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I. INTRODUCTION

When a court has before it a question of statutory interpretation, what difference does it make, or should it make, that the provision has previously been construed by an administrative agency? The court, we know, has the final say, but should it give weight to the administrative interpretation, even though that interpretation may not be the one which the court itself would have placed on the statute (a limited scope of review)? Or should an independent judgment be reached by the court as to its meaning? Put in a different way, is the court's function to decide how, as an original proposition, it would construe the statute, or should the court go no further than determining whether the agency's interpretation is reasonable? The field is one of great uncertainty in which equally impressive cases may be found to cite in favor of deferring to the determination of the administrator or giving it no weight whatever.

Where they have given weight to the agency's determination, courts have used a variety of expressions to describe how much weight: the agency's determination is to be accepted if it has " 'warrant in the record' and a reasonable basis in law";[1] the proper scope

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1. NLRB v. Hearst Publications, 322 U.S. 111, 131 (1944).

is one of "rational basis";[2] "serious deference" must be given to the administrator's determination;[3] the agency's interpretation is "entitled to respect";[4] the agency's definition should be affirmed "if that definition does not appear too farfetched";[5] constructions of statutes by those charged with the administration of the statute must be sustained "unless unreasonable and plainly inconsistent with the . . . statutes."[6] Whatever the expression used, the essential meaning is that the administrator's interpretation will be upheld if it is "reasonable."[7]

The federal Administrative Procedure Act[8] provides that: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action."[9]

While it is clear that the ultimate decision on the interpretation of a statute belongs to the judiciary, the legislative prescriptions of procedure shed no light upon whether the court, in making its determination, should give weight to the agency's prior construction of the provision. For the answer to that question, one must resort to the court decisions.

II. SOME PROPOSED ANSWERS

Let us begin with Judge Friendly's observation in a recent case:

> We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion. . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a Court of Appeals must choose the

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2. Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934).
3. National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 484 (1979).
4. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
5. NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956).
6. Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting with approval Commissioner v. South Tex. Lumber Co., 333 U.S. 496, 501 (1948)).
7. Speaking for the Court, Mr. Justice Stewart put it this way in Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968):

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law.". . . But the courts are the final authorities on issues of statutory construction . . . and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

8. 5 U.S.C. §§ 551-706 (1982).
9. *Id.* § 706.

one it deems more appropriate for the case at hand.[10]

Not only are there two conflicting lines of decision — one line deferring to the determination of the administrator,[11] the other reaching an independent judgment[12] — but the Court has also given no consistent rationale as to why it sometimes uses one approach and sometimes the other.[13] This situation has provided commentators with an opportunity for extensive debate on the subject resulting in a number of suggested theories from which one may plausibly choose.[14]

The conventional approach in determining the scope of review has been to attempt to distinguish between findings of fact and conclusions of law.[15] Questions of law are to be determined by the court, while determinations of facts, if supported by substantial evi-

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10. Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (referring to 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01-.09 (1958 & Supp. 1970)).

11. Some of the leading cases supporting the view that deference must be given to the decisions of an administrative agency are NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); Rochester Tel. Corp. v. U.S., 307 U.S. 125 (1939).

12. Among the cases sanctioning the exercise of independent judgment by the court are Morton v. Ruiz, 415 U.S. 199 (1974); Barlow v. Collins, 397 U.S. 159 (1970); NLRB v. Highland Park Co., 341 U.S. 322 (1951); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

13. In some cases, for example, the Court has explained its independent approach on the ground that the issue was a question of law. Barlow v. Collins, 397 U.S. 159 (1970); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

Yet in cases like O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), and Bates & Guild Co. v. Payne, 194 U.S. 106 (1904), where the question was recognized to be largely one of law, the Court did not take an independent approach.

In Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944), the Court explained its independent approach on the ground that the administrative agency used the wrong "factor" in making its decision.

Occasionally, the question of independent approach vis-a-vis a deferential approach has been said to turn on whether the agency interpretation is "consistent with the Congressional purpose." Morton v. Ruiz, 415 U.S. 199 (1974).

Some cases justify taking a deferential approach either on the ground that the issue is a question of fact, Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939), or that it belonged to the "usual administrative routine," Gray v. Powell, 314 U.S. 402 (1941), or that the decision calls for administrative expertise, National Muffler Dealers Ass'n., Inc. v. United States, 440 U.S. 472 (1979); NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956).

14. *See infra* text accompanying notes 38-50.

15. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.08 (1958); GELLHORN, BYSE & STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 251 (7th ed. 1979); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546 (1965). The Administrative Procedure Act provides that "the reviewing court shall decide all relevant questions of law." 5 U.S.C § 706 (1982).

dence, are appropriately left to the administrative agency.[16] But Professor Dickinson long ago pointed out the weakness of relying upon this distinction. As he says:

> In truth, the distinction between "questions of law" and "questions of fact" really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law. . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of "fact"; and when otherwise disposed, they say that it is a question of "law."[17]

Professor Dickinson's observations are aptly demonstrated by *Rochester Telephone Corp. v. United States*.[18] There the issue was whether one corporation was "controlled" by another. The Court stated: "This is an issue of fact to be determined by the special circumstances of each case."[19] In a similar vein is *O'Leary v. Brown-Pacific-Maxon, Inc.*[20] which arose under the Longshoremen's and Harbor Workers' Act.[21] That act authorizes payment for accidental injury or death "arising out of and in the course of employment."[22] The question was whether a drowning, which occurred during a rescue attempt in a channel near a recreational center maintained by the employer, "arose out of and in the course of [the employee's] employment."[23] Speaking for the Court, Mr. Justice Frankfurter said:

> The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of "fact." Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term "fact." Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least

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16. *See supra* notes 13 & 15.

17. J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) (emphasis in original).

18. 307 U.S. 125 (1939).

19. *Id.* at 145 (followed in Alleghany Corp. v. Breswick, 353 U.S. 151, 169 (1957)).

20. 340 U.S. 504 (1951).

21. 33 U.S.C. § 901 (1976).

22. *Id.* § 902(2).

23. *O'Leary*, 340 U.S. at 506.

> the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."[24]

In contrast with the two previous decisions is a case arising under the National Labor Relations Act.[25] Section 10 of that Act empowers the National Labor Relations Board, when it finds that an unfair labor practice exists, to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.[26] The term "employee" was defined to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . ."[27] The Court reversed the Board's order to reinstate employees who had engaged in a "sit-down" strike, saying, by way of explanation: "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work."[28] Here, the Court treated the issue of whether the term "employee" applied to such persons as a legal question.

Similarly, in a more recent case,[29] a statute permitted participating farmers to assign their payments only as security for cash or advances to finance "making a crop."[30] The Secretary of Agriculture had issued regulations permitting assignments to secure the payment of cash rent for land used in farming.[31] When the regulations were challenged in court, Mr. Justice Douglas stated that the statute, authorizing the Secretary to promulgate such regulations "as he may deem proper," did not commit the task of defining "making a crop" entirely to the discretionary judgment of the Secretary. "On the contrary," according to Douglas, "since the only or principal dispute

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24. *Id.* at 507-08.
25. 29 U.S.C. §§ 151-69 (1976).
26. *Id.* § 160(c).
27. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 152(3) (1976)).
28. NLRB v. Fansteel Metallurigical Corp., 306 U.S. 240, 255 (1939).
29. Barlow v. Collins, 397 U.S. 159 (1970).
30. Act of Nov. 3, 1965, Pub. L. 89-321, 79 Stat. 1187 (1965).
31. 31 Fed. Reg. 2815 (1966) (codified at 7 C.F.R. § 709 (1983)).

relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction."[32]

Is the question one of law, or is it a question of fact, when, for example, as in *NLRB v. Hearst Publications, Inc.*,[33] the statute uses the term "employee" and the issue is whether newsboys are covered by that term.[34] When examined from one angle, it appears to be a determination of fact as to whether newsboys are employees; from the other angle it appears to be a question of law—whether "employee" covers newsboys.

