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Charles H. Koch Jr.

William & Mary Law School

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AN ISSUE-DRIVEN STRATEGY FOR REVIEW OF AGENCY DECISIONS[†]

Charles H. Koch, Jr.*

Justice Scalia, the first administrative law scholar to sit on the Supreme Court since Felix Frankfurter, began his dissent in *NLRB v. Curtin Matheson Scientific, Inc.*: "The Court makes heavy weather out of what is, under well-established principles of administrative law, a straightforward case."¹ That observation should give any administrative law specialist pause because courts, including the Supreme Court, and advocates regularly cast about in a fog of ignorance where the light of "well-established principles of administrative law" is readily available.² Sure enough, this case could be resolved by the application of the principles governing the scope of review of administrative action. These principles have existed for generations. Indeed, Justice Frankfurter, in the famous *Universal Camera*³ opinion involving the very same agency, found those principles to be well established more than forty years ago and incorporated by reference through the Federal Administrative Procedure Act (FAPA).

Yet there is evidence that Justice Scalia has overstated the case in this instance. He dissented from a majority opinion confirming the judgment

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* Woodbridge Professor of Law, College of William and Mary, Marshall-Wythe School of Law; LL.M. 1975, University of Chicago; J.D. 1969, George Washington University; B.A. 1966, University of Maryland. I would like to acknowledge the generous assistance of Peter Strauss and Paul Verkuil.

1. 110 S. Ct. 1542, 1557 (1990) (Scalia, J., dissenting).

2. This seems a propitious opportunity to mention that my two-volume treatise on administrative law has a good deal about "well-established administrative law principles." 2 C. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* (1985) [hereinafter KOCH and the 1990 supplement KOCH SUPP]. I apologize in advance for citing myself but, at least, I have tried to use it for further discussion rather than in support of myself.

Also appearing frequently:

Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985).

McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979).

Federal Administrative Procedure Act, 5 U.S.C. §§ 551-706. [hereinafter FAPA].

Uniform Law Commissioners' Model State Administrative Procedure Act (1981) [hereinafter MSAPA].

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

of a Fifth Circuit judge, Jerre Williams, whose administrative law credentials are impeccable.⁴ What can explain this fundamental disagreement between these two administrative law experts? The answer lies in the fact that, while there are undoubtedly relevant well-established principles, they are not equal to the task. The law governing the extent of review of administrative decisions simply fails in complex cases. This article explores the reasons for the failures of the current principles and suggests formalization of principles that have been evolving through cases such as *Curtin Matheson* in which the well-established principles prove insufficient.⁵

Justice Scalia accused the majority of ignoring well-established principles but, in fact, the majority followed well-established, if not formalized, judicial practice. When faced with a complex review assignment, sophisticated courts usually construct an issue-driven review strategy that transcends the simplistic system contemplated by formalistic administrative law and incorporated in the FAPA. This issue-driven strategy allows the courts to define their role both more flexibly and with more precision and hence enables them to meet the needs of the complex modern relationship between the judiciary and the bureaucracy.⁶

The strategy recognizes that any given administrative decision incorporates the resolution of a bundle of issues. Because of the variety of substantive areas dominated by the administrative process, a fundamental strategy based on particular substantive questions would be impossible. Instead, the law has evolved a strategy towards a few basic, and accepted, categories of issues: policy, fact, law, procedure, and discretion.

4. The majority reversed the judgment of the Fifth Circuit in *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir. 1988), to which Judge Williams dissented. Among other credentials, Judge Williams was an administrative law scholar at Texas and the first chair of the Administrative Conference of the United States.

5. Levin, *supra* note 2, at 1 ("Scope-of-review . . . has always been one of the principal whipping boys of administrative law.").

6. In its formative years, the administrative process was expected to overcome the defects discovered in the three constitutional branches. James Landis, its strongest advocate, argued: The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.

J. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

In modern times, however, we see the defects in the administrative process as well and, hence our search for shared power is more practical than theoretical. *E.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

I. THE PARADIGM

Curtin Matheson provides a useful vehicle for exploring the issue-driven strategy because at least one of its opinions confronts each issue category.⁷ Each opinion, even Justice Scalia's, pursues an issue-driven strategy. Moreover they do so in a context administrative law theory would contend should be easy: formal adjudication by the National Labor Relations Board (NLRB).

The Supreme Court reviewed the NLRB's decision that *Curtin Matheson* committed an unfair labor practice by discontinuing its recognition of a Teamsters local.⁸ The union had been the collective-bargaining agent until a strike in 1979. During the strike, the company hired a number of replacement workers and several employees returned to work. The company contended that it had a good faith belief that the union no longer represented the employees and therefore refused the union's settlement offer. The union filed an unfair labor practice charge with the Board.⁹

An administrative law judge (ALJ) dismissed the charges but the Board reversed and held that the company lacked a sufficient objective basis to question the union's support.¹⁰ In doing so, the Board continued the process of reversing a long-standing "rule" that allowed employers to presume that replacement workers would not support the union.¹¹ Instead, the Board adopted a case-by-case approach in which the employer would be required to provide evidence that the union lacked the support of the replacement employees.¹² The Fifth Circuit refused to enforce the Board's order and rejected the Board's decision not to accept any presumptions about the views of replacement employees.¹³ The Supreme Court took the case to resolve a split in the circuits.

Justice Marshall, writing for three other Justices and the Court, reversed the Fifth Circuit and upheld the NLRB. His review strategy was based on his finding that the Board, rather than the courts, was primarily responsible for labor policy.¹⁴ Courts then are required to uphold the agency's policy decision if "it is rational and consistent with the Act."¹⁵ Justice Marshall found that the Board's change of policy was based on its long experience and was not irrational. Also, the NLRB's decision was consistent with the "overriding policy" of "industrial peace."¹⁶ Chief Justice Rehnquist concurred but observed that the NLRB's

7. NLRB v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990).

8. *Id.*

9. *Id.* at 1547.

10. *Id.*

11. *See, e.g.*, *Station KKH1*, 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989).

12. 110 S. Ct. at 1548.

13. *Id.*

14. *Id.* at 1549.

15. *Id.*

16. *Id.* at 1553.

new rule "press[es] to the limit the deference to which the Board is entitled in assessing industrial reality."¹⁷

Justice Scalia wrote the primary dissenting opinion, with Justice Blackmun making some separate observations.¹⁸ Justice Scalia, as evidenced by the quote introducing this article, tried to contend that the judicial role was well established and that the majority had not performed its well-defined role. Superficially, Justice Scalia followed his contention that the case merely required the application of the well-established word formula review standard of "substantial evidence."¹⁹ One understanding of that test requires "more than a scintilla" and Justice Scalia found "not a shred of affirmative evidence" to support the NLRB.²⁰ The more widely used understanding looks for reasonableness.²¹ Justice Scalia concluded: "On those facts, any reasonable fact finder must conclude that the respondent possessed, not necessarily a certainty, but at least a reasonable, good-faith doubt, that the union did not have majority support."²²

Justice Marshall and Justice Scalia disagreed largely because they disagreed as to the kinds of issues under review. Justice Marshall found the crucial issues to be ones of policy and reviewed them according to the judicial role with respect to policymaking. He also held that the Board "acted within its discretion" and its decision was "consistent with the Act."²³ Justice Scalia believed the crucial issues to be ones of fact and proceeded to review the Board's determination according to the judicial role with respect to fact-finding.²⁴ In his separate dissent, Justice Blackmun raised questions about the adequacy of the procedures.²⁵ In play then were all the major issue categories: policy, fact, law, procedure, and discretion. From this base, we can explore how these judges, and others, defined their role according to types of issues and the advantages of doing so.

II. REVIEW OF POLICY

Justice Marshall and the Court reviewed the Board's judgment "as a matter of policy."²⁶ Judge Williams also found himself guided by his finding that policymaking was at issue:

The simple phrase "substantial evidence," however, does not completely describe the standard of review in this particular case where we consider not only the Board's factual conclusions but also its evolving policy. . . .

17. *Id.* at 1554 (Rehnquist, C.J., concurring).

18. *Id.* at 1555 (Blackmun, J., dissenting).

19. *Id.* at 1557 (Scalia, J., dissenting).

20. *Id.* at 1560 (Scalia, J., dissenting).

21. 2 KOCH, *supra* note 2, at § 9.4.

22. 110 S. Ct. at 1560 (Scalia, J., dissenting).

23. *Id.* at 1553-54.

24. *Id.* at 1557 (Scalia, J., dissenting).

25. *Id.* at 1556 (Blackmun, J., dissenting).

26. *See id.* at 1546.

A great degree of deference is owed to the Board's policy choices. . . .²⁷

As recognized by Judge Williams and the majority of the Supreme Court, there are well-established administrative law principles that define review of administrative policymaking. His protest to the contrary, Justice Scalia was compelled himself to recognize and treat separately the policymaking elements in the Board's decisions. What should the review strategy be if the validity of the decision does depend on policy issues?

Although modern government is expected to provide a variety of services, the fundamental purpose of government is to further general societal goals.²⁸ Government decisions aimed at advancing or protecting *collective* goals of the community is policymaking.²⁹ The agency exercises its policymaking authority when it, rather than some other authority, properly makes these collective decisions.³⁰ Of course such decisions may be based on fact-finding³¹ but they are not factual.³² As has often been observed, in our complicated society the legislative branch cannot perform all or perhaps even a major part of this function.³³ Thus, agencies often receive major policymaking functions.³⁴

Generally agencies dominate the resolution of policy issues. Theoretically, the political authority retains control; the courts traditionally acquire

27. *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362, 368 (5th Cir. 1988) (Williams, J., dissenting).

28. "The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." J. LANDIS, *supra* note 6, at 39.

29. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-59 (1975) reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81 (1977). Policy decisions are based on aggregate values; they do not focus on individual goals or on the resolution of individual situations. Obviously, the two are somewhat interrelated but it is possible to separate those decisions that reflect general or societal goals from other types of decisions. See generally *id.* at 1067-70 (types of rights).

30. Thus distinguishing such decisions from decisions about law. See *infra* notes 139-40 and accompanying text.

31. See *infra* notes 94-95 and accompanying text for a discussion of review of general facts.

32. ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE, FINAL REP. 117 (1941) [hereinafter FINAL REP.].

33. See generally Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). But see Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

34. G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 29-30 (2d ed. 1980) ("[o]ne of the original justifications for agencies [is] the development of policy."); Tomain, *Institutionalized Conflicts Between Law and Policy*, 22 Hous. L. REV. 661, 663 (1985). See also R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 364 (1985) ("It is often impossible for an agency or a reviewing court to discern from the language of a statute or its legislative history how Congress intended an agency to resolve policy issues inherent in scientific uncertainty."); Levin, *supra* note 2, at 22 ("But the agency is expected to use its own creativity in determining what weight to attach to these various factors under the circumstances of the particular regulatory program. In doing so, the agency is not interpreting the legislative will but, instead, responding to a legislative invitation to make law. This aspect of the administrative decision, therefore, does not support independent review by the court.") (emphasis in original).

only a limited role. Thus, policymaking is in reality left to the bureaucracy. As Justice Marshall observed: "This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."³⁵ The same could be said of nearly every agency acting within its own substantive area. For this reason, as Judge Williams concluded: "A great degree of deference is owed to the Board's policy choices. . . ."³⁶ Several reasons exist to continue this special restraint in the issue-driven strategy.

Policymaking implicates all the aspects of expertise. Administrative agencies, as all of the opinions in *Curtin Matheson* recognize, have a special claim on expertise. Foremost, tasks are assigned to the administrative process rather than the courts because agencies embody special expertise. Thus an agency's policymaking expertise constitutes a conscious allocation of functions cautioning the courts against undue interference.

In addition to systemic justification for restraint are operational justifications. Generally expertise includes superior capacity for compiling the information in support of policymaking. Experts identify necessary information and understand how to synthesize the information. Even if judges have the capacity to accumulate and evaluate specialized information, they cannot make expert use of that information in the same way as an expert administrative official.³⁷ When the legislature has made the choice to rely on expert judgments, the generalist courts should meticulously avoid circumventing the legislative choice.³⁸ Thus when policymaking is assigned to the administrative process, courts must assure that this assignment has meaning.³⁹

Another reason for choosing the administrative process is the availability of superior and diverse procedures. Judicial procedures are designed to resolve individual controversies and hence judges confront policy choices only in narrow and biased contexts. On the other hand, administrative procedures can be designed to compile the information and views necessary for uniform decisions.

The judicial process has nothing equivalent to the administrative rule-making processes. Using traditional rulemaking procedures, an agency must give public notice of its regulatory plans and offer some opportunity to comment, often orally as well as in writing.⁴⁰ Rulemaking allows administrative policymakers to seek out information and comments in a way that judges cannot. Also, rulemaking engages both technical experts and political decisionmakers directly in the decision. Although a trial may permit

35. NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 (1990).

36. Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 368 (5th Cir. 1988) (Williams, J., dissenting).

37. See generally McGarity, *supra* note 2 (science policy questions).

38. See Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 499.

39. Fallon, *supra* note 2, at 935-36.

40. 1 KOCH, *supra* note 2, at ch. 4.

testimony from experts and even political actors, a judge cannot involve such people in the actual decisionmaking. At the appellate level, where most policy questions might be resolved, the competence of the judicial process is more questionable. Indeed, much of Justice Scalia's concern relates to administrative law's grudging acceptance of the NLRB's failure to use rule-making, that is, the process specifically designed for sweeping fact-finding and broad participation, when making policy.

True, the NLRB in the case reviewed in *Curtin Matheson* made policy through trial-like or "formal" adjudication and thus chose a process with many of the policymaking defects of a trial.⁴¹ Administrative adjudication, however, has the flexibility to be a policymaking vehicle superior to a judicial proceeding. Even in adjudication, an agency can and often does provide for broader intervention than judges in a judicial proceeding.⁴² An agency may seek out a broad range of comments in adjudication when it finds the need to engage in policymaking in such proceedings. Indeed, the NLRB has used this method quite successfully.⁴³ Judges find it much more difficult to obtain expert assistance. They hear only conflicting testimony from experts chosen by the parties; they may not use experts to help them with the decision making.⁴⁴ In reality the judicial process is designed to prevent open communication between judges and experts. The attributes of a generalist merge with ignorance to substantially impede informed policymaking. Agency adjudicators, often themselves quite expert, can compel the appearance of experts to help and have experts available to assist in the decisionmaking itself.

New policy affects those engaging in the practice at the time the policy becomes effective. Not only is the judicial process incapable of seeking broad participation, denying participation to those affected, but it makes policy in the case at hand. Thus the parties are affected by policy decisions nonexistent at the time they engaged in the practice. The Supreme Court has objected to the retroactive application of administrative rules⁴⁵ but it regularly engages in retroactive policymaking. Indeed, it can act no other way. Agencies, however, can make prospective policy,⁴⁶ and hence, administrative policymaking is likely to be more fair than judicial policymaking. When agencies act prospectively, the courts should be very reluctant to substitute

41. As Justice Scalia observed, NLRB adjudications are "even more judicialized than ordinary formal adjudication. . . ." *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1558 (1990) (Scalia, J., dissenting).

