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# THURGOOD MARSHALL AND THE ADMINISTRATIVE STATE

JONATHAN WEINBERG†

Thurgood Marshall announced his retirement on June 27, 1991, after twenty-four years on the Supreme Court bench. Observers from across the political spectrum, as is customary on such occasions, issued statements of respect and admiration for Marshall's accomplishments.<sup>1</sup> Many of those statements, and much of the journalistic commentary on Marshall's resignation, singled out his opinions in the area of civil rights and in areas of constitutional law such as free speech, privacy, and the death penalty;<sup>2</sup> many focused not on his opinions, but on his accomplishments as the chief litigator for the NAACP Legal Defense and Education Fund before his appointment to the Second Circuit in 1961.<sup>3</sup>

Marshall's legacy as a civil rights litigator is surely worth remembering. He did more to change American society and the

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1. See, e.g., N.Y. Times, June 28, 1991, at A1, col. 5 (statements of Senators Orrin Hatch and Joseph Biden).

2. See, e.g., N.Y. Times, June 28, 1991, at A10, col. 1 (discussing Marshall's opinions in areas of school desegregation and the death penalty); N.Y. Times, June 28, 1991, at A10, col. 3 (quoting Marshall's opinions in areas of free speech, privacy, death penalty, and abortion); Wash. Post, July 1-7, 1991 (nat'l weekly ed.), at 6; NAT'L L.J., July 8, 1991, at 30 (quoting Marshall's opinions in areas of civil rights, death penalty, and criminal law); A.B.A. J., Aug. 1991, at 15 ("Marshall's most eloquent words were . . . on the death penalty, on school busing and on issues affecting those on the lowest rung of society").

3. See N.Y. Times, *supra* note 1 (statement of National Right to Life Committee); N.Y. Times, June 28, 1991, at A10, col. 1; A.B.A. J., Aug. 1991, at 14. Some commentators suggested that Marshall's pre-Court career outshone his contributions as a Justice. See N.Y. Times, June 28, 1991, at A10, col. 1 (Marshall "may be remembered as someone who had at least as powerful an influence on the Supreme Court before he joined it as while a member"); NAT'L L.J., July 8, 1991, at 29 (quoting Prof. Charles Fried); A.B.A. J., *supra* (conservative media personality Bruce Fein describes Marshall's "legacy as a person [as] more important than that as a jurist").

American legal system, and to bring America closer to its ideal of what this nation ought to be, than any other litigator ever has, and he did it while confronting fearsome personal danger from those who opposed the rights he was asserting. For that alone, he stands as one of the greatest Americans this country has known.<sup>4</sup> Similarly, in evaluating Marshall's opinions, there is surely nothing wrong with focusing on the areas in which he wrote with the most passion, such as civil rights and the death penalty.

The focus on Marshall's accomplishments and opinions in areas such as civil rights, however, threatens to obscure what he accomplished elsewhere. Marshall's opinions as a Supreme Court Justice were, across the board, eloquent, astute, and perceptive. In this article, therefore, I have chosen not to discuss the work for which Marshall is best known. Others have done that and will continue to do so; I doubt that any words of mine can add to theirs. Instead, in this article I will discuss Marshall's opinions in the area of administrative law.<sup>5</sup> I chose this focus for two reasons: First, I teach administrative law, and so I began my research already familiar with some of the cases. Second, and more importantly, I believe that Marshall's opinions in this area offer valuable insight into Thurgood Marshall as a Justice.

Marshall's administrative-law opinions stress that government agencies must adhere to the mandates set out for them by the legislature, and that courts must be vigilant in monitoring that adherence. In his landmark opinion for the Court in *Citizens to Preserve Overton Park v. Volpe (Overton Park)*,<sup>6</sup> Marshall emphasized that courts must have authority to review a broad range of agency decisions, and must hold those decisions up to searching scrutiny, in order to ensure each agency's compliance with statutory commands. I will discuss Marshall's *Overton Park* opinion at some length; it displays basic themes characterizing Marshall's attitudes towards judicial review of agency action.

The most important of these themes was a skepticism towards the exercise of government authority; for Marshall, government officials got no free ride. Their decisions, he believed, were at least as likely to be invidious or incompetent as anyone else's. Marshall was therefore committed to judicial review as a means

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4. See generally R. KLUGER, *SIMPLE JUSTICE* (1977).

5. I will limit my analysis, further, to Marshall's opinions concerning judicial review of agency action. Other areas of administrative law, such as agencies' obligations under the due process clause, are beyond the scope of this article.

6. 401 U.S. 402 (1971).

of protecting citizens from lawless government action. Where an agency is charged with violating the law, he maintained, the mere fact that the challenged administrative official might be said to be politically responsible is no reason for a court to defer; it is the proper role of courts is to check the legality of challenged government action at the behest of aggrieved citizens. Moreover, he continued, a court has the right to demand from the agency sufficient information for the court to fulfill its oversight role.

Marshall's attitudes toward judicial review proved generally consistent with his overall liberal political views. He wrote opinions challenging agency performance in carrying out the congressional mandate in areas such as benefits for the indigent<sup>7</sup> and the disabled,<sup>8</sup> protection of the environment<sup>9</sup> and of threatened species,<sup>10</sup>

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7. See *Miller v. Youakim*, 440 U.S. 125 (1979) (Marshall, J.) (overturning a restrictive state-agency definition of "foster family home" within the meaning of the federal Aid to Families with Dependent Children (AFDC) statute); *Burns v. Alcala*, 420 U.S. 575 (1975) (Marshall, J., dissenting) (attacking what Marshall characterized as a newly-developed Department of Health and Human Services position denying additional AFDC benefits to pregnant women); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (Marshall, J., dissenting) (challenging whether a state could deny indigents judicial review of administrative decisions reducing their welfare benefits).

8. See *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987) (Marshall, J., dissenting) (Department of Labor's procedures for awarding black lung benefits were inconsistent with the Department's own regulations and with congressional intent); *Heckler v. Day*, 467 U.S. 104 (1983) (Marshall, J., dissenting) (district court properly issued statewide order requiring Department of Health and Human Services to process disability claims within specific deadlines); *Heckler v. Campbell*, 461 U.S. 458 (1983) (Marshall, J., concurring and dissenting) (agency gave disability claimant inadequate hearing). For a case addressing another sort of benefits statute, see *UAW v. Brock*, 477 U.S. 274 (1986) (Marshall, J.) (union may file federal-court suit challenging Department of Labor's interpretation of trade readjustment benefits statute).

9. See *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116 (1985) (Marshall, J., dissenting) (Environmental Protection Agency practice of allowing certain Clean Water Act variances was inconsistent with the statute); *United States v. SCRAP*, 412 U.S. 669 (1973) (Marshall, J., concurring in part and dissenting in part) (district court had power, pending final judicial determination, to force Interstate Commerce Commission (ICC) to suspend a railroad rate where ICC's failure to do so was assertedly illegal under the National Environmental Policy Act and threatened irreversible ecological damage); see also *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (Marshall, J., dissenting) (Department of Housing and Urban Development may have given insufficient attention to "social environmental impact" in approving siting plan for low-income housing).

10. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (Marshall, J., dissenting) (Secretary of Commerce's failure to take statutorily prescribed action against countries departing from International Whaling Commission schedules was inconsistent with Whaling Act).

voting rights,<sup>11</sup> and rights of the handicapped.<sup>12</sup> Marshall's emphasis on legislative primacy and his recognition of the legitimate needs of the administrative process, however, led him to reject claims accepted by some of his liberal colleagues.<sup>13</sup> Indeed, in *Overton Park*, Marshall rejected the position of Justices Black and Brennan imposing stringent procedural requirements on an agency decision; those requirements, Marshall held, were simply nowhere found in the statute.<sup>14</sup>

For Marshall, governing statutory law played the central role in determining the legality and appropriateness of any agency action. Marshall saw statutes in the Austinian<sup>15</sup> sense, as legislative command; Congress' directive was the central towering presence in any review of agency action, and the ultimate justification for that review. He was committed to judicial review not only to protect citizens from lawless action, but also to guarantee to them the benefits of lawful action; he made clear that judicial review should not be a one-way ratchet, dedicated to preventing the government from taking any action for fear that that action might be flawed. The key issue, rather, was whether the agency was making a sufficient effort to comply with the statutory directive.

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11. See *Morris v. Gressette*, 432 U.S. 491 (1977) (Marshall, J., dissenting) (Attorney General's failure to object to state's voting-law change subject to Voting Rights Act preclearance was subject to judicial review).

12. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (Marshall, J., dissenting) (Civil Aeronautics Board erred in failing to subject commercial airlines to § 504 requirements); *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983) (Marshall, J., dissenting) (Federal Communication Commission erred in refusing to consider, in license-renewal proceeding, allegation that broadcast station failed to comply with § 504).

13. For example, Marshall in *United States v. Locke*, 471 U.S. 84 (1985), upheld the agency's forfeiture of unpatented mining claims because the holders had filed their annual notice of intent to work the claim on December 31; the statute required filing "prior to December 31." The statute, Marshall explained, was clear; the Court had no cause to rewrite its language to mean "on or before December 31," even if individual Justices might think that would be a fairer rule. Justices Brennan, Powell, and Stevens dissented. In *McGee v. United States*, 402 U.S. 479 (1971), Marshall rejected the belated attempt of a defendant, charged with refusal to submit to draft induction, to assert ministerial student or conscientious objector status. That claim was barred by the doctrine of exhaustion of administrative remedies because defendant had not sought to build a record before the agency on these factual issues and had not given the agency a fair chance to pass on them. Justice Douglas dissented.

14. See *infra* note 63 and accompanying text.

15. See Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 ENVTL. L. 301, 313 (1981).

Where Marshall believed that an agency was flouting the statutory mandate, consequently, he had little patience for arguments that the agency's choices were somehow immune from review. In his opinion in *Heckler v. Chaney*,<sup>16</sup> he rejected the Court's position that agency decisions not to take action should be presumptively unreviewable; such a rule, he argued, wrongly immunized illegal or irrational agency choices.<sup>17</sup>

Marshall took a more forgiving approach where he was satisfied that the agency sought to advance statutory goals. A court disserves law and the legislative scheme, he argued, when, in the name of rational governance, it prevents the agency from advancing its congressional mandate. In his dissenting opinion in *Industrial Union Department v. American Petroleum Institute (Benzene)*,<sup>18</sup> Marshall made a strong plea for the Court to defer to the Department of Labor's predictive judgment in issuing a workplace safety standard.<sup>19</sup> Where it was unquestioned that the agency's failure to act would lead to additional cancer deaths, he maintained, the Court had no authority to demand that the agency's uncertainty as to how many lives would be lost be resolved in favor of inaction.<sup>20</sup>

In this article, I will discuss opinions that Marshall wrote in administrative-law cases. In this enterprise, I must disclose my bias: my discussion will unavoidably be tinged by the respect and love that I feel for him. I hope to describe his jurisprudence, and to shed some light on the sort of Justice that he was. I will also look critically at Marshall's administrative-law jurisprudence, and evaluate his views against the background of competing approaches. I hope that in this manner I can use his writings to raise some questions about administrative law, and to suggest some answers.

In Part I of this article, I will discuss the *Overton Park* case; in Part II, I will introduce some objections to the vision of

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16. 470 U.S. 821 (1985) (Marshall, J., concurring in the judgment).

17. *Id.* at 841.

18. 448 U.S. 607 (1980).

19. *Id.* at 689-90.

20. *Id.* at 705. For another case in which Marshall emphasized the costs of a ruling that would seize on imperfections in the agency action to frustrate the agency's mandate, see *NLRB v. J.H. Rutter-Rex Mfg.*, 396 U.S. 258 (1969) (Marshall, J.) (reviewing court may not reduce a backpay award against an employer merely because NLRB delayed in issuing it and backpay continued to accumulate during period of delay; reversing agency would unfairly penalize employees, who are innocent and entitled to their remedy).

administrative law embodied in Marshall's opinion in that case. I will consider those objections in Parts III, IV, and V of the article. In Part III, I will discuss rationality review of administrative action; in Part IV, review of agency statutory interpretations; and in Part V, the question of when agency action is subject to review at all.

