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Ashutosh Bhagwat

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# Three-Branch Monte

Ashutosh Bhagwat\*

## I. INTRODUCTION

Over ten years ago, in its important opinion in *Heckler v. Chaney*,<sup>1</sup> the Supreme Court declared that when an administrative agency declines to initiate enforcement proceedings, its decision should be presumptively exempted from the judicial review provisions of the Administrative Procedure Act<sup>2</sup> (APA) because such decisions are normally “committed to agency discretion by law.”<sup>3</sup> The *Chaney* decision, and the important doctrine of judicial review that it created, rest on fundamental misunderstandings of the nature of the administrative state and of the role that separation of powers principles play within the unitary agencies which constitute most of the modern state. Because of this misunderstanding, the unintended consequence of *Chaney* has been to permit administrative agencies to shield policy decisions of great public significance from judicial review by creating a situation in which agencies are able to hide what are at bottom legislative and judicial judgments behind the facade of executive discretion: by playing, as it were, a game of three-branch monte. Judicial review, however, is an essential component of the scheme created by the APA to control and constrain agency discretion. As a consequence, *Chaney* has systematically disturbed the existing balance of authority within the administrative state by improperly shifting power from reviewing courts to agencies. Some corrective action is therefore required, for both legal and policy reasons.

When the *Chaney* decision was announced, it represented a major shift in the Supreme Court’s administrative law jurisprudence, which until then had strongly favored reviewability of agency actions. Nonetheless, the initial response to *Chaney* in the lower courts was not only widespread acceptance, but indeed some broadening of the Court’s actual holding, as the lower courts attempted to follow what they perceived as the underlying premises of the decision. Over time, however, these same courts, including notably the United States Court of Appeals for the District of Columbia Circuit, have issued a series of opinions sharply limiting the scope of the *Chaney* doctrine, and creating broad, seemingly unprincipled exceptions to its rule of nonreviewability. An examination of these lower court efforts to reconcile *Chaney*’s presumption of nonreviewability with the existing body

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\* Assistant Professor of Law, University of California, Hastings College of the Law <bhagwata@uchastings.edu>. B.A. Yale University 1986; J.D. The University of Chicago 1990. I would like to thank Marsha Cohen, Bill Dodge, Shannon Gaffney, Evan Lee, Ronald Levin, Alan Meese, and the participants at a faculty workshop at Hastings College of the Law for extremely helpful comments and suggestions. I would also like to thank Laura Malinasky and Sunil Kulkarni for excellent research assistance.

1 470 U.S. 821 (1985).

2 Ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

3 5 U.S.C. § 701(a)(2) (1994).

of administrative law regarding judicial review of agency action and inaction yields important insights into the Court's decision in *Chaney*. In particular, it suggests that while the *Chaney* decision rests on some legitimate pragmatic concerns, the principles adopted in *Chaney* and the broad gloss originally placed on that decision by the lower courts—what have together become the *Chaney* doctrine—are inconsistent with preexisting law and with any well-rooted theory of judicial review.

The theoretical difficulties which pervade the *Chaney* doctrine of nonreviewability reveal themselves in the opinion itself. The distinctions upon which the *Chaney* Court relied in defending its curtailment of judicial review, distinctions between positive "law" and mere enforcement policy, and between agency action and inaction, are not sustainable in a world characterized by an almost complete lack of separation of powers within most administrative agencies,<sup>4</sup> and by pervasive regulation. For similar reasons, the *Chaney* opinion's reliance on an analogy between agency nonenforcement decisions and traditional executive branch prosecutorial discretion was also misplaced. The reality is that unitary administrative agencies, in which legislative, adjudicative, and prosecutorial functions are combined, are able to make and implement law and policy through a pattern of enforcement and nonenforcement decisions almost as easily as through more traditional types of agency action, such as rulemaking, which are universally acknowledged to be subject to judicial review. Indeed, a legal realist would argue that no meaningful distinction can be drawn between "enforcement" and "law," either from the points of view of an enforcing agency or of those subject to its authority. The main consequence, then, of a rule against review of enforcement decisions is to encourage agencies to make law using their enforcement powers rather than other reviewable avenues such as rulemaking. And the natural reaction of reviewing courts is to seek to limit the ability of agencies to evade judicial review in that manner. This suggests that the patchwork of decisions that has emerged in the wake of *Chaney* should not be understood as the product of unprincipled efforts by lower courts to evade the *Chaney* doctrine, but rather as a reflection of the logical inconsistencies of *Chaney* itself.

None of which is to say that the pragmatic concerns raised in *Chaney*, regarding institutional limits on the ability of the courts to review agency nonenforcement and resource allocation decisions, are without force. Clearly, universal and searching review of nonenforcement decisions, on the model of judicial review of agency rulemaking, for example, is neither plausible nor desirable. What is needed is a more modulated approach to review of enforcement policy and nonenforcement decisions, under which courts acknowledge the primacy of agencies as to *some aspects* of enforcement policy formulation, but do not wholly forsake judicial supervision of an entire area of agency policymaking, as does the *Chaney* doctrine. Such a modulated approach, under which agencies would be required to articulate, defend, and follow consistent enforcement (and nonenforcement)

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4 For a discussion of the lack of separation of powers within agencies, and some of its problematic implications, see John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 631-34, 654-60 (1996).

policies but would be given substantial freedom in formulating the inherently discretionary parts of those policies, would be far more sustainable and more consistent with longstanding principles of judicial review than the categorical approach of *Chaney*.

## II. *CHANEY* AND ITS PROGENY

*Heckler v. Chaney* stands as one of the modern landmarks of administrative law. It has been the topic of any number of articles describing, discussing, and criticizing its doctrinal analysis.<sup>5</sup> Though I will refrain from covering old ground, a brief discussion of the decision is necessary as background for the events that later unfolded in the lower appellate courts. The underlying claim in *Chaney* was extremely unusual, given the doctrinal significance of the case. A group of death row inmates filed a petition with the Food and Drug Administration (FDA), asking the agency to investigate and regulate the use of certain drugs in lethal injections by the States which had sentenced the inmates to death. The Commissioner of the FDA denied the petition, explaining that he was not pursuing the requested investigation in part because he was uncertain of the agency's jurisdiction, and in part because even if jurisdiction existed, he did not think it a productive use of the agency's resources to pursue such an investigation in light of the "lack of a serious danger to the public health," and the legal uncertainty regarding whether the states' use of the drugs violated the substantive provisions of the Food and Drug Act.<sup>6</sup> The inmates then filed an action in the United States District Court for the District of Columbia, seeking review under the APA of the Commissioner's decision denying their petition. The District Judge granted summary judgment for the agency on the grounds that the Commissioner's decision declining to undertake an enforcement action was unreviewable under the APA. On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the APA did not preclude review of the Commissioner's decision, and that his refusal to commence an investigation was arbitrary and capricious.<sup>7</sup> Finally the Supreme Court granted certiorari and, in an opinion by then-Justice Rehnquist,<sup>8</sup> in turn reversed the D.C. Circuit.

Justice Rehnquist's analysis rested primarily on § 701(a)(2) of the APA, which exempts from the general right of judicial review established in

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<sup>5</sup> See, e.g., Kenneth C. Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1 (1988); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985); *The Supreme Court, 1984 Term, Leading Cases*, 99 HARV. L. REV. 120, 264 (1985 Part III); Donald M. Levy & Delora Jean Duncan, Note, *Judicial Review of Administrative Rulemaking and Enforcement Discretion: The Effect of a Presumption of Unreviewability*, 55 GEO. WASH. L. REV. 596 (1987); Sharon Werner, Note, *The Impact of Heckler v. Chaney on Judicial Review of Agency Decisions*, 86 COLUM. L. REV. 1247 (1986).

<sup>6</sup> *Chaney*, 470 U.S. at 824-25.

<sup>7</sup> *Id.* at 825-27 (citing *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd* 470 U.S. 821 (1985)). Then-Judge Scalia dissented from the panel's opinion.

<sup>8</sup> Justice Rehnquist's opinion was joined by every member of the Court except Justice Marshall, who filed an opinion concurring in the judgment. *Chaney*, 470 U.S. at 840-55. Justice Brennan also filed a concurring opinion, though he joined the opinion of the Court. *Id.* at 838-39.

§ 702 and § 706 of the APA any agency action which "is committed to agency discretion by law."<sup>9</sup> Relying on precedent,<sup>10</sup> the Court first established that this exception only applies "in those rare instances where [the relevant statute governing the agency's actions is] drawn in such broad terms that . . . there is no law to apply."<sup>11</sup> The Court departed from precedent, however, when it concluded that agency nonenforcement decisions, such as the FDA Commissioner's decision at issue in the case, should be *presumptively* exempt under § 701(a)(2) from the APA's judicial review provisions, because of the practical difficulties which would arise if the judiciary sought to review and supervise an agency's decisions as to which violations of law to pursue and which to ignore. In reaching this conclusion, the Court emphasized several factors. First, it noted that nonenforcement decisions involve a complex balancing of discretionary factors, including especially how an agency's resources are best allocated, which courts are ill-suited to second-guess. Second, the Court noted that nonenforcement decisions do not involve the use of an agency's "coercive powers over an individual's liberty or property rights,"<sup>12</sup> and so are presumably less in need of judicial control than decisions to take positive action. And finally, the Court commented on the similarities between agency nonenforcement decisions and the criminal prosecutorial discretion traditionally enjoyed by the Executive Branch. Despite this analogy, however, the Court emphasized that its decision was not dictated by the Constitution, and that the presumption of nonreviewability it was creating could be rebutted under a number of circumstances. Most significantly, the Court pointed out that review would be available when Congress had established statutory guidelines for how an agency should exercise its enforcement authority.<sup>13</sup> It also recognized at least the possibility that review would be available in other circumstances, including when an agency's own regulations set out enforcement guidelines,<sup>14</sup> when an agency refuses to act solely because it believes it lacks jurisdiction, and when an agency has adopted an extreme policy of nonenforcement amounting to "an abdication of its statutory responsibilities."<sup>15</sup>

Despite all of these hedges, *Chaney* represents a substantial departure from the Court's previous decisions regarding judicial review under the APA. Prior to *Chaney*, and beginning with the landmark case of *Abbott Laboratories v. Gardner*,<sup>16</sup> the Court had long recognized a presumption in favor of the reviewability of agency actions. Moreover, this presumption encompassed agency failures to act, since under the APA agency action is defined to include a "failure to act," so that action and inaction are not treated

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9 5 U.S.C. § 701(a)(2).

10 See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

11 *Chaney*, 470 U.S. at 830 (quoting *Overton Park*, 401 U.S. at 410).

12 *Chaney*, 470 U.S. at 832.

13 *Id.* at 833. Congressional authority to override the nonreview presumption would, of course, not exist if the *Chaney* holding had been based on constitutional principles.

14 *Id.* at 836.

15 *Id.* at 833 n.4.

16 387 U.S. 136 (1967); see also *Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995).

differently for purposes of reviewability.<sup>17</sup> As a result, the Court had interpreted the APA's exceptions to its judicial review provisions very narrowly. In *Chaney*, however, the Court created a presumption against judicial review for an entire category of agency actions, based largely on pragmatic rather than statutory factors. As such, the *Chaney* opinion represented an important innovation in the Court's administrative law jurisprudence, and produced a significant shift in the existing balance between agencies and reviewing courts. Certainly *Chaney* was originally so received by the lower courts. The decision has been invoked in a very large number of administrative law cases to deny review of agency action, including a long line of decisions in the D.C. Circuit;<sup>18</sup> it has been described as the Court's "worst departure" from the longstanding tradition of reviewability of administrative action;<sup>19</sup> and it provided the initial impetus for the formulation of a broad, though ultimately abortive, new exception to the general presumption in favor of judicial review for issues of agency resource allocation.<sup>20</sup> Finally, the D.C. Circuit seems from the start to have extended *Chaney*'s presumption of nonreviewability from individual nonenforcement decisions to agency announcements of a general *enforcement policy*.<sup>21</sup> This was not an inevitable step—while there is no clear line between individual decisions and policies,<sup>22</sup> there is a common sense distinction which the D.C. Circuit might have invoked between broadly worded policies with which the public at large is likely to be concerned, and fact-bound individual decisions, relevant primarily to a particular set of parties.

Nonetheless, despite this early enthusiasm, the reception of the *Chaney* doctrine in the lower courts has cooled. In recent years, instead of picking up on the expansive tone of the Court's opinion, lower courts have tended to restrict *Chaney* to its narrow holding regarding review of agency nonenforcement decisions, and even within that sphere, have sought to carve out a number of exceptions to the general nonreviewability presumption. The remainder of this section describes these limitations on the scope of *Chaney*.

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17 See 5 U.S.C. § 551(13) (1994); Levy & Duncan, *supra* note 5, at 624-25; see also 5 U.S.C. § 706 (1994) (permitting reviewing court to "compel agency action unlawfully withheld"); 5 U.S.C. § 702 (1994) (authorizing review if agency officer "failed to act").

18 See, e.g., *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1214-17 (D.C. Cir. 1993); *Coker v. Sullivan*, 902 F.2d 84, 88-90 (D.C. Cir. 1990); *Safe Energy Coalition v. NRC*, 866 F.2d 1473, 1476-80 (D.C. Cir. 1989); *Board of Trade v. SEC*, 883 F.2d 525, 530-31 (7th Cir. 1989); *Arnov v. NRC*, 868 F.2d 223 (7th Cir. 1989); *Massachusetts Pub. Interest Research Group v. NRC*, 852 F.2d 9 (1st Cir. 1988); *Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986); *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985); Levin, *supra* note 5, at 753 n.321 (listing cases); cf. *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 130 (1987) (finding informal settlement by NLRB General Counsel unreviewable because it is "prosecution," not "adjudication").