42. See Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 COLUM. L. REV. 800 (1975).

43. For example, the administrative case at issue in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), was the famous *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), where the NLRB used adjudication to make a "rule" but, in the course of doing so, it did solicit participation from nonparties who would be affected. 394 U.S. at 763.

44. *But see* Fed. R. Evid. 706.

45. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

46. 1 KOCH, *supra* note 2, at § 6.58 (agency can act prospectively in adjudication as well as rulemaking). [*But* the judiciary may make prospective decisions also, *see id.*]

their reactive policymaking. Justice Scalia's concluding objection is to the Board's making policy in the guise of fact-finding.⁴⁷ At least the Board had a choice; judges must make policy in the guise of deciding a specific case.

Perhaps the major factor counseling judicial restraint in reviewing policymaking is uncertainty. A policy choice is made necessarily under conditions of uncertainty, sometimes extreme uncertainty. Policymaking is by nature prospective and incorporates some judgments about the future, about the impact on human behavior, and other intangible factors. Because of this uncertainty, we tend to evaluate the "wisdom" of a particular policy rather than its support. Not only did the legislature ordain that the agency's judgment respecting these uncertain conditions should be dominant, but the agency was structured to make such choices. If various aspects of expertise are merged with political consideration, then the agency structure will reflect this mixture in a way that courts will not.

The danger of this uncertainty is that courts can justify extreme interference. The agency has difficulty proving the correctness of its policy choices and hence such choices are always open to criticism.⁴⁸ A court that wishes to arrogate power can use this opening to do so. Thus it is essential that courts allow agencies policymaking freedom and not require more support and justification than is possible under the particular conditions of uncertainty.⁴⁹ When an agency undertakes policymaking assigned to it, the courts should avoid becoming too deeply involved because of its inherent disadvantages in expertise, process, and considering uncertainty.⁵⁰ A court must discontinue its evaluation of policy choices at the point at which it concludes that the agency has undertaken careful and complete decisionmaking.⁵¹

47. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1566 (1990) (Scalia, J., dissenting).

48. Breyer observed:

Given the uncertainties and complexities . . . , it may appear perfectly reasonable to an engineer to rest a decision . . . on an inspired guess. That same decision might appear irrational to a judge to whom the parties have explained how much time, effort, and money that inspired guess will cost them. Judges may not fully appreciate the agency's need to make decisions under conditions of uncertainty.

S. BREYER, *REGULATION AND ITS REFORM* 117 (1982).

49. McGarity, *supra* note 2, at 809 ("Because an agency need not act with the same degree of certainty that characterizes pure scientific investigation, courts engaged in substantive review of agency decisions on science policy questions should never demand such certainty.").

50. Breyer expressed "nagging doubts" that the courts improve policymaking. Breyer, *supra* note 2, at 395; *see also* Fallon, *supra* note 2, at 920.

51. Nonetheless, this can be a rather hefty review as noted by Diver:

Reviewing courts have insisted that agencies probe the implications of their policy choices. Not only must administrators attend to consequences suggested by public comment; courts will also frequently require them to seek out and analyze other possible consequences of their actions. Although most courts do not demand explicit quantification unless the statute so requires, several have nonetheless called for a qualitative comparison of good and bad consequences. Even if the courts have not universally endorsed specific analytic techniques, they have typically demanded a thorough and expansive approach. . . .

Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 417-18 (1981)

III. THE RELEVANCE OF THE PROCESS

In *Curtin Matheson*,⁵² neither Justice Marshall nor Justice Scalia was sufficiently careful in dealing with the implications of NLRB's method of proceeding. The controversial administrative decision was not so much the case at hand but the policy made by the Board in a prior adjudication, *Station KKHI*.⁵³ Justice Marshall referred to this as a "rule" for which the very limited arbitrariness review standard should be applied.⁵⁴ Justice Scalia noted that the Board made this policy through formal adjudication for which the more severe substantial evidence or reasonableness standard is appropriate.⁵⁵ To what extent should the method used to make policy affect the kind and level of review?

To understand this conflict, it is necessary to confront another review strategy: the word formula system. This system relies on certain phrases to communicate the desired level of review. Although several phrases have been used over the years, three have become established for those agency decisions which are reviewable. The three word formulas are "de novo," "substantial evidence," and "arbitrary or capricious."⁵⁶ Although these phrases lack concrete definition, they have meaning in terms of relative severity of judicial scrutiny.⁵⁷ I have attempted to define them in terms of tolerance for risk of error.⁵⁸ Except in the most rigorous system, even correctness must be viewed in terms of acceptable risk of error.⁵⁹ Thus, a court applying the most demanding word formula, usually called de novo (what I call agreement review), asks whether in its judgment the agency's solution has the least risk of error as among all competing solutions.⁶⁰ From this word formula, the other two standards each express a descending scrutiny for error. In this system, a court operating under the de novo standard is to tolerate less risk of error than one operating under the substantial

(footnotes omitted).

Although Judge Leventhal's hard look doctrine might be applied to a variety of issues, it seems well suited to policymaking. See Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181; see also Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 53-54 (1984).

52. 110 S. Ct. 1542 (1990).

53. 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989).

54. 110 S. Ct. at 1549.

55. *Id.* at 1558 (Scalia, J., dissenting).

56. 2 KOCH and 2 KOCH SUPP., *supra* note 2, at § 9.6.

57. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. . . . But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951).

58. 2 KOCH, *supra* note 2, at §§ 9.3-9.7.

59. *E.g.*, I. PETERSON, *THE MATHEMATICAL TOURIST*, 31, 107 (1988).

60. The de novo formula means that the court should uphold the agency only if it agrees with the agency decision. The court may give "deference" to the agency but ultimately it must be convinced the agency is right.

evidence standard and one operating under that standard less than one operating under the arbitrary standard.⁶¹

Schotland provides a less concrete but perhaps more realistic approach. He observed that the word formulas describe "*mood-points*."⁶² That is, various standards tell the court the critical attitude with which it should approach a particular administrative decision.

Most of the controversies in the application of the word formula system involve a conflict between the substantial evidence standard and the arbitrariness standard.⁶³ Under the tolerance concept, the arbitrariness standard requires a greater tolerance for risk of error than the substantial evidence standard.⁶⁴ In terms of Schotland's mood-points, the substantial evidence and arbitrariness standards require emotionally opposite judicial conclusions. The substantial evidence standard requires the court to reach the *positive* conclusion that the agency's decision is reasonable. The arbitrariness standard requires the court to reach the *negative* conclusion that the agency's decision is not arbitrary. By upholding the agency under the former, the court expresses some sense of approval, whereas in upholding the agency under the latter, the court expresses no more than that it was not offended by the administrative decision. Under this concept of the word formula system, the context in which the decision is made does not affect the level of review.

The reviewing court must determine which standard applies and then obey the mandates of that standard.⁶⁵ Although the word formula system works in the simple review cases, it often fails in the complex review situations.⁶⁶ The system evolved during a simpler era when the vast majority of administrative decisions involved economic regulation and resulted from a few well-established procedural models.⁶⁷ It has not matched the evolu-

61. Operationally, there is a crucial break between de novo or what I call agreement review, testing for correctness, and the other two standards. 2 KOCH, *supra* note 2, at 90. For example, the substantial evidence word formula requires a test for reasonableness. Although this standard appears a term of art, in ordinary speech, we regularly rely on the difference between examination for correctness and that for reasonableness. *E.g.*, BEYOND NUMERACY: RUMINATIONS OF A NUMBERS MAN 54 (1991) (As a math teacher, "I usually give full credit for wrong answers if only the 'math' is wrong but the concept is correct, and partial credit if the approach is a reasonable one.").

62. Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference*, 34 FED. B.J. 54, 59 (1975).

63. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

64. See *infra* notes 188–89 and accompanying text discussing the "abuse of discretion" word formula. In terms of the degree of judicial scrutiny, the abuse of discretion word formula conveys the same level of judicial review as the arbitrariness standard.

65. *E.g.*, *Aircraft Owners & Pilots Ass'n v. FAA*, 600 F.2d 965, 969–70 (D.C. Cir. 1979).

66. Levin, *supra* note 2, at 9–13. A valiant effort to reform the word formula system was undertaken by the ABA's Administrative Law Section. See Levin, *supra* note 63.

67. Decisions that were challenged in court generally were the result of formal adjudication. The substantial evidence test served the purpose of telling the courts to do less review than that of a lower court under the "clearly erroneous" test. It also admonished the courts not to substitute judgment by conducting de novo review. The distinction between substan-

tion of the administrative process and the diversification of the administrative state.

The word formula system lacks flexibility. The system leads a court to evaluate an entire administrative decision, no matter how complex, under a single review standard. Substantial evidence is applied to the entire decision resulting from formal, trial-like processes and arbitrariness is applied to decisions resulting from any informal process. Indeed, when informal agency action, both rulemaking and adjudication, became more prevalent, many commentators contended that the standards had meaning only in terms of the nature of the administrative procedure and the record it produced.⁶⁸ Commentators found that substantial evidence review and arbitrariness review were indistinguishable when applied to an informal record. Future Justice Scalia advocated this approach.⁶⁹

tial evidence and arbitrariness worked because it expressed the distinction between review of facts found through formal adjudication and review of facts and policymaking undertaken through rulemaking. See FINAL REP., *supra* note 32, at 117–20.

68. Judge Friendly's opinion might have been the first judicial adoption of this approach:

The respondents ask us to apply a standard of review less severe than the substantial evidence test. They point to what they consider an anomaly in subjecting notice and comment rulemaking, which has here produced a regulation essentially legislative in nature, to the substantial evidence test, which under the APA, 5 U.S.C. § 706(2)(E), applies only to determinations resulting from adjudication, 5 U.S.C. § 554, and rules "required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 553(c). . . .

. . . .

While we have felt constrained to determine and sustain the applicability of the substantial evidence test, it may well be that the controversy is semantic in some degree, at least in the context of informal rulemaking, and that it lacks the dispositional importance that respondents imply. . . .

In *WBE, Inc. v. United States*, while we applied to F.C.C. rulemaking the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A), it is hard to see in what respect we would have treated the question differently if we had been applying a "substantial evidence" test.

. . . .

Associated Indus. v. Department of Labor, 487 F.2d 342, 347–49 (2d Cir. 1973) (citation omitted).

69. *Association of Data Processing Serv. Org. v. Board of Governors*, 745 F.2d 677, 684–86 (D.C. Cir. 1984). Justice Scalia adopted this view well before he took his place on the bench:

A consumer product safety rule promulgated by the Commission under Section 9 is judicially reviewable in a court of appeals under Section 11. The rule cannot be affirmed "unless the Commission's findings under subsection 9(c) are supported by substantial evidence on the record taken as a whole." For the purposes of this provision, "record" is defined in a fashion which is to our knowledge unique in legislative draftsmanship, and perhaps in human contemplation:

"For purposes of this section, the term 'record' means such consumer product safety rule; any notice or proposal published pursuant to section 7, 8, or 9; the transcript required by section 9(a)(2) of any oral presentation; any written submission of interested parties; and any other information which the Commission considers relevant to such rule."

The obvious purpose and effect of the last clause is to make "record" include that which in lawyerly and even common parlance would more precisely be described by the term "non-record." This verbal absurdity is more than accidental; it reveals a basic problem that has developed in the judicial review of informal rulemaking.

The two most frequently applied statutory bases for setting aside agency action, findings, and conclusions are (1) the determination that they are "arbitrary, capricious, an abuse of

As evidenced by *Curtin Matheson*, this approach robs the review system of both flexibility and precision. For example, Justice Scalia felt compelled to apply the heightened judicial scrutiny of the substantial evidence test to agency policymaking because the policymaking occurred in a formal adjudication. Following his view of the traditional word formula system, he would have applied the less demanding arbitrariness standard to policymaking through rulemaking.⁷⁰

Under this review strategy, the judicial role is tightly structured: formal record means the entire decision must be tested for reasonableness; informal record means the entire decision must be tested for arbitrariness. This strategy lacks technique for more flexible and precise delineation of the judicial role. How would Congress, for example, prescribe heightened scrutiny for selected rulemaking if courts felt free to ignore the statutory standard of review because of the nature of the record? How could judges themselves evolve more sophisticated review strategies?

Either Congress or the courts, for example, might determine that certain policy determinations should be reviewed in the same matter whether the agency makes the determination in adjudication or rulemaking.⁷¹

The process-oriented word formula system may also be too superficial in defining the review of different types of rules. One of the most venerable principles of administrative law is that legislative rules, those made pursuant to statutory authority, have the force of law and are binding on the courts unless arbitrary but nonlegislative rules, interpretative rules, and general

discretion, or otherwise not in accordance with law"; and (2) the determination that they are "unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute." While the former is applicable to review of all agency action, the latter is an additional rigor imposed upon on-the-record adjudication and rulemaking—that is, in those instances the action must not only be shown to be not arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law, but also must be shown to be a reasonable action on the basis of the evidence adduced in the required proceedings and without reference to extrinsic evidence that the parties had no opportunity to refute. This scheme is entirely rational, and is indeed essential to the distinctive character and purpose of an on-the-record proceeding.

What appears to have happened, however, is that the "substantial evidence" test has acquired a vague reputation as the more demanding of the two without appreciation of the fact that it is only rationally applicable to an "on-the-record" proceeding. As a result, it has in recent legislation apparently been included when Congress has desired particularly "tight" review, without reference to whether the reviewed proceeding was "on the record." This mistakes the nature of the standard. The essential constraint of the "substantial evidence" test is not that it requires a higher degree of support for an agency determination (the arbitrary and capricious standard itself would probably be violated by a determination made on the basis of insubstantial evidence) but rather, that it requires this support to be contained within the confines of the public record made pursuant to the provisions of sections 556 and 557 of the Administrative Procedure Act. If there are no such confines, there can be no such constraint. . . .

Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 933–35 (1973) (footnotes omitted).

70. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40–41 (1983).

71. See generally Diver, *supra* note 51.

statements of policy are not binding because they are not the direct result of the delegated authority to make rules.⁷² The distinction is justified by the absence of express authority and public procedures in the promulgation of nonlegislative rules. As to certain types of issues, however, the vast difference in the review of these types of rules may be too great. Certain types of policy choices, for example, may justify limited review even if announced in a nonlegislative rule.

The nature of each issue resolved by the decision and not the nature of the process should define the judicial role. If the review system is to rationally allocate decisionmaking functions, it must do so according to all the factors affecting the relative decisionmaking advantages of the courts and the bureaucracy and not just the nature of the administrative decisionmaking process. While process advantages must be part of the computation, those advantages alone should not be controlling. The system should not compel a judge to review, say, a particular type of policy choice lightly if it happens to be made in informal rulemaking, more severely if made in formal adjudication and still more severely if made in another type of rulemaking.⁷³ The search for the appropriate level of review must reach beyond the decisionmaking process.

The word formula strategy is too simplistic to adequately express the complex relationships between the courts and the bureaucracy. Thus, Justice Marshall's intuition to ignore the admonishment to focus on the formality of the administrative procedures is important. By defining review according to the type of issue in question, he incorporated the advantages of an issue-sensitive form of review.