### I. OVERTON PARK

Marshall's "ubiquitously-cited"<sup>21</sup> opinion in *Overton Park* concerned a judicial challenge to the Secretary of Transportation's approval and funding of a highway in Memphis, Tennessee. Under the statutory scheme, still in force, highways that are to be part of the national highway system are sited and designed in the first instance by state highway departments. Once the location and design of such a highway are approved by the Secretary of Transportation in a consultative process, the federal government bears ninety percent of the cost of the highway's construction.<sup>22</sup>

In *Overton Park*, the Tennessee Highway Department had been working with the Department of Transportation since the 1940s on a new east-west expressway through Memphis; state authorities took the position that the expressway was best routed through Overton Park, a large Memphis park of which the city was quite proud. While routing the highway through the park would mean destroying part of the park and marring the ambiance of much of the rest, the state favored that course as preferable to routing the highway *around* the park, and thus destroying numerous homes and businesses in the highway's path.<sup>23</sup> Federal authorities preliminarily approved that determination in 1956 and again in 1966.<sup>24</sup>

Later in 1966, however, Congress passed an amendment to the Department of Transportation Act narrowing the Secretary's power to approve such decisions.<sup>25</sup> The new language forbade the Secre-

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21. J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 628 (2d ed. 1985).

22. 23 U.S.C. § 120(c) authorizes that payment in the interests of "the prompt and early completion of the . . . System of Interstate and Defense Highways." *Id.* § 101(b). The statute leaves selection of the highway routes "to the greatest extent possible" to the states, subject to the Secretary's approval, and requires the states to submit "such surveys, plans, specifications and estimates . . . as the Secretary may require." *Id.* §§ 103(e)(1), 106(a).

23. Appendix at 67-72, *Overton Park* [hereinafter *Overton Park* Appendix].

24. See *Overton Park*, 401 U.S. at 406-07; *Overton Park* Appendix at 34-35, 38.

25. Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 934, § 4(f) (codified at 49 U.S.C. § 1653(f) (1988)).

tary to approve any highway through a publicly owned park unless "there is no feasible and prudent alternative to the use of such land" and there has been "all possible planning to minimize harm to such park."<sup>26</sup> The provision became effective in 1967; it was amended the following year in ways not relevant here<sup>27</sup> and was incorporated into the Federal-Aid Highway Act.<sup>28</sup>

Routing the highway through Overton Park was the subject of no little controversy in Memphis. On March 5, 1968, the Memphis City Council passed a resolution opposing the Overton Park routing and urging that state and federal governments select another route, placing the highway along the north perimeter of the park "if no better route [could] be obtained."<sup>29</sup> The next month, however, the City Council reversed its position.<sup>30</sup> Its new resolution explained that the state and federal governments had furnished it with "considerable information and data to the effect that no other feasible and prudent route [was] available"; that "further study and hearings could materially affect the beginning of the construction," which was "very essential for the growth and progress of the City of Memphis"; and that the Overton Park route therefore was "the feasible and prudent location for said road."<sup>31</sup> The Federal Highway Administration shortly thereafter issued a press release announcing that, in light of the City Council's finding that the Overton Park route was "feasible and prudent," the Department of Transportation had "reconfirmed" its approval

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26. *Id.*

27. The changes included the addition of a requirement that the park be found to be of "national, State, or local significance." Pub. L. No. 90-495, 82 Stat. 815, 824 (1968).

28. 23 U.S.C. § 138. House members and Senators in 1968 inserted conflicting statements in the legislative history characterizing the two statutes. According to the House members of the Conference Committee, the language was intended to give the Secretary "discretionary authority," allowing him to approve the use of parklands where alternative routes would require substantial numbers of people to move, or would contravene "clearly enunciated local preferences." Statement of the House Managers, H.R. Conf. Rep. No. 1789, 90th Cong., 2d Sess. 32 (1968). Key Senators, on the other hand, repudiated that characterization. They saw the language as giving the Secretary "no discretion." 114 Cong. Rec. 24033 (1968) (statements of Senators Randolph and Cooper).

29. *Overton Park* Appendix at 23.

30. *Id.* at 23-26.

31. *Id.* at 26. The Memphis Parks Commission, which had also opposed the Overton Park route, acquiesced after the City Council's change of position. *Citizens to Preserve Overton Park v. Volpe*, 309 F. Supp. 1189, 1195 (W.D. Tenn.), *aff'd*, 432 F.2d 1307 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).



of the route.<sup>32</sup> With the location approved, all that remained was the design of the road; in November 1969, the Secretary approved, with some modifications, the design submitted by the state.<sup>33</sup>

At this point, opponents of routing the highway through the park filed suit. The district court granted summary judgment to defendants.<sup>34</sup> The Court of Appeals for the Sixth Circuit affirmed, emphasizing the "presumption of regularity" accorded to administrative actions.<sup>35</sup> The Supreme Court granted certiorari<sup>36</sup> on an expedited timetable; the case was argued five weeks after review was granted, and the decision was handed down just seven weeks after that.

As the matter came to the Supreme Court, *Citizens to Preserve Overton Park v. Volpe* may not have seemed particularly difficult or important. The Solicitor General, representing Secretary Volpe, did not contest that the Secretary's decision was subject to judicial review;<sup>37</sup> indeed, he largely confessed error. Under *SEC v. Chenery*

32. *Overton Park* Appendix at 36. Federal Highway Administrator Bridwell later testified before a Senate subcommittee that he had told the City Council that the decision where to locate the highway was up to them, based on "their intuitive and subjective judgment" as to the competing values of preserving parkland and avoiding dislocation of homes and businesses. *Urban Highways: Hearings Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 1st & 2d Sess. 480 (part 2) (1968).

33. The state highway department submitted a design in which the highway would be depressed through part, but not all, of its passage through the park; it rejected the options of placing the highway in a tunnel under the park and of depressing the highway throughout. Assistant Secretary Braman, approving the plan, explained in a press release that the plan "is the most reasonable now open to us and is designed to do minimum damage to the park." *Overton Park* Appendix at 37. Alluding to the fact that President Nixon had taken office only ten months earlier, he continued: "The options of this Administration were few, mainly because the route of the highway had previously been determined." *Id.*

34. *Citizens to Preserve Overton Park v. Volpe*, 309 F. Supp. 1189, 1195 (W.D. Tenn.), *aff'd*, 432 F.2d 1307 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

35. 432 F.2d 1307, 1310 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

36. 400 U.S. 939 (1970).

37. The Solicitor General stated that 49 U.S.C. § 1655(h) (which subjects all "proceedings by the Department [of Transportation] and any of the administrations or boards within the Department" to the Administrative Procedure Act) subjected the Secretary's decision to judicial review. See Brief for the Secretary of Transportation at 31 n.32, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (No. 1066). He did not otherwise address reviewability. Lower courts had reviewed the decisions of the Secretary in similar contexts. See *D.C. Fed'n of Civic Ass'ns v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970), *rev'd*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (D.W. Va. 1969), *aff'd*, 429 F.2d 423 (4th Cir. 1970); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967).

*Corp.*,<sup>38</sup> the Solicitor General conceded, “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>39</sup> Because the administrative record had not been presented to the lower courts, he continued, if the Court found the issue presented whether the Secretary’s determinations were arbitrary, it should not affirm those courts’ favorable determinations. Rather, it should remand so that the district court could resolve the Secretary’s summary judgment motion on the basis of the documents available to the Secretary when he made his decision.<sup>40</sup> The Solicitor General disagreed with petitioners, for the most part, only over whether the Court should remand to the Secretary or to the district judge, and what the terms of that remand should be. While the State of Tennessee took issue with almost all of the Solicitor General’s concessions, its brief was by far the least skillfully drafted of the three.

When the case was argued before the Supreme Court, thus, it may be that nobody expected the opinion to be particularly significant. Today, however, the opinion is seen as one of the most influential postwar Supreme Court opinions regarding judicial review of agency action, “the cornerstone of the prevailing judicial posture.”<sup>41</sup>

What is it about the *Overton Park* opinion that led it to such prominence? One aspect, surely, is its treatment of the question of reviewability. The State of Tennessee took the position that the courts had no authority under the Administrative Procedure Act (APA)<sup>42</sup> to review the Secretary’s decisions concerning *Overton Park*; the state premised its argument on 5 U.S.C. § 701(a)(2), which excludes from APA coverage “agency action . . . committed to agency discretion by law.”<sup>43</sup> Since both the legislative history and the “feasible and prudent” language of the Department of Transportation Act and Federal-Aid Highway Act conferred discretion on the Secretary, the state reasoned, the Secretary’s deci-

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38. 318 U.S. 80 (1943).

39. *Id.* at 87; see Brief for the Secretary of Transportation at 31, *Overton Park*.

40. *Id.* at 32-35.

41. J. MASHAW & R. MERRILL, *supra* note 21, at 628.

42. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (1964 & Supp. V 1970).

43. 5 U.S.C. § 701(a)(2) (1964 & Supp. V 1970).

sions were "committed to agency discretion by law" and the APA granted no power of judicial review.<sup>44</sup>

Marshall, writing for the Court, rejected the state's argument. The exception for action "committed to agency discretion," he wrote, is "very narrow;" it is limited to cases where "statutes are drawn in such broad terms that . . . there is no law to apply."<sup>45</sup> Even though Congress may have intended a government actor to exercise discretion in making a decision, so long as Congress provided any standards to *constrain* that discretion, the decision is subject to judicial review to examine whether the actor conformed to the statutory command.<sup>46</sup>

In this case, Marshall continued, Congress provided standards to constrain the Secretary. Because the legislative history was ambiguous,<sup>47</sup> he stated, the Court should look to "the statutes themselves" to deduce the legislative intent.<sup>48</sup> He found the statutes themselves to circumscribe the Secretary's discretion sharply.<sup>49</sup>

It is obvious that in most cases considerations of costs, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. . . . [S]ince people do not live and work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. . . . [I]f

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44. Brief of Respondent Speight at 37-38, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (No. 1066); *see also id.* at 20-21 & n.19.

45. 401 U.S. 402, 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)); *see also* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946):

Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.

*Id.*

46. Review, however, may be foreclosed on other grounds. In particular, the APA grants courts no authority to review agency action if there is clear and convincing evidence that Congress meant to prohibit review. 401 U.S. at 410; *see* 5 U.S.C. § 701(a)(1) (1988). Similarly, agency action that is not "final" is not subject to review unless some other statute explicitly so provides. 5 U.S.C. § 704 (1988).

47. *See supra* note 28.

48. 401 U.S. at 412 n.29.

49. *Id.*

Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

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. . . [T]he very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.<sup>50</sup>

Because the statutes placed real constraints on the Secretary's decisions, the APA granted persons aggrieved by those decisions the right to go to the courts with their claim that the Secretary was not abiding by Congress' command.<sup>51</sup>

In defining "committed to agency discretion" as he did, Marshall rejected other approaches discussed in the scholarly literature he cited<sup>52</sup> (although not in the state's brief).<sup>53</sup> Most importantly, while the House and Senate Reports on the APA lent support to the "no law to apply" approach,<sup>54</sup> the Attorney General's report

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50. *Id.* at 411-13.

51. *Id.* at 413.

52. See 401 U.S. at 410 n.23 (citing literature).

53. The state's brief did include a reference to 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16 (1958). See Reply Brief of Respondent Speight at 38, *Overton Park*. Professor Davis argued that § 701(a)(2) continued the pre-APA common law of nonreviewability. See K. DAVIS, *supra*.

54. 401 U.S. at 110; see *supra* note 45; cf. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 696-97, 705-09 (1990) (finding that House and Senate reports best support interpretation that no unlawful agency action is barred from review by § 701(a)(2), and querying whether Marshall's formulation accomplishes that result).

Some commentators have criticized the *Overton Park* "no law to apply" formulation on the ground that the standard improperly bars review or is unworkable where an agency action, although subject to no statutory constraints, is nonetheless rooted in misunderstanding of the facts, inconsistent application of precedents, implausible reasoning, or an unconscionable value judgment. See Levin, *supra* at 708; K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28.16, at 639-40 (1976). These criticisms seem to be based on the view that rationality review of agency action is wholly disconnected from the substantive statutory law, and that the presence or absence of statutory standards is therefore irrelevant

to Congress on the APA could have been read to suggest a different tack—that the section incorporated a broader, flexible common law of unreviewability.<sup>55</sup> Some commentators agreed with this broader approach.<sup>56</sup> One contemporary analyst presented a multi-factored approach under which the expertise involved in highway design, the “managerial” (and therefore polycentric) role of the Department of Transportation, and the informality of the decision would all cut against allowing review.<sup>57</sup> In rejecting these interpretations, Marshall emphasized the broad scope of APA review: The courts would be open to almost *any* claim by a person aggrieved that an agency of the government was flouting or misperceiving its statutory mandate.<sup>58</sup>

Once it was established that the Secretary’s decision was subject to judicial review, the next question was *how* the courts should undertake such review. In this respect, too, Marshall’s opinion was important.<sup>59</sup> Informal action such as the Secretary’s in this case, he explained, is reviewed under the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”

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to such review. See Levin, *supra*, at 708. Marshall did not share that belief. See, e.g., *infra* notes 98-108 and accompanying text. He did, however, much later in his career, to some degree adopt the views of his critics on this reviewability issue. See *infra* note 243.

