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William W. Templeton

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HECKLER v. CHANEY: THE NEW PRESUMPTION OF NONREVIEWABILITY OF AGENCY ENFORCEMENT DECISIONS

The concept of unchecked power is a notion antithetical to our system of democracy. The Constitution's design withholds unreviewable power from any single branch of government and allows the judicial, legislative, and executive branches to share in the balance of authority.¹ A familiar equation of our democratic government, the system of checks and balances serves to

1. It has been said that the American system is built upon a belief in weak government. M. FOROSCH, *CONSTITUTIONAL LAW* 12 n.25 (1969). The separation of powers doctrine illustrates this belief and the Constitution impliedly embodies its principles by creating, in three separate articles, the legislative, the executive, and the judicial branches. To each branch there is granted the entirety of its power. "All legislative Powers herein granted shall be vested in a Congress." U.S. CONST. art. I, § 1; "The executive Power shall be vested in a President." U.S. CONST. art. II, § 1, cl. 1; "The judicial Power of the United States, shall be vested in one supreme Court." U.S. CONST. art. III, § 1. This division, however, does not mean that each branch is to receive an equal third of the governing authority. The doctrine of separation of powers does not require each branch to

be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments

. . . .

J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 525 (1891). See *Trustees of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 191 N.Y. 123, 132, 83 N.E. 693, 695 (1908).

The constitutional plan created this tripartite form of government with each branch sharing in the governing authority of the other. The post-revolutionary draftsmen of the Constitution were all too familiar with the hardships inflicted upon citizenry by an unaccountable governing authority. "The delegates to the 1787 Convention were fearful of providing overmuch of power to any one body, for in their own lifetimes they had felt the effects of this monolithic despotism aboard and at home." M. FOROSCH, *supra* at 12. The goal of the Convention was to devise an impartial government. This goal was sized up in the oft-quoted phrase attributed to John Adams as draftsman of the Massachusetts Constitution of 1780, "[t]o the end it may be a government of laws and not of men." MASS. CONST. pt. 1, art. 30.

As Justice Brandeis wrote, the separation of powers doctrine was adopted "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

protect citizens from the injustice of power abused by governing authority.²

The Constitution charges the executive branch and its agencies with the duty to assure "that the laws [are] faithfully executed."³ Under common law, all executive actions are subject to judicial review under the court's gen-

2. The need to check the use of the vast authority to govern was of tantamount concern to the Framers of the Constitution.

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

Rather than restraining each branch of government from intruding into the domain of the others, the Framers' plan, by design, encouraged the constant interplay of branches. Permitting one branch to check on another furthers the goal of limiting power centralized in one department, one agency or, for that matter, one administrator. As Justice Jackson observed, the Constitution's plan demands the close integration of the three branches in order to provide a more workable government. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The role of judicial review is crucial to the balance of separated powers. The system of checks and balances is particularly dependent upon the role played by the courts. Executive agency authority, in particular, is curtailed by the judiciary. By design, the courts were "to serve as a check on the administrative branch of government—a check against excess of power and abusive exercise of power in derogation of private right." ATT'Y GEN. COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 76 (1941).

3. U.S. CONST. art. II, § 3. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* (4th rev. ed. 1957) (asserting the multidimensional power of the Chief Executive); R. PARKER, *ADMINISTRATIVE LAW: A TEXT* 15, 84-97 (1952) (evaluating the executive powers in the scheme of the separation of powers); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950) (discussing the evolving theories of presidential power).

So charged, the chief executive is responsible for the faithful execution of laws "which are, by the constitution and laws, submitted to the executive." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). In exercising his duty to faithfully execute, the Chief Executive is subject to the control of the judiciary which, under the separation theory, is solely authorized to define what is and what is not lawful, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825), and what action will fall within and what will fall outside the executive branch's jurisdiction. See R. PARKER, *supra* at 110-12.

Still, the faithful execution of the laws necessarily affords a great degree of discretion to the executive branch that escapes quantification. Administrative policy and political initiatives generally escape judicial review until crystalized into a specific harm to an aggrieved citizen who brings suit. The campaign promises of a particular administration are most easily implemented through those decisions of the executive agencies that are discretionary in nature. The agencies, in turn, are brought to court, lending credit to de Tocqueville's prescient observation that "scarcely any political question arises in the United States that is not resolved, sooner or

eral powers of equity.⁴ It was not until the enactment of the Federal Administrative Procedure Act of 1946 (APA or the Act)⁵ that a general statutory

later, into a judicial question" 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Bradley's ed. 1945).

Yet, the exercise of discretion is certainly not limited to, nor solely characteristic of, the executive branch administration. As a body, the Congress has complete "discretion" over what laws to enact, when, and how. The judiciary, moreover, is often charged by the legislature with the duty to interpret statutory language so vague that any interpretation necessarily confers wide discretion. *See, e.g., United States v. New York Cent. R.R.*, 212 U.S. 509 (1909). Historically, courts have also wrestled directly with outright policy questions. *See, e.g., Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450, 451, 453-66, 569 (1793); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904); Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 222-23 (1936).

4. One of the earliest expressions of the fundamental concept of judicial review in equity, and in particular review of those matters of government, is found in Lord Coke's treatise *Institutes of the Laws of England*. The legal jurisdiction of the Court of the Kings Bench, as Coke described it, encompassed all acts of oppression, controversy or debate between persons. As such, the infractions of the King's government against the governed were not immune from review, sanction, and punishment by the courts.

[T]his court hath not only jurisdiction to correct errors in judicial proceeding, but other errors and misdemeanours extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law.

4 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 71 (London ed. 1797).

5. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. II 1984)). The subject of lengthy debate, the APA was enacted after more than 10 years of consideration. In it, Congress created the administrative courts, standardized administrative procedure among agencies, and provided for judicial review of all agency actions. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 1 (1946), *reprinted in* 1946 U.S. CODE CONG. & AD. NEWS 1195.

Brief perhaps to the point of oversimplification, the original Act was comprised of only twelve sections. The first four sections outlined standards for agency rulemaking and dissemination of public information. Sections 5 through 8 standardized formats of agency adjudications, hearings, and decisionmaking on matters before the agency. Section 9 addressed the general limitations of administrative power. Section 10 of the Act established the right of judicial review for "[a]ny person suffering legal wrong because of . . . agency action or adversely affected or aggrieved by . . . action within the meaning of . . . relevant statute." Administrative Procedure Act (APA) § 10(a), 60 Stat. 237, 243 (1946).

The APA was enacted in response to the growing need for uniform treatment of procedure by different agencies. Its final form was the product of many previous legislative, executive, and congressional attempts at formulating uniform rules for administrative procedures.

It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power.

S. REP. NO. 442, 76th Cong., 1st Sess. 9-10 (1939), *reprinted in* 1946 U.S. CODE CONG. & AD. NEWS 1195, 1196-97 (accompanying S. 915, the Walter-Logan bill, an earlier version of the APA favorably reported to the Senate). The final bill was passed in response to the "wide-

right to review agency actions existed at law.⁶ The APA codified the common law presumption that, in order to be constitutionally valid, all agency actions must be subject to review by administrative and federal district courts.⁷

spread demand for legislation to settle and regulate the field of Federal administrative law and procedure." S. REP. NO. 758, 79th Cong., 1st Sess. 1 (1945), *reprinted in* 1946 U.S. CODE CONG. & AD. NEWS 1195, 1204 (final report of the Senate Judiciary Committee on S.7, the Senate version of the APA).

6. As originally enacted § 10(c) states: "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." APA § 10(c), 60 Stat. 237, 243 (1946). The Act grants to the courts broad powers of review to investigate and to review administrative agency actions:

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

...
APA § 10(e), 60 Stat. 237, 243 (1946).

Section 10 of the Act essentially records preexisting common law principles of availability, timing, form, and scope of judicial review. 5 U.S.C. §§ 701-706 (1982 & Supp. II 1984). Section 10(e), 5 U.S.C. § 706, subtitled as scope of review, grants authority to the reviewing court to review the entire record of the agency proceeding to ensure that the administrators complied with relevant statutes. It also compels the court to hold unlawful any agency action that it finds to be arbitrary, capricious, or an abuse of discretion.

This section, which compels a court to investigate and determine whether there is an abuse of discretion, has been said to exist in tension with the opening limitation of § 701 that exempts from review those actions committed to agency discretion. Considerable debate has evolved on this seeming contradiction between two oft-quoted authorities on the subject, Professors Kenneth C. Davis and Raoul Berger. Davis concludes that there can be no judicial review of some agency abuses of discretion while Berger maintains that any abuse of discretion is reviewable. *See Berger, Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); *Berger, Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); *Berger, Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word."* 114 U. PA. L. REV. 816 (1966); *Berger, Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); *Berger, Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); *Davis, Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); *Davis, Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966); *Davis, Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967). *See also* Rogers, *A Fresh Look At Agency Discretion*, 57 TUL. L. REV. 776, 787-92 (1983) (synthesizing the two views on the question of unreviewability).

7. The rise of administrative law and its processes closely parallels the rapid development of the United States from an 18th Century agrarian society into a large, complex, and industrialized nation. The requirements of industry regulation necessitated specialization and expertise. Despite the Constitution's tripartite design, the administrative agencies of the executive branch became the only forum capable of such specialization and able to provide continuity in regulatory policy. As the workload of the Congress increased and the nature of regulation became more technical, agencies absorbed greater governing and rulemaking authority. The judiciary branch, also burdened by its caseload, could not meet the growing demands of regulation and was incapable of specialization. As a result, agencies were vested with

greater legislative and adjudicative authority. P. WOLL, *ADMINISTRATIVE LAW: THE INFORMAL PROCESS* 7-8 (1963).

In a 1916 speech, Elihu Root, the president of the American Bar Association observed that the developing administrative process would necessitate a formal mechanism of restraint:

[T]he powers that are committed to these regulating agencies and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed

Root, *Address of the President*, 41 *REP. A.B.A.* 356, 368 (1916).

As a necessary component of their charge, administrative agencies have been permitted broad discretion in the exercise of their duties. Modern administrations could not function without such latitude.

The volume of cases dealt with by administrative agencies is staggering. A regulatory agency like the Interstate Commerce Commission receives, analyzes, and files thousands of rate schedules and disposes of thousands of applications to be allowed to do or to be excused from doing various things, receives complaints, and conducts investigations.

B. SCHWARTZ, *ADMINISTRATIVE LAW* § 1.13, at 30 (2d ed. 1984).

With the rise of the regulatory state, the number of extrajudicial agency adjudications rapidly increased. At a meeting of the Federal Bar Association in 1931, Chief Justice Hughes observed that "the distinctive development of our era" was the problem of "executive justice, perhaps better styled administrative justice. A host of controversies as to provisional rights are no longer decided in the courts." *N.Y. Times*, Feb. 13, 1931, at 18, col. 1.