The question is an old one. Holmes and Thayer debated the issue in describing the function of the jury in negligence cases.[35] Thayer viewed the jury function as simply drawing further inferences from the facts at hand, "namely, the behavior, in a supposed case, of the prudent man."[36] Holmes, on the other hand, thought each case involved the determination of a "standard of conduct" and that even though this was left to the jury it was in reality a conclusion of law.[37]

The process that goes by the name of "interpretation," Pound has suggested, actually encompasses two separate steps: (1) determining the meaning of the statute as it was framed and with respect to its intended scope; and (2) applying to the facts at hand the provision so interpreted.[38] Professor Brown would utilize this line of demarcation in partitioning authority between court and agency:

> [T]he interpretation or definition of [a statute] is a matter of "law" properly for courts. On the other hand, when the law is capable of no further definition, the question whether the facts of the particular case meet the legal norm is a matter of fact and for the fact-finding agency.[39]

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32. Barlow v. Collins, 397 U.S. 159, 165-66 (1970).

33. 322 U.S. 111 (1944).

34. *Id.* at 113.

35. J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898); O.W. HOLMES, THE COMMON LAW (1881).

36. *See* THAYER, *supra* note 35, at 228.

37. *See* HOLMES, *supra* note 35, at 126.

38. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 106-09 (1922).

39. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 904 (1943). *See also* DICKINSON, *supra* note 17, at 313-14. The distinction lies "between the task of establishing a definition, and that of saying whether or not particular facts correspond with it. The former is the question for the court, the latter is for the fact-finding body." Professor Schotland expresses a similar notion: The "general construction of a statute wholly independently of the particular controversy at bar" is for the courts, while apply-

To attempt to determine the meaning of the statute independently of the facts at hand would be unrealistic. To the extent that a statute has meaning independently of the facts, that meaning will generally be evident and need no interpretation.[40] In most cases, an issue of interpretation arises only because there is a question as to whether the statutory provision is applicable to the facts presented.

Nearer to the truth is the description of the decisional process as (1) the finding of the existence of facts of a "basic" or underlying nature; (2) from these basic facts, finding the ultimate facts according to the language of the statute; and (3) from this finding the decision will follow by the application of the statutory criterion.[41] Consider the example of the question in the *Hearst* case,[42] whether newsboys were "employees" within the meaning of the National Labor Relations Act. The NLRB found that the newsboys were in charge of streetcorner stands. Hearst assigned the street corners, allocated the newspapers among the newsboys, and fixed the price at which the newsboys were to sell the papers to the public. Hearst also prescribed the hours of work and imposed certain sanctions on the tardy and the delinquent.[43] All of these findings were certainly findings of fact. But there remained the question whether, assuming the facts to be true, the newsboys were "employees." It is this final step in the decisional process that causes doubt and confusion. "Finding so-called ultimate 'facts,' " said Mr. Justice Frankfurter, "more clearly implies the application of standards of law."[44]

Professor Byse advances the suggestion that the proper scope for the reviewing court is to decide independently whether the agency was entitled, in making its decision, (1) to consider a particular factor; or (2) to give a particular factor controlling weight; or (3) to refuse to consider a possibly relevant factor.[45] This is necessary, he reasons, to determine whether the administrator's action is consistent with the particular statute and the congressional purpose. If the fur-

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ing a statute so interpreted to the particular facts at bar is mainly for the agency. Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference, March 18, 1974*, 34 FED. B.J. 54, 58 (1975).

40. For a fuller discussion of this issue, see the author's article, Coffman, *Essay on Statutory Interpretation*, 9 MEM. ST. U.L. REV. 57 (1978).

41. Saginaw Broadcasting Co. v. FCC, 96 F.2d. 554, 559 (D.C. Cir.) *cert. denied*, 305 U.S. 613 (1938).

42. 322 U.S. 111 (1944).

43. *Id.* at 116-19.

44. Baumgartner v. United States, 322 U.S. 665, 671 (1944).

45. Byse, *The Availability and Scope of Judicial Review of Administrative Action by Ordinary Courts*, LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNOLOGICAL REVOLUTION 543, 559-65 (J. Hazard & W. Wagner, eds., 1974).

ther step of applying the factors to the facts presented is necessary for the agency to reach a determination, the scope of review as to the agency's determination in that instance is limited.[46]

To Professor Jaffe, the controlling principle is that when the judges are convinced that a certain reading, or application, of the statute is the correct—or the only faithful—reading or application, they should intervene and so declare.[47] Where the result of their study leaves them without a definite preference, they can and often should abstain from interfering if the agency's preference is "reasonable."[48]

Still others have suggested that expertise—the comparative qualifications of agency and court in resolving the issue—should be the guide.[49]

Professor Davis concludes that the court's choice between substituting its judgment for that of the agency's and using the reasonableness test is not guided by any explicit theory but depends upon judicial discretion.[50]

None of these approaches affords a very satisfactory guide on which administrators or lower courts may rely in construing statutory language. Hence this search for a better framework of analysis.

III. A DIFFERENT ANALYSIS

Before proceeding to a discussion of a different framework for analysis, a preliminary observation should be made. It is clear that a court will determine independently (1) the meaning of a statute which applies to more than one agency;[51] (2) whether a given statute should be given retroactive effect;[52] or (3) which of two inconsistent statutes applies to the facts presented.[53] The reasons for this are clear. In the case of a statute that is applicable to more than one

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46. *Id.* at 565-67.

47. L. JAFFE, *supra* note 15, at 572 (1965).

48. *Id.*

49. NLRB v. Highland Park Mfg., 341 U.S. 322, 326-28 (1951)(Frankfurter, J., and Douglas, J., dissenting); *See also* J. LANDIS, THE ADMINISTRATIVE PROCESS 145-49 (1938).

50. K. DAVIS, *supra* note 15, at § 30.08 (1958); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 30.00 (1976).

51. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (Freedom of Information Act, 5 U.S.C. § 552 (1982)); General Electric v. Gilbert, 429 U.S. 125 (1976) (Civil Rights Act of 1964, 42 U.S.C. § 2000a through h-6 (Supp. V 1981); Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (Endangered Species Act, 16 U.S.C. § 1531-43 (1982)).

52. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978); United States v. Lindsay, 346 U.S. 568 (1954).

53. Although no case has been found on the point, independent determination of

agency, a court must give an interpretation that applies to all. Even if there were not conflicting views between agencies, it would be inappropriate to have the interpretation depend upon the agency whose decision, encompassing the issue, reached a court. In the case of a question as to whether a statute should be given retroactive effect, or as to which of two inconsistent statutes applies to a given set of facts, the issues are of a kind that make them peculiarly appropriate for judges to decide. That still leaves, however, the question which is most commonly encountered, namely, what are or should be the respective roles for the court and for the agency charged with the administration of an act in determining whether a statutory term applies to a given set of facts?

We might ask ourselves the question: Why do we insist upon judicial review of administrative actions in the first place? Our desire to have courts review administrative actions arises from the historic principle of the "supremacy of law" or " rule of law" as it is called. We want an independent assessment by the court to see that the agency has stayed within the bounds authorized by the legislature. This is the controlling principle to which the court should have regard when it reviews agency action. While it may be asserted that the "correct" interpretation of every word in a statute is necessary for the exercise of power by the administrative agency, the interpretation of certain provisions may be regarded as having special significance in determining whether the agency is acting outside its delegated power. The thesis put forward here is that the question ought not to be viewed as simply a matter of determining the meaning of the prescribed text to be arrived at by a given legal technique and therefore one which courts are uniquely qualified to decide. Instead, the question should be answered in terms of whether the particular issue is one which has been delegated to the agency for decision, or whether it is one which will determine the extent of the agency's delegation. If the former, the court should leave the agency's determination undisturbed if it is a reasonable construction, in order not to stifle effective development of policy. If the latter, the court should make an independent evaluation in order to ensure that the agency does not stray from its delegated power.

To ensure that the agency stays within its mandate, agency interpretations should be independently assessed when the limit of its discretion under the statute or any subordinate provision is at issue.

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this type of interpretive issue would appear to be equally as clear as it is in the other two types of interpretive issues mentioned.

