Table of Contents

Ackno About	wled the	lgments Authors Notes	Page xi xiii xv xviii
	RI	PART ONE EVIEW OF DISTRICT COURT DECISIONS	
I.	Co	e Fundamentals: Constitutional nsiderations, the Four Principal Standards Review, and the Fact/Law Paradigm	3
	A.	Constitutional Considerations	3
	В.	The Standards Governing Review of Preserved Claims of Error, Plain Error and Exceptional Circumstances Review of Unpreserved Claims, and Review of Jurisdictional Issues	4
	C.	The Fact/Law Paradigm and Its Limitations	7
		 Hypothetical Examples: The "FMSS" Cases	9
		Defined Laws and Historical Facts	9
		3. Still Within the Paradigm: Abstract Laws	10
		4. The Limits of the Paradigm: Mixed Questions of Law and Fact	12
	D.	The Theory Informing the Paradigm: The Functional Approach	13

	E.	Discretionary Decisions: Mixed Questions of	Page
	Д.	Law and Fact and the Abuse of Discretion Standard of Review	18
	F.	The Mixed Question in the Final "FMSS" Hypothetical	21
	G.	A Qualifying Comment on Review of Mixed Questions	21
II.		early Erroneous Review of Judicial et-Finding	23
III.		Novo Review of Conclusions of Law: A npling of Substantive Standards	29
	A.	Subject Matter Jurisdiction and Constitutional Standing in Civil Cases: The Unwaivable Article III Prerequisites to Federal Judicial Review	30
		 Subject Matter Jurisdiction Article III Standing 	33 42
	В.	Summary Judgment: Federal Rule of Civil Procedure 56	53
	C.	Testing the Legal Sufficiency of the Evidence in Civil Jury Trials: Federal Rule of Civil Procedure 50	61
	D.	Testing the Legal Sufficiency of Criminal Trial Evidence	67
		1. Taking the Decision from a Jury: The Jackson Standard and Federal Rule of Criminal Procedure 29	67
		2. Reversing Guilty Verdicts in Bench Trials for Insufficient Evidence: <i>Jackson</i> Plus	74

IV.		view of Findings and Conclusions oporting Rule 52 Judgments in Civil	Page
	Bei Not	conclude 52 studyments in Civil check Trials: Clearly Erroneous Review, <i>De</i> coo Review, and the "Mixed Question" nundrum	77
V.	Dis	cisions Committed to a District Judge's cretion: Giving Meaning to the Variable use of Discretion Standard	83
	A.	General Principles	83
	В.	Identifying the Degree of Appellate Scrutiny Afforded Discretionary Decisions	86
		 Ascertaining the Bounds of Discretion Delegated by Congress Enforcing Congressional Bounds on 	86
		Discretion: The Law-Declaring Power of Reviewing Courts	89
		3. Discerning the Limits on Largely Unbounded Discretion	90
VI.	Ho	eserving, Forfeiting, and Waiving Error: w a Party's Actions Before the Trial Court n Affect or Preclude Appellate Review	95
VII.	Rei Fac	e Harmless Error Doctrine: Limiting the medial Response to Preserved Legal, etual, and Discretionary Error in Criminal I Civil Trials	101
	A.	Application of the Harmless Error Doctrine in Criminal Cases	102
		1. The Kotteakos Decision: Harmlessness Review of Nonconstitutional Error	103
		2. The Chapman Decision: Harmlessness Review of (Most) Constitutional Error	107
		3. Structural Defects: When Does Constitutional Error Merit Automatic Reversal?	109

			Page
	В.	Application of the Harmless Error Doctrine in Civil Cases	112
		 The Sanders Standard: Putting the Burden on the Party Claiming Non-constitutional Error to Show Harm The Inapplicability of the Chapman "Beyond a Reasonable Doubt" Standard to Constitutional Error and the Limited 	112
		Availability of Automatic Reversal	117
VIII.		licial Review of Unpreserved Claims and guments	119
	A.	The Four-Part Plain Error Test Governing Review of Unpreserved Error in Criminal Cases	119
	В.	Exceptional Circumstances and Plain Error Review: The Limited Situations in Which Appellate Review of Unpreserved Arguments is Available in Civil Cases	125
		PART TWO REVIEW OF AGENCY ACTION	
IX.	of I	e Fundamentals: The Principal Standards Review, Threshold Considerations, and ministrative Agencies Defined	135
	A.	An Introduction to the Principal Standards of Review and Threshold Considerations	135
	В.	What are Administrative Agencies?	136
Х.	Aut	e Interplay Between the APA and Agency chorizing Statutes: Standards of Review I Causes of Action	139
	A.	Defining the Scope and Standards of Review	140
	В.	Defining a Cause of Action	143