19 Davis, *supra* note 5, at 7; see also *id.* at 2.

20 See *California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1052-53 (D.C. Cir. 1985) (Scalia, J., concurring); *Falkowski v. EEOC*, 764 F.2d 907, 911 (D.C. Cir. 1985). See generally Levy & Duncan, *supra* note 5, at 615-17; Werner, *supra* note 5, at 1257-58 (criticizing such a broad reading of *Chaney*). As the following discussion indicates, no such broad reading of *Chaney* appears to have in fact taken hold.

21 See *National Treasury Employees Union v. Horner*, 854 F.2d 490, 496-97 (D.C. Cir. 1988); *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1190-91 n.4 (D.C. Cir. 1985).

22 See generally *infra* notes 96-99 and accompanying text.

The first notable aspect of the evolution of the *Chaney* doctrine is the enormous resistance that the lower courts have displayed to expanding *Chaney* much beyond its original holding. *Chaney* has been received as a decision about review of agency nonenforcement decisions, not about the role of the courts in controlling agency discretion, or even about review of agency inaction. For example, soon after *Chaney*, the D.C. Circuit was presented with the question of what effect the Court's decision had on the lower court's pre-*Chaney* precedent permitting judicial review of an agency decision not to promulgate regulations.<sup>23</sup> In an opinion by Judge Williams, the court held that despite the facial similarities between agency decisions not to enforce and agency decisions not to promulgate rules, *Chaney* should not be extended to nonpromulgation decisions.<sup>24</sup> In reaching this conclusion, the court noted that nonpromulgation is not analogous to criminal prosecutorial decisions in that it tends to be based on legal rather than factual considerations, and further noted that because § 555(e) of the APA requires agencies to give reasons for denying petitions to initiate rulemaking, nonpromulgation decisions are therefore amenable to judicial review (albeit generally under a very deferential standard). However, the grounds upon which the court distinguished *Chaney* are very weak, since most of Judge Williams's arguments in favor of reviewing nonpromulgation seem to apply equally to nonenforcement.<sup>25</sup> Moreover, nonpromulgation is just one, though perhaps the most significant, example of the resistance of courts to extend *Chaney*. For example, courts have tended to reject efforts to extend the *Chaney* nonreviewability presumption to categories of agency actions, such as personnel decisions, where pragmatic concerns similar to those relied upon by the Court in *Chaney* are raised.<sup>26</sup> In addition, Ronald Levin has catalogued instances in which the courts have faced types

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23 The key existing precedent was *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981).

24 *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987) (AHPA); *see also* *National Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989); *Farmworkers Justice Fund, Inc. v. Brock*, 811 F.2d 613, 635-37 (D.C. Cir.) (Williams, J., dissenting), *vacated as moot* 817 F.2d 890 (D.C. Cir. 1987); *cf. Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 655 (7th Cir. 1986) (Posner, J.) (suggesting in dictum that nonpromulgation is unreviewable under *Chaney*).

25 Levin, *supra* note 5, at 764-67. First, the explanation requirement of § 555(e) applies equally to nonpromulgation and nonenforcement decisions. In addition, it is far from clear that nonpromulgation decisions are generally more "legal" than nonenforcement decisions—and in any event it is not clear why this reasoning supports a categorical rule of review or nonreview, since one could as easily limit review to situations where an agency gives legal reasons for a nonpromulgation decision (or for that matter, a nonenforcement decision). Finally, it is not clear why deferential review is more plausible for nonpromulgation than for nonenforcement. The AHPA decision is thus probably best understood as evidencing the general resistance of the D.C. Circuit, and the lower courts in general, to the underlying themes of the *Chaney* decision. Indeed, as discussed below in detail, all of the reasons given by Judge Williams for reviewing nonpromulgation decisions seem to apply with equal strength to at least some types of nonenforcement decisions. *See infra* Part II.

26 *See National Treasury Employees Union v. Horner*, 854 F.2d 490, 496-97 (D.C. Cir. 1988); *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1403-04 & n.10 (D.C. Cir. 1995) (rejecting application of *Chaney* to Army Board for Correction of Military Records's decision refusing to waive a limitations period); *Cardozo v. CFTC*, 768 F.2d 1542, 1547-51 (7th Cir. 1985) (declining to extend *Chaney* to decision by CFTC declining to review disciplinary action conducted by Chicago Board of Trade). These and similar decisions seem to represent a clear rejection of the early movement towards extending *Chaney* to all agency decisions involving resource allocation. *See supra* note 20 and accompanying text.

of agency decisions parallel to, but distinguishable from, the archetypal nonenforcement decision at issue in *Chaney*, and noted a general refusal of courts to extend *Chaney*'s presumption of nonreviewability to those situations.<sup>27</sup> *In toto*, these decisions have tended to cabin the effects of *Chaney* to the precise and narrow category of agency nonenforcement decisions actually considered by the Supreme Court.

In addition to limiting the reach of *Chaney*, courts have created or relied upon a number of exceptions to the general nonreviewability rule, to again limit the inroads of the *Chaney* doctrine on the general presumption of judicial review. To begin with, all of the possible exceptions recognized in the original *Chaney* opinion have been relied upon and even expanded. Statutes have thus been found to provide sufficient standards to rebut the *Chaney* presumption and permit review.<sup>28</sup> Picking up on a hint in the *Chaney* opinion,<sup>29</sup> the lower courts have also widely recognized that the *Chaney* presumption may be rebutted by agency regulations which purport to guide the agency's exercise of its enforcement discretion.<sup>30</sup> Finally, the narrower exceptions for situations when an agency abdicates its enforcement responsibilities,<sup>31</sup> and when it declines

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27 Thus, when an agency conducts a proceeding to determine whether to pursue a particular violation, and then decides to do nothing, courts have reviewed the final agency order—even though in form the order is nothing more than a decision not to enforce. See Levin, *supra* note 5, at 769-70 & n.406 (citing cases). The underlying principle of these cases, that so-called "negative orders" are reviewable in the same way as agency orders taking positive legal action, has been well-established since Justice Frankfurter's pathbreaking opinion in *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1943); so it is unsurprising that *Chaney* did not alter this result. However, this distinction—between nonenforcement and negative orders—is obviously a difficult one to maintain. See *New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1214-17 (D.C. Cir. 1993) (court applies *Chaney* to preclude review of an agency decision to settle an enforcement action, while acknowledging that a decision declining to invalidate a tariff following a full investigation would be reviewable). Courts have also continued after *Chaney* to review claims that an agency has unreasonably delayed action in an ongoing proceeding, again despite the obvious facial similarity to a nonenforcement decision. Levin, *supra* note 5, at 770-73. Finally, courts have struggled with, and have occasionally continued to review, decisions to dismiss ongoing enforcement proceedings before completion. *Id.* at 773-75 (arguing that "no consistent judicial response" has emerged to such cases); see *id.* at 774 n.436 (citing cases granting review). But see *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Cuyohoga Valley Railway v. United Transp. Union*, 474 U.S. 3 (1985) (per curiam); *New York State Dep't of Law*, 984 F.2d at 1214-17; *Schering Corp. v. Heckler*, 779 F.2d 683 (D.C. Cir. 1985) (all denying review).

28 See, e.g., *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir. 1987); *Shelley v. Brock*, 793 F.2d 1368, 1372-74 (D.C. Cir. 1986) (both following Supreme Court decision in *Dunlop v. Bachowski*, 421 U.S. 560 (1975)—which was distinguished in *Chaney*—and reviewing Secretary of Labor's refusal to sue to set aside union elections under Labor Management Reporting and Disclosure Act); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987).

29 *Chaney*, 470 U.S. at 836.

30 See *Clifford v. Peña*, 77 F.3d 1414, 1417 (D.C. Cir. 1996); *Arnov v. United States Nuclear Regulation Comm'n*, 868 F.2d 223 (7th Cir. 1989); *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1476-80 (D.C. Cir. 1989); *Massachusetts Pub. Interest Research Group v. United States Nuclear Research Comm'n*, 852 F.2d 9 (1st Cir. 1988); *Center for Auto Safety v. Dole*, 828 F.2d 799, 803-09 (D.C. Cir. 1987), *rev'd on other grounds on reh'g* 846 F.2d 1532 (D.C. Cir. 1988) (per curiam) (on rehearing, court reaffirmed that agency regulations could rebut *Chaney* presumption, but found presumption not rebutted by NHTSA regulations at issue); *Greater Los Angeles Council on Deafness v. Baldrige*, 827 F.2d 1353, 1360-62 (9th Cir. 1987).

31 See, e.g., *Northern Indiana Public Service Co. v. Federal Energy Regulatory Comm'n*, 782 F.2d 730, 745-46 (7th Cir. 1986). This exception has its origin in the D.C. Circuit's decision in *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (en banc) (per curiam) (reviewing HEW failure to enforce Title VI).



to act due to a belief that the agency lacks jurisdiction,<sup>32</sup> have also been invoked to permit review.

The courts have not stopped, however, with the exceptions identified in *Chaney*. Using the "lack of jurisdiction" exception as purported authorization, several courts announced soon after *Chaney* was decided that the presumption of nonreviewability would not prevent a court from reviewing a statutory interpretation, or other "legal" conclusion, announced by the agency in the course of a nonenforcement decision; and that therefore courts would be able to review nonenforcement decisions when the sole reason for the agency's failure to act was a legal interpretation. The evolution and possible demise of this exception are of particular significance both in illustrating how the lower courts have struggled to confine *Chaney*, and in exposing the underlying weaknesses of the *Chaney* doctrine.

In the leading case, *International Union, UAW v. Brock*,<sup>33</sup> the D.C. Circuit (by Judge Wald) held unreviewable, on *Chaney* grounds, a decision of the Secretary of Labor declining to enforce the reporting requirements of the Labor Management Reporting and Disclosure Act (LMRDA), but nonetheless *did* review a part of the agency's accompanying opinion which interpreted the underlying statute as not applying to the challenged conduct. In granting this partial review the court relied upon the purported difference between an agency decision not to exercise its enforcement discretion against a particular violation, and an agency decision setting out the legal obligations imposed on the public by a statute; and it emphasized that failing to review the latter would create an enormous loophole in the ability of courts to review statutory interpretations announced by agencies.<sup>34</sup> The "legal issue" exception announced in *International Union* has been relied upon to permit review in at least two subsequent D.C. Circuit decisions. First, in *National Wildlife Federation v. United States Environmental Protection Agency*,<sup>35</sup> the court reviewed and set aside an EPA regulation which interpreted the Safe Drinking Water Act to permit the EPA to decline to withdraw a state's "primacy" (authority to enforce the Act), even after the agency determined that the state no longer met statutory requirements. Then, in *Edison Electric Institute v. United States Environmental Protection Agency*,<sup>36</sup> the court reviewed an EPA Enforcement Policy Statement in which the agency reaffirmed its position that certain waste storage practices violated the substantive provisions of the Resources Conservation Recovery Act (RCRA), but also stated that the agency considered such storage a low enforcement priority. A number of other courts have also indicated support for a "legal issue" exception, or some variant of it, to the *Chaney* doctrine.<sup>37</sup>

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<sup>32</sup> See, e.g., *Montana Air Chapter No. 29 v. Federal Labor Relations Auth.*, 898 F.2d 753 (9th Cir. 1990).

<sup>33</sup> 783 F.2d 237 (D.C. Cir. 1986), *overruled by* *Crowley Caribbean Transp. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994).

<sup>34</sup> *International Union*, 783 F.2d at 246.

<sup>35</sup> 980 F.2d 765, 772-74 (D.C. Cir. 1992).

<sup>36</sup> 996 F.2d 326, 333 (D.C. Cir. 1993).

<sup>37</sup> See, e.g., *Montana Air Chapter No. 29 v. Federal Labor Relations Auth.*, 898 F.2d 753 (9th Cir. 1990); *Board of Trade v. Securities & Exch. Comm'n*, 883 F.2d 525, 530-31 (7th Cir. 1989) (Easterbrook, J.); cf. *Farmworkers Justice Fund, Inc. v. Brock*, 811 F.2d 613, 619-23 (D.C. Cir.

Recently, however, the continued viability of a broad "legal issues" exception has been called into doubt, at least in the all-important D.C. Circuit. In *Crowley Caribbean Transportation, Inc. v. Peña*,<sup>38</sup> that court was faced with a claim that it should review an individual nonenforcement decision by the Maritime Administrator, because the decision was based on the legal conclusion that the challenged conduct did not violate the underlying statute.<sup>39</sup> Recognizing that *International Union* would permit review in this situation, the court (in an opinion by Judge Williams) undertook a review of the law in the area, and concluded that the "legal issues" exception, when applied to permit review of an individual nonenforcement decision, was inconsistent with Supreme Court precedent. The court noted in particular that subsequent to *Chaney* the Supreme Court had apparently forbidden reviewing courts from "carving out" reviewable issues from unreviewable agency actions.<sup>40</sup> The court distinguished the *Edison Electric Institute* and *National Wildlife Federation* cases on the grounds that they involved legal challenges to "an agency's statement of a general enforcement policy . . . [rather than] an agency's decision to decline enforcement in the context of an individual case."<sup>41</sup> Thus in *Crowley* the D.C. Circuit appears to have narrowed the exception to *Chaney* opened in *International Union*, to encompass legal challenges to general enforcement policies only. An examination of the reasons for this rejection of what had been identified as a potentially promising means to limit the dangerous consequences of the *Chaney* doctrine,<sup>42</sup> as well as of the problems with the solution adopted by Judge Williams in *Crowley*, must, however, wait until I have discussed one more significant line of cases in which lower courts have circumvented the principles announced in *Chaney*.