IV. REVIEW OF FACT-FINDING

Justice Scalia's view that the controverted issues were factual, not so much his weak effort to apply the process-driven word formula system, formed the center of the controversy in *Curtin Matheson*. The contrast between his efforts to review fact-finding in contrast to Justice Marshall's efforts to review policy demonstrates the versatility of the issue-driven strategy.

Traditionally, fact-finding demands its own review strategy.⁷⁴ As with policymaking, questions of fact are and should be dominated by the agency

72. 1 KOCH, *supra* note 2, at § 3.52.

73. See generally McGarity, *supra* note 2.

74. The plurality Supreme Court opinion in *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101, 2111-12 (1986), demonstrates that when necessary the courts rely on this difference. In *Bowen*, the court conceded to the agency substantial authority in "governing" but raised the level of review of the factual conclusions that support the exercise of that power. "Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both." *Id.* at 2112.

decisionmakers.⁷⁵ Nonetheless, as evidenced by the conflicting opinions in *Curtin Matheson*, the review strategies as to these two categories of agency dominated issues will differ in kind and degree.

The act of fact-finding differs fundamentally from determinations of policy. Jaffe provided a useful working definition: "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect."⁷⁶ Thus, for our purposes, a "fact" is something done or having existence or information with objective reality.⁷⁷ Fact-finding, while different from policymaking, is no less important. Justice Scalia concluded his dissent with "Chief Justice Hughes' description of the unscrupulous administrator's prayer: 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'"⁷⁸

Justice Scalia's review strategy focused on the factual nature of the Board's decision. Nonetheless, he too recognized that the agency's authority, and hence the limits on judicial authority, over fact-finding is quite different from its authority over policymaking. Here he found that the NLRB's conclusions were "bad fact-finding, and must be reversed under the 'substantial evidence' test."⁷⁹ Here also he recognized that the limitations on review of the two differ in kind as well as degree.⁸⁰ Justice Scalia contended that the NLRB circumvented scrutiny of its policymaking by appearing to apply factual presumptions just as the majority had conducted inappropriate review by reviewing those presumptions as policy.⁸¹ In the

75. Intermittently, the idea appears that certain types of facts, sometimes known as "jurisdictional facts" or "constitutional facts," should be dominated by the courts, *i.e.*, administrative findings of such facts should be subject to de novo review. 2 KOCH, *supra* note 2, at 125-28. Support for the concept of constitutional facts can be found in Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).

76. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965) (emphasis omitted); accord B. SCHWARTZ, ADMINISTRATIVE LAW 650 (2d ed. 1984) ("Analytically, a question of fact is only a question of whether something has happened independent of any assertion as to its legal effect.").

77. One trial judge found E.B. White's definition of "fact" meaningful: "'Use this word only of matters capable of verification, not matters of judgment.'" L. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 267 (1987).

78. NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1566 (1990) (Scalia, J., dissenting).

79. *Id.* at 1564 (Scalia, J., dissenting).

80. While the word formula system works better in defining review of fact-finding, *Curtin Matheson* demonstrates its weakness as a complete review strategy.

81. This comment is based on a valuable observation about the relationship among presumptions, inferences, fact-finding and policymaking. Scalia observed that presumptions operate quite differently from inferences and that the majority's mistake resulted from the failure to recognize this difference. The agency may create presumptions "*in the teeth of the facts*, as means of implementing authorized law or policy in the course of adjudication." 110 S. Ct. at 1564 (Scalia, J., dissenting) (emphasis in original). Inferences (or presumptions of fact) are not created by the agency but control the agency "representing the dictates of reason and logic that must be applied in making adjudicatory factual determinations." *Id.* Scalia concluded:

[T]he Board may choose to implement authorized law or policy in adjudication by *forbidding* a rational inference, just as it may do so by *requiring* a nonrational one (which is what a presumption of law is). . . . But that is not what the agency did here. It relied on the

end Justice Scalia commented: "[The NLRB] is not entitled to disguise policymaking as fact-finding, and thereby to escape the *legal and political* limitations to which policymaking is subject."⁸² That statement seems to admit that his review of policymaking would have been different even in the context of adjudication.

The bundle of issues resulting in a given administrative decision may contain different types of factual issues. For generations, administrative law has used the distinction between specific facts ("adjudicative" facts) or general facts ("legislative" facts),⁸³ and that distinction should guide review. Review strategy that distinguishes facts is superior to one that reviews facts differently depending on the procedures used to develop them. Although some courts, including the majority in *Curtin Matheson*, instinctively vary their review for certain types of facts, the practice needs to become a formal aspect of our general review strategy.

Specific facts are by nature central to determinations of individual rights and duties, and hence they have a unique importance to a system that prizes individualization.⁸⁴ They also differ from general facts in that specific facts can be "proven" in the traditional ways and do not raise the same kinds of evaluation problems as do general facts. For these reasons, courts might review these facts very closely.

reasoning of [a prior case], which rested upon the conclusion that, *as a matter of logic and reasoning*, "the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative." That is simply false. It is bad factfinding, and must be reversed under the "substantial evidence" test.

Id. (emphasis in original) (citation omitted).

The agency could make policy that ignored or repudiated relevant facts but it cannot purport to find facts that a court cannot accept as reasonable. Justice Scalia's problem with the Board's conduct was not that it may not adopt "counterfactual policy determination" but that it may not do so "as ordinary factfinding." *Id.* at 1565 (Scalia, J., dissenting). When the agency is making policy, it must say so and do so through policymaking processes. Here he found that the Board undertook fact-finding and did not do so adequately.

82. *Id.* at 1566 (Scalia, J., dissenting) (emphasis added).

83. Although for the purposes of this analysis the terms "specific" and "general" facts seem sufficient, the terms "adjudicative" and "legislative" facts may have a richer meaning:

The key difference between adjudicative and legislative facts is not the characteristics of particular versus general facts, but rather, evidence whose proof has a more established place and more predictable effect within a framework of established legal rules as distinct from evidence that is more manifestly designed to create the rules. The line between adjudicative and legislative facts is indistinct, however, because decision makers use even the most particularized facts to make legal rules.

Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988); see also 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 15.03 (1958); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942). The idea has been applied outside administrative law, particularly in evidence. *E.g.*, Advisory Committee's Notes, FED. R. EVID. 201.

In the context of a review strategy, the distinction between general and specific seems sufficient.

84. "When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts." 2 K. DAVIS, *supra* note 83, at 353.

The present word formula system decides the degree of judicial scrutiny of specific facts based on the formality of the procedures. If the fact is found through formal adjudication then review is substantial evidence (reasonableness); if the fact is found through informal processes then review is arbitrariness.⁸⁵ In terms of the comparative basis that gives these word formulas meaning, the court is instructed to give less scrutiny to specific facts found on an informal record and more scrutiny to those found on a formal record. In short, the present system requires less review for cases involving less procedure.⁸⁶ Again, the level of review should depend on the comparative advantages of courts and agencies over the types of issues rather than the nature of the process.⁸⁷

Review of specific facts involves the tension between the importance of individual rights and the needs of society. Resolution of such factual issues seem to score high on all three of the *Mathews v. Eldridge* factors.⁸⁸ Specific facts are extremely important to the individual and additional consideration may substantially contribute to accuracy, but the facts are so numerous that cost-effective resolution is important to the operation of many government programs. How should these tensions be played out in designing a review system? Since judicial review is undeniably costly, the answer must depend on the judicial capacity to improve the ultimate decision. Several factors weigh on this decision.

Process advantages argue for administrative dominance over questions of specific fact. The administrative process can be designed to take advantage of the most cost-effective approach to specific facts. Also, the nature of specific fact-finding necessarily limits review; specific facts often involve decisions as to testamentary competence and reliability. Usually such issues are controlled by the on-site decisionmaker and effective review would create redundancies. For these reasons, the decision might be left to the administrative level fact finder.

Other factors, however, countervail arguments for limited review of specific facts. Since the final decision in the administrative process itself is usually made by an appellate administrative authority that has not actually heard the evidence, the appellate judicial authority might have equal

85. Rulemaking rarely, if ever, depends on finding of specific facts.

86. While it seems irrational to define the review function for specific facts inversely to the formality of the process, it may make some sense from a decisionmaking resource allocation point-of-view. The argument for this result is that extensive judicial review of facts found on an informal record would rejudicialize decisionmaking that had been assigned intentionally to nonjudicialized decisionmaking. *United States v. Erika, Inc.*, 456 U.S. 201, 209–10 (1982). Control of the potential costs of comprehensive judicial review of findings of specific facts might be more effectively incorporated into the review system through less structured and more sensitive law.

87. Levin, *supra* note 63, at 272 (“[T]here is no logical reason for courts to give a particular fact finding less critical scrutiny when it underlies a regulation than they would have given it if it had underlain an adjudicative order.”).

88. 424 U.S. 319, 335 (1976).

competence.⁸⁹ Also, limited judicial scrutiny of specific facts rarely can be justified by a strong claim of administrative expertise.⁹⁰ Findings of specific facts rarely depend on technical expertise and the most an agency can claim is substantial experience dealing with certain specific facts. Moreover, judges are accustomed to reviewing specific facts because they do so in reviewing inferior courts. Judges then have the capacity to make a nearly equal contribution to the resolution of specific factual questions.

Nonetheless, administrative tribunals make millions of findings of specific fact every day. In economics jargon, the degree of agency dominance over specific facts should be measured by the bureaucracy's "comparative advantage."⁹¹ If courts were to review these findings with any depth, they would be paralyzed and unable to perform more important functions. The key is how much responsibility over specific facts can we afford to assign to the courts. Here the opportunity costs are immense. It seems likely that judicial review of agency determinations of specific fact will not increase accuracy equal to the increase in decisionmaking costs.⁹² If we mire the courts in the mass of specific factual decisions, even controversial ones, made by the bureaucracy, we will prevent the courts from performing much more important functions to which they can make a greater contribution.⁹³

Thus, the courts may have the capacity to review findings of specific fact very closely but should not. The reasonable trade-offs offered by *Mathews* would suggest that the cost of extensive review to society usually would be far greater than the benefits to the individual. This argues for the courts generally accepting the agency's finding and for review law that instructs

89. In fact, current review doctrine incorporates this idea by increasing the judicial scrutiny of certain types of agency decisions when the administrative appellate authority disagrees with the presiding official. 1 KOCH SUPP., *supra* note 2, at § 6.54A.

90. For example, Social Security Administration disability cases use medical and vocational expert evidence, as in a judicial proceeding, but the decisions are made by lawyers (administrative law judges) after the initial stage. F. BLOCH, *FEDERAL DISABILITY LAW AND PRACTICE* § 4.20 (1984).

91. "Comparative advantage" is an economics term that seems to soften the controversy here. In economics, it is a way of conceptualizing the efficient allocation of functions among various productive units. If Y is better than X at everything, it is still better that X perform some functions, the functions for which Y's effort is of less value. As to these functions, X has a comparative advantage even if not an absolute advantage. Here it allows us to avoid an argument over the relative competence of the two institutions and still argue for allocating dominance between them. Comparative advantage might suggest that, for example, even though the courts are *always* better decisionmakers, we optimize decisionmaking resources if we assign some decision-making tasks to the bureaucracy. A general description of comparative advantage can be found in most basic economics texts. See, e.g., A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION: COMPETITION, COORDINATION, & CONTROL* 141-43 (3d ed. 1983).

92. J. MASHAW, C. GOETT, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS* (A Study for the National Center for Administrative Justice), 146-47 (1978) ("The contribution of court-review to accuracy through its corrective function is modest at best.").

93. Indeed the burden on the courts may be affecting their ability to contribute. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100-08 (1987).

courts to tolerate a reasonably high risk of error. Courts should intervene only at the extreme.

Nonetheless, there may be circumstances that support exceptions to this general principle. The system, and a reviewing court, should base its acceptance of administrative decisions in a specific program on some judgment as to the value of the judicial contribution. The depth of the judicial scrutiny should depend on a judgment as to the general risk of error created by acceptance of the agency dominance in the particular decisionmaking context. The review system then should develop a consistent judicial strategy as to these special circumstances. An issue-driven strategy would allow the trade-offs to be faced up front and not hidden by formalism.

Many administrative decisions depend on conclusions of general or legislative facts.⁹⁴ The questions raised in developing a review strategy for these facts are quite different from those raised by review of specific facts. Courts do tend to conduct more limited review of general facts.⁹⁵

In support of the Board's policy conclusions in *Curtin Matheson*, Justice Marshall agreed with its approach "as an empirical matter."⁹⁶ He kept review of this empirical support, that is, the Board's findings of general facts, very limited. Justice Marshall concluded that factual conclusions contrary to the Board's were not inevitable.⁹⁷ Similarly, Chief Justice Rehnquist, in his concurring opinion, found that the Board's conclusions "press to the limit the deference to which the Board is entitled in assessing industrial reality."⁹⁸ Justice Blackmun in dissent also accepted the Board's power over the general facts at issue. He suggested that he would strike down only "an implausible assessment of industrial reality."⁹⁹ On the factual issues, he was concerned that there appeared to be a *total* "lack of empirical support."¹⁰⁰ Even Justice Scalia, who attempted to apply the substantial evidence test to the facts, seemed to adopt subconsciously a very restrained level of review. He concluded that "it seems to me *impossible* to conclude on this record" that the Board's fact-finding is reasonable.¹⁰¹

Judicial restraint in the face of findings of general fact results from several factors. The agencies generally have or develop expertise as to all general facts that are relevant to their functions. Often this expertise is more expe-

94. "When a court or an agency develops law or policy, it is acting legislatively . . . the facts which inform the tribunal's legislative judgment are called legislative facts." 2 K. DAVIS, *supra* note 83, at 353.

95. *E.g.*, *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1103-04 (D.C. Cir. 1978) (even where substantial evidence review is authorized, courts should limit their review of general facts); *Environmental Defense Fund v. EPA*, 598 F.2d 62, 83-85 (D.C. Cir. 1978) (reviewing courts should give less scrutiny to agency inference from available data and existing knowledge).

96. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1550 (1990).

97. *Id.* at 1552-53.

98. *Id.* at 1554 (Rehnquist, C.J., concurring).

99. *Id.* at 1556 (Blackmun, J., dissenting).

100. *Id.*

101. *Id.* at 1557 (Scalia, J., dissenting) (emphasis added).

rience than actual knowledge. But the agency nonetheless has had broader experience with a wide range of general facts and is often capable of making a more sophisticated decision as to general facts.

The dominance of the agency may also depend on its efficacy for evaluating the correctness of findings of general facts. Finding general facts usually incorporates a point of view. A well-schooled point of view is superior and hence the agency has an advantage. It is simply not easy to say that a conclusion of general fact has been demonstrated and that correctness depends on who decides the question. Judges often seize on the most obvious answer, but a sophisticated decisionmaker sees the full complexity of the question. If the court abuses its position, it adds inaccuracy. A reviewing court then must be tolerant of the administrative conclusion if the program is to have the sophistication envisioned by the delegation to the agency in the first place.

The agencies also have a process advantage. Rulemaking allows the agency to develop records specifically designed for finding such facts.¹⁰² Rulemaking also allows experts actually to participate in the decisionmaking itself. Even in adjudication the agencies have processes better designed for finding general facts and for incorporating expert judgments.