Administrative adjudications that come before the courts constitute only a small fraction of those dealt with by the agencies alone, and yet the courts' role is far from obsolete. The judiciary's primary concern is that of ensuring that the administrative process protects the due process rights of the litigants and preserves the elements of fundamental fairness. B. SCHWARTZ, *supra*.

Administrative law is a body of judicial and legislative restrictions to preserve the elements of fairness. In private litigation it is generally believed that both parties are of relatively equal position and ability. This premise is not uncontroverted. Indeed, *Critical Legal Studies (CLS)* posits the relative inequality of position and ability and condemns much of the judicial and legal system as fraudulent. *See, e.g.,* Gordan, *New Developments in Legal Theory* in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 281 (D. Kairys, ed. 1982). The scope of the CLS critique is enormous and clearly falls beyond the realm of this Note. For an excellent introduction to CLS, as well as to its detractors, see *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1-674 (1984).

Administrative law cases, obviously, involve federal agencies.

The situation is different in administrative law cases. Here the body politic has stepped in; the private party is confronted not by another private person, but by an agency of government, endowed with all the power, prestige, and resources enjoyed by the possessor of sovereignty. The starting point is the basic inequality of the parties. The goal of administrative law is to redress this inequality—to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice.

B. SCHWARTZ, *supra* at 29.

Courts have the burden of maintaining this goal of administrative law. In drafting the APA's generous provisions for judicial review of all other agency actions, Congress created an exception for agency discretion. Where precluded by the enabling legislation or committed to its discretion by law, agency action is exempt from review. 5 *U.S.C.* § 701 (1982). *Heckler v.*

An agency's discretion to enforce its regulations,⁸ however, is a source of unreviewable authority. An agency decision not to investigate or to enforce certain regulations against particular violators remains beyond the reach of judicial scrutiny.⁹ Traditionally, this has been known as "prosecutorial discretion," a doctrine that allows criminal prosecutors to pick and to choose the object of their prosecution in order to maximize the efficient distribution of law enforcement resources.¹⁰ However, this practice of criminal law has never been formally accepted by administrative law courts and commentators.¹¹ Federal courts were hesitant to tip the balance of power in favor of the executive branch by granting agencies unreviewable discretion in their enforcement priorities.¹²

Chaney, 105 S. Ct. 1649 (1985), placed agency enforcement decisions outside the realm of judicial review by construing this previously little used provision. See *infra* notes 123-53 and accompanying text.

8. An agency is charged with the implementation and oversight of the rules and regulations it promulgates pursuant to the authority delegated to it by the Congress. The enforcement of these regulations, in order to assure compliance, is essentially the day to day task of the agency. But the agency's enforcement capabilities are limited, vastly outnumbered by the number of violations. The finite resources of an agency can only be deployed against a fraction of the violators. The sheer volume of the enforcement caseload necessitates an element of discretionary authority to determine which violations will and which will not be pursued.

Like the discretion of a criminal prosecutor to seek the maximum penalty or accept a plea bargain, the agency is at liberty to accelerate or to restrain its enforcement efforts on a case by case basis. As such, the enforcement discretion accorded criminal prosecutors and agencies alike has come under stern criticism. While Attorney General, Mr. Justice Jackson observed that in criminal proceedings: "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . he can choose his defendants . . . a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18-19 (1940), quoted in 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 2D, § 9:1, at 216 (1979).

The discretionary power of the agencies can and does lead to dissimilar treatment of the same violations. As Professor Kenneth C. Davis has observed, the resulting system of enforcement is somewhat less than equitable.

Discretionary power to enforce in varying degrees may mean that a tax official squeezes out every drop of what one taxpayer owes but may overlook large deficiencies of another taxpayer. The Immigration Service may vigorously enforce against one alien but may respond to a congressman's request for lenience toward another alien whose problem is identical. A licensing agency may institute a revocation proceeding against one violator and let another go. A rate agency may push for a reduction of one utility but amiably agree with another through "continuing surveillance." In each instance, the theory of the law is that equal protection is always required, but the reality of the law over long periods—even centuries—may be not only denial of equal protection but also lack of effective legal remedy for the denial of equal protection.

2 K. DAVIS, *supra* § 9:1, at 217.

9. See *infra* notes 168-75 and accompanying text.

10. *Id.*

11. *Id.*

12. *Id.*

In *Heckler v. Chaney*,¹³ the United States Supreme Court firmly established the application of the prosecutorial discretion doctrine to administrative law proceedings by denying review of agency enforcement decisions. Writing for a unanimous court, Justice Rehnquist held an agency decision not to investigate alleged statutory violations to be a valid exercise of an agency's enforcement discretion, precluded from judicial review by section 701(a)(2) of the APA.¹⁴

By removing the agency enforcement decision from judicial oversight, *Chaney* undermines a critical pillar of agency authority. The decision stands in contradistinction to the established presumption of the judicial reviewability of agency rulemaking and adjudicative orders.

Chaney involved a petition to the Commissioner of the Food and Drug Administration (FDA)¹⁵ by eight inmates who were sentenced to death by lethal injection under new state death penalty statutes.¹⁶ Seeking FDA investigation and prevention of a method of execution that employed drugs not approved for that purpose,¹⁷ the inmates asserted that use of barbituates and

13. 105 S. Ct. 1649 (1985).

14. 5 U.S.C. § 701 (1982) provides: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The Supreme Court concluded that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition." *Heckler v. Chaney*, 105 S. Ct. at 1656. Whether or not there was such a tradition and whether such was the true congressional intent is subject to debate. Compare 2 K. DAVIS, *supra* note 8, §§ 9:1-9:22. "Our basic system is one of discretionary power to discriminate in making decisions to enforce or not to enforce, and typically the discretionary power is not only uncontrolled by law but is even unguided by law. The uncontrolled and unguided discretionary power to discriminate is in fact especially damaging to justice . . ." *Id.* § 9:1, at 220.

15. *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd*, 105 S. Ct. 1649 (1985).

16. See, e.g., TEX. CODE CRIM. PROC. ANN. art 43.14 (Vernon 1979 & Supp. 1986) that provides "[w]henever the sentence of death is pronounced against a convict, the sentence shall be executed . . . by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead." Similar statutes exist in other states. N.M. STAT. ANN. § 31-14-11 (1978); OKLA. STAT. ANN. tit. 22, § 1014(A); WASH. REV. CODE ANN. § 10.95.180 (West Supp. 1986). Since 1977, states have begun adopting lethal injection statutes as a means of human execution. The prisons in those states have not fully implemented the lethal injection as a means of capital punishment and it was not until December 7, 1982 that the first condemned man was executed by lethal injection in Texas. 718 F.2d at 1177.

17. The inmates specifically requested that the FDA take action in order to: (1) affix warnings labels stating that the drugs were not approved for the purpose of human execution to the boxes of the drugs involved; (2) send notice to the states' departments of correction that the drugs were unapproved and should not be used for the purpose of human execution; (3) place an article in the Drug Bulletin advising that the drugs were not effective as a means of execution; (4) adopt a procedure for the seizure of the drugs from departments of corrections;

paralytically for capital punishment violated both the "new drug"¹⁸ and "misbranding"¹⁹ provisions of the Food, Drug and Cosmetic Act (FDCA).²⁰ Relying on his agency's "inherent enforcement discretion," the Commissioner of the FDA declined to investigate the alleged violations.²¹

The inmates sought review of the FDA's decision not to take action by filing suit in the United States District Court for the District of Columbia.²² The petitioners alleged that the agency had acted arbitrarily and capriciously in its refusal to bar execution by drugs not proven "safe and effective" for that purpose.²³ The District Court granted summary judgment and upheld the FDA's refusal as a valid exercise of its enforcement discretion.²⁴ The United States Court of Appeals for the District of Columbia vacated and remanded the case for further proceedings to compel action by the FDA.²⁵ Citing with approval the trend toward greater judicial review of all agency actions,²⁶ the District of Columbia Circuit granted review and found the

and (5) to recommend the prosecution of culpable retailers who knowingly sell the drugs for the purposes of execution. In addition, the inmates requested an evidentiary hearing on any controlling issue of fact. 718 F.2d at 1178.

18. The inmates argued that use of drugs violated 21 U.S.C. § 321(p)(1) (1982) that states a "new drug" is one that is "not generally recognized, among experts . . . as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof . . ." See also 21 U.S.C. § 355 (1982) (which governs the procedures for "new drug" approval by the FDA).

19. A drug is "misbranded" unless its label provides "adequate directions for use," or such warnings "as are necessary for the protection of users." 21 U.S.C. § 352(f) (1982). The inmates "appended to their petition affidavits of leading medical and scientific experts which aver that there is no 'expert consensus' founded upon 'substantial evidence' that these drugs will produce death quickly and without pain and discomfort." 718 F.2d at 1177-78.

20. Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982).

21. Under 21 C.F.R. § 5.10 (1986), the Secretary of Health and Human Services may delegate authority to the Commissioner to implement the FDCA. The Commissioner refused to investigate the inmates' claim for two reasons: "(1) the case law on the unapproved use of drugs that were otherwise approved by FDA was not uniform, and (2) FDA had a policy of not initiating enforcement action against unapproved uses of approved drugs absent 'serious danger to the public health.'" 718 F.2d at 1178. These are typical prosecutorial reasons for denial of enforcement proceedings. The FDA also argued that state sanctioned use of the drugs for lethal injection came under the "'practice of medicine' exception to the FDCA." 718 F.2d at 1179. The legislative history of the FDCA shows a particular exemption carved out in order to avoid interference with a physician's treatment of his or her patients. See *Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration*, 37 Fed. Reg. 16,503 (1972).

22. *Chaney v. Schweiker*, [1982-1983 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 38,184, at 39,031 (D.D.C. Aug. 30, 1982).

23. *Id.* at 39,032-33.

24. *Id.* at 39,037.

25. *Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C. Cir. 1983), *rev'd*, 105 S. Ct. 1649 (1985).

26. 718 F.2d at 1183 n.22. In support of this proposition the court of appeals cited *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *WHHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir.

