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# Understanding Unreviewability in Administrative Law

Ronald M. Levin

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# Understanding Unreviewability in Administrative Law

Ronald M. Levin\*

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## INTRODUCTION

One of the more intriguing developments in recent administrative law scholarship has been a changed attitude toward the role of judicial review in controlling administrative action. A generation ago, scholars could assume without much soul-searching that judicial review was fundamental to the sound governance of the regulatory system.<sup>1</sup> Today, some of the most respected commentators in the field offer pointed and often biting criticisms of the courts' place in the administrative process.<sup>2</sup> Naturally, this new intellectual climate has affected the timeless debate over the proper *intensity* of judicial review.<sup>3</sup> Sharing the stage, however, are increasingly prevalent questions about *whether* the judiciary should review certain agency actions, or at least some of the determinations that underlie them.

In part, the debate over reviewability focuses on statutes that directly prohibit courts from examining some or all aspects of certain agency conduct: this debate looks at the proper ground rules for interpreting preclusion statutes<sup>4</sup> and also at

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1. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320-94 (1965) (outlining the presumptive right to judicial review of agency actions).

2. See, e.g., Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 *YALE J. ON REG.* 257, 292-99 (1987) (arguing that "hard look" judicial review has sabotaged rulemaking by the National Highway Traffic Safety Administration); McGarity, *Judicial Review of Scientific Rulemaking*, 9 *SCI., TECH. & HUM. VALUES* 97, 97-103 (1984) (suggesting that personal opinions about the value of an agency's goals guide judges in reviewing agency actions); 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, 303-13 (arguing that intrusive appellate court review has led to a decrease in agency rulemaking); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *COLUM. L. REV.* 1093, 1135-36 (1987) (arguing that the Supreme Court encourages lower courts to defer to agencies' statutory interpretations because it fears that judicial lawmaking tends to disrupt complex regulatory schemes).

3. In addition to the sources cited *supra* note 2, see, e.g., Garland, *Deregulation and Judicial Review*, 98 *HARV. L. REV.* 505, 525-61 (1985) (documenting the rise of modern "hard look" review); Smith, *Judicialization: The Twilight of Administrative Law*, 1985 *DUKE L.J.* 427 (criticizing intrusive judicial review of agency procedures and decisions); *Symposium*, 1986 *DUKE L.J.* 217 (articles responding to Smith's essay).

4. See generally O'Connor, *Reflections on Preclusion of Judicial Review*

whether new ones should be enacted.<sup>5</sup> On another level, the debate focuses on actions that are, in the language of the Administrative Procedure Act (APA),<sup>6</sup> "committed to agency discretion by law."<sup>7</sup> This somewhat awkward phrase refers to actions that are exempt from review because of judicial self-restraint rather than because of perceived congressional command.

This Article deals with the "committed to agency discretion" category of unreviewable administrative action. The category always has been considered quite small; some theorists have refused to acknowledge that it even exists in a meaningful sense.<sup>8</sup> Nevertheless, the "committed to agency discretion" clause of the APA, section 701(a)(2), has shown surprising life during the past several years. In *Heckler v. Chaney*,<sup>9</sup> the Supreme Court relied squarely on that clause to hold that agency refusals to initiate proceedings are presumptively unreviewable.<sup>10</sup> In *ICC v. Brotherhood of Locomotive Engineers*<sup>11</sup> (*BLE*), the Court invoked the clause as partial support for holding that an agency's denial of a petition for reconsideration is unreviewable when the petition is predicated on an asserted material error in the original decision.<sup>12</sup> The Court's reliance on this APA clause was striking, because none of the parties

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*in England and the United States*, 27 WM. & MARY L. REV. 643, 644-58 (1986) (comparing judicial responses in the United States and Great Britain to legislative acts precluding judicial review of certain agency decisions); *infra* notes 246-252 (discussing Supreme Court's development of a "common law of preclusion").

5. In 1988, after decades of controversy, Congress for the first time authorized judicial review of veterans' benefits decisions, but continued to prohibit the courts from hearing challenges to factual and law-applying determinations of the Department of Veterans' Affairs. Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 101-403, 102 Stat. 4105, 4105-22 (1988) (to be codified in scattered sections of 38 U.S.C.); see Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U.L.Q. 889, 897-904 (1989) (discussing development and probable impact of the Act); see also Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1, 15-30 (1987) (discussing bills that would limit judicial review of Social Security disability claims); Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 753-64, 771-75 (1983) (analyzing extent to which statutes should limit judicial review of rules during enforcement proceedings).

6. 5 U.S.C. §§ 501-706 (1988).

7. *Id.* § 701(a)(2).

8. See, e.g., *infra* notes 43-47, 52-53 and accompanying text.

9. 470 U.S. 821 (1985).

10. *Id.* at 832-33.

11. 482 U.S. 270 (1987) (*BLE*).

12. *Id.* at 282.

had mentioned it, nor particularly dwelt on the reviewability issue at all. Finally, in *Webster v. Doe*,<sup>13</sup> the Court held under section 701(a)(2) that a dismissed employee of the Central Intelligence Agency could not challenge his termination in the federal courts, except on constitutional grounds.

The Court's revival of section 701(a)(2) makes scholarly analysis of its scope a pressing priority, because existing understandings of its meaning are surprisingly underdeveloped. Since 1971 the primary guideline used to determine whether an agency action is "committed to agency discretion" has been whether there is "law to apply" to the administrative decision. The Court has cited this test as authoritative as recently as the 1989-90 Term.<sup>14</sup> Yet the test, first announced in *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>15</sup> is simplistic, historically unfounded, and needlessly rigid in its implications. It ignores so many of the considerations that undoubtedly should influence decisions about unreviewability that the lower courts have tortured and evaded the formula in as many ways as they can contrive. In any event, *Chaney* and *Doe* display considerable ambivalence regarding the utility of the test,<sup>16</sup> and *BLE* disregards it entirely.<sup>17</sup>

The "law to apply" formula, then, may be on the verge of losing its influence; but if it passes from the administrative law scene, what will replace it? This Article suggests a clearer way of framing the issues posed by the "committed to agency discretion" doctrine. The key lies in a new solution to what might be called the Supreme Court's "judicial restraint dilemma." On the one hand, the Court is committed to preventing excessive judicial intervention in executive branch activities; on the other it prefers to shun the exercise of federal common law-making power. These priorities come into conflict in the unreviewability context. The Court has pretended that the responsibility for curtailing excessive judicial review lies with Congress — a premise that is becoming progressively harder to sustain. The only way the Court will be able to tame the unruly law of unreviewability is to become less timid about utilizing its common law powers toward that end.

This Article's purpose is not to urge that more agency ac-

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13. 486 U.S. 592 (1988).

14. *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1860 n.22 (1989) (dictum).

15. 401 U.S. 402, 410 (1971).

16. See *infra* notes 129-43 (*Chaney*), 200-17 (*Doe*) and accompanying text.

17. See *BLE*, 482 U.S. at 282.

tions should be placed beyond the reach of judicial scrutiny. An era of expanded unreviewability seems, nevertheless, to lie ahead, and the Article does aim to equip the judiciary with meaningful categories of analysis. Part I introduces the principal concepts used in discussions of unreviewability in administrative law. Part II then surveys the four principal Supreme Court opinions that have explored the unreviewability doctrine. A pervasive theme of this part is that the Court has overemphasized the notion that an agency action is unreviewable when the courts are *unable* to engage in meaningful judicial review. Part II claims that judicial review is virtually always feasible, and that the real question is thus one of desirability. Part III presents this claim more formally, asserting that courts should overtly weigh pragmatic considerations when deciding whether, and to what extent, a given type of agency action should be deemed unreviewable. A pragmatic approach would bring needed flexibility to the "committed to agency discretion" doctrine. For example, it would provide a basis for courts to hold, in some circumstances, that they will review an agency's legal conclusions while refraining from reviewing its factual and discretionary conclusions.

A major objection that might be raised against this pragmatic approach is that it might lead to unpredictable results, or to unprincipled and frequent rejection of unreviewability claims by courts seeking to maximize their own power. Part IV tests this possibility by examining *Chaney's* progeny in the lower courts. This review indicates that courts have appropriately weighed practical arguments when they have had to apply *Chaney* to situations not precisely addressed in the Supreme Court's opinion. In light of this experience, the Article concludes that the pragmatic approach to unreviewability has considerable promise and should be taken more seriously in the future.

## I. THE PROBLEM OF UNREVIEWABILITY

The APA's judicial review chapter<sup>18</sup> provides that agency action is normally subject to review,<sup>19</sup> but also states in section 701(a) that the chapter "does not apply to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."<sup>20</sup> The first of the two

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18. 5 U.S.C. §§ 701-06 (1988).

19. 5 U.S.C. §§ 702, 704 (1988).

20. 5 U.S.C. § 701(a) (1988).

numbered clauses does not create interpretation difficulties (although there may be uncertainty as to whether a given statute actually precludes review). The cryptic language of the second clause, however, has generated tremendous confusion.<sup>21</sup>

The most fundamental point in controversy has been whether this "committed to agency discretion" clause renders any administrative action unreviewable. As used in this Article, the term "unreviewability" refers to a situation in which the courts deliberately refrain from reviewing an agency action, or at least some of the findings and conclusions underlying it.<sup>22</sup> An agency's action is *totally* unreviewable if all of its premises escape the court's examination; it is *partially* unreviewable if only some of them do.<sup>23</sup> Thus, unreviewability is a threshold defense, like standing or ripeness. When the government prevails on this defense, a particular administrative action or finding receives no scrutiny — not even deferential scrutiny — on judicial review. Section 701(a)(1) obviously recognizes unreviewability in this sense, but whether section 701(a)(2) does has been hotly disputed. Raoul Berger crystallized the issue in a famous 1965 article.<sup>24</sup> He maintained that Congress had intended in the APA to subject *every* administrative action to judicial review for abuse of discretion.<sup>25</sup> His claim gave rise to

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21. As recently as 1986, Professor Davis commented: "I don't see how anybody can find the meaning of those words. The words seem to contradict themselves; they don't make any sense; if they do, what might the sense be?" *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 519 (1986) (panel discussion) (remarks of K.C. Davis) [hereinafter *Present at the Creation*].

22. Professor Koch uses the term "unbridled discretion" to denote the same concept. See Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 495-502 (1986). Koch also envisions a second category of unreviewable action, "numinous discretion," consisting of actions that a court could not possibly review. *Id.* at 502-03. As subsequent discussion will make clear, however, I believe that *no* administrative actions fall into this latter category. For example, Koch contends that the FDA was exercising numinous discretion in its famous ruling that the minimum peanut content of peanut butter should be set at 90% rather than 87%, because "the range of equally correct answers was very broad." *Id.* at 505. In my view, however, there is no reason to call the FDA's ruling unreviewable; rather, one should say that it was an easy case *on the merits*. Indeed, as Koch acknowledges, some exercises of the FDA's authority might well have violated the agency's mandate (e.g., if the FDA had set the level at 99.99%). To try to distinguish between a 90% case and a 99.99% case on the basis of "reviewability" would be awkward to say the least.

23. See *infra* note 54 and accompanying text.

24. Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965).

25. *Id.* at 57-58.

what is probably the longest — and possibly the most vitriolic — debate in the history of law reviews, with Professor Kenneth Culp Davis challenging the thesis in a series of four articles and Berger replying in four more.<sup>26</sup>

A look at the language and legislative history of section 701(a)(2) helps one understand why there was uncertainty on this point. In the first place, a straightforward reading of the text of section 701(a)(2) would be totally unacceptable. At face value, the clause seems to say that every enabling statute that grants some discretion to an agency creates a sphere of administrative conduct that the courts must not examine. That conclusion, however, would be absurd: everyday reality teaches that judicial review of agencies' exercises of discretionary judgment is routine.<sup>27</sup> Indeed, the APA contains compelling internal evidence that the literal interpretation was not intended. Section 706(2)(A) provides that an agency action may be set aside for "abuse of discretion."<sup>28</sup> If the existence of statutory discretion made the challenged action unreviewable, that provision would become meaningless.<sup>29</sup> Accordingly, the need for a restrictive, and perhaps artificial, reading of the phrase "committed to agency discretion" has been universally acknowledged since the earliest days of the APA.<sup>30</sup>

The legislative drafters of section 701(a)(2) realized that this clause was obscure. Indeed, the evolution of this section has been recognized from the beginning<sup>31</sup> as exemplifying a familiar form of congressional evasion. Early in the drafting process, the legislative players agreed on textual language that they must have known was ambiguous. Then, as questions about the meaning of this language surfaced, each side attempted to slant the legislative history in its favor, instead of going to the trouble of revising the text itself.<sup>32</sup> The Attorney

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26. See Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 966 n.9 (1969) (citing eight previous installments).

27. See generally Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 250-60 (1986) (summarizing current law on abuse of discretion review).

28. 5 U.S.C. § 706(2)(A) (1988).

29. See, e.g., L. JAFFE, *supra* note 1, at 374-75; Berger, *supra* note 24, at 60.

30. E.g., Dickinson, *The Judicial Review Provisions of the Federal Administrative Procedure Act (Section 10): Background and Effect*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 546, 567 (G. Warren ed. 1947).

31. See Conard, *New Ways to Write Laws*, 56 YALE L.J. 458, 461 & n.13 (1947).

32. The history of subsequent administrative procedure legislation contains other well documented examples of precisely the same congressional tac-

General, representing the executive branch, explained section 701(a)(2) as embodying a straightforward notion of unreviewability — i.e., as restating the prior law, under which courts simply would refrain from examining certain “unreviewable” issues.<sup>33</sup>

The House and Senate sponsors of the Act, however, disputed this interpretation. They evidently felt a need to reassure colleagues who were worried that the clause would be read literally — i.e., as prohibiting judicial review whenever an agency possessed *some* discretion. Thus, the legislative sponsors filled their reports and floor colloquies with assurances that the APA would still permit courts to consider whether an agency had abused its discretion.<sup>34</sup> Consistently with that position, the sponsors found themselves denying that section 701(a)(2) had any operative effect at all. By their account, the clause merely stated the truism that, when an agency has been granted broad discretionary powers, its actions are likely to be *lawful* and therefore immune from judicial reversal. As the Senate committee report stated: “If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.”<sup>35</sup> In a similar vein, the House committee report remarked: “In any case the existence of discretion does not

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tic. See *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (describing legislative history of Freedom of Information Act); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:3, at 312-13 (2d ed. 1978) (same); Levin, *Review of “Jurisdictional” Issues Under the Bumpers Amendment*, 1983 DUKE L.J. 355, 370-85 (describing legislative history of proposed Regulatory Reform Act of 1982). For more general descriptions of manipulation of legislative history, see, e.g., Moorhead, *A Congressman Looks at the Planned Colloquy and its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1314-16 (1959); Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 436 (1989).

33. UNITED STATES DEPARTMENT OF JUSTICE, APPENDIX TO ATTORNEY GENERAL'S STATEMENT REGARDING REVISED COMMITTEE PRINT OF OCTOBER 5, 1945, S. REP. NO. 752, 79th Cong., 1st Sess. 43-44 (1945) [hereinafter S. REP.] (stating, as an example, that the NLRB's refusal to issue a complaint is unreviewable), reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 229-30 (1946) [hereinafter LEGISLATIVE HISTORY].

34. *E.g.*, 92 CONG. REC. 2153-54 (1946) (remarks of Senators Donnell, Austin, and McCarran), reprinted in LEGISLATIVE HISTORY, *supra* note 33, at 310-11. Although obviously staged, these colloquies do show what interpretation the floor manager, Senator McCarran, wished to place on the public record.

35. S. REP., *supra* note 33, at 26, reprinted in LEGISLATIVE HISTORY, *supra* note 33, at 212. For discussion of the Supreme Court's highly inventive interpretation of the sentence quoted in text, see *infra* Part II. B.

prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein.”<sup>36</sup>

On the surface, this history may seem to leave little doubt that the intent behind the APA — in the sense in which courts understand legislative “intent” — was to renounce the concept of unreviewability (except where review is precluded by statute). The House and Senate committees clearly took that position; and under conventional statutory interpretation lore, committee reports are far and away the most reliable type of legislative history material.<sup>37</sup> In this situation, however, there are reasons to go beyond the traditional respect for committee reports. This Article will not rehash the many doubts now being voiced in court cases and law reviews concerning the reliability of legislative history as a general matter. For, regardless of one’s attitude towards committee reports in general, there are especially strong grounds for discounting them in this context.<sup>38</sup>

In the first place, the committee reports are somewhat at odds with the text of section 701(a)(2). As enacted in 1946, before being revised for incorporation into the United States Code, the section provided that agency action was judicially reviewable “[e]xcept so far as . . . agency action is committed by law to agency discretion.”<sup>39</sup> Although not wholly clear, this language at least indicates that section 701(a)(2) was designed to create an “exception” to the judicial review principles that the APA prescribes elsewhere. The same argument can be made about the current language of section 701(a)(2), which ap-

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36. H. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), reprinted in LEGISLATIVE HISTORY, *supra* note 33, at 275; see also S. REP., *supra* note 33, at 26 (stating that the § 701(a)(2) exception “would apply even if not stated at the outset”), reprinted in LEGISLATIVE HISTORY, *supra* note 33, at 212.

37. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 & n.3 (1984) (collecting cases declaring that committee reports are especially authoritative); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 n.14 (D.C. Cir. 1979) (stating as a self-evident proposition that although the “Attorney General’s gloss on [§ 701(a)(2) of] the APA is entitled to some deference,” it “is not entitled to particular deference . . . to the extent that it is inconsistent with the Senate Committee Report”).

38. See, e.g., *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring); Starr, *Observations on the Use of Legislative History*, 1987 DUKE L.J. 371, 373-79 (arguing that benefits of using legislative history as an interpretive tool are outweighed by abuses); Strauss, *supra* note 32, at 436-38. But see Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437-52 (1988) (criticizing the critics).

39. Administrative Procedure Act § 10, Pub. L. No. 404, 60 Stat. 237, 243 (1946).

pears to refer to circumstances in which the usual judicial review guarantees of the APA do not "apply." Moreover, this "exception" interpretation maintains the parallelism of the two clauses of section 701(a): obviously the purpose of clause (1) is to exempt certain agency actions from judicial review, and the structure of the statute invites the inference that clause (2) does the same.

Second, if members of Congress really believed that section 701(a)(2) had no effect, one must ask why they did not simply delete the clause. A maxim of statutory construction declares that a statute should, if possible, be construed so that none of its provisions will be superfluous.<sup>40</sup> The maxim cannot be considered absolute, of course, because superfluous provisions sometimes result from sheer carelessness of legislative drafters. Oversight, however, cannot account for section 701(a)(2), a clause that received sustained attention from legislators. The inescapable conclusion is that the sponsors left section 701(a)(2) in the APA because some members of Congress believed it was important. More specifically, the clause must have survived because the Act's sponsors did not want to risk alienating the Administration and its supporters in Congress.<sup>41</sup>

Seen in this light, the legislative history of section 701(a)(2) is much more balanced than initial inspection might suggest. The interpretation offered in the committee reports may not disclose much more about the legislature's "intent" than the Attorney General's interpretation does.<sup>42</sup> Ultimately, this

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40. See, e.g., *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 837 & n.11 (1988) (collecting cases).

41. As knowledgeable observers have reported, the unanimous vote by which Congress enacted the APA was largely attributable to the Attorney General's endorsement of the measure. See *Present at the Creation*, *supra* note 21, at 514-15 (remarks of Walter Gellhorn); Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES* 12-13 (G. Warren ed. 1947).

42. The Supreme Court has obliquely endorsed this conclusion in other contexts. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978) (stating that Attorney General's interpretation of the APA is entitled to "some deference . . . because of the role played by the Department of Justice in drafting the legislation"). Strictly speaking, the Court's comment in *Vermont Yankee* referred to the explanatory manual that the Attorney General published soon after the passage of the Act. See UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter ATT'Y GEN. MANUAL]. It would be difficult to argue, however, that the Attorney General's pre-enactment interpretation is less reliable than his post-enactment interpretation; the usual assumption is precisely to the contrary. See

means that a fair reading of the APA and its legislative history does not really indicate whether section 701(a)(2) preserves a realm of true unreviewability. At least by default, Congress left resolution of the question to the courts and commentators.

Given these circumstances, the legislative history support for the notion that section 701(a)(2) was meaningless was strong enough to give plausibility to Raoul Berger's defense of that notion two decades later.<sup>43</sup> Specifically, Berger read section 701(a)(2) as merely declaring that courts should respect *legitimate* exercises of agency discretion. Under his construction, the clause would not even come into play until a court had ascertained that the agency had not abused its discretion.<sup>44</sup> Of course, Berger's view was still vulnerable to the surplusage objection. Because *unabused* discretion would pass muster under the section 706 scope-of-review criteria,<sup>45</sup> such discretion would survive judicial review in any event; so what was the point of section 701(a)(2)?<sup>46</sup> Nevertheless, Berger's article was a masterpiece of rhetoric; it seized and held the moral high ground with colorful warnings about the dangers of unchecked administrative power.<sup>47</sup> In contrast, his antagonist Professor Davis argued for an interpretation like the Attorney General's — section 701(a)(2) recognized a realm in which certain administrative determinations would be genuinely unreviewable.<sup>48</sup>

It is unnecessary to dwell on the details of their arguments here, because the Supreme Court has since rewritten the law of

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Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) (stating that post-enactment legislative history normally is mistrusted). This comparison need not be pursued here, however, because the manual's interpretation of § 701(a)(2) did not differ significantly from the interpretation in the Attorney General's pre-enactment correspondence with Congress. Compare *supra* note 33 and accompanying text with ATT'Y GEN. MANUAL, *supra*, at 94-95.

43. See *supra* note 24 and accompanying text.

44. See Berger, *supra* note 24, at 63. He articulated this construction more clearly in later articles. See, e.g., Berger, *supra* note 26, at 968-71.

45. Section 706 lists various grounds that courts may use in overturning agency action, such as abuse of discretion, excess of authority, and procedural error. 5 U.S.C. § 706 (1988). Thus, the court's task during judicial review is to measure a given agency action against the § 706 criteria, except to the extent that § 701 exempts the action from such scrutiny.

46. See Rogers, *A Fresh Look At Agency "Discretion,"* 57 TUL. L. REV. 776, 787-88 (1983) (arguing that "if the 'committed to agency discretion' exception applies, by definition, only to proper exercises of discretion, it would serve little purpose. Proper choices would be upheld anyway.").

47. See Berger, *supra* note 24, at 55-57, 88-95.

48. E.g., Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643, 643 (1967).

unreviewability in ways that neither Berger nor Davis (let alone the framers of the APA) could have foreseen. What is of interest today is the outcome of the debate. Technically, Davis's side of the argument clearly has prevailed. Recent Supreme Court cases<sup>49</sup> have confirmed (if any doubt remained) that the "committed to agency discretion" clause does refer to certain administrative actions that are genuinely unreviewable because of judicial self-restraint.<sup>50</sup>

Nevertheless, Berger has achieved something of a moral victory. Because the legal system's distaste for unchecked administrative power remains strong, the Berger view that section 701(a)(2) is inconsequential still appeals to some scholars.<sup>51</sup> For example, one can detect echoes of Berger's position in the writings of Professor Cass Sunstein, who comes close to assuming that a court must explore every possible theory by which a given agency action could be set aside before it may label the action unreviewable.<sup>52</sup> Of course, as Sunstein seems to acknowledge, this assumption deprives section 701(a)(2) of any practical significance.<sup>53</sup> More importantly, the courts still dis-

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49. See *supra* notes 9-13 and accompanying text.

50. Read literally, the phrase "by law" in § 701(a)(2) is broad enough to encompass statutes that directly preclude judicial review, and it is sometimes construed that way. *E.g.*, J. MASHAW & R. MERRILL, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 698-701 (2d ed. 1985); Davis, *supra* note 48, at 652 n.30. One problem with that construction, however, is that it makes § 701(a)(1) completely superfluous. The Supreme Court has admonished that the two clauses should, if possible, be read so as to give effect to each. *Heckler v. Chaney*, 470 U.S. 821, 828-30 (1985). Furthermore, a reading of § 701(a)(2) that *excludes* preclusion statutes contributes to analytic clarity. Frequently, the government asks a court to refrain from review of a particular action because of a preclusion statute, or, in the alternative, as a matter of judicial self-restraint. It is convenient to discuss these two contentions, each of which implicates a separate line of cases, as arising under § 701(a)(1) and § 701(a)(2), respectively.

51. See, *e.g.*, B. SCHWARTZ, *ADMINISTRATIVE LAW* § 8.10 (2d ed. 1984) (§ 701(a)(2) adds "little or nothing" to exemption from review in § 701(a)(1)).