55. See Levin, *supra* note 54, at 695-96. This approach has most recently been championed by Justice Scalia. See *Webster v. Doe*, 486 U.S. 592, 606-10 (1988) (Scalia, J., dissenting).

56. See K. DAVIS, *supra* note 54; Saferstein, *Nonreviewability: A Functional Analysis of “Committed to Agency Discretion,”* 82 HARV. L. REV. 367 (1968) (setting out eight factors courts should consider in deciding whether particular agency action is reviewable); see also *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970).

57. See Saferstein, *supra* note 56, at 382-86, 387-89.

Professor Raoul Berger, by contrast, took the position in a series of sometimes emotional articles that § 701(a)(2) should never be read to bar review of arbitrary agency action. See Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis’ “Final Word,”* 114 U. PA. L. REV. 816 (1966); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

58. 401 U.S. at 410.

59. See Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 275 n.40 (1987) (*Overton Park* is the Court’s “most comprehensive statement” of scope-of-review principles).

test of 5 U.S.C. § 706(2)(A).<sup>60</sup> In the application of that standard, while “the Secretary’s decision is entitled to a presumption of regularity . . . that presumption is not to shield his action from a thorough, probing, in-depth review.”<sup>61</sup> An agency’s decision cannot stand if the agency misconstrued the statutory command, failed to consider factors that the statute makes relevant, or made a clear error of judgment; it cannot stand if it cannot “reasonably be said to be within” the range specified by Congress.<sup>62</sup> “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.”<sup>63</sup>

Going about that review in this case would not be easy. The Secretary had left no contemporaneous explanation or other formal paper trail on the basis of which his decision could conveniently be reviewed. His informal, unmemorandized decision was thus remarkably resistant to after-the-fact scrutiny. Marshall rejected the argument that the Secretary’s failure to make explicit contemporaneous findings was itself a statutory violation<sup>64</sup>—neither the APA nor either of the substantive statutes, after all, explicitly required such findings<sup>65</sup>—but the absence of such findings raised the question how the district court was supposed to undertake the “searching and careful” review the Court described.<sup>66</sup> How was the district court to decide whether the Secretary knew the statutory constraints on his decision, and whether the Secretary’s actual decision was made with those constraints in mind?

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60. 401 U.S. at 416. Defendants challenged whether plaintiffs’ complaint actually raised the issue whether the Secretary’s action was arbitrary, but the Court found the issue squarely before it. *Id.* at 408 n.16.

61. 401 U.S. at 415 (citations omitted).

62. *Id.* at 416.

63. *Id.*

64. 401 U.S. at 417-19. In this, his view differed from that of Justices Black and Brennan, who saw the statutes as “a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of . . . the Secretary of Transportation.” 401 U.S. at 421 (separate opinion of Justice Black). Justices Black and Brennan concluded, somewhat imaginatively, that the statutes discussed in text, together with 23 U.S.C. § 128, a statutory provision requiring state highway departments to hold public hearings on the location and design of highways, required the Secretary himself to hold “hearings—hearings that a court can review,” and to make explicit findings growing out of those hearings. *Id.* at 422.

65. *Id.* at 417.

66. *See id.* at 419-21.

The Solicitor General's response was simple: the district court need only look to "the full administrative record."<sup>67</sup> According to the Solicitor General's brief, all parties agreed on the nature of the administrative record, which included all of the information the Secretary had before him when he made the decisions under review, and "consist[ed] of one carton (approximately file-drawer size) of documents."<sup>68</sup> With that carton of documents before it, the Solicitor General argued, the district court could examine all of the information available to the Secretary when he made his decision, and could properly dispose of the case.<sup>69</sup>

Marshall, however, recognized that the problem was more difficult. The contents of that file-drawer size carton, he cautioned, "may not disclose the factors that were considered or the Secretary's construction of the evidence."<sup>70</sup> And indeed, as later commentators have emphasized, it is not generally the case in informal agency decisionmaking that "all documents critical in reaching a given agency decision are in fact placed 'before' the head of the agency," or that those documents necessarily are easy to assemble when it comes time for judicial review.<sup>71</sup> Therefore, Marshall continued, in order for the district court to understand the Secretary's decision, it was empowered to require the Secretary to "prepare formal findings . . . that will provide an adequate explanation for his action," or, in the absence of such findings, to require agency decisionmakers to testify. Those steps might be "the only way . . . [to engage in] effective judicial review."<sup>72</sup>

In so ruling, Marshall rejected alternatives that might have left the world of administrative law with a different shape. On the

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67. See *id.* at 420 n.34.

68. Brief for the Secretary of Transportation at 30-31 n.31, *Overton Park*.

69. *Id.* at 34-35.

70. 401 U.S. at 420.

71. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 62 (1975). The *Overton Park* opinion has been criticized for "blandly assert[ing]" that there existed an administrative record in connection with the Secretary's decision. See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 175-76 (3d ed. 1986); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 723 (1975) ("The Court . . . seemed to assume that there was somewhere an elaborate administrative record which could easily be produced."). That assertion, however, was a straightforward reliance on the Solicitor General's representations; the Court was skeptical whether the Solicitor General's neat solution would indeed solve the problem of review. See 401 U.S. at 420.

72. 401 U.S. at 420.

one hand, he rejected any understanding of the agency's "presumption of regularity" under which a court could uphold the agency's decision without a firm understanding of the agency's decisional process.<sup>73</sup> If the record the agency produced was insufficient to make its reasoning clear, the court would have to look beyond that record; no other course would allow the court to perform its role of monitoring the agency's compliance with the statute. He emphasized further that the reviewing court could not fulfill this duty simply by relying on litigation affidavits purporting to reconstruct the agency's reasoning.<sup>74</sup>

On the other hand, Marshall rejected the option of requiring the agency to follow formal procedures in order to ensure a transparent, trial-type decision.<sup>75</sup> Moreover, he gave the court no authority to supplement the record by collecting its own evidence pertaining to the merits of the controversy.<sup>76</sup> Rather, the burden was on the agency, as it saw fit, to compile a contemporaneous record that would allow the reviewing court to do its job. If the agency failed to do so, it would be subject to the intrusion of a court order designed to make the agency's reasoning more plain; but if the agency did compile a record sufficient to expose its reasoning, the court had no authority to look elsewhere.<sup>77</sup>

## II. QUESTIONING JUDICIAL REVIEW

In recent years, some scholars have questioned whether the era of searching and easily available judicial review ushered in by *Overton Park* has brought us unmitigated good. In a prominent administrative law casebook, Professors Mashaw and Merrill outline an argument that *Overton Park* was wrongly decided; the highway issues at stake there, they suggest, were the sort in which courts ought not to interfere. Courts, after all, have no expertise in highway planning, which requires "continuous negotiation and

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73. Cf. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1310 (6th Cir. 1970) (emphasizing the "presumption of regularity" in upholding the Secretary's action), *rev'd*, 401 U.S. 402 (1971).

74. 401 U.S. at 419.

75. See *supra* note 63.

76. *Id.* That course was nonetheless essayed by the Court of Appeals for the Fourth Circuit in the later case of *Camp v. Pitts*, 463 F.2d 632 (4th Cir. 1972), *vacated*, 411 U.S. 138 (1973); the Supreme Court reversed summarily, explaining that the lower court's approach was not the one "contemplated by *Overton Park*." 411 U.S. at 143.

77. See 401 U.S. at 417-21.



accommodation among [political] actors" and a balancing of a host of interrelated considerations.<sup>78</sup> It is wrong, the authors suggest, to subject highway plans, which were (and are) developed through a lengthy political process of intergovernmental consultation, to "rational," ahistorical, apolitical judicial scrutiny.<sup>79</sup>

Arguments against judicial review such as these, I believe, rest on two essential concerns. The first, in its strongest form, is that making routine agency actions subject to judicial review is fundamentally misguided, because agencies should be free to carry out their functions through an ineffable, politically and historically directed, nonscientific way of thinking inconsistent with strict conformity with legal authority.<sup>80</sup> The second is that close judicial review may be counterproductive because courts, intruding in areas in which they have little expertise or institutional competence, are likely to reach bad results or to be manipulated by deep-pocketed litigants.<sup>81</sup>

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78. J. MASHAW & R. MERRILL, *supra* note 21, at 636. One of the authors of the Memphis highway plan stated in an *Overton Park* affidavit that highway planning "involves literally thousands of ideas all of which are interrelated to each other." He continued: "Perhaps nowhere is the truism 'everything is related to everything else' more appropriate . . ." *Overton Park* Appendix at 105 (affidavit of William S. Pollard). Such polycentric decisionmaking, it has been argued, cannot easily be reviewed in the judicial forum. See generally Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

79. See J. MASHAW & R. MERRILL, *supra* note 21, at 635-37.

80. Cf. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427 (emphasizing value-laden, subjective, political nature of agency decisionmaking).

81. See, e.g., R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAR AIR ACT (1983); Mashaw & Harfst, *supra* note 59; Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991) [hereinafter Pierce, *Unintended Effects*]; Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 327.

Some commentators have suggested that agencies should engage in negotiated rulemaking precisely to avoid judicial review. See, e.g., Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 136 (1985) (advocating negotiated rulemaking as alternative to a system in which, "[b]y encouraging and empowering regulatees to challenge agency decisionmaking . . . Congress and the courts have simply increased the complexity, cost, and time it takes to generate rules that can be implemented."). See generally Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4970; Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFFALO L. REV. 615, 631-32 (1991).

The first argument is more easily addressed. It is hardly controversial that agencies are influenced by industry groups. It is almost a cliché that agencies, if left to their own devices, may take actions primarily serving their own agendas and those of their clients.<sup>82</sup> Those actions may have little or no connection with the requirements of relevant statutes.<sup>83</sup> In *Overton Park*, thus, the institutional bias of both the federal Department of Transportation and the state department of highways arguably was to build roads at any cost. Congress, responsive to environmental lobbying and concerns, had imposed a statutory restriction designed to check the Department of Transportation's natural instincts and to stop it from advancing that institutional agenda. The Department, however, did not see the statutory provision as a significant constraint; it apparently put the final decision on the highway's location to the Memphis City Council, itself under pressure from state and federal highway authorities, and approved the City Council's decision without hesitation.<sup>84</sup> The statutory direction, thus, was unavailing unless judicially enforceable.

In that situation, I believe, separation of powers required that the Court seek to enforce its understanding of the legislative command.<sup>85</sup> The legislative process, after all, laughable or depressing as it may seem at times, is there for a reason: huge amounts of our national bounty are channeled into legislative disputes over the smallest of details in statutory language. It would render that system pointless to adopt a theory of administrative law under which statutory language was deemed irrelevant to actual agency choices. On the contrary, once a deal is struck in Congress and

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82. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975); see also Weinberg, *supra* note 81, at 692-709. Immediately before writing this footnote, I saw yet another story on the evening news that an agency had withdrawn an educational publication because of pressure from an industry group; this time, it was the EPA, finding too controversial for publication the suggestion that people could reduce solid waste by avoiding disposable cups and plates.

83. Cf. Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 66-89 (1987) (describing negotiated rules bearing only a tenuous relationship to their purported statutory authorizations).

84. See *supra* note 32 and accompanying text.

85. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1278-79 (1982). But see Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-92 (1985); Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 464-67 (1986) (concept of "statutory duty" insulates bureaucrats from democratic control).

embodied in a statute, it is important that there be some effective mechanism<sup>86</sup> through which an agency can be required to abide by that deal.<sup>87</sup> Nor, if our concern is that the agency will subordinate the legislative command to political considerations and to the interests of industry groups, can we rely on the agency to police its own compliance. For these reasons, any approach to judicial review based on a theory of agency decisionmaking "dependen[t] on the nonrational, subjective, human-relations side of life"<sup>88</sup> must fail insofar as it rejects the task of measuring agency action against the governing statute. Unless a court is able to carry out that function, the agency can and will implement its own views regardless of the legislative direction.<sup>89</sup>

This analysis, however, leaves unaddressed the argument that close judicial review may be counterproductive because ill-informed, incompetent, or overly stringent. In order to evaluate that claim, one must turn to subsidiary issues: First, the ultimate issue before the Court in *Overton Park* was whether the Department of Transportation was acting in conformity with its governing statutes. Yet what of judicial review *not* explicitly addressed to that ques-

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86. While nonjudicial mechanisms, such as legislative oversight, are available for enforcing statutes, the control provided by such mechanisms is likely to be even more random, sporadic, and superficial than that provided by judicial review. See, e.g., Study on Federal Regulation: Congressional Oversight of Regulatory Agencies, U.S. Senate Committee on Governmental Affairs, S. Doc. No. 26, 95th Cong., 1st Sess., vol. 2, at 66-67 (1977).

