Judicial Deference to Agency Action

*By Thomas W. Merrill**

One of the most important questions in administrative law concerns how closely and critically judges review action taken by administrative agencies. This is often said to be the question of what "scope of review" courts will use in assessing a challenge to an agency decision.

Generalizing broadly, one can distinguish three types of agency determinations: findings of fact, conclusions of law, and determinations of policy. There is obviously interaction and overlap here. Views of law and policy will influence which facts are relevant, findings of fact can influence policy judgments, and questions of law shade off into questions of policy. But in principle, these types of agency determination are distinct, and are associated with different traditions regarding the appropriate scope of review.

Consider, by way of illustration, a decision of the Environmental Protection Agency (EPA) setting a standard for permissible exposure levels to air-borne mercury. The decision will include findings of fact about the effects on human health from exposure to different levels of mercury in the air. It will also include policy judgments, such as what frequency of disease or death in the population is acceptable based on exposure to air pollutants, and whether industry should be expected to incur costs in abating such pollution that exceed the expected benefits from the abatement. And it will include legal judgments about what procedures the EPA should follow in answering the factual and policy questions presented, and whether the statutes enacted by Congress constrain the policy judgments the agency must make in setting a standard. Once EPA resolves these issues, and establishes an exposure standard, its decision is likely to be challenged in court on one or more of these dimensions, either by environmental groups that think the standard should be tougher, or by industry groups that think it is too demanding. The court hearing such challenges will have to decide what the proper scope of review is as to each of the issues raised by the challengers. This will require a prior determination of whether the issue is one of fact, law, or policy.

The verbal formulas that courts employ in describing the scope of review are based on the Administrative Procedure Act (APA). Sometimes the scope of review is prescribed by a more specific statute that applies to a particular agency. But even here, Congress tends to use the verbal formulas found in the APA, and courts interpret these formulas in light of precedents based on the APA.

Questions of fact are governed by the "substantial evidence" standard when the agency decision is based on a record complied at a hearing; otherwise fact questions are reviewed under the "arbitrary, capricious or abuse of discretion" standard.[1] Questions of policy are governed by the "arbitrary, capricious or abuse of discretion" standard.[2] Questions of law, according to the APA, are to be resolved by the court itself exercising independent judgment. The APA says: "[T]he reviewing court shall decide all relevant questions of law," and shall hold unlawful and set aside agency action that is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law."[3] As we shall see, the Supreme Court has significantly modified—some would say ignored—the APA's provisions regarding the scope of review of questions of law.

The verbal formulas themselves do not tell us very much about the actual scope of review that courts apply in reviewing agency decisions. The real question in every case is how much deference the court will give to executive or agency determinations. The possibilities here range along a spectrum, from complete deference, on the one hand, to complete substitution of judgment, on the other. Nearly everyone recognizes that some issues belong at one end of the spectrum or the other. The President's decision about who he will nominate to serve as the head of a department or agency would be regarded by everyone as one as to which the courts will give complete deference. It is said to be a "political question" or "unreviewable." A question about whether an agency was constituted in an unconstitutional manner, perhaps because the head of the agency was not properly appointed by the President, would be recognized by nearly everyone as something the courts should decide independently, without giving any weight to the views of the agency. Courts here are said to exercise "independent judgment" or to decide the question "de novo." The history of administrative law, very broadly speaking, has witnessed an evolution from a world in which most exercises of judicial review clustered around one of the two poles—courts either refused to review administrative action at all or decided matters or themselves—to one in which most action by administrative agencies falls somewhere in between these two poles. Courts will generally review agency action when it is challenged by an aggrieved party. But in doing so, the courts will give some weight or deference to the views of the agency, rather than simply deciding the matter themselves.

A critical question in the great preponderance of administrative law cases, therefore, is just how much deference courts should give to the agency along the particular dimensions of the particular agency decision that has been challenged. This question is answered not so much by the verbal formulas employed as by applying loose conventions developed by courts in reviewing agency decisions. The U.S. Supreme Court plays a leading role in establishing these conventions. Lower court judges, agencies, and lawyers attend carefully to the Supreme Court's decisions reviewing agency action. One or two Supreme Court decisions do not necessarily establish a convention. But a reasonably consistent pattern of review by the Court over time defines an attitude or "mood"[4] about how much deference to give to agency determinations of fact, policy, and law. Other legal actors emulate this attitude or mood. The result has a significant impact on the distribution of power among the branches within our system of government.