Where, however, the statutory term involves an issue within the agency's discretion, its interpretation, if reasonable, should not be overridden.

In cases involving questions of statutory construction falling within an agency's discretion, the requirement that the "correctness" of every interpretation be subject to an independent determination by the court would cost more than we would gain. First, it would, to some significant degree, cause a diminution of administrative energy by taking from its hands responsibility for the decision. Who, from within the administrative process, has not heard an administrator say, "Well, if he is entitled to a court decision on this, there is no point in my taking any more time on it," and then proceed to a determination without the same thorough consideration of the claimant's position that he would otherwise give to it? "Responsibility," said Mr. Justice Brandeis, "is the great developer of men."[54]

At the same time, however, the interest of the judiciary is to avoid the accusation of being a rubber stamp for administrative interpretations. But courts need not go so far as to develop an interpretation of their own; it should suffice to determine that the agency's interpretation is reasonable.

It is sometimes argued that the courts must independently assign a meaning to the statute, for if the agency's interpretation is not "correct," the agency is acting illegally. This falsely assumes that words have one meaning and no other. We must recognize that the interpretation of statutes, as Mr. Justice Holmes has stated, involves not just "taking the words and a dictionary" in order to determine their meanings.[55] Nor do the types of issues of interpretation confronted in this area often present questions "of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment."[56] Rather, the appropriate construction of a statute may be a matter of policy — a matter Congress chose to delegate to an administrative body, not the courts.

IV. COURT CASES

The basis on which this notion proceeds first emerged in *ICC v. United States* ex rel *Humbolt Steamship Company*,[57] an early case

54. St. Joseph Stock Yards v. United States, 298 U.S. 38, 92 (1936).

55. Gompers v. United States, 233 U.S. 604, 610 (1914).

56. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122 (1939)(Frankfurter, J., concurring).

57. 224 U.S. 474 (1912).

under the Interstate Commerce Act.[58] That Act gave the Interstate Commerce Commission jurisdiction over carriers operating "from one State or Territory,. . . to any other State or Territory . . . or from one place to another place in the same Territory."[59] A steamship company petitioned the Commission alleging that the White Pass and Yukon Railway Company, operating in Alaska, violated the Act. The Commission, however, construed the word "territory" to include only so-called "organized territories" such as New Mexico or Arizona were at that time.[60] The steamship company instituted an action to require the Commission to take jurisdiction and to grant the relief which the steamship company requested.[61] The Commission argued that the court was bound by the Commission's interpretation and that the question of jurisdiction which the Commission had decided was as much within the scope of its authority as any other question of interpretation.[62]

The Commission's argument was based upon statements made by the Supreme Court in an earlier case,[63] where the Court was referring to a proceeding before the Commission in which the railroad carrier was the owner of extensive coal fields and had sold the coal to be delivered for a fixed sum per ton for both the coal and the transportation.[64] In that case, *New York, New Haven & Hartford Railroad Company v. ICC*,[65] argument was made to the Commission that such a fixed sum was insufficient to pay for both the cost of mining the coal and the rate of transportation the railroad charged private shippers, and therefore amounted to an "undue or unreasonable preference or advantage" contrary to section 3 of the Interstate Commerce Act.[66] The Commission held otherwise, stating that the vendor-carrier had a legal right to charge any loss that may have occurred to its account as vendor, rather than to its account as a carrier, and therefore the transaction could not be found to be a discrimination between the freight rate it charged itself and the rate it charged other

58. Act of June 29, 1906, ch. 3591, 34 Stat. 584 (codified as amended at 49 U.S.C. § 10101-11917 (Supp. V 1981)).

59. *Id.* § 1, 34 Stat. 584 (codified as amended at 49 U.S.C. § 10501(a)(2) (Supp. V 1981)).

60. *Humbolt S.S.*, 224 U.S. at 479-80.

61. *Id.* at 477-78.

62. *Id.* at 476.

63. New York, New Haven & Hartford R.R. Co. v. ICC, 200 U.S. 361 (1906).

64. *Id.* at 382.

65. 200 U.S. 361 (1906).

66. Act of Feb. 4, 1887, ch. 104, § 3, 24 Stat. 379, 380 (current version at 49 U.S.C. § 10741(b)-(d) (Supp. V 1981)).

shippers.[67] The Court stated that such an interpretation given by the Commission would be binding on the Court, invoking "the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with."[68]

In *Humbolt Steamship*, however, the Court, without so much as addressing the question whether any weight should be given the Commission's interpretation, stated categorically that Alaska was one of the Territories of the United States and ordered the Commission to take jurisdiction of the cause and proceed to the merits of the controversy.[69]

Why did the Court act in this independent fashion to apply the term "territory" to Alaska? Why was there no discussion of the Commission's first-line responsibility for interpreting the statute? If we can accurately discern the reason why the Court treated this issue in *Humbolt Steamship* differently from the way it treated the issue in *New Haven Railroad*,[70] we may have the answer to the question as to how those cases in which the Court exercised a limited review of an agency's interpretation of a statute[71] may be distinguished from those cases in which it performed an independent evaluation.[72]

The guiding principle seems to be that where a particular interpretation involves an issue as to whether the agency acted within the scope of its authority, the Court has ordinarily faced and resolved that type of issue in a substantially independent manner.[73] When the agency's scope of authority has been resolved, interpretations of statutory issues within the agency's area of discretion, if reasonable, have been favorably decided in the agency's behalf.

Thus, when the question again arose whether certain practices engaged in by a carrier constituted an "undue or unreasonable preference," the Court reaffirmed the view that the determination of that

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67. Haddock v. Delaware, Lackawanna & Western Ry. Co., 3 I.C.C. Rep. 302 (1890).

68. 200 U.S. at 402.

69. 224 U.S. at 481.

70. *See supra* text accompanying notes 63-64.

71. *See supra* note 11.

72. *See supra* note 12.

73. *See* Red Ball Motor Freight v. Shannon, 377 U.S. 311 (1964) (whether the ICC had jurisdiction over dealers in livestock and commodities who backhauled sugar in their trucks under an exception for persons transporting property in furtherance of a primary business enterprise (other than transportation) of such persons); Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957) (labor union held to be "employer" of its own workers and therefore within the jurisdiction of NLRB).

question fell to the agency's administrative discretion. In that case, *United States v. Louisville & Nashville Railroad Company*,[74] the issue was whether the railroad, by granting certain grain reshipping privileges at Nashville while refusing such privileges at Atlanta, had violated the prohibition against "undue or unreasonable preferences."[75] The lower court thought that since the facts were undisputed, the question was one of law which it should decide independently.[76] The Supreme Court reversed, however, saying:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. . . . If the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.[77]

When this analysis is applied to a recent case arising under a program for the assistance of Indians,[78] the parameters within which deference should be accorded an agency is clear. Ramon Ruiz and his wife were Papago Indians who left the Papago Reservation in Arizona to seek employment fifteen miles away at the Phelps-Dodge Copper mines. Although the Ruizes had lived away from the reservation continuously since 1940, they had not been assimilated into the dominant culture apart from employment and maintained their ties with the reservation. They were denied general assistance benefits by the Bureau of Indian Affairs on the ground that eligibility was limited to Indians living "on reservations."[79]

The Snyder Act[80] provided that the Bureau of Indian Affairs should expend such moneys as Congress might deem appropriate for the assistance of "Indians throughout the United States."[81] The annual appropriation Acts authorized assistance to "needy Indians."[82] The formal budget request submitted to Congress, the eligibility requirements in the administrative manual, as well as testimony before

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74. 235 U.S. 314 (1914).
75. *Id.* at 318-20.
76. *Id.* at 320.
77. *Id.* at 320-321 (citation omitted).
78. Morton v. Ruiz, 415 U.S. 199 (1974).
79. *Id.* at 204.
80. 25 U.S.C. § 13 (1976 & Supp. V 1981.)
81. *Id.*
82. Morton v. Ruiz, 415 U.S. 199, 207 (1974)(citing Department of Interior and Related Agencies Appropriation Act of 1968, Pub. L. No. 90-28, 81 Stat. 59, 60 (1967)).

successive appropriations subcommittees had all been to the effect that assistance of this kind was limited to Indians "on reservations."[83] On the basis of this legislative material, the Secretary of Interior took the view that Congress did not intend[84] assistance be given to Indians in the position of the Ruizes.[85] Mr. Justice Blackmun, writing for a unanimous Court, agreed that there was "some force" in the Secretary's argument but said the Court's examination of this and other materials "leads us to a conclusion contrary to that urged by the Secretary."[86] Speaking specifically to the question of whether weight should be given to an agency interpretation, Mr. Justice Blackmun stated that for deference to be granted, it must be consistent with the Congressional purpose, and that in this case it was "evident" to the Court that Congress did not itself intend to limit its authorization to only those Indians directly on, in contrast to those "near," the reservation and that therefore the Bureau of Indian Affair's interpretation must fail.[87] Authority to determine assistance eligibility of individual Indians rested with the administrative agency. Whether the agency had discretion to exclude Indians not on reservations, however, involved a question of the extent of the agency's delegated authority and was therefore appropriate for independent evaluation by the Court.