Judicial review provides such a mechanism directly, by striking down agency action inconsistent with the governing statute; it may also provide such a mechanism indirectly, by enforcing procedural requirements at the agency level that give parties favored by the deal an enhanced opportunity to block changes that would disadvantage them. See McCubbins, Noll, & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

87. Judicial review does not have these salutary effects if the reviewing court misunderstands the relevant statute; the argument could be made that the *Overton Park* Court did not interpret the Department of Transportation Act and the Federal-Aid Highway Act in the manner most consistent with legislative intent. That argument, though, does not support the view that judicial review is fundamentally illegitimate; it raises the question whether courts are competent to undertake it. As for that question, see *infra* Parts III & IV.

88. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318 (1984) (criticizing the model).

89. *But see* *Chevron, U.S.A., Inc., v. National Resources Defense Council*, 467 U.S. 837 (1984) (court has no power to reverse agency action so long as the agency's position as to what the statute allows is "reasonable," even if the court would otherwise have identified a more natural reading of the statute to the contrary); *infra* Part IV.

tion? Courts engaging in judicial review sometimes seek primarily to test not an agency's fidelity to the statutory command, but the *rationality* of its action. They thus ask whether there is a "rational connection between the facts found and the choice made":<sup>90</sup> whether the agency has "entirely failed to consider an important aspect of the problem, offered an explanation . . . that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>91</sup> The Court in *Overton Park* had no occasion to engage in such rationality review, but its language invited lower courts to do so, and the courts have "enthusiastically accepted" that invitation.<sup>92</sup> Is such review legitimate? How closely should the court look? I will discuss Marshall's grappling with those questions in Part III of this article.

Second, how closely must a court look when it is measuring an agency's fidelity to its governing statute? In *Overton Park*, the Court simply announced its understanding of the statutory meaning; while the Court's construction was by no means the only possible one, it was, the Court believed, the most logical and natural reading of the law.<sup>93</sup> In later cases, however, the Court adopted a different approach, indicating that a reviewing court should not necessarily prefer its own views to those of the agency regarding the meaning of a statute.<sup>94</sup> I will discuss Marshall's response to the question of statutory interpretation in Part IV of this article.

Finally, in *Overton Park*, the Court made clear a general presumption in favor of reviewability.<sup>95</sup> Must the courts, though, in order to preserve the societal benefits of judicial review, grant review in *every* case? I will discuss Marshall's response to this issue in Part V of this article.

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90. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

91. *Id.*

92. Pedersen, *supra* note 71, at 48.

93. For another possible reading of the statute, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 309 F. Supp. 1189, 1194-95 (W.D. Tenn. 1970) (statute requires that highway "avoid the park if, after considering all relevant factors, it is preferable to do so"), *aff'd*, 432 F.2d 1307 (6th Cir. 1971), *rev'd*, 401 U.S. 402 (1972).

94. *See Chevron, U.S.A., Inc., v. National Resources Defense Council*, 467 U.S. 837 (1984); *see also, e.g., Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985).

95. 401 U.S. 402, 410 (1971).

## III. REVIEW OF ADMINISTRATIVE RATIONALITY

Much judicial review of agency action does not seem addressed to the fidelity of the agency action to some governing statute; rather, it seems more nearly directed to the *rationality* of the agency's action. How appropriate is that inquiry? On the one hand, the Administrative Procedure Act requirement that courts overturn "arbitrary [or] capricious"<sup>96</sup> agency action mandates some degree of rationality review. On the other hand, separation-of-powers concerns, which I earlier invoked in support of review testing an agency's fidelity to the statutory command,<sup>97</sup> may not be so easily employed to support rationality review. In the absence of a separation-of-powers grounding, might the scope of review be drawn more narrowly?

For Marshall, rationality review was part and parcel of measuring an agency's compliance with its governing statute. His opinion in *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*,<sup>98</sup> two years after *Overton Park*, illustrates his approach. The case concerned prices charged by railroads to shippers of grain. While the railroads had previously been willing to switch railroad cars off a main line and onto a siding for inspection of the grain the cars carried without any charge beyond the regular line-haul rates, they now proposed to add a special charge for such in-transit inspections. The Interstate Commerce Commission approved the new charge, and plaintiffs sought review, alleging in part that the Commission had failed to follow its own earlier decisions.<sup>99</sup>

Marshall began by explaining the judicial role: "A reviewing court must be able to discern . . . the policy [the agency] is now pursuing, so that it may . . . determine whether [the agency's] policies are consistent with its mandate from Congress."<sup>100</sup> In order "to determine whether the course followed by the [agency] is consistent with its mandate from Congress,"

the agency must set forth clearly the grounds on which it acted. For '[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

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96. 5 U.S.C. § 706(2)(A) (1988); see *supra* note 60 and accompanying text.

97. See *supra* notes 84-88 and accompanying text.

98. 412 U.S. 800 (1973) (plurality opinion).

99. *Id.* at 805.

100. *Id.* at 805-06.

And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process.<sup>101</sup>

Prior agency precedents, Marshall continued, were important in that analysis:

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.

[I]t is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives.<sup>102</sup>

Marshall noted that the Commission in the past had required carriers to show that the new *aggregate* rates would be reasonable for shippers who would be paying both the old line-haul rates and the new separate charge.<sup>103</sup> The Commission had this time justified its departure from its past practice on the ground that the inquiry would be impractical, because the new charge would be added to thousands of different line-haul rates, each of which would have to be examined separately. Marshall answered, however, that that argument did not fully explain the agency's action. The Commission's order would have the effect of shifting the burden of proof from the carrier to the shipper in any subsequent proceeding to determine whether a specific rate was reasonable. The agency had not disclosed the policies behind that shift.<sup>104</sup> Nor did the Com-

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101. *Id.* at 806-07 (quoting *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935)) (other citations omitted).

102. *Id.* at 806-07, 809 (citations omitted).

103. *Id.* at 809-11.

104. *Id.* at 813-15.

mission's opinion, "[e]ven giving [it] the most sympathetic reading that we find possible,"<sup>105</sup> reveal the policies behind the agency's abandonment of its prior insistence on evaluating the fairness of the change as applied to shippers who would stop buying the separate service, but continue paying the old rates.<sup>106</sup> With those policies nowhere set out, the Court could not judge their conformity to the statute.<sup>107</sup>

The *Atchison, Topeka & Santa Fe Ry.* opinion is striking. On the one hand, Marshall's plurality opinion demonstrates stringent rationality review. Even though the Commission explained why it was departing from its past practice, the plurality nonetheless found a remand necessary because, on a close examination, it found the Commission's explanation logically inadequate. At the same time, the opinion remained fixed on the lodestar of statutory fidelity: it emphasized that the source of its refusal to pass over gaps in the agency's reasoning was its duty to rule on the statutory legitimacy of the agency's policies.<sup>108</sup>

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105. *Id.* at 817.

106. *Id.* at 815-17.

107. *Id.* at 822. Marshall went on to hold, however, that the mere fact that the Commission's approval was insufficiently explained did not give the district court power to suspend a carrier's implementation of the rate. Under the complex railroad regulatory scheme, the railroad's right to implement the rate in the first instance did not depend on Commission approval, and so the invalidity of the agency's approval, without more, did not give the court power to enjoin the carrier. *Id.* at 817-26.

108. This same linkage can be found in Marshall's dissenting opinion some years later in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980). *Strycker's Bay* bore certain parallels to *Overton Park*: it involved a grassroots challenge to the Department of Housing and Urban Development's approval of a New York City Planning Commission siting plan for the construction of low-income housing. Plaintiffs argued that the Department's approval was improper because the plan would concentrate large numbers of low-income public housing units on a single crosstown axis. The local agency's report conceded that the plan was "questionable" in terms of its "impact . . . on social fabric and community structures," and that an alternative siting would be superior "[f]rom the standpoint of social environmental impact." *Id.* at 230 (Marshall, J., dissenting). The local agency and the Department, however, rejected the alternate plan because adopting it would delay construction by an additional two years.

For Marshall, those facts called for careful scrutiny of the agency's decision. It was by no means clear, he argued, that the agency, consistently with the "significant substantive goals" of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370a, could treat the potential two-year delay as weightier than the environmental disadvantages of the course it chose. 444 U.S. at 230 (Marshall, J., dissenting) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)). The Secre-

On a general level, Marshall's point is hard to argue with: a court cannot review the statutory fidelity of an agency's action if it declines any inquiry into rationality. An agency, after all, can always characterize its decision as motivated by statutorily legitimate concerns; the reviewing court will be impotent unless it has the power to ask whether the factors that the agency purports to have relied upon bear any relation to the decision it reached. "As long as the court declines to examine the substance of the agency's . . . explanation, an agency that dutifully jumps through the quasi-procedural hoops will survive review regardless of its actual motives."<sup>109</sup> Courts thus have used rationality review to smoke out agency decisions motivated by considerations inimical to the legislature's purposes.<sup>110</sup>

Rationality review, however, can be a powerful weapon in the hands of lawyers seeking to overturn a complex agency decision. A team of high-powered lawyers can always seize on some gap or logical flaw in the intricacies of a difficult and complicated agency choice.<sup>111</sup> The result is not so much that agency decisions are commonly overturned,<sup>112</sup> as that courts possess the power to over-

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tary, he noted, had conceded that it might be arbitrary for the Department to give environmental values little or no weight; it was an open question, in light of NEPA's requirements, whether the agency had given the environmental consequences of its action the requisite "hard look." 444 U.S. at 231 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

Marshall therefore called for plenary review of the court of appeals' decision vacating the agency action. The Court majority, however, saw the issues differently; it reversed summarily, without oral argument. According to the other Justices, the lower court had improperly read NEPA to require that the agency give environmental factors "determinative weight." 440 U.S. at 227 (quoting *Karlen v. Harris*, 590 F.2d 39, 44 (1978)). This was error, the Court said; NEPA should be read to impose only procedural requirements on the agency, with no bearing on substantive decisionmaking.

109. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 554 (1985).

110. *Id.* at 553; *see id.* at 554-55 ("If a court finds the chosen course unreasonable . . . it may [have] measured the outcome against the wrong motive. The result may be perfectly rational in light of the agency's true . . . motive. The agency may have left that motive unstated, however, because it conflicts with the statute."); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 469-71 (1987).

111. *See Pierce, Unintended Effects, supra* note 81, at 9-10, 26; Mashaw & Harfst, *supra* note 59, at 282-83.

112. *See Schuck & Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1011 ("petitioners who challenge administrative decisions in court today confront a very low probability of success").



turn agency decisions regardless of whether those decisions are, on the whole, well or badly reasoned.<sup>113</sup> That power can lead to paralysis; agencies can become reluctant to take any action not judicially bulletproof.<sup>114</sup> Moreover, the process reinforces a systemic bias favoring those parties in a position to retain numerous and expensive attorneys.

Rationality review, critics argue, has thus sometimes undercut legislative goals by frustrating valid and important agency programs.<sup>115</sup> Nor should this be surprising; courts operate without technical expertise, and attack only small pieces of big problems. Their chances of understanding the full ramifications of the technical issues before them may be slim.<sup>116</sup>

How vulnerable is Marshall's vision of judicial review to this attack? Marshall emphasized that flaws or omissions in an agency's

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113. Cf. Mashaw & Harfst, *supra* note 59, at 283 (describing Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972), an opinion overturning a National Highway and Traffic Safety Administration rule, as "announc[ing] to NHTSA] sotto voce that anything could happen on any issue").

114. See *id.* at 296-97, 315; Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 391-93 (1986). Several commentators have urged that this uncertainty discourages agencies from making policy through rulemaking, where their decisions are particularly vulnerable to such attacks. See Breyer, *supra*, at 391-93; Mashaw & Harfst, *supra* note 59, at 272-312; Pierce, *Unintended Effects*, *supra* note 81, at 27.

115. See sources cited *supra* note 81; see also, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991). According to Jerry Mashaw and David Harfst, judicial review helped destroy the National Traffic and Motor Vehicle and Safety Act's program of revolutionizing auto safety requirements through rulemaking. See Mashaw & Harfst, *supra* note 59. By requiring, in the name of rationality and fairness, that the National Highway Traffic Safety Administration prove in advance the reasonableness and ultimate success of its rules, courts thwarted that agency's attempts to force industry to develop new safety technologies. One particular judicial remand, the authors suggest, has cost the nation "tens of thousands of lives and millions of serious injuries" over the past twenty years. *Id.* at 295.

116. *Accord Ethyl Corp. v. EPA*, 541 F.2d 1, 66-67 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 426 U.S. 941 (1976); Breyer, *supra* note 114, at 388-91.