FDA's refusal to investigate to be arbitrary and capricious.²⁷ The Court of Appeals recognized the possible application of section 701(a)(2) of the APA, but observed the existence of a "strong presumption" that all agency actions are inherently reviewable and that statutory exceptions merit extremely narrow interpretation.²⁸

A unanimous Supreme Court reversed,²⁹ holding that the FDA's decision not to take the requested enforcement measures was precisely the type of action immune from review under section 701(a)(2) of the APA.³⁰ In contrast to the established presumption of reviewability of all agency action, the Court fashioned a new presumption exempting agency enforcement decisions from judicial review.³¹ In concurring opinions, Justices Brennan and Marshall expressed a more limited acceptance of the new nonreviewability presumption.³² Justice Brennan endorsed the majority's holding under the particular facts presented but maintained that all agency decisions should remain within the purview of the judiciary.³³ Justice Marshall, however, was more critical of the new presumption of nonreviewability of enforcement decisions. Arguing that such a doctrine undermined past precedent, he warned that the new presumption would cause unintended citizen hardship at the hands of a disinterested and unaccountable bureaucracy.³⁴

This Note will trace the development of the presumption of judicial review relied on by the District of Columbia Court of Appeals³⁵ and will examine earlier judicial treatment of agency enforcement discretion under section 701(a)(2) of the APA.³⁶ An analysis of *Chaney* will suggest a judicial reluctance to recognize the increasing frequency with which review was given to all actions of administrators under the APA. The Note will demonstrate that by holding enforcement decisions to be committed to agency discretion by law, *Chaney* applies section 701(a)(2) to place such administrative decisions presumptively beyond judicial scrutiny. This Note will conclude with an evaluation of the present condition of agency discretion and the impact of *Chaney* on future decisions.

1981); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

27. 718 F.2d at 1190.

28. *Id.* at 1183 n.23.

29. *Heckler v. Chaney*, 105 S. Ct. 1649 (1985).

30. *Id.* at 1654.

31. *Id.* at 1656.

32. *Id.* at 1659-68.

33. *Id.* at 1659-60 (Brennan, J., concurring).

34. *Id.* at 1660-68 (Marshall, J., concurring).

35. *See* 718 F.2d at 1188 n.36.

36. *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed To Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

I. THE COMMON LAW PRESUMPTION OF JUDICIAL REVIEW

The majority of administrative agencies are part of the executive branch and derive their operating authority from enabling legislation written by Congress.³⁷ While a particular administration may dictate policy and Congress may rewrite statutes, executive agencies retain a large degree of autonomy and discretion in the routine administration of their charge.³⁸ Access to federal courts by aggrieved individuals is crucial to ensure an examination of a particular agency action.³⁹ Should such access be foreclosed, the action stands beyond any immediate scrutiny.⁴⁰

Whether judicial review of agency actions is available turns on various considerations.⁴¹ Upon examination of the particular statute governing an agency activity, the reviewing court will reach one of three conclusions: the statute expressly provides for review;⁴² the statute is completely silent on review;⁴³ or the statute precludes review.⁴⁴ If the statute expressly provides

37. As defined by the APA, 'agency' means each authority of the Government of the United States . . . but does not include . . . the Congress . . . the courts . . . the governments of the territories or possessions of the United States . . . the government of the District of Columbia . . . agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them.

5 U.S.C. § 551(1)(A)-(E) (1982).

38. *See supra* notes 1-3.

39. *Id.*

40. *Id.*

41. In answering the question of whether judicial review is available the reviewing court must consider: (1) whether the Congress has permitted or precluded review in the enabling legislation; (2) whether the action has been brought by plaintiff with proper standing; (3) whether the suit has been brought against the proper defendant; (4) whether the timing is proper; (5) whether the action is ripe for judicial review; (6) whether the proper formalities of review have been observed. B. SCHWARTZ, *supra* note 7, § 8.1.

42. If the statute expressly provides for review, the legislative will must be respected. Such a review action must be brought in the form specified by the enabling legislation. In this regard, the discretion of the legislature is quite broad. Diverse forms of review actions exist. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 45(c) (1982) (review requires filing of a petition); Longshoreman's & Harbor Workers' Compensation Act, 33 U.S.C. § 921 (1982) (review requires filing a suit for injunction); N.Y. CIV. PRAC. LAW § 7801 (McKinney 1978) (review requires a certiorari proceeding); CAL. GOV'T CODE § 11,523 (West 1980) (review requires an action for mandamus); B. SCHWARTZ, *supra* note 7, § 8.3, at 441; *see also id.* § 8.3, at 439.

43. Statutory silence on review is a particularly troublesome predicament for the courts. From an early date courts have held, largely as a matter of policy, that in the absence of specific statutory provisions for review, courts must possess some means of controlling administrative officers. As Justice Marshall observed, "it would excite some surprise if, in a government of laws and of principle . . . a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the individual] no remedy, no appeal to the laws of his country." *United States v. Nourse*, 31 U.S. (9 Pet.) 8, 28-29 (1835); *see Stark v. Wickard*, 321 U.S. 288 (1944); *see also infra* notes 52-58 and accompanying text. *But see* 321 U.S. 288, 312 (1944)

for review, the inquiry obviously ends there. Those statutes that preclude review, which are vaguely written, or are completely silent on the question of review, launch the judicial inquiry into congressional intent.⁴⁵

Fundamentally, Congress and the courts bring competing concerns to the question of agency authority. Congress is careful not to restrict an agency's ability to deal imaginatively with the exigencies of day-to-day regulation.⁴⁶ Conversely, the courts, though mindful of the prerogatives of the legislature, seek review where equity and the protection of fundamental rights demand.⁴⁷ The objective shared by both branches is to maintain the legality of agency authority in light of the constitutional plan of balanced governing authority. The presumption that all agency actions are reviewable serves this end.⁴⁸

The presumption of review arose out of the courts' general equity jurisdiction.⁴⁹ Parties aggrieved by agency action had recourse to federal district courts, which had general jurisdiction over acts regulating interstate commerce.⁵⁰ Statutory language permitting judicial review was unnecessary. The mere omission of legislative language was insufficient to bar judicial access.⁵¹

(Frankfurter, J., dissenting) ("There is no such thing as a common law of judicial review in federal courts.").

44. Even the most explicit legislative pronouncements of nonreviewability are discounted by the courts. For instance the Immigration and Nationality Act (INA) provides that the INA's deportation decisions "shall be final." 8 U.S.C. § 1252(b) (1982). The logical, literal interpretation of such a statute would preclude review of such a decision in the courts. "[T]here is a plain and sufficient meaning for the words making their decision final—and that is that it shall be final where it is most likely to be questioned, in the courts." *Pearson v. Williams*, 202 U.S. 281, 285 (1906). Yet, the word "final" has been construed as "ambiguous" and in spite of its placement in the INA, deportation decisions have always been subject to judicial review through deportation proceedings. *United States ex rel. Trinler v. Carusi*, 166 F.2d 457, 461 (3d Cir. 1948). In the landmark decision of *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), the Supreme Court addressed this provision of the INA in light of the "generous review provisions" of the APA. The Court removed all doubt that courts will not be left out of the agency adjudication process. "It is more in harmony with the generous review provisions of the [APA] to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part." 349 U.S. at 51.

45. B. SCHWARTZ, *supra* note 7, §§ 8.1-8.6.

46. *Id.* § 8.4.

47. *Id.*

48. *Id.*

49. *See supra* note 4.

50. *Id.*

51. As Justice Reed wrote, "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

*Stark v. Wickard*⁵² is the leading case on legislative silence. In *Stark*, the Secretary of Agriculture promulgated regulations to set minimum milk prices in the Boston area,⁵³ pursuant to the Agricultural Marketing Agreement Act of 1937.⁵⁴ Under the rules, commercial producers received a particular sum less an amount collected by the Secretary in order to subsidize milk-producing cooperatives.⁵⁵ The commercial producers sought judicial review of the regulations, alleging that the agency abused its statutory authority.⁵⁶ The Secretary defended his action by arguing that review was unavailable because the enabling legislation failed to address the subject.⁵⁷

The Supreme Court rejected the Secretary's claim, holding that the agency possessed only that authority which Congress had provided in the statute.⁵⁸ The Court observed that denial of judicial review serves the agency, increasing its power. Accordingly, a statutory omission could not give rise to such

52. *Id.* Although it never directly addresses the matter, *Stark* is based upon a notion of due process. Due process of law is not applicable unless one has been deprived of something to which she has a right. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970). Where no such right existed there was no presumption of review. See B. SCHWARTZ, *supra* note 7, §§ 5.11, 8.7. The government may give a "privilege" to someone who had no previous right and condition this new right by whatever terms it chooses. *Id.* The privilege of conducting business with the United States government, for example, justified one's abrogation of the right to judicial review. The Supreme Court held this in *Perkins v. Lukins Steel Co.*, 310 U.S. 113 (1940). The government may rightfully condition the terms of acceptance on the privileges it grants. In this area, the courts were powerless to apply the presumption of judicial review. "Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny . . ." 310 U.S. at 130.

The enactment of the APA quickly terminated this common law doctrine of nonreview. Under the APA, all "agency action" was made subject to judicial review. 5 U.S.C. § 704 (1982). See *supra* note 37. The "Privileges" referred to by common law now fall within the rubric of "agency action" under the Act. 5 U.S.C. § 551(13) (1982). Today, in the so called privilege cases, legislative silence is no longer a bar to review. See *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964).

53. 321 U.S. at 291, 302.

54. Pub. L. No. 75-137, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-659 (1982)).

55. *Id.* at 302.

56. The petitioners alleged that the Secretary's plan was "unlawfully diverting funds" that belonged to them. *Id.* at 289. "It is this deduction which the producers challenge as beyond the Secretary's statutory power." *Id.* at 302.

57. *Id.* at 306-07.

58. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." *Id.* at 309 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803)). See also *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942); *Morgan v. United States*, 298 U.S. 468, 479 (1936); *International R.R. v. Davidson*, 257 U.S. 506, 514 (1922); *Interstate Commerce Comm'n v. Union Pacific R.R.*, 222 U.S. 541, 547 (1912); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109-10 (1902).

an expansion of agency authority.⁵⁹ The Court embraced the rule of presumptive access to courts for those aggrieved by agency actions.⁶⁰

Stark illustrated the importance of maintaining access to the courts for the purposes of obtaining review. The presumption of judicial review insured access despite the legislative failure to provide for review. Four years later, *Stark's* principle of review was embodied in the APA that made all "agency action" subject to judicial scrutiny.⁶¹ Section 701(a)(1) of the Act speci-

59. 321 U.S. at 309-11.

60. *Id.* Justice Frankfurter, however, dissented, declaring "[t]here is no such thing as a common law of judicial review in the federal courts." *Id.* at 312. He argued that Congress alone was charged with the power to allow judicial review. The question of whether review is available, who may invoke it, when and to what degree it is permitted, he believed, must be embodied in the enabling statute in order for courts to examine agency actions. Congress, not the courts, has the opportunity and resources to provide the provisions for review. To apply judicial review provisions to a statute where there is none is "mischievous." *Id.* "Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction." *Id.*

Justice Frankfurter's view, however, had obvious flaws. Taken literally, if the Secretary *had* exceeded his authority, no recourse at law would be available for the producers aggrieved by the Secretary's order. Consequently, the courts would be powerless to address unlawful or extrastatutory agency conduct. The agency would be the final judge of its actions. His argument against the presumption of judicial review "overlooked the fact that the federal courts, like all courts, exist to uphold the rule of law." B. SCHWARTZ, *supra* note 7, § 8.4.