No pair of cases illustrates this principle better than two well-known decisions, often contrasted with each other,[88] *NLRB v. Hearst Publications, Inc.*[89] and *Packard Motor Car Co. v. NLRB*.[90]In both cases, the employers were subject to the National Labor Relations Act's requirement that an employer bargain collectively with the chosen representatives of his employees.[91] The term "employee" was not defined by the statute.[92] In the *Hearst* case, the employer had refused to bargain collectively with its so-called "newsboys" on the ground that they were not employees but independent contrac-

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83. *Id.* at 210-12.
84. *Id.* at 210.
85. *Id.* at 211.
86. *Id.* at 212.
87. *Id.*
88. *See, e.g.*, K. DAVIS, *supra* note 15, at § 30.06; L. JAFFE, *supra* note 15, at 558-61.
89. 322 U.S. 111 (1944).
90. 330 U.S. 485 (1947).
91. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 158(a)(5) (1976)).
92. Congress provided a more complete definition of "employee" in the Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, 137-38 (1947) (amending the National Labor Relations Act, ch. 372, 49 Stat. 449, 450 (1935) (codified as amended at 29 U.S.C. § 152(3) (1976)).

tors.[93] The NLRB, after making the specific findings of fact outlined earlier,[94] decided that the newsboys were employees and ordered Hearst to bargain with them.[95] The Supreme Court, reversing the Circuit Court of Appeals, upheld the Board's determination, stating:

> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve. . . . But where 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.[96]

The Board's determination is to be accepted, the court said, if it has " 'warrant in the record' " and "a reasonable basis in law."[97]

In *Packard*, the question concerned the right of foremen to bargain collectively[98] under the same act.[99] The company employed about 32,000 rank-and-file workmen and approximately 1,100 "foremen."[100] As a group, the foremen were stated to be highly paid and, unlike the workmen, were paid for justifiable absences and holidays.[101] The company contended the "foremen" were not "employees" under the Act and thus the company was under no duty to bargain.[102] In 1942, the Board held that foremen were statutory em-

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93. 322 U.S. at 113, 119-20.

94. *See supra* text accompanying notes 42-43.

95. 322 U.S. at 114.

96. *Id.* at 130-31.

97. *Id.* at 131. The statute was later amended to exclude independent contractors. Labor Management Relations Act, ch. 120, 61 Stat. 136, 137-38 (codified as amended at 29 U.S.C. § 152(3) (1976)).

The approach in the *Hearst* case followed in the path of the earlier case of Gray v. Powell, 314 U.S. 402 (1941), which arose under the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72 (1937). That act authorized the Bituminous Coal Division of the Department of Interior to fix minimum prices to be paid for coal but exempted from its provisions coal "consumed by the producer." *Id.* at 83. The Seaboard Airline Railroad entered into leases with certain owners and contracted with independent contractors to mine the coal with machinery which they leased from the mine owners. The railway filed an application for exemption but was turned down by the Commission as not being the "producer" of the coal it consumed and therefore not entitled to the exemption. *Gray*, 314 U.S. at 403. The Supreme Court upheld the Commission saying: "Such a determination as is here involved belongs to the usual administrative routine. . . . Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." *Id.* at 411-12.

98. 330 U.S. at 486.

99. National Labor Relations Act, ch. 372, § 8(a)(5), 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 158(a)(5) (1976)).

100. 330 U.S. at 487.

101. *Id.*

102. *Id.* at 488

ployees.[103] One year later, in *Maryland Drydock Company*,[104] the Board reversed its earlier position and held that foremen were not statutory employees. [105] Thereafter, in *Packard Motor Car Company*,[106] the Board returned to its original position.[107] The Court, in a five-to-four decision, affirmed the last determination of the Board, but not by the same approach it had used in *Hearst*.[108] Writing for the majority, Mr. Justice Jackson stated: "The question presented by this case is whether foremen are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities. . . ."[109] The Court held that they were, stating: "[I]t is for Congress, not for us, to create exceptions or qualifications at odds with [the statute's] plain terms."[110]

In both *Packard* and *Hearst*, the Board construed the same statutory term. In *Hearst*, where the question was whether newsboys were "employees," the Court stated that it must accept the Board's determination if it has " 'warrant in the record' " and "a reasonable basis in law."[111] In *Packard*, where the issue was whether foremen were "employees," the Court, although it affirmed the Board's decision, did so on the basis of an independent interpretation of the statute. The four dissenting justices also made a categorical determination that foremen were not and could not be "employees" under the Act.[112] Because their unionization may create conflict of interest on matters of labor relations, the question of whether supervisory employees, as a general matter, are protected by the Labor Act is a determination necessary to establish an important point of reference from which the Board's discretion may be determined. If the underlying premise of this discussion is correct, this is the very type of issue on which we desire an independent evaluation by the Court. When, on the other hand, the same word "employee" is read in the context of an issue on the periphery of the area of concern — whether it covers specific newsboys— a determination one way or the other does not have the same significance in seeing that the agency stays within its mandate.

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103. Union Collieries Coal Co., 41 N.L.R.B. 961, 969 (1942).
104. 49 N.L.R.B. 733 (1943).
105. *Id.* at 741-42.
106. 61 N.L.R.B. 4 (1945).
107. *Id.* at 26.
108. *See supra* text accompanying note 96.
109. 330 U.S. at 486.
110. *Id.* at 490.
111. 322 U.S at 131.
112. 330 U.S. at 500 (Douglas, Burton, Frankfurter, J.J., and Vinson, C.J.).

The foregoing analysis of *Hearst* and *Packard* is reflected in the Court's decision in *NLRB v. Bell Aerospace Company*,[113] where the question arose whether the company had a duty to bargain with certain buyers. The Board determined that the buyers were statutory "employees" and thus found that the company violated the NLRA by refusing to bargain.[114] The Court overrode the determination of

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113. 416 U.S. 267 (1974). The disparate treatment of the Board's determinations in *Packard* and *Hearst* closely track an earlier pair of cases under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1976 & Supp. V 1981). In South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940), the widow of an individual employee had been awarded compensation for her husband's drowning. Her husband's employer owned a lighter on navigable waters of the United States. The decedent's chief task was facilitating the flow of coal from his boat to the vessel being fueled — removing obstruction to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties but occasionally performed some cleaning duties on the boat. He did not work while the boat was en route from the dock to the vessel to be fueled. The deputy commissioner, in awarding the compensation to be paid by the employer to the widow, held that the decedent was not "a member of a crew." After examining the legislative history of the exception, the Court concluded that the exception was enacted for the distinct aim of exempting seamen. Seamen, the Court found, preferred to remain outside the coverage of the act, thus retaining the presumed advantages of common law remedies. The Court therefore affirmed the determination of the deputy commissioner. The question, said the Court, speaking through Chief Justice Hughes, was not a question of law. "The word 'crew' does not have an absolutely unvarying legal significance." *Id.* at 258. Each case turns on questions of fact, and authority to determine such questions has been conferred by Congress to the deputy commissioner. *Id.* at 257-58.