On close consideration, however, these advantages are not overpowering. The agency expertise advantages as to many general facts are important but do not suggest that the courts cannot make a substantive contribution. In many situations, the court can use the agency expertise in its own decisionmaking and hence determine how it can best contribute. Because the actual administrative decisionmaking usually is left to a generalist bureaucrat, indistinguishable in training from a judge, the expertise argument is weakened further.

Similarly, the process advantage in fact-gathering does not necessarily translate into an advantage in the fact-finding. The court can review general facts on the record developed by the agency.¹⁰³ The courts, therefore, are very much disadvantaged in directing the search for data, but less disadvantaged in drawing conclusions from the data. These considerations diminish the administrative advantage.

In addition, the breadth of the impact of many findings of general facts increases the overall value of the judicial contribution. Although adjustments in specific facts might have substantial impact on one individual, even a small improvement in a general fact-finding may affect an array of individuals. Close judicial scrutiny of general facts offers a substantial net benefit to society if that scrutiny can be expected to bring about even an

102. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) ("Typically, the issues [in rulemaking] relate not to the evidentiary facts . . . but rather to the policy-making conclusions to be drawn from the facts.").

103. Courts now review rulemaking records compiled by the agency even though they cannot themselves develop such records. The character of the record presents no great obstacle to an expanded judicial role with respect to general facts.

incremental improvement in accuracy. The decisionmaking resource argument for limited review is not as strong as in review of specific facts. Thus for many general facts the courts can have a relatively significant role perhaps almost equal to that of the agency.

This all pushes in a revolutionary direction. It may be that the law should develop in the direction of more judicial scrutiny of many decisions of general facts.¹⁰⁴ Indeed, courts often feel compelled to engage in close scrutiny of general facts.¹⁰⁵ These courts are called activist but they may not be following that judicial philosophy at all. The real problem is that the law does not permit them to do what they know needs to be done.

The nature of this review must reflect the comparative advantages of the two institutions. The agencies are superior fact gatherers and hence the courts should do little monitoring of fact-gathering. Yet review cannot allow the agencies unlimited authority in determining what facts to gather. The "hard look" approach works well here.¹⁰⁶ In evaluating the accumulation of the relevant facts, it should be enough for the courts to determine that the agency did a careful job of fact-gathering.¹⁰⁷ The heightened review will increase only the evaluation of the conclusions drawn from the data compiled.¹⁰⁸

104. The word formula system has artificially constrained this development because it has based heightened review on the formality of the record, and it has tended to require little scrutiny of general facts because they are usually made in informal rulemaking.

105. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

106. Simply, using hard look review, the courts look closely at whether the agency has taken a hard look at the question (i.e., the court is not to take a hard look itself). Hard Look retains the focus on the administrative decision while intensifying judicial scrutiny, especially where the agency action is questionable. Nonetheless judicial inquiry carefully examines the decisionmaking elements in a way that does not interfere with the administrative decision-making itself. The "hard look" doctrine was hinted at by Judge Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-51 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) and formed later in an article, Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974). Slowly it has evolved into a staple element of modern judicial review theory. See Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 419-21 (arguing that strict reasons requirement results from the recent increase in substantive review).

107. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183 ("The substantive component of the hard-look doctrine is a judicial willingness to overturn decisions that appear unjustified in light of the evidentiary record. This aspect of the doctrine has been rarely exercised.") (footnotes omitted).

108. However, some legislative facts are very judgmental and require the reviewing court to be particularly sensitive to the intended allocation of decisionmaking authority. For example, Fox contrasted the voting of two recent FTC chairmen on the decision to take action against the General Motors-Toyota joint venture:

[O]ne who believes that the forces of competition are robust would not see any costs to the American consumer. On the other hand, . . . one who is sympathetic to the view that the market is susceptible to collusion and that independent action of major market factors tend to yield more progressiveness than combinations, and one who predicts that government trade restraints will persist or recur, is likely to foresee that the social costs of the joint venture will overwhelm its possible benefits.

. . . World views about big business and its power, about consumers and their sovereignty, and about the power of business and the power of government, and which is the more to

Some general facts, however, are clearly more a function of expertise than others. Thus, at least with respect to a review strategy, we might spin out from the traditional notion of legislative facts a separate category: technical facts.¹⁰⁹ Conclusions as to these facts involve special training and expertise. It is readily recognized that many conclusions reached by the agency are the result of a technical competence that even the most arrogant nonexpert could not hope to replicate.¹¹⁰

Generalist courts should not involve themselves in these decisions.¹¹¹ The argument for protecting this group of general facts, however, has spilled over into other general facts for which the courts could, as discussed above, make a useful contribution.¹¹² Therefore, one reason for trying to separate this group from most general facts is to allow the law to develop in the direction of increased review for many other general facts.

As to technical facts, however, courts should continue to proceed with great care. A court really cannot make up for its deficiencies here; competency is not merely in testing the validity of the factual record and evaluating the agency's jump from that record to its technical conclusion. True, experts disagree but, assuming they are making expert judgments, they disagree at a level of sophistication that is beyond the nonexpert.¹¹³ Courts lack the learning to move from the facts to a defensible conclusion. Although federal judges are at least as inclined as other lawyers to believe they can learn anything in a short period, they are constrained by the absence of a long-term familiarity with an alien discipline. Indeed, there is substantial likelihood that they will decrease the validity of these decisions rather than increase them.¹¹⁴

be feared, determined the positions adopted by the [two commissioners].
Fox, *Chairman Miller, the Federal Trade Commission, Economics*, and RASHOMON, 50 LAW & CONTEMP. PROBS. 33, 54 (1987). See Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 108 (1976) (Even if society "knows" the risk of a certain action, somehow it must decide whether the action will create a net benefit.).

109. See generally W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF, R. SCHOTLAND, ADMINISTRATIVE LAW: CASES AND COMMENTS ch. VII, § 4 (8th ed. 1987).

110. E.g., *Tri-Bio Laboratories, Inc. v. United States*, 836 F.2d 135, 142 (3d Cir. 1987); *Thompson Medical Co., Inc. v. FTC*, 791 F.2d 189, 196 (D.C. Cir. 1986).

111. E.g., *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 569 (1980) ("Administrative agencies are simply better suited than courts to engage in such [an expert] process."); *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) ("[W]e recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.").

112. McGarity, *supra* note 2, at 797-808 (While review of technical facts should be limited, "trans-scientific" facts, those on which experts cannot reach a definitive answer, should be more carefully reviewed).

113. E.g., S. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY 4-5 (1985).

114. R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 34, observed:

Professor McGarity argues that scientific questions that appear to raise issues of fact actually raise issues that fall somewhere on a spectrum between issues of pure scientific fact, in the sense that the question can be answered relatively easily through application of existing scientific methodology, to issues of pure policy, in the sense that the question cannot be answered at all through use of existing scientific methodology. Most issues lie

Therefore, the courts should accept agency findings of technical fact except in those cases where the risk of error is substantially demonstrated. Though they sometimes stray, most judges understand and accept their deficiencies as to truly technical facts. If this is confined to true technical facts, the restraint is necessary to deriving the full benefit from the administrative process.¹¹⁵

The restraint need apply only as to true technical findings. Justice Frankfurter's authoritative opinion in *Chenery I*¹¹⁶ limits this restraint to those issues over which the agency has actually exercised its technical expertise. A court need not show any special respect for a technical decision by a generalist official with no special claim to technical competence. In addition, review of policy judgments derived from such findings, while also limited, are limited in a different way and degree.¹¹⁷ Indeed, the identification of technical issues might depend on whether the *decision* itself required technical competence.

V. REVIEW OF LAW IN CONTRAST TO REVIEW OF POLICY

The restraints on review of policymaking and fact-finding should not diminish the judicial authority over questions of law. This principle is well established in general legal theory as well as in administrative law. Since *Marbury v. Madison*, the courts have dominated questions of law.¹¹⁸ Administrative law has long recognized judicial dominance over questions of law as agencies have administrative dominance over questions of policy.¹¹⁹ State,

between these poles.

Id. at 364 (footnote omitted).

115. This seems preferable to educating the judges. *But see* Wald, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1982).

116. *SEC v. Chenery Corp.*, 318 U.S. 80, 92 (1943).

117. McGarity, *supra* note 2, at 809. In an article distinguishing hard scientific fact from "science policy," McGarity concludes: "[I]f a court recognizes that the resolution of science policy questions depends on striking a balance between accuracy and result-oriented policies, it can play a valuable substantive review role." *Id.*

118. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The FAPA attempts to incorporate this long-standing concept. *Massachusetts v. Secretary of Health and Human Servs.*, 816 F.2d 796, 801 (1st Cir. 1987). Subsection (A) permits the court to strike down conclusions that are "otherwise not in accordance with law" and subsection (C) prevents decisions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (1988). These phrases are clumsy and largely meaningless in application. Nonetheless the drafters' intention was clear: "This subsection provides that questions of law are for courts rather than agencies to decide in the last analysis. . . ." (S. REP. NO. 752, 79th Cong., 1st Sess. (1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 214 (1946); *accord* H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 278 (1946).

119. Richard Fallon found that there are two lines of cases on the standard of review of questions of law. One line holds that a court can only review the agency's determination of law for reasonableness and the other recognizes judicial dominance. Fallon pointed out that the second approach is still sensitive to all the values inherent in deference:

A requirement that courts determine questions of law independently is not completely

as well as federal, administrative law accepts this principle.¹²⁰

Nothing should diminish the "well-established principle of administrative law" that in reviewing the bundle of issues that comprise an administrative decision the agency's determination is dominant as to policy but not as to law.¹²¹ The best example of this long-standing principle as it applies to the

incompatible with the "deference" that existing practice accords and that the modern administrative state arguably requires. At least two kinds of deference are consistent with the proposition that the power to engage in independent review must be vested in an article III court: deference to an agency's congressionally delegated lawmaking power and deference to an agency's interpretive expertise. . . . [A]n article III court frequently should conclude that Congress committed the power to resolve a particular legal question to the agency rather than to the courts. . . .

When a court renders its ruling after an administrative agency has spoken, the agency's decision is a part of the legal landscape that the court appropriately takes into account. Even though a court must have ultimate responsibility for the correct decision of questions of law, no article III value forbids acknowledgement that, concerning questions to which administrative expertise is relevant, the agency's interpretation furnishes a presumptively reliable indicator of how the question ought to be resolved. In deferring in this way, a court does not absolve itself of responsibility for determining that issues of law are decided "correctly," not merely "reasonably." Nevertheless, its inquiry frequently addresses the reasonableness of the agency's decision. In areas of the agency's expertise, the evident reasonableness of its conclusion may provide a crucial basis for the court's decision.

Fallon, *supra* note 2, at 983-85 (footnotes omitted).

Actually, a sharp distinction between the two lines of cases seems unjustified; rather, some courts have overstated the controlling effect of administrative decisions on questions of law.

Stephen Breyer, First Circuit judge, offered these observations as to how judges actually weigh agency interpretations of law:

Inevitably, one suspects, we will find the courts actually following more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending upon the statute, the question, the context, and what "makes sense" in the particular litigation, in light of the basic statute and its purposes. No particular, or single simple judicial formula can capture or take into account the varying responses, called for by different circumstances, and the need to promote a "proper," harmonious, effective or workable agency-court relationship.

Breyer, *supra* note 2, at 381.

Judge Breyer suggests that the law is not so clear but he leaves no doubt as to what he thinks the law should be: "Would one not expect courts to conduct a stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert?" *Id.* at 397.

120. *E.g.*, *Connecticut State Medical Soc'y v. Connecticut Bd. of Examiners in Podiatry*, 546 A.2d 830, 834 (Conn. 1988).

121. Much less confusion results from the distinction between law and facts. While there is sometimes confusion at the margin, courts generally seem capable of distinguishing questions of law from questions of fact and reviewing the two differently. A classic example is the *Hearst* opinion. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). The issue was whether newsboys were "employees" under the National Labor Relations Act, 29 U.S.C. § 152. The majority found that the question was not one of law for the Court to decide: "[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *Id.* at 131. The dissent, however, found the same question to be one of law: "The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question." *Id.* at 136 (Roberts, J., dissenting). The conflicting conclusions on this issue resulted in the disagreement as to the final outcome of the review.

An interesting state example is *Connecticut State Medical Soc'y v. Connecticut Bd. of Examiners in Podiatry*, 546 A.2d 830 (Conn. 1988), in which the Connecticut Supreme Court concluded that the question as to whether the ankle was part of the foot was a question of

relationship between the agency policymaking functions and the development of law is the first *Chenery* case.¹²² The SEC prohibited insider trading, not under its power to define prohibited practices, but as an interpretation of the law. Because it was interpreting law rather than carrying out its policymaking function, the Supreme Court said the SEC's opinion about the law was entitled to little extra weight. The Supreme Court noted, however, that if the SEC had made its own decision as an exercise of its authorized policymaking function, then the Court could not interfere unless that exercise was arbitrary.¹²³

More recent authority for the distinction between review of policy and review of law is *Federal Communications Commission v. WNCN Listeners Guild*.¹²⁴ The FCC attempted to deregulate programming by a statement generally abandoning its "diversity" requirements. The lower court found that the decision as to whether the statute required deregulation was a question of law "in which the judicial word is final."¹²⁵ The Supreme Court reversed, holding that the decision to permit the market to decide program format was a question of policy rather than law.¹²⁶ The Court held that the judicial function was extremely limited because the question was left to the "broad discretion" of the FCC in policymaking.¹²⁷

Nonetheless, the "*Chevron* doctrine"¹²⁸ has caused some confusion that the issue-driven strategy must confront. This doctrine derives not so much from the Supreme Court opinion as from the interpretations of that opinion. The opinion has been read to severely limit judicial review of law and debate rages as to how much the opinion limits review.¹²⁹ About these inter-

law and not fact. Although surprising, it is difficult to disagree in the context of this case. Regardless, the outcome depended on the characterization of the issue.

One unfortunate idea has been that of a mixed question of law and fact. Schwartz describes a conflict between the Friendly view and the Frankfurter-Harlan view. B. SCHWARTZ, *supra* note 76, at 650-54. The Friendly approach would change an agency finding applying law to facts into a mixed question of fact with limited review. The Frankfurter-Harlan approach would separate the legal aspects from the factual aspects. Schwartz agreed with the latter: "The judicial label cannot change the presence of both legal and factual elements in findings involving application of legal concepts to the facts of a case." *Id.* at 652. The Friendly approach is anathematic to the issue-driven review strategy.

122. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

123. *Id.* at 94; *see also* *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 498 (1947) (Douglas, J., dissenting); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

124. 450 U.S. 582 (1981).

125. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 855 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

126. 450 U.S. at 592-99, 604.

127. *Id.* at 594.

128. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

129. *Pierce, Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988) ("In the three years since the Court decided *Chevron*, the case has transformed dramatically the approach taken by courts in reviewing agency interpretations of statutory provisions."). *But see* Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469, 470 ("The note concludes that *Chevron*, in establishing a frame-

pretations, one might echo Justice Scalia's statement which introduced this article: These interpretations make "heavy weather out of what is, under well-established principles of administrative law, a straightforward case."¹³⁰ Unfortunately, the *Chevron* opinion used some very loose language in distinguishing review of policy from review of law and this loose language has been seized upon by some to find a new restraint on the traditional judicial dominance over questions of law.