With respect to review of findings of fact by administrative agencies, the attitude or mood appears to be fairly stable. Whether the case calls for application of the "substantial

* *Thomas W. Merrill is a Professor of Law at Yale University.*

evidence" standard, or the "arbitrary, capricious, or an abuse of discretion" standard, the courts will give very considerable deference to the fact findings of administrative agencies. Deference is not as great as has traditionally been applied in reviewing jury verdicts. Jury verdicts will be set aside only if the reviewing court is convinced that no rational person could find as the jury did. Agency fact findings are probed a bit more deeply. Where agency findings concern scientific or technical questions as to which agencies presumably have greater expertise than courts, courts probably give agencies more deference than they would give to a trial judge on review of fact findings in a bench trial.

The Supreme Court seemed like it might unsettle this stable convention in *Allentown Mack Sales and Service v. NLRB*.[5] The opinion for the Court, by Justice Scalia, sent a mixed message. On the one hand, the opinion explicitly equated the "substantial evidence" standard with the convention that applies in reviewing jury verdicts.[6] As we have seen, the understanding that had evolved before *Allentown Mack* was that courts would apply somewhat more searching review to findings by agencies than they traditionally have done to juries. On the other hand, the Court's opinion gave very close scrutiny to the National Labor Relations Board's findings in the case—a far more intense criterion than conventionally applies to jury verdicts, and indeed, more intense than has traditionally been applied to agency fact finding. Subsequent decisions, however, both of the Supreme Court and of lower courts, have not treated *Allentown Mack* as changing the established scope of review. The decision illustrates the proposition that one Supreme Court decision does not establish a convention, at least insofar as scope of review is concerned. As things presently stand, there is no indication that the Court is posed to change the scope of review for questions of fact. Very substantial deference to agencies remains the watchword.

The story with respect to review of policy decisions is different. The APA indicates that courts should apply a deferential "arbitrary and capricious" standard to agency policy decisions. What this was originally understood to mean is not entirely clear, although the verbal formula seems to invoke the very great deference that courts traditionally have given to trial management decisions by trial judges, for example decisions ruling on the admissibility of evidence. Starting in the 1970s, however, lower courts, especially the Court of Appeals for the D.C. Circuit, began applying a much more demanding scope of review to agency policy decisions. This came to be known as the "hard look" doctrine.[7] The idea was that agencies were required to take a "hard look" at certain policy implications of their decisions, and that courts would monitor the explanations provided by the agency in order to satisfy themselves that the agency had given these implications the attention they deserved. This nebulous idea eventually congealed into the understanding that agencies had to support their policy determinations with detailed reasons, especially in response to objections raised by interested parties in the administrative proceedings.

In an important decision in 1983, *Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co.*,[8] the Supreme Court appeared to endorse the "hard look" concept. The Court overturned a decision of the National Highway Traffic Safety Administration for failing to address adequately certain objections to rescinding an automobile safety standard. In the ensuing years since *State Farm*, criticisms of "hard look" review have mounted. Critics have noted that it is always possible to write a more complete explanation for any action; consequently, the standard permits courts to second-guess almost any administrative decision they do not like. "Hard look" review also creates incentives for agencies to conduct elaborate inquiries and write lengthy statements justifying their actions. This has led to the claim that this style of review has produced an "ossification" of the regulatory process. Agencies do not issue as many regulations as they should to provide guidance to the public, or they seek to evade judicial review by making policy in surreptitious ways that fly beneath the radar screen.

The Supreme Court has never acknowledged these criticisms. Nor has it repudiated *State Farm*. After *State Farm*, however, the Court avoided applying anything like full-blown "hard look" review in any decision. To some extent, this may reflect the Court's perception that "hard look" issues are specific to individual controversies, and do not present the kind of general legal issue that the Court ordinarily grants review to resolve. Nevertheless, it is probably the case that few if any of the current justices holds a strong brief for perpetuating aggressive "hard look" review. Given the persistent academic criticism, it is not inconceivable that the Court will reconsider the doctrine sometime in the future. Whether the Court reaffirms "hard look" review or trims it back may well depend on whether future justices are sensitive to the costs of demanding too much of agencies, and are aware of the potential for judicial manipulation that this creates.