But in Norton v. Warner, 321 U.S. 565 (1944), the Court took an altogether different approach. Though the statute was the same, the facts were different. This case concerned a worker on a barge which had no mode of power of its own. The worker was a seaman. The deputy commissioner determined the barge was not a vessel and the worker not a "member of a crew," and therefore held him covered by the Longshoremen's and Harbor Workers' Compensation Act. The Court, however, showed no deference toward the administrative view in this case, and held that the barge was a vessel and the worker "a member of the crew." The Court recalled as it had noted in the *South Chicago* case the reason for the exemption:

> The maritime unions appearing in the present case [as *amici curiae*] maintain that those remedies [at admiralty] are indeed superior to the relief afforded by the Longshoremen's and Harbor Workers' Act. Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class of or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise.

Norton, 321 U.S. at 571.

The statute, the word, and the agency involved were all the same. How then to explain the difference except that, read in the context of the latter case, the issue was significant in establishing the limits of the exemption? Once the contours of the exception were established, the agency was free to make a choice as in the coal supply boat case.

114. 416 U.S. at 270-71.

the Board, and held that all "managerial employees" were excluded from the Act, but then deferred to the Board's decision whether these buyers were within the category of managerial employees.[115] Once again, the Court allowed the Board's determination within its discretion to stand, once the reach of its discretion had been determined.

Another set of cases which may serve to illustrate significantly the rationale suggested herein is *NLRB v. Highland Park Manufacturing Co.*[116] and *NLRB v. Coca-Cola Bottling Co.*[117] The Taft-Hartley Act[118] provided that a labor organization could not be certified by the Board as a collective bargaining agent unless each officer of the labor organization and the "officers" of any "national or international labor organization" of which it was an affiliate or constituent unit, certified they were not members of the Communist Party.[119] In *Highland Park*, the officers of the Textile Workers Union did so certify but the officers of the CIO, with which the Textile Union was affiliated, did not. The employer refused to bargain with the union. The Board held that the CIO was not a "national or international labor organization" within the meaning of the statute since it was regarded in labor circles as a federation rather than a national or international union. Mr. Justice Frankfurter, dissenting in the case, maintained that "[t]he best source for us in determining whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute. Certainly if there is no reasonable ground for rejecting the determination of the National Labor Relations Board, its view should not be rejected."[120] Mr. Justice Douglas cited *Hearst* in his dissent and stated,

> I see no answer to the analysis of Mr. Justice Frankfurter if objectivity is our standard and if the expertise of administrative agencies is to continue as our guide. In situations no more difficult than this we have taken the administrative construction of statutory words. Until today the test has not been whether the construction would be our own if we sat as the Board, but whether it has a reasonable basis in custom, practice, or legislative

115. *Id.* at 289-90.

116. 341 U.S. 322 (1951).

117. 350 U.S. 264 (1956).

118. Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (1947).

119. Section 101, 61 Stat. 146 (1947) (amending National Labor Relations Act, ch. 372, § 9, 49 Stat. 449, 453 (1935)), *relevant language repealed by* Act of Sept. 14, 1959, Pub. L. No. 86-257, § 201(d), 73 Stat. 519, 524 (1959).

120. 341 U.S. at 327 (Frankfurter, J., dissenting).

history.[121]

But the majority reversed the Board, holding, in an independent approach, that not to apply the requirement to the very top levels of influence and actual power in the labor movement in this country would be contrary to the "basic purpose" of the provision which was to "wholly eradicate and bar" members of the Communist party from leadership in the American labor movement "at each and every level."[122] Plainly, a majority of the justices believed that the discretion in the Board was not broad enough to determine whether the CIO was exempt from the requirement.

Yet, notwithstanding the purpose to "wholly eradicate and bar" members of the Communist party from leadership in the American labor movement at each and every level, the Court, in *Coca-Cola*, Mr. Justice Frankfurter this time writing for the majority, let stand the Board's determination that the word "officer" in the same provision included only those persons who occupied a position identified as an office in a union's constitution.[123] In the proceeding before the Board in that case, the employer offered to prove that the Regional Director of the CIO for Kentucky, who admittedly had not filed a non-Communist affidavit, was an "officer" within the meaning of the statute. The Board rejected this contention on the ground that he was not a person occupying a position identified as an office in the union's constitution. The Court upheld the Board's determination. On one hand, said Mr. Justice Frankfurter, if the word is to be viewed in its ordinary meaning, "officer" normally means those who hold defined offices, and not "the boys in the backroom" whether in politics or in the trade-union movement.[124] Citing *Hearst*, he stated:

> But if the word be deemed to have a peculiar connotation for those intimate with trade union affairs, . . . then of course the Board's expertness comes into play. We should affirm its definition if that definition does not appear too farfetched.[125]

Clearly the Court thought there was a sufficient delegation of authority to enable the Board to make the determination as to which officers must take the oath.

In all of these cases an observable pattern can be identified: the agency is permitted to make those statutory interpretations which the

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121. *Id.* at 327-28 (Douglas, J., dissenting).
122. *Id.* at 325.
123. *Coca-Cola Bottling*, 350 U.S. at 269.
124. *Id.*
125. *Id.*

Court perceives Congress left to the discretion of the agency, but the determination of the extent of the authority given to the agency to make the decisions has been determined by the Court.[126]

V. POSSIBLE MISCONCEPTIONS

It may be useful at this stage to anticipate some misconceptions that may occur to one or another of the readers of this article. Administrative action may take a variety of forms and the distinction between these forms may seem to provide a convenient basis for de-

126. Although this principle has prevailed most of the time, it has not been without its aberrations. Under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), for example, the Federal Trade Commission is authorized to restrain "unfair methods of competition." In the first case to reach the Supreme Court interpreting "unfair method of competition," FTC v. Gratz, 253 U.S. 421 (1920), the Commission had ruled that the refusal of a vendor, who held a dominant and controlling position in the sale of both cotton ties and jute bagging, to sell ties unless the purchaser would agree to buy a proportionate share of cotton bagging was an unfair method of competition. *Id.* at 424. The Supreme Court reversed the Commission. In its approach, the Court did not limit itself to a consideration of whether reasonable grounds existed for the Commission's decision. Instead, the Court arrived at its conclusion by way of an independent judgment of the issue. *See id.* at 427-29. The conception that the question of what constituted an "unfair method of competition" was an issue upon which an independent judgment rested with the Court was repeated by Mr. Justice Frankfurter, dissenting in FTC v. Motion Pictures Advertising Serv. Co., 344 U.S. 392, 404 (1953). The determination of the scope of that term, he said, "has not been left to the administrative agency as part of its fact-finding authority but is a matter of law to be defined by the Courts." In the end, however, the Court, recognizing that the agency's very "charter" was to evolve the meaning of "unfair methods of competition," retreated to the line that deference should be paid to the administrative judgment on that subject matter. FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934).

Keppel & Brothers sold penny candies in "break and take" packs, by which children were induced to buy lesser amounts of concededly inferior candy in the hope of receiving bonus packs containing extra candy and prizes. *Id.* at 306-07. The FTC issued a cease and desist order against the manufacturer on the theory that the marketing scheme contravened public policy in tempting children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children. *Id.* at 307-08. The Court upheld the Commission's determination. While repeating that it is for the courts to determine what practices or methods of competition are to be deemed unfair, the Court stated that in passing on that question "the determination of the Commission is of weight." *Id.* at 314. The Commission, said Mr. Justice Stone speaking for the Court, was created with the purpose of lodging this function in a body specially competent to deal with it, " 'by reason of information, experience and careful study of the business and economic conditions of the industry affected.' " Mr. Justice Stone went on to say that the Commission was "organized in such a manner, with respect to the length and expiration of the terms of office of its members as would 'give to them an opportunity to acquire the expertness in dealing with those questions concerning industry that comes from experience.' " *Id.* (quoting SENATE COMM. ON INTERSTATE COMMERCE, S. REP. No. 597, 63d Cong., 2d Sess. 9, 11 (1914)).

termining the appropriate scope of judicial review. These distinctions, however, do not provide suitable guidance.