The "*Chevron* doctrine" casts an unnecessary shadow in this previously well-lit corner of judicial review law. The *Chevron* opinion, read in the context of the long-standing distinction between review of law and policy, does not itself create this confusion. The case involved an EPA regulation allowing states to lump pollution sources by "bubbles" of related sources so that a decision to permit construction would be based on compliance by the "bubble" rather than the individual source.¹³¹ The Court found that this was a permissible construction by the EPA of the Clean Air Act.¹³²

Read with reference to "well-established principles of administrative law," the opinion merely reaffirms the traditional agency dominance over policymaking. The Court could not have made its intentions clearer:

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary. . . .¹³³

The Court did not intend to make new law about review of policymaking.¹³⁴ The opinion quoted a 1961 opinion stating that a court should not disturb an agency's accommodation of "conflicting policies."¹³⁵ It upheld the EPA rule because the rule was "a reasonable *policy* choice for the agency to make."¹³⁶ The Court made the true nature of its holding even clearer in its summation: "When a challenge to an agency construction of a statutory

work of analysis for review of an agency interpretation of the statute in its charge, is a significant decision providing long-awaited guidance to the lower federal courts."). Some have given the opinion a "strong" reading which severely limits review of "law" and some a "weak" reading. *Pierce, supra*. The strong reading has been criticized. Sunstein, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 366-71 (1987).

130. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1557 (1990) (Scalia, J., dissenting).

131. 467 U.S. at 840.

132. *Id.* at 866; 42 U.S.C. §§ 7411(a)(3), 7502(b)(6), 7602(j).

133. 467 U.S. at 843-44.

134. Justice Stevens also followed another "well-established principle of administrative law": the binding effect of legislative rules. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

135. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

136. *Id.* (emphasis added). The court went on to justify this conclusion for the traditional reasons of expertise. *Id.* at 845-47.

provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."¹³⁷ Thus the case merely followed the long line of cases in which policymaking receives very limited review.¹³⁸

Unfortunately, some read *Chevron's* recognition of policymaking dominance as a new limit on the judicial authority over questions of law. The Court did caution reviewing judges that where they find "the intent of Congress is clear, that is the end of the matter."¹³⁹ The Court stated the obvious proposition that a court must obey the law itself: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."¹⁴⁰ Hence, courts may be dominant over questions of law but they are not free agents.¹⁴¹ This is not extraordinary.¹⁴²

What is extraordinary, if true, is the limits some find in the opinion on the traditional judicial dominance over questions of law. However, one need only separate those portions of the opinion dealing with the agencies' traditional dominance over policymaking from those portions dealing with the courts' traditional dominance over questions of law to fit *Chevron* into a long line of similar cases.

Necessarily there is a close relationship between questions of law and questions of policy. Indeed, law is policy that has been adopted by legislative action or the common law process. The two are related closely at least for the purposes of administrative law; however, they are widely different in allocation of decisionmaking authority between the judiciary and the bureaucracy. The failure to distinguish accurately between the two may lead to immense mistakes in defining review, as evidenced by the progeny of the *Chevron* decision.

137. *Id.* at 866.

138. Jordan, *Deference Revisited: Politics as a Determinant of Deference Doctrine and the End of the Apparent Chevron Consensus*, 68 NEB. L. REV. 454, 458-65 (1989); Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 490-91 (1986); Note, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113, 115-18 (1987).

139. 467 U.S. at 842.

140. *Id.* at 843 n.9.

141. In such cases, the controversy does not represent a tension between administrative versus judicial decisionmaking but between judicial decisionmaking versus the legislative branch. See Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 665 (1988) ("The central theme of this article is that this role [of judicial review] can only be defined by considering the relative ability of the courts and the political process to resolve societal issues, a difficult task."). In a sense the court usurps not just the agency's authority but the legislative authority by straying into the realm of policymaking left to the agency. Levin, *supra* note 2, at 21-22.

142. Fallon, *supra* note 2, at 985 ("Even though a court must have ultimate responsibility for the correct decision of questions of law, no article III value forbids acknowledgement that, concerning questions to which administrative expertise is relevant, the agency's interpretation furnishes a presumptively reliable indicator of how the question ought to be resolved.").

Whatever the difficulties in developing an abstract definition of "law,"¹⁴³ a working definition for these purposes is relatively straightforward. In this context, the term "law" refers to decisions advancing or protecting collective goals established through either the legislative process or the "common law" process. The necessary contrast here is between this law and what might be called "agency law." Where the agency is given the authority to decide questions of collective or societal interest, it may create "agency law." I choose to refer to this "law" as policy to emphasize the contrast between such decisions made by the agency and similar decisions made through the law-making processes of the legislature or the common law. Where the source of the decision on collective or societal interest is not the agency, then we have a question of "law" (sufficient for our purposes) and the courts are dominant.¹⁴⁴ Where the source is the agency, we have a question of "policy" and the agency is dominant.

A similar approach was taken by Levin in his comprehensive discussion of review of law.¹⁴⁵ Basically he defined law as "normative" decisions over which the court has "independent" authority.¹⁴⁶ These normative decisions are taken from the sources of law, particularly Congress. If these sources do not make the normative decisions, or leave to the agency the authority to make those decisions, then the agency must exercise discretion and its decision is dominant. The term "normative" does not quite capture the shared element. For me, however, and hence I describe it instead as the advancement of protection of collective or societal goals.

Regardless, the review strategy must focus on the proper allocation of authority over decisions with this shared element. The process of policy-making, whether by the legislative process, the common law process or the administrative process, is a complex melding of general fact-finding, various types of expertise, and special judgment. Therefore, it seems more accurate to distinguish the term "law," as used to find the appropriate judicial review function, as decisions about collective goals made through either the legislative or common law processes, from decisions about collective goals made through the administrative process, that is, policymaking.¹⁴⁷

143. See generally R. DWORKIN, *LAW'S EMPIRE* ch. 1 (1986) (saying that lawyers and judges seem to spend a good deal of time and effort doing law even though legal theorists have not discovered a universal definition of "law").

144. L. JAFFE, *supra* note 76, at 546-48; B. SCHWARTZ, *supra* note 76, at 650-53.

145. Levin, *supra* note 2. Levin distinguishes law and "discretion" by which he means what I have designated policymaking discretion. *Id.* at 12-13.

146. *Id.* at 12.

147. Without using the same terminology, others have found a distinction between "law" over which the courts have dominant authority and "agency law," i.e., policymaking. Breyer, *supra* note 2, at 364. Landis suggested that administrative "law" is law that the lawmaking branches allow the agency to make. J. LANDIS, *supra* note 6, at 2-3. This agency law differs in kind from the law over which courts have the final authority and hence the system requires that this law should be subject to a quite different and much more limited review.

The drafters of the revised MSAPA also recognized a fundamental distinction between these two types of issues. Although it lumped these together as "law," it clearly intended quite different review. The comments suggest that the court review interpretations of law

The system then works from this distinction. If policymaking refers to the agency's authority to make decisions about collective goals, then the limits on judicial authority follow. When the law-giving authority leaves to the agency the power to decide how to advance or protect the collective goals of the community as a whole, it authorizes the agency to make policy rather than making the policy itself. It does not authorize the courts; as a result, the courts violate the law if they unduly infer such authority.¹⁴⁸ The limit is not on the judicial power over law but on judicial power under the law to exercise a policymaking function assigned elsewhere.

This formulation solves another problem: the place of "common law" or evolved law in the administrative process. This traditionally is considered "law" in our legal system and it is not agency law or the exercise of policymaking as I use the term here. Of course, it is not supported by clear statutory language; yet we find much of our law outside of statutory language. Indeed the "law" at issue in the seminal *Chenery* opinion had been derived by the agency from judicially evolved common law.¹⁴⁹ Although conceding administrative policymaking authority, the Court held that it was more capable of interpreting that law than the agency.¹⁵⁰ In the second *Chenery* case, the agency was held to have developed policy and hence its decision, the same as that at issue in the first case, was subject to very limited review.¹⁵¹ Common law, where the source is the courts rather than the agency, is as much "law" for review purposes as is statutory law, where the source is the legislature rather than the agency.

Once this distinction is recognized, it is apparent that *Chevron* was merely applying the "well-established principle of administrative law" compelling judicial restraint in reviewing administratively developed policy. Rather than new limits on the review of law, the problem is its simplistic definition of the term "law" itself. The criticism has overreacted to the Court's loose language. In addition to imprecision as to the distinction between legislative law and policy or agency law, however, the opinion also created some confusion about judicial authority over law.

The opinion created confusion by expressing the "well-established

to see if it "merely disagrees with the agency's interpretation." MSAPA, *supra* note 2, § 5-116 and comment to (c)(4). "By contrast, with regard to the agency's *application* of the law to specific situations, the enabling statute normally confers some discretion upon the agency. Accordingly, a court should find reversible error in the agency's application of the law only if the agency has improperly exercised its *discretion* [under the limited review provided elsewhere in the section]." *Id.* (emphasis added). Thus, in my terms, a court can reverse the latter "agency law" only if it finds that the agency has "improperly exercised its [policymaking] discretion."

148. The threshold question may also ask whether the agency's exercise of policymaking is consistent with the legislative concept. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 587 (1985) ("Under the emerging model, courts ensure not only that fidelity to congressional purpose marks the outer bounds of agency discretion, but also that it animates the exercise of that discretion.").

149. SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

150. *Id.* at 88-89.

151. SEC v. *Chenery Corp.*, 332 U.S. 194, 207-08 (1947).

administrative law principles" counseling judicial respect for the informed administrative opinions concerning questions of law. *Chevron* said that "a court may not substitute its own construction of a statutory provision" for that of the agency; it immediately followed that statement by noting "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." ¹⁵² In admonishing reviewing courts against freely substituting judgment for the agency's determinations of law, the Court said no more than that "the principle of deference to administrative interpretations" has been consistently followed. ¹⁵³ The Court is talking of the "weight" and "deference" the law has provided for generations. ¹⁵⁴ These terms connote respect; they do not establish binding effect. Such deference is another "well-established principle of administrative law." ¹⁵⁵ Otherwise the opinion demands only that reviewing courts take care to carry out the will of Congress as expressed in the statute and not impose their own judgments. ¹⁵⁶

152. *Chevron v. Natural Resource Defense Council*, 467 U.S. 837, 844 (1984) (emphasis added).

153. (Citing Supreme Court cases decided in 1943, 1944, 1945, and 1953).

154. The Court merely observed that if a court finds the statute clear "that is the end of the matter." *Id.* at 842. From this, commentators and lower courts have spawned the useless review strategy known as the "Chevron two step." Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 17 (1990).

The Court recently applied the *Chevron* doctrine in *Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990). It asked the two step question:

(1) is the intent of Congress clear;

(2) if not, is the agency's meaning permissible.

The Court held, 5-4, that the Tenth Circuit had misinterpreted the statute. Justice Scalia first determined that the statute was not clearly against the agency's interpretation. The dissent, however, asserted that he and four other Justices did not understand the "plain terms of the statute." *Id.* at 968 (Stevens, J., dissenting). While it seems odd that a case which could be decided under the "plain terms of the statute" should even reach the Supreme Court, it is even more odd that five Justices could not understand that "plain meaning." Because of his difficulty in grasping the plain meaning of the statute, Justice Scalia was forced to consider whether the agency's interpretation was "permissible." Having determined that the agency's interpretation was permissible, Justice Scalia then determined whether the agency's policy development was arbitrary and concluded that it was not. *Id.* at 966-67. For me, this case demonstrates the unnecessary formality of the *Chevron* doctrine. In *Curtin Matheson*, Justice Marshall merely stated that the Board's policymaking was "consistent with the Act." If the agency's action might be illegal then a court should decide that question. If the agency is exercising a legitimate policymaking function then the court should test for arbitrariness. Courts have proceeded in this manner for generations and there seems to be no justification for adding the structured clumsiness of the *Chevron* doctrine.

155. See Fallon, *supra* note 2, at 984 ("At least two kinds of deference are consistent with the proposition that the power to engage in independent review must be vested in an article III court: deference to an agency's congressionally delegated lawmaking power and deference to an agency's interpretive expertise.").

156. The FAPA provides for review of constitutional issues involved in agency decisions. 5 U.S.C. § 706(2)(B); see also MSAPA § 5-116(c)(1). Where the law is constitutional law, deference to the agency interpretation will be slight. Such review is limited because review of legislation *per se* is limited. See generally Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980). Although courts give little deference to agency constitutional judgments, two basic categories of constitutional challenges to agency action are generally subjected

Any other reading of *Chevron* would eliminate the well-established authority and necessary contributions of the courts in interpreting statutory law and would ignore the other potent and well-established source of law in Anglo-American jurisprudence: the evolution of law through the common law process.¹⁵⁷ The Supreme Court gave no indication that it was undertaking such a fundamental change in our legal theory.¹⁵⁸ It merely wanted the agencies to continue to exercise their policymaking functions within their well-accepted authority to do so but left to the courts the power to interpret statutes and otherwise develop law.¹⁵⁹

Thus no change has been made in the "well-established principle of administrative law" that courts are the final arbiters of questions of law. While giving deference to agency interpretations, they may uphold the agency's legal judgments only if they agree. Regardless of the theoretical debate over the unfortunate "*Chevron* doctrine," in practice courts gener-

to more limited review. The first, due process, usually involves a constitutional minimum and a reasonable procedure will probably receive little judicial scrutiny. The second, the nondelegation doctrine, also tends to raise little judicial support. Most administrative law authorities see the doctrine as virtually defunct. *E.g.*, S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 68-85 (2d ed. 1985). To some extent this limited review can be attributed to the fact that a challenge to a delegation actually questions the congressional action, i.e., the delegating statute, rather than the administrative action.

157. Recent decisions suggest that the Court never intended to limit the traditional judicial methods for interpreting statutory language. In *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988), the plurality found that "traditional tools of statutory construction" should be used. *Id.* at 1822 (Brennan, J., concurring and dissenting). In *Public Citizen v. Department of Justice*, 109 S. Ct. 2558 (1989), a majority of the Court relied on such tools to interpret a statutory provision. They used legislative history and the canons of construction to determine that Congress had made its intent clear. *Id.* at 2567, 2572. The concurring Justices said that the "plain language" of the statute determines whether a statutory provision is ambiguous, and since this language was not clear, the Court should have considered deference to the agency's interpretation. *Id.* at 2578 (Kennedy, J., concurring).

Although upholding the agency, the majority opinion in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), seemed to be following the traditional strategy for the review of a regulation. The challenge, as the Court noted, was limited to the facial legality (and constitutionality) of the regulation and hence only questions of law were before the Court. Answering the legal challenge, the Court found: "The broad language of [the act] plainly allows the Secretary's construction of the statute." *Id.* at _____. As to the legislative history argument, it said: "When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency." *Id.* at _____ (emphasis added). Thus, it held that "[t]he Secretary's regulations are a permissible construction of [the act]. . . ." *Id.* at _____.

158. This confusion is reminiscent of that caused by *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), two decades ago. Both had language which suggested that review, either reviewability in *Abbott* or standards of review in *Chevron*, must be based on the clear language in the statute but did not seem to affirmatively deny the search for law elsewhere.

