White, under *Chevron* and its progeny, 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."[113]

Justice Scalia has also applied *Chevron* deference "to an agency's interpretation of its own statutory authority or jurisdiction."[114] According to Scalia, such an 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.' "[115] This argument, however, is a two-edged sword. Under *Chevron* deference, if agencies are permitted to exceed their authority, it militates against *Chevron* itself in a system that had its origin in the jurisdictional basis of judicial review.[116]

Justice Scalia further stated 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."[117] It is questionable, however, whether Congress had the intention stated by Scalia. Statutory provisions confining an agency's authority manifest an unwillingness to give the agency freedom to define the scope of its own power. As Professor Sunstein tells us, a "cardinal" administrative law principle, "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."[118] To give effect to the confining intent behind statutory limitations, the ultimate word on jurisdiction should be with the courts, not the agencies.

112. *Id.* at 943-44.
113. *Id.* at 944.
114. Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988).
115. *Id.*
116. See Wade, Administrative Law 41 (6th ed. 1988).
117. Mississippi Power & Light Co., 487 U.S. at 381-82.
118. SUNSTEIN, *supra* note 105, at 224.

D. Chevron *Ad Absurdum?*

The most controversial decision of the Supreme Court's 1990 Term, *Rust v. Sullivan*,[119] illustrates how *Chevron* may skew the result in what would have once been a simple administrative-law case. At issue in *Rust* were Department of Health and Human Services (HHS) regulations which prohibited federally-funded Title X projects from engaging in activities advocating abortion as a method of family planning.[120] Doctors challenging the regulations 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 information and advice about abortion.[121]

The controversy over *Rust* concerns the Court's holding that the regulations did not violate plaintiffs' First-Amendment rights. It was the Court's application of *Chevron*, however, that was the foundation of the *Rust* decision. Chief Justice Rehnquist first declared the statutory language to be "ambiguous" and therefore, under *Chevron*, "substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it."[122] As a result, "[t]he Secretary's construction of Title X 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."[123] Here, because the Secretary's construction falls under this test, "we must defer to the Secretary's permissible construction of the statute."[124]

Several points should be noted about the *Rust* application of *Chevron*. Rehnquist's opinion states that *Chevron* deference requires the agency's interpretation to be upheld "if it reflects a *plausible* construction of . . . the statute."[125] Until *Rust*, it had been assumed that "the *Chevron* yardstick [was one of] 'reasonableness.' "[126] As previously quoted, Justice Scalia stated that *Chevron* requires the courts to "give effect to a

119. 111 S. Ct. 1759 (1991).

120. *Id.* at 1764-65.

121. *Id.* at 1766.

122. *Id.* at 1767.

123. *Id.*

124. *Id.* at 1769.

125. *Id.* at 1767 (emphasis added).

126. Continental Air Lines v. Dept. of Transportation, 843 F.2d 1444, 1449 (D.C. Cir. 1988). *See also*, National Assn. for Better Broadcasting v. FCC, 849 F.2d 665, 669 (D.C. Cir. 1988) (discussing the "reasonableness" standard enunciated in *Chevron*).

reasonable agency interpretation of a statute."[127] *Rust*, however, transforms the reasonableness requirement to one of plausibility. The plausibility requirement may be met by an interpretation that has only an appearance or show of the truth,[128] or in other words, a statutory interpretation that is only superficially fair or reasonable.[129] In this respect, *Rust* further dilutes the scope of review even beyond the dilution under *Chevron* itself.

Rust also changes the *Chevron* approach to cases involving inconsistent agency interpretations. In *Rust*, petitioners argued that the agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question."[130] The Court declined to accept the argument stating that it had been rejected by *Chevron* itself.[131] *Chevron*, however, only said that inconsistent agency interpretations, "[do] not . . . lead [the Court] to conclude that no deference should be accorded to the agency's interpretation of the statute."[132] The Court did not state that full *Chevron* deference should be accorded. Both logic and law indicate that the scope of review should be stricter in such a case. Where the administrative experts themselves are so unsure of their ground that they have taken different positions in different cases, the courts should feel something less than the confidence in agency expertise that called forth the rule of limited review. In such a case, the reviewing court may well declare that the agency's decisions hardly have the "consistency to which [it] should yield [its] judgment."[133] Hence, as the Court put it not long ago, "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[134]

The most important issue resulting from the *Rust* application of

127. INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987).

128. 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2202 (1971).

129. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1886 (2d ed. 1951).

130. Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991).

131. *Id.*

132. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863 (1984).

133. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 789 (2d Cir. 1946) (Learned Hand, J., writing the opinion of the Court), *aff'd*, 328 U.S. 275 (1946).

134. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987). *See also* NLRB v. United Food & Commercial Workers Union, 484 U.S112, 124 (1987); Seldovia Native Assn. v. Lujan, 904 F.2d 1335, 1345 (9th Cir. 1990); Board of Trustees v. Sullivan, 763 F. Supp. 178, 184 (S.D. Miss. 1991).

Chevron is whether it leaves to the agency questions of fundamental policy that in our representative system should be determined by the legislature. In *Boreali v. Axelrod*,[135] the New York court struck down regulations prohibiting smoking in most public places on the ground "that the . . . line between administrative rule-making and legislative policy-making has been transgressed."[136] It was for the legislature to decide whether it was the policy of the state to prohibit smoking. "Striking the proper balance among health concerns, cost and privacy interest . . . is a uniquely legislative function. . . . Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was 'acting solely on [its] own ideas of sound public policy' and was therefore operating outside of its proper sphere of authority."[137]

In *Rust*, the agency also imposed its own views on a basic question of policy. It should be as much for the legislature to determine whether abortion counseling should be prohibited as it is whether smoking should be prohibited. In fact, the abortion-counseling-prohibition decision is one that should more plainly be made by legislators, not unelected bureaucrats, because of its impact upon constitutional rights and upon women seeking such counseling. Statutory ambiguity should not be taken as equivalent to delegation of lawmaking power where a question of fundamental policy is resolved.[138] In such a case, "[a]n agency cannot by its regulations effect its vision of societal policy choices [prohibiting] that which was never contemplated or delegated by the Legislature."[139]

V. CONCLUSION

Administrative law is a magic mirror which reflects the principal developments in the society which it helps to regulate.[140] The crucial administrative-law issues noted by Landis half a century ago were a direct result of the mushrooming administrative process during the New-Deal years. Critics of the agencies, particularly in the legal profession, claimed that the new administrative justice was a revival of the prerogative justice of Stuart days and that agency procedure smacked of Star-

135. 71 N.Y.2d 1 (1987).
136. *Id.* at 11.
137. *Id.* at 12.
138. *Cf.* SUNSTEIN, *supra* note 105, at 143.
139. Campagna v. Shaffer, 73 N.Y. 2d 237, 242 (1989).
140. *Cf.* Oliver W. Holmes, *The Law*, in COLLECTED LEGAL PAPERS 25, 26 (1920).

Chamber jurisprudence. Even as restrained a body as the Attorney General's Committee on Administrative Procedure noted deficiencies in agency procedure in its 1941 report.[141] Three members of the committee went further and condemned the "substantial defects in adjudicatory practices"—particularly their "haphazard" and "formless" character.[142]

The solution to the procedure problem was seen to be a legislative code of standards of fair administrative procedure.[143] Such a law was strongly opposed by the agencies and many of their defenders. Hence, the primary crucial issue of the day was whether agencies should be subjected to a general administrative-procedure law.

Those disturbed by the growth of administrative power were also concerned about what they considered the ineffectiveness of judicial review. With the Attorney General's Committee minority, they believed that Congress should prescribe the scope of review rather than leave it to the courts to do so "without needed statutory direction."[144] A general feeling that judicial review was too narrow led to Congressional passage of the Walter-Logan bill, vetoed by President Roosevelt, which would have substantially broadened the scope of review. Because of the conflicting views on scope of review, Landis noted the proper scope of review as a second crucial issue.

The crucial issues stated by Landis were, as previously discussed, resolved in the years following his lecture. As significant as the resolution of the these crucial issues was the change in the administrative-law climate that occurred. The years following the Landis lecture were critical in the development of American administrative law. Such changes included: (1) the publication of the report and studies of the Attorney General's Committee, which for the first time provided a detailed factual picture of the working of the federal administrative process; (2) the enactment of the Administrative Procedure Act, based upon the report of the Attorney General's Committee, which was the first significant legislative intervention in the field of administrative law; and (3) the continuing expansion in administrative authority, which led people on both sides of the political boundary to realize the need for safeguards.