Moreover, judicial review adds important delays to the regulatory process. In a survey of cases decided in 1984-1985 in which courts remanded agency decisions for further consideration, post-remand proceedings at the agency level averaged about seventeen months. While almost two-thirds of the proceedings were completed within a year, one in ten was still pending after almost five years. Schuck & Elliott, *supra* note 112, at 1050. On judicial review as a source of delay in the administrative process, see Breyer, *supra* note 114, at 383; Mashaw & Harfst, *supra* note 59, at 295; Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 678-82.

reasoning are grounds for remand.<sup>117</sup> Such flaws, he argued, are danger signals; a reviewing court must pounce on them to prevent ill-considered or impermissibly motivated agency action. Marshall's arguments, I believe, are powerful. Yet his aggressive approach to judicial review invites the objections just set out; it is difficult to weigh the benefits of transparency, enforced rationality, and the rule of law<sup>118</sup> against those objections in any rigorous manner.<sup>119</sup>

Marshall was sensitive to the charge that judicial review of agency action acts as a fundamentally conservative force, placing legal roadblocks in the way of any agency attempt to change the status quo. He was willing to defer, therefore, to agency technical and predictive judgments regarding the need for regulation in cases where the costs of ill-considered inaction might equal those of ill-considered action. In *Industrial Union Department v. American Petroleum Institute (Benzene)*,<sup>120</sup> Marshall made a strong plea for deference to an agency's predictive judgments when acting at the frontiers of knowledge.

The *Benzene* case involved the Department of Labor's decision to reduce the permissible level of workplace exposure to benzene vapors from ten parts per million (ppm) to one ppm. The Secretary of Labor had found that exposure to benzene increased workers' risks of cancer, chromosomal damage, and a variety of blood disorders. He found further that fewer lives would be lost at one ppm than at ten.<sup>121</sup> No party challenged those findings. The Secretary had also found, however, that it was impossible to say exactly how many lives would be saved; no direct empirical data was available on the carcinogenicity of benzene at levels below ten ppm, and there was not sufficient information to construct even a speculative dose-response curve.<sup>122</sup> The best that could be said, the Secretary concluded, was that the number of lives saved by

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117. See *supra* notes 98-108 and accompanying text.

118. See, e.g., the testimonial of William Pedersen, then an EPA attorney, in Pedersen, *supra* note 71, at 59-60.

119. Actual empirical evidence on the effect of judicial review is scarce; most observers base their views on anecdotal evidence, and "different observers evidently rely upon different anecdotes." Schuck & Elliott, *supra* note 112, at 987. Compare Sunstein, *supra* note 110, at 470-73 (the objections "have some basis, but they are insufficient to justify abandonment of the hard-look doctrine") with Pierce, *Unintended Effects*, *supra* note 81 (detriments grossly outweigh any benefits).

120. 448 U.S. 607 (1980).

121. *Id.* at 654 (plurality opinion).

122. *Id.* at 631-32.

the new standard "may be appreciable," and that the costs of the new standard were "justified in light of the hazards."<sup>123</sup>

A splintered Supreme Court overturned the agency's standard; the various opinions covered more than 120 pages of U.S. Reports. The plurality opinion began by finding an unwritten statutory requirement that the Secretary not increase the stringency of his workplace standards unless workplaces complying with existing regulation presented a "significant risk of harm."<sup>124</sup> It then vacated the agency's standard on the ground that the Secretary had, unsurprisingly, made no explicit findings with reference to this newly minted test.<sup>125</sup> This tactic was problematic, in part because the Secretary had explicitly stated that remedying the hazards of the status quo justified new capital investments and estimated first-year costs in excess of \$450,000,000;<sup>126</sup> it is hard to imagine how he could have done so had he not seen the averted risk as "significant."<sup>127</sup>

Perhaps aware of this awkwardness, the plurality hinted that the Secretary could not have supported a finding that benzene risks at 10 ppm were significant. The opinion had indicated earlier that the Secretary could not issue a standard unless he had "quantified [the risk] sufficiently to enable [him] to characterize it as significant in an understandable way";<sup>128</sup> that suggested that the Secretary could never take action, since he had found the risk benzene presented at ten ppm impossible to quantify.<sup>129</sup> The plurality went on, however, to grant that it did not intend its requirement to be "a mathematical straitjacket,"<sup>130</sup> and that the agency need not support its finding "with anything approaching scientific certainty."<sup>131</sup> The plurality chided that the agency could, if it set its mind to it, come up with numerical data on which to base "a rational judgment about the relative significance of the risks."<sup>132</sup>

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123. See *id.* at 665-66 (Powell, J., concurring in part and in the judgment); *id.* at 704, 714 (Marshall, J., dissenting).

124. *Id.* at 642 (plurality opinion).

125. *Id.* at 662.

126. *Id.* at 628-29.

127. See Rodgers, *supra* note 15, at 304-05.

128. 448 U.S. at 646. Chief Justice Burger, a member of the plurality, repeated that standard in his concurring opinion, although conceding that "[p]recisely what this means is difficult to say." *Id.* at 663 (Burger, C.J., concurring).

129. *Id.* at 646 (plurality opinion).

130. *Id.* at 655.

131. *Id.* at 655-56.

132. *Id.* at 656-57 & n.64.

The agency's failure, the plurality concluded, was in not doing so.<sup>133</sup>

Marshall dissented. The Occupational Safety and Health Act, he pointed out, explicitly required the Secretary to set the standard that "most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity" from toxic materials such as benzene present in the workplace.<sup>134</sup> It was unchallenged that employees would fall victim to cancer at ten ppm; for the Court to require the Secretary to stay his hand simply because he could not state the *number* of employees who would suffer presented a direct conflict with the statute. Such an approach, inimical to Congress' desire that the Secretary proceed on the basis of "the best available evidence" so that "the standard-setting process would not be destroyed by the uncertainty of scientific views,"<sup>135</sup> ensured that American workers would remain subject to undisputed and "continuing risk[s] of cancer and other fatal diseases, [with] the Federal Government powerless to take protective action on their behalf."<sup>136</sup>

Marshall's *Benzene* opinion cautioned against what it saw as the plurality's "nearly de novo review of questions of fact and of regulatory policy";<sup>137</sup> it emphasized deference to the Secretary's judgment that no quantification was possible.<sup>138</sup> The Secretary's inability to provide unassailable evidence in support of the more stringent standard, Marshall argued, should not, without more, cause that standard to be struck down; there is no reason for a court to prefer nonregulation to regulation as such, and "inaction has considerable costs of its own."<sup>139</sup> Marshall's *Benzene* approach is consistent with a theory of judicial review involving alert and skeptical oversight of agency action, requiring clear and detailed explanations of what the agency did and why, but nonetheless allowing for uncertainty, and respecting the agency's job of setting policy and making value choices in implementing the legislative plan.<sup>140</sup>

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133. *Id.* at 659.

134. *Id.* at 707 (Marshall, J., dissenting) (quoting 29 U.S.C. § 655(b)(5) (1976)).

135. *Id.* at 693.

136. *Id.* at 690.

137. *Id.* at 695 n.9.

138. *Id.* at 705.

139. *Id.* at 722.

140. See Rodgers, *supra* note 15, at 309-18.

That approach has garnered praise;<sup>141</sup> but it cannot lay to rest the questions raised earlier regarding the costs of judicial review. Powerful as Marshall's *Benzene* opinion is, it is a bit too neat to argue that a judge need only bear in mind the precepts of that opinion in order to realize all of the benefits of judicial review of agency action and none of the disadvantages. Agencies have made arguments, similar to those Marshall made in *Benzene*, in favor of rules that under any analysis were pernicious. The Federal Communications Commission (FCC) in *Home Box Office v. FCC*,<sup>142</sup> for example, invoked its predictive and technical expertise in conditions of uncertainty, and warned of the risks of not regulating, in support of a rule whose main effect was for several years to squelch the emergence of pay cable television channels. That rule was properly struck down,<sup>143</sup> and indeed the FCC's decision in that case was rather less carefully considered than the Labor Department's decision in *Benzene*. Yet is there a reliable doctrinal way to tell the two situations apart?

One approach, as Marshall suggested in *Benzene*, might be for courts to be less aggressive when review is sought by or on behalf of "institutions . . . by no means unable to protect themselves in the political process."<sup>144</sup> The idea, of course, is that intrusive judicial review is less necessary when the aggrieved parties can seek political redress. This representation-reinforcing approach is consistent with the "fat cat" theory of the judicial role Marshall sometimes expressed to his clerks: although a judge should uphold valid legal arguments pressed by a "fat cat" litigant, he explained, there is no need for the judge to get too excited about them.

But Marshall recognized, I think, that we cannot avoid the tension between the need for intrusive judicial review and the disadvantages of that review.<sup>145</sup> Keeping administrators within their

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141. See *id.* (approvingly associating Marshall's opinion with "muddling through" theory of agency decisionmaking).

Professor Diver has characterized Marshall's *Benzene* opinion as consistent with an "incrementalist" approach to review that has much in common with Professor Rodgers' model. In contrast to Professor Rodgers, though, Professor Diver associates the incrementalist paradigm with a generally lenient approach to review. See Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981). But see Mashaw & Harfst, *supra* note 59, at 316 (there is no coherent way to use the model to shape a lenient approach to review).

142. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

143. See Weinberg, *supra* note 81, at 692-701.

144. *Benzene*, 448 U.S. at 695 n.9.

145. See Breyer, *supra* note 114, at 394-95.

delegated authority is an essential element of the rule of law; strict rationality review is the only meaningful way to do it. Much post-New Deal regulatory legislation calls for “[l]arge-scale rearrangement of entitlements by general rules, promulgated by appointive agencies having vague mandates”;<sup>146</sup> our common-law heritage, and our basic views of justice, demand judicial oversight of such an enterprise. In undertaking that effort, judges will deliver an imperfect product. The judicial review game, though, is still the only one in town.

#### IV. REVIEW OF ADMINISTRATIVE STATUTORY INTERPRETATION

In cases placing in question the fidelity of agency statutory interpretations to legislative directives, Marshall wrote opinions both supporting and rejecting agency positions. In the *Benzene*<sup>147</sup> case, for example, Marshall, writing for four Justices, championed the Secretary of Labor’s interpretation of the Occupational Safety and Health Act; he accused the plurality of making up its “significant risk” requirement out of whole cloth because of its unwillingness to accept the policy choices Congress embodied in the Act.<sup>148</sup> In *Chemical Manufacturers Association v. National Resources Defense Council, Inc.*,<sup>149</sup> Marshall again dissented, again writing for four Justices but this time rejecting the agency position. While the Court majority ruled that the EPA could, consistently with the Clean Water Act,<sup>150</sup> offer certain variances from the requirements of that statute,<sup>151</sup> Marshall argued that Congress had explicitly and intentionally forbidden the agency to grant those variances.<sup>152</sup>

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146. Mashaw & Harfst, *supra* note 59, at 314.

147. 448 U.S. 607 (1980).

148. [T]oday’s decision represents a usurpation of decisionmaking authority that has been exercised by and properly belongs with Congress and its authorized representatives. The plurality’s construction has no support in the statute’s language, structure, or legislative history. The threshold finding that the plurality requires is the plurality’s own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

448 U.S. at 712-13 (Marshall, J., dissenting).

149. 470 U.S. 116 (1985).

150. 33 U.S.C. §§ 1251-1387 (1988).

151. 470 U.S. at 134.

152. *Id.* at 138-52 (Marshall, J., dissenting).

A year later, Marshall, again writing for four Justices, dissented from a Court opinion upholding the Secretary of Commerce's understanding of the Pelly<sup>153</sup> and Packwood<sup>154</sup> Amendments in *Japan Whaling Association v. American Cetacean Society*.<sup>155</sup> He argued with considerable force that the Secretary had ignored plain statutory language and legislative intent because of his unwillingness to implement the choice Congress had made.<sup>156</sup> Finally, three years ago, Marshall dissented in *Public Employees Retirement System v. Betts*,<sup>157</sup> in which the majority rejected an Equal Employment Opportunity Commission interpretation of the Age Discrimination in Employment Act<sup>158</sup> as inconsistent with "the plain language of the statute."<sup>159</sup> Marshall, defending the agency's view, pointed out that the majority's preferred reading was at least as inconsistent with the statutory language, and was wholly unmoored from the statute's legislative history and purposes.<sup>160</sup>

These four cases have several things in common.<sup>161</sup> Marshall was on the losing side in all of them. His opinions in all of them

153. 22 U.S.C. § 1978 (1988).

154. 16 U.S.C. § 1821 (1988).

155. 478 U.S. 221 (1986).

156. *Id.* at 241-50 (Marshall, J., dissenting).

157. 492 U.S. 158 (1989).

158. 29 U.S.C. §§ 621-634 (1988), amended by 29 U.S.C. §§ 623-631 (1988 & Supp. 1989).

159. 492 U.S. at 171.

160. *Id.* at 185-91 (Marshall, J., dissenting).