A. *Legislative Rules vs. Interpretive Rules*

It may occur to some, for example, that perhaps the answer may lie in whether the agency is explicitly authorized by statute to define the statutory term in question. In administrative law, two types of rules are issued by agencies: "legislative" and "interpretive."[127] Legislative rules are those issued pursuant to specific statutory authority and are said to "have the force and effect of law," whereas interpretive rules are merely statements issued by the agency to advise the public of the agency's construction of a statute, which the court is free to accept or reject.[128] It might be thought, therefore, that the courts have been guided by the principle that deference should be accorded to administrative interpretations issued through "legislative" rules, but not those agency interpretations issued only as so-called "interpretive" rules. That misconception is dispelled, however, by comparing *Skidmore v. Swift & Company*[129] with *Addison v. Holly Hill Fruit Products, Inc.*[130]

In *Skidmore*, some employees of a Swift & Company packing plant brought an action under the Fair Labor Standards Act[131] against their employer for overtime. The issue was what constituted "working time" under the Act. If the employees were engaged in "working time" they were entitled to overtime pay.[132] In addition to working a regular day shift, the petitioners agreed to stay in the fire hall on the company premises three or four nights a week. For each alarm answered, the employees were paid an agreed amount in addition to their fixed compensation. The company provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time as they saw fit except that they were required to be ready to respond to alarms.[133] The Administrator, given the duty of bringing injunction actions to restrain violations, had set forth his views of

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127. Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979). See the discussion in 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 36-43 (2d ed. 1979) and JAFFE & NATHANSON, ADMINISTRATIVE LAW, CASES AND MATERIALS 470-82 (3d ed. 1968). The Administrative Procedure Act itself draws this distinction. *See* 5 U.S.C. § 553(b)(3)(A) (1982).

128. Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

129. 323 U.S. 134 (1944).

130. 322 U.S. 607 (1944).

131. 29 U.S.C. §§ 201-19 (1976).

132. *See id.* § 207; 323 U.S. at 136.

133. 323 U.S. at 135-36.

the proper application of the Act under different circumstances in an interpretive bulletin and in informal rulings.[134] The Court held that the rulings of the Administrator, while not conclusive or binding on the Court, were "entitled to respect."

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[135]

In *Holly Hill*, a legislative rule was issued by the same Administrator under another provision of the same act, which provided an exemption from the Act's overtime requirements for any individual employed "within the area of production (as defined by the Administrator), engaged in. . .canning of agricultural. . .commodities for market. . . ."[136] The Administrator had defined "area of production" to include an individual engaged in canning operations if the cannery obtained its raw materials exclusively from farms in the neighborhood " 'and the number of employees in such establishment [did] not exceed seven.' "[137]

The Court overrode the Administrator's definition. The textual meaning of "area of production," the Court thought, required consideration of varying economic factors. In making his determination, "the administrator may properly weigh and synthesize the various economic factors. So long as he does that and no more, judgment belongs to him and not to the courts."[138] But the Congress did not leave the decision to the Administrator whether, within the geographic bounds defined by him, the Act further permits discrimination between smaller and bigger establishments.[139] "The determination of the extent of authority given to a delegated agency by Congress," said Mr. Justice Frankfurter, "is not left for the deci-

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134. *Id.* at 138.

135. *Id.* at 140. Quoted with approval in General Electric v. Gilbert, 429 U.S. 125, 141-42 (1976).

136. 322 U.S. at 608 (quoting Holly Hill Fruit Products v. Addison, 136 F.2d 323, 324 (5th Cir. 1943)).

137. *Id.* at 609 (quoting 29 C.F.R. § 536.2(b) (1938)).

138. *Id.* at 614.

139. *Id.* at 613-16.

sion of him in whom authority is vested."[140]

So, while in the one case an interpretation contained in a mere "interpretive" regulation was held by the Court to be "entitled to respect," in the other case an interpretation contained in a "legislative" regulation, supposedly binding on the Court because issued pursuant to apparent delegated authority, was not allowed to rest with the Administrator. It is therefore clear that the distinction between interpretive rules and legislative rules does not determine the standard of review accorded agency orders. Rather, as with any other administrative order, the standard of review is defined by the relationship of the order to the agency's statutory mandate. If within the agency's bounds of discretion, the court will defer to the agency's reasonable determination. If the bounds of the agency's discretion is at issue, however, the court will independently construe the statutory term.

B. *Rulemaking vs. Adjudication*

At one point, the existence of the two lines of cases apparently in conflict with each other was ascribed to the difference between rulemaking and adjudication.[141] Rulemaking, since it is said to have the force and effect of law, would be binding on the court, whereas adjudications would not.[142] But this does not explain the distinction. Under Section 5 of the Federal Trade Commission Act,[143] for example, the Federal Trade Commission is authorized to restrain "unfair methods of competition" in interstate commerce. Even where the rules for defining unfair methods of competition come from the process of adjudication, the determinations of the Commission are to be given weight.[144] Similarly, although the NLRB is free to conduct its activities either through rulemaking procedures or by adjudication, it has elected, with minor exceptions, to proceed by adjudication.[145] Nevertheless, in *Hearst*, the court's review of the Board's determination that newsboys were "employees" was stated by the Court to be a limited review.[146] In *Holly Hill*, on the other hand, the Court substituted its judgment for the Administrator's interpretation issued in a

140. *Id.* at 616.
141. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 149-52 (1938).
142. *Id.* at 151-52.
143. 15 U.S.C. § 45 (1982).
144. *See supra* note 126.
145. R. GORMAN, BASIC TEXT ON LABOR LAW 15-18 (1976).
146. *Hearst*, 322 U.S. at 131-32.

legislative rulemaking proceeding.[147] Clearly then, the difference in treatment cannot be attributed to whether the proceeding is one of rulemaking or adjudication.

C. *Adjudication vs. Enforcement*

Judge Learned Hand once intimated that a distinction should be drawn between interpretations given in adjudications of contested cases and interpretations of officials charged with the duty of enforcing statutes.[148] The position, he reasoned, of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, "his duty is to present the case for the side which he represents, and leave decision to the court. . .upon which lies the responsibility of decision."[149] Putting aside the fact that this distinction has not been used to determine the appropriate scope of review,[150] it seems of questionable validity even in theory. The consequences of such a distinction would be to create differing standards for application of the same statute depending upon the route by which the case reached the court. If by review of agency adjudication, then the agency's judgment on the question would be accepted if reasonable, even if contrary to the court's interpretation. If, however, the court is reviewing the interpretation of an official responsible for enforcement, the interpretation would have to give way to the contrary view of the court. The same statutory term might be reviewed under both routes. For example, an aggrieved person may petition a court of appeals to review a decision of an agency's adjudication in a contested case, while simultaneously, the same agency may initiate enforcement action involving the same issue. Conceivably, the same circuit court of appeals might be called upon to review the two cases at the same time, but would be required under Hand's distinction, to employ dissimilar scopes of review. The incongruous results likely under this approach make it unsuitable for determining an appropriate standard of review.

VI. THE PROPOSED ANALYSIS APPLIED

What follows is an attempt to apply the analytical framework outlined herein to some additional sample cases to ascertain if the

147. *See supra* text accompanying note 140.

148. Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 789-90 (2d Cir.), *aff'd*, 328 U.S. 275 (1946).

149. *Id.* at 789.

150. *See, e.g, Coca-Cola Bottling*, 350 U.S. at 269.

results can be explained, or better explained, in terms of the suggested principle.