When Landis spoke, only those on the so-called "right" (accused by their opponents of being concerned only with property rights and really

141. Report of the Attorney General's Committee on Administrative Procedure Chapters 4-5 (1941).

142. Id. at 213.

143. Id. at 217.

144. Id. at 209.

aiming their shafts at the substance, rather than the administrative machinery, of the New Deal legislation) articulated their demands for controls over agency authority. More recently, proposals for safeguards have evoked a bipartisan response all but inconceivable fifty years ago. As Justice Douglas, noted for anything but hostility toward the administrative process, asserted "[u]nless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."[145] A decade or two earlier, it would have been almost unthinkable for one of Justice Douglas's political convictions to direct such a "sanguinary simile"[146] against administrative expertness. It is not that the views of those involved were swayed by shifts in the political wind, but rather that developments in administrative law led to the changing climate. Extremists on both sides moved toward the middle, and, consequently, most of the controversy engendered by extremism tended to abate.

During the quarter century in question, another development occurred, pregnant with consequences for administrative law - the rise of the Welfare State. By midcentury, the Welfare State was an established fact in both the polity and the law. Administrative law was its primary instrument. Administrative power expanded into areas of social welfare. The trend, which began with the Social Security Act of 1935, intensified over the years. Disability, welfare, aid to dependent children, health care, and a growing list of other services (education, medical care, housing, slum clearance, urban development) all came under the fostering guardianship of the administrative process. The traditional area of administrative regulation was dwarfed by the growing field of social welfare.

The changing administrative-law focus, reflecting the burgeoning of the Welfare State, gave rise to the primary crucial issue of the third quarter of the century. The new growing point of administrative law, social-welfare administration, was subjected to the fundamentals of fair play that had been developed to control more traditional regulatory administration. That issue was resolved in *Goldberg v. Kelly*,[147] which held that government largess were "entitlements" that were protected by due process. The administrative apparatus of the Welfare State was now as

145. New York v. United States, 342 U.S. 882, 884 (1951).
146. Jones v. SEC, 298 U.S. 1, 33 (1936).
147. 397 U.S. 254 (1970).

much subject to the requirements developed in our administrative law as the older regulatory apparatus.

The years after *Goldberg v. Kelly* saw an end to the unlimited economic expansion that had fueled the growth of the Welfare State. In what increasingly appeared as a postaffluent society, attention was paid to the fear expressed in a *Goldberg* dissent "that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing, and other living essentials."[148] Extending the full panoply of due process to social-welfare would not only press these newer areas into an inappropriate judicialized mold; it would also channel scarce resources into procedure from the funds available to aid the poor.

The Supreme Court attempted to deal with this problem by the cost-benefit approach in *Mathews v. Eldridge*.[149] Unfortunately, the Court did not stop with the *Mathews* test in its use of CBA. Instead, it has been moving toward a general use of CBA to determine whether particular procedural rights are applicable in agency proceedings. CBA as *the* criterion in administrative procedure cases may lead to a major dilution in individual rights, because the CBA balance always tilts in favor of costs where rights that cannot be measured in mere monetary terms are at issue.

Application of CBA to administrative procedure gives increasing weight to agency autonomy in fashioning its own procedures. A narrower scope of review, such as the *Chevron* doctrine which has come to dominate judicial review during the past decade, also favors agency autonomy. The end result of both CBA and *Chevron* is a renewed deference toward agencies that bears comparison with the trend of half a century ago.

The current trend coincides with the emergence of the New Right in jurisprudence.[150] Its members have brought about a new tilt toward the Executive in our administrative law. Under it, the lion's share in the interpretation, as in the carrying out of laws, has come once again to rest with administration, with the "hard look" approach to judicial review[151] giving way to renewed deference toward the administrative expert. The judges appointed by Presidents Reagan and Bush have used their positions to begin to translate the New Right legal agenda into positive

148. 397 U.S. at 284.

149. 424 U.S. 319 (1976).

150. *See generally* Kozinski, in ECONOMIC LIBERTIES AND THE JUDICIARY XI (Dorne and Manne eds. 1987).

151. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-53 (D.C. Cir. 1970).

law.[152]

We should remember, however, that administrative law, like the law itself in the Cardozo aphorism, has its epochs of ebbs and flow.[153] The past decade has seen a flow toward deference and away from the distrust of the expert that had previously prevailed in the courts. Yet, if this paper has shown anything, it is that the administrative-law flow is never constant in one direction. With a Democratic Administration in power, the Reagan-Bush judges may be more reluctant to apply the deference doctrine. The result may be a reversal in the tendency to defer unduly and a new period of judicial skepticism toward the administrative expert.

The opposite scenario is also possible: An increase in regulatory activity accompanied by a new zealousness in applying *Chevron* to support the activities of a reinvigorated Administrative State. At any rate, by that time, the current crucial administrative law issues may have been resolved, but we can be sure that new ones will have arisen to take their place.

152. *See generally* BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK (1990) (developing the theme).

153. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 126 (1921).