61. The language of § 10 embodies the principle of judicial review. See *supra* notes 5-6. Enacting the bill, the President's Committee on Administrative Management, appointed by President Roosevelt to study the growth and intensification of the regulatory administration, cited the unhealthy condition of conflicting pressures on administrative officers to be both prosecutor and judge. See H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946), reprinted in 1946 U.S. CODE CONG. & AD. NEWS 1195.

Section 701 is a modern, codified embodiment of an entrenched but unwritten judicial concern over protecting internal agency actions from unnecessary external scrutiny. In order to justify the exclusion of particular agency actions from judicial review on the merits, courts created and employed a number of doctrines to protect agency autonomy. Employing such doctrines as sovereign immunity, separation of powers, and justiciability, courts erected legal barriers to review of an agency's internal decisionmaking process. Similarly, such procedural doctrines as standing, exhaustion of administrative remedies, and ripeness served to inhibit judicial scrutiny of internal agency decisions. See *infra* note 69. The unwritten purpose of such barriers to review was to grant agencies the leeway necessary to cope with the enormous workload burdens demanded of limited agency resources. In the face of such caseloads, it was believed that agency activity would be severely burdened if each of its decisions were subject to challenge by aggrieved petitioners. See generally 2 K. DAVIS, *supra* note 8.

The concept of judicial deference to an agency's determination of particular policy has its origin in the doctrine of "prosecutorial discretion." The reasons advanced for non-reviewability stem from this doctrine of administrative efficiency. An enormous volume of both civil and criminal violations and the physical limitations of time and resources restrict the office of the prosecutor to the prosecution of only a small fraction of violators. Which violators shall be pursued and which shall not has traditionally been left to the discretion of the prosecutor whose knowledge of the particular facts, chances for conviction, and availability of resources make such a cost-benefit analysis possible. See generally *id.* § 9.2.

A decision not to prosecute or enforce rarely undergoes judicial review. Most such deci-

cally withholds its review provisions when the enabling statute expressly allows.⁶² Section 701(a)(2) withholds review for an action "committed to agency discretion by law."⁶³

II. EARLY INTERPRETATION OF EXCLUSIONS TO JUDICIAL REVIEW PROVIDED BY SECTION 701 OF THE ADMINISTRATIVE PROCEDURE ACT

The APA defines reviewable acts as "[e]very agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court."⁶⁴ However, this right of review could be revoked by explicit language in the enabling legislation.⁶⁵ Similarly, if the matter sought to be reviewed is one committed to the discretion of the agency "by law," judicial review is withheld.⁶⁶ These two exemptions from review guarded an agency's inner operations from the scrutiny of the

sions, by their nature, go unnoticed as there are oftentimes neither aggrieved parties nor anxious constituencies to object. Yet, a decision to refrain from action can have a silent impact far more damaging to society and its legal integrity than a decision requiring visible agency action. Often it is only when administrative actions cross a vested interest that objections are voiced and the question of review arises.

62. 5 U.S.C. § 701(a)(1) (1982) provides: "This chapter applies . . . except to the extent that . . . statutes preclude judicial review."

63. 5 U.S.C. § 701(a)(2) (1982) provides: "This chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law." Although the interpretation of § 701(a)(2) is the focus of this Note, a brief examination of the statutory preclusion provision of § 701(a)(1) illustrates the zeal with which courts defend the right to review acts, even when seemingly precluded by statute under § 701(a)(1).

One example of judicial intolerance of statutory preclusions is found in *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968). In *Oestereich*, a divinity student was reclassified as "1-A," making him immediately available for the draft despite his statutory entitlement to a deferral. 393 U.S. at 325. See 50 U.S.C. § 456(g)(2) (1982). The Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967) (codified as amended at 50 U.S.C. § 451 et seq. (1982)), expressly precluded review of the reclassification prior to induction. The legislative history clearly indicated a congressional intent to prevent any courtroom contest prior to induction. Nevertheless, the Supreme Court granted preinduction judicial review of the reclassification. 393 U.S. at 239. Refusing to give the statute its literal interpretation, the Court said "[e]xamples are legion where literalness in statutory language is out of harmony either with constitutional requirements . . . or with an Act taken as an organic whole." *Id.* at 238. The separation of powers doctrine and the exigencies of constitutional fairness forced the Court to ignore the extreme language precluding review. *Id.* at 243. In short, the student's liberty interest demanded the right to a courtroom hearing. *Id.* at 243 n.6.

An examination of the common law foundation of judicial review and the reluctance of courts to deny access even in the face of an express preclusion highlights the uniqueness of the APA's exception for agency discretion.

64. APA § 10(c) (codified as amended at 5 U.S.C. § 704 (1982)).

65. See 5 U.S.C. § 701(a)(1) (1982); *supra* note 62.

66. See 5 U.S.C. § 701(a)(2) (1982); *supra* note 63.

courts.⁶⁷ The second exception resisted incorporation with the general presumption of review, remained undefined, and until *Heckler v. Chaney*, was of dubious practical application.

The Supreme Court initially developed the application of section 701 in *Abbott Laboratories v. Gardner*.⁶⁸ In *Abbott*, drug manufacturers sought and eventually won judicial review of regulations promulgated by the FDA to tighten generic drug labeling requirements.⁶⁹ Following *Stark*, Justice

67. See *supra* note 61.

68. 387 U.S. 136 (1967).

69. *Abbott* involved the FDA's promulgation, pursuant to the Federal Food, Drug, and Cosmetic Act (FDCA), Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-392 (1982 & Supp. II 1984)), of regulations requiring drug manufacturers to designate the generic name of the drug alongside of its labeled trade name. 21 U.S.C. §§ 352(e)(1)(B), 352(e)(2) (1982 & Supp. II 1984). In the United States District Court for the District of Delaware, drug manufacturers sought and won injunctive relief voiding the regulations before they were enforced. 228 F. Supp. 855 (D. Del. 1964). The United States Court of Appeals for the Third Circuit reversed without reaching the merits, holding there could be no judicial review of regulations prior to an enforcement action. 352 F.2d 286 (3d Cir. 1965). The Supreme Court reversed, granting the manufacturers pre-enforcement judicial review of the challenged regulations because nothing in the FDCA precluded such review and the controversy was ripe for judicial resolution. 387 U.S. 136, 148 (1967).

Whether the pharmaceutical companies' problems deserved judicial attention or simply the attention of the agency was another concern of the Court. *Id.* While eager to assist the aggrieved, the Court declined to place itself in the middle of the rulemaking process of proposal, comment, and dispute. The Court measured the finality of the regulations promulgated by the costs imposed on the company. *Id.* at 152. Finding "a direct effect on the day-to-day business of all prescription drug companies," the Court considered the costs of conversion necessary to comply with the regulations to be an appropriate factor for review. *Id.*

One concern of the doctrines of standing, exhaustion of administrative remedies, and ripeness requirements is, when is it best to apply judicial review of administrative action. Standing and exhaustion of administrative remedies make technical and procedural inquiries, while the ripeness doctrine requires a more inchoate assessment of the role of judicial review in the administrative process. Standing requires that the aggrieved party show actual injury due to agency action or inaction. See *infra* note 74. Exhaustion requires that judicial intervention be sought only after all other internal avenues of appeals are closed. Ripeness requires a certain maturation of the issues before the introduction of judicial review. See generally K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 20.01, 21.01 (2d ed. 1972); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395-98, 424-26 (1965).

Application of the ripeness doctrine has fluctuated, with some courts refusing to consider cases of present injury, while others allow questions based upon abstract or remote factual possibilities. *Abbott* represents a middle ground on the spectrum. The drug manufacturers received review prior to enactment of the regulation or injury to the parties because the administrative process had reached the point where it would imminently affect the manufacturers. The ripeness doctrine examines adverse effect, concreteness and imminence of the agency act to determine whether judicial review is appropriate. This doctrine helps free the court from engaging in disputes over agency policies. Nevertheless, ripeness for review exists in tension with the hardship suffered by an aggrieved party. The doctrine reflects the weight given by the Court to unencumbered agency action, but to the extent that priority is given to noninterference with internal agency decisions and policies, the doctrine is similar in effect to the agency

Harlan enunciated what would become the maxim of the presumption of review doctrine. “[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”⁷⁰ According to *Abbott*, only absolute Congressional intent to exempt particular agency actions from judicial scrutiny, as provided in the statutory language and legislative history of the enabling legislation, would preclude such review.⁷¹ The FDA argued that specific procedures in the statute for review of enumerated regulations created the presumption that those regulations left unaddressed were exempt from judicial examination.⁷² *Abbott* flatly rejected this presumption of exemption due to statutory omission.⁷³ Instead, statutory silence was held to establish a presumption of reviewability rebuttable only by specific evidence of a congressional design to exempt the particular regulations from review.⁷⁴

discretion doctrine. Neither doctrine considers the potential hardship of tremendous agency authority on the citizen. L. JAFFE, *supra* at 395-98.

70. 387 U.S. at 140.

71. *Id.* at 140; *see* *Rusk v. Cort*, 369 U.S. 367 (1962); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Brownell v. We Shung*, 352 U.S. 180 (1956); *Heikkila v. Barber*, 345 U.S. 229 (1953); *Board of Governors of the Fed. Reserve Sys. v. Agnew*, 329 U.S. 441 (1947); *Stark v. Wickard*, 321 U.S. 288 (1944); *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938).

72. “The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review.” 387 U.S. at 141.

73. To strengthen its pronouncement of a presumption of review of all final agency actions, *Abbott* made extensive use of the legislative history of the APA and the Declaratory Judgment Act, Pub. L. No. 73-512, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. §§ 2201, 2202 (1982)), strengthening the argument for presumptive review of all final agency actions. *See* H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 235 (1944-1946): “To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.” *See also* S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 185 (1944-1946).

74. 387 U.S. at 141. *Abbott* became the touchstone for exceptions to review of agency actions. Its language was subsequently cited by many courts ruling on the question of review. *See, e.g., City of Chicago v. United States*, 396 U.S. 162, 164 (1969) (“we start with the presumption that aggrieved persons may obtain review”); *Aquavella v. Richardson*, 437 F.2d 397, 400 (2d Cir. 1971) (recognizing the *Abbott* articulation of the presumption of reviewability); *Independent Bankers Ass’n v. Board of Governors of the Fed. Reserve Sys.*, 500 F.2d 812, 814 (D.C. Cir. 1974) (asserting that nonreviewability must be clearly shown to be the intention of Congress); *Pollard v. Romney*, 512 F.2d 295, 298 (3d Cir. 1975) (holding review of agency action may be foreclosed by Congress); *Colon v. Carter*, 633 F.2d 964, 967 (1st Cir. 1980)

III. DISCRETIONARY AGENCY AUTHORITY: EARLY SUPREME COURT TREATMENT OF SECTION 701(A)(2)

A. *The "Law to Apply" Test: Citizens to Preserve Overton Park v. Volpe*

The Supreme Court's peripheral treatment of section 701(a)(2) indicated an entrenched predisposition favoring judicial review in all cases, implicitly narrowing the "committed to agency discretion by law" exemption.⁷⁵

(recognizing the strong presumption of reviewability may be overcome only by the clear purpose of Congress).