Marshall's views on the importance of the judicial role in ensuring agency fidelity to the governing statute are also revealed in *Heckler v. Day*, 467 U.S. 104 (1984), in which the Court majority reversed a district court order setting state-wide deadlines for Health and Human Services processing of disability claims. Marshall, dissenting, described the district court as properly and reasonably requiring the agency to obey its statutory responsibilities. *Id.* at 121-37; see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (Marshall, J., dissenting) (Federal Communications Commission interpretation of the Communications Act ignored duty imposed on agency by that statute); *Miller v. Youakim*, 440 U.S. 125 (1979) (Marshall, J.) (state agency's definition of "foster family home" within meaning of federal AFDC statute inconsistent with statutory language, structure, and legislative history); cf. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 161 (1987) (Marshall, J., dissenting) (Department of Labor's rules concerning black lung benefits inconsistent with its own regulations).

161. *Benzene, Chemical Manufacturers*, and *Japan Whaling Association* are the only non-unanimous Supreme Court cases I am aware of, challenging federal agency action and presenting a question of "pure" interpretation of the agency's governing statute, in which Marshall wrote an opinion. I have added *Betts* to the list, notwithstanding that plaintiff was not challenging agency action in the

manifest a commitment to vindicating Congress' actual intent. And, at least in the eyes of this observer, Marshall has the better of the argument in all four.<sup>162</sup> Without regard to whether Marshall was attacking or defending the agency, his dissents seem more nearly to capture what Congress intended and expressed, while the prevailing opinions seem rather more creatively to capture what their authors believed it would have been convenient for Congress to have intended and expressed.<sup>163</sup>

This suggests an irony in Marshall's vision of searching judicial scrutiny of agencies' compliance with statutes. The Court eagerly embraced that vision in two cases where Marshall believed the agencies' actions to be well supported;<sup>164</sup> it espoused a philosophy of deference in two cases where Marshall believed the agencies to be violating their mandates.<sup>165</sup> It is hardly clear that the Court, in

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conventional sense (a former state employee filed suit against the state agency providing her with retirement benefits), because it turns so prominently on the question of the appropriate degree of deference due to the EEOC's interpretation of the relevant statute.

I have omitted from this list cases that rest on challenges to the rationality of the agency's actions (as opposed to its statutory interpretations), and cases such as *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 612 (1981) (Marshall, J., dissenting), involving intertwined arguments that agency action was both an unreasonable departure from earlier policies and inconsistent with the agency's statutory obligations. While the *Benzene* case raises important rationality issues, its statutory-interpretation issue was a separate crucial question in the case.

162. The weakest of the four in this respect is *Betts*; the fragmentary legislative history in that case can be read to support either side. It is worth noting, though, that all five courts of appeals that considered the *Betts* issue, as well as a Solicitor General's office not noted for its liberal interpretations of the civil rights laws, agreed with Marshall.

The other three are much stronger cases for Marshall's position. In *Benzene*, indeed, a majority of the Court agreed with Marshall that there was nothing in the statute or its legislative history contravening the agency's interpretation. Justice Rehnquist, however, decided that a key statutory provision, while consistent with Marshall's view, could not be used to support the agency action because it was unconstitutional: the legislative history gave so little guidance as to the statute's meaning as to render it invalid under the nondelegation doctrine. 448 U.S. at 680-88 (Rehnquist, J., concurring in the judgment).

163. At least one academic observer, thus, has expressed the view that the result in *Benzene* was "quite sensible" policy, and that the agency's intended action was "overzealous." Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529. That may be so; Marshall, though, would answer that rethinking the statute's wisdom is not an appropriate part of statutory interpretation.

164. See *supra* notes 147-48, 157-60 and accompanying text.

165. See *supra* notes 149-56 and accompanying text.



essaying its review, was more responsive to the legislative mandate than the agencies had been in the first instance. Although one can hardly draw reliable generalizations from four cases, the incongruity prompts the question raised in Part II of this article: are courts undertaking judicial review of agency statutory interpretations likely to reach sufficiently good results to make that review a good thing? Or will judicial review, in the long run, be counterproductive, an expensive way of reaching essentially random results?<sup>166</sup>

Marshall's position was firmly on the side of judicial review. To understand the evolution of that issue, it is necessary to examine the ways in which the Court approached judicial review of agency statutory interpretations over the years. In *Overton Park*,<sup>167</sup> when the Court considered the meaning of the Department of Transportation Act and the Federal-Aid Highway Act, Marshall had before him no agency interpretation, promulgated outside of the press of litigation, setting forth the Department's view as to the proper understanding of the statutes. Had there been such an interpretation, there was case law both supporting and rejecting the notion that the Court should defer to the agency's position.<sup>168</sup> In some earlier cases, the Court had given the agency's view no weight whatsoever;<sup>169</sup> in others, it had instructed lower courts to take from the "experience and informed judgment" of the agency whatever guidance they felt was justified.<sup>170</sup> In still other cases, the Court had described the definition of statutory terms as part

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166. See *supra* notes 89-90 and accompanying text.

167. 401 U.S. 402 (1971).

168. Compare *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("since the only or principal dispute relates to the meaning of a statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction") with *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."). See generally *Diver*, *supra* note 85, at 549-67, from which these quotations are taken.

169. See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953).

The plurality took the same approach in *Benzene*; it stated in a single sentence, buried in the bottom of a footnote seven-eighths of the way through its opinion, that it "declin[e]d to defer" to the agency's interpretation. 448 U.S. at 651 n.58.

170. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Court stated: "The weight of [the agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

of "the usual administrative routine" of the agency, not to be overturned by a court without reasonable basis.<sup>171</sup>

The Court attempted to impose some order on that chaos in the landmark case of *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>172</sup> The *Chevron* opinion announced that when a court reviews an agency's construction of its governing statute, and "Congress has [not] directly spoken to the precise question at issue,"<sup>173</sup> the court must uphold the agency's view so long as it is "reasonable."<sup>174</sup> Under *Chevron*, if Congress has not spoken to the exact point at issue, considerations of policy, purpose, or structure are to play little role. Courts have no authority "to force recalcitrant agencies to implement more vigorously the policies that animated Congress."<sup>175</sup> *Chevron* restricted judicial power to reject agency interpretations on the grounds of infidelity to general statutory purposes, as opposed to specific contrary intent; it thereby invalidated "what had been a rather common method of overturning agency interpretations."<sup>176</sup>

Marshall did not participate in *Chevron*; his first opportunity to speak to its holding came eight months later, in *Chemical Manufacturers Association v. NRDC*.<sup>177</sup> The majority reaffirmed the *Chevron* rule<sup>178</sup> and upheld the EPA's practice of offering certain Clean Water Act variances. The Court had to defer to the agency interpretation, it concluded, because the language and legislative history of the statute did not "evinced an unambiguous congressional intention to forbid" the specific course the agency chose.<sup>179</sup> Marshall dissented, arguing that Congress had explicitly intended, in a 1979 amendment to the statute, to bar the challenged practice.

Language in Marshall's opinion may reveal his approach to the deference question.<sup>180</sup> In discussing the level of deference due

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171. See *NLRB v. Hearst Publications*, 322 U.S. 111, 130-31 (1944).

172. 467 U.S. 837 (1984).

173. *Id.* at 842.

174. *Id.* at 842-45.

175. Starr, *Judicial Review in the Post-Chevron Era*, 3 *YALE J. ON REG.* 283, 295 (1986).

176. *Id.* at 295 n.93 (citing four of the cases listed *infra* note 182).

177. 470 U.S. 116 (1985); see *supra* notes 149-52 and accompanying text.

178. See Schuck & Elliott, *supra* note 112, at 991, 1025-26. The authors characterize *Chemical Manufacturers* as "particularly significant" for its role in the evolution of the *Chevron* doctrine. *Id.*

179. 470 U.S. at 129.

180. The *Chevron* holding did not control the debate in *Chemical Manufac-*

the agency, Marshall explained, "the courts are the final authorities on issues of statutory construction . . . [and] must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."<sup>181</sup> He then cited a string of cases in which the Court had invalidated agency interpretations as being inconsistent with statutory policies, purposes or structure.<sup>182</sup>

This is subtly, but importantly, different from the approach of *Chevron*: in *Chevron*, the Court largely *denied* judicial power to overturn agency interpretations on such grounds. Marshall, by contrast, was unwilling to forswear a role for judges in safeguarding congressional policy. Where congressional language offered no

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*turers*, for Marshall argued that the EPA's interpretation was inconsistent with an explicit legislative choice. The majority, for its part, considered and rejected the argument that the variances would frustrate statutory goals. Marshall thus stated that his "disagreement with the Court [did] not center on its reading of *Chevron*." 470 U.S. at 152 (Marshall, J., dissenting). His differences regarding *Chevron* are nonetheless, I think, significant.

181. 470 U.S. at 151 (emphasis added) (quoting Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981)). The Court had quoted the same language in *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137 (1984), an earlier post-*Chevron* case. That majority opinion, though, is notable for its failure to mention *Chevron* at all; it approved the agency's interpretation as supported by the statutory language and "fully consistent with the Act's purposes." *Id.* at 140.

182. 470 U.S. at 151. In *SEC v. Sloan*, 436 U.S. 103 (1978), the Court rejected the agency's interpretation of the Securities Exchange Act, which it characterized as "not an impossible reading of the statute [but] not the most natural or logical one." *Id.* at 111. The structure of the Act and the purposes of the relevant provision, the Court held, cut against the agency's view. *Id.* at 112-23. In *FMC v. Seatrain Lines*, 411 U.S. 726 (1973), Marshall's opinion for a unanimous Court rejected the agency's interpretation of ambiguous statutory language in light of the policies and structure of the statute. In *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968), the Court rejected the agency's understanding of the Shipping Act, finding the agency's reading of the statutory language "extremely narrow" and inconsistent with the policies and structure of the statute. *Id.* at 273. In *NLRB v. Brown*, 380 U.S. 278 (1965), the Court rejected the Board's application of the unfair labor practice provisions of the NLRA; the Court held that the Board had improperly struck the "balance . . . between conflicting interests." *Id.* at 292. In *Social Security Board v. Nierotko*, 327 U.S. 358 (1945), the Court struck down the agency's interpretation of the Social Security Act as inconsistent with statutory policies and sound reasoning. In *Burnet v. Chicago Portrait Co.*, 285 U.S. 1 (1932), the Court rejected the administrative interpretation of ambiguous statutory language in light of "the purpose of the statute." *Id.* at 7. In *Webster v. Luther*, 163 U.S. 331, 342 (1896), the Court similarly rejected the agency interpretation in light of statutory purposes.

guidance,<sup>183</sup> he suggested, congressional policies should remain paramount.<sup>184</sup>

The *Chevron* rigid rule of deference seems problematic. Why should a court not strike down an agency statutory interpretation that, in its view, disservices the policies of the underlying statute?<sup>185</sup> One good reason for the court to stay its hand might be that Congress intended the agency, not the court, to exercise the relevant law-making authority.<sup>186</sup> The *Chevron* holding is not limited, however, to such cases; the Court made clear that its rule applies regardless of whether Congress explicitly chose to give the agency that power.<sup>187</sup> Deference to Congress' allocation of interpretive authority, thus, does not explain the Court's unswerving rule that a court, in the absence of legislative attention to the specific issue, must *always* defer to a "reasonable" agency interpretation. It is hard to justify the view that *any* gap in a statutory scheme

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183. Marshall later relied on *Chevron* in some of his own opinions, including *United States v. City of Fulton*, 475 U.S. 657 (1986). In *City of Fulton*, though, Marshall emphasized that the statutory language and legislative history provided *no* guidance, and that various policies underlying the statute pointed in conflicting directions; in such a case, it could not be said that the agency's interpretation was inconsistent with the statute.

184. Solicitor General Starr has characterized Marshall in *Chemical Manufacturers Association* as going "to some length to point out that [his] disagreement with the majority did not reflect a disagreement either with *Chevron* or with the majority's reading of that case." Starr, *supra* note 175, at 289. That is overstated. Marshall made clear that under any reasonable view of *Chevron*, his understanding of the statute and its legislative history counseled reversal, while the majority's counseled affirmance. See *supra* note 180. That is not to say, though, that he had no disagreement with the majority's reading of *Chevron*; his opinion, as I discuss in the text, suggests that he did.

185. See Sunstein, *Deregulation and the Courts*, 5 J. POL'Y ANAL. & MGMT. 517, 529 (1986).

186. See, e.g., Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); Breyer, *supra* note 114, at 369-70; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Starr, *supra* note 175, at 308-09.