This particular story begins with the D.C. Circuit's 1987 decision in *Community Nutrition Institute v. Young*<sup>43</sup> (*CNI*). The court was faced with the question whether the Notice and Comment requirements for informal rulemaking under the APA<sup>44</sup> applied to the adoption of FDA "Action Levels," which are numerical standards published by the FDA (without No-

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1987), *vacated as moot* 817 F.2d 890 (D.C. Cir. 1987) (actions committed to agency discretion still reviewable for statutory violations); *Assiniboine and Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 791-92 (9th Cir. 1986) (same); *Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1025 (9th Cir. 1985) (Schroeder, J., dissenting) (same). See generally Levin, *supra* note 5, at 777 & n.446 (listing cases permitting review of particular claims in face of *Chaney* presumption); *id.* at 746-50 (arguing in favor of a rule of "partial unreviewability," permitting review of legal challenges, but not discretionary decisions); Sunstein, *supra* note 5, at 658-59, 676-77 (suggesting that reviewability after *Chaney* must depend on the nature of the challenge to the agency decision, and the reasons for the agency's inaction).

38 37 F.3d 671 (D.C. Cir. 1994).

39 The challenge to the agency action was brought by a competitor of the regulated entity seeking a waiver. The competitor sought to challenge the agency's conclusion, announced in the course of denying the requested waiver, that there was no statutory violation.

40 *Crowley*, 37 F.3d at 676 (citing *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282-83 (1987)).

41 *Crowley*, 37 F.3d at 676. The court did note, however, that a general enforcement policy might be articulated in the course of announcing an individual nonenforcement decision, in which case such an agency statement might be reviewable. *Id.* at 677. This concession has significant implications, which will be discussed *infra* notes 97-101 and accompanying text.

42 See, e.g., Levin, *supra* note 5, at 746-50; Sunstein, *supra* note 5, at 658-59, 676-77.

43 818 F.2d 943 (D.C. Cir. 1987).

44 See 5 U.S.C. § 553 (1994).

tice and Comment) to inform food producers of what the agency considers to be allowable levels of contamination in food.<sup>45</sup> The FDA argued that the Action Levels fell within the APA exception for “interpretative rules [and] general statements of policy,” because action levels were merely “nonbinding statements of agency enforcement policy,”<sup>46</sup> and therefore were not “legislative rules” subject to Notice and Comment.<sup>47</sup> Describing the distinction between legislative rules and interpretative rules or policy statements as “enshrouded in considerable smog,” the court concluded that the primary criteria for distinguishing non-legislative rules are that they must “not have a present effect,” and must “genuinely leave[ ] the agency and its decisionmakers free to exercise discretion.”<sup>48</sup> The court then applied these criteria to the FDA’s Action Levels, and rejected the agency’s argument that Action Levels should be exempt from Notice and Comment requirements. In reaching this conclusion, the court relied in part on the mandatory language employed by the FDA in describing Action Levels. More interestingly, however, the court also relied on the fact that Action Levels, though concededly not “binding” on regulated firms (in the sense that the FDA could not rely on Action Levels to prove a violation of law in court), acted as legislative rules because they *effectively constrained* the discretion and ability of the agency to prosecute contamination levels below the published Action Level, the reasoning being that the agency would find it almost impossible to convince a court that such a level of contamination made food “adulterated” under the Food, Drug and Cosmetic Act.<sup>49</sup> Therefore, the court held that the Action Levels, even though described by the agency as enforcement guidelines, were subject to the Notice and Comment requirements of the APA, and remanded for the agency to follow these procedures.<sup>50</sup>

The issues resolved in the *CNI* case did not directly implicate *Chaney*, because the *CNI* court did not rule that the FDA’s enforcement guidelines were subject to substantive judicial review under the APA, but rather held that the agency could not issue them without going through Notice and Comment procedures.<sup>51</sup> And it is quite clear that the availability of sub-

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45 The Action Level at issue in *CNI* involved permissible levels of aflatoxins in corn.

46 *Community Nutrition Inst.*, 818 F.2d at 945-46 (quoting 5 U.S.C. § 553(b)(3)(A) (1994)).

47 See *Shalala v. Guernsey Memorial Hospital*, 115 S. Ct. 1232, 1239 (1995); *Hector v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, J.).

48 *Community Nutrition Inst.*, 818 F.2d at 946 (quoting *American Bus Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)).

49 *Id.* at 948 (citing 21 U.S.C. § 342(a)(1) (1994)).

50 The actual history, and eventual disposition, of the *CNI* litigation was even more convoluted than this description suggests. When the aflatoxin Action Level was originally appealed to the D.C. Circuit, the court had set it aside on the grounds that the FDA could not proceed through informal Action Levels, but rather had been required by Congress to issue formal rules, called tolerances. *Community Nutrition Inst. v. Young*, 757 F.2d 354, 357-61 (D.C. Cir. 1985). The Supreme Court reversed, on *Chevron* grounds. *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986). The decision discussed in the text was issued on remand. Ultimately, however, the FDA avoided the cumbersome Notice and Comment procedures required by the D.C. Circuit, by simply announcing that its Action Levels were not binding on anyone, including the agency. For a full discussion of the history of this litigation, see Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 144-54 (1992).

51 Thus the *CNI* court did not even cite *Chaney* in resolving the Notice and Comment issue, though it did invoke *Chaney* in a separate portion of its opinion, in which the court declined to

stantive judicial review is an issue distinct from an agency's procedural obligations.<sup>52</sup> Nonetheless, Richard Thomas has pointed out that the result in *CNI* in a very real sense evades the broader policy of *Chaney*. By placing *Chaney* in the context of the recent Supreme Court efforts to limit judicial control over administrative agencies, Thomas shows that one possible understanding of *Chaney* is that agencies should be able to allocate their enforcement resources and formulate enforcement policy autonomously, without having to answer to the courts.<sup>53</sup> The *CNI* doctrine clearly interferes with that ability, by bringing the courts into the process of setting guidelines. And the continued lack of substantive judicial review after *CNI* may not alleviate these concerns because, as Thomas points out, the *procedural* review necessary to determine whether an agency really has complied with Notice and Comment requirements can easily fade into substantive review.<sup>54</sup> Moreover, the evolution of the so-called *CNI* doctrine tends to confirm Thomas's fears. *CNI* has been invoked in a number of cases to set aside on procedural grounds what could be characterized as agency enforcement policies.<sup>55</sup> And later cases have tended to expand the reach of the *CNI* doctrine. Most notably, in *McLouth Steel Prods. Corp. v. Thomas*,<sup>56</sup> Judge Williams reexamined the APA's legislative rule versus policy statement distinction and concluded that in addition to mandatory language, a key determinant of whether a rule is legislative is whether the agency in practice applies the rule inflexibly, and treats it as binding on itself.<sup>57</sup> *CNI* and its progeny thus quite clearly narrow the "nonlegislative rules" exemption from Notice and Comment requirements.<sup>58</sup> Of course, *CNI* does not

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review the FDA's granting of exemptions to its Action Levels. *Community Nutrition Inst.*, 818 F.2d at 945-50.

52 See *Lincoln v. Vigil*, 113 S. Ct. 2024 (1993) (distinguishing substantive review from Notice and Comment requirements).

53 Thomas, *supra* note 50, at 132-44.

54 Thomas relates this phenomenon to the general use of "hard look" review in APA rulemaking cases, under which a reviewing court, in deciding if an adopted rule is "arbitrary and capricious" under 5 U.S.C. § 706(2)(A) (1994), determines if the agency has meaningfully responded to all public comments, and has given a reasoned explanation for its decision. See Thomas, *supra* note 50, at 151 & nn.121, 122. For examples of "hard look" review, see *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983); *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). For some academic criticisms of such review, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); Levin, *supra* note 5, at 690 n.2; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1067-68 & n.65 (1995).

55 See, e.g., *Alaska v. USDOT*, 868 F.2d 441 (D.C. Cir. 1989); *United States Tel. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). The *Alaska* decision is particularly noteworthy because the author of that opinion, Judge Starr, dissented from the original *CNI* opinion, indicating the degree to which the doctrine of that case has gained acceptance in the D.C. Circuit.

56 838 F.2d 1317 (D.C. Cir. 1988).

57 *Id.* at 1321-22. This focus on actual agency behavior seems to have become an established part of the law in this area. See, e.g., *United States Tel. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

58 For an example of a previous, more permissive view, see *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) (Scalia, J.). For a complete and incisive discussion of the misuse by agencies of nonlegislative rules, see Robert Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); see also Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE

formally impose substantive judicial review on any agency actions; and its effect is largely limited to agencies' statements of enforcement policy, as opposed to individual enforcement decisions, because broadly worded policies are far more likely to establish generally applicable principles, and so constitute rules subject to Notice and Comment, than a decision not to pursue an individual violation.<sup>59</sup> Furthermore, not all circuits have followed the *CNI* approach.<sup>60</sup> Nonetheless, given the significance of the D.C. Circuit in administrative law, *CNI* certainly represents a significant collateral attack on the effectiveness of the *Chaney* doctrine.

### III. CONFUSION IN THE RANKS: THE FAILURE TO EFFECTIVELY CONFINE THE *CHANNEY* DOCTRINE

Why this concerted resistance in the lower courts to a broad implementation of *Chaney*? One possible explanation is simply the judiciary defending its turf: *Chaney* represents an effort by the Supreme Court to restrict the power of the Courts of Appeals, which those courts not surprisingly resist. This theory seems incomplete, however, especially given the near unanimity of the lower courts' reception of *Chaney*.<sup>61</sup> A more plausible explanation for these efforts to cut back on *Chaney* is that they reflect the difficulties courts have faced in trying to reconcile that decision with the well-established existing law governing judicial review of agency action, difficulties rooted in underlying weaknesses in the *Chaney* doctrine itself. Those weaknesses are well illustrated by another story, involving the efforts of the Federal Communications Commission (FCC) to impose its detariffing policy on the long distance telecommunications industry.

In 1979, prior to the break-up of the Bell System, the FCC was faced with a difficult regulatory problem, in which an increasingly competitive long distance market was emerging in the shadow of a regulatory structure which was designed on the assumption of monopoly power on the part of

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L.J. 381 (arguing against imposition of Notice and Comment requirements on nonlegislative rules).

59 See 5 U.S.C. § 551(4) (1994); *supra* note 22 and accompanying text. Of course, it is always possible that an agency will announce a general policy in the course of an individual nonenforcement decision, such as occurred in *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7, 11-14 (2d Cir. 1995) (*NYCER*), in which case difficult questions of categorization are raised. Note that the distinction between enforcement policy and individual nonenforcement decisions was also relied upon by Judge Williams in *Crowley*, to limit the scope of the "legal issues" exception to *Chaney*. See *supra* notes 38-42 and accompanying text.

60 Thus in *NYCER*, 45 F.3d at 12, the Second Circuit held that an SEC no-action letter, in which the SEC announced a "new interpretation" of a long-standing rule regarding corporate obligations to include shareholder proposals in proxy materials, was not subject to Notice and Comment requirements because the SEC statement was merely an "interpretive rule." The court relied heavily on the fact that a no-action letter "binds no one." *Id.* at 12. Under the pragmatic approach to the "binding" character of agency statements announced in *CNI* and *McLouth*, however, one suspects the case would be decided differently. It should be noted that SEC no-action letters have been held to be substantively unreviewable under *Chaney*. See, e.g., *Board of Trade of City of Chicago v. SEC*, 883 F.2d 525, 530-31 (7th Cir. 1989).