Three years after *Abbott* the Supreme Court reaffirmed its pronouncement in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). In *Data Processing*, plaintiffs sought judicial review in the United States District Court for the District of Minnesota of a ruling by the Comptroller of the Currency allowing national banks to make data processing services available. 279 F. Supp. 675 (D. Minn. 1968). The District Court dismissed and was affirmed on appeal. 406 F.2d 837 (8th Cir. 1969). Reversing the Court of Appeals for the Eighth Circuit, the Supreme Court reiterated the presumption of review stating that "[t]here is no presumption against judicial review and in favor of administrative absolutism . . . unless that purpose is fairly discernible in the statutory scheme." 397 U.S. at 157.

In *Data Processing*, the Supreme Court had implicitly sanctioned a two-tier inquiry for evaluating the reviewability of an agency act. First, did the statute preclude judicial review on its face? If not, was there any evidence of congressional intent, express or implied, to preclude review or to commit the challenged action to the agency's discretion? The preclusion of review was unlikely to be inferred from a less than specific legislative history. Advocates of preclusion bore a heavy burden of proof. Review of administrative action was the rule—nonreview the unwelcome exception requiring clear evidence in the legislative history. *Id.*

Data Processing addressed the related question of standing. The Court focused on whether the challenged action had caused some injury in fact, whether economic, " 'aesthetic, conservational, and recreational' " or otherwise to the plaintiffs. 397 U.S. at 151, 154 (quoting *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966)). Standing requires the injured interest to be arguably within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The APA grants standing to sue or enjoin agency action to any person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1982).

Article III of the Constitution provides the framework for which standing in the federal courts is to be considered. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party." U.S. CONST. art. III, § 2, cl. 1.

75. Any amount of unchecked discretionary authority is fundamentally inconsistent with our scheme of democratic governance and is incongruous with the system of checks and balances. *See supra* notes 1-2. This discrepancy does not go unnoticed and it has rightly been said that "the American legal system—federal, state, and local—is shot through with excessive and unnecessary discretionary power in the hands of miscellaneous and diverse administrators of many kinds." 2 K. DAVIS, *supra* note 8, § 9:1, at 216. Agency enforcement discretion seems particularly subject to suspicion of abuse. *Id.*

The APA provides that actions committed to agency discretion are to be exempt from review under § 701(a)(2). Yet, the Act also allows "all agency actions" to be reviewed "for abuse of discretion" under § 706(2)(A). 5 U.S.C. § 706(2)(A) (1982). A question naturally arises: how can discretionary action be reviewable for abuse while simultaneously being exempt from all review? 2 K. DAVIS, *supra* note 8, § 28:6. A frequent assertion is that the APA

In *Citizens to Preserve Overton Park v. Volpe*,⁷⁶ the Secretary of Transportation approved federal funding to construct a highway that would sever a public park and destroy twenty-six acres of parkland.⁷⁷ The petitioners brought suit in the United States District Court for the Western District of Tennessee to enjoin construction and to obtain judicial review of the Secretary's decision.⁷⁸ In response, the Secretary pointed to his wide discretion which was unreviewable under section 701(a)(2) of the APA.⁷⁹ Construing its review powers narrowly, the District Court denied the injunction. The Court of Appeals for the Sixth Circuit affirmed.⁸⁰

The Supreme Court reversed and remanded, flatly rejecting the agency's contention that its discretion was unreviewable.⁸¹ Upon examining the enabling legislation,⁸² the Court found "clear and specific directives"⁸³ for the Secretary's discretionary exercise of his highway funding authority. The Court cited *Abbott* for the proposition that the legislation must set forth "clear and convincing evidence" of a congressional intent to restrict access to judicial review.⁸⁴ Writing for the Court, Justice Marshall found that the Act's directives evinced a congressional intent to force the Secretary's decisionmaking to conform to particular standards.⁸⁵ The decision was, therefore, judicially reviewable to ensure that it fell within those boundaries.⁸⁶ Borrowing from the legislative history of the APA, the Court held section 701(a)(2) to be inapplicable except "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" ⁸⁷ Here there was plainly "law to apply" and, therefore, the "committed to agency discretion" exemption was inapplicable.

demands review of discretion. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 365 (1965). Conversely, it is propounded that an agency's enforcement discretion mirrors that of the criminal prosecutor's discretion and, therefore, is given little review. K. DAVIS, *supra* note 8, § 9:6. Although courts had given mixed indications of the reviewability of enforcement discretion, the Supreme Court had no occasion to address the question directly until *Heckler v. Chaney*. See *infra* notes 133-34 and accompanying text.

76. 401 U.S. 402 (1971).

77. *Id.* at 406.

78. 309 F. Supp. 1189 (W.D. Tenn. 1970).

79. 401 U.S. at 411.

80. 432 F.2d 1307 (6th Cir. 1970).

81. 401 U.S. at 413.

82. Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified as amended 49 U.S.C. § 1653(f) (1982)). The case also involved scrutiny of the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815 (1968) (codified as amended in scattered sections of 15, 23, and 49 U.S.C.).

83. 401 U.S. at 411.

84. *Id.* at 410 (quoting *Abbott*, 387 U.S. at 141).

85. *Id.* at 411.

86. *Id.*

87. *Id.* at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

The "law to apply" test introduced in *Overton Park* effectively limited the practical application of section 701(a)(2). Reflecting the concern voiced in *Abbott* for discerning congressional intent, this test closely scrutinized the enabling statute's description of the particular discretionary authority.⁸⁸ Under the test, the existence of statutory standards to evaluate agency discretion provides a reviewing court with "law to apply." Therefore, the action is reviewable.⁸⁹ Conversely, absent statutory guidelines, discretion is presumed committed to the agency by law or, more accurately, by the absence of law.⁹⁰

B. *Dunlop v. Bachowski: Judicial Review of an Agency Enforcement Decision*

An excellent example of the Supreme Court's willingness to review an agency decision to refuse enforcement action is *Dunlop v. Bachowski*.⁹¹ In *Dunlop*, a dissatisfied loser in a union election sought an investigation by the Department of Labor into his allegation of violations of section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).⁹² After a preliminary investigation, the Secretary decided not to institute further civil proceedings against the alleged violators.⁹³ The United States District Court for the Western District of Pennsylvania dismissed Bachowski's action for review of the Secretary's decision,⁹⁴ but the United States Court of Appeals for the Third Circuit reversed.⁹⁵

Citing *Abbott Laboratories*, the Third Circuit determined that the agency

88. Justice Marshall's opinion focuses extensively on the enabling legislation. See *supra* note 82; see also 401 U.S. at 412 n.29.

89. "Plainly, there is 'law to apply' and thus the exemption for action 'committed to agency discretion' is inapplicable." 401 U.S. at 413.

90. *Id.* at 413. *Overton Park* left § 701(a)(2) untested, and did not address the unlikely circumstance where no law applied. The requirement of "clear and convincing evidence" of congressional intent demanded explicit statutory language to preclude review under § 701(a)(1). The question of what language would suffice to commit an action to the discretion of the agency under § 701(a)(2) remained unanswered. An express preclusory clause would remove the action from the "by law" exception and would place it within the § 701(a)(1) exception, presumably leaving § 701(a)(2) with little, if any, practical application.

91. 421 U.S. 560 (1975).

92. Pub. L. No. 86-257, 73 Stat. 532 (1959) (codified as amended at 29 U.S.C. § 481 (1982)); 421 U.S. at 562.

93. 421 U.S. at 563.

94. The district court issued no opinion with its order granting the motion for dismissal. According to the record established at the hearing, "the court concluded that it lacked 'authority' to find the Secretary's actions were arbitrary and capricious and to order him to file suit." *Bachowski v. Brennan*, 502 F.2d 79, 83 n.5 (3d Cir. 1974) (citing Doc. 9, at 27 (W.D. Pa., Civ. No. 73-0954)).

95. 502 F.2d at 85.

shouldered the burden of demonstrating that the Secretary's decision was exempt from review.⁹⁶ Finding the burden had not been met, the court concluded that judicial review of the Secretary's decision "would further the general policy of [the LMRDA] by ensuring that the Secretary does not deny a remedy to those whose rights Congress sought to protect."⁹⁷ This, clearly, disposed of the question of whether review was precluded under section 701(a)(1). Turning to the Secretary's assertion that his enforcement discretion was exempt from review under section 701(a)(2), the court stated that "we do not mean to deny that the Secretary has considerable discretion in the exercise of his enforcement powers However, the fact that an agency action involves some discretion does not necessarily make it unreviewable."⁹⁸ The court dismissed the idea that enforcement discretion, like criminal prosecutorial discretion, was traditionally unreviewable and upheld judicial review of the Secretary's decision.⁹⁹

96. The court of appeals stated that the plaintiff seemed to be entitled to APA review of the Secretary's decision under § 702, unless the decision was shielded from such review by either of the provisions of § 701(a). "The burden of establishing such exclusion, however, is on the defendants." 502 F.2d at 84 (citing *Abbott Laboratories*, 387 U.S. 136, 140-41 (1967)).

97. 502 F.2d at 85.

98. *Id.* at 86.

99. The court dealt with, at some length, the Secretary's assertion that his decision whether to bring suit was protected from review under the doctrine of prosecutorial discretion. *Id.* at 86-89.

Federal courts have often decided the question of review of agency inaction under § 701(a)(2) but seldom with any uniformity. The Securities and Exchange Commission's efforts to shield its enforcement decisions respecting shareholder proxy regulations is illustrative of the treatment given to enforcement decisions by many federal courts. In *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), the District of Columbia Court of Appeals granted review of the Commission's formal approval of a staff recommendation against action on petitioner's shareholder proxy proposal. *Id.* at 668. The court permitted review based on an express provision of the Security and Exchange Act of 1934 (1934 Act) which allowed review of any order issued by the Commission. *Id.* at 665 (citing 15 U.S.C. § 78(a) (1964)). According to the court, the lack of formality and finality of the staff's recommendation made the Commission's formal acceptance of it a reviewable agency order. *Id.* at 668.