52. See Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 659-60 (1985). Sunstein's analysis rests heavily on the widely accepted doctrine that an action always is reviewable if there is "law to apply" to the administrative action. He does not, however, limit his support for judicial review to the boundaries inherent in that test. On the contrary, he goes on to suggest that an unreviewability defense should not prevent a court from deciding whether the plaintiff has made an "especially powerful" showing that the agency is guilty of "generalized arbitrariness." *Id.* at 682-83. A logical application of the unreviewability concept would compel a court to terminate its inquiry without deciding whether the plaintiff's case on the merits is strong or weak.

53. See *id.* at 659. Although Sunstein makes some suggestions about how to choose between calling a decision "unreviewable" and calling it "lawful," *id.*

play a lingering attachment to the Berger viewpoint. They have construed section 701(a)(2) quite narrowly; and even when they have invoked it, they often have felt compelled to pay lip service to the idea that unreviewability occurs only when courts are *unable* to provide review. In other words, courts are reluctant to acknowledge the possibility that they might deliberately refuse to resolve challenges they *could* entertain. Subsequent parts of this Article will examine in detail how this reluctance has influenced the courts' substantive gloss on section 701(a)(2).

Before reaching these substantive issues, however, we must consider briefly the important "to the extent that" language in section 701(a). This prefatory phrase establishes that an action can be partially rather than totally unreviewable.<sup>54</sup> The notion of partial unreviewability becomes clearer when one realizes that, in order to take any valid action, the agency must make a series of determinations. Depending on what issues the parties choose to raise, the agency may have to decide, for example, whether the proposed action is constitutional, whether it is within the agency's statutory jurisdiction, what criteria Congress expected the agency to utilize in making the decision, what the facts are, or whether the agency made a plausible argument that those facts support agency action to fulfill the congressional mandate. Ordinarily, each of these determinations is subject to judicial review (although some determinations are reviewed more searchingly than others). To say that an action is partially unreviewable simply means that courts will examine some of these determinations but will not examine others.

This theoretical refinement, although sometimes overlooked,<sup>55</sup> is a crucial one, because partial unreviewability is much more common than total unreviewability. Courts rarely pronounce an action "unreviewable" without adding that they would, nevertheless, entertain a challenge under limited circumstances — for example, if the action were alleged to be

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at 659 n.37, his discussion implies that this choice is purely a matter of diction, not substance. See also Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 477-78 (1987) (arguing that, because § 701(a)(2) is superfluous, it should be repealed).

54. E.g., ATT'Y GEN. MANUAL, *supra* note 42, at 95; 5 K. DAVIS, *supra* note 32, § 28:5, at 271.

55. See *Hotel & Restaurant Employees Union, Local 25 v. Attorney Gen.*, 804 F.2d 1256, 1272 (D.C. Cir. 1986), *vacated*, 808 F.2d 847 (D.C. Cir. 1987) (en banc), *district court aff'd by equally divided ct.*, 846 F.2d 1499 (D.C. Cir. 1988) (en banc).

unconstitutional.<sup>56</sup>

## II. UNREVIEWABILITY IN THE SUPREME COURT

### A. BACKGROUND

Although courts have not enjoyed much success in defining which administrative actions to treat as unreviewable, one premise about the substantive scope of section 701(a)(2) is uncontroversial: the clause applies to only a small fraction of all agency actions. The Supreme Court formally endorsed this premise in *Abbott Laboratories v. Gardner*,<sup>57</sup> by establishing a presumption in favor of judicial review.<sup>58</sup> Under *Abbott Laboratories*, therefore, courts should rarely invoke the two preclusion provisions in section 701(a), and should do so only reluctantly. The case is a symbol of society's deeply ingrained commitment to the availability of judicial review as a check on administrative action.

Despite its importance, however, the presumption favoring judicial review of administrative action is just a presumption.<sup>59</sup> By itself, *Abbott Laboratories* neither resolves individual cases nor provides a mode of analysis to guide courts in deciding whether a given agency action is unreviewable. Indeed, until 1971, when the Supreme Court began to play an active role in elaborating the theoretical underpinnings of section 701(a)(2), administrative law did not seem to have any identifiable theory as to the kinds of agency actions that were "committed to agency discretion." Of course, certain subject areas had been regarded as among the best candidates for unreviewability — for example, military and foreign affairs, and the exercise of prosecutorial discretion.<sup>60</sup> Nevertheless, the identification of

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56. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 601-05 (1988) (refusing to hold that § 102(c) of the National Security Act precluded judicial review of constitutional claims); *Padula v. Webster*, 822 F.2d 97, 101 (D.C. Cir. 1987); *Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir. 1987); *Dina v. Attorney Gen. of United States*, 793 F.2d 473, 476-77 (2d Cir. 1986).

57. 387 U.S. 136 (1967).

58. *Id.* at 139-41. As originally formulated in *Abbott Laboratories*, the presumption was said to be *subject to* the limitations in § 701 of the APA. 387 U.S. at 140. However, the case is regularly read as meaning that the presumption should guide the interpretation of the preclusion provisions themselves. *See, e.g.*, R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 5.3, at 135 (1985).

59. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) (finding statutory preclusion).

60. *See generally* K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16 (1st ed. Supp. 1970) (surveying and critiquing pre-1971 case law).

particular situations in which section 701(a)(2) came into play was essentially ad hoc.

At best, the lower courts tried to achieve a coherent understanding of section 701(a)(2) through a balancing test that called for weighing policy reasons for and against judicial review. The First Circuit followed this balancing approach in the well-known case of *Hahn v. Gottlieb*.<sup>61</sup> *Hahn* held that tenants in government-subsidized housing projects could not obtain judicial review of the Federal Housing Authority's approval of rent increases. The court said that the availability of review should turn on three factors: "first, the appropriateness of the issues raised for review by the courts; second, the need for judicial supervision to safeguard the interests of the plaintiffs; and third, the impact of review on the effectiveness of the agency in carrying out its assigned role."<sup>62</sup> In adopting this approach, the First Circuit relied on a study by Harvey Saferstein.<sup>63</sup> Still one of the finest treatments of section 701(a)(2), Saferstein's article identified eight factors that courts often considered relevant in deciding whether a given action was "committed to agency discretion."<sup>64</sup> Saferstein explicitly urged courts to consider these and perhaps still other factors when faced with unreviewability claims in individual cases.<sup>65</sup>

The chief difficulty with *Hahn* was not that it had been wrongly decided — although the court's holding has been controversial<sup>66</sup> — but that its open-ended reading of section 701(a)(2) could potentially lead to any result that a particular court might desire. One could have predicted that the Supreme Court would not be prepared to live indefinitely with such a catholic approach. Thus, the time was ripe for the Court to furnish more clear-cut guidelines for the application of section 701(a)(2). The question that will have to be asked, however, is

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61. 430 F.2d 1243 (1st Cir. 1970).

62. *Id.* at 1249.

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

64. The eight factors were: broad agency discretion; expertise and experience required to understand subject matter of agency action; managerial nature of agency; impropriety of judicial intervention; necessity of informal agency decision making; inability of reviewing court to ensure correct result; need for expeditious operation of congressional programs; quantity of potentially appealable agency actions; and existence of other methods of preventing abuses of discretion. *Id.* at 380-95.

65. *Id.* at 396-97.

66. *Compare* *Frakes v. Pierce*, 700 F.2d 501, 505-06 (9th Cir. 1983) (collecting cases following *Hahn*) with R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 58, § 5.3.1, at 138 (arguing that court's opinion is "poorly reasoned").

whether the Court went too far in the opposite direction — toward excessive rigidity.

### B. *OVERTON PARK*

The Supreme Court advanced its first general explanation of the meaning of section 701(a)(2) in *Citizens to Preserve Overton Park, Inc. v. Volpe*.<sup>67</sup> The plaintiffs, a citizen group, challenged a decision of the Secretary of Transportation approving a proposed highway route that would bisect a public park. The citizen group relied on two identically worded highway funding statutes that forbade the use of public park land for road construction unless there was “no feasible and prudent alternative.”<sup>68</sup> Ultimately, the Court remanded the case so the lower courts could decide whether the Secretary had properly applied the statutory criterion.<sup>69</sup> Before reaching the merits, however, the Court considered whether plaintiffs were entitled to any judicial review. After finding that review was not precluded by statute, the Court continued:

Similarly, the Secretary's decision here does not fall within the exception for action “committed to agency discretion.” This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where “statutes are drawn in such broad terms that in a given case there is no law to apply.”<sup>70</sup>

The Court then construed the words “no feasible and prudent alternative” in the highway funding statutes as requiring the Secretary to give “paramount importance” to protection of park land, unless there were “extraordinary” levels of cost or community disruption, or other “truly unusual” factors.<sup>71</sup> On this premise, the Supreme Court had no trouble disposing of the section 701(a)(2) argument: “Plainly, there is ‘law to apply’ and thus the exemption for action ‘committed to agency discretion’ is inapplicable.”<sup>72</sup>

The four sentences quoted above constituted the Court's only analysis of section 701(a)(2). Indeed, under the circumstances, the brevity of the Court's discussion was not surprising. The *Overton Park* case was decided on an expedited timetable: only three months elapsed from the day the Supreme Court

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67. 401 U.S. 402 (1971).

68. *Id.* at 405.

69. *Id.* at 420-21.

70. *Id.* at 410 (quoting S. REP., *supra* note 33, at 26) (citations omitted).

71. *Id.* at 412-13.

72. *Id.* at 413.

granted review until the day when the decision came down.<sup>73</sup> Technical errors pervading the Court's opinion on a variety of issues<sup>74</sup> suggest that this hurried pace was not without its costs. Moreover, the Secretary had not even argued that the agency action was unreviewable, and therefore the briefing on section 701(a)(2) had been almost negligible.<sup>75</sup> These background circumstances may help explain some of the serious flaws in the Court's apparent holding that the applicability of section 701(a)(2) turns solely on whether there is "law to apply" to the agency decision.

The most fundamental flaw in this position was that the Court seemed to obscure the distinction between the issue of reviewability and the issue of legality.<sup>76</sup> The Court drew its "no law to apply" test from the language of the Senate Judiciary Committee report on the APA.<sup>77</sup> Under the theory of that report, as discussed above,<sup>78</sup> an agency action is "committed to agency discretion" only when there are no grounds on which the action could possibly be set aside. When this condition is met, however, the agency action obviously would survive judi-

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73. Certiorari was granted December 7, 1970. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970). The decision was handed down March 2, 1971. 401 U.S. at 402.

74. The most significant error was the Court's holding, 401 U.S. at 420, that informal agency decisions must be reviewed on the basis of an exclusive "administrative record." See Williams, *Hybrid Rulemaking Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 419-21 (1975) (demonstrating that Court's view of APA was historically inaccurate); see also 401 U.S. at 414 (incorrectly stating that the substantial evidence test applies during judicial review of rulemaking proceedings under 5 U.S.C. § 553); *id.* at 417 (incorrectly describing *City of Yonkers v. United States*, 320 U.S. 685 (1944), as a case in which "the nature of the agency action [was] ambiguous").

75. The only party discussing § 701(a)(2) was the State of Tennessee, which argued *against* reviewability. See Reply Brief of Respondent Charles Speight, Com'r Tenn. Dep't of Hwys., at 37-39.

76. The courts' propensity for confusing these two concepts is not confined to administrative law cases. See Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 636-38 (1971) (chiding judges for failing to distinguish between "primary discretion," the right of a court to act as it chooses, and "secondary discretion," the absence of review by a higher court); see also Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 747-50 (elaborating on Rosenberg's analysis).

77. *Overton Park*, 401 U.S. at 410. As discussed below, the Court did not actually vitiate § 701(a)(2) to the extent suggested by the Senate report. See *infra* notes 84, 93 and accompanying text. Because the Court justified the "law to apply" test solely on the basis of legislative history, however, the persuasiveness of its position had to depend in large part on the credibility of the report.

78. See *supra* notes 34-36 and accompanying text.

cial review in any event. Consequently, this view would make section 701(a)(2) mere surplusage, because the APA would generate exactly the same results without the clause as with it. Indeed, the report's theory renders the idea of unreviewability meaningless. Before declaring that a particular type of agency action could not conceivably be reversed, a conscientious court surely will examine the challenger's contentions to see if any of them has arguable merit. Yet this is essentially the same inquiry that the court would conduct if it were examining the agency action on the merits. Under the Senate report's theory, therefore, only by actually *reviewing* an agency action can a court declare that the action is unreviewable!<sup>79</sup>

To the extent that the "law to apply" formula *restricted* the scope of section 701(a)(2), the Court's position was somewhat understandable, despite the weakness of its analytical underpinnings. Justice Marshall's professed desire to treat the clause as a "very narrow" exception was well served by a rule that meant, in effect, that no agency action would be deemed "committed to agency discretion" in the face of a colorable claim that the agency had exceeded its statutory mandate. Although this position was clearly a departure from some prior case law,<sup>80</sup> it was a reasonable extrapolation of other precedents in which the Court had considered hospitality to judicial review a dominant theme of the APA.<sup>81</sup> Finally, although the Court easily could have questioned the authoritativeness of the Senate report,<sup>82</sup> the Court's heavy reliance on the report was consistent with orthodox statutory construction doctrine.<sup>83</sup>

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79. In *Overton Park* itself, when the Court reached the issue of whether the Secretary had acted within the scope of his authority, it simply referred back to its earlier discussion of whether there was "law to apply." *Overton Park*, 401 U.S. at 416. The Court already had examined that issue at the "reviewability" stage, and there was nothing more for it to examine at the "merits" stage.

80. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-19 (1958); *Curran v. Laird*, 420 F.2d 122, 126 (D.C. Cir. 1969).

81. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Heikkila v. Barber*, 345 U.S. 229, 232 (1953).

82. See *supra* notes 39-42 and accompanying text.

83. See *supra* note 37 and accompanying text. Some suggest that the Senate report supports a broader concept of unreviewability than the Court acknowledged, because the sentence from which the Court quoted contains the words "for example" and thus did not purport to exhaust the circumstances under which an action could be held unreviewable. See, e.g., *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting). It would appear from the context, however, that the authors of the report used the "law to apply" sentence as an "example" of their position that § 701(a)(2) did not diminish the availability of judicial review under the APA. Thus, the question to ask about the

What was more puzzling about the *Overton Park* test was the kind of unreviewability that it *preserved*. Consider a case in which the relevant statutes have granted the agency sweeping discretion, but the challenger claims the agency has exercised its discretion improperly. The challenger probably would assert this claim under section 706(2)(A) of the APA, which states that an agency action shall be set aside if found to be “arbitrary, capricious, [or] an abuse of discretion.”<sup>84</sup> Under *Overton Park*, this type of scrutiny — known as arbitrariness review or abuse of discretion review — is simply unavailable if there is no “law to apply.”

Presumably, if the Court gave any thought to this implication of the “law to apply” test, it assumed that a reviewing court simply could not conduct abuse of discretion review without “law to apply.” I call this line of analysis the “futility” theory: an action should be deemed “committed to agency discretion” if judicial review would be infeasible and therefore futile.<sup>85</sup> The futility theory is superficially plausible to the extent one equates abuse of discretion review with an inquiry into whether the agency used legally relevant factors in exercising its discretion.<sup>86</sup> If there are no legally relevant factors, the ar-

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report’s analysis of § 701(a)(2) is not whether the Court read this passage broadly enough, but whether the report was trustworthy in the first place (and also, as shown *infra* note 93 and accompanying text, whether it supported even the limited unreviewability implied by the “law to apply” test).

84. 5 U.S.C. § 706(2)(A) (1988). Theoretically the same issues could arise under the APA’s “substantial evidence” test, *id.* § 706(2)(E). That test, however, generally comes into play only when a statute requires that an action be preceded by an “on the record” hearing. In practice, the government never contends that actions taken under such statutes are “committed to agency discretion,” presumably because the legislature’s requirement of an evidentiary hearing is itself a strong sign that the agency was not expected to wield completely unsupervised discretion. At least, I know of no case in which such a contention has been advanced, let alone sustained. *But cf.* Export Administration Act, 50 U.S.C. app. § 2412(a), (c) (1988) (Commerce Department must allow a formal hearing before denying an export license, but judicial review is precluded by statute).

85. Although it may seem unduly speculative to ascribe the futility theory to the *Overton Park* Court, the case is commonly interpreted as resting upon such reasoning. *See, e.g.,* Koch, *supra* note 22, at 509 (interpreting *Overton Park* to mean that in the absence of standards by which to evaluate a decision, “a court cannot review a decision without usurping the discretionary function assigned to the agency”). The Court clearly did embrace the theory later in *Chaney*. *See infra* notes 114-15 and accompanying text.

86. *See, e.g.,* Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (concluding that agency rule is arbitrary if “the agency has relied on factors which Congress has not intended it to consider”); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (stating that

gument goes, a court obviously cannot conduct this inquiry.<sup>87</sup>

This reasoning, however, completely ignores certain additional theories that today's courts routinely use in reviewing agency actions for abuse of discretion. A plaintiff might claim, for example, that the agency misunderstood the facts, that it departed from its precedents without a good reason, that it did not reason in a minimally plausible fashion, or that it made an unconscionable value judgment. These arguments can be called "pure" abuse of discretion theories, because they do not rest on an assertion that the agency misunderstood its governing statute or any other source of legal constraints. Although these theories were only beginning to emerge at the time of *Overton Park*,<sup>88</sup> each of them is now a well established component of substantive judicial review doctrine.<sup>89</sup> Of course, some commentators have vigorously criticized pure abuse of discretion review.<sup>90</sup> In careless or impulsive hands, such review certainly can lead to excessive judicial interference in the regulatory process. Nevertheless, this type of judicial review is an integral part of contemporary administrative law practice and shows no signs of going away.<sup>91</sup>

When these aspects of scope-of-review doctrine are considered, the futility theory's weakness immediately becomes evident. Pure abuse of discretion inquiries do not depend on the contents of the statute under which an agency acts; therefore, it is illogical to suppose that the lack of "law to apply" makes these inquiries unworkable. If judicial review of the agency's factual perceptions, logic, and consistency is acceptable when

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abuse of discretion review entails consideration of "whether the decision was based on a consideration of the relevant factors"); Levin, *supra* note 27, at 250-53 (interpreting *Overton Park's* "relevant factors" test to mean factors imposed by statute or other source of binding law).

87. Professor Rogers appears to assume that this is the *only* meaning of abuse of discretion review. See Rogers, *supra* note 46, at 777. It is for this reason, apparently, that he finds nothing anomalous about the *Overton Park* "law to apply" test. See *id.* at 788-92.

88. The *Overton Park* Court did recognize pure abuse of discretion review in at least a rudimentary way. See 401 U.S. at 416 (stating that action is an abuse of discretion if "there has been a clear error of judgment").

89. See, e.g., Levin, *supra* note 27, at 253-60 (cataloguing and citing authority for these and other abuse of discretion theories). For a fuller discussion, including apposite Supreme Court cases, see *infra* notes 117-19 and accompanying text.

90. Mashaw & Harfst, *supra* note 2, at 292-99; Smith, *supra* note 3, at 454.

91. See Levin, *supra* note 27, at 259-60 (noting criticisms but anticipating only marginal changes in near future). See generally Garland, *supra* note 3, at 525-61 (analyzing the standard and scope of review appropriate for administrative deregulation cases).

the agency operates under significant statutory restrictions, it should be no less acceptable when the agency is not doing so.<sup>92</sup>

The restrictive aspects of the "law to apply" test might have been understandable if the legislative history on which the Court relied had strongly impelled the Court to embrace that approach. Just the opposite is the case, however: The *Overton Park* Court purported to extract from the APA's legislative history a lesson that clearly was not there. The crucial sentence from the Senate report read as follows: "If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review."<sup>93</sup> By its terms, this sentence dealt only with "statutory questions." Yet the questions the *Overton Park* test appeared to shield from judicial scrutiny (in the absence of "law to apply") were *nonstatutory*, and obviously the quoted sentence said nothing about the circumstances in which courts should or should not decide such questions.

The Supreme Court's cursory analysis of section 701(a)(2) in *Overton Park*, then, left the law of unreviewability in a decidedly unstable state. The Court's apparent willingness to hear *any* challenge based on "law" was not the main difficulty; the Court might later retreat from this bold stand, but at least one could perceive logical reasons for the Court's position. Rather, the main difficulty was that the Court had, for no apparent reason, prohibited courts from engaging in abuse of discretion review in the absence of "law to apply." The Court's declared premise that the exemption must remain "very narrow" could not have supported this prohibition, because the "law to apply" test, in this regard, *restricted* review. The prohibition simply seemed to erect a formalistic barrier to judicial

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92. The analysis in the text is similar, but not identical, to that of Professor Davis. He argues that, even in the absence of "law to apply," a reviewing court can always test an agency's exercise of discretion against "such omnipresent standards as justice, fairness, and reasonableness." Davis, "No Law to Apply", 25 SAN DIEGO L. REV. 1, 6 (1988). Many administrative lawyers (and more than a few judges) would likely believe, however, that Davis's open-ended phrasing risks the very dangers of judicial usurpation that a doctrine of unreviewability is supposed to prevent. In my view, the present case law on abuse of discretion review identifies a number of relatively conservative theories by which a court may consider reversing agencies on grounds that are independent of "law." One can, therefore, demonstrate the inadequacy of the futility theory without any need to bless judicial discretion as unequivocally as Davis seems to contemplate.

93. S. REP., *supra* note 33, at 26, reprinted in LEGISLATIVE HISTORY, *supra* note 33, at 212.

review.<sup>94</sup> One could have predicted, therefore, that when abuse of discretion claims arose in later cases, *Overton Park* would carry only limited moral authority.

### C. *HECKLER V. CHANEY*

For the next fourteen years, the Supreme Court said virtually nothing more about section 701(a)(2).<sup>95</sup> Meanwhile, of course, the lower courts had to decide cases as they arose. Some courts applied the *Overton Park* test as it read, foreclosing judicial review when the statute appeared to contain no substantive guidance.<sup>96</sup> At times, these courts seemed unaware that an administrative action potentially could be an abuse of discretion even if there were no law to apply to the agency's decision.<sup>97</sup> Other courts, however, steered clear of the "law to apply" formula and reverted to the "pragmatic" reasoning of *Hahn*<sup>98</sup> and other cases predating *Overton Park*.<sup>99</sup> A promi-

94. Professor Schauer writes that the term "formalistic" should not necessarily be regarded as derogatory, because in some contexts formalistic rules can supply needed stability and predictability. See Schauer, *Formalism*, 97 YALE L.J. 509, 509-10, 538-44 (1988). Although this point may be well taken, the "committed to agency discretion" doctrine is one area in which formalism has caused more difficulties than it has solved.

95. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979), the plaintiffs challenged the decision of an agency to release commercially sensitive information. The Court noted: "Were we simply confronted with the authorization in 5 U.S.C. § 301 to prescribe regulations regarding 'the custody, use, and preservation of [agency] records, papers and property,' it would be difficult to derive any standards limiting agency conduct which might constitute 'law to apply.'" *Id.* at 317. The Court did not decide this question, however, because it found that the agency also was governed by a criminal statute that placed stricter limitations on its ability to disclose trade secrets. *Id.* at 318.

In *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), the Court rejected judicial review of the ICC's decision not to commence an investigation of filed rates. One reason was the absence of any substantive limits on the face of the statute; the Court cited *Overton Park*, preceded by a "cf." *Id.* at 455. Ultimately, however, the Court's holding rested on a perception that Congress had impliedly precluded judicial review. See *id.* at 454, 462.

96. *E.g.*, *California v. Settle*, 708 F.2d 1380, 1385 (9th Cir. 1983); *Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 510-13 (7th Cir. 1981) (holding decision of FTC to release its investigative files exempt from judicial review); *Greater New York Hosp. Ass'n v. Mathews*, 536 F.2d 494, 497-98 (2d Cir. 1976) (holding timing of Medicare payment dates not subject to judicial review).

97. See, *e.g.*, *Standard Oil Co. v. FTC*, 596 F.2d 1381, 1385 (9th Cir. 1979) *rev'd on other grounds*, 449 U.S. 232 (1980).