61 In this context, it is noteworthy that Judge Bork was on the original panel that decided *International Union v. Brock*, 783 F.2d 237 (D.C. Cir. 1986) (creating the "legal issues" exception to *Chaney*); and Judge Williams authored the opinion declining to extend *Chaney* to nonpromulgation of rules. Neither is known as a particular supporter of broad-ranging judicial authority.

the American Telephone and Telegraph Company (AT&T).<sup>62</sup> The FCC believed that this structure, including in particular its burdensome tariffing requirements,<sup>63</sup> was inhibiting the emerging competition, and it responded with a permissive detariffing policy, by which it would forebear from enforcing tariff-filing requirements against all "nondominant carriers" (i.e., everyone in the long-distance industry except AT&T).<sup>64</sup> No one challenged this action. In 1985, however, the FCC adopted a mandatory detariffing policy which *forbade* such carriers from filing tariffs.<sup>65</sup> MCI Telecommunications Corp. (MCI), one nondominant carrier, challenged this policy in the D.C. Circuit, which found the FCC policy to violate § 203 of the Communications Act.<sup>66</sup> The court did not consider the validity of the prior permissive detariffing policy, even though the court's reasoning in striking down mandatory detariffing seemed to apply equally to permissive detariffing, primarily because the FCC had justified its permissive detariffing policy as an exercise of its enforcement discretion, and therefore it was arguably immune from review under *Chaney*.<sup>67</sup> For the next four years, therefore, the permissive detariffing regime remained in place, under which AT&T alone among long distance carriers was required to file rate tariffs for all of its services. In 1989, AT&T decided to challenge the legality of permissive detariffing. A direct attack of the FCC's policy, however, was not possible, in part because the time had long past for direct review of the 1983 Fourth Report and Order, and in part because of the FCC's invocation of *Chaney*.<sup>68</sup> AT&T therefore filed a complaint before the FCC under § 208 of the Communications Act<sup>69</sup> against MCI, seeking damages and a cease and desist order on the theory that since 1987 MCI had been violating § 203 of the Communications Act by providing services at negotiated rates which were not contained in filed tariffs, and therefore caused competitive injury to AT&T, both because when competing for new business, MCI was aware of AT&T's prices but not vice versa, and because the regulatory process itself could be manipulated to hinder AT&T's provision of services. The FCC's original response was to avoid resolving AT&T's complaint. But after AT&T petitioned for a writ of mandamus before the D.C. Circuit, the FCC resolved the complaint by dismissing it on procedural grounds, purportedly without resolving the underlying issue of whether MCI had violated the Communications Act. AT&T appealed, and the D.C. Circuit reversed.<sup>70</sup> The court began by rejecting the procedural grounds

62 See generally Title II of the Communications Act of 1934, 47 U.S.C. §§ 201-229 (1994).

63 See 47 U.S.C. § 203 (1994).

64 See *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof*, 95 F.C.C.2d 554 (1983) (Fourth Report and Order).

65 See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof*, 99 F.C.C.2d 1020 (1985) (Sixth Report and Order).

66 *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

67 See *id.* at 1190-91 n.4; see also *AT&T v. FCC*, 978 F.2d 727, 730 (D.C. Cir. 1992).

68 It should be remembered that at this time, prior to its decisions in *Edison Electric Institute and Crowley*, the D.C. Circuit understood the *Chaney* doctrine to apply to enforcement policies. See *supra* notes 21-22 and accompanying text.

69 47 U.S.C. § 208 (1994) (as amended by Telecommunications Act of 1996, 47 U.S.C.A. § 208 (West Supp. 1996)).

70 See *AT&T v. FCC*, 978 F.2d 727, 730 (D.C. Cir. 1992). For a description of the events leading up to this appeal, see *id.* at 730-31.

invoked by the FCC, describing them as an "administrative law shell game."<sup>71</sup> Reaching the merits, the court then noted that the FCC, after a decade of wavering, was no longer claiming that its permissive detariffing policy was a mere enforcement policy, but rather had conceded that it constituted a substantive rule defining the rights and obligations of regulated carriers.<sup>72</sup> Once it had gotten over the *Chaney* hurdle to reviewability, the court quickly concluded that the permissive detariffing policy clearly violated § 203 of the Communications Act, as interpreted in its 1985 decision.<sup>73</sup>

The FCC's ability for an entire decade to invoke *Chaney* to avoid judicial review of a policy that the agency must have known would be found illegal by the courts is extremely troubling. But what is more troubling is the difficulty the courts had in determining whether permissive detariffing even *qualified* as an enforcement policy immune from review under *Chaney*, or whether it was, as everyone ultimately agreed it was, a run-of-the-mill legislative rule fully reviewable under the APA. The FCC was of course able to take advantage of the courts' uncertainty to prolong its avoidance of judicial scrutiny, while at the same time never having to accept the consequences of stating definitively that permissive detariffing was merely an enforcement policy. The agency's equivocations were only ended because of the happenstance that the Communications Act contained a private right of action for damages, which AT&T was able to invoke.<sup>74</sup> That reviewability should turn on such thin reeds seems absurd.<sup>75</sup> It is also indicative of the arbitrariness of the line drawn by *Chaney* to distinguish reviewable from unreviewable actions, because the practical consequences of the FCC's "permissive detariffing" policy—for the public, for regulated carriers, and for the agency—were precisely the same whether the policy was characterized as "enforcement guidelines" or as a substantive rule. The agency was able to make and implement policy with equal ease through either vehicle.

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<sup>71</sup> *Id.* at 731-32.

<sup>72</sup> *Id.* at 735. The FCC of course had to take this position, in order to argue even plausibly that MCI's conduct was immune from a *private* challenge brought under the Communications Act.

<sup>73</sup> *Id.* at 735-36. The D.C. Circuit's interpretation of the Communications Act, and its conclusion that permissive detariffing violated the Act, were confirmed by the Supreme Court in *MCI Telecomms. Corp. v. AT&T*, 114 S. Ct. 2223 (1994). In § 401 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128-29 (1996), however, Congress appears to have granted the FCC explicit forbearance authority, effectively overruling the holding of *MCI v. AT&T*. Finally, in the interest of full disclosure, I should mention that while I was not involved in any of the litigation described in this article, I did in a prior incarnation participate in some of the aftermath of the *AT&T v. FCC* litigation, on behalf of AT&T.

<sup>74</sup> It should be noted that § 208, the Communications Act's private right of action, seems to be designed not for the benefit of regulated entities such as AT&T, but rather for aggrieved customers of regulated carriers, the theoretical statutory beneficiaries. The language of the provision, however, is broad enough to encompass AT&T's claim.

<sup>75</sup> It could be argued that Congress's failure to include a private cause of action in a regulatory statute evinces an intent to shield certain types of policies from judicial review—but this is most implausible. The policy considerations governing whether to subject regulated entities to private suits for damages are quite different from the considerations relevant to whether the regulating agency's policies should be entirely immune from judicial review. See generally Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (discussing relationship between private right to initiate administrative enforcement and private right of action against regulated entities).

Indeed, these two purportedly distinct types of agency statements are in practical terms so similar that the FCC was able to plausibly characterize a single written document as either a rule or an enforcement policy, depending on expediency. Yet that characterization was decisive in determining the availability of substantive judicial review. Such an arbitrary rule invites agencies to manipulate form to avoid judicial scrutiny when it is inconvenient or likely to result in reversal—and those are of course the circumstances when review is most needed.

One response to the concerns just outlined might be that recent developments in the D.C. Circuit, limiting the scope of *Chaney*, have alleviated these problems and eliminated (or constrained) the ability of agencies to evade review in this unprincipled manner. The *CNI* doctrine and the “legal issues” exception of *UAW* and *Crowley* in particular appear to impose some controls on agency legislation through enforcement policy, by permitting procedural and occasionally substantive review of such policies. In fact, however, that is not the case. The solutions adopted by the D.C. Circuit provide only partial, and ultimately unsatisfactory, solutions to the conundrum created by *Chaney*.

Perhaps the most prominent and often-invoked “exception” to *Chaney* is the *CNI* doctrine, which requires agencies to go through the full Notice and Comment procedures of § 553 of the APA<sup>76</sup> when issuing enforcement guidelines which the agency treats as “binding.”<sup>77</sup> Richard Thomas has argued that *CNI* threatens to substantially undercut the scope of unreviewable discretion created by *Chaney*.<sup>78</sup> In fact, however, the FCC’s experience with permissive detariffing indicates that Notice and Comment procedures alone are simply inadequate to constrain agency misbehavior. The permissive detariffing rules were issued after full notice and comment, yet the problem of their inconsistency with statutory mandates remained unresolved. Absent substantive judicial review, which of course Notice and Comment does not provide,<sup>79</sup> the core problem created by *Chaney*, which is the ability of agencies to avoid judicial review of their regulatory policies by substituting enforcement guidelines for legislative rules, remains unsolved. The procedural protections and public participation requirements of Notice and Comment, while perhaps adding some value to the rulemaking process, simply do not provide the kind of accountability provided by judicial review. And while the value of judicial review itself might be questioned,<sup>80</sup> suffice to say that as the episodes recounted in this article illustrate, some degree of external control over agencies seems essential to ensure continuing compliance with the rule of law.<sup>81</sup>

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76 5 U.S.C. § 553 (1994).

77 See *supra* notes 43-50, 56-58 and accompanying text.

78 Thomas, *supra* note 50, at 133-34, 148. Thomas, unlike me, sees this as an unfortunate development because of his lack of confidence in the efficacy of judicial review.

79 See *supra* note 52 and accompanying text (citing *Lincoln v. Vigil*, 113 S. Ct. 2024, 2033-34 (1993)).

80 See *supra* note 54 (citing numerous modern critiques of the efficacy of judicial review of agency rulemaking).

81 Cass Sunstein has made two important points in this regard—first, that the presumption of judicial review under the APA is a logical response to the lack of separation-of-powers or electoral checks on administrative agencies, and generally to the questionable constitutional status of agen-



Beyond the inefficacy of Notice and Comment, moreover, an argument can be made that procedural requirements such as Notice and Comment simply are not cost-efficient means to regulate agencies in this area. The burdens imposed by Notice and Comment, in terms of cost and delay,<sup>82</sup> are well known. The benefits—especially in an area such as the formulation of enforcement policy, where delicate judgments must be made about resource allocation and prioritization—are less obvious. This problem is magnified when one considers a systematic problem, identified by several commentators, with imposing Notice and Comment requirements on agencies which voluntarily choose to publish enforcement policies and other nonlegislative rules, which are normally exempt from Notice and Comment procedures<sup>83</sup>—the “perverse incentive” problem. The point is that under current law an agency is in no way required to issue such statements, including in particular statements describing the agency’s enforcement policies and priorities. Therefore, the predictable consequence of imposing substantial costs on an agency when it does issue such statements is to discourage agencies from issuing policy statements at all, and encourage them to proceed on an ad hoc basis.<sup>84</sup> Public statements of enforcement policy, however, are valuable things. Knowledge on the part of the public of how an agency interprets and intends to enforce its rules tends to encourage voluntary compliance, to minimize enforcement costs for agencies as well as the dead-weight social cost of disputes, and to generally increase the openness of agency decisionmaking.<sup>85</sup> The creation of significant procedural obstacles to voluntary agency statements of enforcement policy tends to sacrifice all of these benefits by creating strong incentives for the agency to proceed instead on a case-by-case basis in deciding what purported regulatory violations to pursue.<sup>86</sup> For all of these reasons,

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cies; and second, that the very *existence* of review can act as a check on agency arbitrariness and lawlessness, even if actual error correction by reviewing judges is spotty and flawed. See Sunstein, *supra* note 5, at 655-56. A full defense of judicial review, however, is simply beyond the scope of this article.

82 See, e.g., Asimow, *supra* note 58, at 403-04. Asimow concludes that the costs of imposing full Notice and Comment requirements on nonlegislative rulemaking, such as formulation of enforcement policy, clearly exceed the benefits. See *id.* at 404-09.

83 5 U.S.C. § 553(b)(3)(A) (1994). Nonlegislative rules include “general statements of policy” and “interpretive rules,” with enforcement policies generally falling within the former rubric.

84 See Asimow, *supra* note 58, at 404-09; Thomas, *supra* note 50, at 152-53, 155-57. Of course, agencies always have *some* incentive to publish enforcement policies, since publication permits agencies to more easily communicate to the regulated community its policies and legal interpretations, and to discipline employees for failing to conform to the agency’s enforcement policy. Also, enforcement policies might be published with some hope of influencing judicial decisions, perhaps by triggering *Chevron* deference. See *infra* notes 107-08 and accompanying text. But if large costs become associated with publication, it is predictable that fewer, perhaps substantially fewer, agencies will find publication of enforcement policies worthwhile on balance.

85 See Asimow, *supra* note 58, at 387-88 & nn.35-38 (citing numerous legal and social sciences authorities supporting these propositions).

86 The current D.C. Circuit case law interpreting § 553’s exceptions to Notice and Comment requirements and applying the *CNI* doctrine in fact magnifies this problem by making the availability of the policy statement exception depend on whether the agency in fact treats its policy statement as binding, and whether it uses mandatory language in its statement. See *supra* notes 56-58 and accompanying text. The result, of course, is to encourage agencies to use vague language in their policy statements, or otherwise to depart regularly from their stated policies, thereby sacrificing the benefits of certainty. See *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592 (5th Cir. 1995) (finding an FDA Compliance Manual not subject to Notice

the imposition of Notice and Comment procedures on the issuance of enforcement guidelines, as the *CNI* case and its progeny seek to do, is of questionable wisdom, and in any event does not impose the kind of direct accountability needed to constrain agency lawlessness.

Another, perhaps more direct response to the "*Chaney* problem" can be found in the "legal issues" exception to *Chaney* developed in *International Union, UAW v. Brock*.<sup>87</sup> This exception directly responds to the evasive uses of *Chaney* by agencies seeking to avoid judicial scrutiny, by carving out what seem to be the types of agency pronouncements most in need of judicial review—i.e., statutory interpretations which purport to state the legal obligations of regulated entities—from the nonreviewability presumption of *Chaney*.<sup>88</sup> The difficulty with the legal issues exception as originally stated, however, is that it proves either too much or too little. As Judge Williams pointed out in *Crowley*<sup>89</sup> in the course of limiting the legal issues exception, the problem is that almost every agency nonenforcement decision has some element of legal interpretation. A decisionmaker might of course decide not to prosecute a violation, or a class of violations, purely because of limited resources; but more likely such a judgment is also going to be based on an assessment that the conduct in question does not violate the underlying legal rule, or perhaps arguably does not violate the legal rule, and therefore the agency's chances of success are in doubt and/or litigation is likely to be expensive. Indeed, a decision not to prosecute might stem from a judgment that for independent policy reasons the conduct should not be prevented, or is a lower enforcement priority, even though the conduct probably *does* violate the legal norm.<sup>90</sup> Sifting the "legal interpretation" from the policy judgments in such a decision is well-nigh impossible, and therefore a "legal issues" exception will either swallow the general presumption of nonreviewability, or it will affect a trivially small number of cases. In fact, as Judge Williams further pointed out, the Supreme Court, in an opinion by Justice Scalia, has relied on just this conundrum to prohibit courts from "carving reviewable legal rulings out from the middle of non-reviewable actions,"<sup>91</sup> as the *UAW* court purported to do.