159. The Supreme Court seems to be struggling to control the extreme readings of *Chevron* while maintaining the vitality of the law/policy distinction. *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413 (1987); *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987).

ally follow this approach.¹⁶⁰ Thus Justice Marshall applied no “*Chevron* two step” in *Curtin Matheson*; he merely held the Board’s decision “consistent with the Act”—end of analysis.¹⁶¹

VI. REVIEW OF PROCEDURAL ISSUES

Justice Blackmun’s separate dissenting opinion in *Curtin Matheson* suggests yet another review strategy.¹⁶² He observed:

Rarely will a court feel so certain of the wrongness of an agency’s empirical judgment that it will be justified in substituting its own view of the facts. But courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the bases for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed. This emphasis upon the decisionmaking process allows the reviewing court to exercise meaningful control over unelected officials without second-guessing the sort of expert judgments that a court may be ill-equipped to make. Such an approach also affords the agency a broad range of discretion.¹⁶³

He would then have a reviewing court concern itself primarily with the adequacy of the procedures.¹⁶⁴ This strategy is both too restrained and too liberated. By using procedure, courts may arrogate power over substance.¹⁶⁵ Or by limiting review to procedural questions, the courts may avoid the important, if restrained, review of substantive issues. Thus reviewing courts’ authority over procedural questions affect both the procedural and the substantive review roles.

The “well-established principles of administrative law” dictate that courts should dominate procedural questions because these issues are similar, or the same as, issues of law.¹⁶⁶ Courts are free to substitute judgment on

160. The issue becomes, then, whether the role of the court in dealing with a less than explicit legislative command should change simply because an administrative agency is in the picture. Certainly, from the standpoint of constitutional regularity, nothing would indicate such an inclination. One may start with the point that the courts were explicitly contemplated by the Framers, while the agencies were not, or were much less, the objects of their consideration. Since statutory construction is assigned to the judicial branch by the Constitution, advocates of change in that allocation should at least bear the burden of persuasion.

Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646, 669 (1988) (footnotes omitted).

161. *NLRB v. Curtin Matheson Scientific, Inc.* 110 S. Ct. 1542, 1549 (1990).

162. *Id.* at 1555 (Blackmun, J., dissenting).

163. *Id.* at 1556 (Blackmun, J., dissenting).

164. Without using the term, Justice Blackmun may be adopting the “hard look” doctrine, which requires a court to assure that the agency took a hard look at the questions. See *supra* note 106 and accompanying text.

165. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1312–14 (1975).

166. Preclusion of question of law precludes review of procedures. *Gott v. Walters*, 791 F.2d 172 (D.C. Cir. 1985) (per curiam) (en banc); see *Heckler v. Ringer*, 466 U.S. 602, 615 (1984) (Under the Medicare Act’s preclusion provision, 42 U.S.C. § 405(h), procedural challenges are subsumed within a claim “arising under” a preclusion statute.).

procedural choices with which they do not agree. Judicial dominance is based on the fact that judges are experts in procedures. Indeed, their procedural expertise is paramount and the agency's expertise cannot stand up to it even though the agency is deeply concerned with its own procedures.

On the other hand, the law recognizes that an agency's method of proceeding is a central concern of that agency. Agencies are experts in their own procedural requirements and agencies are concerned directly with the success of their procedures. Courts see only a distorted sample of the results of those procedures and may not recognize their overall success. Also, judges tend to evaluate procedural questions according to the dictates of tradition; the agencies, however, are under some practical pressure to innovate.

In response to these considerations, the law has instructed the courts to give "great deference" to the agencies;¹⁶⁷ the law has created a rather strong presumption of regularity. Courts sometimes believe the law binds them to the procedural judgment of the agency much as in agency dominated issues¹⁶⁸ but this overstates the restraint. There is little question of judicial authority to do agreement review; the agency's procedures must comply with the law and the courts must assure that it does.¹⁶⁹ However, the courts themselves must obey the law and, despite their unmistakable expertise, are not free agents in designing procedures.

The leading case, *Vermont Yankee*,¹⁷⁰ makes this clear. *Vermont Yankee* involved judicial authority to add procedures to informal rulemaking. After a hearing, the Atomic Energy Commission (AEC) granted petitioners a license to operate a nuclear power plant. The AEC subsequently instituted rulemaking proceedings to deal with special environmental effects and eventually issued a rule about nuclear fuel cycles. Respondents appealed the fuel cycle rule and the decision to grant a license. The D.C. Circuit held that the basic notice and comment rulemaking prescribed by APA section 553 was a statutory minimum and in this situation that minimum procedure was inadequate. The Supreme Court reversed.

Some contend that the Supreme Court's opinion in *Vermont Yankee* reversed the long-standing judicial dominance over procedural questions.¹⁷¹ Yet the Court held no more than that courts are not authorized to impose procedures in addition to those prescribed by the FAPA.¹⁷² True, the opinion contained language which severely restricts judicial authority to develop

167. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) ("In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").

168. *FCC v. Schreiber*, 381 U.S. 279, 290-91 (1965).

169. The FAPA expressly provides for such review. 5 U.S.C. § 706(2)(D). While once again the Act fails to describe the depth of the review it was intended to be what I call agreement review.

170. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), *on remand*, 685 F.2d 459 (D.C. Cir. 1982), *rev'd*, 103 S. Ct. 2246 (1983).

171. Levin, *supra* note 2, at 60.

172. 435 U.S. at 524.

administrative procedures, but such language does not contradict the notion that the reviewing courts can substitute judgment on procedural questions.

The opinion only makes the self-evident finding that courts, although free to substitute judgment on questions of law, including procedural law, are not free to misapply the law. The Supreme Court found the lower court in *Vermont Yankee* misinterpreted the law so the Court rejected the lower court's judgment. Read closely this case, as does *Chevron* discussed above, stands for the rather unextraordinary proposition that courts must obey the law themselves.¹⁷³

Judicial dominance over procedural questions similarly was restrained in *Steadman v. SEC*.¹⁷⁴ *Steadman* involved the standard of proof in fraud cases brought in SEC administrative proceedings.¹⁷⁵ The FAPA required the "preponderance of the evidence" standard in agency adjudications, but lower courts had ordered the SEC to use a higher standard of proof in fraud cases.¹⁷⁶ The Court read the FAPA as mandating a preponderance of the evidence standard and held that lower courts lacked the authority to impose a higher standard of proof. However, the Court said that had there been no congressionally created standard, as in a prior case,¹⁷⁷ the lower court would have been free to impose whatever standard it felt was fair and to substitute judgment on this procedural question.¹⁷⁸ The Supreme Court held, however, that the law did not permit the lower court this freedom where the statutory language was clear.¹⁷⁹

Like other law questions, there are limits on procedural review and an issue-driven strategy might continue these limits. The court should review the agency's procedural judgment at three different levels. First and foremost, the court should assure that the agency procedures comply with statutory requirements, both the specific enabling act and the general law created by the FAPA. Second, the court must assure that the procedures comply with constitutional requirements, particularly due process. Third, the court must ultimately make its own judgment that the procedures create fundamental fairness.

The first test in procedural review is, of course, the relevant statute. A reviewing court must assure that the agency procedures comply with the relevant statute or congressional intent. After such review, however, it may be that the *Vermont Yankee/Steadman* line of cases requires that the courts themselves stick very closely to the legislation.

This law restricts innovation by the courts but perhaps it could encourage innovation by the agencies. Under these cases, the agencies are given some

173. See also *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2373 (1988) (making the same point with respect to court supervision of grand jury investigations).

174. 450 U.S. 91 (1981).

175. *Id.* at 92.

176. *E.g.*, *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 824 (D.C. Cir. 1977).

177. *Woodby v. INS*, 385 U.S. 276, 284 (1966).

178. 450 U.S. at 95.

179. *Id.*

freedom from stifling judicial review. Unfortunately, agencies are not as inclined as they might be to experiment with procedures. One review strategy permitted under *Vermont Yankee* would be to encourage the agency to engage in innovation.

Regardless, the courts have a continuing duty to test administrative action against the Constitution. The procedures for many administrative decisions are not covered by statute, particularly those used for informal adjudication. Where the statute is not clear, the due process test for procedural decision becomes the dominant source of procedural law. Since the courts have plenary authority over constitutional law, the courts are very dominant here.

However, the due process authority over procedural questions is much more substantial than that. Although somewhat inconsistent with the tone of *Vermont Yankee* and *Steadman*, the Supreme Court has established that due process determinations are dominant even over statutory procedures. In *Arnett v. Kennedy*,¹⁸⁰ Justice Rehnquist suggested the "bitter with the sweet" doctrine.¹⁸¹ This doctrine would limit due process analysis in much the same way as *Vermont Yankee* limits the courts in other regards. It would create per se compliance with due process where the statute that established the entitlement to a right also set the procedures for vindication of that right.¹⁸² The Supreme Court in *Loudermill*¹⁸³ expressly rejected this doctrine. Therefore, even where the agency follows procedures set by statute, the court must make an independent judgment as to whether those procedures comply with due process. In other words, at least at the due process level, the *Vermont Yankee* line of cases has no force.

The third possible procedural review is whether the procedures violate the court's sense of fundamental fairness. Recent Supreme Court decisions such as *Vermont Yankee* seem to limit the court's ability to free-lance in this way. Somewhere between due process and interpretation of the statutory requirement, *Vermont Yankee*, however, may still have left some authority in the courts to review procedures that violate fundamental fairness. One clear example of this gap would be where the statute neither establishes the procedure nor gives the agency the authority to do so.¹⁸⁴ Here, even under *Vermont Yankee*, the court need not look to the Constitution or due process alone to find authority to closely scrutinize procedures for fairness.

Although not as restrictive as some contend, *Vermont Yankee* does confine judicial review of procedural issues. Here the issue-driven strategy serves the purpose of opening the debate over the advisability of judicial intervention in procedural questions. Where Congress has in fact intentionally set the procedures, a court should treat that decision with the same respect

180. 416 U.S. 134 (1974).

181. *Id.* at 152-54.

182. *Id.*

183. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985).

184. 450 U.S. at 95.

the judiciary is to accord other legislative judgments. However, where the agency sets the procedures, courts should be free to apply their special procedural expertise to those administrative judgments. If they object to the agency's procedural judgment, they should take care to justify their intervention and they should accord the agency's procedural judgment the traditional great deference. Many judges have an unfortunate predisposition towards increasing procedures and this predisposition must be tempered.¹⁸⁵ Nonetheless, conceding the advantages of deference and judicial restraint, courts should have an active role as to procedural law.

I would hope then that the issue-driven strategy might change the nature of the debate. It might temper some of the confrontational aspects and lead the courts and the agencies to work in concert to develop procedural innovations for particular administrative programs. This cooperation is possible even under current law but the law might allow the courts more freedom in order to take full advantage of their substantial procedural expertise.

VII. REVIEW OF DISCRETION

The last element of an issue-driven review strategy is the designation of the judicial role with respect to administrative discretion. In *Curtin Matheson*, the majority summarized: "We hold that the Board acted within its discretion in refusing to adopt a presumption of replacement opposition to the union. . . ." ¹⁸⁶ The tone of this statement suggests that the Court believed it had little, if any, authority over the valid exercise of administrative discretion.

However, "discretion" is a slippery, although vital, term in administrative law.¹⁸⁷ Indeed, administrative law uses the term in a variety of different senses, each suggesting different review strategies.¹⁸⁸ In a general sense, discretion connotes a sense of both authority and decisionmaking freedom. Thus, to determine the judicial role with respect to issues resolved by the exercise of administrative discretion, the review system must be sensitive to the different types of authority and the various levels of decisionmaking freedom.

185. S. BREYER, *supra* note 48, at 347 ("Critics of procedural expansion are 'uncertain whether the more elaborate procedures have changed substantive results or have led to more accurate decision making.'").

186. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1544 (1990).

187. The classic legal theory description of discretion was provided by Hart and Sacks. For them, discretion is "the power to choose between two or more courses of action each of which is thought of as permissible." H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 162 (1958). In the administrative law context, this definition is inconsequential. Even under the substantial evidence test an agency decision must be accepted if the court finds that the agency chose one among several acceptable positions. 1 KOCH SUPP., *supra* note 2, at 34.

188. I have observed five distinct uses of the term: three designating decisionmaking that is subjected to different levels of review and two designating unreviewable administrative decisionmaking. Koch, *supra* note 137, at 470-71.

Administrative law has been evolving such a system. Conscious and orderly application of the principles being developed will provide the necessary judicial sensitivity to the distinct judicial role with respect to each sense of the term. The first level distinction is between discretion subject to some review and that made unreviewable.

Reviewable discretion

The current law has evolved several strategies with respect to reviewable discretion under the single word formula "abuse of discretion."¹⁸⁹ As with the other issue-oriented approaches, this strategy has evolved because courts recognize instinctively the different senses of authority and decisionmaking freedom at work in the exercise of discretion before them rather than a formalistic application of the "abuse of discretion" word formula. In conducting abuse of discretion review, courts consider the nature of the relevant grant of discretion and then the meaning of the term "abuse" in the context of that type of discretion.

The existence of discretion creates a tension between the authority of the courts and that of the agency exercising the discretion. Where the discretion is reviewable, that review must vary in accordance with the nature of the authority intended in the grant of discretion. A reviewing court must strive to recognize the appropriate administrative authority in order to implement the intended allocation of decisionmaking responsibility.

Several factors justify measuring review according to the authority implicated in the grant of administrative discretion. Administrative systems that employ discretion are designed with the agencies, not the courts, having the primary decisionmaking responsibility. The grant of discretion is usually related to agency expertise, including specialized knowledge and experience. Although the courts may make informed judgments about many of these issues, the agencies often have a comparative advantage. The comparative advantage, however, differs among programs. Thus, the extent to which the agency authority is to be dominant over the judicial authority varies among such programs. The nature of the discretion conveys the allocation of authority.¹⁹⁰

189. This word formula appears in the FAPA. 5 U.S.C. § 706(2)(A).

190. In light of the different senses of authority conveyed by the term, I have suggested that the abuse of discretion word formula requires a different review strategy for each of the three reviewable senses of discretion I have observed. 2 KOCH, SUPP., *supra* note 2, at § 9.7.

We have already confronted one major use of the term: the authority and freedom to make policy. Justice Marshall in *Curtin Matheson* used the term in this sense. As suggested in that opinion, courts have the authority to review administrative policymaking but that authority is very limited. As discussed above, this limited judicial authority over policymaking is more often communicated through the arbitrariness standard than the abuse of discretion standard. No matter the word formula, very restrained review is well established.

Administrative law also uses the term discretion to describe a narrower authority and freedom: the discretion to fill in the gaps in legislation. I have labeled this sense of discretion as "executing discretion." Executing discretion is quite different from policymaking even though

The determination of what constitutes "abuse" recognizes the decision-making freedom conveyed by the grant of discretion. The term communicates a very limited role for the reviewing courts. Abuse, like arbitrariness, suggests that the courts are to interfere only if they find the administrative decisionmaking to be particularly egregious. Indeed, in this sense the two standards are roughly equivalent.¹⁹¹ Abuse, as does arbitrariness, instructs reviewing courts to tolerate a relatively high risk of error. Thereby, the abuse standard preserves the administrative discretion while assigning to the courts responsibility for preventing intolerable exercises of such discretion.