98. See *supra* notes 61-62 and accompanying text.

99. See, *e.g.*, *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984) (noting a strong presumption in favor of judicial review unless such review would impair effective agency administration); *Bullard v. Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980) (calling for "a weighing of the need for, and fea-

nent line of decisions, mainly from the District of Columbia Circuit, asserted that inquiry into whether there is "law to apply" should itself turn on pragmatic considerations<sup>100</sup> — a proposition that was so illogical on its face as to be tantamount to open rebellion against the *Overton Park* analysis. Thus, the unreviewability case law was split badly when, in 1985, the Supreme Court reentered the fray with its decision in *Heckler v. Chaney*.<sup>101</sup>

Rarely does the Court hear an administrative law case in which the underlying facts favor the government's side as strongly as did those in *Chaney*. The case began when eight death row prisoners wrote to the Food and Drug Administration (FDA), contending that state governments' use of lethal drug injections as a means of capital punishment violated the Food, Drug, and Cosmetic Act, because the drugs were not "safe and effective" for human execution.<sup>102</sup> They asked the FDA Commissioner to proceed against state authorities who were using the drugs for such "unauthorized" purposes.<sup>103</sup> When the Commissioner refused, the prisoners sought judicial review.<sup>104</sup>

The district court dismissed the complaint, but the District of Columbia Circuit reversed, holding that the FDA's rejection of the prisoner's request was reviewable and had been arbitrary and capricious.<sup>105</sup> Then-Judge Scalia dissented, asserting that the FDA's decision should be considered unreviewable as an exercise of traditional prosecutorial discretion.<sup>106</sup> In a follow-up opinion, he also protested the D.C. Circuit's frequent resort

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sibility of, judicial review versus the potential for disruption of the administrative process"), *cert. denied*, 451 U.S. 907 (1981); *Local 2855, AFGE v. United States*, 602 F.2d 574, 578-80 (3d Cir. 1979) (stating that application of § 701(a)(2) requires a "weighing of the practical and policy implications of reviewability"). Professor Davis's strenuous criticism of the "law to apply" test helped fuel this resistance. See K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28:16 (1976). For Davis's later and more complete critique, see 5 K. DAVIS, *supra* note 32, § 28:8, at 290-97.

100. *E.g.*, *Local 1219, AFGE v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982); *WWHT, Inc. v. FCC*, 656 F.2d 807, 816 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979); *accord Tuepker v. FmHA*, 708 F.2d 1329, 1332 (8th Cir. 1983).

101. 470 U.S. 821 (1985).

102. *Id.* at 823-24.

103. *Id.* at 824.

104. *Id.* at 825.

105. *Chaney v. Heckler*, 718 F.2d 1174, 1185-86 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821, 827 (1985).

106. *Id.* at 1192-98 (Scalia, J., dissenting).

to pragmatic considerations, rather than the *Overton Park* "law to apply" test, in deciding questions of reviewability.<sup>107</sup>

The bizarre nature of the prisoners' requested relief made it easy to predict that the Supreme Court would find some way to reverse the court of appeals.<sup>108</sup> But the Court never reached the merits. Instead, in an opinion written by Justice Rehnquist and joined by seven other Justices, the Court held broadly that an agency refusal to institute investigative or enforcement proceedings was "presumptively unreviewable."<sup>109</sup> This presumption could be rebutted when Congress furnished "law to apply" in the form of substantive guidelines circumscribing an agency's enforcement discretion.<sup>110</sup> Congress had not, however, placed relevant limits on the FDA's freedom to decline to use its enforcement authority, and therefore the court of appeals' decision had to be reversed.<sup>111</sup> Only Justice Marshall rejected the Court's analysis. He argued, in a lengthy opinion concurring in the result, that the FDA's decision was reviewable, but should be upheld on the merits.<sup>112</sup>

On the surface, *Chaney* appeared to be a strong vindication of the *Overton Park* test of unreviewability; most commentators have read it that way.<sup>113</sup> When the Court's reasoning is scrutinized, however, *Chaney* proves to be just the opposite. The Court subtly undermined the "law to apply" formalism, substituting a decidedly functional approach. This conclusion emerges from an examination of three aspects of the Court's reasoning: 1) its general exegesis of the meaning of section 701(a)(2); 2) its explanation of why exercises of enforcement

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107. *Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of rehearing en banc).

108. The equitable argument supporting the court of appeals' holding was that lethal drugs might cause excessive pain to prisoners to whom they were administered. See 718 F.2d at 1177-78. Even in this respect, however, the plaintiffs' case was shaky, because, as the dissent in the court of appeals noted, states had turned to the lethal injection method of capital punishment largely because it was considered *less* painful than alternative methods such as electrocution. See *id.* at 1197 (Scalia, J., dissenting). See also *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (suggesting that electrocution should be considered "cruel and unusual punishment").

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

110. *Id.* at 832-35.

111. *Id.* at 835-37.

112. *Id.* at 840-55 (Marshall, J., concurring).

113. See, e.g., Davis, *supra* note 92, at 3; *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 120, 270 (1985); Note, *The Impact of Heckler v. Chaney on Judicial Review of Agency Decisions*, 86 COLUM. L. REV. 1247, 1256 (1986).

discretion "presumptively" fall within that provision; and 3) its suggestions about the circumstances in which such agency discretion might nevertheless be reviewable.

### 1. *Chaney* and the "law to apply" test

Before turning to the specific question of enforcement discretion, Justice Rehnquist presented what appeared to be a general theoretical framework for analysis of section 701(a)(2). He quoted at length from *Overton Park*, explaining its construction of the clause in light of what I call the "futility" theory.<sup>114</sup> That is, he read section 701(a)(2) to mean that

review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. . . . This construction avoids conflict with the "abuse of discretion" standard of review in § 706 — if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for "abuse of discretion."<sup>115</sup>

Unfortunately, this explanation did not come to grips with the problems in the *Overton Park* analysis. If the only agency actions that fall within section 701(a)(2) are actions that could not, in any "meaningful" or "judicially manageable" sense, be deemed abuses of discretion, the concept of unreviewability serves no purpose. Such agency actions would survive "merits" scrutiny under section 706 in any event. Thus, the Court's explanation of the "law to apply" test did not solve the problem of devising a rationale for section 701(a)(2) under which the clause would not be superfluous.<sup>116</sup> Moreover, even if one accepts the premise that unreviewability should depend on the availability of "meaningful standards," the "law to apply" analysis falsely assumes that a broad statute makes judicial review unworkable. The truth is that, regardless of how broadly "the statute is drawn," courts typically have some "judicially manageable standards" available for abuse of discretion review.

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114. See *supra* note 85 and accompanying text.

115. *Chaney*, 470 U.S. at 830.

116. See *supra* notes 76-79 and accompanying text. Curiously, Justice Rehnquist brought up the surplusage issue himself in the same context. He observed that the two clauses of § 701(a) could be read as calling for identical inquiries, *Chaney*, 470 U.S. at 828-30; see *supra* note 50, but sought to avoid such an overlap because of "the common-sense principle of statutory construction that sections of a statute generally should be read 'to give effect, if possible, to every clause.'" *Chaney*, 470 U.S. at 829 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). He seemed not to notice that, although the futility theory did distinguish § 701(a)(1) from § 701(a)(2), it did not suggest any function for the latter clause that § 706 does not serve on its own.

The peculiar facts of *Chaney* provide a good illustration of the latter point, for one can easily conceive of ways in which the Commissioner could have abused his discretion in responding to the prisoners' petition, even if we assume that the Food, Drug, and Cosmetic Act did not limit the FDA's enforcement discretion. Suppose, for example, the FDA had declined to proceed against execution drugs on the ground that they were not dangerous at all. If the record contained strong contrary evidence, a court might regard this decision as arbitrary, because a regulatory decision that rests on unjustifiable factual assumptions is an abuse of discretion.<sup>117</sup> Alternatively, suppose that the Commissioner had denied the prisoners' petition on the ground that anyone who is sentenced to capital punishment should die an agonizing, lingering death. Quite apart from the question of whether anything in the statute bears on this rationale, one can easily picture a judge holding that deliberate cruelty is an unconscionable basis for decision, and therefore an abuse of discretion — a "clear error of judgment," in the words of *Overton Park*.<sup>118</sup> Finally, suppose the Commissioner had announced that the FDA would not act on the petition because the agency wished to leave the issue to state-level health officers. This rationale would be completely illogical, because such officers could not override state *statutes* requiring execution by injection. As such, the rationale for the FDA's refusal to proceed against execution drugs could be challenged as lacking the "reasoned analysis" required under abuse of discretion case law.<sup>119</sup>

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117. The case would resemble *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986), in which the Supreme Court set aside rules prohibiting hospitals from withholding treatment from handicapped infants over their parents' objections; the rules lacked an adequate factual basis, because there was no evidence that any hospital had ever engaged in this conduct. *Id.* at 630-36. See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (dictum) (rule is arbitrary if agency's "explanation for its decision . . . runs counter to the evidence before the agency"); Levin, *supra* note 27, at 274-75 (discussing lack of factual support as a form of arbitrariness).

118. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); see *State Farm*, 463 U.S. at 43 (dictum) (stating that "an explanation [that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" is arbitrary and capricious); Levin, *supra* note 27, at 253-55 (discussing cases holding unacceptable policy judgments to be abuses of discretion).

119. *State Farm*, 463 U.S. at 57. In *State Farm*, the agency rescinded a rule requiring the automobile industry to adopt either airbags or automatic seatbelts. The agency explained that automatic seatbelts, the industry's favored method of meeting the requirement, would be ineffective. The Court reversed because, among other reasons, the agency's statement did not explain

Other examples can be imagined, but these sufficiently demonstrate why the futility theory, standing alone, could not have logically supported the Court's finding of unreviewability in *Chaney*. In each of the hypothetical cases, the basis for reversal would be unrelated to the dictates of the Food, Drug, and Cosmetic Act. In short, what the *Chaney* Court did not acknowledge is that, even if the Act did not contain "manageable standards" delineating how the Commissioner *must* use his discretion, general administrative law doctrine on abuse of discretion identifies certain ways in which he *must not* use it. Thus, if the Commissioner's decision in *Chaney* was to be treated as "committed to agency discretion," the reason could not be that a court could not possibly find any abuses of his discretion, but rather that there were good reasons for the Court to refrain from looking for such abuse.<sup>120</sup>

## 2. *Chaney* and the pragmatic calculus

On some level, the Court evidently was aware that *Overton Park* alone could not persuasively support a holding that the FDA Commissioner's decision was unreviewable. For, after expounding the above elaboration of the "law to apply" test, the Court abruptly laid the test aside and began to discuss various practical considerations that demonstrated the "general unsuitability for judicial review of agency decisions to refuse enforcement."<sup>121</sup>

At least some of these practical arguments were persuasive. Perhaps the strongest argument was that, when an agency decides which alleged law violators it will pursue, it must take into account such variables as its chances of prevailing in the action, its overall regulatory priorities, and competing uses for

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why it had abandoned airbags as well. *See generally* Levin, *supra* note 27, at 255-56, 259-60 (discussing agency's illogical reasoning and lack of reasoned decisionmaking as bases for reversal).

120. One might defend the Court by arguing that the terms "meaningful" and "judicially manageable," in the block quotation above, were meant to be heavily loaded phrases, to be equated with "suitable" or "appropriate." Under this reading of the quoted paragraph, the Court was saying that a decision is "committed to agency discretion" when abuse of discretion review would be a poor idea, albeit not necessarily infeasible. Even if the paragraph can be read that way, however, which probably is not the way it was intended, the analytic conclusion would be the same: the *Chaney* holding cannot be defended on a futility theory, but only on the basis of whatever practical considerations are thought to make judicial review of the particular decision "inappropriate."

121. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

its limited budget and personnel.<sup>122</sup> Judicial supervision of these choices might not be impossible, but it would at least be unusually difficult. Even many observers who favor a narrow application of *Chaney* concede that the managerial nature of agencies' decisions about how they can best deploy scarce resources warrants considerable solicitude from the courts during judicial review.<sup>123</sup> Moreover, there was force to the Court's comment that "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."<sup>124</sup> The Court apparently meant that judicial review of agency inaction may be "unfocused" because the court cannot know what measures the agency ultimately would have adopted if it had commenced a proceeding.<sup>125</sup>

Justice Rehnquist's other arguments for the presumptive unreviewability of agencies' nonenforcement decisions were weaker and might even be considered makeweights. First, the Court argued that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights."<sup>126</sup> Even if one were to accept the dubious premise that persons coerced by agency action deserve review more than persons who hope to benefit from such action,<sup>127</sup> the

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122. *Id.* at 831-32.

123. *See, e.g., Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 389 (1987) (panel discussion) [hereinafter *Conservative Era*] (remarks of Alan B. Morrison); *id.* at 392-93 (remarks of Cass Sunstein). According to these two commentators, resource allocation considerations should affect the scope of review, rather than reviewability. *See also* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1267-71 (1982) (reviewing how courts have hesitated to create private rights of initiation because of their awareness of agencies' resource limitations).

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

125. *See* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046-47 (D.C. Cir. 1979) (explaining why an agency's failure to adopt regulations at the end of a rulemaking proceeding is more amenable to review than a refusal even to initiate rulemaking proceedings).

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

127. *See* Sunstein, *supra* note 53, at 476-77 (arguing that interests of regulatory beneficiaries should not be subordinated to those of regulated parties, because congressional concern for the former is shown by the existence of the statutory scheme itself); *see also* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891-93 (1987) (similar analysis). The distinction between coerced parties and benefit-seekers, a common theme in the literature of a generation ago, seems obsolete in an age in which the legal system has increasingly treated "new property" interests in the same manner as traditionally protected interests. *See* Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 20-22 (1983); Note, *Congressional Preclusion of Judicial Review of Fed-*

Court's argument was strikingly overbroad. Numerous agency decisions that courts routinely review are also noncoercive: for instance, appeals from denials of Social Security disability benefits make up a large fraction of the federal courts' caseload. The Court also drew an analogy between agency inaction and a prosecutor's decision not to seek a criminal indictment — ignoring substantial differences between the two factual contexts.<sup>128</sup>

This Article is not the place for a detailed exploration of whether agency enforcement discretion should be judicially reviewable. Other commentators have treated that topic in depth elsewhere.<sup>129</sup> What is important is the role of functional arguments in the structure of the *Chaney* Court's analysis. The opinion's pointed reliance on those arguments demonstrated that the Court was not interested in a straightforward application of its earlier futility analysis. Had the Court been prepared to adhere strictly to the *Overton Park* "law to apply" test, such policy considerations would have been irrelevant, and the case would have been over almost immediately. Thus, although Justice Rehnquist did not offer a precise concept of how the two parts of his analysis fit together, the Court evidently was groping toward a more complex approach to section 701(a)(2), in which the absence of "law to apply" would be an important factor militating against reviewability, but not necessarily a dispositive factor.<sup>130</sup>

Part of the reason that *Chaney* has been mistakenly interpreted as a simple reaffirmation of *Overton Park* is that, in addressing the circumstances in which the *Chaney* presumption against review of nonenforcement decisions could be rebutted, the Court focused on what it termed a "law to apply" issue. A plaintiff could overcome the presumption by showing that a

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*eral Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 780-82 (1984).

128. See *Chaney*, 470 U.S. at 847-50 (Marshall, J., dissenting) (beneficiaries of regulatory schemes have a direct and tangible stake in enforcement, transcending society's generalized interest in criminal law enforcement; and the overall trend in administrative law has been away from unconstrained discretion); Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 657-61 (1983).

129. K. DAVIS, DISCRETIONARY JUSTICE 188-214 (1969); Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877 (1989); Sunstein, *supra* note 52, at 665-75; see also A. GOLDSTEIN, THE PASSIVE JUDICIARY 52-75 (1981) (advocating judicial review of criminal prosecutors); Thomforde, *Controlling Administrative Sanctions*, 74 MICH. L. REV. 709, 734-57 (1976) (evaluating judicial review of administrative sanctions).

130. For an articulation of one such approach, see *infra* note 301-04 and accompanying text.

statute prescribed substantive priorities or other limits on an agency's enforcement discretion.<sup>131</sup> As an example, the Court referred to its 1975 decision in *Dunlop v. Bachowski*,<sup>132</sup> which had permitted judicial review of the Secretary of Labor's decision not to challenge a union election under the Labor-Management Reporting and Disclosure Act (LMRDA).<sup>133</sup> The key to the *Dunlop* holding, Justice Rehnquist explained, was that the language of the LMRDA had constrained the Secretary's enforcement discretion, directing him to file suit "if he finds probable cause to believe that a violation . . . has occurred."<sup>134</sup> The statutory directive, therefore, had provided "law" that a reviewing court could properly enforce.<sup>135</sup>

In this portion of the *Chaney* opinion, however, the phrase "law to apply" served a function that was entirely different from its role in *Overton Park*. The Court did not treat the absence of law to apply as a self-sufficient *reason* for the rule of unreviewability; rather, it regarded the availability of law to apply as a *limitation* on a rule of unreviewability that was largely rooted in practical considerations.<sup>136</sup> The distinction is subtle but significant. The Court's position implied that examination of a wide range of functional considerations would not necessarily be foreclosed when courts faced novel reviewability issues in later cases. Such courts might decide, as *Chaney* had,

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131. *Chaney*, 470 U.S. at 833.

132. 421 U.S. 560 (1975).

133. 29 U.S.C. §§ 401-531 (1982).

134. *Chaney*, 470 U.S. at 833-34 (quoting 29 U.S.C. § 482 (1982)).

135. *Id.* at 834. This was a somewhat questionable reading of *Dunlop*, a decision from which Justice Rehnquist himself had dissented. The extent of the Court's revisionism need not be explored here, however. Post-*Chaney* cases have generally interpreted *Dunlop* as having meant what the *Chaney* Court claimed it meant, and therefore this Article will do the same.

136. See *Cardoza v. CFTC*, 768 F.2d 1542, 1549 (7th Cir. 1985) (stating that "[t]he Court did not directly utilize the 'no law to apply' test to resolve the case"). Perhaps the most easily misinterpreted aspect of the Court's discussion was Justice Rehnquist's remark that the decision to find prosecutorial discretion reviewable in *Dunlop* "was not based on 'pragmatic considerations' . . . that amount to an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decisionmaking." *Chaney*, 470 U.S. at 834 (quoting the opinion below). Some have read this remark as saying that the nature of the plaintiff's interests should have no bearing on the question of whether there should be a presumption of unreviewability in the first place. See, e.g., *California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring). But the Court could not have seriously intended to exclude the plaintiff's interests from the unreviewability calculus. Only two pages earlier, the Court had focused on exactly that variable as a justification for the *Chaney* rule itself. See *supra* note 126 and accompanying text.

that a given agency determination should be reviewed only on the basis of "law," but that outcome would not be a foregone conclusion.

### 3. *Chaney's* caveats

A final bit of evidence that the Court was not strictly wedded to the futility theory was Justice Rehnquist's readiness to mention situations in which the *Chaney* rule might not come into play. The *Dunlop* type of case did not appear to be the only one in which a plaintiff could overcome the *Chaney* "presumption." In asides and footnotes scattered throughout the opinion, the Court hinted that agency inaction might be reviewable 1) where the agency refused to commence rulemaking proceedings;<sup>137</sup> 2) where the plaintiff alleged that the agency's nonenforcement decision contravened the Constitution<sup>138</sup> or the agency's rules;<sup>139</sup> 3) where the agency's inaction was "based solely on the belief that it lacks jurisdiction,"<sup>140</sup> or 4) where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>141</sup> Moreover, the tenor of the *Chaney* opinion did not indicate that these escape routes were the only ones that the Court would consider upholding. Indeed, Justice Brennan suggested in his concurring opinion that the *Chaney* holding would not prevent a court from reviewing allegations that an agency's nonenforcement decision had resulted from bribery, although he assumed that the Court had not explicitly reserved this possibility.<sup>142</sup>

Neither Justice Rehnquist nor Justice Brennan seriously attempted to explain how these qualifications could be reconciled with the "law to apply" analysis that the Court's opinion purported to endorse.<sup>143</sup> Collectively, however, these reserved

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137. *Chaney*, 470 U.S. at 825 n.2.

138. *Id.* at 838.

139. *Id.* at 836.

140. *Id.* at 833 n.4.

141. *Id.* (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

142. *Id.* at 839 (Brennan, J., concurring). Although Justice Brennan did not elaborate, probably the simplest way to justify review in such a case would be to argue that the federal criminal bribery statute, 18 U.S.C. § 201(b)-(c) (1988), furnishes "law to apply" to the agency's decision. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (finding that where government's release of commercially valuable information would violate a criminal statute, disclosure may be enjoined under the APA).

143. In conjunction with the third and fourth potential exceptions noted in

issues reinforced the impression that the Court was prepared to embrace a far more complex conception of section 701(a)(2) than the *Overton Park* reasoning alone could sustain. Or, at the very least, these qualifications suggested that Justice Rehnquist had been able to attract near-unanimous support for his opinion only by conspicuously leaving room for such complexity.

In summary, the *Chaney* opinion suffered from a deep theoretical inconsistency. Although Justice Rehnquist initially attempted to make sense of *Overton Park*, he then effectively acknowledged the inadequacy of the "law to apply" reasoning by resting the *Chaney* rule of presumptive unreviewability largely on pragmatic grounds. The Court therefore deserves credit for shifting unreviewability analysis in *Chaney* to a more credible footing than the formalist approach of *Overton Park*. Perhaps the Court would have deserved even more credit if the transformation had not been so poorly articulated as to have escaped the notice of so many readers.

#### D. *ICC v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS*

The Supreme Court's next encounter with section 701(a)(2), in *ICC v. Brotherhood of Locomotive Engineers (BLE)*,<sup>144</sup> has not yet attracted much attention. A likely reason for this neglect is that the Court's argument was narrow, technical, and convoluted; the trade press called the case a "snoozer."<sup>145</sup> Still, *BLE* utilized section 701(a)(2) in a fashion that is unusual at the Supreme Court level, and thus it deserves more than passing attention.

In *BLE*, the ICC issued an order in October 1982, allowing two railroads to use the tracks of a newly consolidated carrier.<sup>146</sup> Under the Hobbs Act,<sup>147</sup> which governs judicial review in this context, challengers had to seek review of the ICC order

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the text (inaction resulting from the agency's belief that it lacks jurisdiction or from abdication of responsibilities), the Court speculated that "in those situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'" *Chaney*, 470 U.S. at 833 n.4. By their nature, however, these exceptions (if they were to be recognized at all) necessarily would be triggered primarily by the agency's conduct, not by what the statute had said about the agency's enforcement discretion initially. Thus, the Court's explanation of why these exceptions might be appropriate was, to say the least, incomplete.

144. 482 U.S. 270 (1987).

145. Legal Times of Wash., June 15, 1987, at 11, col. 2.

146. *BLE*, 482 U.S. at 274.

147. 28 U.S.C. §§ 2341-2352 (1982).

within sixty days of the agency action.<sup>148</sup> Six months later, however, in 1983, two unions requested the ICC to “clarify” that it had not intended to allow the railroads to use their own crews in these operations.<sup>149</sup> The Commission responded that it indeed had intended this result and would adhere to it.<sup>150</sup> The unions requested reconsideration, which the Commission denied in a lengthy opinion.<sup>151</sup> The unions then sought review in the District of Columbia Circuit, which overturned the ICC decision on the merits.<sup>152</sup>

The Supreme Court, in an opinion by Justice Scalia, reversed the court of appeals.<sup>153</sup> The Court held that, because the unions had sought reconsideration on grounds that could have been advanced in the 1982 proceedings, the agency’s orders denying their petitions were not subject to judicial review.<sup>154</sup> The Court argued that the statutory time limit in the Hobbs Act would be undercut if a party were allowed to request agency reconsideration, claiming that the agency’s original decision was erroneous, and then to file for judicial review of the denial of reconsideration.<sup>155</sup> Furthermore, the Court said, a judicial “tradition” of declining to review such denials of reconsideration was “preserved” in section 701(a)(2) of the APA.<sup>156</sup> Justice Stevens rejected these propositions in a concurrence joined by Justices Brennan, Marshall, and Blackmun.<sup>157</sup> He asserted that the ICC’s 1983 orders were reviewable, although he went on to conclude that the unions should lose on the merits.<sup>158</sup>

From the standpoint of unreviewability doctrine, *BLE* had several salutary aspects. First, the Court liberated itself, sub silentio, from the constraints of a pure “law to apply” test. Justice Scalia did not even allude to that criterion for applying section 701(a)(2). He had good reason to avoid mentioning the test — the case on its merits would have turned primarily on statutory construction issues.<sup>159</sup>

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148. *Id.* § 2344.

149. *BLE*, 482 U.S. at 275.

150. *Id.* at 275-76.

151. *Id.* at 276.

152. *Id.*

153. *Id.* at 277.

154. *Id.*

155. *Id.* at 281-82.

156. *Id.* at 282.

157. *Id.* at 287-303 (Stevens, J., concurring).

158. *Id.* at 287.

159. *See id.* at 295-300 (reaching the merits and analyzing the relevant statutes).