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and Comment on such grounds); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986); Anthony, *supra* note 58, at 1318-19; Thomas, *supra* note 50, at 152-53. The denouement of the *CNI* litigation illustrates this problem perfectly, see *supra* note 9, as does the Second Circuit's decision in *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995), which also seems to reward agency arbitrariness.

87 783 F.2d 237 (D.C. Cir. 1986), *overruled by Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994). See *supra* notes 33-37 and accompanying text.

88 See *International Union, UAW*, 783 F.2d at 246.

89 *Crowley*, 37 F.3d at 676-77.

90 The FCC's detariffing policy is one example of this type of judgment. In addition, the Federal Trade Commission, in its previous enforcement policies, apparently took such an approach towards efficiency-producing horizontal mergers, stating that even though such a merger might violate § 7 of the Clayton Act (because it considered efficiencies irrelevant to the legal analysis under that provision), the FTC would consider efficiencies in making the "policy" judgment of whether to pursue enforcement. See *Merger Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,102, at 20,528 (June 14, 1982). I am grateful to Alan Meese for this example.

91 *Crowley*, 37 F.3d at 676 (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)).

The solution adopted by Judge Williams in *Crowley*, and the way in which he reconciled his decision with Circuit precedent, was to limit the reviewability doctrine of *UAW* to a "statement of a general enforcement policy" which the agency has "expressed as a formal regulation . . . or has otherwise articulated in some form of universal policy statement."<sup>92</sup> Such general statements, Judge Williams explains, are far more likely to contain broad legal interpretations regarding statutory requirements, or, perhaps, to represent improper abdication of an agency's statutory responsibilities. Finally, general enforcement policies are easier to review, because they present clearer statements of an agency's reasons for declining to prosecute.<sup>93</sup> Therefore, substantive review of enforcement policies, but not of individual nonenforcement decisions, should limit the damage caused by *Chaney* without pushing courts into the morass of reviewing agency resource allocation decisions.

*Crowley* represents an important step forward in the rationalization of the *Chaney* doctrine. The concerns identified and, at least to some degree, resolved by Judge Williams lie at the core of this article—i.e., the misuse of *Chaney* by agencies to evade review of unlawful policies, and the interchangeability of enforcement policies with substantive rules. The *Crowley* solution is, however, ultimately incomplete. At the outset, the precise scope of the holding in *Crowley* remains unclear. *Crowley* could be read to authorize courts to undertake full and complete review of all formal agency statements of enforcement policy. If so, *Crowley* provides a solution to a number of the difficulties generated by the *Chaney* doctrine. In particular, plenary review of all enforcement policy statements seems to resolve the problem—illustrated by the FCC's implementation of its permissive detariffing policy—of agencies characterizing what are for all intents and purposes rulemakings as enforcement policy statements, for the sole purpose of avoiding judicial review.<sup>94</sup> But *Crowley* could also be read to permit review only of legal issues raised by enforcement policies and not to authorize review of the components of such policy statements dealing with, for example, resource allocation or enforcement priorities based on independent policy judgments.<sup>95</sup> This narrower reading, which seems more consistent with the *Chaney* Court's and the D.C. Circuit's prior statements regarding the need to retain agency discretion over these kinds of issues, does not fully address even the characterization problem, because it per-

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92 *Id.* at 676. It should be noted that *Crowley's* suggestion that agency statements of enforcement policy are reviewable is in tension with previous opinions by the D.C. Circuit, including in the original *MCI* opinion's reference to permissive detariffing. See *supra* note 21; *MCI Telecomm. Corp. v. FCC*, 765 F.2d 1186, 1190-91 n.4 (D.C. Cir. 1985); see also *National Treasury Employees Union v. Horner*, 854 F.2d 490, 496-97 (D.C. Cir. 1988).

93 *Crowley*, 37 F.3d at 677.

94 It should be noted, however, that even if the broader reading of *Crowley* does prevail, and it does provide a fairly effective solution to the problems created by the *Chaney* doctrine, there is no guarantee that its holding would be adopted by circuits other than the D.C. Circuit, or that it would be ultimately upheld by the Supreme Court as consistent with *Chaney*.

95 See *Crowley*, 37 F.3d at 676 (stating that enforcement policies are reviewable for "legal sufficiency"). The roots of *Crowley* in the "legal issues" exception to *Chaney* also suggest this limitation on the scope of review.

mits agencies to avoid review by simply restating substantive policies as judgments about enforcement priorities grounded in resource concerns.<sup>96</sup>

In any event, whichever reading of *Crowley* is ultimately adopted by the courts, the decision leaves some difficult questions unresolved. First of all, there is an assumption underlying *Crowley* that enforcement policies will be more clearly "legal" than individual decisions and so more important to review as well as more easily reviewed; but this is far from obviously true, since the application of general rules to specific fact situations often raises profound interpretational issues.<sup>97</sup> Even more importantly, limiting review to enforcement policies as *Crowley* does recreates in full the "perverse incentives" problem discussed with respect to Notice and Comment procedures and the *CNI* doctrine. Any added burden on the issuance of enforcement policy statements will encourage agencies to proceed case-by-case, thereby forgoing the societal value of clearly stated enforcement policies. One response to this objection might be that if an agency chooses to proceed case-by-case, it loses its ability to make general policy without subjecting it to judicial review (this response is implicit in *Crowley*). However, this is not really true. Most obviously, agencies are quite capable of announcing general policies in the course of an individual nonenforcement decision—as, for example, the SEC did in the no-action letter at issue in *NYCER*.<sup>98</sup> Judge Williams in *Crowley* acknowledges this point, and suggests that in that circumstance review might be available;<sup>99</sup> but distinguishing individual decisions from statements of policy may not be so easy, because an agency may not state its legal understandings and intentions as explicitly as the SEC did in *NYCER*. For example, an agency might use an individual nonenforcement decision to announce its understanding of the underlying statute, as happened in *Crowley*, thereby permitting regulated entities to clearly discern its enforcement policy; and it might then reinforce this implicit message by enforcing, and refusing to enforce, the statute consistent with that understanding. In this instance, the agency has clearly announced an enforcement policy, but has never formulated its intentions in a formal enforcement policy statement which would be reviewable under *Crowley*. In other words, enforcement policies can be developed and expressed through broad or informal statements combined with patterns of individual decisions as well as through general, formal policy statements.<sup>100</sup>

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96 Again, the FTC's prior policy towards efficiency-producing mergers would appear to illustrate such a situation. See *supra* note 90.

97 Compare Levin, *supra* note 5, at 765 & n.390 (making a similar point about nonpromulgation of rules versus individual nonenforcement decisions). As the following discussion indicates, *Crowley* itself and the Second Circuit's *NYCER* decision provide examples of situations where an agency faced and resolved an important legal issue in the course of an individual nonenforcement decision.

98 *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995). See *supra* note 59.

99 *Crowley*, 37 F.3d at 677.

100 In fact, an agency could conceivably formulate and communicate an enforcement policy purely through a pattern of enforcement, without any actual statements whatsoever, whether formal or informal. Perhaps not as quickly or effectively, but it could be done. An example of this phenomenon might be the enforcement of the (former) 55 m.p.h. speed limit on highways, especially in western states. The 55 m.p.h. rule simply was not enforced in many states, and certainly not in California. Police tended to set their detecting instruments, and stop violators, at a significantly higher speed—anecdotal evidence suggests it was around 65 m.p.h. This policy

Indeed, in the rulemaking context the Supreme Court has explicitly recognized the right of agencies to develop policies through individual, adjudicatory decisions rather than through formal rulemaking.<sup>101</sup> And in the regulatory context, the ability of agencies to proceed through informal policies and exhibited patterns of activity is enhanced by the fact that regulated communities are often relatively homogeneous and cohesive, and regulation is often pervasive. As a result, when an agency acts pursuant to an informal (or perhaps even unannounced or secret) policy, patterns are likely to emerge, and be observed, more quickly than with laws applicable to the general public, especially if the enforcement pattern is supplemented with informal, unreviewable agency statements hinting at the underlying policy. The consequence is that even under *Crowley*, agencies retain some significant ability to make policy and implement rules, while avoiding judicial review.

The inability of the "legal issues" exception to confine the damage to principles of judicial review inflicted by the *Chaney* doctrine points to a deeper problem in the assumptions underlying the *Chaney* decision, a problem which also permeates the lower courts' attempts to limit or avoid the implications of the Court's decision. Briefly, the line drawn in *Chaney* between presumptively reviewable and presumptively unreviewable agency decisions rests on a distinction between positive law, i.e., rules of conduct laid down by a legislative authority, and enforcement policy, meaning an agency's decisions regarding whether to pursue certain violations of those rules. The D.C. Circuit in *International Union, UAW* also relied on this distinction in creating the "legal issue" exception to *Chaney*, by emphasizing the purported differences between "an agency's announcement of how it will exercise its discretion, [and] an agency's announcement of what a citizen's duties are under a statute."<sup>102</sup> In fact, however, it is a relatively elementary legal realist insight that when there is a single enforcement authority, a decision not to enforce under stated circumstances is indistinguishable from amending the underlying "rule" to exempt the affected conduct from prohibition. Enforcement *is* legal prohibition, and lack of enforcement *is* legal permission. The contrary view, that enforcement policy is fundamentally different from "law," rests on a formalistic definition of law which has been largely discarded since the realist revolution of a half century ago. The ephemerality of the line drawn by *Chaney* explains why the FCC was able to alternatively claim its permissive detariffing policy was either a substantive rule or an enforcement policy—because absent a second enforcement authority, there is no difference between the two. This is also why the FDA, in the *CNI* litigation, was able to characterize its Action

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was never stated, but it was easily observable over time, and clearly had been so observed by drivers. Therefore, the effective speed limit on highways in these states was *not* 55 m.p.h., as even the briefest excursion onto a California freeway demonstrated. This type of unstated pattern of underenforcement can be contrasted with the stated policy of underenforcement in, for example, the State of Montana. See MONT. CODE ANN. §§ 61-8-718, 61-11-103 (1995) (establishing \$5 fine for violation of federally mandated speed limit, and prohibiting any record to be kept of same).

<sup>101</sup> See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

<sup>102</sup> *International Union, UAW v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986).

Levels, which look very much like legislative standards, as statements of enforcement policy.<sup>103</sup> In both cases, the line between the two characterizations is a purely formal one, with little or no substantive significance. But, of course, the distinction was crucial under *Chaney* for the availability of judicial review. To rest reviewability on such a contentless distinction—as *Chaney* does, and as *UAW* did as well, though with a different emphasis—is bad law and bad policy.

The above argument contains a caveat which bears examination. Enforcement policy is equivalent to rules of conduct only when there is a single enforcement authority (or when the enforcement policy binds all enforcement authorities). When independent enforcement exists—most commonly through private rights of action—a chasm develops between enforcement policy and substantive rules, because enforcement policy does not technically bind private parties.<sup>104</sup> It was precisely because the Communications Act does contain a private right of action that the FCC eventually was forced to take a firm stance on the nature of its permissive detariffing rules (for rules they turned out to be). This suggests that when a private right of action does exist, the need for review of enforcement policies and decisions is less critical.<sup>105</sup> But private rights of action are far from the norm in modern regulatory schemes, and where they do not exist, the above analysis strongly suggests that the distinctions drawn in *Chaney* and its progeny are unsatisfactory.<sup>106</sup> Moreover, there is a lurking issue here over whether enforcement policy *might* in fact bind even private prosecutors, because of potential *Chevron* deference to statutory interpretations

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103 The difficulty of distinguishing enforcement policies from substantive rules is well illustrated by the D.C. Circuit's recent decision in *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995), in which the court rejected the FDA's argument that its promulgation of a standard for "substantial compliance" under the Nutrition Labeling and Education Act constituted an enforcement action, unreviewable under *Chaney*, but did not give any explanation for this conclusion.

104 Private rights of action are, of course, not the only means through which private parties can "enforce" rules of conduct. For example, violation of such rules can sometimes arise as a defense to a common-law claim, such as a contract action. *See, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982) (permitting defense in contract action based on alleged violation of antitrust laws). In addition, the "filed-rate doctrine" permits regulated firms to collect fees based on rates filed in tariffs, even in the face of contrary contractual agreement, thereby indirectly enforcing the statutory requirement of charging only filed rates—though perversely, the enforcement in this instance is by the regulated entity who has originally violated the relevant rule. *See Maislin Indus. v. Primary Steel*, 497 U.S. 116 (1990). The arguments made in the text apply to some degree to these situations as well, but I am primarily concerned with private rights of action here, because they provide the most consistent and dependable means for private parties to enforce rules. The other avenues available tend to be subject to special factual predicates which are often beyond the control of those who are injured by violations.