Unreviewable discretion

Agency authority and decisionmaking freedom over certain issues may be so extensive that the courts may have no residual authority (although some other institution might) and hence resolution of those issues may be unreviewable. Here, it is particularly important to remember that a given administrative decision incorporates the resolution of a bundle of issues. Some of the issues in the decision may be reviewable while others are not. The entire decision will be unreviewable only if none of the controverted issues resolved by the decision are reviewable.¹⁹² For example, Veterans Administration decisions were expressly unreviewable but the Supreme Court ruled that controverted constitutionality issues contained in those decisions were still reviewable.¹⁹³ Later, Congress provided for review of

they both relate to incomplete legislation. Policymaking is not merely the power to extend legislation or fill in detail; rather, policymaking is the authority to define the path by which the legislative goals are to be attained. In the exercise of executing discretion, the agency merely follows a path defined by the legislation. A reviewing court can evaluate the exercise of this type of authority more intensely than it can policymaking because the court can test these implementing judgments against the narrow confines of the legislative prescription. Judicial authority here could be quite extensive.

The most prevalent sense of discretion is quite different from the other two reviewable senses of the term. It implicates administrative authority to engage in individual decision-making, and hence I have labeled this as "individualizing discretion." Agencies may have express or inherent authority to make adjustments in the way they apply statutory standards or administrative rules in individual situations. Commentators have long recognized this sense of discretion. *E.g.*, K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25 (1969) ("Discretion is a tool, indispensable for individualization of justice. . . . Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice."); J. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 107 (1983) ("Rulemaking necessarily constrains sensitive exercise of individualized discretion."). Individualizing discretion allows the process to be sensitive, fair and efficient; hence a reviewing court should approach this type of discretion with a positive attitude. Because most courts already recognize the positive aspects of such discretion, they rarely undertake extensive review unless they find the particular exercise of such individualizing discretion well beyond the range of plausible deviations from the standard or rule.

191. As the Restatement of Scope-of-Review Doctrine by the ABA Section of Administrative Law found: "No distinctions are drawn among the terms 'arbitrary, capricious, [or] an abuse of discretion' in § 706(2)(A)." Levin, *supra* note 63, at 292.

192. *Heckler v. Ringer*, 466 U.S. 602, 614 (1984) (Any claim "inextricably intertwined" with an unreviewable claim will also be unreviewable.).

193. *Johnson v. Robison*, 415 U.S. 361 (1974).

these veterans' benefits decisions but it retained unreviewability for questions of fact.¹⁹⁴

Often, the unreviewability of an issue is conveyed by the term "discretion." Still, not all discretion is unreviewable. Further inquiry is necessary to determine whether the particular issue involves one of the term's two unreviewable senses. Discretion may refer to an issue made unreviewable by statute or other law. The term may also cover the administrative resolution of issues which are inherently unsuitable for review.

(a) *Unbridled discretion*. The first category of unreviewability defines administrative decisions that the empowering authority or existing law has shielded from judicial scrutiny. There is no *universal* justification to support completely removing these issues from review. Nothing inherent in the kinds of issues made unreviewable suggests that courts could not perform some useful function. Usually it seems that the reasons for unreviewability are either to avoid any judicial interference or to cut the cost of the program.¹⁹⁵ Still, some review, albeit limited, does not seem clearly inappropriate even for these reasons. Yet the political authority or tradition, for some reason, deemed it advisable to give the agency the final word and created a sense of the term "discretion" conveying unreviewability.¹⁹⁶

To use the terminology of the FAPA, this unreviewability can be created either by statute¹⁹⁷ or "by law."¹⁹⁸ Both state and federal administrative law recognize that either a statute or the common law might prevent judicial intervention in the administrative determination as to certain issues. Because the federal act incorporates both, it is useful to discuss the law as it has been applied by federal courts.

The first provision, section 701(a)(1), merely incorporates any enabling act that expressly precludes review. Interpretation of the provision has not caused much trouble. The pendulum has swung back and forth between the *Abbott*¹⁹⁹ doctrine requiring the unreviewability within the statutory language and the acceptance of other evidence of legislative intent to make

194. 2 KOCH SUPP., *supra* note 2, at 130-31.

195. For example, according to the Supreme Court, the purpose of unreviewability in the provision covering the Veterans' Administration, 38 U.S.C. § 211(a) is the technical nature of the decisions and administrative and judicial costs. *Johnson v. Robison*, 415 U.S. 361, 370 (1974); *see also* *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2139-40 (1986). Congress may have also precluded judicial review to eliminate any sense of adversariness between the government and veterans. Note, *The Case for Judicial Review of Veterans' Administration Benefit Determinations*, 2 ADMIN. L.J. 217, 235-36 (1988).

196. Dworkin, *The Model Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted in* R. DWORIN, *TAKING RIGHTS SERIOUSLY* 32 (1977) ("Sometimes we use the term [discretion] in a . . . weak sense, to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official.").

197. 5 U.S.C. § 701(a)(1) (Review provided "except to the extent that— (1) statutes preclude judicial review").

198. 5 U.S.C. § 701(a)(2) (Review provided "except to the extent that— (2) agency action is committed to agency discretion by law").

199. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

the decision unreviewable.²⁰⁰ At present the latter seems to be the law.²⁰¹

The second provision, section 701(a)(2), has caused more definitional problems. Interpretation of this provision involves an analysis of the type of "discretion" covered and of the type of "law" which can create such unreviewable discretion. The major source of confusion is the phrase "by law" and that vague phrase has caused problems for generations. What "law" does the provision include? Since subsection (a)(1) expressly covers all unreviewability expressly provided by statute, subsection (a)(2) must cover some other sources of unreviewability. This law must be that created by the grant of preemptive administrative authority and decisionmaking freedom in the statutory scheme, the common law evolution, or the Constitution.²⁰²

One type of "law" that might create unreviewable discretion is statutory law. As recognized by subsection (a)(1), a statute might expressly preclude review. However, a statute may also imply unreviewability, as recognized by subsection (a)(2), by granting the full decisionmaking authority to the agency. The famous *Overton Park* opinion described the nature of this source of unreviewable discretion.²⁰³

In *Overton Park*, a public interest group challenged the Secretary of Transportation's decision to authorize the use of federal funds to finance the construction of a highway through a Memphis park. The Court was compelled to engage in an in-depth analysis of its role in such informal decisionmaking. It ultimately concluded that the proper judicial role was the very restrained arbitrariness standard. Nonetheless, it first asked whether the decision was reviewable at all. Since the statute did not expressly preclude review, the remaining basis for unreviewability was the nature of the discretion. Based in part on the legislative history of the FAPA,²⁰⁴ the Court found that unreviewable "absolute discretion" existed when the statute left the courts "no law to apply," that is, the statute lacked meaningful standards whereby a reviewing court might evaluate the agency's exercise of discre-

200. 2 KOCH SUPP., *supra* note 2, at § 9.32.

201. Compare *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (Review can be precluded by specific language or specific legislative intent that is "'fairly discernible' in the detail of the legislative scheme.") and *United States v. Fausto*, 108 S. Ct. 668, 675-76 (1988) with *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2139 (1986).

202. Although the only member of the Court to recognize the breadth of the term "law" as used in § 701(a)(2), Justice Scalia confused the point by relying heavily on statutory interpretation to find the "common law." *Webster v. Doe*, 108 S. Ct. 2047, 2055-63 (1988) (Scalia, J., dissenting). The boundary between statutory interpretation and evolved law is indeed sometimes murky, but Justice Scalia's resolution conceptually puts him in a curious position vis-à-vis judicial activism. If statutory interpretation is common law then is it not in the domain of the judiciary?

203. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

204. S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 212 (1946) ("If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.").

tion.²⁰⁵ This analysis established a fairly straightforward and often cited test for determining whether Congress had so committed the decision to the agency's authority as to preclude all judicial involvement.²⁰⁶

But statutory law is not the only "law" that might create absolute, and hence unreviewable, discretion. Another "law" that might create unreviewable discretion is the "common law" or traditional principles. This law is judge-made but is nonetheless very strongly rooted in our system.²⁰⁷

Traditional or common law, for example, has evolved unreviewability for the exercise of "prosecutorial" discretion. The Supreme Court's *Heckler v. Chaney* opinion demonstrates the persistence of the tradition of unreviewable prosecutorial discretion.²⁰⁸ The case arose in a bizarre factual setting but the nature of the administrative action offered the opportunity for a concept of modest review of the initiation-type decisions covered by the concept of prosecutorial discretion. Prison inmates brought actions to compel the Food and Drug Administration (FDA) to take enforcement action against the use of lethal injections to carry out the death penalty, arguing that the drugs used were not approved by the FDA for human executions. The issue was whether the decision not to act against this drug use was committed to agency discretion in a way that precluded review.²⁰⁹ The district court, the circuit court, and the Supreme Court all began with the test for reviewability in *Overton Park*, which is whether a meaningful standard exists by which to evaluate the agency's decision.²¹⁰ Applying this test, the Court in *Heckler* found no controlling standard and hence held that the FDA's decision was unreviewable. However, the statute provided a meaningful standard that judges could apply.²¹¹ The real basis of the opinion was the well-

205. HOUSE COMM. ON THE JUDICIARY, 79th Cong., 1st Sess., APP. TO ATT'Y GEN. STATEMENT (Comm. Print 1945), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 413-14 (1946).

206. Although well established, this concept may run afoul of the nondelegation doctrine. Doesn't delegation without meaningful standards create a *per se* violation of the nondelegation doctrine, even in its weak modern version? While that question is beyond the scope of this article, the answer may lie in this article's foundational concept that administrative decisions result from the resolution of a bundle of issues. Thus, although an issue, even a crucial issue, may be left to the agency's unbridled discretion, still the decisionmaking itself will be sufficiently retained to survive the nondelegation doctrine.

207. *NLRB v. United Food and Commercial Workers' Union*, 108 S. Ct. 413, 422 (1987) (reading preclusion of review of settlement decisions into the NLRB as an exercise of prosecutorial discretion.).

208. 470 U.S. 821 (1985).

209. *Id.* at 823.

210. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410-13 (1971).

211. While it is true that, as Justice Rehnquist points out, nothing in the statute compels the Secretary to bring a case, the sections cited by the Court itself contain meaningful standards. 470 U.S. at 835-37. The injunction section, 21 U.S.C. § 332, refers to a section listing "prohibited acts" (21 U.S.C. § 331), and the seizure section, 21 U.S.C. § 334, creates liability for "adulterated or misbranded" goods (as the Court recognized § 352 further defines misbranded). These are standards that the Court regularly finds meaningful and applies. In short, there was sufficient "law to apply" and hence the Court had the capacity to review in accordance with these standards but for the traditional acceptance of unbridled prosecutorial discretion.

established principle against review of prosecutorial discretion.

The Court started with the presumption that a decision not to act involved unreviewable prosecutorial discretion.²¹² This unreviewability, it found, evolved into a well-established doctrine that was not changed by the FAPA.²¹³ As Justice Rehnquist stated: "For good reasons, such a decision [whether to bring enforcement action or not] has *traditionally* been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that *tradition*. (APA did not significantly alter the 'common law' of judicial review of agency action.)"²¹⁴ Thus, the Court actually based its finding of unreviewability on tradition and not on the absence of standards.

The law that makes prosecutorial discretion unreviewable has evolved over time and that law is judge-made common law. What judges have made they can unmake if they have sound reason for doing so.²¹⁵ It is true that often the relevant prosecutorial decisions involve the necessary and beneficial discretion to individualize in order to allow the system to do individual justice. While this might justify some limits on review of this individualizing discretion, it does not justify complete unreviewability. Prosecutors and other law enforcement officials should not be inflexible even where the law is clear, but their decisions need not be unreviewable. In most other countries prosecutors' decisions are in fact reviewable.²¹⁶ Despite significant arguments against unbridled prosecutorial discretion,²¹⁷ however, the view persists that our system cannot permit review.

Tradition as the basis for unreviewability was also the actual concept at work in the more recent *Webster v. Doe* opinion.²¹⁸ The majority held that a CIA termination decision was so committed to agency discretion as to preclude review, except for serious constitutional questions.²¹⁹ Justice Scalia, dissenting, found constitutional questions precluded as well. He agreed with the assertion made above that the "no law to apply" test does not describe

212. As I have noted previously, there is a natural distinction between a *decision* not to act and mere delay. 2 KOCH SUPP., *supra* note 2, at § 9.21. In at least some types of cases, review of decisions not to act is practical.

213. 470 U.S. at 831-32.

214. *Id.* at 832 (emphasis added) (citation omitted).

215. Even *Chaney* may not support an extreme view of prosecutorial discretion. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675 (1985) ("It would probably be a mistake to read *Chaney* as establishing a general rule of nonreviewability for enforcement decisions. The opinion is filled with more than the usual number of disclaimers."). See also Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 104, 117 (1984-85).

216. E.g., Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 463-66 (1974).

217. See *Dunlop v. Bachowski*, 421 U.S. 560, 568-74 (1975).

218. 108 S. Ct. 2047 (1988).

219. *Id.* at 2053.

the full reach of section 701(a)(2) preclusion²²⁰ and he recognized that the "law" that precludes review may be common law.²²¹ This common law, he observed, constitutes "a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review."²²² The personnel decision at issue in *Webster*, like prosecutorial decisions, was traditionally unreviewable.

Having recognized the common law genesis of the relevant discretion, Justice Scalia articulated theoretical support for a contraction of unreviewability "by law."²²³ Unfortunately, Justice Scalia never confronted the question as to whether judges could change this common law.²²⁴

The third type of "law" that creates unreviewable discretion is the Constitution. For example, the conduct of military or foreign affairs is unreviewable by constitutional "law."²²⁵ In *Webster*, for example, Justice Scalia could rely not only on the common law but also the Constitution.

Such decisions differ from traditionally unreviewable discretion in that the "law" making it unreviewable has some constitutional base.²²⁶ There is a very strong separation of powers argument that supports the conclusion that such decisions are entirely within the constitutional powers of the executive and the judicial branch is precluded from involving itself in them. Unlike the common law source of unreviewability, constitutionally based unreviewability is unassailable directly. When the "law" that creates the unreviewable discretion is founded on constitutional principles then changes in that law may be beyond the power of the judicial branch.

220. *Id.* at 2056 (1988) (Scalia, J., dissenting) ("The 'no law to apply' test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded [by § 701(a)(2)]."). "The Court could clarify its analysis by explicitly acknowledging what it is already doing implicitly: it should cease treating the 'law to apply' test as the exclusive standard for identifying actions that are 'committed to agency discretion.'" Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 734 (1990).

221. 108 S. Ct. at 2056 (Scalia, J., dissenting).

222. *Id.*

223. Regardless, both *Chaney* and *Webster* make reversal of this law unlikely in the foreseeable future. The "law" of prosecutorial discretion will continue to give the agencies extreme dominance over decisions within that category. The position here is that *Chaney's* extreme position is unnecessary. Some see it as an incorrect reading of the law. Davis, "No Law to Apply," 25 SAN DIEGO L. REV. 1, 11 (1988) ("Even if a reviewing court takes the position that it has no law to apply, it normally can and should exercise *judicial discretion* in deciding whether the agency has abused its discretion.") (emphasis in original).