The Court, in an early case,[151] was required to determine its role in reviewing the Postmaster General's exclusion of certain sheet music from second class mail matter as not being a "periodical" under a statute that provided for reduced rates for such mail.[152] Said the Court:

> [W]e think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General. . .and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong.[153]

A recent tax case[154] provides additional support for the view that courts owe deference to agency action taken within the parameters of the agency's delegated authority, regardless of the form of the agency's action. The Internal Revenue Code provides an exemption from income taxes for "business leagues, chambers of commerce, real estate boards, boards of trade, or professional football leagues. . .not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."[155] The National Muffler Dealers Association, organized by Midas Muffler franchisees to establish a group to serve as a bargaining agent for its members dealing with Midas, was denied an exemption as a "business league" by the Commissioner of the Internal Revenue Service.[156] The Court upheld the Commissioner, saying:

> The statute's term "business league" has no well-defined meaning or common usage outside the perimeters of [the Code]. It is a term "so general. . .as to render an interpretive regulation appropriate.". . .In such a situation, this Court customarily defers to the regulation which, "if found to implement the Congressional mandate in some reasonable manner, must be upheld.". . .
>
> We do this because "Congress has delegated to the [agency], not to the Courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code." . . . That delegation helps insure that in "this area of limitless factual variations,". . . like cases will be treated alike. It

151. Bates & Guild Co. v. Payne, 194 U.S. 106 (1904).
152. Act of March 3, 1879, ch. 180, § 7, 20 Stat. 355 (1879).
153. Bates & Guild Co. v. Payne, 194 U.S. 106, 107-08 (1904).
154. National Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).
155. 26 U.S.C. § 501(c)(6) (1976).
156. National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 474-75 (1979).

> also helps guarantee that the rules will be written by "masters of the subject". . . .[157]

It should be noted that a number of cases that are treated by some commentators[158] as involving a substitution by the Court of its judgment for that of the administrative judgment are actually cases in which the Court upheld the interpretation by the agency.[159] Where the Court upholds the agency's interpretation, it is difficult to tell how much weight, if any, the Court gave to the administrative judgment. Where an agency's interpretation is upheld, only on rare occasions will the Court indicate the weight accorded the administrative decision.[160] In some of the cases the opinions undeniably read as expressing an independent view. Nevertheless, since the Court did in fact confirm the agency's interpretation, the cases do not render less valid the fundamental premise of this article that where the boundaries of the agency's discretion have been established, its exercise of discretion ought not to be interfered with unless the Court is clearly of the opinion that it was wrong.

It only remains to account for a few cases that, at a hasty glance, might seem not to be consistent with the analysis suggested here. One of the cases is *Citizens to Preserve Overton Park, Inc. v. Volpe*.[161] Section 4(f) of the Department of Transportation Act[162] and Section 138 of the Federal-Aid Highway Act of 1968[163] provide that the Secretary of Transportation shall not approve for financing any project that requires the use of any public parkland unless there is no "feasible and prudent" alternative.[164] The Secretary had authorized the expenditure of federal funds for the construction of a six-lane interstate highway through Overton Park in Memphis, Tennessee. The

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157. *Id.* at 476-77 (citation omitted).

158. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 30.06 (1976).

159. *See, e.g.*, NLRB v. Washington Aluminum Co., 370 U.S. 9, 17-18 (1962); FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 553-54 (1960); Board of Governors v. Agnew, 329 U.S. 441, 449 (1947).

160. For one such occasion, see Justice Rutledge's concurring opinion, in which Justice Frankfurter joined, in Board of Governors v. Agnew, 329 U.S. 441, 451 (1947):

> I cannot say that the Board's conclusion. . .is wanting either for warrant in law or for reasonable basis in fact. . . . I think it important, not only for this case but for like ones which may arise in the future, perhaps as a result of this decision, to make clear that my concurrence in the Court's disposition of the case is based upon the ground I have set forth, and not upon independent judicial determination of the question presented on the merits.

161. 401 U.S. 402 (1971).

162. 49 U.S.C. § 1653(f) (1976).

163. 23 U.S.C. § 138 (1976).

164. *Id.*; 49 U.S.C. § 1653(f) (1976).

petitioners brought suit to halt construction, contending, among other things, that the Secretary had violated the statute.[165] Although the Secretary had not issued any regulations defining the term "feasible and prudent" or made any factual findings purporting to show why he believed there was no such alternative to use of the parkland, the Secretary took the position during the litigation that he had wide discretion.[166] It was recognized that the requirement that there be no "feasible" alternative granted "little administrative discretion." "For this exemption to apply, the Secretary must find that as a matter of sound engineering it would not be feasible to build the highway along any other route." The Secretary argued, however, that the requirement that there be no other "prudent" route required him to engage in a wide-ranging balancing of competing interests. He contended that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be "prudent."[167]

The Court, however, reached the conclusion that no such wide-ranging balancing was intended.

> [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.[168]

The Court's independent evaluation of the meaning of the statute arguably could be accounted for on any one of several grounds: that there had in fact been no prior interpretation of the term by the administrator but only argument of counsel after the case was in litigation; the Court's sensitivity to the environmental issue; or even perhaps the simple conclusion that the interpretation urged by counsel was an unreasonable one. But the argument can also be made that the Court's approach was dictated by the Court's perception that this was a significant limitation on the agency's authority. On that

165. 401 U.S. at 405-09.
166. *Id.* at 409.
167. *Id.* at 411.
168. *Id.* at 412-13.

view, this is but another illustration of the principle that the determination of the extent of the authority given to a delegated agency by the Congress to make the determination is to be decided independently by the Court. Once the Court has outlined the administrator's authority, however, the application of the term within his authority is left to the administrator.

Hardin v. Kentucky Utilities Company[169] is a case on the other side of the line. In 1959, Congress, in order to protect private utilities from further TVA competition, amended the Tennessee Valley Authority Act[170] to provide that TVA should make no contracts for the sale or delivery of power outside the "area" for which TVA was the primary source of power supply on July 1, 1957.[171] On that date, the TVA supplied 62% of the electric power uses in all of Claiborne County, Tennessee.[172] But in the villages of Tazewell and New Tazewell in Claiborne County, the TVA supplied 6% of the power and the Kentucky Utilities Company, a private utility company, supplied 94%.[173] When TVA made plans to supply electricity to the two villages, Kentucky Utilities instituted an action to enjoin the agency from supplying power to them, on the ground that the two Tazewells were outside the area for which the TVA was the primary source of power on July 1, 1957.[174] The Court upheld TVA's determination that all of Claiborne County was within the area for which TVA was the principal source of power, stating:

> Given the innate and inevitable vagueness of the "area" concept and the complexity of the factors relevant to decision in this matter, we think it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take the TVA's "area" determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion.[175]

Viewed from one standpoint, the issue in this case appears to go to the question of the agency's "authority" to expand its operations, and under the theory advanced here would seem, therefore, to be one for the Court's independent decision. Mr. Justice Harlan, in his

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169. 390 U.S. 1 (1968).
170. 16 U.S.C. § 831 (1982).
171. *Id.* § 831n-4(a).
172. 390 U.S. at 3.
173. *Id.* at 4.
174. *Id.* at 5.
175. *Id.* at 9.

dissent, appears to have been thinking along these lines when he observed that "an orderly system of law does not place the enforcement of a restraint upon discretion into the unfettered hands of the party sought to be restrained. . . ."[176] But the agency's discretion in this case included the discretion to determine the "areas" in which it was the primary source of power supply.[177] The very term "area" is a broad term which calls for a determination of the geographic bounds of the areas in which TVA was the primary source of power supply.[178] The bounds of these areas could not be defined by Congress itself, and the text manifests the undoubted purpose of Congress to delegate authority to the TVA to make the determination.[179] It is unlikely to the point of being inconceivable that Congress intended to leave such determination to the vagaries of litigation. As the Court held, therefore, the agency's "area" determinations, provided they are reasonable, should not be set aside.[180]

Certainly, it is reasonable to say that the cases we have been considering have been guided by the principle suggested herein; it is hardly possible to say other of Mr. Justice Douglas' opinion in *Barlow v. Collins*[181] than that it is inconsistent with that approach. In that case, a statute[182] authorized a program under which payments were made to farmers for diverting land from the production of cotton.[183] The authorized participants in the program were permitted to assign their payments to secure cash or advances made to finance "making a crop."[184] The regulations of the Secretary of Agriculture defined "making a crop" to include assignments to secure "the payment of cash rent for land used for planting, cultivation or harvesting." Some of the other advances for which payments might be assigned were seed, fertilizer, and equipment, as well as food, clothing and other necessities for the producer and his dependents. Assignments could not be made to secure or pay pre-existing debts or for the purchase price of a farm.[185] Petitioners, cash-rent tenant farmers, filed an action seeking a declaratory judgment that the reg-

176. *Id.* at 14. Justice Harlan thought there should be a more independent scope of review. *See id.* at 13-16.