105 Stewart & Sunstein, *supra* note 75, at 1215-16 & n.83, suggest that courts may draw just such a distinction; *see also NYCER*, 45 F.3d at 14 (denying substantive review of SEC no-action letter because of the availability of a private cause of action). I discuss the possibility of such a limit on a right to judicial review *infra*, at notes 158-59 and accompanying text.

106 *See* Sunstein, *supra* note 5, at 671-72. It should be noted that in the case of *malum in se* offenses, some independent "enforcement" might be created through the moral weight of the community as well, rather than through legal processes alone, suggesting that for *malum in se* offenses review of enforcement policies is less needed. On the other hand, *malum in se* offenses tend to be more socially harmful than *malum prohibitum* offenses, suggesting that review of enforcement policy is *more* needed here. And in any event, most regulatory offenses tend to be *malum prohibitum* rather than *malum in se*.

stated in such a policy.<sup>107</sup> There is an argument that *Chevron* deference should not be given to such informal interpretations, but the case law, though far from clear on this point, suggests that deference will be given.<sup>108</sup> Suffice it to say that the possibility of *Chevron* deference makes enforcement policy even less distinguishable from formal rules, and more in need of scrutiny.

The *Chaney* Court defends the distinction it draws between agency nonenforcement decisions and other kinds of agency action on the grounds that “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights.”<sup>109</sup> Drawing on this argument, one might respond to the above points by suggesting that enforcement policies are *not* the same as substantive rules, because they do not coercively *forbid* conduct, as regulations generally do, and so are less in need of judicial review. This response fails, however, for any number of reasons. To begin with, the *Chaney* Court’s argument does not appear to be fully consistent with the policies expressed in the APA’s provisions defining agency “action” to include a “failure to act,” and authorizing review when action is “unlawfully withheld” or if an agency officer “failed to act.”<sup>110</sup> Perhaps more substantively, the premise of the argument itself is not really true with respect to at least some kinds of agency actions to which *Chaney* has been applied. In a world of vague statutory standards, enforcement and nonenforcement policies can delineate the scope of forbidden conduct just as substantive rules can—the FDA’s use of Action Levels in *CNI* being a prime example. But this objection does not apply to individual nonenforcement decisions, where the State’s coercive power indeed is not being invoked against regulated entities. The question arises, therefore, whether those decisions should be unreviewable, even if enforcement policies, including informal policies and policies expressed through patterns of enforcement decisions, are subject to review.<sup>111</sup> Cass Sunstein has convincingly presented one reason why the answer is No: the *Chaney* Court’s as-

107 *But see* *Kelly v. EPA*, 15 F.3d 1100, 1107-09 (D.C. Cir. 1994) *cert. denied*, 115 S. Ct. 900 (1995) (holding that courts should not grant *Chevron* deference to agency interpretations while resolving suits brought pursuant to a private right of action). *See generally* Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1 (1996) (arguing that *Kelly* is wrongly decided, and that courts should defer to reasonable agency interpretations even when resolving private lawsuits).

108 *See* *Reno v. Korey*, 115 S. Ct. 2021, 2026-27 (1995) (granting deference to internal agency guideline because it is “akin” to an interpretive rule); *Batterton v. Francis*, 432 U.S. 416, 424-26 & n.9 (1977) (pre-*Chevron* case suggesting a limit on deference); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181-82 (3rd Cir. 1995) *cert. denied*, 116 S. Ct. 816 (1996) (granting *Chevron* deference to interpretive rule, even though the rule is not subject to Notice and Comment procedures); *Community Nutrition Inst. v. Young*, 818 F.2d 943, 953 (D.C. Circuit 1987) (Starr, J., dissenting) (suggesting that *Chevron* deference would be due to nonlegislative rules in subsequent enforcement proceedings); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 55-60 (1990); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 973 & nn.13-14, 987 (1992).

109 *Chaney*, 470 U.S. at 832.

110 *See* 5 U.S.C. § 551(13) (1994) (defining agency action to include a “failure to act”); *id.* at § 706 (permitting review of “agency action unlawfully withheld”); *id.* at § 702 (authorizing review if agency officer “failed to act”).

111 It is in fact possible to read the *Chaney* opinion as establishing just such a rule, especially in light of the numerous exceptions to the principle of nonreviewability recognized in *Chaney* itself. *See Chaney*, 470 U.S. at 833-36.

sumption that coercive agency action requires judicial control, but noncoercive action—in which an agency “merely” fails to protect regulatory beneficiaries from the conduct of regulated entities—does not require judicial scrutiny, is based on a *Lochnerian* baseline understanding that only common law rights are worthy of judicial protection. Sunstein argues convincingly that in the modern administrative state regulatory benefits and rights—i.e., those created by statutory schemes—are of equal importance and are equally worthy of protection, and that therefore the *Chaney* Court’s understanding that regulatory beneficiaries need not be accorded legal rights has no place in modern law.<sup>112</sup> In a similar vein, Robert Anthony has argued that nonenforcement policies which create “safe harbors”—such as the Action Levels in *CNI*—can create “binding norms,” both by defining through negative implication conduct that is *not* permitted, and by limiting the scope of the statutory offense.<sup>113</sup> Under this view, which the above-quoted language of the APA appears to endorse, nonenforcement decisions should be subject to judicial review because they deny regulatory beneficiaries protected rights, even if they do not expose regulated entities to coercive action.<sup>114</sup>

The criticism of the *Chaney* Court’s reliance on arbitrary baselines points to another problem with the opinion’s distinction between coercive and noncoercive agency actions, which is that it rests on faulty understandings of the role and extent of government regulation. One of the key conclusions reached by the Court in *Chaney* was that coercive enforcement actions require judicial scrutiny, but nonenforcement decisions do not, because only the former threaten common law rights.<sup>115</sup> This conclusion, however, contains a lurking assumption. The assumption is that regulation—meaning governmental controls—is the exception, and that most activities of most regulated entities occur free of regulatory constraints. If the Court were not making this assumption, its distinction between coercive and noncoercive actions would make little sense, because in a world of pervasive regulation, nonenforcement decisions, because of their substantial role in formulating regulatory policy, can have a significant impact on the economic well-being of regulated firms, thereby threatening core, common law entitlements. But, of course, in the modern administrative state, a huge number of industries are characterized by pervasive regulation, where almost any activity of the regulated entities occurs within a web of regulatory requirements.<sup>116</sup> When an agency overseeing such an industry enforces one part of a regulatory scheme but not another, or exempts particular entities from regulatory requirements, it is effectively amending comprehensive regulatory schemes. In addition to possibly thwarting the

112 See Sunstein, *supra* note 5, at 666-69 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

113 See Anthony, *supra* note 58, at 1329, 1339-40.

114 See also *Chaney*, 470 U.S. at 851 (Marshall, J., concurring in the judgment); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983); Levy & Duncan, *supra* note 5, at 623-30.

115 See *supra* note 12 and accompanying text.

116 Examples include the FCC’s regulation of the telecommunications industry, and increasingly of the cable industry; the SEC’s regulation of the securities industry; the Federal Reserve’s regulation of the banking industry; the FDA’s regulation of the pharmaceutical industry; the NRC’s regulation of the nuclear power industry; and countless others.



will of the legislature, such selective enforcement can have a substantial competitive effect on other regulated entities who are not given the benefit of nonenforcement.<sup>117</sup> All in all, the effect of selective nonenforcement can be to substantially modify, and sometimes to thwart or skew, regulatory schemes, thereby causing direct injury to some portion of the public or of the regulated community—presumably that portion which is complaining about the agency's actions. The consequent competitive disadvantage causes pecuniary losses, and so impairs a common-law property right of precisely the sort which courts have traditionally protected. This possibility provides yet another reason why nonenforcement decisions should, as a matter of sound policy, be subject to judicial scrutiny.

The above analysis, including in particular my criticisms of the *Chaney* Court's and the D.C. Circuit's distinctions between enforcement policy and rules of conduct, and between coercive and noncoercive agency actions, in fact point to a deeper problem with the Supreme Court's reasoning in *Chaney*, a problem which is illustrated by the Court's reliance in *Chaney* on an analogy between agency nonenforcement decisions and criminal prosecutorial discretion. One of the many arguments presented by Justice Rehnquist in *Chaney* for exempting nonenforcement decisions from judicial review is that such a decision "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch."<sup>118</sup> This analogy is closely related to the Court's coercion/noncoercion distinction. After all, the judiciary does review criminal indictments (through the grand jury and the criminal process generally), but does not review failures to prosecute, because victims of crimes generally do not have a legal right to invoke the government's prosecutorial power.<sup>119</sup> It is similarly related to the Court's distinction between enforcement policy and substantive rules, because rules of conduct, which are the province of the legislature in the criminal context, are regularly reviewed and interpreted by the judiciary, while enforcement policy, the province of the executive, is not except in the most extraordinary circumstances.<sup>120</sup>

The Court's analogy, however, is flawed—agency nonenforcement decisions are *not* similar to decisions not to indict in the criminal context. The reason is a simple one: in the criminal context, the traditional constitutional separation of powers remains in force, while in the context of most agency actions, it is nonexistent. Agencies exercise legislative powers (through rulemaking), executive powers (when invoking their enforcement authority), and judicial power (when adjudicating complaints);<sup>121</sup>

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117 This was AT&T's complaint in the litigation over the FCC's permissive detariffing policy—that the FCC's selective enforcement of tariffing rules against only AT&T placed AT&T at a serious competitive disadvantage. See *AT&T v. FCC*, 978 F.2d 727, 730 (D.C. Cir. 1992).

118 *Chaney*, 470 U.S. at 832.

119 See *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

120 See *Wayte v. United States*, 470 U.S. 598 (1985). It is noteworthy that *Wayte* was decided the day before *Chaney*.

121 Of course, within agencies these functions might be delegated and divided up among different personnel, such as ALJs, an Enforcement Division or General Counsel, and other staff; but ultimate authority over these functions generally remains with the Commission or agency head in whom Congress has invested the agency's powers.

and in a typical enforcement proceeding against a regulated entity, all three types of power are often involved.<sup>122</sup> The FCC's experience with permissive detariffing and the FDA's use of Action Levels demonstrate, moreover, that it is precisely this lack of separation of powers which permits agencies to use the *Chaney* doctrine to evade review of substantive policies. As I have discussed above, it is a relatively straightforward legal realist insight that prosecutorial policy can be the equivalent of lawmaking. But it is only when prosecutorial and lawmaking powers are exercised by the same entity that it becomes problematic for the law to establish separate rules governing the two types of power, as the *Chaney* doctrine does by exempting a particular variety of agency action—the exercise of enforcement discretion—from judicial review. The consequence of such differentiation is to drive policymaking and rulemaking activities by agencies into enforcement policy. In other words, it may be perfectly sensible for institutional reasons for there to be fewer constraints on the exercise of criminal enforcement discretion by the Executive than on the exercise of lawmaking powers by the Congress,<sup>123</sup> but it makes no sense to treat a single agency's exercise of those two types of power differently.<sup>124</sup>

For all of these reasons, the rule-of-law arguments in favor of judicial review when an agency exercises rulemaking or adjudicative powers apply fully to the exercise of enforcement discretion. When the agency implements its regulatory policies, it often makes no difference from the point of view of both regulated entities and regulatory beneficiaries whether the agency is purporting to exercise "legislative" power or "executive" power. And therefore the *Chaney* Court's reliance on this distinction to justify a rule of nonreview is indefensible.

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122 Indeed, the lack of separation-of-powers checks on agencies provides one of the strongest arguments in favor of broad, searching judicial review of all forms of agency action. It seems a matter of common sense that because in the administrative state traditional constraints on abuse of power by governmental actors have been removed, something must take their place—and judicial review appears to be the only plausible candidate for this role. See Sunstein, *supra* note 5, at 655-56. There are, of course, some electoral checks on agency abuse of power, but I would argue (recognizing that this is a controversial proposition) that in the context of the huge modern executive branch, in which only the President is elected, the extent to which agencies are actually politically answerable is quite limited. Compare Sunstein, *supra* note 5, at 655-56 (arguing that lack of electoral checks on agencies supports judicial review) with Thomas, *supra* note 50, at 140 & n.66 (citing Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v (1982)) (linking modern academic defense of administrative autonomy to the political answerability of agencies).

123 An argument can be made that even criminal prosecutorial discretion is based historically on the availability of private prosecutions, a premise which of course no longer holds. See *Chaney*, 470 U.S. at 849 n.6 (citing John Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443-46 (1974)). The wisdom of permitting broad prosecutorial discretion in the criminal context is, however, beyond the scope of this article. See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969).

124 This suggests in turn that when an administrative scheme does contain an independent prosecutorial authority, as is the case for example with the NLRB General Counsel's authority to enforce the NLRA, see 29 U.S.C. § 153(d) (1994), or with the Secretary of Labor's authority to enforce OSHA, see 29 U.S.C. § 659 (1994), the arguments in favor of judicial review presented in this article are less compelling. See Levin, *supra* note 5, at 773-74. I will not pursue this point further than to acknowledge that in those relatively rare cases, application of the *Chaney* doctrine is less problematic.