224. "The Supreme Court should acknowledge the common law role that it, in any event, obviously feels impelled to play. It could do so by replacing the formalistic *Overton Park* analysis with a pragmatic approach to section 701(a)(2)." Levin, *supra* note 219, at 741. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968) offered some useful considerations for determining whether unreviewability should continue.

225. *E.g.*, *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983) (per curiam), *cert. denied*, 467 U.S. 1251 (1984); *Dickson v. Ford*, 521 F.2d 234, 235-36 (5th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 954 (1976).

226. In our early constitutional history, there was no acceptance of absolute prosecutorial discretion. See *Heckler v. Chaney*, 105 S. Ct. 1649, 1663-65 (1985) (Marshall, J., concurring).

Justice Scalia severely criticized the majority for leaving this door open:

In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.²²⁷

Justice Scalia further admonished the Court:

The harm done by today's decision is that, contrary to what Congress knows is preferable, it brings a significant decisionmaking process of our intelligence services into a forum where it does not belong. Neither the Constitution, nor our laws, nor common sense gives an individual a right to come into court to litigate the reasons for his dismissal as an intelligence agent. It is of course not just *valid* constitutional claims that today's decision makes the basis for judicial review . . . but all *colorable* constitutional claims, whether meritorious or not. . . .

Today's result . . . will have ramifications far beyond creation of the world's only secret intelligence agency that must litigate the dismissal of its agents. If constitutional claims can be raised in this highly sensitive context, it is hard to imagine where they cannot. The assumption that there are any executive decisions that cannot be hauled into the courts may no longer be valid. Also obsolete may be the assumption that we are capable of preserving a sensible common law of judicial review.²²⁸

This then becomes the domain of conflicting theories of constitutional interpretation. If one sees the courts' power as severely limited then any unreviewability grounded in the Constitution will rarely be changed.²²⁹ Nonetheless, within the confines of proper constitutional interpretation, courts may still have some room to narrow the scope of unreviewable discretion.²³⁰

(b) *Inherently unreviewable discretion*. In administrative decisionmaking, there is a second category of unreviewable discretion: issues that are by nature unsuitable for review.²³¹ We use the word discretion to identify this type of issue and use of the term here differs from all other forms of discretion. Indeed, it differs from any other form of decisionmaking. It is unique because it cannot be tested according to any sense of error or even probability of error. The process for resolving this form of discretion appears more like intuition than judgment. Many have noted similar issues in other

227. 108 S. Ct. at 2059 (Scalia, J., dissenting).

228. *Id.* at 2062–63.

229. The *Webster* majority suggests also that Congress may limit the courts' constitutional review. *Id.* at 2053.

230. See *INS v. Abudu*, 108 S. Ct. 904, 912–15 (1988) (subjecting a foreign affairs related decision to abuse of discretion review); 2 KOCH SUPP., *supra* note 2, at 135–36.

231. In a mischievous moment, I labeled such decisionmaking as “numinous discretion.” Koch, *supra* note 137, at 502.

legal decisionmaking²³² but such issues seem particularly important in the administrative process.

Jurisprudential literature tends to refer to it as the "strong sense" of discretion or it could be called "pure" discretion.²³³ For such decisionmaking, any standard that might be found or derived from the grant of authority only guides the decisionmaking; it cannot *control* its exercise. In making such decisions, the official, as Dworkin observed, "can be criticized, but not for being disobedient."²³⁴ Dworkin urged that judges do not have this type of discretion but, even accepting this conclusion,²³⁵ his observation does not deny the possible existence of such discretion in the hands of at least some administrative decisionmakers.

Justice O'Connor conceded that such discretion does exist in the administrative process.²³⁶ She observed: "Some decisions, in short, may turn more on experience and intuition than on any listing of reasons, factors, standards, or the like."²³⁷ Others have wrestled with the indisputable existence of "unknowable" elements in administrative decisions²³⁸ and have observed this form of administrative decisionmaking.²³⁹

Jaffe observed this form of administrative decisionmaking which he also

232. DWORKIN, *supra* note 195, at 31-39 (distinguishing the "strong" sense of discretion from other uses of the term); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing primary and secondary discretion); see also Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747.

233. Dworkin has explained the meaning of this strong sense of the term:

Sometimes we use "discretion" in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment. . . .

. . . We use "discretion" sometimes not merely to say that an official must use judgment in applying the standards set [for] him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question. . . .

. . . An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion. Of course this latter sort of freedom is important; that is why we have the strong sense of discretion. Someone who has discretion in this [strong] sense can be criticized, but not for being disobedient. . . .

Dworkin, *supra* note 195, at 31-33.

234. *Id.* at 33.

235. Dworkin's view challenges the positivist approach. H. HART, *THE CONCEPT OF LAW* 138-44 (1961). It continues to be a controversial issue. *E.g.*, Greenawalt, *supra* note 231, at 366-68; McCormick, *Discretion and Rights*, 8 LAW & PHIL. 23, 35-36 (1989); Waluchow, *Strong Discretion*, 33 THE PHIL. Q. 321 (1983).

236. O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 654-55 (1986).

237. *Id.* at 655. She cited an oriental parable quoted in my treatise (2 KOCH, *supra* note 2, at 147 n.7) that suggests the practical necessity of such decisionmaking.

238. R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 34, at § 7.3.4.

239. J. MASHAW, *supra* note 189, at 67 (described as "clinical intelligence" involving "the feel or craft of decisionmakers").

called discretion.²⁴⁰ He recognized that review of those decisions he included under the term "discretion" involves a variety of different functions based on the fundamental existence of "a purported application of the statutory grants of power to the facts as found."²⁴¹ He separated these grants according to the three types of "rules" they might create.²⁴² Two of these three types involve decisionmaking where the application of facts is conclusive. In contrast, the third type of decisionmaking is entirely different in character: the authorization merely suggests what type of facts are relevant but does not make them conclusive.²⁴³

The essence of such decisionmaking is that knowable factors pass through the appropriate administrative process towards a decision. Jaffe explained that this type of discretion

compels the administrator to resort to a whole complex of additional concepts and attitudes, official and personal, . . . some of which he may not express, some of which he may be unaware of. . . . The mind focuses attention for a period of time on a group of authoritative decisional factors. But ultimately it reaches decision by an intuitive leap.²⁴⁴

The bureaucratic process here then can be understood in terms of an intuitive mental process.²⁴⁵

Intuition is knowing without conscious reasoning; it is the ability of the subconscious mind to synthesize variables in a more complex way than can the conscious mind.²⁴⁶ In some cases, we seem to make better decisions through such mental processes than we make through more rational processes.²⁴⁷ For example, if asked to select drapes, we would do better simply

240. L. JAFFE, *supra* note 76, at 555-56.

241. *Id.* at 555.

242. *Id.*

243. *Id.*

244. *Id.* at 555-56; see also Hart, *Problems of Philosophy of Law* in 6 ENCYCLOPEDIA OF PHILOSOPHY 264, 270 (P. Edward ed. 1972).

245. J. MASHAW, *supra* note 189, at 75-76: "[T]here is some desire that adjudicative personnel exercise not only a relatively controllable systematic rationality but also a relatively uncontrollable intuitive rationality. By intuitive rationality I mean an exercise of judgment that is not explained, or perhaps explainable, through a reasoned connection of value premises and factual findings." *Id.*

246. See ENCYCLOPEDIA OF PSYCHOLOGY 605 (D. Benner ed. 1985) (citing H. KOHUT, *THE RESTORATION OF THE SELF* (1977)) (defining intuition as "observation conclusions that occur very quickly of an unconscious level").

247. For whatever it is worth, recent social psychology research has demonstrated that a conscious, rational mental process does not always lead to a better decision. See generally S. FISKE & S. TAYLOR, *SOCIAL COGNITION*, 399-402 (2d ed. 1991). One recent study is particularly interesting. Wilson & Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preference & Decisions*, 60 J. OF PERSONALITY & SOC. PSYCHOLOGY 181, 190 (1991). The researchers evaluated certain types of choices in terms of the subjects' satisfaction and found that "rational" decisionmaking produced inferior choices in terms of the *subjective* preferences of those subjects. One study, evaluating student course selection, suggested that some choices might be *objectively* inferior as well. That study found that the "rational" choices were inferior to the "intuitive" choices when measured against the opinions of the faculty and the recommendations of students who have previously taken the course.

selecting the drapes than setting out the characteristics of the "correct" drapes and then trying to pick the drapes according to that description.

The equivalent of intuitive judgment in a bureaucracy is combining various talents and strengths in a group decisionmaking process. This blending of decisionmaking elements creates what might be called "decisional synergism."²⁴⁸ Blending the experience and knowledge of a number of individuals develops a better decision than does the sum of each individual's experience and expertise.²⁴⁹

One of the advantages of the administrative process is that it can create diverse groups of decisionmakers and bring them to bear in a variety of combinations, producing the synergistic effect necessary to the exercise of inherent discretion. Just as an individual thinking intuitively synthesizes an immeasurable array of data, an administrative process can bring together a variety of instincts, values, sensitivities, experience, and knowledge. The administrative process replicates that mental process by bringing together people who are likely to represent this complex array of factors. Just as we might feel more confident with an interior designer's choice of drapes, we look to the design of the institutional decisionmaking process to assure the best resolution of this type of discretion.

There is a tendency to view the exercise of inherent discretion as the suspension of reasoned or considered decisionmaking. However, when correctly applied, it is not only a proper administrative function, it is also one of the strengths of the administrative process. A court that fails to allow for such decisionmaking robs the administrative process of its richness and eliminates one of its greatest strengths.

Finding that the decision involves such discretion, the court must take care. Since it cannot judge the exercise of inherent discretion according to any standard, it can only destroy the vitality of the exercise if it attempts to interfere. By its nature, only one authority can exercise such discretion.²⁵⁰ If the court attempts to evaluate the administrative exercise, it will in essence be substituting its judgment for that of the agency intended to

248. Koch, *Confining Judicial Authority Over Administrative Action*, 49 MO. L. REV. 183, 213 (1984).

249. S. BREYER, *supra* note 48, at 112 ("The Environmental Protection Agency, for example, divided the problem of setting water pollution standards among several of its divisions; it staffed different divisions with people possessing different professional backgrounds (lawyers, business graduates, scientists); and it deliberately encouraged argument among them, in hope of giving top decision makers a more objective view."). As another observer of the administrative process expressed it: "Bureaucracy . . . is not an impersonal machine but a social system, a way of mobilizing all aspects of the human personality in order to transform individuals into a functioning group." Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1318 (1984).

250. Maurice Rosenberg called this sense of discretion "primary discretion." The choice made by a person exercising primary discretion, he contended, is by definition the "correct" choice. The correctness of the choice cannot be attacked because there are no external criteria on which to base such an attack. Rosenberg, *supra* note 231, at 639-40.

exercise the judgment.²⁵¹ The drafters of the FAPA understood this and built it into the concept of unreviewability: "Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning."²⁵²

The court simply cannot review the exercise of this discretion as such in the way it reviews all other issues. As Dworkin said of "strong" discretion: "An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority. . . ."²⁵³ Further, Jaffe suggests that the agency "may freely use all permissible elements, though an excessive emphasis on one to the exclusion of other elements may be an 'abuse of discretion.'"²⁵⁴ Evidence must be available that the agency included all relevant factors in the exercise.

Most importantly, however, the court must assure that the decision resulted from the proper and anticipated mix of decisionmaking elements in order to take the fullest advantage of decisional synergism. Thus, it must assure that the process meaningfully incorporated all the different instincts, expertise, and values that the legislature intended to be brought to bear on the question, or that should ordinarily be brought to bear, where the legislature has not demonstrated an intent. The court must also assure the integrity of the process. The exercise of discretion must not be made in an environment of bias or political pressure.²⁵⁵ Nonetheless, as to the exercise of inherent discretion itself, review is precluded by the nature of the decisionmaking itself.²⁵⁶

251. To see the rationale behind this proposition, consider the situation in which a statute instructs an agency to distribute benefits by lottery. The court simply could not "review" the core decision without destroying the random result. Inherently unreviewable discretion is not the result of random choice but it is similar in that the court cannot interfere without destroying the intended decisionmaking process.

252. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), reprinted in LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 275 (1946).

253. R. DWORKIN, *supra* note 195, at 33.

254. L. JAFFE, *supra* note 76, at 556.

255. 2 KOCH, *supra* note 2, at 153-54.

256. Ronald Levin contended that administrative decisions are always reviewable. Levin, *supra* note 219, at 693. The misunderstanding stems from a failure to view administrative decisions as a bundle of issues. An issue, even a pivotal issue, in a particular decision may be resolved by the exercise of inherently unreviewable discretion and yet the decision may include resolution of other reviewable issues. Where the agency's resolution of these other issues is not disputable, the only controverted issue will involve inherently unreviewable discretion. In which case, the particular decision will be totally unreviewable but need not have been.

Levin noted my example of the infamous FDA peanut butter rule. *Id.* at 694 n.22. I observed that the real problem with the peanut butter rule was not the procedures but the nature of the issue the FDA was trying to resolve through the procedures. Koch, *supra* note 137, at 504-05 (1986). It simply could not demonstrate the correctness of the choice between 90 percent and 87½ percent as the appropriate level of peanuts in peanut butter. No matter how much procedure it employed, ultimately the choice had to be the result of its institutional process. Because of the nature of the choice, a court could not review that choice. True, a court could ask whether the choice was within FDA's legal authority, for example, but that was not controverted. In a sense then, the decision was potentially reviewable for

Conclusions about review of discretion

In sum, “well-established principles of administrative law” suggest that a court reviewing “discretion” must take care about the meaning of the term. Agencies have dominance over issues of discretion, but the range of dominance among the possible uses of that term is substantial. Justice Marshall in *Curtin Matheson* used the term in its general sense of broad authority and substantial decisionmaking freedom. The proper review of any given exercise of discretion must be guided by the specific nature of the delegated authority and the intended decisionmaking freedom.

VIII. CONCLUSION

The “well-established principles of administrative law” for defining judicial authority over administrative decisions have not kept up with the massive changes in administrative law over the several decades since they became established. The review strategy courts currently are attempting to apply fails so often, especially in complex review situations, that in reality judges find little useful guidance from the present system. This article is a call to reformulate the inquiry; to ask again the basic questions about the proper allocation of decisionmaking authority between the courts and the bureaucracy; to derive from such questions a more flexible and precise means of expressing judgments about this allocation.

An improved review system must recognize that any given decision involves the resolution of a bundle of issues. Each issue in this bundle may require a separate review strategy. Defining review in minute detail, depending perhaps on differing substantive questions, is impossible and hence the review strategy must depend on groupings of issues. This article identifies issue categories and suggests the proper allocation of decisionmaking authority in each category. In doing so, it relies on various judicial efforts to shift to an issue-driven review strategy in those cases where the well-established review principles are not equal to the task. Thus, legal authority is currently available that will support a shift to an issue-oriented system. By providing form and support for this emerging review system, this article offers a foundation for a comprehensive issue-driven review strategy.

that and other issues but the pivotal issue, whether peanut butter should have 90 percent or 87½ percent peanuts, could not be reviewed.