Indeed, the *BLE* opinion unmistakably sanctioned broad judicial creativity in shaping the boundaries of section 701(a)(2). The Court strained to distinguish the situation in the case at bar from several other situations in which the availability of judicial review was established by precedent or was obviously essential. Justice Scalia conceded that a party may obtain judicial review of the ICC's disposition of a motion for reconsideration if: 1) the Commission reopens the proceedings;<sup>160</sup> 2) the motion alleges "new evidence or changed circumstances;"<sup>161</sup> or 3) the Commission, in the guise of clarifying its prior order, actually changes its substance.<sup>162</sup> Regardless of the persuasiveness of these distinctions, the Court could not have advanced them at all unless it was prepared to recognize a wide range of policy arguments as grist for the section 701(a)(2) mill.

Furthermore, *BLE* was noteworthy for the Court's open treatment of the reviewing courts' capabilities as a relevant factor in applying section 701(a)(2). First, Justice Scalia pointed out that "[t]he vast majority of denials of reconsideration . . . are made *without statement of reasons*."<sup>163</sup> Thus, he maintained, judicial review of such denials would rarely be workable. This was a valid point, although the Court could have probed it more deeply. In a way it begged the question, because a reviewing court *could*, under familiar doctrine, force an agency to provide a statement of reasons for its action in order to facilitate the review process.<sup>164</sup> After a few such remands the Commission undoubtedly would feel obliged to start writing explanations for its denials of reconsideration on a routine basis. The Court must have concluded that, in light of the ICC's

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160. *Id.* at 280 (opinion of the Court).

161. *Id.* at 284; *see also* *INS v. Abudu*, 485 U.S. 94, 107-08 (1988) (holding that INS refusal to reopen case in the face of new evidence is reviewable for abuse of discretion).

162. *BLE*, 482 U.S. at 286.

163. *Id.* at 283 (emphasis in original).

164. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *City of Vernon v. Federal Energy Regulatory Comm'n*, 845 F.2d 1042, 1048 (D.C. Cir. 1988); Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 *DUKE L.J.* 199, 223 (concluding in part that when an agency's findings are inadequate or erroneous, "reversal is inevitable . . . to preserve the meaningful quality of judicial review"). Some of the classic expressions of this power are found in ICC cases. *See Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (stating that "the agency must set forth clearly the grounds on which it acted"); *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935) (stating that "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong").

other responsibilities, imposing this extra burden of opinion-writing was not worthwhile.

In a related vein, the Court referred to "the impossibility of devising an adequate standard of review" for administrative denials of petitions for reconsideration.<sup>165</sup> Justice Scalia noted that great deference already is given to agency action that is appealed *directly*. Thus, courts could not easily devise a standard of review that was *even more deferential*.<sup>166</sup> Apparently, the Court feared that judges too often would yield to the temptation to meddle in supposedly settled agency proceedings.<sup>167</sup>

More troubling was the Court's response to Justice Stevens' suggestion<sup>168</sup> that the ICC's decision should be reviewable because it was based on substantive legal grounds rather than solely on grounds of untimeliness. Justice Scalia denied

that if the agency gives a "reviewable" reason for otherwise unreviewable action, the action becomes reviewable. To demonstrate the falsity of that proposition it is enough to observe that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently "reviewable" proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review.<sup>169</sup>

There are at least two reasons why the Court's quick reference to criminal prosecution should not have been "enough" to dispose of the concurrence's suggestion. First, the propriety of equating prosecutors with administrative agencies is not self-evident.<sup>170</sup> Second, although courts have not *always* treated agency actions as reviewable when the agency gives a "reviewable" reason, many cases *have* relied on the manageability of the agency's rationale as a significant factor militating in favor of review.<sup>171</sup> Supported by precedent as well as logic, Justice Stevens' argument deserved a better response than the majority's brusque dismissal.

Probably, however, one should not read too much into the quoted passage. Just two years earlier, in *Chaney*, the Court

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165. *BLE*, 482 U.S. at 282.

166. *Id.*

167. Indeed, courts have not been conspicuously successful in their other efforts to devise a standard of review that would be narrower than the usual arbitrariness standard. See *infra* notes 394-96 and accompanying text.

168. *BLE*, 482 U.S. at 290-91 (Stevens, J., concurring).

169. *Id.* at 283 (opinion of the Court).

170. See *supra* note 128 and accompanying text.

171. See *infra* Part IV. A.

had explicitly mentioned the possibility that a nonenforcement decision would be reviewable if the agency had explained its action as resting on a lack of jurisdiction.<sup>172</sup> Because the Court was so careful to leave the issue open in *Chaney*,<sup>173</sup> it is unlikely that the Court meant to resolve the question definitively in *BLE* in such a casual fashion. Perhaps in future cases the Supreme Court will give this line of analysis more careful consideration.

The cursoriness of the quoted passage raises questions about the thoughtfulness of the *BLE* decision as a whole. Those questions become especially pressing when one notices the off-hand way in which the Court brought section 701(a)(2) into the analysis in the first place. None of the briefs in the *BLE* case had even mentioned that provision, and the Court's reliance on "tradition" was perfunctory at best.<sup>174</sup> The "committed to agency discretion" rationale was, in short, a strikingly impulsive act in an area of administrative law that demands self-restraint and circumspection. The flexibility that courts obtain when implementing section 701(a)(2) without the constraints of the "law to apply" test imposes a concomitant obligation of intellectual discipline. Otherwise the clause could degenerate into little more than a makeweight that might be utilized at will to support otherwise flimsy arguments against the reviewability of various agency actions.

The actual outcome in *BLE* arguably exemplifies this danger, for the Court certainly could have been more lenient. The majority conceded that if the ICC had responded to the unions' petition by *formally* reopening the proceedings and entering a fresh order rejecting their position, the unions could have sought judicial review of that order.<sup>175</sup> What the Commission had actually done, however, was quite similar: the order denying reconsideration had responded in detail to all of the points the unions had made. In that sense, the ICC order definitely was susceptible of judicial review.<sup>176</sup> The Court, however, re-

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172. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

173. The Court went even further out of its way to reserve the issue again in *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 5 n.1 (1985) (*per curiam*).

174. *See BLE*, 482 U.S. at 280, 282 (relying solely on one Supreme Court case — which had turned on specific statutory language — and two court of appeals cases).

175. *Id.* at 278, *citing* *United States v. Seatrains Lines*, 329 U.S. 424 (1947).

176. *See* *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1047 & n.19 (D.C. Cir. 1979) (stating that "in general, the more complete an

garded the completeness of the agency's response as entirely irrelevant.<sup>177</sup>

The Court sought to defend its bright line rule by comparing the Commission's orders denying clarification and reconsideration with a court of appeals' order denying rehearing, which "no one supposes . . . is an appealable action."<sup>178</sup> The analogy was weak: the ICC is a tribunal with ongoing frontline responsibility for its cases, and as such is more like a district court than an appellate court. A better comparison, therefore, would have been to a district court's order denying a motion to reopen a final judgment under Federal Rule of Civil Procedure 60(b). Such an order undoubtedly is appealable for abuse of discretion, even if the only basis for the motion is that the court's original decision was erroneous when rendered.<sup>179</sup>

Ultimately, whether one approves of the Court's stringency in *BLE* must depend on how fully one accepts the Hobbs Act policy of cutting off review after sixty days. Cases involving statutes of limitation present some of the strongest rationales for precluding judicial review: finality is important to the coherence of a regulatory program, and the challenging party cannot complain about never having had a chance to attack the agency's position.<sup>180</sup> The Court's insistence on a formal reopening of the proceedings (which rarely occurs) as a precondition

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agency's consideration of an issue, the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review").

177. *BLE*, 482 U.S. at 280-81.

178. *Id.* at 280.

179. In *Browder v. Director, Dep't of Corrections*, 434 U.S. 257 (1978), the state claimed in a post-judgment motion that the district court had erred in granting habeas corpus relief without first holding an evidentiary hearing. In dictum, the Supreme Court noted that if the state had filed this motion under Rule 60(b), the district court's denial of the motion would have been reviewable for abuse of discretion. *Id.* at 263 & n.7; see also, e.g., *Carter v. Albert Einstein Medical Center*, 804 F.2d 805 (3d Cir. 1986) (holding that, because dismissal of plaintiff's complaint as a discovery sanction had been erroneous, court abused discretion by not reinstating complaint in response to Rule 60 motion filed five months later); *Page v. Schweiker*, 786 F.2d 150, 154-55 (3d Cir. 1986) (holding that district court did not abuse discretion in denying defendant's Rule 60(b) motion alleging that original judgment was erroneous as a matter of law); 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 60.30[3] (2d ed. 1987).

180. See, e.g., *Raton Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 852 F.2d 612, 615 (D.C. Cir. 1988) (stating that "finality in agency decisionmaking and . . . protect[ing] justifiable reliance on agency rules" require time limit enforcement); *Texas Mun. Power Agency v. Administrator of EPA*, 799 F.2d 173, 175 (5th Cir. 1986) (noting that time limits are important in finalizing agency actions); see also *infra* note 298 (discussing proposals to place time limits on opportunities to challenge factual basis of rules).

to appeal may thus be viewed as a device to filter out many potential filings in a disfavored category of appeals.<sup>181</sup>

In any event, as mentioned earlier, *BLE* has had no particular influence on subsequent discussion of section 701(a)(2) — unsurprisingly, in light of the narrowness of the Court's holding and, perhaps, the dryness of its discussion. Possibly the case has had some small impact on practitioners, leading them to seek reconsideration, and then judicial review, more promptly than they otherwise might.<sup>182</sup> *BLE*'s potentially larger significance, however, lies in the possibilities that the case opens up for the concept of unreviewability in various contexts. More clearly than any other modern Supreme Court case, *BLE* exposes both the opportunities and the dangers that section 701(a)(2) creates when the constraints of the *Overton Park* "law to apply" test are removed.

#### E. *WEBSTER V. DOE*

The Supreme Court's latest treatment of section 701(a)(2) arose in a sensitive, emotionally charged context — a strong contrast with the arcaneness of *BLE*. The Court in *Webster v. Doe*<sup>183</sup> had to be mindful of national security concerns, demands for sexual privacy, and the federal courts' strongly entrenched solicitude for constitutional rights. There is good reason to believe that the high stakes involved in *Doe* directly affected the manner in which the Court approached section 701(a)(2).

"John Doe," an employee of the Central Intelligence Agency, informed his superiors that he was a homosexual. The Director of the CIA, William Casey, soon discharged Doe from employment pursuant to section 102(c) of the National Security

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181. Cf. *Califano v. Sanders*, 430 U.S. 99, 108 (1977) (stating that when Secretary denies reconsideration of disability benefits decision, Social Security Act precludes judicial review, thus "forestall[ing] repetitive or belated litigation of stale eligibility claims").

182. See *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989), cert. denied, 110 S. Ct. 1166 (1990) (following *BLE* holding); *John D. Copanos & Sons v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988) (same); *Western Pac. Stockholders' Protective Comm. v. ICC*, 848 F.2d 1301, 1303 (D.C. Cir. 1988) (same). Transportation lawyers tell me that the significance of *BLE* for their practice lies less in its unreviewability holding than in its teachings, 482 U.S. at 277, 284-85, about when the time limit for judicial review begins to run. See generally *United Transp. Union v. ICC*, 871 F.2d 1114, 1116-18 (D.C. Cir. 1989) (elaborating on these teachings).

183. 486 U.S. 592 (1988).

Act.<sup>184</sup> Section 102(c) provides that “the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.”<sup>185</sup> The CIA’s discharge letter did not explain this decision, except by quoting the statutory language.

Doe sought reinstatement in district court, asserting that the CIA’s dismissal order violated his statutory and constitutional rights.<sup>186</sup> The district court ordered the CIA to reconsider its decision, and the CIA appealed.<sup>187</sup> The District of Columbia Circuit remanded because the district court had given too little deference to the CIA’s decision.<sup>188</sup> Nevertheless, the court of appeals completely rejected the government’s arguments that the Director’s order was immune from judicial review.<sup>189</sup>

The Supreme Court reversed in part, holding that Doe could not litigate any claims under the APA, because the Director’s implementation of section 102(c) was “committed to agency discretion.”<sup>190</sup> In an opinion by Chief Justice Rehnquist, the Court examined section 701(a)(2) in light of the “no law to apply” reasoning of *Overton Park* and *Chaney*.<sup>191</sup> The Court concluded that section 102(c) “fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review.”<sup>192</sup> On the other hand, the Court rejected the government’s argument that section 102(c) foreclosed judicial review of Doe’s claims that his dismissal had violated his constitutional rights.<sup>193</sup> The Court

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184. National Security Act of 1947, § 102(c) (codified as amended at 50 U.S.C. § 403(c) (1982)).

185. *Id.*

186. *Doe*, 486 U.S. at 595-96.

187. *Id.* at 597-98.

188. *Id.* at 598.

189. *Doe v. Casey*, 796 F.2d 1508, 1513 (D.C. Cir. 1986), *aff’d in part and rev’d in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988).

190. *Doe*, 486 U.S. at 601.

191. *Id.* at 599-600.

192. *Id.* at 600.

193. The Court’s two holdings may seem contradictory, because one normally assumes that constitutional claims against an agency are themselves conducted pursuant to the APA. *See* 5 U.S.C. § 706(2)(B) (1988). Possibly the Court agreed with the plaintiff’s theory that his claim arose directly under the Constitution, without reference to the APA. *See Davis v. Passman*, 442 U.S. 228, 234-44 (1979) (implying cause of action for employment discrimination directly from the Constitution). Alternatively, the Court may have assumed that the APA controlled, but that the Director’s decision was not “committed to agency discretion” to such an “extent” as to foreclose review under

noted that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," and concluded that the government had failed to make this "heightened showing" of legislative intent.<sup>194</sup>

Justice Scalia dissented. Although agreeing that the district court should not entertain any statutory challenges to the Director's decision, Justice Scalia strongly criticized what he saw as the Court's narrow focus on the "law to apply" test. He argued that neither *Overton Park* and *Chaney*, nor the legislative history on which they relied, established that the "law to apply" test defines the full range of cases from which section 701(a)(2) excludes the courts.<sup>195</sup> On the contrary, he continued, Congress intended section 701(a)(2) to incorporate "the 'common law' of judicial review of agency action," including such principles as the political question doctrine, sovereign immunity, equitable restraint, and generalized comity notions.<sup>196</sup> In light of that common law, as well as the statutory language, Justice Scalia believed that *all* of Doe's claims, including the constitutional ones, were "committed to agency discretion."<sup>197</sup>

Perhaps the key to assessing the status of the "law to apply" test of section 701(a)(2) in light of *Doe* is the brief dissenting opinion of Justice O'Connor. Like Justice Scalia, she believed that Doe's complaint should be dismissed.<sup>198</sup> Although she joined the portions of the majority opinion dealing with APA review, Justice O'Connor added that, according to her understanding, the Court did not mean to say "that the exception in section 701(a)(2) is necessarily or fully defined by reference to statutes 'drawn in such broad terms that in a given case there is no law to apply.'"<sup>199</sup>

A close reading of the majority opinion confirms Justice O'Connor's observation. Although Chief Justice Rehnquist spoke favorably of the "law to apply" reasoning and relied on it to some extent,<sup>200</sup> he never expressly said the test is the only permissible method of finding an agency action to be "commit-

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§ 706(2)(B). See *supra* notes 54-56 and accompanying text (discussing partial unreviewability).

194. *Doe*, 486 U.S. at 603 (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)).

195. *Id.* at 606-11 (Scalia, J., dissenting).

196. *Id.* at 608 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

197. *Id.* at 606.

198. *Id.* at 605-06 (O'Connor, J., concurring in part and dissenting in part).

199. *Id.* at 605 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

200. *Id.* at 599-600 (opinion of the Court).

ted to agency discretion." Indeed, the Court made only a cursory and unpersuasive effort to demonstrate that section 102(c) contained insufficient statutory guidance to make judicial review *possible*.<sup>201</sup> The Court's analysis of APA review was dominated by a more generalized notion that Congress had granted the CIA Director a kind of authority that courts *should* not review.<sup>202</sup>

Chief Justice Rehnquist surely realized that section 102(c) could not easily be characterized as a statute that furnishes "no law to apply." The only tangible evidence of congressional intent that he could cite was the fact that section 102(c) applies "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States,' . . . not simply when termination *is* necessary or advisable to those interests."<sup>203</sup> In the past, however, the Court had not found the innocuous word "deem" to possess such powerful preclusive force.<sup>204</sup> Moreover, the statutory language on its face makes the national interest the benchmark for any CIA terminations. One thus would have thought that, as Justice Scalia observed, the statute "at least excludes dismissal out of personal vindictiveness, or because the Director wants to give the job to his cousin,"<sup>205</sup> or, one might add, because of a personal dislike of homosexuals.

Thus the Court was quickly forced, in spite of itself, to reach beyond a pure "law to apply" analysis to an appraisal of the practical limitations of reviewing courts. Chief Justice Rehnquist commented that a court could not assess a CIA termination decision "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests."<sup>206</sup> On the surface, this remark appeared to presuppose that courts would not be able to proceed at all. Yet under established precedent, cross-examination is precisely what a court *would* permit if asked to review an otherwise unexplained decision issued by some other agency.<sup>207</sup> The Court's revulsion at

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201. *Id.* at 600-01.

202. *Id.*

203. *Id.* at 600 (quoting § 102(c)) (emphasis added by the Court).

204. *See* Barlow v. Collins, 397 U.S. 159, 166 (1970) (holding that the statutory term "deem" does not foreclose review of agriculture regulations).

205. *Doe*, 486 U.S. at 610 (Scalia, J., dissenting).

206. *Id.* at 600 (opinion of the Court).

207. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21 (1971); Levin, *supra* note 27, at 266. The Court exaggerated the problem to

this prospect in connection with CIA decisions surely reflected a reluctance to involve the courts in delicate national security matters.

The Chief Justice then launched into a discussion of the "overall structure" of the National Security Act. Quoting from earlier Supreme Court decisions that had stressed the need for the CIA Director to be able to trust subordinates and protect intelligence sources,<sup>208</sup> the Chief Justice concluded that section 102(c) likewise exhibits "the Act's extraordinary deference to the Director in his decision to terminate individual employees."<sup>209</sup> Here the Chief Justice was not even suggesting that courts *could* not, but rather that they *should* not, review CIA termination decisions. The imperative of deference was attributed pro forma to Congress, but no reader of the opinion will doubt that the Court's own attitudes had become central to its unreviewability analysis.<sup>210</sup>

Finally, the Court's decision to permit Doe to litigate his constitutional claims provided a further demonstration of how much the *Doe* opinion was driven by policy considerations. The Court did not argue that section 102(c) itself supported the distinction between constitutional and nonconstitutional claims — and, of course, the language of the statute would not support such an argument. Nor did the Court argue, as it could have, that the Constitution furnished "law to apply" to Doe's claims. Instead, the Court relied on a purely judicial invention: a superstrong presumption against preclusion of constitutional

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some extent. Generally speaking, an agency head can avoid taking the stand by simply providing a contemporaneous explanation of the decision. See *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Overton Park*, 401 U.S. at 420; Levin, *supra* note 27, at 265. Thus, the specter of cross-examination arises only where, as in *Doe*, an action is not explained contemporaneously.

208. *Doe*, 486 U.S. at 601 (citing *Snepp v. United States*, 444 U.S. 507, 510 (1980); *CIA v. Sims*, 471 U.S. 159, 173 (1985)).

209. *Id.* at 601.

210. The nature of the Court's concerns is not difficult to guess. Indeed, the Court had articulated its concerns only a few months earlier in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). *Egan* held that the Navy's revocation of a federal employee's security clearance was "committed by law to the appropriate agency of the Executive Branch." *Id.* at 526-27. However, the plaintiff was seeking *administrative* review by the Merit Systems Protection Board, not *judicial* review, and the § 701(a)(2) case law was not on point. Thus, the Court moved directly to policy: "Predictive judgment of this kind," Justice Blackmun wrote, "must be made by those with the necessary expertise," rather than outside observers who lack experience in assessing security risks. Moreover, military and national security affairs are traditionally within the province of the Executive. *Id.* at 528.

claims.<sup>211</sup> The Chief Justice explained that this presumption was required "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."<sup>212</sup>

The merits of the underlying constitutional question to which Chief Justice Rehnquist alluded are beyond the scope of this Article. The question has been widely debated by federal courts scholars for years,<sup>213</sup> and probably will be debated further in light of Justice Scalia's skillful attack on the anti-preclusion view in *Doe*.<sup>214</sup> To date, however, the presumption invoked in *Doe* has been virtually an article of faith in the lower courts.<sup>215</sup> Apparently, the presumption stems not only from the courts' doubts about the constitutionality of preclusion, but also from the perceived preciousness of constitutional rights<sup>216</sup> and from the expectation that relatively few agency actions present serious constitutional problems.<sup>217</sup> For present purposes, the significant point is the openness with which the

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211. *Doe*, 486 U.S. at 603. The presumption is "superstrong" in the sense that it has even more force than the normal *Abbott Laboratories* presumption favoring judicial review. Cf. *supra* notes 57-58 and accompanying text (discussing *Abbott Laboratories*).

212. *Doe*, 486 U.S. at 603 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

213. See generally Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900-02 (1984) (discussing various congressional attempts to narrow federal court jurisdiction and various arguments to justify such action).

214. *Doe*, 486 U.S. at 611-15 (Scalia, J., dissenting).

215. See, e.g., *Marozsan v. United States*, 852 F.2d 1469, 1471 (7th Cir. 1988) (holding that statute foreclosing judicial review of Veterans' Administration actions concerning benefits did not preclude judicial review of constitutionality of procedures employed); *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987) (indicating that Disaster Relief Act preclusion provision did not apply to claim that regulation was unconstitutional); *Padula v. Webster*, 822 F.2d 97, 100-01 (D.C. Cir. 1987) (deciding on facts very similar to *Doe's* that appellant could challenge FBI hiring decision as unconstitutional, although the decision was otherwise committed to agency discretion); *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir.) (holding that doctrine of sovereign immunity does not permit Congress to preclude all judicial review of constitutionality of enactment), *rehearing order vacated*, 824 F.2d 1240 (D.C. Cir. 1987); *Paluca v. Secretary of Labor*, 813 F.2d 524, 526 (1st Cir.) (holding that the district court has jurisdiction to review constitutional challenges to the Secretary's compliance with FECA), *cert. denied*, 484 U.S. 943 (1987).

216. But see *Doe*, 486 U.S. at 618-20 (Scalia, J., dissenting) (arguing that constitutional rights are not always more important to plaintiffs than statutory rights).

217. See generally Note, *supra* note 127, at 791-95 (using balancing test to defend the presumption).

Court in *Doe* engaged in interest balancing to arrive at a partial unreviewability holding.

For all these reasons, Justice O'Connor probably was right in assuming that the Court's embrace of the "law to apply" test was decidedly limited. Indeed, the Court could not possibly have rested its unreviewability holding primarily on that test. For, contrary to the Court's assumption,<sup>218</sup> *Doe* had *never* asked the courts to review the CIA's finding that his dismissal was "necessary or advisable in the interests of the United States" within the meaning of section 102(c).<sup>219</sup> Thus, the Chief Justice's remarks about the open-endedness and unmanageability of the statutory standard<sup>220</sup> were addressed to language that was not even in controversy. *Doe*'s only statutory argument, at least by the time he reached the Supreme Court, was that the CIA Director had not furnished a "brief statement of the grounds for [his dismissal]," as provided in section 555(e) of the APA.<sup>221</sup> Chief Justice Rehnquist could scarcely have maintained that there was no "law to apply" to *that* question. Yet, after *Doe*, a discharged CIA employee apparently cannot obtain any judicial relief by invoking section 555(e).

A similar problem would have arisen if *Doe* had challenged the Director's termination decision on a "pure" abuse of discretion basis. For example, suppose a CIA agent, fired for homosexuality, presented seemingly incontrovertible evidence to a court that the charge was not true. One can think of reasons not to allow such a claim to be litigated — the Director's rebuttal information might be too sensitive to disclose, or might come from a confidential source, or might reveal the agency's investigative methods — but the absence of "law to apply" should be irrelevant, because the dispute over whether the termination was arbitrary would not revolve around the language of section 102(c). Again, the language of the *Doe* opinion ap-

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218. *Doe*, 486 U.S. at 600.

219. See *Doe v. Casey*, 796 F.2d 1508, 1511, 1513 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom.* *Webster v. Doe*, 486 U.S. 592 (1988). *Doe*'s amended complaint fleetingly mentioned § 102(c) in its jurisdictional allegations, but otherwise bears out the statement made in text. See Joint Appendix at 5, 12-13, *Webster v. Doe*, 486 U.S. 592 (1988).

220. *Doe*, 486 U.S. at 600-01.

221. 5 U.S.C. § 555(e) (1988). See Brief for Respondent at 5-8, *Webster v. Doe*, 486 U.S. 592 (1988). In addition to his APA claim, *Doe* pleaded violations of the Constitution and of CIA regulations. The Supreme Court held that the claim based on the regulations was not properly before it. *Doe*, 486 U.S. at 604 n.8.

pears broad enough to foreclose such a challenge, yet the “law to apply” reasoning does not readily support that result.