187. See *Chevron*, 467 U.S. at 865, where the Court stated: "Perhaps [Congress] consciously desired the Administrator to strike the balance . . . perhaps it simply did not consider the question. . . . For judicial purposes, it matters not which of these things occurred." *But see* *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390 (1990) (Marshall, J.) (court need not defer to agency interpretation of a statute it does not administer, because "precondition to deference under *Chevron* is a congressional delegation of administrative authority"). Cf. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (relevant statutory provision "cannot be read except as a delegation of interpretive authority" to the agency).

manifests an "implicit" congressional "delegation to [the] agency."<sup>188</sup> Congress, if it thought at all about the allocation of interpretive authority in a particular case, may well have contemplated that the courts would resolve any ambiguity.<sup>189</sup>

Another good reason for judges to defer to agency interpretations might be that the agency knows more about the relevant area of law than does the court.<sup>190</sup> But this situation too does not necessarily arise in every case of statutory interpretation; in some cases the agency may have no relevant expertise.<sup>191</sup> The Court's blanket rule, thus, again seems incompletely justified. Moreover, any advantages the agency may have in divining congressional intent<sup>192</sup> and "elucidat[ing] the understanding of a statute's audience"<sup>193</sup> seem almost meaningless in light of the agency's lack of incentive to interpret the statute in accordance with the intentions of its enactors; the agency's strong interest lies instead in interpreting the statute in whatever manner best suits its policy goals.<sup>194</sup>

A defender of *Chevron* might argue that congressional statutes typically reflect a variety of conflicting policies, and that any interpretation will serve some but disserve others; because the interpretive job is one of "reconciling conflicting policies,"<sup>195</sup> a

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188. *Id.* at 844.

189. See Breyer, *supra* note 114, at 376. Judge Breyer, indeed, argues that "[f]or the most part courts have used 'legislative intent to delegate the law-interpreting function' as a kind of legal fiction. . . . to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose," to defer to the agency's interpretation. *Id.* at 370. That approach, he argues, is superior to *Chevron*'s.

190. See *id.* at 368-69; Diver, *supra* note 85, at 574-78.

191. See Breyer, *supra* note 114, at 373-78.

192. See Diver, *supra* note 85, at 574-75; Starr, *supra* note 175, at 309-10.

193. Diver, *supra* note 85, at 576. An agency also may be better situated to guess the real-world consequences of various statutory interpretations. *Id.* at 577-78.

194. Professor Diver concedes that "the danger that self-interest will infect the agency's reading of its statute is pronounced." *Id.* at 582. He finds, however, that one can draw no clear conclusion from the factors discussed in text favoring either deference or independent review. He ultimately concludes that deference is usually appropriate, because leaving interpretive authority with the agency fosters geographic uniformity, allows healthy administrative changes of policy, makes it easier for agencies to adopt statutory readings that reinforce other agency policies, allows interpretive decisions to be made with enforcement considerations in mind, and encourages compliance with agency rulings by making them seem more final. *Id.* at 585-92; see also Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087-91 (1990).

195. *Chevron*, 467 U.S. 837, 865.

variety of interpretations will likely be consistent with the statute. Thus, it will often be wrong for a court to reject an agency interpretation simply because the court believes that the agency's choice disserves a policy underlying the statute; that policy is likely to be only one of a set of conflicting legislative goals and concerns.<sup>196</sup> But the question can be raised once again: why the blanket rule? Even in the absence of such a rule, a perceptive judge will recognize conflicting statutory policies when she sees them, and will not incorrectly elevate one over the rest. The effect of the blanket rule on such a judge is only to prevent her from invalidating agency interpretations in other cases where it is in fact appropriate to do so.<sup>197</sup>

The Court's approach, thus, seems to make the most sense as a prophylactic rule. If all judges were as perceptive as themselves, the *Chevron* Justices may have felt, there would be no need for a blanket rule; even without the rule, good judges would not seek to import their own "personal policy preferences"<sup>198</sup> into the statutory command. But because some judges may make improper use of statutory policies, judicial review of agency statutory interpretations can be counterproductive: the *Chevron* straightjacket was designed to check that.<sup>199</sup> *Chevron* can thus be seen as a doctrinal embodiment of the argument raised earlier in this article<sup>200</sup> that we should limit judicial review because otherwise courts undertaking such review will make wrong decisions.<sup>201</sup>

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196. See Starr, *supra* note 175, at 294-95.

197. It might be argued that the *Chevron* rule will not inappropriately prevent judges from overturning bad agency interpretations, because an agency decision will not be "reasonable" if it contravenes clear statutory policies. If *Chevron* allows courts to give statutory policies such weight, though, it is not clear what content it has. It is hardly controversial that judges should uphold otherwise appropriate agency decisions where they can find neither specific nor general legislative intent to the contrary.

198. 467 U.S. at 865.

199. See Sunstein, *supra* note 110, at 468 n.217.

200. See *supra* note 81 and accompanying text.

201. One could alternatively argue that since Congress *commonly* intends agencies to exercise interpretive authority, and agencies *commonly* are more competent to determine the meaning of statutory language than are courts, a blanket rule of deference is more cost-effective than a system under which courts have to decide in each case whether to defer. After all, one can rarely find clear evidence of how Congress wished to allocate interpretive authority in a specific case, see Diver, *supra* note 85, at 570, and a blanket rule of deference will save money, both by simplifying the judicial task and by discouraging petitions for review. *Id.* at 572-73; see also Sunstein, *supra* note 194, at 2097 ("an ad hoc

Since 1984, *Chevron* has ascended to the status of a landmark case. Marshall's softer reformulation in his *Chemical Manufacturers Association* dissent received little attention. It is by no means clear, though, that the *Chevron* rule has improved the quality of judicial review. On the one hand, by the very nature of a prophylactic rule, *Chevron* presumably has led courts to affirm some agency interpretations that, except for adherence to the rule, properly would have been reversed. On the other hand, the *Chevron* rule was insufficient to cause the Court to support the agency in *Betts*, just as the deference principle was insufficient in *Benzene*; both cases were decided—incorrectly, according to Marshall—on the putative ground that the agency interpretations were inconsistent with the plain language of the relevant statutes.<sup>202</sup> The *Chevron* approach, thus, has deprived reviewing courts of interpretive tools while only incompletely (if at all) achieving its goal of protecting valid agency interpretations.<sup>203</sup>

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inquiry into administrative competence would be an exceedingly poor way to handle the question whether *Chevron* applies"). *But see* Breyer, *supra* note 114, at 380 ("There is no particular reason to believe that automatically accepting the agency's interpretation of a statute would simplify, or make easier, the judge's task."). The appeal to bright-line simplicity has considerable force. In my view, however, the *Chevron* rule goes sufficiently to the heart of American separation of powers that it should be upheld only because it improves the quality of judges' decisions in some meaningful sense, not because it allows judges to reach inferior results more cheaply.

202. The Supreme Court has found itself quite able, notwithstanding *Chevron*, to overturn agency interpretations by characterizing them as inconsistent with unambiguous statutory language or explicit congressional decisions. *See, e.g.,* Presley v. Etowah County Comm'n, 60 U.S.L.W. 4135 (U.S. Jan. 27, 1992); Dole v. United Steelworkers, 494 U.S. 26 (1990); Sullivan v. Zebley, 493 U.S. 521 (1990); Pittston Coal Group v. Sebben, 488 U.S. 105 (1988). This lends support to the argument that the language of deference is simply a smokescreen. *See generally* Rodgers, *supra* note 15, at 302 (voicing "the suspicion . . . that the grand synthesizing principle that tells us whether the court will dig deeply or bow cursorily depends exclusively on whether the judge agrees with the result of the administrative decision"); Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15 (1984) ("Judicial rhetoric about deference to the 'political branches' and to administrative expertise, of course, is commonplace. Such talk is a venerable aspect of the courts' protective coloration, and should not be taken too seriously."); *quoted in* Diver, *supra* note 85, at 564 n.113; Shapiro, *supra* note 85, at 479 n.38 ("One should not pretend to be fooled by the language of *Chevron* . . . obviously the court does not defer to the agency. It simply agrees that the regulatory policy adopted by the agency is a good one.").

203. *Chevron* has had an important atmospheric effect on the lower courts, at least temporarily increasing affirmances of agency decisions and decreasing

Marshall's opinions in this area ultimately wrestled with a basic contradiction in judicial review of agency action. Judicial review of agencies' statutory interpretations is necessary because of agencies' bias, pursuit of their own agendas, and result-orientation; *Overton Park* stands as authority for that. That same judicial review can be problematic, though, as demonstrated by Marshall's consistent position in dissent: the Court itself is not free from bias, pursuit of Justices' own agendas, and result-orientation. Marshall opposed any suggestion that that tension should lessen the Court's commitment to judicial review as an institution. Rather, his opinions suggest, we simply are stuck with the contradiction.<sup>204</sup> We surely have found no way around it.

#### V. THE BOUNDS OF REVIEW

A final question raised by *Overton Park*<sup>205</sup> concerns the bounds of reviewability. Marshall made clear in his later opinions that the nature of the congressional scheme and the demands of the administrative process impose important limits on the reviewability of agency action.<sup>206</sup> Thus, in *Briscoe v. Bell*,<sup>207</sup> Marshall rejected

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remands. See Schuck & Elliott, *supra* note 112, at 1029-41. It is possible to argue that the case has had a salutary effect on the lower courts regardless of its application in the Supreme Court. The mere fact that *Chevron* has increased affirmances of agency decisionmaking, though, does not speak to whether those decisions ought to have been affirmed.

204. See generally Frug, *supra* note 88.

205. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

206. In *McGee v. United States*, 402 U.S. 479 (1971), Marshall's opinion for the Court relied on the doctrine of exhaustion of administrative remedies to bar review. The opinion held that a defendant who had not sought to build a record before the draft board on whether he should receive either ministerial student or conscientious objector status, and had not given the agency a fair opportunity to pass on those factual issues, could not thereafter challenge his 1-A classification when charged with refusal to submit to draft induction. *Id.* at 479. Marshall distinguished his own majority opinion in *McKart v. United States*, 395 U.S. 185 (1969), holding that a criminal defendant could raise the classification issue notwithstanding having failed to seek an internal administrative appeal of the draft board's classification decision, given that defendant had built the necessary administrative record and that the substantive issue he raised was wholly one of statutory interpretation. *Id.* at 484-86. *Cf.* *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365, 387 (1972) (Marshall, J., dissenting) (pre-induction review should be available to a person challenging constitutionality of draft board decisionmaking process).

For another holding by Marshall limiting the court's powers on review, see *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 817-26 (plurality opinion), discussed *supra* note 108.

207. 432 U.S. 404 (1977).



the District of Columbia Circuit's view that it had inherent power, even in the face of an explicit congressional bar, to review government decisions said to be "on their face . . . plainly in excess of statutory authority."<sup>208</sup> Congress, Marshall explained, was the source of the review power; in the absence of any constitutional question, the courts had no authority to intervene where the legislature forbade them to.<sup>209</sup>

After *Overton Park*, however, Marshall increasingly found himself in dissent from Supreme Court rulings rejecting judicial review for regulatory beneficiaries, or upholding obstacles to such review. In *Ortwein v. Schwab*,<sup>210</sup> the Court majority summarily dismissed the argument that a state violates due process when it imposes a filing fee beyond the reach of indigent claimants as a precondition to judicial review of administrative decisions reducing welfare benefits.<sup>211</sup> Marshall dissented; he queried whether the Constitution permits the state to eliminate the judicial forum in that manner when it deprives welfare recipients of protected property interests.<sup>212</sup>

In *Morris v. Gressette*,<sup>213</sup> the Court majority denied any judicial review of the Attorney General's failure to object, under the Voting Rights Act, to a state's change in its voting laws.<sup>214</sup> While acknowledging that review should be available under the APA unless there is "persuasive reason to believe"<sup>215</sup> that Congress meant to preclude it, the Court found in the Voting Rights Act an unexpressed legislative desire to bar review so as not to "unduly delay the implementation of validly enacted, nondiscriminatory state legislation."<sup>216</sup> Marshall again dissented; "[t]he conclusion in [*Briscoe v. Bell*] that review is precluded when Congress says so," he retorted, "does not support the conclusion that review is also precluded when Congress has not said so."<sup>217</sup> Noting that the

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208. *Id.* at 408.

209. *Id.* at 409.

210. 410 U.S. 656 (1973).

211. *Id.* at 661.

212. *Id.* at 665-66.

213. 432 U.S. 491 (1977).

214. *Id.* at 501-03.

215. *Id.* at 501 (citing, *inter alia*, *Overton Park*, 401 U.S. 402, 410 (1971), which itself quoted *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), for the proposition that review could not be cut off absent "clear and convincing evidence" that Congress so intended).

216. 432 U.S. at 503.

217. *Id.* at 510 n.3 (Marshall, J., dissenting).