By far the most controversial set of issues about the scope of review concerns questions of law decided by agencies. The APA, as we have seen, appears to reflect the understanding that courts should decide questions of law—at least "pure" questions of law as opposed to questions involving the application of law to particular facts—independently, without deferring to the views of administrative agencies. In the decades following the adoption of the APA in 1946, some inroads were made on this understanding. Courts would defer to agency interpretations if they were adopted contemporaneously with the enactment of the statute, or if they had been consistently maintained for a long time, on the ground that these sorts of interpretations probably reflect congressional intent. And courts would defer to agency interpretations when Congress had explicitly delegated authority to an agency to interpret and statutory term. But the basic understanding remained that ordinarily courts would interpret statutes independently, thereby providing a check on the exercise of agency discretion.

Then, in 1984, the Court announced what appeared to be a very different understanding of the scope of review of questions of law. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] the Court reaffirmed that courts should examine statutes independently, using traditional tools of statutory interpretation, in order to determine whether Congress had resolved the "precise question at issue."[10] But if the statute was silent or ambiguous on the question, courts should defer to the agency's interpretation, provided it was a reasonable or as the court said "permissible" reading.[11] This seemingly

shifted authority dramatically from courts to agencies over matters of statutory interpretation. Previously the Court had recognized that courts should defer to agency interpretations when Congress has explicitly delegated authority to interpret to an agency; *Chevron* seemed to say that Congress should be deemed to delegate authority to interpret to an agency whenever it leaves a gap or ambiguity in a statute that the agency is charged with administering.

The *Chevron* doctrine has blossomed into the most frequently litigated and hotly debated issue in administrative law. *Chevron* itself gave multiple reasons for why agencies should have primary authority in resolving gaps or ambiguities in statutes. The Court mentioned the traditional view that agencies have greater expertise, particularly in interpreting technical provisions with which they have greater familiarity.[12] It also mentioned the superior accountability of agencies to the public, given that agencies answer to the President, who is elected by all the people.[13] A third explanation was that Congress, by delegating authority to make policy judgments to the agency, should be understood also to want statutory gaps and ambiguities resolved primarily by the agency, because the process of filling gaps and resolving ambiguities also entails resolving policy questions.[14] In recent years, the Court has had to face a number of difficult issues about the meaning and scope of the *Chevron* doctrine. For example, the Court has had to decide whether agency interpretations must be announced in a proceeding that has the "force of law" in order to receive *Chevron* deference, or whether interpretations that are merely advisory such as opinion letters or amicus briefs are also entitled to such deference. In *United States v. Mead Corp.*,[15] the Court indicated that interpretations rendered in proceedings that lack the "force of law" are not entitled to *Chevron* deference. But the Court's opinion, written by Justice Souter, was unclear as to the rationale for this limitation, as was its understanding of the meaning of "force of law."

Whatever its rationale and scope, *Mead* effectively creates three tiers of deference in matters involving questions of law. If the conditions for *Chevron* deference are met, then courts must accept reasonable agency interpretations of statutory gaps and ambiguities. If *Chevron* does not apply, and the issue is one as to which the agency has special expertise, then Courts are to ask whether the agency interpretation is "persuasive," given a variety of contextual factors such as the consistency with which the interpretation has been maintained by the agency. This is known as *Skidmore* deference.[16] Finally, if neither *Chevron* nor *Skidmore* applies, perhaps because the statute applies to all agencies and hence no agency has any special expertise in the matter, then courts are to interpret the statute without giving any deference to agency views.

Another vexing issue concerns the question whether agency interpretations trump judicial interpretations rendered before the agency has offered an interpretation eligible for *Chevron* deference. Decisions reached shortly after *Chevron* was decided held that agency interpretations must yield to prior judicial interpretations. Then the Court reversed course, and in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[17] held that agency decisions trump prior judicial interpretations, provided the agency interpretation otherwise qualifies for *Chevron* deference. Many variations on this question remain undecided, such as what happens when a court upholds an agency decision applying *Skidmore* deference, and then the agency changes its mind in a decision entitled to *Chevron* deference.

A third troubling issue, which remains unresolved, is whether agency decisions interpreting statutes to preempt state law are entitled to *Chevron* deference. Preemption is grounded in statutory interpretation, but it also has major consequences for the division of powers between the federal government and the states. In particular, a determination of preemption displaces state authority in the area preempted, leaving the federal government with a monopoly of regulatory authority. Agency expertise is relevant here, because agencies have a good sense of what impact the continued application of state law will have for a federal regulatory scheme. But state interests may not be well represented or well served by federal agencies, and states may not easily accept agencies as having primary authority over preemption questions. The question whether *Chevron* applies in this context was raised but not reached in *Watters v. Wachovia Bank, N.A.*[18] Three dissenting justices (Stevens, Roberts and Scalia) reached the issue and said *Chevron* should not apply here.