The Court’s answer, to the extent any can be inferred, is apparently that the National Security Act *authorizes* the Director to fire CIA employees without explanation and for totally irrational reasons. This implication, however, merely underscores what an unnatural reading of the statute the Court had to adopt to make the “law to apply” argument even minimally pertinent. One can imagine the surprise members of the intelligence oversight committees of Congress would feel if they took the CIA Director to task for a whimsical or uninformed dismissal and the Director asserted that any such firing is entirely lawful. The Court could have avoided this result if it had been willing to say frankly that the statute *does* contain a meaningful substantive standard and *does* rest upon customary expectations of rationality and fair procedure, but that for prudential reasons the courts should not enforce these obligations. *Doe* thus exemplifies one of the perverse consequences of the “law to apply” analysis. Insistence that courts must always enforce “law” will not always broaden the domain of judicial review; sometimes it will narrow the domain of “law.”

The interesting question is why Chief Justice Rehnquist approached the case through a “law to apply” analysis at all, despite its inadequacies, some of which the dissent had demonstrated.<sup>222</sup> Certainly the weight of precedent — particularly *Chaney*, which he himself had written — was a factor, but probably not the only one. The “law to apply” approach also enabled the Chief Justice to produce a narrow opinion that seven participating Justices could endorse. Because his arguments for precluding statutory claims from judicial review revolved entirely around inferences drawn from the National Security Act, the opinion would not necessarily control cases that might arise under any other statute. The price for this near unanimity, however, was a rather implausible interpretation of congressional intent.

The delicacy of the issues and the difficulty of holding a broad coalition together also probably account for the exceptional terseness of the Court’s opinion. As a result of this brevity, the Court left itself plenty of room to maneuver in future cases. By the same token, the Court still is a long way from settling the exact relationship between the “law to apply” test and other methods of identifying actions that are “committed to

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222. *Doe*, 486 U.S. at 606-11 (Scalia, J., dissenting).

agency discretion." One can anticipate, however, that Justice Scalia's attack on the "law to apply" test will be influential, especially because it echoes an already loud chorus of lower court judges who can barely conceal their skepticism about the value of the test.<sup>223</sup> If the courts are to abandon or modify the "law to apply" test, however, they will need a credible alternative. The following part of this Article undertakes to provide one.

### III. BEYOND "LAW TO APPLY"

The preceding part of the Article shows that the Supreme Court has made little headway in defining the boundaries of section 701(a)(2). The Court could clarify its analysis by explicitly acknowledging what it is already doing implicitly: it should cease treating the "law to apply" test as the exclusive standard for identifying actions that are "committed to agency discretion." Instead, the Court should candidly approach section 701(a)(2) as a source of authority for elaborating a "common law of unreviewability."

#### A. THE FUTILITY OF "FUTILITY"

The Court's defense of the "law to apply" test rests primarily on what I call the "futility" theory. This theory maintains that an administrative action is unreviewable if and only if judicial review of the decision would be infeasible.<sup>224</sup> The difficulties with the futility theory have been explored at length above and require only a brief recapitulation.

On the most abstract level, the futility theory is intrinsically suspect because it renders the concept of unreviewability superfluous: it assumes that the only unreviewable agency actions are ones that would survive review even if a court reached

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223. See, e.g., *Chong v. United States Information Agency*, 821 F.2d 171, 175-76 & n.4 (3d Cir. 1987) (following "law to apply" approach but also reaffirming pre-*Chaney* precedents prescribing pragmatic analysis); *Woodsmall v. Lyng*, 816 F.2d 1241, 1244-47 (8th Cir. 1987) (noting *Chaney's* nominal rejection of the pragmatic considerations test and *Chaney's* critics, refusing to determine *Chaney's* effect on pragmatic considerations approach, and holding FmHA's evaluation of creditworthiness unreviewable because it was based on agency expertise and because statute contained no meaningful standards for reviewing agency's exercise of discretion); *Cardoza v. CFTC*, 768 F.2d 1542, 1548-49 & n.5 (7th Cir. 1985) (noting that "law to apply" test has been "severely criticized" and reading *Chaney* "solely as reaffirming the recognized position that § 701(a)(2) applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion").

224. See *Doe*, 486 U.S. at 599-600; *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

the merits.<sup>225</sup> Indeed, the theory is self-defeating because it means that a court cannot find an agency action unreviewable without thinking about the substance of the challenger's contentions — that is, *reviewing* the action.

Second, the major premise of the futility theory — that extremely broad statutory language makes judicial review infeasible — is also mistaken. Even a broad statutory mandate, which gives an agency wide latitude to strike a balance among varied public policy factors, can have teeth when a litigant alleges that the agency failed to take the prescribed factors into account.<sup>226</sup> Furthermore, courts have devised a number of doctrines with which they can test an agency action for arbitrariness without relying on the statutory language under which the agency acted.<sup>227</sup> Of course, one can find loosely reasoned decisions in which courts have invoked section 701(a)(2) because they have failed to perceive some of the ways in which agency action can be statutorily unauthorized<sup>228</sup> or an abuse of discretion.<sup>229</sup> The

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225. See *supra* notes 76-79 and accompanying text.

226. See *Community Television v. Gottfried*, 459 U.S. 498, 508-09 (1983) (considering effect of Rehabilitation Act on FCC's duty to regulate "in the public interest"); *id.* at 513-18 (Marshall, J., dissenting) (same); *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 666 (1976) (holding that the FPC's duty to advance public interest does not include authority to proscribe discriminatory employment practices).

227. See *supra* notes 88-91, 117-19 and accompanying text.

228. A series of cases arising under the Flood Control Act of 1944 is illustrative. The Act directs the Secretary of Interior to allocate excess electric power among "preference" utilities "in such manner as to encourage the most widespread use thereof." 16 U.S.C. § 825s (1988). Reading the statute at face value, one would think that there might be any number of potential allocations of power that the Secretary could not reasonably defend as fostering the "most widespread use." Yet several courts, without citing any evidence that the statute has a broader scope than its language implies, have held that these allocation decisions are unreviewable because the Act contains "no law to apply." *E.g.*, *Electricities of N.C., Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985); *Greenwood Utils. Comm'n v. Hodel*, 764 F.2d 1459, 1464-65 (11th Cir. 1985); *City of Santa Clara v. Andrus*, 572 F.2d 660, 668 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978).

229. For cases that appear to assume that a broad statutory mandate makes abuse of discretion review impossible, see, e.g., *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), *rev'g* *Scalise v. Meese*, 687 F. Supp. 1239 (N.D. Ill. 1988), *cert. denied*, 110 S. Ct. 1815 (1990); *Florida Dep't of Business Regulation v. Department of Interior*, 768 F.2d 1248, 1255 (11th Cir. 1985) (denying review where Secretary was given broad power to acquire land for the benefit of an Indian tribe), *cert. denied*, 475 U.S. 1011 (1986); *South Delta Water Agency v. United States*, 767 F.2d 531, 536 (9th Cir. 1985) (*dictum*); *Greenwood Utils.*, 764 F.2d at 1464-65.

*Scalise* is particularly striking. In that case, two Americans convicted of crimes in England requested the Attorney General to seek their transfer to a

existence of these cases, however, merely suggests that the futility analysis breeds a carelessness that creates the potential for misguided substantive results. In the long run, a theory of unreviewability that rests on false assumptions about the power of modern scope-of-review doctrine cannot be expected to flourish.<sup>230</sup>

Conceivably, of course, one could oppose judicial review in situations in which there is no, or very little, "law to apply," even while conceding that review is feasible in those situations. A proponent of this position, however, would have to explain *why* such situations are appropriate candidates for unreviewability. As already seen, the fragment of legislative history that the Court originally cited in *Overton Park* was utterly inadequate to support the "law to apply" test.<sup>231</sup> And the courts have never attempted to defend the preclusion inherent in the *Overton Park* test on any policy ground other than "futility."

The nearest that anyone has come to offering such an alternative rationale is Professor Richard Pierce's analysis.<sup>232</sup> Relying on *Chaney's* endorsement of the "law to apply" test, Professor Pierce submits that courts should refuse to review all questions arising under administrative statutes that he calls "meaningless," such as provisions authorizing an agency to regulate "in the public interest" or to set "just and reasonable"

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prison in the United States. The Attorney General refused. The district court found the refusal arbitrary and capricious, in part because this action had deviated from past practice without explanation and because there was no evidentiary support for the Attorney General's findings. 687 F. Supp. at 1246. The court's rationales, of course, did not depend on the terms of the statute under which the Attorney General had acted. Even with the district court's opinion squarely before it, however, the court of appeals held the decision unreviewable because of the "absence of any [statutory] standards upon which this court could review the Attorney General's discretionary authority." 891 F.2d at 648.

230. It might be argued that the erroneous applications of § 701(a)(2) described in the text do no harm, because when a court is unable to perceive any basis for questioning a given agency action, the government is destined to prevail anyway. Once a category of agency actions has been held "unreviewable," however, litigants in future cases may refrain from challenging those actions; courts may feel that precedent constrains them from reaching the merits of such actions; and the agency that takes such actions may be tempted to behave irresponsibly. Moreover, incorrect doctrinal analysis in a circuit's case law can mislead the court as it confronts agency actions arising in wholly unrelated contexts.

231. See *supra* note 93 and accompanying text.

232. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 513-20 (1985).

rates.<sup>233</sup> His justification for this proposal is that administrative agencies are more politically accountable than courts.<sup>234</sup> According to Pierce, if courts openly announced that the President must bear complete responsibility for any policy decision as to which Congress has not provided specific guidance, both elected branches would feel "pressure" to become more actively involved in supervising agency decisionmaking.<sup>235</sup>

Professor Pierce's argument contains a number of debatable assumptions,<sup>236</sup> but for present purposes the main question is whether he makes a persuasive case for using a reviewability standard analogous to the "law to apply" test. Certainly his desire to leave important policy decisions to politically accountable actors, rather than to unelected judges, is a valid goal. This goal, however, is also implicated in cases in which, although Congress has given *some* guidance, an alleged ambiguity in the statute gives rise to a dispute between an agency and a private party. Pierce recognizes this connection in his approving discussion of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>237</sup> which involved a statutory standard that he does *not* regard as "meaningless."<sup>238</sup> In other words, Pierce's political accountability rationale *always* militates against judicial review, except where a statute is essentially unambiguous. Even Professor Pierce does not seem ready for so drastic an abandonment of judicial review;<sup>239</sup> yet he fails to explain why the need for political accountability is more pressing in cases arising under "meaningless" statutes than in cases arising under statutes that are "meaningful" but nevertheless ambiguous. In this sense, his analysis does not provide a satisfying reason for making the applicability of section 701(a)(2) turn on whether or not the statute is "meaningless" — nor, by extension, on whether or not there is "law to apply." It offers no log-

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233. See *id.* at 474-78 (cataloguing "meaningless" statutes).

234. *Id.* at 520-21.

235. See *id.* at 521-24.

236. See Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 269-70 (questioning whether curtailment of judicial review actually would induce Congress to write more specific legislation); cf. Bunn, Irwin & Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 368-77 (suggesting, on the basis of a state-level case study, that a revitalized nondelegation doctrine would do little to encourage specificity in legislative drafting).

237. 467 U.S. 837 (1984), discussed in Pierce, *supra* note 232, at 494-95, 505-07.

238. See Pierce, *supra* note 232, at 494.

239. See *id.* at 514.

ical stopping point that would enable courts to distinguish between agency actions that should be unreviewable and agency actions that should be examined under normal (if deferential) standards of review.<sup>240</sup>

Of course, lower courts would have to follow the "law to apply" approach to section 701(a)(2) if Supreme Court precedents clearly mandated the test. Despite its lip service to the futility theory, however, the Court has never relied solely on that rationale to hold an agency action unreviewable. Both *Chaney* and *Doe* seemed to stress the absence of "law to apply,"<sup>241</sup> but a close study of the opinions reveals that the Court's reliance was partial and inconclusive.<sup>242</sup> Moreover, in *BLE* the Court ignored the *Overton Park* test and invoked section 701(a)(2) in a case in which there certainly was "law to apply."<sup>243</sup>

Why has the Court been so reluctant to discard an interpretation of section 701(a)(2) that embodies such a thoroughly unsupported distinction between the reviewable and the unreviewable? For one thing, the Court probably continues to believe in the *Overton Park* teaching that section 701(a)(2) should remain "very narrow." The "law to apply" test does tend to achieve that end, albeit crudely. In addition, part of the explanation may lie in the Court's sensitivity to the charge of "judicial lawmaking." Hesitation about usurping what is even arguably the province of Congress has been a hallmark of the

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240. In any event, the Pierce proposal seems too sweeping and inflexible to be defended solely on the basis of political accountability. For one thing, it apparently would foreclose judicial review when agencies with "meaningless" mandates issue *adjudicative* orders, such as FTC cease and desist orders and FCC license renewals and revocations. Yet presidential supervision of agency adjudication is uncommon and would be widely considered undesirable. See *Sierra Club v. Costle*, 657 F.2d 298, 407 & n.527 (D.C. Cir. 1981) (stating that "there is no inherent executive power to control the rights of individuals in [adjudicative] settings"). As regards many policy decisions, moreover, the likelihood that the President would suffer political reprisals if his administration made the wrong choice seems infinitesimal. Cf. *Conservative Era*, *supra* note 123, at 391 (remarks of Alan Morrison) (asking, "how many people in the world do you think are going to decide whom to vote for in 1988 based upon whether the Food and Drug Administration went after drugs or not in *Heckler v. Chaney*?"). In these contexts, the argument that the need to enhance the President's accountability outweighs any of the potential benefits of judicial review loses much of its force.

241. See *supra* notes 114-15 and accompanying text (discussing *Chaney*); notes 190-92 and accompanying text (discussing *Doe*).

242. See *supra* notes 121-43 and accompanying text (analyzing *Chaney*); notes 200-17 and accompanying text (analyzing *Doe*).

243. See *supra* notes 159, 168-69 and accompanying text.

Burger and Rehnquist years.<sup>244</sup> Thus the Court disables itself from developing a coherent unreviewability doctrine, by suggesting that it must leave the entire job to Congress.<sup>245</sup>

Curiously, however, in the related area of *statutory* preclusion of judicial review, the Court has been developing what might be considered a "common law of preclusion." A critical reading of recent case law under section 701(a)(1) of the APA, which gives effect to statutory preclusion provisions,<sup>246</sup> indicates that the Court tends to allow some issues to be precluded more readily than other issues. At the top of the scale, as *Doe* illustrates, the presumption against preclusion of constitutional grievances against an agency is practically irrebuttable.<sup>247</sup> The Court also has proved less willing to find preclusion in cases involving administrative rules than in cases involving agency adjudication,<sup>248</sup> and less willing to foreclose legal challenges than factual ones,<sup>249</sup> especially where the legal issues are not within the administering agency's expertise.<sup>250</sup> At the bottom of the

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244. For a few random examples of this pervasive theme, see *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-17 (1981) (restricting federal common law of nuisance); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 575-78 (1979) (revising test for implied private causes of action, so that focus is on congressional intent); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48 (1978) (holding that courts have no federal common law power to impose procedures on administrative agencies); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 894-98 (1982) (tracing drift towards literalism in statutory construction).

245. See *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (stating that "we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable").

246. 5 U.S.C. § 701(a)(1) (1988).

247. In addition to *Doe*, see, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (stating that a serious constitutional issue would arise if preclusion provision were read to deny a judicial forum for constitutional claims); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (holding that the prohibition of judicial review of Veterans' Administration decisions does not preclude judicial review of constitutional challenges to veterans' benefits legislation); *supra* note 215 (citing lower court cases).

248. Compare *Michigan Academy*, 476 U.S. at 674-78 (concluding that provision in Part B of the Medicare Act permits review of regulations) with *United States v. Erika, Inc.*, 456 U.S. 201, 206-11 (1982) (holding that the same provision forbids review of individual benefit determinations).

249. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (permitting ultra vires review of Clean Air Act regulations after statutory deadline, but not arbitrariness review). In the Veterans' Judicial Review Act, Congress heeded this distinction: it expressly authorized judicial review of legal issues while forbidding review of factual and law-applying issues. See *supra* note 5.

250. See *Traynor v. Turnage*, 485 U.S. 535, 541-45 (1988) (holding that statu-

hierarchy are issues of fact and application of law to fact, which the Court allows to be precluded more readily than any others.<sup>251</sup>

In most of these cases, the Court also found technical grounds for reading the statutes to support these results; thus the Court's lawmaking was peripheral and somewhat covert. Yet these holdings clearly have been informed by practical judgments about the relative importance of judicial review of various kinds of issues.<sup>252</sup> One would have been astonished if the Court had adopted any of the opposite distinctions — for example, if it had made factual contentions reviewable in a situation in which legal issues were unreviewable.

Thus the great irony of the Supreme Court's reviewability doctrine: the Court has engaged in obvious, if unacknowledged, lawmaking in cases arising under section 701(a)(1), where theoretically it is merely uncovering the will of Congress; but the Court disclaims a lawmaking role in cases arising under section 701(a)(2), which by its very nature is an open invitation to judicial creativity. The following section proposes a mode of analysis that would bring these two bodies of precedents into closer harmony with each other.

## B. A COMMON LAW OF UNREVIEWABILITY

The elevation of Antonin Scalia to the Supreme Court may prove to have been a crucial turning point in the development of section 701(a)(2). Justice Scalia's opinions in *BLE* and *Doe* suggest that courts should be creative in identifying appropriate cases for unreviewability, drawing upon "the 'common law' of judicial review."<sup>253</sup> My position is that, whatever one thinks of the results that Justice Scalia favored in those two cases, the

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tory bar to review of Veterans' Administrator's decisions on questions of law or fact under any law administered by the VA did not foreclose review of allegation that VA regulation violated Rehabilitation Act).

251. See *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985) (holding that civil servants may appeal denials of disability benefits on legal and procedural grounds but not on factual grounds).

252. See generally *infra* Part III. B. 3.

253. *Webster v. Doe*, 486 U.S. 592, 608-09 (1988) (Scalia, J., dissenting) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). This represents a change in Justice Scalia's view; earlier he had denounced the D.C. Circuit's departures from the "law to apply" test. See *supra* note 107 and accompanying text. Perhaps his change of heart occurred on the day when he found himself both *condemning* and *using* pragmatic analysis in the course of a single paragraph! See *California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., dissenting).

manner in which he analyzed section 701(a)(2) was essentially correct. The Supreme Court should acknowledge the common law role that it, in any event, obviously feels impelled to play. It could do so by replacing the formalistic *Overton Park* analysis with a pragmatic approach to section 701(a)(2).<sup>254</sup>

Under such an analysis, a court could legitimately consider a wide variety of historical, utilitarian, and prudential arguments in deciding whether to refrain from judicial review in a given case. Of course, individual judges should not have unfettered discretion to accept or reject any administrative case presented to the courts. The Supreme Court, and to a lesser extent lower courts, could establish case law rules declaring a broad class of agency actions unreviewable. Or, at times, the courts might prefer to resort, as the Supreme Court did in *Chaney*, to the weaker device of a "presumption,"<sup>255</sup> which implies that courts in subsequent cases may sometimes make reasoned departures from the general rule.<sup>256</sup> At still other times, a court might find the accepted rules and presumptions unhelpful and, therefore, embark on a fresh examination of competing policy issues.<sup>257</sup> Over time, various aspects of the law of unreviewability probably would fluctuate between rule and ad hoc decisions, as often occurs in subject areas governed by the common law.<sup>258</sup>

It would be unrealistic to suppose that we could predict with any specificity where the pragmatic approach would lead. Based on the existing case law under section 701(a)(2), however, one may expect that this approach to the "committed to agency discretion" doctrine would: 1) remain narrow in its scope; 2) usually be invoked in certain peripheral areas of ad-

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254. Although jurisprudential issues are largely beyond the scope of this Article, the mode of reasoning envisioned here is roughly similar to the philosophy of "legal pragmatism" or "practical reason" espoused by Daniel Farber and Philip Frickey. See Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341-49 (1988); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1639-56 (1987). For a critical review of the developing "practical reason" literature, see Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988).

255. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

256. See Schauer, *supra* note 94, at 544-48 (envisioning a model of "presumptive formalism").

257. See *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 623 n.10 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987), *discussed infra* notes 441-45 and accompanying text.

258. Cf. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-9 (1947) (describing characteristic rise and fall of common law rules).

ministrative action; and 3) shield legal issues from judicial scrutiny less often than factual and discretionary issues.

### 1. Narrow Application

In the unreviewability law of the future, the scope of the "committed to agency discretion" doctrine is likely to remain very limited. *Abbott Laboratories*, with its presumption in favor of the availability of judicial review,<sup>259</sup> is a well entrenched precedent<sup>260</sup> that reflects widely held convictions about the value of judicial review in our system of government. A standard account of the contributions of judicial review would read something like this: Scrutiny of administrative action by an independent judiciary is an integral part of the American checks and balances system — a powerful deterrent to abuses of power and an effective remedy when abuses occur.<sup>261</sup> By helping maintain public confidence that government officials remain subject to the rule of law, judicial review also bolsters the legitimacy of agency action.<sup>262</sup> The courts' supervision of agency action complements the oversight activities of political actors, who often have parochial interests at heart or are inaccessible, as a practical matter, to some victims of regulatory action or inaction.<sup>263</sup> Finally, judicial review can enhance the quality of administrative action by exposing partiality, carelessness, and perverseness in agencies' reasoning.<sup>264</sup>

In its recent statutory preclusion cases, however, the Supreme Court has stressed that the *Abbott Laboratories* pre-

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259. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967), discussed *supra* notes 57-58 and accompanying text.

260. For a full discussion, see *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-73 (1986).

261. See, e.g., Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937-38 (1988) (discussing the values implicit in the Constitution's separation of powers); Sunstein, *supra* note 52, at 655-56 (discussing the importance of judicial review in the administrative agency context); Note, *supra* note 127, at 785-88 (discussing the role of judicial review in maintaining separation of powers).

262. See, e.g., L. JAFFE, *supra* note 1, at 320 (stating that judicial review is "the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid"); Fallon, *supra* note 261, at 942 (noting that "Congress frequently provides for judicial review in part to secure an imprimatur of legitimacy for administrative action").

263. See, e.g., Levin, *supra* note 236, at 271-74 (discussing the interplay between judicial review and the democratic process).

264. See Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975) (describing beneficial effects of intensive judicial review of technically complex regulations).

sumption can be rebutted where a congressional intent to foreclose review is "fairly discernible."<sup>265</sup> By analogy, under the pragmatic approach to section 701(a)(2), the presumption likely will give way where the courts find sufficiently strong practical reasons to exercise self-restraint.

## 2. Kinds of Unreviewable Actions

Predicting the circumstances that would trigger application of section 701(a)(2) under a pragmatic approach is a highly speculative undertaking. The scholarly literature on the subject is exceedingly sparse. There is, of course, a burgeoning literature on the shortcomings of judicial review.<sup>266</sup> In general, however, these critiques, even if accepted at face value, do not seem readily adaptable to the effort to define the scope of the "committed to agency discretion" doctrine. For example, Professor Mashaw has mounted a powerful and widely noticed attack on judicial review of Social Security disability benefits decisions.<sup>267</sup> Claimants who have been denied disability benefits, however, have an explicit statutory right to judicial review;<sup>268</sup> abandonment of this judicial function would manifestly require legislative action. On another front, a growing body of scholarship suggests that agencies often refrain from launching worthwhile rulemaking proceedings because they are reluctant to generate the detailed explanatory statement and comprehensive factual record needed to satisfy a rigorous judicial "hard look."<sup>269</sup> This critique may indicate that courts should become more deferential when reviewing agency policymaking in technically sophisticated subject areas, but probably no one would seriously suggest that courts should treat all such policymaking as "committed to agency discretion."<sup>270</sup>

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265. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

266. See articles cited *supra* note 2.

267. J. MASHAW, *BUREAUCRATIC JUSTICE* (1983). Mashaw argues that courts' intervention in that realm does little to upgrade the overall quality of the disability system. *Id.* at 185-90. At the same time, it fosters inequality, because claimants who file appeals tend to win benefits, while many other equally deserving claimants will acquiesce in a denial of benefits because they lack the stamina and resources to litigate. See *id.* at 138-39.

268. 42 U.S.C. § 405(g) (1982).

269. See Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 391-93 & n.93 (1986); Mashaw & Harfst, *supra* note 2, at 294-99; Pierce, *supra* note 2, at 309-13.