Attorney General had undisputedly failed to carry out his statutory duty to object to voting-law changes that he believed violated the Act,<sup>218</sup> Marshall found it “simply implausible that Congress . . . intended to allow the Act’s primary enforcement mechanism to be vitiated at the whim of an Attorney General.”<sup>219</sup>

In *Heckler v. Chaney*,<sup>220</sup> finally, Marshall—and the Court—came full circle to the question, first discussed by the Court in *Overton Park*, of the scope of the statutory exemption for actions “committed to agency discretion.” The facts of *Chaney* were unusual, and a bit macabre; respondent death row inmates contended that the states’ use of lethal injection drugs for executions violated the Federal Food, Drug, and Cosmetic Act,<sup>221</sup> and had requested the Food and Drug Administration (FDA) to take enforcement action to ensure that the drugs would not be used.<sup>222</sup> The FDA declined to do so. It found it unclear whether it had jurisdiction over the drugs at all; and, in any event, it explained, its enforcement resources were limited, and use of the drugs in executions did not present “a serious danger to the public health.”<sup>223</sup> The Court of Appeals for the D.C. Circuit reversed; it found the FDA’s decision irrational in light of agency precedents and a prior agency statement relating to unapproved uses of approved drugs.<sup>224</sup>

The Supreme Court reversed, upholding the agency action;<sup>225</sup> the FDA’s decision was immune from review, Justice Rehnquist explained, because it was “committed to agency discretion.”<sup>226</sup>

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218. *Id.* at 513-14 (Marshall, J., dissenting).

219. *Id.* at 508 (Marshall, J., dissenting).

220. 470 U.S. 821 (1985).

221. 21 U.S.C. §§ 301-392 (Supp. 1985).

222. 470 U.S. at 823. Plaintiffs argued first that use of the drugs for executions violated 21 U.S.C. § 352(f) (1982) because the drugs were not distributed with “adequate directions for use” in order to induce the quick and painless death intended. They argued further that the FDA was required to approve the drugs as “safe” and “effective” for execution under 21 U.S.C. § 355. They pointed out that the agency had applied § 355 in the analogous case of drugs used to kill animals (although that case involved drugs marketed by the manufacturer solely for that purpose, rather than, as in this case, drugs already approved and marketed for an unrelated purpose). *See* 470 U.S. at 826-27. The agency would not be able to find that the drugs met § 355’s requirements, the inmates argued, because death by lethal injection was commonly slow and excruciating. 470 U.S. at 823-24.

223. 470 U.S. at 824-25.

224. *See id.* at 827.

225. *Id.*

226. *Id.* at 834-35; *see* 5 U.S.C. § 701(a)(2) (1982). The Court did not reach the “thorny” question whether the FDA would have had statutory authority to take action against the drugs had it chosen to do so. 470 U.S. at 826-27.

Citing *Overton Park*, Rehnquist started with the principle that the APA bars review "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."<sup>227</sup> He continued, though, that when the challenge is to an agency's refusal to take enforcement action, special rules apply—and "the presumption is that judicial review is not available."<sup>228</sup> In general, he explained, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is . . . committed to an agency's absolute discretion."<sup>229</sup> That principle, he continued, flows from the fact that the typical nonenforcement decision is polycentric, uniquely within agency expertise, noncoercive, and unfocused, as well as from the Framers' decision to direct the President, rather than the courts, to "take Care that the laws be faithfully executed."<sup>230</sup>

After setting out those factors, Rehnquist nonetheless conceded that the ultimate question under § 701(a)(2) of the APA is whether "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. . . . Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."<sup>231</sup> This, of course, is the "no law to apply" standard of *Overton Park*. Rehnquist accordingly "turn[ed] to the FDCA to determine whether Congress has provided us with . . . meaningful standards for defining the limits of [agency enforcement] discretion."<sup>232</sup> He ultimately concluded that neither the statute nor any prior agency pronouncement provided any binding law circumscribing the FDA's discretion,<sup>233</sup> and that the court of appeals therefore erred in undertaking review.<sup>234</sup>

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227. 470 U.S. at 830.

228. *Id.* at 831.

229. *Id.*

230. *Id.* at 831-32 (quoting U.S. CONST. art. II, cl. 3).

231. *Id.* at 833.

232. *Id.* at 834.

233. *Id.* at 835-37. This portion of Rehnquist's analysis seems to assume that review should be available if the nonenforcement decision violated agency regulations. *Id.* The opinion also suggests that review should be available where the agency bases its nonenforcement decision "solely on the belief that it lacks jurisdiction. . . . [or if] the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)). The opinion reserves the case where nonenforcement is

The effect of Justice Rehnquist's opinion is unclear. Given the opinion's ultimate reliance on the presence or absence of law constraining the agency's choice, what role does the presumption against review play? Ultimately, it appears simply to be a thumb on the scales, and a warning to lower courts to be stingy when faced with claims for review of nonenforcement decisions.<sup>235</sup> Is it justified? Marshall, the only member of the Court not joining the majority opinion, said no.

In his opinion concurring in the judgment, Marshall lambasted the Rehnquist presumption, which he characterized as "create[d] out of whole cloth" and "fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence."<sup>236</sup>

[T]he sine qua non of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion. . . . Judicial review is available under the APA . . . precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness.<sup>237</sup>

The rule against reviewability that Rehnquist invoked, Marshall protested, did not exist except in the area of criminal prosecutions, and even there the courts had imposed limitations.<sup>238</sup> The analogy to criminal prosecutions, moreover, was not a good one. An agency's decision not to enforce a regulatory statute could deprive regulatory beneficiaries of benefits Congress intended to bestow upon them,<sup>239</sup> or threaten them with dangers Congress sought to avoid, in the way that a prosecutor's decision not to proceed under a criminal statute would not.<sup>240</sup> "A request that a nuclear plant

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said to violate plaintiff's constitutional rights. 470 U.S. at 838. *Webster v. Doe*, 486 U.S. 592 (1988), however, later made clear that a constitutional claim is never barred by § 701(a)(2); the Constitution always provides "law to apply." 486 U.S. at 601-05.

234. 470 U.S. at 838.

235. *But see* Levin, *supra* note 54, at 712-13, 715-20 (the Court in *Chaney* was groping toward a more complex, functional approach to replace the *Overton Park* test).

236. 470 U.S. at 840 (Marshall, J., concurring in the judgment).

237. *Id.* at 848.

238. *Id.*

239. *Id.*

240. *Id.*

be operated safely or that prosecution be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law."<sup>241</sup> A presumption of unreviewability was therefore untrue to the premises of administrative law: "one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."<sup>242</sup>

Marshall thus argued that any presumption of unreviewability was inappropriate. Indeed, he continued, since the question of whether there was "law to apply" would ultimately collapse into the merits,<sup>243</sup> the Court should simply proceed to that issue.<sup>244</sup> The FDA's action should be upheld, he concluded, because the agency's bona fide decision to allocate its resources to more pressing problems was within the discretion granted it by statute, not because nonenforcement decisions are somehow invulnerable to review.<sup>245</sup>

Marshall has the better of the argument, I think, as to whether there should be a "presumption" against review of agency inaction. Review at the behest of statutory beneficiaries vindicates the legislative will by ensuring that programs enacted by Congress are in fact executed. While decisions whether to take enforcement action require reconciliation of a variety of competing factors, some of which are peculiarly within the agency's expertise, the same is true of many agency decisions that are nonetheless routinely subject to

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241. *Id.*

242. *Id.* at 851.

243. *Id.* at 852-53. Marshall argued in *Chaney* that agency action inconsistent with "traditional principles of rationality and fair process" should be deemed reviewable and illegal under the APA even in the absence of explicit statutory constraint. On that basis, he argued that reviewability should always collapse into the merits. *See id.* at 853. This position seems to me to be a shift from Marshall's otherwise consistent emphasis on the centrality of statutory directives in judicial review. *See, e.g., supra* notes 98-108 and accompanying text. That shift, I believe, was not necessary to Marshall's point in *Chaney*. Agency decisions that are the products of such factors as "bribe[s], vindictiveness or retaliation," 470 U.S. at 852, are reviewable without any need for recourse to "traditional principles of rationality and fair process": Even a statute that merely enjoins the agency to promote the "public interest" provides standards that exclude bribery as a legitimate decisional factor. *See Sunstein, Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 677 (1985).

244. 470 U.S. at 853.

245. *Id.* at 842.

review. Those considerations go to the scope of review, not to reviewability.<sup>246</sup>

While nonenforcement decisions do not involve government coercion, it is hardly clear why a "noncoercive" flouting of the legislative mandate should be less subject to review than a coercive one.<sup>247</sup> Such an action can still be quite damaging to regulatory beneficiaries, and, in any case, courts routinely review "noncoercive" decisions such as the denial of AFDC or disability benefits.<sup>248</sup> Nor does the "take Care" clause pose any more of a bar here than it does in the typical case of review of agency action; in both cases, judicial review promotes separation of powers by ensuring executive adherence to the legislative command.<sup>249</sup> Where plaintiffs' argument that agency laxness or arbitrariness has frustrated congressional intent would otherwise be successful on the merits, it seems peculiar to deny the courts their law-enforcement function and to send plaintiffs back to the legislature that already decided the issue in their favor.<sup>250</sup>

The *Chaney* presumption, thus, can be justified only in the same manner as the *Chevron* blanket rule: it can be seen as an attempt to tip the scales against review in order to forestall incorrect decisions by lower courts, which might otherwise misapply the *Overton Park* test and grant review in inappropriate cases. There was no evidence in *Chaney*, however, beyond the ruling below, that such decisions were in fact a problem.

Marshall's rejection of the *Chaney* presumption repudiates the Court's "tilt" against review when an agency has declined to take enforcement action; it is responsive to his convictions regarding the need for judicial oversight of agency decisions. Marshall's *Chaney* opinion, indeed, reflects basic themes that characterize his administrative-law jurisprudence as a whole. It reiterates his skepticism concerning agency action: administrative discretion "can be a veil for laziness, corruption, incompetency, lack of will or other

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246. Considerations such as ripeness and finality will bar review of administrative inaction in a variety of cases. See generally *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). The mere fact that many cases of agency inaction will be deemed nonreviewable under ordinary justiciability doctrine, however, is no reason to create a new doctrine barring review where that law does not pose an obstacle.

247. See generally Sunstein, *supra* note 243, at 666-68.

248. See Levin, *supra* note 54, at 716-17.

249. But see Shapiro, *supra* note 85, at 464-67.

250. See Sunstein, *supra* note 110, at 475-77.

motives.<sup>251</sup> There is no substitute for judicial review, Marshall believed, in checking those tendencies. At the same time, *Chaney* illustrates Marshall's belief in properly directed government action, and his commitment to vindicating the will of Congress requiring such action. Judicial review, as Marshall understood it, should not automatically favor government inaction over action. Rather, it is a tool that courts must use against agencies lawlessly failing to do what Congress has required.

## VI. CONCLUSION

Marshall's vision of administrative law emphasized agencies' obligation to adhere to governing statutory law. That obligation was far-reaching. In order for courts to police the agencies, Marshall believed, agency actions must be subject to searching judicial scrutiny; courts can thereby guard the public against administrative ignorance, laziness, corruption, or caprice. For Marshall, moreover, the appropriate judicial role extended as much to requiring agencies to take actions Congress required of them as it did to barring agencies from taking actions Congress forbade.

That vision of administrative law, however, is open to attack. There is persuasive reason to believe that intrusive judicial review has helped make agency action across the board more expensive and time-consuming; judicial review has thus put obstacles in the way of proper as well as improper government action. Courts have reversed agency action on the basis of reasoning itself subject to criticism, and have sometimes betrayed a profound lack of understanding of the substantive matters at issue. Moreover, it is not a sufficient answer that judicial review will work well so long as judges are uniformly intelligent and wise.<sup>252</sup> "[T]he wise judge"<sup>253</sup> may not preside over every case;<sup>254</sup> one cannot ignore the question whether, in practice, Marshall's vision of administrative law has produced better results than would have its competitors.

Marshall's answer to these attacks was straightforward. For Marshall, notwithstanding any arguments that could be made

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251. 470 U.S. at 848.

252. See, e.g., Sunstein, *supra* note 110, at 472 (notwithstanding "some judicial errors," courts can evaluate detailed regulatory decisions without imposing their own political or technical judgments so long as the relevant doctrine is "properly understood").

253. Shapiro, *supra* note 85, at 470.

254. See generally R. MELNICK, *supra* note 81; Mashaw & Harfst, *supra* note 59.

against an active judicial role, the best protection of the citizenry against administrative lawlessness could only lie in judges, operating in good faith and doing their jobs as best they could. Leaving the relevant decisions in the agencies' hands would yield results far worse. And in that, ultimately, I must agree. There is a tension in the judicial-review system Marshall helped put in place. That tension, however, flows inevitably from our desire to accommodate an influential administrative policymaking role within a common-law framework emphasizing the rule of law. Marshall helped show us how it all could be done.