The Commission subsequently declined to take the same formal action on a similar staff recommendation in *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974). Recognizing the absence of a final order by the Commission, the same court denied review because the staff did not have the authority to make such an "'order issued by the Commission'" necessary for review under the statute. *Id.* at 644. The *Kixmiller* decision relied on *Medical Committee* in granting the SEC wide discretion in processing the "'formidable number of proxy statements in limited time and with insufficient manpower.'" *Id.* at 645 (quoting 432 F.2d at 674). The court cited § 701(a)(2) in support of its assertion that "[a]n agency's decision to refrain from an investigation or an enforcement action is generally unreviewable." *Id.* at 645. In the final analysis, however, the decision rested on an interpretation of § 25(a) of the 1934 Act which allowed only for review of the Commission's final orders. 492 F.2d at 645 n.24.

The *Kixmiller* court cited *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Jacobsen v. NLRB*, 120 F.2d 96 (3d Cir. 1941), in support of its general presumption of nonreviewability of enforce-

ment discretion. Both cases construe the National Labor Relations Act (NLRA), Pub. L. No. 80-120, 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1982), but neither discussed the APA. *Vaca*, an oft-cited case for the proposition of unreviewable enforcement discretion, asserts that under the NLRA, the General Counsel of the National Labor Relations Board "has unreviewable discretion to refuse to institute an unfair labor practice complaint." 386 U.S. 171, 182 (1967). Although a clear grant of unreviewable authority, the conclusion is drawn from the NLRA, not common law or the APA.

Jacobsen is even weaker support for such a presumption. Prior to enactment of the APA, the Third Circuit interpreted the NLRA to grant enforcement discretion to the Board only as a fact-finder to issue complaints or prohibit unfair labor practices. 120 F.2d at 98, 100. "The course to be pursued rests in the sound discretion of the Board and is the concern of expert administrative policy." *Id.* at 100.

Similarly, in *Natural Resource Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), public interest groups challenged the Commission's failure to adopt their rulemaking petition which would require publicly held corporations to make comprehensive environmental and employment policy disclosures. *Id.* at 1036. Although the Commission claimed that its decision was protected under § 701(a)(2), the Court of Appeals for the District of Columbia granted review after an evaluation of three factors: (1) the need for judicial supervision in order to protect the plaintiffs' concerns; (2) the burden that review would place on the agency's effectiveness in completing its congressionally assigned role; and (3) the ripeness for judicial review of the issue raised. *Id.* at 1044 (citing *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970)). After considering these factors, the court concluded review of the SEC's enforcement discretion to be appropriate. As Judge McGowan wrote: "The balance to be struck is that between the goal of efficient and effective agency action, on the one hand, and the value of judicial review in ensuring the rationality and fairness of agency decisionmaking, on the other." 606 F.2d at 1048.

The court then addressed the question of the suitability of the issues for review.

Perhaps the strongest argument against reviewability is the concern that the issues posed will often not be well-suited for judicial resolution. An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution—e.g., internal management considerations as to budget and personnel; weighing of competing policies within a broad statutory framework Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived.

606 F.2d at 1046 (emphasis in original) (citations omitted). Judge McGowan observed,

The interest of plaintiffs in this context will thus rarely present unusual or compelling circumstances calling for judicial review. . . . [T]he [agency] has not invaded any of [plaintiff's] substantive statutory or constitutional rights, nor singled them out for special and seemingly unfair treatment, nor even, indeed, taken any action to alter the status quo ante.

606 F.2d at 1045. In dicta, the court noted that the agency's level of consideration given to the subject matter was linked to the likelihood that the decision was reviewable. "[I]n general, the more complete an agency's consideration of an issue, the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review." *Id.* at 1047 n.19.

Again, in *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), environmental protection organizations petitioned the Secretary of Agriculture to exercise his statutory authority to suspend the registration of pesticides containing DDT. Despite extensive evidence of the harmful effects of the poison, the Secretary declined to undertake any action. The facts of this case are compelling and strikingly similar to those of *Heckler v. Chaney*. See *supra* notes 13-26 and accompanying text. The court of appeals focused on statutory authorization, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-

The Supreme Court affirmed.¹⁰⁰ Dissenting, Justice Rehnquist maintained that the Secretary's decision was committed to his enforcement discretion under section 701(a)(2).¹⁰¹ Justice Rehnquist noted in support that not only did the LMRDA make the Secretary's institution of a civil action the sole vehicle for challenging a union election,¹⁰² but that Congress depended upon "the *special knowledge and discretion*"¹⁰³ of the Secretary. Justice Rehnquist observed that, under the LMRDA, the Secretary's failure to file a complaint was "precisely the kind of agency action" committed to his discretion by section 701(a)(2) and exempted from the judicial review mandates of the APA.¹⁰⁴

C. *The Criminal Prosecutor's Discretion: Similarities and Differences*

A tradition of extreme judicial deference to the enforcement decisions of the criminal prosecutor existed at common law.¹⁰⁵ Numerous courts have reasoned that agency enforcement discretion deserves similar treatment,¹⁰⁶ however, analogies between the two are not entirely helpful.¹⁰⁷

The Supreme Court held in *United States v. Nixon*,¹⁰⁸ that "the Executive Branch has exclusive authority and absolute discretion to decide whether to

135K (1964). Although the Act provided for judicial review "[i]n a case of actual controversy as to the validity of any order under this section," the agency argued correctly that there had been no final order. 428 F.2d at 1098 n.21 (quoting 7 U.S.C. § 135b(d) (1982)). Therefore, the provisions for review were inapplicable. The agency argued further that there were no other provisions for review and that in their absence, review was precluded. The no action decision on the petition was, in reality, a final decision, but *not* a final order and, therefore, it was unreviewable. Similarly, in *Heckler v. Chaney*, the FDA argued that the lack of a final agency order precluded review. See *supra* notes 21-26 and accompanying text. In *Hardin*, the court of appeals held the Secretary's failure to take action to be judicially reviewable. The court rejected the Secretary's contention that his inaction was committed to his discretion under § 701(a)(2). 428 F.2d at 1097. The preclusion of judicial review was "not lightly to be inferred" but required "clear evidence of legislative intent." *Id.* at 1098. The immediacy of the circumstance and the possibility of harm to the petitioners, if correct in their claims, contributed to the court's decision to grant review. *Id.* at 1099.

100. "We agree . . . that the Secretary's decision not to sue is not excepted from judicial review . . . rather, §§ 702 and 704 subject the Secretary's decision to judicial review under the standard specified in § 706(2)(A)." 421 U.S. at 566.

101. "It seems to me that prior decisions of this Court establish that the Secretary's decision to file or not to file [suit] is precisely the kind of 'agency action . . . committed to agency discretion by law' exempted from the judicial-review provisions of the APA." 421 U.S. at 595 (Rehnquist, J., dissenting).

102. 421 U.S. at 595.

103. *Id.* (emphasis in original).

104. *Id.*

105. 2 K. DAVIS, *supra* note 8, § 9:6.

106. *Id.*

107. See *infra* notes 117-22 and accompanying text.

108. 418 U.S. 683 (1974).

prosecute a case."¹⁰⁹ The Court's denial of judicial review of prosecutorial discretion was based upon the separation of powers doctrine and the belief that "the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."¹¹⁰ As the Second Circuit observed in *Inmates of Attica Correctional Facility v. Rockefeller*,¹¹¹ "federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute."¹¹²

Prosecutorial discretion, however, is not entirely unreviewable. Indeed, a prosecutor's abuse of this discretion has always remained reviewable.¹¹³ Criminal law has evolved in order to afford a greater opportunity for review.¹¹⁴ The pronouncement in *Nixon* was subsequently tempered by *Bordenkircher v. Hayes*,¹¹⁵ which held that "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise."¹¹⁶

The analogy of criminal prosecutorial discretion to agency enforcement discretion, however, breaks down at an early stage. Criminal law prosecutors seek to punish offenders *after* their violation.¹¹⁷ The interest pursued is that of society exacting punishment, in the form of imprisonment or penalties, for a wrong already committed against its laws and its citizens.¹¹⁸ Administrative agencies, on the other hand, do not necessarily seek punishment

109. *Id.* at 693.

110. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

111. 477 F.2d 375 (2d Cir. 1973).

112. *Id.* at 379.

113. See 2 K. DAVIS, *supra* note 8, § 9.6, at 240. "Although post-1974 cases are tending to form a rather consistent body of law allowing review for affirmative abuse of prosecutors' discretion, the law is still somewhat unclear as to reviewability of prosecutors' decisions not to prosecute." *Id.* at 244. "[T]he case law since 1974 is strongly on the side of reviewability." *Id.* at 240. See *Rinaldi v. United States*, 434 U.S. 22 (1977); *Blackledge v. Allison*, 431 U.S. 63, 76 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *Santobello v. New York*, 404 U.S. 257, 260 (1971).

114. 2 K. DAVIS, *supra* note 8, § 9:1, at 244. See *Jackson v. Walker*, 585 F.2d 139, 148 (5th Cir. 1978) (shifting burden to prosecutor to show absence of malice).

115. 434 U.S. 357 (1978).

116. *Id.* at 365.

117. See S. KADISH, S. SCHALHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES*, 1-7 (1983).

118. *Id.*

but *prevention* of regulatory violations.¹¹⁹ As the interested parties involved usually seek injunctive relief from some immediate or impending harm,¹²⁰ the agency's failure to act may carry with it more immediate consequences, causing more disruption and hardship for petitioning parties than would an affirmative act.¹²¹ Conversely, the failure to bring a criminal prosecution only undermines society's interest in obedience to state authority.¹²²

119. See B. SCHWARTZ, *supra* note 7, §§ 2.23-2.25.

120. *Id.*

121. Many parties petitioning administrative agencies seek some sort of enforcement intervention to redress, curtail, or prevent the occasion of a perceived harmful or undesirable activity by another. Whether the agency intervenes, often determines the outcome of the dispute. For instance, when the Labor Department refused to file suit against the union that Walter Bachowski alleged had manipulated his election, Bachowski was left with no other recourse at law. Congress had endowed the Labor Department with the sole jurisdictional means for addressing such election disputes. See *Dunlop v. Bachowski*, 421 U.S. 560 (1975); see also *supra* notes 91-104 and accompanying text. Other examples of citizen hardship resulting from agency inaction may be more obvious. An overtly graphic example is that of Larry Leon Chaney and the seven other inmates, who, subsequent to the Food and Drug Administration's refusal to pursue their petition, were to be executed by lethal injection, a means that they had claimed to be in violation of the statutory standards and had rather desperately sought agency intervention. See *Heckler v. Chaney*, 105 S. Ct. 1649 (1985); see also *infra* notes 123-35 and accompanying text.

122. Professor Davis treats the question of whether nonenforcement decisions pose a threat to the general welfare in terms of the power concomitantly accorded the administrator.

But why should we be concerned with the negative power, the power *not* to enforce?