270. Congress's demonstrable desire for a continuation of the judicial hard look in some of these areas would again be a major objection to such an abandonment of judicial review. See, e.g., *National Lime Ass'n v. EPA*, 627 F.2d

Next let us consider whether the case law provides more direction. Some courts have tried to resolve reviewability questions with balancing tests. Under the best known formula, originated by the First Circuit in *Hahn v. Gottlieb*<sup>271</sup> and used by other courts up until the time of *Chaney*,<sup>272</sup> availability of judicial review should depend on three factors: "first, the appropriateness of the issues raised for review by the courts; second, the need for judicial supervision to safeguard the interests of the plaintiffs; and third, the impact of review on the effectiveness of the agency in carrying out its assigned role."<sup>273</sup> The *Hahn* formula is roughly consistent with the pragmatic analysis under discussion here. Such a formula, however, is obviously too general and all-embracing to offer courts very much meaningful direction. Like *Abbott Laboratories*, *Hahn* furnishes a starting point for analysis, not a self-sufficient guideline.

Cases with a narrower focus may also be illuminating. Possibly the most reliable way to project the future of the common law of unreviewability is to examine several categories of agency actions that have been held unreviewable under section 701(a)(2) in the recent past.<sup>274</sup> One group of cases involves agency actions arising from unusually sensitive subject areas. Actions relating to foreign policy, military, and national security affairs are among the strongest candidates for being considered "committed to agency discretion."<sup>275</sup> Courts simply do not give these matters the same kind of "hard look" that domestic policy decisions routinely receive. This self-restraint rests on

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416, 452 n.127 (D.C. Cir. 1980) (quoting legislative history of 1977 Clean Air Act amendments).

271. 430 F.2d 1243, 1249 (1st Cir. 1970); see *supra* Part II. A.

272. *Intercity Transp. Co. v. United States*, 737 F.2d 103, 107 (D.C. Cir. 1984); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1044 (D.C. Cir. 1979). For a minor variation, see *Woodsmall v. Lyng*, 816 F.2d 1241, 1243-46 (8th Cir. 1987) (looking to "(1) whether the challenged action is of the type Congress intended be left to a reasonable exercise of agency expertise; and (2) whether the problem raised is one suitable for judicial determination" (quoting *Tuepker v. FmHA*, 708 F.2d 1329, 1332 (8th Cir. 1983)).

273. *Hahn*, 430 F.2d at 1249.

274. For overviews of the § 701(a)(2) case law, see 5 K. DAVIS, *supra* note 32, §§ 28:6-9; J. MASHAW & R. MERRILL, *supra* note 50, at 698-706.

275. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding denial of visa to alien unreviewable if a facially legitimate and bona fide reason was given to applicant); *United States v. Pink*, 315 U.S. 203, 230 (1942) (stating that the Executive's decision regarding recognition of foreign governments is conclusive in the courts); *Centeno v. Shultz*, 817 F.2d 1212, 1213-14 (5th Cir. 1987) (following *Mandel*), *cert. denied*, 484 U.S. 1005 (1988); *Khalsa v. Weinberger*, 779 F.2d 1393, 1398-1401 (9th Cir. 1985) (holding that military appearance regulations are not reviewable).

policies similar to those underlying the political question doctrine:<sup>276</sup> the courts' lack of information about foreign affairs, the confidentiality of much of that information, and the need to minimize the incoherence that results when American foreign policy is articulated by multiple voices. The desire to curtail judicial involvement in delicate subject areas also extends to certain corners of the domestic realm.<sup>277</sup> For example, the Federal Reserve Board's regulation of the nation's money supply has long been regarded as a function that courts could not possibly supervise effectively; therefore, they decline to attempt review.<sup>278</sup>

Another group of cases concerns informal, unstructured agency operations that are closely related to the agency's management of its workload and may not reflect conclusions on the merits of the petitioner's substantive claims. Such agency decisions frequently are made on grounds that courts cannot easily evaluate in a constructive way. *Chaney* and *BLE* exemplify this category. In adopting a limited bar to review of administrative prosecutorial discretion, *Chaney* relied on the abstract quality of the issues presented and on the problems inherent in judicial attempts to supervise agencies' resource allocation decisions.<sup>279</sup> In *BLE*, similarly, the Court was concerned about the practical problems presented by review of agency denials of reconsideration. Because agencies often fail to explain such denials (and the *BLE* Court was unwilling to impose a duty of explanation), judicial efforts to scrutinize their reasoning could be futile.<sup>280</sup> Moreover, precluding judicial review would encourage parties to make all of their arguments during the initial round of litigation, thus furthering the legal system's interest in finality of

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276. See, e.g., *Baker v. Carr*, 369 U.S. 186, 211-13, 217 (1962); *Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir.) (holding that suit challenging government's efforts to locate missing prisoners of war in Vietnam was nonjusticiable), *cert. denied*, 109 S. Ct. 390 (1988).

277. See *Padula v. Webster*, 822 F.2d 97, 101 (D.C. Cir. 1987) (holding FBI personnel decisions unreviewable except on constitutional grounds).

278. See *Huntington Towers, Ltd. v. Franklin Nat'l Bank*, 559 F.2d 863, 868-69 (2d Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *Raichle v. Federal Reserve Bank*, 34 F.2d 910, 915-16 (2d Cir. 1929). *But cf.* *Independent Bankers Ass'n v. Board of Governors*, 500 F.2d 812 (D.C. Cir. 1974) (following *Abbott Laboratories* and holding that Board regulation concerning check-clearing practices was subject to review). Restrictive application of standing principles has buttressed the Fed's substantial immunity from judicial supervision. E.g., *Reuss v. Balles*, 584 F.2d 461, 468-70 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978).

279. See *supra* notes 122-25 and accompanying text.

280. See *supra* notes 163-64 and accompanying text.

decisionmaking.<sup>281</sup>

Finally, courts likely will hold unreviewability appropriate when the petitioner challenges a phase of administrative activity that does not directly affect private interests.<sup>282</sup> An instructive case in this category is *Natural Resources Defense Council, Inc. v. Hodel*.<sup>283</sup> There, a statute required the Secretary of Interior to submit a report to Congress explaining "in detail" why he had rejected certain proposals concerning offshore oil and gas leasing.<sup>284</sup> The state of California asked the District of Columbia Circuit to review whether the Secretary's response had been sufficiently "detailed."<sup>285</sup> The court refused, observing that the "agency action" at issue was entirely unlike the rulemaking and adjudicative functions that courts normally review, and that the presumption of reviewability was "woefully inapposite" in this context.<sup>286</sup>

### 3. Partial Unreviewability

Another likely element of a pragmatic approach to section 701(a)(2) would be liberal use of the concept of partial unreviewability.<sup>287</sup> Thus, much as they have done in statutory preclusion cases,<sup>288</sup> courts applying section 701(a)(2) probably would treat many agency actions as reviewable on some grounds but not on others. Judges already tend to assume that agency actions that are to some extent "committed to agency discretion" remain reviewable for compliance with the Constitution.<sup>289</sup> A similar but broader principle would be that certain agency actions may be challenged on legal grounds, but not on abuse of discretion grounds. The cases show some support for this proposition;<sup>290</sup> indeed, it obviously bears some relationship

281. See *supra* notes 180-81 and accompanying text.

282. See *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (concluding that agency's failure to prepare impact statement for White House use, as required by Executive Order, is no basis for reversal).

283. 865 F.2d 288 (D.C. Cir. 1988).

284. *Id.* at 316.

285. *Id.*

286. *Id.* at 316-19; cf. *Industrial Safety Equip. Ass'n v. EPA*, 837 F.2d 1115, 1119 (D.C. Cir. 1988) (holding that report issued for educational purposes was not "agency action" within the meaning of the APA, and thus was not subject to judicial review); *American Trucking Ass'n v. United States*, 755 F.2d 1292, 1296-97 (7th Cir. 1985) (same).

287. For an explanation of this concept, see *supra* notes 54-56 and accompanying text.

288. See *supra* notes 247-51 and accompanying text.

289. See *supra* note 56 and accompanying text.

290. See *infra* Part IV. A. In cases involving foreign affairs, the political

to the prevailing "law to apply" theory. Before discussing that relationship more fully, it will be useful to explore why a pragmatic analysis could support reviewing certain agency actions solely on the basis of "law."

There can be several justifications for such a rule of partial unreviewability. First, courts traditionally have been regarded as the "final authorities" in interpreting statutory commands and other legal mandates;<sup>291</sup> their competence and legitimacy in that realm is widely accepted. When courts review factual and discretionary determinations, however, they confront issues on which the agency often has superior expertise and experience.<sup>292</sup> Indeed, even when unreviewability is not involved, a reviewing court generally examines an agency's factual and discretionary conclusions only to determine whether they are rational, not whether they are correct.<sup>293</sup> Accordingly, a decision not to exercise this judicial function has less tendency to subvert the principle of checks and balances than a refusal to review an agency's legal interpretations.<sup>294</sup>

Second, when a court resolves a legal issue, it characteristically writes an opinion interpreting the relevant statute or regulations; that decision provides lasting guidance to the agency and the public. A judicial opinion deciding whether an agency acted arbitrarily, when no explicit legal issues are raised, has

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question doctrine generally does not foreclose review based on alleged errors of law. *See, e.g.,* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986) (stating that the Court cannot shirk its responsibility to interpret statutes merely because the decision may have political overtones); *Romer v. Carlucci*, 847 F.2d 445, 461-63 (8th Cir. 1988) (en banc) (holding that military decisions regarding deployment of MX missiles are reviewable for compliance with NEPA); *South African Airways v. Dole*, 817 F.2d 119, 123 (D.C. Cir.) (holding that court may review propriety of order revoking permit of South African air carrier pursuant to Anti-Apartheid Act), *cert. denied*, 484 U.S. 896 (1987); *DKT Memorial Fund, Ltd., v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987); *Population Inst. v. McPherson*, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986).

291. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *SEC v. Sloan*, 436 U.S. 103, 118 (1978); Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 16-18 (1985).

292. *See* Breyer, *supra* note 269, at 394.

293. *See* Levin, *supra* note 27, at 253-60.

294. *See* Note, *supra* note 127, at 793. This is not to say that review of fact findings makes no contribution to separation of powers values. *See* Fallon, *supra* note 261, at 987-88; *cf.* Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 679-713 (1988) (defending judicial scrutiny of whether agency actions rest on "some evidence"). Thus, this distinction is basically one of degree.

more limited precedential value.<sup>295</sup> In an era when docket pressures weigh heavily on the federal judiciary,<sup>296</sup> the desire to make efficient use of judicial resources bolsters the case for foreclosing appeals that add to the courts' workload without contributing proportionately to the growth of the substantive law.<sup>297</sup>

Third, review of factual and discretionary issues imposes certain tangible costs on agencies that review of legal issues does not. When the reasoning underlying an agency's exercise of discretion is subject to judicial review, the agency has to furnish a written opinion; when factual premises are subject to review, the agency has to compile a record.<sup>298</sup> Thus, the threat of

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295. This comparison between the precedential effects of legal review and abuse of discretion review cuts two ways, as Professor Strauss has recently pointed out: if the court's legal interpretation is ill-advised, it may do more *harm* than a ruling on an individualized act of discretion. See Strauss, *supra* note 2, at 1131. He suggests that this danger helps to explain why the Supreme Court has recently been pressing the lower courts to defer to agencies' statutory interpretations, see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984), even as it also has ratified the use of a "hard look" in abuse of discretion review, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983). See Strauss, *supra* note 2, at 1129-31. One might accept Strauss's point as a reason for courts to be cautious before overturning agencies' statutory interpretations; but he does not press it to the counterintuitive extreme of suggesting that courts should sometimes engage in abuse of discretion review of an agency action while entirely ignoring claims that the agency exceeded its statutory authority.

296. See, e.g., FEDERAL COURTS STUDY COMMITTEE, REPORT 4-9 (1990) (exploring the results of the federal courts' caseload "crisis"); Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L. REV. 371, 377 (1988).

297. See Fallon, *supra* note 261, at 987; Note, *supra* note 127, at 792-93. In opposing legislation to permit judicial review of veterans' benefits decisions, Judges Morris Arnold and Stephen Breyer, speaking for the Judicial Conference of the United States, stressed competing claims on judges' time, the judiciary's lack of expertise on the technical issues involved, and the loss of uniformity that would result if a single agency's decisions were subject to review by courts scattered across the country. *Judicial Review of Veterans' Affairs: Hearing Before the House Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 202-03, 214-17 (1988). They did not oppose judicial review of constitutional questions and questions of statutory interpretation, however: "that fundamental duty is one the courts will always perform, regardless of the burden." *Id.* at 214.

298. An especially costly form of judicial review, from an agency's point of view, is an enforcement proceeding in which a private party challenges a rule that has long been in force. Often, by the time the agency starts preparing to defend the rule, the record is stale, and the staff that wrote the rule has scattered. To ameliorate this problem, some authorities favor imposing strict time limits on the right to challenge certain agency rules as unsupported by the record. See Recommendation No. 82-7 of the Admin. Conf. of the United States, 1 C.F.R. § 305.82-7 (1989); Verkuil, *supra* note 5, at 771-75. As these authorities

judicial review encourages greater formality in administrative decisionmaking.<sup>299</sup> Administrative decisions that for policy reasons should remain extremely informal might, therefore, be exempted from the full power of "hard look" review. Such logic, however, allows for judicial review that does not indirectly shape the agency's procedures — for example, review to determine whether the action on its face exceeds the agency's statutory authority.

Besides providing a rationale for one type of partial unreviewability, these practical distinctions between legal and factual issues suggest an attractive way to reconcile the formalist and pragmatic approaches to section 701(a)(2). Many authorities speak as though the "law to apply" test and a pragmatic approach are mutually exclusive,<sup>300</sup> but this is not necessarily so. A better view is the one that prevailed before *Overton Park*: the presence or absence of "law to apply" is *one relevant factor* that courts should weigh along with others in the pragmatic calculus.<sup>301</sup> This is the way in which the "law to apply" approach was actually used in *Chaney*<sup>302</sup> and *Doe*,<sup>303</sup> notwithstanding the Court's lip service to a futility approach.

Specifically, the *presence* of law against which the court can judge the plaintiff's claims should *usually* be a sufficient reason to permit judicial review of those claims; thus, the *Overton Park* analysis should control most cases. Nevertheless, courts should recognize the possibility that, in a relatively small number of cases, countervailing considerations will dictate that a claim of legal error should remain adjudicated.<sup>304</sup> On the

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recognize, however, claims that a rule exceeds the agency's statutory authority do not present the same practical problem, and the case for allowing delayed challenges to the rule on this ground is accordingly stronger. Cf. NLRB Union v. Federal Labor Relations Auth., 834 F.2d 191, 195-97 (D.C. Cir. 1987) (construing statute of limitations to reflect this distinction).

299. The judicially imposed requirement of a rulemaking record, for example, has greatly changed the nature of agency rulemaking. See, e.g., DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 262-67 (1979); Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 477-78 (1986).

300. See, e.g., *Woodsmall v. Lyng*, 816 F.2d 1241, 1244-45 (8th Cir. 1987); *Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of rehearing), *rev'd*, 470 U.S. 821 (1985); Fallon, *supra* note 261, at 980 n.349.

301. See Saferstein, *supra* note 63, at 380-82.

302. See *supra* Part II. C. 2.

303. See *supra* notes 200-17 and accompanying text.

304. The legal system's interest in finality might support this result. See *supra* notes 180-81 and accompanying text (discussing *BLE*); see also *supra* text accompanying notes 221-22 (suggesting that *Doe* opinion would have been

other hand, the *absence* of "law to apply" should militate to some degree against judicial review. Because abuse of discretion review remains feasible in such a case, however, the court should continue to weigh arguments for and against review before it decides how far, if at all, the action is "committed to agency discretion."

Distinguishing between legal and nonlegal issues is not, of course, the only approach to partial unreviewability worth considering. Under one alternative version, a court would explore not only whether the agency had correctly understood its legal authority, but also whether the agency had a facially plausible basis for its application of the law to the facts of an individual case. The Supreme Court adopted this approach, in effect, in *Dunlop v. Bachowski*.<sup>305</sup> This model would differ from full reviewability in that a court would not examine evidence to determine whether the agency's factual premises were supported; thus, the agency would not have to compile a record. This approach would, however, hold an agency to a slightly higher level of responsibility than if the court reviewed for legal error alone: the agency would have to know the law *and* be conscientious in addressing the private party's particular grievance.<sup>306</sup>

### C. THE PERILS OF PRAGMATISM

The reader perhaps has begun to suspect that the pragmatic approach to section 701(a)(2) is too vague and indeterminate to be useful. The approach does indeed place a great deal of trust in the courts' ability to muddle their way through unreviewability issues with scarcely any fixed reference points. This indeterminacy, however, should be primarily a short-run phenomenon. As already explained,<sup>307</sup> nothing in the nature of the pragmatic approach would prevent courts from generating rules and presumptions specifying categories of situations that

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more persuasive if Court had ruled that the CIA was bound by "law" that the judiciary should not enforce).

305. 421 U.S. 560, 571-74 (1975). The Court purported to be interpreting the standard of review prescribed by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 482 (1982). Outside the LMRDA context, the *Dunlop* standard has seldom been followed. For comprehensive discussion, see *Center for Auto Safety, Inc. v. Dole*, 828 F.2d 799, 809-15 (D.C. Cir. 1987), *vacated on rehearing*, 846 F.2d 1532 (D.C. Cir. 1988); *id.* at 820-26 (Bork, J., dissenting).

306. See *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir. 1987) (reversing Labor Department on the basis of *Dunlop*); *Shelley v. Brock*, 793 F.2d 1368, 1372-75 (D.C. Cir. 1986) (same).

307. See *supra* notes 255-58 and accompanying text.

should or should not be reviewable.<sup>308</sup> Over time, application of the "committed to agency discretion" doctrine could become progressively more manageable and predictable.

A more significant question to raise about the Article's proposal is substantive: whether the pragmatic approach presents unacceptable risks of misuse. Some observers might fear that the pragmatic analysis would lead to repeated and damaging assaults on the institution of judicial review — a disembowelment of the *Abbott Laboratories* principle.<sup>309</sup> The *BLE* case, which reached a highly debatable application of section 701(a)(2) in a disturbingly casual fashion,<sup>310</sup> may be a good illustration of this risk.

Others might suggest that the proposed approach would result in *too much* review. A sophisticated version of this argument might proceed as follows: Lower court judges tend to focus on the immediate potential benefits of judicial review in an administrative appeal; moreover, they typically assume that they will not misuse their power if they reach the merits of the agency's decision.<sup>311</sup> The Supreme Court, on the other hand, with its discretionary jurisdiction, can take a more global, detached view of reviewability issues; it is more likely and better able to consider the possible long-run institutional costs of judicial review. Over the long run, therefore, one should expect the Supreme Court to be more receptive to unreviewability claims than the lower courts.<sup>312</sup> If the Court gave an explicit

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308. In principle, threshold jurisdictional issues should be easy to administer, so that parties will not have to engage in expensive, exhausting battles that merely determine whether a court will reach the merits of the plaintiff's claims. For example, the Supreme Court's case law on standing has been cogently criticized for unnecessarily complicating administrative law with difficult questions of causation and redressability. See, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 58, § 5.4.7, at 161. The major problem in the standing cases, however, is that the central issues are factual and thus must be examined anew in each individual case. In contrast, arguments about the scope of the "committed to agency discretion" doctrine have usually turned on legal issues; if courts wish to simplify the doctrine, they certainly can develop bright-line rules that will have this effect.

309. Sunstein, *supra* note 53, at 478 & n.269; Note, *supra* note 113, at 1257.

310. See *supra* notes 174-79 and accompanying text.

311. See Christie, *supra* note 76, at 764 (stating that "[i]f we are uneasy about [discretionary] choices made by [others], we usually have no such qualms about the choices that we ourselves make. We almost inevitably seek to increase our freedom of action, that is to increase the ambit of our 'discretion,' rather than subject ourselves to 'artificial restraints'"); see also Shapiro, *supra* note 299, at 476-80 (discussing development of modern scope-of-review doctrine as a reflection of judges' social philosophies).

312. One should expect exceptions to this generalization: witness statutory

blessing to the flexible common law approach to section 701(a)(2), however, lower courts would continually resort to interest-balancing arguments to whittle away at the Court's precedents upholding government claims of unreviewability.<sup>313</sup> The Court, because of well-known limitations on its caseload, could not as a practical matter police these excursions.<sup>314</sup> Therefore, the argument might conclude, the Supreme Court should continue to demand adherence to the formal, "law to apply" approach to section 701(a)(2), because bright-line rules are the most effective means to minimize the maneuvering of lower court judges over time.<sup>315</sup>

These objections are plausible, and the final part of this Article responds to them. In order to avoid speculating about these concerns in the abstract, however, the next part offers a case study that puts both the advantages and risks of the pragmatic approach to the test of experience.

#### IV. VARIATIONS ON *CHANEY*: AGENCY INACTION AND JUDICIAL REVIEW

As noted earlier, the Supreme Court's opinion in *Heckler v. Chaney*<sup>316</sup> conspicuously left open a variety of questions about the reviewability of administrative inaction. To be sure, the main points in *Chaney* were clear: nonenforcement decisions were presumptively unreviewable, but the presumption could be overcome by statutory standards restricting the agency's en-

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preclusion cases in which the Court has intervened on the side of reviewability, such as *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985), and *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978). Even if one rejects the generalization entirely, however, it is clear that the present Supreme Court looks more favorably upon § 701(a)(2) claims than do the district courts and courts of appeals.

313. See *Conservative Era*, *supra* note 123, at 382 (remarks of Assistant Attorney General Willard) (accusing D.C. Circuit of using "practical and functional approaches . . . to evade the clear [formalist] teachings of their superior court"). The inspiration for this charge was Professor (now Justice) Scalia's analysis of the D.C. Circuit's evasion of Supreme Court jurisprudence on administrative procedure in the 1970s. See *id.* at 381 (citing Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345).

314. See Strauss, *supra* note 2, at 1096-1100.

315. See *id.* at 1095, 1117 (suggesting that at times "the Court's opinions on the merits may be influenced by its management dilemmas. It may choose outcomes that tend to make its control over the appellate courts more effective; or that tend to reduce the opportunities those courts might enjoy for adventurism").

316. 470 U.S. 821 (1985).

forcement discretion.<sup>317</sup> Throughout its opinion, however, the Court hinted at further exceptions to the presumption, without reconciling those hints with the “law to apply” analysis that it purported to follow.<sup>318</sup>

After *Chaney*, lower courts reviewing agency inaction have had to struggle with the issues raised by the Court’s manifest ambivalence. Interestingly, these courts have developed analyses that generally are consistent with the mode of pragmatic reasoning described in the previous section. This body of case law has been largely neglected in the academic literature, and deserves scholarly inquiry in its own right. Accordingly, this part reviews and critically evaluates several lines of cases. A larger objective of the discussion, however, is to assess the pragmatic approach to section 701(a)(2) by how well it has worked — that is, to evaluate it “on pragmatic terms!”<sup>319</sup>

Some lower court rulings on the reviewability of agency inaction are best understood as straightforward applications of the Court’s analysis in *Chaney*: in these cases, the presence<sup>320</sup> or absence<sup>321</sup> of statutory limits on agency enforcement discretion has been decisive. In addition, an occasional decision has extended *Chaney* to a type of agency inaction that the Court did not squarely address.<sup>322</sup>

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317. See *supra* notes 131-35 and accompanying text.

318. See *supra* notes 137-43 and accompanying text.

319. Farber, *supra* note 254, at 1349.

320. See, e.g., *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 456 n.1 (5th Cir. 1989) (holding *Chaney* inapplicable because statutes and regulations specify circumstances under which Army Corps of Engineers must issue permits for construction projects), *cert. denied*, 110 S. Ct. 720 (1990); *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988) (allowing judicial review based on specific duties that the Federal Land Policy and Management Act assigns to the Bureau of Land Management).

321. See, e.g., *Sierra Club v. Larson*, 882 F.2d 128, 132 (4th Cir. 1989) (refusing judicial review because the Highway Beautification Act does not provide standards concerning commencement of enforcement proceedings); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 686-87 (7th Cir. 1987) (noting that judicial review is inappropriate because § 503 of the Rehabilitation Act does not limit the Department of Labor’s discretion); *Marlow v. Department of Educ.*, 820 F.2d 581, 582-83 (2d Cir. 1987) (explaining that § 504 of the Rehabilitation Act does not allow judicial review because the statute does not provide guidelines), *cert. denied*, 484 U.S. 1044 (1988); *Harmon Cove Condominium Ass’n v. Marsh*, 815 F.2d 949, 952 (3d Cir. 1987) (finding decision of Secretary of the Army unreviewable because neither the Rivers and Harbors Act nor the Federal Water Pollution Control Act provides guidelines for enforcement).