## IV. TOWARDS A WORKABLE MODEL OF JUDICIAL REVIEW

Having concluded that, contrary to conclusions of the *Chaney* Court, judicial review of agency enforcement policy and nonenforcement decisions is desirable as a matter of sound policy, the question to be confronted is whether such review is possible and practical. The difficulties that courts generally face when trying to review agency inaction, and especially when reviewing nonenforcement decisions, are well known<sup>125</sup> and lie at the core of the *Chaney* Court's reasoning.<sup>126</sup> Perhaps most importantly, nonenforcement decisions tend to involve a complex balancing of many factors, including the likelihood of success in litigation and whether agency resources are better spent elsewhere, which courts are not well placed to review. In addition, it is often difficult to identify when an agency has failed to act—at the least, delay and inaction can be difficult to distinguish—so that there is often no clear focus for judicial review of agency inaction. And finally, even if inaction can be identified and reviewed, it is not always apparent what remedy is available, since a judicial order to commence an enforcement proceeding is both constitutionally troubling<sup>127</sup> and perhaps unworkable considering the ease with which such an order could be evaded. For all of these reasons, there are substantial practical barriers to a regime of pervasive, searching judicial review of agency nonenforcement decisions.

Nonetheless, a system of effective review of agency nonenforcement, one that would address the worst problems generated by the current *Chaney* regime of presumptive nonreview, is, I believe, workable. The solution to the practical difficulties described above can be found in the now well-established administrative law principle which grounds review of agency action in a requirement that the agency state reasons for its decision, and then confines judicial review to the agency's stated reasons.<sup>128</sup> This principle, which is generally associated with the Supreme Court's decision in *SEC v. Chenery Corp.*,<sup>129</sup> is of great value in formulating a workable system of review of agency nonenforcement decisions because it permits courts to review both the rationality of an agency's stated reasons for declining to enforce, and the consistency of the current inaction with past behavior and stated policy, but otherwise to defer to agencies on the specific choices they make.<sup>130</sup> In addition, it permits courts to remedy improper agency deci-

125 See, e.g., Lehner, *supra* note 114, at 638; Levin, *supra* note 5, at 715-16; Stewart & Sunstein, *supra* note 75, at 1283-84; Sunstein, *supra* note 5, at 672-73.

126 See *Chaney*, 470 U.S. at 831-32.

127 Cf. *Doyle v. Brock*, 821 F.2d 778, 788 (D.C. Cir. 1987) (Silberman, J., dissenting).

128 For an excellent discussion of the agency "duty to explain" and its role in current administrative law, see Gary Larson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996). See generally BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* §§ 7.30, 10.4 (1991); 5 U.S.C. § 555(e) (1994).

129 318 U.S. 80, 94 (1943). For a description of the development of this principle in early administrative law, and its application in a related context, see Levin, *supra* note 5, at 722 & n. 109.

130 For examples of cases applying the statement-of-reasons approach to review of nonenforcement decisions, see *Dunlop v. Bachowski*, 421 U.S. 560, 571-72 (1975); *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987); *Shelley v. Brock*, 793 F.2d 1368, 1372-74 (D.C. Cir. 1986).

sions by remanding, and ordering the agency to take a second look, without having to directly intrude upon agency discretion. This remedial approach avoids the constitutional difficulties (if any) which might arise from courts ordering actual agency action. As a consequence judicial review based on a statement-of-reasons requirement, like the modern "hard look" review which it has spawned,<sup>131</sup> should not substantially interfere with an agency's own decisionmaking and policymaking powers. Thus if reviewing judges in such a regime exercise their powers properly, final control over an agency's allocation of its resources and its formulation of substantive policy should remain with the agency, rather than being transferred to the courts.<sup>132</sup>

In applying these principles to the specific context of agency nonenforcement decisions, some adjustment is necessary in light of the pragmatic concerns discussed above. In particular, a system of judicial review in this area must rest centrally on a requirement—one new to administrative law and representing an admittedly significant departure from existing practice—that agencies state, and then consistently follow, a rational policy regarding enforcement priorities and disposition of enforcement resources. Actual application of this policy to specific factual settings will remain largely within the discretion of the agency. The enforcement policy might consist of relatively precise rules; or it might be a list of the standards and factors the agency will consider in deciding whether to pursue a particular action, along with some explanation of how those factors will be weighed. In either case, once an agency has stated an enforcement policy, judicial review of its substance should be available. In particular, relatively searching review should be available for those aspects of the policy which incorporate substantive policy judgments or establish effectively binding norms, whether permissive or prohibitive, though of course, even such searching review must ultimately defer to reasonable policy judgments made by agencies, so long as they are consistent with legal norms. Review of the discretionary aspects of that policy, especially those aspects dealing with resource allocation issues and other questions of prioritization, can however be quite deferential, thus balancing the need for agency autonomy in administrative matters with the need for judicial supervision of policymaking and rulemaking. And this deference should extend both to review of the relevant aspects of the policy statement itself, and to individual nonenforcement decisions premised on those considerations. Finally, when a reviewing court is faced with mixed explanations of agency policy—for example, a decision to place lower priority on prosecuting certain violations

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<sup>131</sup> See *supra* note 54; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

<sup>132</sup> For a discussion of the capacity of such methods of judicial review to avoid "usurpation" of agency prerogatives, see Sunstein, *supra* note 5, at 671 & nn.109-11; *id.* at 668 n.99. There is, of course, always some danger that reviewing courts will improperly seize such powers, and permit judicial policy preferences to outweigh informed choices made by agencies. But that danger does not seem any more present with respect to nonenforcement decisions than with any other variety of agency action, suggesting that this criticism is more an attack on the entire institution of judicial review than on review in any particular context. As stated *supra* note 81, beyond noting that there are good institutional reasons for its preservation, a broad defense of judicial review is beyond the scope of this article.

based both on a lack of resources, and a substantive policy judgment that the violation is of less concern—the reviewing court must separate out these different components of the agency's reasoning in selecting the standard of review. Thus in the example given, if the court concludes that the agency's substantive policy judgment is unreasonable, the court can remand for the agency to reconsider its prioritization, without questioning the basic principle that an agency with limited resources is entitled to set *some* enforcement priorities, and in the course of setting such priorities make reasonable judgments about what kinds of violations cause the most social harm.

This regime achieves most of the objectives set out above for an effective system of judicial review, and it does so at relatively limited cost. The benefit of mandating a statement of enforcement policy is that it will force agencies to formulate and explain their enforcement priorities. As Justice Frankfurter once said, “[t]hose who decide should record their judgments and give reasons for them, which procedure will in itself have a fruitful psychological effect. We feel much more responsibility—always do—if we write down why we think what we think.”<sup>133</sup> But the current system, of reviewing enforcement policies, but not requiring them, has the perverse effect of discouraging agencies from creating written explanations for their decisions. Compelling (or strongly encouraging) agencies to state their enforcement policies addresses this problem in current law. In addition, grounding review in a required statement of general policy has the advantage of permitting courts to more easily review substantive rules and policies implemented by agencies in the guise of enforcement policy.<sup>134</sup> As discussed above, the remedial difficulty courts face in reviewing nonenforcement is also addressed, since courts can remand for further explanation without commanding that an agency pursue an enforcement action.<sup>135</sup> Another, and perhaps the most important, benefit of such an approach is that once an agency has stated its general policy, or standards, regarding enforcement, courts will have a much easier time spotting and preventing inconsistent or arbitrary actions, since a particular decision can at least be assessed against a stated policy and prior applications of that policy. Thus the costs recounted above which flow from unpredictability and arbitrariness in agency enforcement strategy<sup>136</sup> would at least be reduced by a sys-

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133 *Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on S.674, S.675 and S.918, 77th Cong. 338 (1941)* (statement of Commissioner Healy); see also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1506 (7th Cir. 1991) (Posner, J.) (“[W]riting disciplines thought. We should not create disincentives to” the creation of written explanations.).

134 See *supra* Part II.

135 See *supra* notes 130-31 and accompanying text. A difficult question would arise if an agency ignored judicial commands, or repeatedly presented inadequate reasons for a refusal to act, and a reviewing court felt obliged to order action. The Court in *Dunlop* acknowledged this problem, but declined to address it, preferring to believe the situation was unlikely to occur. *Dunlop*, 421 U.S. at 575-76 & n.12. My own inclination is to think that the separation-of-powers concerns raised regarding a court ordering an agency to commence enforcement proceedings are somewhat artificial, in light of all the other departures from separation-of-powers principles in an agency's day-to-day operation. But like the Court, I am inclined to think the situation is unlikely to arise very frequently.

136 See *supra* notes 85-86 and accompanying text.

tem of judicial review based on a requirement of following a stated policy. And finally, a requirement of consistency with stated policy would sharply limit the ability of agencies to evade judicial review of substantive rules and policy which are communicated through patterns of enforcement decisions combined with informal agency statements, or even patterns of activity undertaken alone,<sup>137</sup> because a pattern of enforcement which has not been set out in the enforcement policy would soon become obvious to reviewing courts. If it did not, it is unlikely to be effectively communicated to regulated entities, which would largely eliminate the usefulness of such a course of action.<sup>138</sup>

On the other hand, highly deferential review under the "arbitrary and capricious" standard<sup>139</sup> of those aspects of an agency's stated policy which involve administrative and discretionary matters, such as the best allocation of limited resources, or the prioritization of socially harmful violations, would permit agencies to retain largely untrammelled authority in those areas where they need it the most, thereby addressing the gravest pragmatic concerns raised by the *Chaney* Court. Moreover, in these areas the courts should permit statements of policy in relatively general terms, and should not reverse an individual agency decision unless there is a clear inconsistency with either the stated policy or with previous applications of that policy. Again, such an approach seems necessary if review of nonenforcement decisions is to be implemented without destroying all agency flexibility. Of course, as with any system of deference, there is a danger that agencies will seek to exploit their relative independence in this aspect of their enforcement discretion and advance other agency goals using the guise of discretionary decisions. But the need to hide such policies from judicial watchdogs will make it much more difficult to communicate the agency's intentions to the regulated community, thereby making such evasive tactics of little use as a practical matter, for much the same reasons that a requirement of publishing formal statements of enforcement policies makes it more difficult to use informally expressed or uncommunicated patterns of enforcement to establish norms.

As has probably become obvious, the key to the above-described regime of judicial review is the availability of different standards of review for different aspects of an agency's enforcement policy. When the reasons an agency states for nonenforcement rest on discretionary factors such as resource allocation, and concomitantly when courts are reviewing aspects of an agency's enforcement policy dealing with such factors, review must be deferential. But when a decision or policy rests on statutory interpretation or a substantive policy judgment, review can be more searching.<sup>140</sup> And when both elements are present in a single decision or policy, the court must modulate its level of scrutiny depending on what element of the deci-

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137 See *supra* note 100.

138 See *supra* notes 99-101 and accompanying text.

139 See 5 U.S.C. § 706(2) (A) (1994).

140 For an example of a court engaging in such searching review in a nonenforcement context, see *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir. 1987). For an early instance of such an approach, see *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 673-76 (D.C. Cir. 1970), *vacating as moot* 404 U.S. 403 (1972).

sion it is reviewing at the moment. This concept—that the standard of review will vary based on the aspect of the agency decision being reviewed—is hardly foreign to administrative law. Most obviously, the APA sets out a number of distinct standards of review courts must apply in reviewing agency action.<sup>141</sup> But the insight seems to have entirely escaped the *Chaney* Court, which concluded that because nonenforcement decisions often will rest, at least in part, on discretionary factors difficult to review, the entire category of nonenforcement decisions should be presumptively unreviewable.<sup>142</sup> The Court's conclusion, however, is a non sequitur. In determining whether an agency action (or inaction) is reviewable, as a logical matter a court *must* consider the nature of the claim advanced by the challenging party. Indeed, the very language of the Court's "no law to apply" formulation of the APA § 701(a)(2) exemption from review implies such a limitation since with respect to certain claims there will *always* be "law to apply."<sup>143</sup> Thus even when an agency action is generally unreviewable, certain kinds of challenges to the action—a constitutional challenge, for example, or a claim of extraordinary agency misconduct—will almost always be reviewable. This in turn suggests that even the most seemingly discretionary types of agency action generally are, and should be, subject to at least partial review.<sup>144</sup> It is then but a small step to the suggestion that the type and level of judicial scrutiny can and should be adjusted to the particular challenge advanced against the agency action—the only difference from the partial reviewability regime described above being that claims addressed at discretionary aspects of decisions will generate extremely deferential review, rather than no review at all.<sup>145</sup> After all, if different aspects of agency decisions can be separated out for purposes of reviewability, as a logical matter they can also be separated out in choosing a standard of review. None of these possibilities seems to have been considered by the *Chaney* Court when it adopted its across-the-board rule restricting review.

The Supreme Court's resistance to the possibility of modulated review in *Chaney* appears to be closely tied to its understanding, exemplified by its decision in *ICC v. Brotherhood of Locomotive Engineers (BLE)*, that reviewability is an all-or-nothing proposition.<sup>146</sup> Because of the sharp distinction the Court has drawn between the question of reviewability and the choice of a

141 See 5 U.S.C. § 706 (1994) (setting forth various standards to be applied in judicial review of agency action).

142 See *Chaney*, 470 U.S. at 831-32.

143 See Sunstein, *supra* note 5, at 658-59. The "committed to agency discretion" language of the APA itself also supports such a limitation, since it seems clear that agencies never have discretion to act for some reasons, such as racial or religious animus.