Questions about the scope of the *Chevron* doctrine do not divide justices along familiar ideological lines. Three distinctive perspectives can be discerned on the Court.

One perspective, which is associated most closely with Justice Clarence Thomas, resolves these issues by attending to the logic of implied delegation. This perspective understands *Chevron* to be grounded in a delegation from Congress to the agency to make policy, including the resolution of gaps and ambiguities in the statute the agency administers. The implied delegation theory strongly suggests that *Chevron* should be limited to occasions when an agency exercises its delegated power by acting with the force of law, and that agency interpretations that reflect an implied delegation should trump prior judicial interpretations. Justice Thomas's majority opinions in *Christensen v. Harris County*,[19] a precursor of *Mead* and *Brand X*, are clear examples of this perspective.

Another perspective, which is associated with Justice Antonin Scalia, would resolve these issues by treating *Chevron* as a simplifying rule about the appropriate scope of review of questions of law. The virtue of *Chevron*, from this perspective, is that it eliminates much of the clutter that has complicated the determination of the appropriate scope of review, notwithstanding the apparent simplicity of the APA. Courts should determine whether the statute has a clearly preferred meaning. If it does, that is the meaning they should enforce. If it does not, they should defer to any reasonable official agency interpretation. Consistent with this perspective, Justice Scalia dissented in both *Mead* and *Brand X*. *Mead*, according to Justice Scalia, created undue complexity in determining the scope of review. *Brand X* he disparaged for creating unnecessary instability and devaluing judicial authority.

A third perspective, associated perhaps most clearly with Justice Breyer, sees *Chevron* as just one decision in a larger universe in which the scope of review of questions of law is driven by a mix of pragmatic factors. This perspective in effect

driven by a mix of pragmatic factors. This perspective in effect treats *Skidmore* as the true expression of the scope of review, with courts weighing the persuasiveness of agency interpretations case by case, looking to multiple factors.[20] *Chevron* simply emphasizes one factor—whether authority to interpret as been delegated to the agency—but was not intended to eliminate other factors. This perspective, by denying that there is anything distinctive about the *Chevron*, has the effect of muddying questions about the scope of review, to the point where no structure can be discerned at all.

CONCLUSION

Future appointments to the Supreme Court will undoubtedly have an important effect on the shape and scope of the *Chevron* doctrine. As is revealed by the distinctive perspectives of Justices Thomas and Scalia on these issues, it is difficult to predict how larger jurisprudential commitments will translate into positions on the scope of review of administrative action. Justice Thomas's clear commitment to the implied delegation conception of *Chevron* may provide the most promising basis for achieving coherence in this area of the law. His views are grounded in a plausible reading of *Chevron* and leading post-*Chevron* decisions, they reflect a rigorous commitment to the logic of those decisions, and they have commanded the support of a majority of justices in recent critical cases, such as *Chrestensen* and *Brand X*. Justice Scalia has been unable to convince any other justice to embrace his perspective on the nature and scope of *Chevron*. And Justice Breyer's rootless pragmatism seems to invite courts to do whatever they want to do, rather than delineate a sound conception of proper institutional roles between reviewing courts and agencies.

Endnotes

1 *See* 5 U.S.C. § 706(2) (E); id. § 706(2)(A).

2 *Id.* § 706(2)(A).

3 5 U.S.C. § 706; id. § 706(2)(C), (D).

4 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (observing that Congress in adopting the "substantial evidence" formula for review of fact questions did not change the verbal formula but evidenced a "mood" that required a more searching scope of review than had been applied in the past).

5 522 U.S. 359 (1998).

6 *Id.* at 366-67.

7 The phrase was coined by Judge Harold Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

8 463 U.S. 29 (1983).

9 467 U.S. 837 (1984).

10 *Id.* at 842.

11 *Id.* at 843.

12 *Id.* at 865.

13 *Id.*

14 *Id.* at 844.

15 533 U.S. 218 (2001).

16 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

17 545 U.S. 967 (2005).

18 127 S.Ct. 1559 (2007).

19 529 U.S. 576 (2000).

20 *See* Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (Breyer, J.).