322. Courts have, of course, drawn upon *Chaney*’s formalistic “law to apply” analysis in a wide range of contexts. See, e.g., cases cited *supra* notes 228-229. In the specific context of agency inaction, however, where one might have expected *Chaney*’s functional arguments against judicial review to carry influ-

What is most striking, however, is how rapidly and consistently the lower courts have limited the potential scope of *Chaney*. As the discussion in this part will show, all the situations the *Chaney* Court said *might* be distinguished were soon held distinguishable by lower courts. Other exceptions emerged without any encouragement from the *Chaney* opinion. One explanation for this trend is that lower courts accurately perceived the functional aspect of *Chaney* and applied it faithfully. An alternative explanation is that the Court's opinion, with all its intellectual weaknesses, simply was not compelling enough to overcome the courts' propensity to apply doctrines of unreviewability narrowly.

Some of these limitations on the *Chaney* rule were entirely predictable. Given that courts, under *Chaney*, could enforce *statutory* restrictions on enforcement discretion, as in *Dunlop*,<sup>323</sup> it was only a short step to hold that they also could enforce restrictions on enforcement discretion that were contained in a binding *regulation*.<sup>324</sup> Although judges often doubt that a particular regulation was intended to confine agency discretion,<sup>325</sup> they unanimously agree that a regulation that does have this intent may be enforced. Likewise, *Chaney* has not

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ence, there appear to be only two cases in which a court of appeals has extrapolated the *Chaney* principle to a situation that was not squarely covered by the Court's opinion. See *Falkowski v. EEOC*, 783 F.2d 252, 254 (D.C. Cir.) (applying the principle to a refusal to supply counsel to agency employee), *cert. denied*, 478 U.S. 1014 (1986); *Schering Corp. v. Heckler*, 779 F.2d 683, 686 (D.C. Cir. 1985), *discussed infra* note 437. Neither decision appears to have been influential.

323. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

324. See, e.g., *Center for Auto Safety, Inc. v. Dole*, 828 F.2d 799, 802-03 (D.C. Cir. 1987), *vacated on other grounds*, 846 F.2d 1532 (D.C. Cir. 1988); *id.* at 820 n.3 (Bork, J., dissenting); *Greater Los Angeles Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987) (collecting authorities).

325. Compare *Chong v. United States Information Agency*, 821 F.2d 171, 175-76 (3d Cir. 1987) (finding that rules permit review of USIA's failure to waive residency requirements) with *Singh v. Moyer*, 867 F.2d 1035, 1038-39 (7th Cir. 1989) (collecting cases disagreeing with *Chong's* interpretation of rule); see also *Arnow v. Nuclear Regulatory Comm'n*, 868 F.2d 223, 234-36 (7th Cir.) (finding NRC rules nonbinding), *cert. denied*, 110 S. Ct. 61 (1989); *Center for Auto Safety, Inc. v. Dole*, 846 F.2d 1532, 1534-35 (D.C. Cir. 1988) (stating that rules constraining enforcement discretion are generally enforceable, but Transportation Department rule in this case does not purport to limit agency's discretion). It should be clear that a nonbinding rule is not "law" and thus cannot furnish "law to apply." See *Massachusetts Public Interest Research Group v. Nuclear Regulatory Comm'n*, 852 F.2d 9, 17-18 (1st Cir. 1988); *Padula v. Webster*, 822 F.2d 97, 100-01 (D.C. Cir. 1987). *But see Cardoza v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985) (stating that an agency must follow rules upon which the public justifiably relies).

foreclosed review of allegations that an agency's enforcement practices are unconstitutional.<sup>326</sup>

Moreover, lower courts have been quick to act on *Chaney's* suggestion that the presumption of unreviewability could be overcome if an agency had " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>327</sup> One can easily argue that this kind of agency inaction violates the will of Congress, and prior cases often had allowed judicial review in such circumstances.<sup>328</sup> Finally, courts have not hesitated to review cases in which there was an express statutory right to judicial review of a nonenforcement decision.<sup>329</sup> Although *Chaney's* language does not specifically envision this situation, Justice Rehnquist's emphasis there on the primacy of Congress<sup>330</sup> dispels any serious doubt that the Supreme Court would endorse this development.

Other limitations were not as obviously appropriate under the reasoning of *Chaney*. These limitations, therefore, must be closely examined if one is to fully appreciate the lower courts' willingness to seize opportunities to undercut *Chaney*.

#### A. LEGAL QUESTIONS AND OTHER "REVIEWABLE" ISSUES

A question that arose immediately after *Chaney* was whether the presumption of reviewability would be overcome if a litigant alleged that an agency's refusal to act was based on an erroneous interpretation of substantive law. Challengers in

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326. See *Smith v. Meese*, 821 F.2d 1484, 1489-93 (11th Cir. 1987) (permitting judicial review of alleged racial discrimination in selection of persons to be investigated for election improprieties).

327. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); see, e.g., *Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm'n*, 782 F.2d 730, 745 (7th Cir. 1986) (finding FERC's abandonment of its function of ensuring just rates is reviewable); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 350-52 (8th Cir. 1985) (finding judicial review appropriate where the Department of Agriculture does not pay farmers under an act contemplating such payments), *cert. denied*, 478 U.S. 1012 (1986).

328. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 n.\* (1983) (Rehnquist, J., dissenting); *Office Employees Int'l Union Local 11 v. NLRB*, 353 U.S. 313 (1957); *United States v. Markgraf*, 736 F.2d 1179, 1182-83 (7th Cir. 1984); *Adams*, 480 F.2d at 1162.

329. See, e.g., *Democratic Congressional Campaign Comm. v. Federal Election Comm'n*, 831 F.2d 1131 (D.C. Cir. 1987) (allowing review pursuant to Federal Election Campaign Act, 2 U.S.C. § 437g(a)(8)(A) (1982)); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1083 n.2 (D.C. Cir. 1986) (same).

330. *Chaney*, 470 U.S. at 838.

this type of case do not argue that Congress furnished "law to apply" to the agency's *enforcement policy*; in fact, they may concede that the agency *could* have declined to act simply because it was busy with other projects. Nonetheless, the challenger claims that the reasons the agency *did* give for not acting betray a misunderstanding of its legal authority, and that there is at least "law to apply" to the agency's chosen rationale. This line of analysis builds upon the recognized scope-of-review principle that a court may uphold discretionary agency action only on the grounds relied on by the agency.<sup>331</sup> Such a case raises the question of the extent to which *Chaney* may be cut back by resort to the concept of partial unreviewability.

*Chaney* itself was, at best, equivocal about the propriety of such a loophole. Of course, in footnote four the Court observed that the plaintiffs did not allege "a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction."<sup>332</sup> By its terms, however, this dictum was limited to legal errors that could be characterized as "jurisdictional" in nature. Elsewhere in the opinion, moreover, Justice Rehnquist seemed to squarely reject the logical implications of this dictum. The plaintiffs had argued that there was "law to apply" to the FDA decision by pointing to the substantive provisions of the Food, Drug, and Cosmetic Act.<sup>333</sup> Justice Rehnquist brusquely responded that the substantive provisions of the Act were "simply irrelevant to the agency's discretion to initiate proceedings."<sup>334</sup> This flat pronouncement appeared to cast considerable doubt on the possibility that the Court would permit lower courts to review alleged errors of law in the nonenforcement context. The fact that the Court could easily have disposed of the plaintiffs' argument on narrower grounds<sup>335</sup> made its airy dismissal of that argument all the more striking.

The lower courts, however, have not displayed any inclination to accept these negative signals. In *UAW v. Brock*,<sup>336</sup> the

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331. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943); Levin, *supra* note 27, at 261. For a thorough discussion of how a focus on the challenger's contentions opens up avenues for applying *Chaney* narrowly, see Sunstein, *supra* note 52, at 675-83.

332. *Chaney*, 470 U.S. at 833 n.4.

333. *Id.* at 835-36 (citing 21 U.S.C. §§ 352(f)(1), 355 (1988)).

334. *Id.* at 836.

335. The Court could instead have pointed out that the Commissioner had not relied "solely" on his construction of the substantive provisions, as specified in footnote four. Prosecutorial discretion had been an independent ground for rejecting the plaintiff's request. *Id.* at 824.

336. 783 F.2d 237 (D.C. Cir. 1986).

Secretary of Labor declined to act on the union's complaint that an employer, Kawasaki, had failed to file reports on the activities of its supervisors and consultant, as allegedly mandated by the Labor-Management Reporting and Disclosure Act.<sup>337</sup> One reason for the agency's decision was that the Secretary recently had concluded that these activities were exempt from the reporting requirement.<sup>338</sup> The D.C. Circuit held that the Secretary's statutory interpretation was reviewable notwithstanding *Chaney*.<sup>339</sup> The panel stated that "courts are emphatically qualified to decide [statutory questions]. . . . Indeed, it seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law."<sup>340</sup> The court's reasoning represented a considerable expansion of *Chaney*, which had established only that the presumption against review would be overcome if the agency's enforcement policies were cabined by "law."<sup>341</sup> The court in *UAW* ignored that limitation. Instead, it imported the *Overton Park* version of the "law to apply" test into the inaction context, so that any properly presented legal issue raised by the plaintiff would support judicial review.

The *UAW* court did not address the propriety of the Secretary's enforcement decision regarding Kawasaki in particular, because that decision had rested on a mixture of discretionary and legal rulings.<sup>342</sup> Subsequently, however, the D.C. Circuit has assumed that an agency's decision not to act can be remanded if the decision rests on a misconstruction of law.<sup>343</sup>

One of the circuit's more curious decisions in this vein is *Safe Energy Coalition v. United States Nuclear Regulatory Commission*.<sup>344</sup> The plaintiffs asked the NRC to investigate a nuclear power company's program for handling its employees' safety-related complaints. They claimed that the program did not comply with the Commission's "Appendix B" safety regulations.<sup>345</sup> The Commission refused to act,<sup>346</sup> and the plaintiffs

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337. *Id.* at 241.

338. *Id.* at 242-43.

339. *Id.* at 245-46.

340. *Id.*; see also *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 622 (D.C. Cir.) (stating that "the holding in *Chaney* in no way precludes judicial review of agency decisions that are contrary to law"), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987).

341. See *supra* notes 131-35 and accompanying text.

342. *Id.* at 242-43, 245 n.9; see *infra* notes 368-71 and accompanying text.

343. See *Farmworker Justice Fund*, 811 F.2d at 622.

344. 866 F.2d 1473 (D.C. Cir. 1989).

345. *Id.* at 1474-75.

filed for review.<sup>347</sup> At first the court made the surprising assertion that *Chaney* could not be distinguished on the ground that the plaintiffs were seeking a "legal determination."<sup>348</sup> This statement, however, turned out to be only a bit of hairsplitting: although the "legal" nature of the plaintiffs' allegations did not keep the agency decision from being *presumptively* unreviewable, the court carefully examined the merits of those allegations to decide whether the *Chaney* presumption had been *rebutted*.<sup>349</sup> Accordingly, the court sustained the NRC's decision by finding that Appendix B did not apply to the nuclear power company's program.<sup>350</sup>

As these cases reflect, the D.C. Circuit has consistently — if obliquely — recognized a "legal issues" exception to the *Chaney* rule. Other circuits apparently endorse this exception.<sup>351</sup> Indeed, there appears to be *no* post-*Chaney* case in which a court has held administrative inaction unreviewable in the face of a clearly articulated claim that the agency had misconstrued its statutory authority. This pattern is all the more striking in light of the language in *BLE* suggesting, albeit in a different context, that an otherwise unreviewable agency decision does *not* become reviewable if the agency gave a legally flawed reason for its decision.<sup>352</sup> That signal (like the case itself, perhaps) has simply been ignored. Nor have lower courts shown interest in the question of whether particular legal issues were "jurisdictional" and thus squarely covered by footnote four of *Cha-*

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346. *Id.* at 1475-76.

347. *Id.* at 1474.

348. *Id.* at 1476-77.

349. *Id.* at 1477-80.

350. *Id.* at 1478.

351. See, e.g., *Montana Air Chapter No. 29, Ass'n of Civilian Technicians v. Federal Labor Relations Auth.* 898 F.2d 753, 756-57 (9th Cir. 1990) (holding that FLRA General Counsel's refusal to issue an unfair labor practice complaint is normally unreviewable, but may be reviewed if based on belief that agency lacks jurisdiction); *Davis Enters. v. EPA*, 877 F.2d 1181, 1185-86 (3d Cir. 1989) (stating in dictum that agency decisions that allegedly violate a statutory command are reviewable), *cert. denied*, 110 S. Ct. 1113 (1990); *Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir. 1987); *Dina v. Attorney Gen. of United States*, 793 F.2d 473, 476-77 (2d Cir. 1986) (stating that otherwise unreviewable agency actions may be reviewed for fraud, absence of jurisdiction, or unconstitutionality); *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 791-92 (9th Cir. 1986) (collecting cases holding that "claims that an agency has acted outside its statutory authority are reviewable even though the agency's decision on the merits might be unreviewable as committed to agency discretion"); *Electricities of N.C., Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985).

352. See *supra* notes 168-73 and accompanying text.

ney;<sup>353</sup> instead, they have been receptive to all kinds of claims of legal error.<sup>354</sup>

In retrospect, it is easy to see why courts have embraced this loophole so uniformly. The loophole has enabled them to hold the challenger's claim reviewable by finding "law to apply" in exactly the same fashion as the Supreme Court did in *Overton Park*;<sup>355</sup> *Chaney's* innovative revision of the "law to apply" formula could simply be overlooked. Furthermore, in similar pre-*Chaney* cases, the Supreme Court itself had often reached the merits without expressing any concern about potential reviewability difficulties.<sup>356</sup> Moreover, when an agency renders a legal interpretation in the form of a declaratory judgment, an advisory letter, or an even more informal pronouncement, judicial review has long been considered feasible.<sup>357</sup> Thus, as the District of Columbia Circuit noted in *UAW*, it would make scant sense to hold that the agency could shield the same legal interpretation from judicial scrutiny by simply inserting it into a decision refusing to initiate an enforcement proceeding.<sup>358</sup>

Most importantly, functional arguments strongly support an exception to *Chaney* that allows judicial review of a nonenforcement decision that allegedly resulted from an agency's legal error. In administrative law as a whole, judicial review of legal issues tends to be more reliable and legitimate, and less costly to accomplish, than review of factual or discretionary is-

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353. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

354. At various times in the history of administrative law, writers have proposed that so-called "jurisdictional" issues should be subjected to especially searching judicial review. None of these efforts has endured, and it is doubtful that any convincing justification for such a distinction can be devised. See Levin, *supra* note 32, at 371-78. Justice Brennan has recently defended the notion that an agency's interpretation of limits on its jurisdiction should receive less deference than other interpretations. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2446-47 (1988) (Brennan, J., dissenting). The Court has never adopted this distinction, however, as Justice Scalia convincingly demonstrated in the same case. See *id.* at 2443 (Scalia, J., concurring).

355. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-13 (1971); *supra* notes 67-72 and accompanying text.

356. See, e.g., *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137 (1984); *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395 (1975); cf. *NAACP v. Federal Power Comm'n*, 425 U.S. 662 (1976) (remanding agency refusal to engage in rulemaking because agency had misunderstood its statutory mandate).

357. See, e.g., *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986).

358. *UAW v. Brock*, 783 F.2d 237, 246 (D.C. Cir. 1986).

sues.<sup>359</sup> At the same time, *Chaney's* practical arguments *against* judicial review of nonenforcement decisions have relatively little force when legal issues are involved. If the agency says that it is declining to act because it lacks the legal authority to proceed, the agency's interest in flexibility in the allocation of its personnel and other resources is not implicated. Indeed, it would be odd for a court to defer to "prosecutorial discretion" if the agency thinks it has no discretion to exercise.

Actually, the theory of the *UAW* case can be extrapolated beyond purely legal issues, as the D.C. Circuit demonstrated in *Farmworker Justice Fund, Inc. v. Brock*.<sup>360</sup> In this case, the Secretary of Labor ordered a two-year suspension in a long-standing rulemaking proceeding involving a proposed requirement of field sanitary facilities for agricultural workers.<sup>361</sup> The Secretary indicated that the delay would give states time to address the problem.<sup>362</sup> Writing for a panel majority, Chief Judge Wald assumed *arguendo* that under *Chaney* such a decision is presumptively unreviewable.<sup>363</sup> She asserted, however, that the presumption is overcome if the agency writes an opinion resting on *reviewable reasons* of any kind.<sup>364</sup> Thus, only if the agency relied on a reason that judges could not evaluate — such as one involving allocation of scarce agency resources — would the court refrain from review. Accordingly, the *Farmworker* panel set aside the Secretary's decision: partly because of legal errors, but also because the Secretary's hope that state authorities would fill the gap appeared farfetched in light of the record — an abuse of discretion rationale.<sup>365</sup>

Ultimately, the *Farmworker* case became moot and was vacated while awaiting en banc review,<sup>366</sup> and therefore the panel decision does not carry precedential weight. It would not be surprising, however, to see another test of the "reviewable reasons" limitation on *Chaney* in the near future. Indeed, the D.C.

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359. See *supra* notes 291-99 and accompanying text.

360. 811 F.2d 613 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987).

361. *Id.* at 618.

362. *Id.* at 618-19.

363. *Id.* at 623 n.10. The court could reasonably have avoided the *Chaney* analysis entirely if it had analogized the Secretary's decision to a "negative order" case rather than to a "nonenforcement" case. See *infra* notes 439-45 and accompanying text.

364. *Id.* at 621 (stating that "*Heckler* assumes continued judicial review of agency inaction for abuse of discretion where the decision is based on factors that the court is competent to evaluate").

365. *Id.* at 631-33.

366. 817 F.2d 890 (D.C. Cir. 1987).

Circuit already adheres to that limitation in other contexts in which section 701(a)(2) is pleaded.<sup>367</sup> Acceptance of this reasoning would, of course, require the court to justify its decision to review without reference to the "law to apply" theory. The policy arguments for abuse of discretion review in the inaction context are not as strong as in the case of "legal" review. If, however, courts deem the policies behind *Chaney* to be even weaker, the reviewable reasons limitation may ultimately prevail.

Future debates over the scope of the "legal issues" limitation are also likely to focus on issues of causation and proof. One wonders whether to take seriously the Court's intimation in footnote four of *Chaney* that an alleged misinterpretation of law supports judicial review only if the agency reached its decision "solely" on that basis. Of course, if a challenged agency decision rested on alternative and independent grounds — on an allegedly erroneous legal ruling as well as on resource-allocation considerations — review is foreclosed, for that was the situation in *Chaney* itself.<sup>368</sup> Less obvious is the proper disposition of a case in which managerial considerations contributed to the agency's refusal to proceed, but might not have been sufficient in the absence of the alleged legal error. The court in *UAW* seemed to assume that judicial review should be foreclosed in this situation as well,<sup>369</sup> but that position is debatable. Under normal scope-of-review principles, when a court finds that an agency decision rested on a flawed rationale, the decision cannot stand unless the court is convinced the agency would have reached the same result anyway.<sup>370</sup> Similarly, agencies should not be permitted to shield their nonenforcement decisions from review by casually appending to them a boilerplate reference to prosecutorial discretion.<sup>371</sup>

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367. *Doe v. Casey*, 796 F.2d 1508, 1518 & n.35 (D.C. Cir. 1986) (dictum), *aff'd in part and rev'd in part sub nom. Webster v. Doe*, 486 U.S. 592 (1988); *Robbins v. Reagan*, 780 F.2d 37, 44-46 (D.C. Cir. 1985). The Supreme Court's reversal of *Doe* does not necessarily repudiate this argument. The Court assumed that only legal claims were presented, ignoring the entire issue of abuse of discretion review. *Doe*, 486 U.S. at 599-601.

368. *Chaney*, 470 U.S. at 824.

369. *See UAW v. Brock*, 783 F.2d 237, 245 n.9 (D.C. Cir. 1986) (noting that agency's decision not to act had been predicated on both discretionary and statutory grounds).

370. *See Levin*, *supra* note 27, at 261-62.

371. *See Conservative Era*, *supra* note 123, at 386-87 (remarks of Alan Morrison); *cf. American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 540 n.74 (1981) (stating that "[s]ince the Secretary had already presented an unauthor-

A related, and as yet unsettled, issue arises if an agency's decision not to commence enforcement proceedings is unexplained or poorly explained. One can read *Chaney* to mean that if an asserted legal error is not obvious from the face of the agency's opinion, the "presumption of unreviewability" remains un rebutted and the administrative decision must stand. On the other hand, normal scope-of-review principles authorize a court to remand a case if an agency has failed to explain its decision fully enough to permit judicial review.<sup>372</sup> If one strongly believes that a nonenforcement decision should be reversed if it rests on certain improper premises, such as mistaken assumptions about the agency's jurisdiction, it would be logical to allow courts some authority to investigate whether those premises underlie an ambiguous agency decision. At a minimum, courts presumably may enforce the APA's requirement that an agency's denial of a request to commence a proceeding be accompanied by a "brief statement of the grounds for denial."<sup>373</sup>

#### B. REFUSALS TO INITIATE RULEMAKING

Although *Chaney* explicitly left open "the question of agency discretion to invoke rulemaking proceedings,"<sup>374</sup> there

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ized reason for the guarantee provision, we decline to accept this 'boilerplate' statement as a sufficient determination").

372. See, e.g., *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 395-97 (1974); Levin, *supra* note 27, at 261-62.

373. 5 U.S.C. § 555(e) (1988); see *Chaney*, 470 U.S. at 841 & n.1 (Marshall, J., concurring in the judgment); *Dunlop v. Bachowski*, 421 U.S. 560, 594 (1975) (Rehnquist, J., dissenting); *Roelofs v. Secretary of Air Force*, 628 F.2d 594, 599-600 (D.C. Cir. 1980).

In the context of an agency's refusal to reopen a case (a situation to which § 555(e) by its terms does not apply), Justice Stevens has suggested that a court should simply presume that an unexplained decision rested on permissible discretionary considerations. *ICC v. Brotherhood of Locomotive Engineers (BLE)*, 482 U.S. 270, 291 n.4 (1987) (Stevens, J., dissenting). That presumption may be plausible, although in other contexts doubts about the basis of a decision below are sometimes resolved in favor of a court's ability to entertain an appeal. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (holding that in an appeal from an ambiguous state court judgment that may have rested on state grounds or federal constitutional grounds or both, Supreme Court will presume that federal ground was a significant enough element to support Court's review jurisdiction).

374. *Chaney*, 470 U.S. at 825 n.2. The Court erred in asserting that the case did not present such a question. Plaintiffs had asked for more than individual relief. They had also asked the FDA to "[p]lace in the Drug Bulletin an article advising that the [execution] drugs . . . are not approved" and to "[a]dopt a policy and procedure for the seizure and condemnation" of execution drugs. *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985).

were reasonable grounds for thinking that the courts might extend *Chaney* by declining to review agency refusals to engage in rulemaking ("nonpromulgation decisions"). Broadly speaking, the problem for a reviewing court in this situation is the same as the one Justice Rehnquist identified for nonenforcement decisions:<sup>375</sup> the agency's inaction may simply reflect the fact that the agency prefers to devote its limited resources to other areas. Furthermore, to the extent that *Chaney* rests on the notion that judicial review is less necessary when an agency has not coerced anyone, that point applies equally to nonpromulgation decisions. Significantly, Justice Marshall, in his separate opinion in *Chaney*, questioned whether the majority would be able to find any substantial differences between the two situations.<sup>376</sup>

Nevertheless, in *American Horse Protection Association v. Lyng (AHPA)*,<sup>377</sup> the D.C. Circuit adhered to its previous view<sup>378</sup> by holding that agencies' refusals to commence rulemaking are fully reviewable despite *Chaney*.<sup>379</sup> Judge Williams, writing for the court, conceded the strength of the above arguments for extending *Chaney*, but offered other reasons for

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Although these actions would not have created binding obligations, they would technically have been "rules" within the meaning of the APA. See Department of Labor v. Kast Metals Corp., 744 F.2d 1145, 1149-51 (5th Cir. 1984); Center for Auto Safety v. National Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983).

375. *Chaney*, 470 U.S. at 831-32.

376. *Id.* at 850 n.7 (Marshall, J., concurring).

377. 812 F.2d 1 (D.C. Cir. 1987).

378. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 815 (D.C. Cir. 1981). The court in *AHPA* did not rely directly on pre-*Chaney* precedents in finding nonpromulgation decisions to be reviewable, perhaps because it realized that those precedents could contribute little to the analysis. The court in *WWHT* had justified its position by relying on the *Abbott Laboratories* presumption of reviewability and on a fragment of legislative history. See *id.* at 814-16. After *Chaney*, however, any reliance on a presumption would clearly have begged the question of *which* presumption to use; and the legislative history cited by the court had always been rather suspect, for reasons well discussed in Sunstein, *supra* note 52, at 681.