144 See Levin, *supra* note 5, at 700-02 (discussing Sunstein's understanding of reviewability, and pointing out that the Supreme Court, in cases like *Webster v. Doe*, 486 U.S. 592 (1988), has implicitly recognized that some claims are almost always reviewable); see also *id.* at 746-50 (reciting benefits of a regime of partial reviewability); *Board of Trade v. SEC*, 883 F.2d 525, 530-31 (7th Cir. 1989) (Easterbrook, J.) (endorsing view that otherwise unreviewable decision may be reviewable for certain types of challenges).

145 See Levin, *supra* note 5, at 750 (advancing such a position, and suggesting that the Supreme Court may have adopted such an approach in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), a predecessor to *Chaney* which was distinguished in the latter decision).

146 See *supra* note 91 and accompanying text (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)).

standard of review, it was unable or unwilling to consider a middle position as a response to the problem it faced in *Chaney*. The reasoning of the *BLE* Court in this regard has, however, been sharply criticized.<sup>147</sup> Indeed, the Court's conclusion that reviewable issues cannot be "carved out" from otherwise unreviewable decisions seems facially inconsistent with the language of the APA's exemption from judicial review, which states that agency actions are exempt from review only "to the extent that . . . [they are] committed to agency discretion by law."<sup>148</sup> In light of these objections, Ronald Levin has argued that the *BLE* decision should not be read so broadly as to preclude doctrines of partial reviewability, and perhaps that is the best response to *BLE*.<sup>149</sup> Certainly a number of courts, including some subsequent to the *BLE* decision, have recognized that questions of reviewability are not so easily separated from the choice of a standard of review. When faced with claims that highly discretionary agency actions should be immune from judicial review, these courts have responded by permitting review, but adopting a highly deferential level of scrutiny to acknowledge the agencies' legitimate claims to discretion.<sup>150</sup> This approach, which seems both sensible and eminently pragmatic, could be very easily extended to review of nonenforcement decisions. And when combined with the requirement that agencies state and follow consistent enforcement policies, such a system could limit many of the unfortunate consequences of the *Chaney* doctrine without raising insurmountable practical difficulties.

One question that remains about the framework set forth above is whether it is reasonable or feasible to require agencies to develop and promulgate formal statements of their enforcement policy prior to actual experience with violations, and then to subject these statements to judicial review. Given the range of factual situations in which violations can arise, the requirement of formulating a complete enforcement policy seems a formidable burden. Moreover, Michael Asimow has explained that agencies' policies regarding enforcement priorities often develop informally, as agency employees gain experience with different applications of governing

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147 See Levin, *supra* note 5, at 723-24; see also *id.* at 705-06 (criticizing Court's general interpretation of 5 U.S.C. § 701(a)(2) as confusing reviewability with legality).

148 5 U.S.C. § 701(a) (emphasis added). The legislative history of the APA, insofar as it bears on this issue, also seems to reject the Court's view that discretionary agency decisions are entirely immunized from judicial review. See H.R. REP. NO. 79-1980 (1946), reprinted in ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY, 79th Cong., 1944-46, at 275 (1946) ("the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein"); *id.* at 310-11 (Proceedings from the Congressional Record on March 12, 1946: colloquy between Senators McCarran and Donnell in which Senator McCarran agrees that the "mere fact that a statute may vest discretion in an agency" does not preclude review); *id.* at 368-69 (Proceedings from the Congressional Record on May 24, 1946: statement of Representative Walter).

149 See Levin, *supra* note 5, at 723-24. If true, this argument suggests that Judge Williams's rejection in *Crowley* of the "legal issues" exception to *Chaney* may have been premature. See *supra* notes 37-40 and accompanying text.

150 See, e.g., *Connecticut Dept. of Children & Youth Servs. v. Department of Health & Human Servs.*, 9 F.3d 981, 986 (D.C. Cir. 1993); *International Union v. Dole*, 869 F.2d 616, 621 (D.C. Cir. 1989); *Cardozo v. Commodity Futures Trading Comm'n*, 768 F.2d 1542 (7th Cir. 1985). The distinction drawn here between reviewability and the standard of review parallels Ronald Dworkin's distinction between two different views of discretion, one of which rests on a lack of control by others, and another which rests on a lack of clear controlling standards. See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).



rules, and only over time do they solidify into clearly articulable principles.<sup>151</sup> If this is true—and there is every reason to think that it is—perhaps it is simply too much to ask agencies to state coherent enforcement policies.

The answer, I think, is that most agencies are not novices in most areas they regulate. Therefore, in most areas of agency authority enforcement standards *should* be well developed, and if they are not, it is not unduly burdensome to require that they be. Of course, there will be exceptions—new areas of agency power, or areas where violations, or agency experience with violations, are relatively rare. In such circumstances, reviewing courts must be willing to make an exception so that agencies are permitted to proceed more or less on a case-by-case basis, in formulating enforcement policy. The requirement of a statement of reasons for declining enforcement, however, would continue to exist,<sup>152</sup> and judicial review would focus on the rationality of the reasons given (with the appropriate degree of deference), as well as the consistency of the decision under review with previous agency actions and inactions. Such an approach would create strong incentives to agencies to formulate general standards as quickly as practicable, since once an enforcement policy has been stated and judicially approved, review would be confined to consistency with that policy. But agencies would retain the discretion to delay development of formal policies so long as it seems necessary. Similar reasoning also suggests that even when an agency is not new to an area of regulation, agencies should have broad flexibility to amend previously stated enforcement policies in light of new circumstances or insights, and when an agency chooses to do so, reviewing courts should defer to this decision to the appropriate degree, judging future enforcement and nonenforcement decisions against the newly stated policy rather than placing agencies in a straitjacket.<sup>153</sup>

What remain for consideration are the practical and procedural hurdles to review of nonenforcement decisions, and the related question of whether permitting such review would create a deluge of litigation. Here, however, I think that the difficulties identified by opponents of review are vastly overstated. The procedural obstacles in particular, and the allegedly related difficulty in identifying a “final agency action,”<sup>154</sup> seem very minor. It would be relatively easy to establish a petition procedure permitting private parties to seek an agency enforcement action, similar to the procedure employed by the plaintiffs in *Chaney*,<sup>155</sup> and to procedures apparently currently in place in the NRC and NLRB.<sup>156</sup> Combined with the requirement

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151 Asimow, *supra* note 58, at 386 & n.28.

152 See 5 U.S.C. § 555(e); *supra* notes 128-32 and accompanying text.

153 It should be noted that the need for such flexibility argues sharply against imposing Notice and Comment or other procedural requirements on the issuance of enforcement guidelines. See *supra* note 82 and accompanying text.

154 See 5 U.S.C. § 704; Heckler v. Chaney, 470 U.S. 821, 832 (1985).

155 *Chaney*, 470 U.S. at 823.

156 Regarding the NRC's consideration of petitions to enforce, see *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223 (7th Cir. 1989); *Safe Energy Coalition v. United States Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989); *Massachusetts Pub. Interest Research Group v. United States Nuclear Regulatory Comm'n*, 852 F.2d 9 (1st Cir. 1988). Regarding the NLRB's procedures, see *Dunlop v. Bachowski*, 421 U.S. 560, 562-63 (1975). Any number

that an agency explain its reasons for denying such a petition,<sup>157</sup> this procedure would generate both a relatively straightforward administrative mechanism to initiate review, and a clearly defined "final agency action" suitable for review. Moreover, such a procedure appears to be contemplated, and perhaps even required, by the provisions of the APA.<sup>158</sup>

A more substantial question is raised by the possibility that review of nonenforcement decisions will lead to wasteful, or perhaps abusive, litigation. Again, however, the problems are far from insurmountable. First of all, there is reason to doubt whether the number of persons who would seek review of nonenforcement decisions is all that high,<sup>159</sup> so the whole issue may be something of a chimera. But even if this were a potentially serious concern, there are relatively simple mechanisms available within current law to alleviate it. First of all, requirements of finality would prevent private parties from interfering with agency decisionmaking until the agency had definitively decided whether or not to act. This constraint might not reduce the number of challenges, but it will bring order to them. A more substantial barrier is raised by the APA's limitation of review to agency actions "for which there is no other adequate remedy available at law."<sup>160</sup> In the nonenforcement context this principle has been interpreted to limit the right of review to parties who lack any other avenue of redress, including notably a private right of action against the alleged violator.<sup>161</sup> If enforced strictly, this principle would sharply limit the number of enforcement petitions agencies would be forced to entertain, and would limit the right of review of agency inaction to those situations where it is most needed. Similarly, existing judicial standing doctrines<sup>162</sup> would, for better or worse, prevent the vast majority of the public from challenging most nonenforcement decisions for lack of a particularized injury. In combination, these principles seem sufficient to shield agencies from any flood of new litigation.

Finally, one must confront the possibility of abusive, as opposed to excessive, litigation. The concern here is that regulated entities would seek to hinder the agency's enforcement efforts directed at them by challenging an agency's failure to prosecute their competitors. It has, however, been long established that an agency's failure to proceed against one's competitor is not a defense to an enforcement action directed at oneself,<sup>163</sup> and there is no reason why permitting review of nonenforcement decisions should change that rule. A regulated entity is welcome to petition the agency to proceed against its competitors as well as itself, but it may not

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of other agencies also entertain complaints filed by private parties regarding alleged regulatory violations within their jurisdiction.

157 See *supra* note 128; 5 U.S.C. § 555(e) (1994).

158 See 5 U.S.C. § 706 (1994) (permitting a reviewing court to "compel agency action unlawfully withheld"); *id.* at § 702 (authorizing review if agency officer "failed to act").

159 See Levin, *supra* note 5, at 764-65 & n.388.

160 5 U.S.C. § 704 (1994).

161 See *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7, 14 (2d Cir. 1995); *Salvador v. Bennett*, 800 F.2d 97 (7th Cir. 1986).

162 See, e.g., *National Wildlife Fed'n v. Lujan*, 504 U.S. 555, 560-67 (1992); *Allen v. Wright*, 468 U.S. 737 (1984).

163 See *Moog Indus. v. FTC*, 355 U.S. 411, 413-14 (1958).

resist sanctions directed against itself on those grounds. As with all of the limiting mechanisms set forth here, such a rule cannot prevent all abuse or burden on the agency, but it should suffice to make the problems manageable. It must be borne in mind, after all, that in the search for manageable, institutional mechanisms which characterizes administrative law, no solution is without its costs.

## V. CONCLUSION

The Supreme Court's decision in *Heckler v. Chaney* represents perhaps the most significant restriction placed on reviewability of administrative agency decisions in many years. The Court's conclusion that agency decisions not to pursue enforcement actions should be presumptively unreviewable under the APA was based on a series of pragmatic considerations, combined with a strong view of the appropriate roles of executive branch discretion and judicial control in this area. Unfortunately, the underlying tenets of the *Chaney* decision, and the doctrine that it has engendered, are faulty; and as a consequence, *Chaney* has produced significant confusion in the lower courts. The reaction of the lower courts in the decade since *Chaney* can fairly be characterized as a series of efforts to restrict the scope of *Chaney's* presumption of unreviewability and to create principled exceptions to it whenever possible. All of these efforts, however, have ultimately failed to accomplish their purpose, largely because the distinctions drawn by the lower courts in seeking to constrain *Chaney* have proven as unmanageable as the distinctions drawn in *Chaney* itself.

The inability, or perhaps refusal, of the lower courts to come to terms with *Chaney* might appear to be a mere judicial turf battle, but in fact that does not seem the case. Rather, the lower courts' resistance reflects underlying problems with *Chaney* itself. The holding and opinion in *Chaney* rest critically upon a distinction between an agency's use of its "executive branch" enforcement powers on the one hand, and its use of legislative and adjudicative powers on the other; but this distinction is ultimately unsustainable because it is theoretically incoherent within the administrative context. First, administrative agencies generally lack the separation of powers which in the criminal context provides the justification for shielding executive prosecutorial discretion from judicial scrutiny. Furthermore, elementary legal realist analysis reveals that agencies are able to make rules and formulate substantive policies through enforcement policy in much the same manner as through rulemaking or adjudications. When a single agency possesses all three types of governmental power, therefore, it is often able to employ them interchangeably. Indeed, it is sometimes difficult to even tell which power an agency is exercising at a particular time. As a consequence, a legal rule which makes the important question of reviewability turn on such an insubstantial distinction seems likely to engender confusion, and seems also an invitation to abuse, as agencies manipulate the types of action through which they implement their objectives in order to avoid judicial review of substantive rules and policies.

All of these problems, and the inability of the lower courts to address them adequately, argue strongly in favor of recognizing a right of review of

agency nonenforcement decisions. On the other hand, pragmatic concerns about the ability and capacity of courts to supervise multi-factored decisions regarding allocation of resources and establishment of priorities suggests that the right of review must be a limited one. I argue that a balance can be found in a system of modulated review, which rests heavily on a dual requirement that an agency state reasons for failing to pursue an enforcement action, and develop coherent guidelines and policies to control future exercises of enforcement discretion. If, however, an agency formulates and consistently follows a particular enforcement policy, courts should be extremely deferential in reviewing the discretionary aspects of that policy regarding such matters as limited resources, as well as in reviewing the application of such discretionary factors to particular enforcement decisions. Where a policy or decision rests on more substantive or legal judgments, however, the courts should engage in more searching review. Such a system of review, along with some procedural innovations and some limitations, is well suited to alleviate the worst concerns raised by the *Chaney* doctrine and still avoid the costs of limiting agency flexibility that a right of review might otherwise produce.