TABLE OF CONTENTS

	a	ANT ALL OF THE ART OF THE	Page
	C.	A Note About the Distinct Roles of District and Appellate Courts	145
XI.		reshold Jurisdictional and Prudential nits on Judicial Review	147
	A.	Waiver of Sovereign Immunity	149
	В.	Subject Matter Jurisdiction	151
	C.	Article III Standing	158
	D.	Mootness	165
	E.	The Overlapping Doctrines of Finality, Ripeness, Exhaustion of Administrative Remedies, and Issue Waiver	169
		 The Finality Doctrine The Ripeness Doctrine Exhaustion of Administrative Remedies Issue Waiver 	169 175 180 183
XII.		e Parameters of Judicial Review of Agency	187
	A.	Challenges to Final Actions Having the Force of Law: The Presumption of Reviewability and Its Exceptions	188
		 Statutory Preclusion of Judicial Review Actions Committed to Agency Discretion by Law 	190 194
	В.	Challenges to Informal, Non-Final Actions Lacking the Force of Law: The Presumptive Non-Reviewability of Policy Statements and Interpretive Rules	196
		1. Policy Statements and Interpretive Rules: What They Are and Why They Are (Generally) Not Reviewable	196

		2. The Tests for Determining When a Purported Policy Statement or Interpretive Rule Is a Final, Substantive Action to Which the Presumption of Reviewability Applies	Page		
XIII.	The Zone-of-Interests Inquiry: Is the Complainant Within the Class of Plaintiffs Authorized to Invoke the Cause of Action Asserted?				
XIV.		e Deference Due an Agency's Construction Its Authorizing Statute	211		
	A.	The Chevron Framework	211		
	В.	Chevron Step One: Has Congress Directly Spoken to the Precise Question?	216		
	C.	Chevron Step Two: Judicial Deference to Agency Lawmaking Choices that Are Within the Scope of an Agency's Congressionally Delegated Authority	221		
		 An Agency Must Act Pursuant to Congressionally Delegated Authority An Agency Must Act with the Force of Law 	223 224		
		 Judicial Assessments of Agency Constructions of Authorizing Statutes to Determine Reasonableness	226 230		
		5. Agency Interpretations Resting on Implied Delegations of Authority	231		
	D.	The Chevron "Carve Outs"	237		
		1. Situations in Which an Agency Has Failed to Act with the Force of Law	238		
		2. Situations Involving "Major Questions"—An Evolving Doctrine?	238		

Table of Contents

			Page
		3. Situations in Which an Agency Fails to Use Its Delegated Authority	244
		4. No Chevron Deference Is Due to an Agency's Litigation Position	246
		5. Situations in Which an Agency Does Not	240
		Have Sole Responsibility for Administering a Statute	247
	E.	Skidmore Deference: The Power to Persuade	248
XV.	Inte	Deference Due an Agency's expretation of Its Own Regulations: Auer Seminole Rock	253
XVI.	Dec	Requirement of Reasoned isionmaking: Arbitrary and Capricious iew	259
	A.	The State Farm Framework	259
	B.	The Importance of the Agency Record	265
XVII.	On-	tual Determinations Made in the-Record Proceedings: Substantial dence Review	269
XVIII	Con Sta	nparing and Contrasting the Principal ndards of Review	273
	A.	The Interplay of <i>Chevron</i> Step Two and Arbitrary and Capricious Review	273
	В.	The Substantial Evidence Test and Arbitrary and Capricious Review	278
XIX.	The	Requirement of Fair Notice	281
Table	of C	ases	
Index			