177. *See id.* at 12-13.

178. *See id.* at 9-10.

179. *See id.* at 8-9.

180. *Id.* at 9.

181. 397 U.S. 159 (1970).

182. Food and Agricultural Act of 1965, Pub. L. No. 89-321, 79 Stat. 1187 (1965).

183. *Id.* § 402.

184. 397 U.S. at 160.

185. 7 C.F.R. § 709 (1969).

ulation permitting them to make assignments to secure the payment of cash rent was unauthorized. Their complaint alleged that they were injured because the regulation provided their landlord with the opportunity to demand that they assign their payments in advance as a condition to obtaining a lease to work the land. As a result, the complaint stated, the tenants were required to obtain financing of all their other farm needs—groceries, clothing, tools and the like—from the landlord as well, since prior to harvesting the crop they lacked cash and any source of credit other than the landlord. The landlord, the complaint alleged, in turn levied such high prices and rates of interest on these supplies that the tenants' crop profits were consumed each year in debt payments.[186]

The case was before the Court solely on the issue of whether the petitioners had standing to challenge the validity of the regulations in light of the fact that the regulations did not obligate, but merely permitted, tenant farmers to assign the payments.[187] Consequently, the Court's decision went only to the standing issue. Nevertheless, in the course of arriving at the conclusion that the petitioners had standing to challenge the regulations, Mr. Justice Douglas, speaking for the Court, stated:

> The amended regulation here under challenge was promulgated under 16 U.S.C. § 590d(3) which authorizes the Secretary to "prescribe such regulations, as he may deem proper to carry out the provisions of this chapter." Plainly this provision does not expressly preclude judicial review, nor does any other provision. . . . Nor does the authority to promulgate such regulations "as he may deem proper" in § 590(d)(3) constitute a commitment of the task of defining "making a crop" entirely to the discretionary judgment of the Executive Branch without the intervention of the courts. On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction.[188]

Although the standing issue alone was decided, it is clear that Mr. Justice Douglas conceived the Court's function, if the question of interpretation should subsequently be brought to the Court, to embrace the right to determine independently the proper interpretation

186. 397 U.S. at 162-63.

187. *Id.* at 160 & n.1.

188. 397 U.S. at 165-66.

of the term "making a crop."[189] This does not appear to be a sound view of the appropriate spheres for judicial and administrative interpretation of such a statutory term.

A decision more congenial to the analysis advocated here arose in the administration of the Clean Air Act Amendments of 1970.[190] That statute established a program for controlling air pollution.[191] The Environmental Protection Agency (EPA) was required to set quality standards for the outdoor air used by the general public.[192] Each state, after promulgation of the standards, was required to submit an implementing plan that required approval by the EPA if it met certain conditions, the main one of which was that the plan provide for the attainment of the standards "as expeditiously as practicable" but no later than three years from the date of the plan's approval.[193] One approach for implementing the standards was that adopted by Florida, under which the plan's emission limitations would not take effect until the attainment date. Under this approach, no source was subject to enforcement action during the pre-attainment period, but all were put on notice of the limitations with which they must eventually comply. Georgia, however, elected to follow an EPA-endorsed approach under which a State's emission limitations would be immediately effective, but the State would have the authority to grant variances to particular sources, a factory for example, which could not immediately comply with the stringent emission limitations necessary to meet the standards. EPA based its power to allow such variance procedures on its interpretation of Section 110(a)(3) of the Act which provides in pertinent part as follows:

> (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirement of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.[194]

EPA took the position that a proposed variance was a "revision" and that a state plan may provide for an individual variance so long as it does not cause the plan to fail to provide for attainment and maintenance of the national standards under paragraph (2).

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189. The suit was later dismissed in the lower court for failure to prosecute.

190. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (current version at 42 U.S.C. § 7410 (1976 & Supp. V 1981)).

191. 42 U.S.C. § 7410.

192. *Id.* § 7408.

193. *Id.* § 7410(a)(2)(A).

194. *Id.* § 7410(a)(3)(A).

The environmental organizations in the suit argued that the revision authority of Section 110(a)(3) was available only for generally applicable changes of a state plan, as distinguished from emission limitations for an individual source. Variances applicable to individual sources could be approved, the environmental organizations contended, only if they met the procedural and substantive standards set forth in Section 110(f), under which its postponements may be for no more than a year, may be granted only if application was made prior to the date of required compliance, and must be supported by the agency's determination that the source's continued operation was essential to national security or the public health or welfare.[195]

The Supreme Court noted that EPA's construction of the statute had been challenged in a number of circuits.[196] The Courts of Appeals for the First, Second and Eighth Circuits rejected the "revision" authority as a basis for a variance procedure but concluded that authority for the exemption prior to the three-year date for mandatory attainment of the primary standard nevertheless existed as a necessary adjunct to the statutory scheme.[197] The Ninth Circuit concurred in the view that authority for individual variances existed as a necessary adjunct to the statutory scheme but thought that such authority existed as well after the attainment date as before.[198] The Fifth Circuit, the circuit from which the present case arose,however, agreed with the environmental organizations that the "postponement" provision of Section 110(f) was the only method by which individual sources could obtain relief from applicable emission standards.[199]

The Supreme Court stated that,

> Without going so far as to hold that the agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts.[200]

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195. 84 Stat. 1676 (1970) (current version at 42 U.S.C. § 7410(e) (Supp. V 1981)).

196. Train v. Natural Resources Defense Council, 421 U.S. 60, 72 (1975).

197. Natural Resources Defense Council v. EPA, 478 F.2d 875, 887 (1st Cir. 1973); Natural Resources Defense Council v. EPA, 494 F.2d 519, 523 (2d Cir. 1974); Natural Resources Defense Council v. EPA, 483 F.2d 690, 693-94 (8th Cir. 1973).

198. Natural Resources Defense Council v. EPA, 507 F.2d 905, 912-13 (9th Cir. 1974).

199. Natural Resouces Defense Council v. EPA, 489 F.2d 390, 403 (5th Cir. 1974), *rev'd sub nom.*, Train v. Natural Resouces Defense Council, 421 U.S. 60 (1975).

200. Train v. Natural Resources Defense Council, 421 U.S. 60, 75 (1975).

VII. CONCLUSION

The suggestion put forward here is that courts will and should pay deference to administrative interpretations with respect to issues falling within the agency's discretion to establish policy but not to determinations of issues necessary to establish the extent of that discretion.[201] The suggested principle may not mark with precision the line between those interpretations for which the court will look to the agency for guidance and those which the court will determine independently of the agency's view, but it does afford some guide for judgment. Such a view better explains the decisions and will permit the most efficient use of court and agency.

Although an independent evaluation by the court of any question admittedly may give a defeated party additional protection, it is not necessary for assuring adequate legal control over the agency. Administrative agencies are distinct institutions and are meant to have some policy making function. Important as confining agencies to their business may be, no less fundamental should be an arrangement that assures the most efficient and effective use of all of our institutions.

201. The conclusion that this distinction accounts for the two apparently conflicting lines of decisions on the scope of review of administrative interpretations of statutes is strengthened by the two recent cases of SEC v. Sloan, 436 U.S. 103 (1978), where the Court rejected a long-standing interpretation by the SEC of its authority to issue consecutive 10 day suspension orders on the basis of evidence revealing a single manipulative scheme, 436 U.S. at 122-23, and CBS, Inc. v. FCC, 453 U.S. 367 (1981), in which the Court upheld an FCC interpretation of "reasonable access" to broadcasting facilities, " 'since Congress has confided the problem to the latter,' " 453 U.S. at 394 (quoting FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946)).