How can anyone be hurt by lack of enforcement? Probably, as a matter of historical fact, such rhetorical questions are the main justification for tolerating the extreme growth of the discretionary power not to enforce. But below the surface is a reality of the greatest consequence: *Discretionary power not to enforce is the power to discriminate*. Even a moment's thought should bring the realization that discretionary power not to enforce necessarily means discretionary power to enforce; the negative is impossible without the positive. An officer who has discretionary power not to enforce has the power to discriminate by refraining from enforcement against a thousand violators and by enforcing against one violator, even if the one violator is less deserving of prosecution than many others. The discrimination against the one is sharp and severe and unjust. The same injustice, although perhaps less sharp and less severe, results from enforcement against 500 out of a thousand, especially if the 500 are selected on an irrational or other unsatisfactory basis. The negative power, the discretionary power not to enforce, necessarily carries with it the power to discriminate, and the power to discriminate is an extremely dangerous power.

2 K. DAVIS, *supra* note 8, § 9:1, at 218 (emphasis in original). Davis asserts that the "[p]ower not to enforce is often turned into an affirmative weapon." *Id.* He concludes,

We carve on our court buildings "Equal Justice under Law." And inside the court buildings, we do reasonably well in achieving equal justice under law. Enforcement officers make more than ten times as many decisions involving justice or injustice as judges do, but we do not carve on their buildings "Equal Justice under Law" because we don't expect them to achieve it. We look the other way if an officer enforces

IV. *HECKLER v. CHANEY*: ENFORCEMENT DECISIONS ARE COMMITTED TO AGENCY DISCRETION BY LAW

In *Chaney v. Schweiker*,¹²³ prison inmates sentenced to death by lethal injection filed suit in the United States District Court for the District of Columbia seeking to set aside the FDA's decision to take no enforcement action regarding various states' use of drugs that were unapproved for the purpose of human execution and thus in violation of the Food and Drug Cosmetic Act.¹²⁴ On a motion for summary judgment, the District Court denied review of the agency enforcement decision.¹²⁵ The United States Court of Appeals for the District of Columbia approached the FDA's refusal to investigate with the strong presumption of reviewability first articulated in *Stark* and further developed by *Abbott* and *Overton Park*.¹²⁶ In reversing the District Court, the Court of Appeals correctly observed that, in light of these cases, section 701(a)(2) warranted the most narrow interpretation.¹²⁷ Relying on *Dunlop*,¹²⁸ and citing with approval similar cases upholding review of enforcement decisions,¹²⁹ the Court of Appeals granted review, and held that the agency had abused its discretion.¹³⁰

The Supreme Court reversed.¹³¹ Nearly ten years since his dissent in

against A but not against B, even if the two cases are identical, or even if the reasons for enforcement against B are greater.

If A is the victim of unequal justice as a result of capricious exercise of discretion not to enforce, our legal system typically gives A no remedy.

Our basic system is one of discretionary power to discriminate in making decisions to enforce or not to enforce, and typically the discretionary power is not only uncontrolled by law but is even unguided by law. The uncontrolled and unguided discretionary power to discriminate is in fact especially damaging to justice

Id. at 220. Professor Davis proposes as an alternative to the present administrative state, a system of planned prosecuting. Wherein "new statutes, instead of authorizing enforcement, sometimes authorize *and require* enforcement . . . [prescribing] not only what is legal and illegal but also what is to be enforced [and] what is not to be enforced." *Id.* § 9:13, at 278 (emphasis in original).

123. [1982-83 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 38,184 (D.D.C. Aug. 30, 1982).

124. *Id.* at ¶ 39,035.

125. *Id.* at ¶ 39,037.

126. See *supra* notes 51-60, 68-74, and accompanying text.

127. "[T]he Supreme Court has consistently instructed us to construe narrowly the 'committed to agency discretion' exception." *Chaney v. Heckler*, 718 F.2d 1174, 1184 (D.C. Cir. 1983).

128. *Id.*; see *supra* notes 91-99 and accompanying text.

129. 718 F.2d at 1183 n.22 (citing *WWHT v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Carpet, Linoleum & Resilient Tile Layers Local Union No. 419 v. Brown*, 656 F.2d 564 (3d Cir. 1974); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (per curiam); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971)).

130. 718 F.2d at 1190.

131. *Heckler v. Chaney*, 105 S. Ct. 1649 (1985).

Dunlop, Justice Rehnquist wrote close to the same argument for a unanimous Court in *Heckler v. Chaney*.¹³² The opinion immediately observed that section 701(a)(2) did not “obviously lend itself to any particular construction”¹³³ and went on to construe and apply it.¹³⁴ Elucidating the dichotomy between section 701(a)(1) and section 701(a)(2), the Court relied on the “law to apply” distinction made in *Overton Park*. Where the enabling legislation provided no statutory guidelines for the agency’s exercise of discretion, there is no law to apply. In the absence of law to apply, the Court reasoned, the decision is committed to the agency discretion by law under section 701(a)(2) and is therefore unreviewable.¹³⁵

A. *The New Presumption of Nonreviewability*

The narrow holding of *Chaney* was that the Court of Appeals had erroneously relied on an old FDA policy statement for the requisite “law to apply.”¹³⁶ On this point, the Court specifically reversed.¹³⁷ Without “law to apply” under the *Overton Park* test, review of the FDA decision should have been denied.¹³⁸ The *Chaney* opinion demonstrated the application of a test only alluded to in *Overton Park*.

Eager to address the larger question of the reviewability of all agency enforcement decisions, Justice Rehnquist announced a new presumption of nonreviewability for all agency enforcement decisions.¹³⁹ This new presumption was in direct conflict with the principles of *Stark*, its progeny, and the APA.¹⁴⁰ Aware of prior decisions supporting reviewability, and distinguishing *Dunlop* as a case turning on statutory interpretation of the LMRDA, Justice Rehnquist noted “the general unsuitability for judicial re-

132. *Id.*

133. *Id.* at 1654.

134. *Id.* at 1654-58.

135. *Id.* at 1657-58.

136. *Id.* at 1658. The Court of Appeals had held that an FDA policy statement imposed on the agency an affirmative “obligation” to “investigate and take appropriate action against unapproved uses of approved drugs” where such use threatened the public health. 718 F.2d 1174, 1176 (citing Legal Status of Approved Labeling for Prescription Drugs; Prescribing for Uses Unapproved by the Food and Drug Administration, 37 Fed. Reg. 16,503, 16,504 (Aug. 15, 1972)). The Supreme Court dismissed this policy statement as vague, misinterpreted by the Court of Appeals, and as conflicting with the FDA rule on judicial review currently found at 21 C.F.R. § 10.45 (1986). Moreover, the Court observed that the policy statement itself was never adopted by the FDA.

137. 105 S. Ct. at 1659.

138. *Id.* at 1658-59.

139. *Id.* at 1656. The Court concluded that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under 701(a)(2).”

140. See *supra* notes 51-61 and accompanying text.

view of agency decisions to refuse enforcement.”¹⁴¹ The unique nature of enforcement decisions warranted complete deference by the Court.¹⁴²

Chaney offered three reasons to support this bold assertion. The first was administrative efficiency: “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”¹⁴³ The Act did not mandate agency enforcement of all regulations; therefore, the FDA, not the Court, was the best judge of how to allocate its limited resources.¹⁴⁴ Moreover, general principles of administrative law demanded that courts “defer to an agency’s construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.”¹⁴⁵

Second, agency inaction posed no threat to any vested private rights because the agency did not bring its coercive powers to bear on the individual.¹⁴⁶ By contrast, when an agency affirmatively acts to enforce, the action and its consequences are clearly measurable and more easily reviewable.¹⁴⁷ The action itself “provides a focus for judicial review.”¹⁴⁸

Finally, agency refusals to enforce are similar to criminal prosecutors decisions not to indict—“a decision which has long been regarded as the special province of the Executive Branch.”¹⁴⁹ That “tradition” of prosecutorial

141. 105 S. Ct. at 1656. Interestingly, the Court distinguished *Dunlop* as a case of adequate “law to apply.” According to the Court, *Dunlop* “presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability.” 105 S. Ct. at 1657. The applicable provision of the Labor Management Reporting and Disclosure Act (LMRDA) reads, “[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action.” *Id.* (quoting 29 U.S.C. § 482(b) (1982)). The use of the command “shall” in the LMRDA differs from the permissive tone of the applicable statute in *Chaney* which reads: “The Secretary [of the FDA] is authorized to conduct examinations and investigations . . .” 21 U.S.C. § 372(a) (1982). *But cf.* 2 K. DAVIS, *supra* note 8, § 9:5, at 238 (“‘Duty’ means ‘no duty’ and ‘shall’ means ‘may.’”). With the statutory differences set out, the Court concluded that “*Dunlop* is thus consistent with a general presumption of unreviewability of decisions not to enforce.” 105 S. Ct. at 1657.

142. 105 S. Ct. at 1657.

143. *Id.* at 1656.

144. “The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” *Id.*

At this point Justice Rehnquist drew upon the “hands off” approach of previous decisions with regard to agency expertise: courts will defer to agency interpretation of the statutes it is charged with implementing. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (Rehnquist, J., opinion); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975).

145. 105 S. Ct. at 1656.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

discretion was embodied in section 701(a)(2).¹⁵⁰

Justice Rehnquist's narrow ruling on the question of reviewability was well-reasoned. His application of *Overton Park's* "law to apply" test to remove enforcement discretion decisions from judicial review is compatible with previous case precedent.¹⁵¹ However, the newly announced presumption of nonreviewability rests on less sound reasoning. The separate opinions of Justices Brennan and Marshall concur in the narrow holding but reject the broad pronouncement of the new presumption.¹⁵² Justice Marshall's opinion is a loosely disguised dissent from the Court's holding that all enforcement decisions are to be presumed immune from judicial review.¹⁵³

B. Weaknesses in the New Presumption's Foundation

The reasoning employed by Justice Rehnquist in support of the new presumption is not entirely consistent with prior decisions.¹⁵⁴ To begin, all actions of an administrative agency may be couched in terms of an action "peculiarly within its expertise."¹⁵⁵ Given the absence of statutory language in the FDCA on the question of review, *Abbott Laboratories* would have resolved the conflict in favor of reviewability.¹⁵⁶ The Court asserted that an

150. *Id.* The Court observed that prior decisions have held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* In support of this contention that civil processes warrant this extreme deference to the agency, the Court cited to *United States v. Batchelder*, 442 U.S. 114 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869).

151. See *supra* notes 75-90 and accompanying text.

152. Concurring, Justice Brennan embraced the Court's holding that the FDA's refusal to respond to citizen requests for action are subject to a general presumption of nonreviewability. Even so, Justice Brennan limited this new presumption so as not to affect nonenforcement decisions where (1) an agency denies holding the statutory authority to reach certain conduct; (2) "an agency engages in a pattern of nonenforcement"; (3) agency refusals to enforce regulations validly promulgated and still in effect; (4) constitutional rights are violated; or any other nonenforcement decision made illegitimate for illegal reasons. 105 S. Ct. at 1659-60. Notably, in a footnote, Justice Brennan stipulated that in light of the particular facts of this case, his concurrence "should not be misread as an expression of approval for the use of lethal injections to effect capital punishment." *Id.* at 1660 n.2.

153. Justice Marshall's lengthy concurrence begins:

Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding . . . would eschew. In my view, the "presumption of unreviewability" announced today is a product of [such a] lack of discipline . . .

Id. at 1660.

154. See *supra* notes 52-74 and accompanying text.

155. 105 S. Ct. at 1656. Indeed once passed the threshold jurisdictional questions, all agencies amass expertise on whatever the subject of regulation. This has never before impeded the process of judicial review. See generally B. SCHWARTZ, *supra* note 7, § 10.1.

156. See *Abbott Laboratories*, 387 U.S. at 140; see also *supra* notes 68-74.

agency's inaction failed to bring coercive power to bear, thereby overlooking the obvious hardships caused by an agency's failure to protect a class from harm.¹⁵⁷ In fact, the argument that the "tradition" of criminal prosecutorial discretion applies equally to agency enforcement decisions ignores the fundamental differences between criminal law enforcement and industry regulation.¹⁵⁸ Furthermore, prosecutorial discretion is not absolute but is judicially reviewable for abuse.¹⁵⁹

Justice Rehnquist briefly addressed the problem regarding the interpretation of section 701, which bars review, in light of the generous review provisions of section 706.¹⁶⁰ Justice Rehnquist's "common sense" approach reads section 706 to pertain only to "law to apply" review scenarios. In other words, where section 701(a)(2) applies, section 706 automatically would not.¹⁶¹ Yet this approach would allow obvious abuses of agency enforcement discretion to go completely unchecked.¹⁶²

Justice Marshall raised the concern that the new presumption would bar courts from the proper review of flagrant abuses of agency discretion.¹⁶³ Justice Marshall's apprehension is not unjustified. He correctly observed that the new presumption is only rebuttable when statutes provide standards governing the exercise of discretion or show clear evidence of congressional

157. That the particular appellees in the case were adversely affected by the FDA's refusal to investigate is beyond question. Myriad examples of similar hardship through agency inaction are neither difficult to locate nor imagine. See *supra* note 121. The APA itself anticipates such hardship caused by agency failure to act. Its judicial review provisions apply to all persons aggrieved by such agency inaction. See 5 U.S.C. § 706 (1982).

158. See *supra* notes 105-22 and accompanying text.

159. Patterns of prosecution that violate constitutional rights are subject to judicial review. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

160. "How is it . . . that an action committed to agency discretion can be unreviewable and yet courts still can review agency actions for abuse of that discretion." 105 S. Ct. at 1654.

161. "This construction avoids conflict with [§ 706]—if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.* at 1655.

162. As noted by concurring Justice Marshall. See *infra* notes 164-67 and accompanying text. A recent decision explains this portion of the opinion by focusing on the law to apply question in each case. The existence of statutory language circumscribing the exercise of discretion rebuts the presumption of nonreviewability. The United States Court of Appeals for the Seventh Circuit has concluded: "Thus we read *Chaney* solely as reaffirming the recognized position that § 701(a)(2) applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion." *Cardoza v. Commodity Futures Trading Comm.*, 768 F.2d 1542, 1549 (7th Cir. 1985).

The court cited Professor Davis criticizing the "law to apply test" of *Overton Park* as unsound and without basis in law or logic. "The idea is flagrantly and obviously unsound, because, whether or not law applies, a judicial check is often needed to assure that administrative action is not arbitrary, capricious or an abuse of discretion." 2 K. DAVIS, *supra* note 8, § 28:8, at 290 (emphasis in original).

163. 105 S. Ct. at 1661.

intent to allow review.¹⁶⁴ If left unrebutted by the enabling legislation, the new presumption would protect even the most egregious enforcement decisions.¹⁶⁵ Vexatious, retaliatory or unconscionable agency reasons for refusing enforcement action would stand without judicial correction.¹⁶⁶

To anticipate future judicial interpretation, the facts in *Heckler v. Chaney* should be read closely.¹⁶⁷ Despite the Court's broad pronouncement of a new presumption of nonreviewability, there are formidable obstacles to its unfettered application.¹⁶⁸ Constitutional questions, for instance, could presumably alter the outcome.¹⁶⁹ The Court, however, did not address this pos-

164. With this observation Justice Marshall objects to the limited opportunities for rebuttal which "implies far too narrow a reliance on positive law, either statutory or constitutional." *Id.* at 1667.

165. *Id.* at 1668.

166. Justice Marshall observed, "a refusal to enforce that stems from a conflict of interest, that is the result of a bribe, vindictiveness or retaliation, or that traces to personal or other corrupt motives ought to be judicially remediable." *Id.* at 1667. See *Marshall v. Jerricho, Inc.*, 446 U.S. 238, 249-50 (1980) (factors of personal interest in the prosecutorial decision may be impermissible and raise constitutional questions). Such impermissible motives for enforcement decisionmaking are precisely the wrong Congress and the APA sought to avoid.

167. So cautions Justices Brennan and Marshall. 105 S. Ct. at 1660. In the final paragraph of the majority opinion, Justice Rehnquist provides a caveat: "No colorable claim is made [that the FDA's] refusal to institute proceedings violated any constitutional rights . . ." *Id.* at 1659.

Indeed, subsequent decisions following *Chaney* have construed the opinion narrowly. See *California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1048 n.28 (D.C. Cir. 1985) (agency action circumscribed by statute is subject to judicial review); *Donovan v. Daniel Marr & Son*, 763 F.2d 477, 484 (1st Cir. 1985) (Secretary of Labor's decision not to issue citations is unreviewable); *Falkowski v. EEOC*, 764 F.2d 907, 908-11 (D.C. Cir. 1985) (Department of Justice decision not to appoint counsel is tantamount to enforcement discretion in *Chaney* and unreviewable); *Gillis v. United States Dep't of Health and Human Services*, 759 F.2d 565, 576 (6th Cir. 1985); see also *Cardoza v. Commodity Futures Trading Comm.*, 768 F.2d 1542, 1549-51 (distinguishing *Chaney* as based upon the particular lack of FDA statutory authority and restating the importance of reviewability; "judicial scrutiny . . . is the type of traditional judicial function which courts are qualified to exercise").

168. See 105 S. Ct. at 1658.

169. A pattern of enforcement or nonenforcement based upon discrimination of a protected class would obviously run afoul of the Equal Protection Clause of the Constitution. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the Supreme Court observed of the San Francisco Board of Supervisors Administration of a zoning ordinance,

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74; see also *Two Guys, Inc. v. McGinley*, 366 U.S. 582, 588-89 (1961) (asserting that unconstitutional discrimination to be a valid defense to discriminatory enforcement).

Similarly, a prosecutor's enforcement discretion that was deliberately used to infringe First Amendment rights is always subject to judicial review. See, e.g., *United States v. Falk*, 479 F.2d 6161 (7th Cir. 1973); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v.*

sibility.¹⁷⁰ The question remains whether evidence of egregious conduct or abuse of enforcement discretion on the part of the FDA could rebut the presumption of nonreviewability. Justice Rehnquist, apparently, would answer this question in the negative. However, the long established presumption of reviewability may demand judicial examination under such circumstances.¹⁷¹ The relative simplicity of *Chaney's* factual setting, which presented no constitutional complexities and no evidence of administrative misconduct, leaves open this question. It is doubtful that future decisions will extend the section 701(a)(2) exception to agency enforcement decisions that flout constitutional rights and elements of fundamental fairness.¹⁷²

V. CONCLUSION

Heckler v. Chaney creates a new presumption of judicial nonreviewability of agency decisions to refuse enforcement actions.¹⁷³ This presumption places all agency enforcement decisions within the narrow exception created by section 701(a)(2) of the APA.¹⁷⁴ *Chaney* purports to foreclose a rebuttal of the new presumption by any evidence other than that found in the enabling statute.¹⁷⁵ Prior Supreme Court decisions and the constitutional design of separation of powers may demand judicial review upon evidence of either infringement of fundamental rights or egregious administrative action.¹⁷⁶ Concurring, Justice Marshall cautions against broad application of the new presumption.¹⁷⁷ He and Justice Brennan suggest that the *Chaney* holding should be limited largely to its facts.¹⁷⁸

The simplicity of Justice Rehnquist's sweeping new presumption of judicial nonreviewability of enforcement decisions belies the potential inequities of the decision. The opinion implicitly sanctions vexatious abuses of agency enforcement discretion by foreclosing the forum of review.¹⁷⁹ This result is wholly incompatible with the APA in that it is precisely this sort of abuse

Crowthers, 456 F.2d 1074 (4th Cir. 1972); 2 K. DAVIS, *supra* note 8, § 9:7; L. JAFFE, *supra* note 69, at 376-89.

170. 105 S. Ct. at 1659.

171. *See supra* notes 69-79 and accompanying text.

172. This is the concern of the concurring opinions of Justice Marshall. *See supra* notes 164-67.

173. *See supra* notes 136-52 and accompanying text.

174. 105 S. Ct. at 1659.

175. *See supra* notes 136-52 and accompanying text.

176. *Id.*

177. *See supra* notes 163-67 and accompanying text.

178. 105 S. Ct. at 1660. "[O]ne can only hope that [the majority opinion] will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood." *Id.* (Marshall, J., concurring).

179. *See supra* notes 163-67 and accompanying text.

that Congress sought to prevent.¹⁸⁰ Furthermore, the decision is inconsistent with the enlightened edicts of prior Supreme Court decisions. It remains for future decisions to define further the scope of the new presumption; decisions that will undoubtedly limit the application of this new gap in the scheme of balanced government authority.¹⁸¹

Fortunately, the long established presumption of review remains intact. An analysis of prior case law suggests that *Chaney* does little to undermine judicial review in factual circumstances warranting judicial intervention for the protection of fundamental rights and for the prevention of abuse of authority. However, where agencies make simple administrative resource-allocation decisions, absent any standards or guidelines provided by the enabling legislation, *Heckler v. Chaney* serves to remove the agency decision entirely from the ambit of judicial review.

William W. Templeton

180. "[W]hen 'enforcement' inaction allegedly deprives citizens of statutory benefits or exposes them to harms against which Congress has sought to provide protection, review must be on the merits to ensure that the agency is exercising its discretion within permissible bounds." 105 S. Ct. at 1668 (Marshall, J., concurring).

181. See *supra* notes 163-67 and accompanying text.