Although *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), is often cited as having supported the reviewability of refusals to initiate rulemaking proceedings, it actually dealt with a different subject: whether a court may review an agency's failure to issue a rule *after* conducting a rulemaking proceeding. *Id.* at 1047. That is a much easier question, see *infra* Part IV. C. 1., and the court in *NRDC* itself was at pains to distinguish the two situations. See *id.* at 1045-47.

379. *AHPA*, 812 F.2d at 4. The Seventh Circuit has hinted at a contrary view, but only in a brief dictum. See *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 655 (7th Cir. 1986).

distinguishing nonenforcement decisions from nonpromulgation decisions.<sup>380</sup> In the first place, he said, the *Chaney* holding rested heavily on an analogy to the tradition of prosecutorial discretion.<sup>381</sup> This analogy, in turn, reflected the fact that nonenforcement decisions, like exercises of prosecutorial discretion, are "numerous" and "are typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis."<sup>382</sup> Nonpromulgation decisions, in contrast, "are likely to be relatively infrequent and more likely to turn upon issues of law."<sup>383</sup>

In addition, said the court, when an agency refuses to initiate rulemaking, the APA provides a "focal point" for judicial review, because it requires agencies to entertain petitions for the issuance of a rule (section 553(e)) and also requires them to explain the denial of such petitions in a written statement (section 555(e)).<sup>384</sup> The *Chaney* opinion, of course, had alluded to the absence of a "focus for judicial review" as a reason for not reviewing nonenforcement decisions.<sup>385</sup> Judge Williams concluded by pledging that, in any event, the court would overturn nonpromulgation decisions "'only in the rarest and most compelling of circumstances.'"<sup>386</sup>

Every one of the *AHPA* court's arguments was unpersuasive. First, Judge Williams presented no support for the proposition that nonpromulgation cases would be less prevalent than nonenforcement cases. It certainly is true that agencies receive — and consequently decline — requests for enforcement actions more often than rulemaking petitions.<sup>387</sup> The underlying policy goal, however, is to alleviate the practical burdens that judicial review can impose on both courts and agencies; therefore the relevant question appears to be whether *petitions for judicial review* are more likely to be filed in one situation than in the other. It is not at all clear that the number of persons who will seek review of nonpromulgation decisions under

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380. *AHPA*, 812 F.2d at 4.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* (discussing 5 U.S.C. §§ 553(e), 555(e)).

385. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see *supra* note 124 and accompanying text.

386. *AHPA*, 812 F.2d at 5 (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981)).

387. See Lunenburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 43.

*AHPA* is less than the number of persons who, in the absence of *Chaney*, would seek review of nonenforcement decisions.<sup>388</sup>

Similarly, Judge Williams did not justify his assertion that refusals to commence rulemaking are more likely to raise legal issues than refusals to commence enforcement proceedings. The difference between rulemaking and adjudication depends primarily on the number of people who will be affected by the proposed action.<sup>389</sup> On the other hand, the most important factor affecting the likelihood of a "legal" challenge is whether the agency is acting at the outskirts of its statutory authority, thus inviting a "legal" challenge, or squarely within its authority, in which case any court challenges are more likely to involve factual or policy issues. There is no obvious relationship between these two variables.<sup>390</sup> Indeed, even if legal issues will arise more often in nonpromulgation cases, the significance of this fact is questionable. For there *already* is an established exception to *Chaney* where legal issues are raised; thus, the principle adopted in *AHPA* is important only where an agency refusal to initiate rulemaking does *not* raise a discrete legal issue.<sup>391</sup>

The court's APA arguments also were strained. Although section 555(e) does require an agency to furnish a written explanation when it denies a rulemaking petition, Judge Williams failed to mention that it imposes exactly the same requirement

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388. In an unscientific but perhaps instructive investigation of this question, I examined the list of twenty-five lower court cases that Justice Marshall cited in *Chaney* as having been thrown into question by the majority opinion. See *Chaney*, 470 U.S. at 850 n.7 (Marshall, J., concurring). Refusals to issue rules were involved in eight of the twenty-five — a ratio that gives modest support to the court's generalization. A number of the cited cases, however, predated the general expansion of administrative rulemaking during the mid-1970s. Of the cases cited by Justice Marshall that had been decided after 1976, seven out of eight had involved requests for rulemaking! (The early non-promulgation case was *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); the recent nonenforcement case was *Carpet, Linoleum & Resilient Tile Layers Union, Local Union No. 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981).)

389. See 2 K. DAVIS, *supra* note 32, §§ 7:2-3.

390. It is interesting to observe that, contrary to what the court's hypothesis would predict, the merits issues in *Chaney* were almost entirely legal, see *Chaney v. Heckler*, 718 F.2d 1174, 1179-82 (D.C. Cir. 1983) (holding that the FDA had jurisdiction over lethal drugs), *rev'd*, 470 U.S. 821 (1985), while the merits issues in *AHPA* were largely factual, see 812 F.2d at 6 (holding that the Department of Agriculture failed to articulate the factual and policy bases for its decision, relied on questionable data, and misapprehended its statutory mission).

391. See *supra* Part IV. A.

when an agency denies a petition for enforcement action.<sup>392</sup> The only difference in the APA's treatment of the two types of petitions is that section 553(e) requires agencies to accept petitions for rulemaking. This difference, however, should not carry much weight: few agencies, if any, will *not* allow citizens to petition for individual enforcement action. Consequently, it is difficult to see a basis for the court's assertion that a non-promulgation decision offers more of a "focal point" for judicial review than a nonenforcement decision.<sup>393</sup>

The court's final suggestion, that review of nonpromulgation decisions can be kept manageable because the scope of review will be narrow, is more difficult to appraise. In the abstract, this appears to be an attractive compromise between the conflicting pulls of *Chaney* and *Abbott Laboratories*. When the *AHPA* court turned to the merits, however, it reversed the agency on the basis of a standard "hard look" analysis that was indistinguishable from many of the court's opinions that are governed by "normal" standards of review.<sup>394</sup> Of course, it never is easy for the reader of a judicial opinion to know how deferentially its author (let alone other panel members) approached the case. Nevertheless, the District of Columbia Circuit has yet to decide a nonpromulgation case in which the substance of its analysis would clearly have been different if the court had not been paying an "extra" measure of deference.<sup>395</sup> One need not question the court's good faith to suspect

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392. "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with *any agency proceeding*." 5 U.S.C. § 555(e) (1988) (emphasis added). See *Dunlop v. Bachowski*, 421 U.S. 560, 594 (1975) (Rehnquist, J., concurring in part and dissenting in part); *Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984) (concluding that agency's refusal to institute declaratory order proceeding was not committed to agency's discretion, in part because § 555(e) would provide a basis for review).

393. In any event, when Justice Rehnquist hinted in *Chaney* that nonenforcement decisions are difficult to review because of their lack of "focus," *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), he probably was not referring to the Court's need for a written explanation. The FDA in *Chaney*, after all, had provided just such an explanation. *Id.* at 824-25. (For an alternate interpretation of the "focus" language in *Chaney*, see *supra* note 125 and accompanying text.)

394. See *AHPA*, 812 F.2d at 5-7.

395. In addition to *AHPA*, see, e.g., *General Motors Corp. v. NHTSA*, 898 F.2d 165, 170-77 (D.C. Cir. 1990); *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1078-79 (D.C. Cir. 1989); *National Customs Brokers & Forwarders Ass'n of Am., Inc., v. United States*, 883 F.2d 93, 96-103 (D.C. Cir. 1989); *Lunenburg*, *supra* note 387, at 48 n.280 (citing other cases). *But cf.* *National Ass'n of Regulatory Util. Comm'rs v. Department of Energy*, 851

that this exceptional leniency is too elusive to matter very much in the overall debate over the reviewability of non-promulgation decisions.<sup>396</sup>

Of course, the *AHPA* exception does have a certain appeal. When one considers the matter in isolation from *Chaney*, there is a strong argument that review of nonpromulgation decisions is not unduly difficult.<sup>397</sup> Furthermore, the court did not mention the most obvious argument for distinguishing *Chaney*: that the need for judicial oversight of the policymaking process is more pressing than the need for judicial oversight of agencies' dispositions of individual complaints. By its nature, rulemaking usually affects many more people than adjudication. When an agency refuses to commence a rulemaking proceeding, therefore, the stakes are relatively high; society may simply be unwilling to trust such important matters to the unreviewed discretion of the bureaucracy.<sup>398</sup> Judges sometimes endorse unreviewability because of their reluctance to supervise "mundane" or "minor" agency decisions,<sup>399</sup> and that rationale has

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F.2d 1424, 1430 (D.C. Cir. 1988) (*NARUC*). In *NARUC*, the petitioners challenged an Energy Department cost allocation methodology, arguing that the agency should have developed the methodology by holding an APA rulemaking proceeding. *Id.* at 1430. The department's defense was that the methodology was merely an interpretive rule, exempt from APA requirements. *Id.* at 1430-31. The court declined to decide whether the agency's view was correct, stating that under *AHPA* it could sustain the agency by merely finding that the agency's view was a "reasoned" one. *Id.* at 1431. The *NARUC* example proves very little, however, because the court's reliance on *AHPA* was a serious blunder. *NARUC* was not a case of administrative inaction; it was a case in which the agency had acted, and the only issue was whether the agency should have used rulemaking procedure. *Chaney* and its progeny have nothing to do with that issue.

In any event, the question raised in the accompanying text is whether a court can fulfill *AHPA*'s pledge to apply a standard of review that is more lenient than other applications of the "arbitrary and capricious" test. Since APA compliance usually is reviewed de novo, the fact that the *NARUC* court found itself able to apply an unusually deferential standard in the APA context sheds little light on that question.

396. See *Lunenburg*, *supra* note 387, at 48-49.

397. *Id.* at 43-44.

398. See *Sunstein*, *supra* note 53, at 486 & n.305. For examples of major regulatory decisions that have come before the courts on appeal from denials of rulemaking petitions, see *Radio-Television News Directors Ass'n v. FCC*, 809 F.2d 860, 863 (D.C. Cir.) (per curiam) (ordering review of FCC's refusal to commence proceedings to abandon the fairness doctrine), *vacated*, 831 F.2d 1148 (1987); *Quincy Cable TV, Inc., v. FCC*, 768 F.2d 1434, 1447 n.29 (D.C. Cir. 1985) (discussing "must-carry" rules for cable systems), *cert. denied*, 476 U.S. 1169 (1986).

399. See *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring) (asserting that "[i]t is entirely permissible to presume that Congress has

much less force in a nonpromulgation case than in a nonenforcement case.

Without some refinements, however, the *AHPA* principle may prove difficult to administer in an evenhanded way. One can foresee puzzling linedrawing problems. Suppose a citizen urges an agency to address a given problem, without specifying what action it should take: should this request be interpreted as seeking a rule or an individual enforcement proceeding? What if the citizen suggests that the agency employ both kinds of remedies, as was the case in *Chaney* itself?<sup>400</sup> Perhaps the best solution lies somewhere between the two poles of *Chaney* and *AHPA*: courts ultimately may decide that nonpromulgation decisions should be reviewable under some circumstances in which nonenforcement decisions would not be, but not under all circumstances.<sup>401</sup>

What is most striking about the *AHPA* principle is that it

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not intended courts to review such mundane matters" as "[i]ndividual, isolated nonenforcement decisions"); compare *United States v. Erika, Inc.*, 456 U.S. 201, 210 (1982) (holding that Congress precluded review of the amount of individual Medicare Part B determinations "in order to avoid overloading the courts with quite minor matters'") (quoting legislative history) with *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680 & n.11 (1986) (contrasting "quite minor matters" with the "substantial" issues presented by challenges to Medicare regulations, which remained reviewable). Some language in *Chaney* can be read to imply that the magnitude of the need for judicial review is irrelevant, but close scrutiny of the opinion refutes that interpretation. See *supra* note 136.

400. See *supra* note 374.

401. One possible solution would be to make the reviewability of a nonpromulgation decision depend on the extent to which the agency has compiled a full record and explained its reasons for denying the petition for rulemaking; a court would make an ad hoc judgment about whether it felt it could deal meaningfully with the regulatory issues. See *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1047 n.19 (D.C. Cir. 1979) (quoted *supra* note 176). An attractive feature of this solution is that the petitions the agency takes most seriously at the administrative level would stand the greatest chance of being reviewed. To that extent, this solution is grounded in a healthy respect for the agency's interest in controlling its agenda.

One flaw in this case-by-case approach, however, is that its test for reviewability would be almost completely subjective. Because parties would be unable to predict in advance whether a court would deem the agency's decision reviewable, they would have to file briefs on the merits in nearly every case. Similarly, this solution would do little to save time for judges, because courts would have to probe deeply into the merits in order to decide whether the record was in sufficiently good shape to permit review of the particular contentions advanced by the plaintiff. On balance, therefore, this alternative approach may compare unfavorably to the D.C. Circuit's present approach: it might be only slightly less burdensome than the *AHPA* rule, and it certainly would be more complicated.

has become established in the D.C. Circuit without any visible controversy. Despite serious weaknesses in the opinion, the court of appeals — which is intimately familiar with *Chaney* and certainly has its champions of agency autonomy<sup>402</sup> — has been content to allow Judge Williams' position to stand.<sup>403</sup> Notice, in particular, that the “law to apply” test was never mentioned in *AHPA*; Judge Williams explained and distinguished *Chaney* on functional grounds alone.<sup>404</sup> That this line of reasoning occasioned no public challenge says a great deal about the D.C. Circuit's understanding of — and regard for — the Supreme Court's opinion.

### C. ALREADY-COMMENCED PROCEEDINGS

*Chaney* dealt with an agency's refusal to *commence* proceedings, but the subject of “administrative inaction” can crop up in a variety of other settings as well. This section explores some of the other facets of that phenomenon and how *Chaney* bears on the courts' responses to them.

#### 1. Negative orders

The easiest case involves the so-called “negative order,” in which an agency conducts an entire proceeding, examines a regulatory problem on the merits, and then decides for substantive reasons to do nothing. The Supreme Court has recognized the reviewability of the negative order for fifty years.<sup>405</sup> The Court's decision in *Chaney* almost certainly leaves the law unchanged in this respect.<sup>406</sup> After all, judicial review of the neg-

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402. See *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 523-27 (1988) (panel discussion) (remarks of Chief Judge Wald) (noting the “court's contributions . . . in the area of insulating agency inaction from judicial challenge”).

403. *E.g.*, National Customs Brokers & Forwarders Ass'n of Am. Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989); Shipbuilders Council of Am., Inc. v. United States, 868 F.2d 452, 456 n.3 (D.C. Cir. 1989) (dictum).

404. See *supra* notes 377-86 and accompanying text.

405. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 142-43 (1939); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.17 (1st ed. 1958); see also *City of Chicago v. United States*, 396 U.S. 162, 165-67 (1969) (holding that ICC decision to take no action to prevent rail service termination was reviewable, although initial refusal to investigate would not have been). Without discussing reviewability, the Court has often reviewed negative orders on the merits. See, *e.g.*, *United States v. Rutherford*, 442 U.S. 544 (1979) (reviewing FDA's refusal to exempt from regulation drugs for the terminally ill); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 447 (1978) (reviewing Treasury department's finding that no action was required on a countervailing duty claim).

406. See *Kemmons Wilson, Inc. v. FAA*, 882 F.2d 1041, 1045-46 (6th Cir.

ative order threatens none of the policies underlying *Chaney*.<sup>407</sup> It does not implicate the courts' limited ability to supervise agencies' choices about the allocation of their resources; by the time the petition for review is filed, the resources will already have been expended. Instead, the petitioner will simply argue the merits, and there certainly will be "law to apply" to that question (assuming that there would have been law to apply if the agency had acted affirmatively). In addition, the agency's previous decision to conduct the proceeding will reflect its view that the problem is substantial, thus alleviating concerns about interference with prosecutorial discretion.<sup>408</sup> Finally, the agency presumably will have compiled a record and written an opinion explaining its decision, thus providing a "focus" for the court's review.<sup>409</sup>

## 2. Delay

A less clear-cut problem, one might have thought, is whether *Chaney* casts doubt on the power of a court to require an agency to complete an excessively protracted proceeding. Prior to *Chaney*, the courts' power to rectify administrative delay under some circumstances was well established.<sup>410</sup> The prevailing approach was elaborately stated by the D.C. Circuit in 1984 in *Telecommunications Research & Action Center v. FCC (TRAC)*.<sup>411</sup> Writing for the court, Judge Edwards announced a "rule of reason," consisting of six equitable factors that the

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1989); *Williams Natural Gas Co. v. Federal Energy Regulatory Comm'n*, 872 F.2d 438, 443 (D.C. Cir. 1989); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1485 (D.C. Cir. 1985) (dictum); see also *Consumers Union of United States v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986) (Scalia, J.) (stating that when FTC adopted rule but failed to include provision sought by petitioners, its decision was not equivalent to a failure to commence rulemaking; holding that court should review rationality of agency's choice in light of suggested alternatives).

407. Cf. *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1239-40 (D.D.C. 1987) (explaining why a decision not to adopt a rule, following a rulemaking proceeding, should be evaluated under the normal arbitrary-capricious standard of review).

408. See *City of Chicago*, 396 U.S. at 166.

409. See *Williams Natural Gas*, 872 F.2d at 443; *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979).

410. See *NLRB v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 725 n.7 (1984) (per curiam); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980). See generally Eisner, *Agency Delay in Informal Rulemaking*, 3 ADMIN. L.J. 7, 12-31 (1989) (undertaking a comprehensive treatment of the law on judicial review of agency delay); Levin, *supra* note 27, at 289-90 (providing a concise summary of same topic).

411. 750 F.2d 70 (D.C. Cir. 1984).

courts should weigh in deciding whether a given agency's delay was unreasonable.<sup>412</sup>

Once *Chaney* had held that much agency inaction was "presumptively" beyond judicial correction, however, one might have supposed that the law on unreasonable delay would also be affected. After all, delay cases implicate some of the core concerns of *Chaney*: the judiciary's limited capacity to decide whether the agency should be devoting its resources to the matters sought by the plaintiff, as opposed to other matters; the absence of "law" to guide the court's deliberations;<sup>413</sup> and the absence of a "focus" for review, such as an actual agency decision would provide.<sup>414</sup>

The lower courts, however, have refrained from extending *Chaney* to cases involving allegedly unreasonable delay. Instead, they have continued to decide these cases in much the same fashion as they did before *Chaney*. Sometimes courts have ordered immediate agency action,<sup>415</sup> sometimes they have expressed concern but limited themselves to warnings,<sup>416</sup> and sometimes they have found the agency's pace reasonable.<sup>417</sup>

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412. According to *TRAC*, the court should (1) apply a rule of reason, (2) look to statutory guidance if available, (3) be especially vigilant when human health and welfare are at stake, (4) consider competing priorities of the agency, (5) consider the interests prejudiced by delay, and (6) not require a showing of agency impropriety. *Id.* at 80.

413. Even when Congress has directed an agency to take action by a specific date, reviewing courts have not always treated a missed deadline as conclusive on the question of whether there has been unreasonable delay. See Abbott, *The Case Against Federal Statutory and Judicial Deadlines*, 39 ADMIN. L. REV. 171, 178-79 (1987). As to whether the APA itself furnishes "law to apply," see *infra* note 423 and accompanying text.

414. See *supra* notes 114-15, 122-25 (discussing these core concerns in *Chaney*).

415. See, e.g., *United Steelworkers v. Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987) (directing OSHA to issue, within 60 days, rule governing labeling of hazardous materials by nonmanufacturing industries); *Public Citizen Health Research Group v. Commissioner, FDA*, 724 F. Supp. 1013, 1022 (D.D.C. 1989) (ordering FDA to issue tampon absorbency labeling rule within 2 months).

416. See, e.g., *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (per curiam) (stating that OSHA's proposed timetable to include a short-term exposure limit in its ethylene oxide rules "treads at the very lip of the abyss of unreasonable delay").

417. See, e.g., *Sierra Club v. Thomas*, 828 F.2d 783, 797-99 (D.C. Cir. 1987) (holding that EPA's deliberations on fugitive emissions regulations in strip mining were not unusually delayed after three years); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1091 & n.17 (D.C. Cir. 1986) (finding justified the FEC's two-year disposition of Congressman's complaint); *Oil, Chemical & Atomic Workers v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (upholding MSHA's two year timetable to make rules to protect miners from radon exposure).

They have not, however, been fazed by the vagueness of the *TRAC* formula, or by the inevitable shortcomings of the agency record on appeal, or by the hazards of second-guessing the agency's resource-allocation and other managerial judgments. Instead of supporting a "presumption against judicial review," these considerations have served as mere prudential factors counseling judicial restraint in the resolution of unreasonable delay claims *on their merits*.

Indeed, the lower courts have scarcely deemed the potential relevance of *Chaney* to delay cases worthy of discussion. The District of Columbia Circuit briefly mentioned the issue in *Oil, Chemical & Atomic Workers v. Zegeer*.<sup>418</sup> The court, however, did not come to grips with *Chaney's* analysis. Rather, it simply noted that the two situations were not the same and went on to assume that *TRAC* was still good law.<sup>419</sup>

What explains the absence of efforts to apply *Chaney* in delay cases?<sup>420</sup> Of course, section 706(1) of the APA specifically contemplates court orders that "compel agency action . . . unreasonably delayed."<sup>421</sup> The same clause, however, also envisions judicial relief from "agency action unlawfully withheld,"<sup>422</sup> and yet *Chaney* establishes that this provision is qualified by the "committed to agency discretion" language of section 701(a)(2). Why then have lower courts ignored the possibility that section 701(a)(2) also limits the delay provision of section 706(1)?<sup>423</sup> Probably part of the reason is that they are essentially unconvinced by the fundamental premises of *Chaney*. Not being under pressure from the Supreme Court to ex-

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418. 768 F.2d 1480, 1484 (D.C. Cir. 1985).

419. *See id.*

420. The issue is open in the Supreme Court. In *Brock v. Pierce County*, 476 U.S. 253 (1986), the Court indicated that a court could invoke § 706(1) to expedite the Secretary of Labor's consideration of a complaint that a CETA grant recipient had misspent funds. *See id.* at 260 n.7. In doing so, however, the Court noted that the matter clearly was not "committed to agency discretion," because the statute said that the Secretary "shall" act within 120 days. *Id.*

421. 5 U.S.C. § 706(1) (1988).

422. *Id.*

423. One can argue that the APA differentiates inaction from delay, in that it devotes an additional provision to the latter. 5 U.S.C. § 555(b) (stating that "within a reasonable time, each agency shall proceed to conclude a matter presented to it"); *see* *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76-77 (D.C. Cir. 1984). This provision, however, would not seem to contribute any more "law to apply" than § 706(1) does. Perhaps a better argument is that the precise wording of § 706(1) — "unlawfully withheld or unreasonably delayed" — implies that courts should rely on "law" in inaction cases (as *Chaney* indicates) and "reason" in delay cases.

tend that opinion, lower courts have not gone out of their way to find an opportunity to do so.

### 3. Midstream Dismissals

Some exceptionally subtle problems are posed by “midstream dismissal” cases — those in which an agency drops a case while administrative proceedings are under way but before they have ended. Perhaps such a case should be compared with *Chaney* — an exercise of enforcement discretion that the courts may not review. The agency’s decision may, after all, rest on the same type of managerial considerations that *Chaney* said courts cannot evaluate.<sup>424</sup> Alternatively, the decision could be analogized to a negative order case.<sup>425</sup> The decision may rest on conclusions that the agency reached about the merits while the case was alive. At this time, no consistent judicial response to the midstream dismissal problem has yet emerged.

Two recent Supreme Court decisions are pertinent. In *Cuyahoga Valley Railway v. United Transportation Union*,<sup>426</sup> the Court held that the Occupational Safety and Health Review Commission could not review the Secretary of Labor’s withdrawal of a citation accusing an employer of safety violations.<sup>427</sup> Then, in *NLRB v. United Food & Commercial Workers Union Local 23*,<sup>428</sup> the Court held that the General Counsel of the NLRB has unreviewable discretion to withdraw an unfair labor complaint before a hearing occurs.<sup>429</sup> The Court observed that an official who has unreviewable discretion to determine whether to issue a citation should logically have final authority over whether to withdraw it,<sup>430</sup> and that a contrary rule would constrain the government’s ability to negotiate settlements.<sup>431</sup>

Both *Cuyahoga* and *United Food Workers*, however, differ from many other midstream dismissal cases in a vital respect. The Occupational Safety and Health Act<sup>432</sup> and the National Labor Relations Act<sup>433</sup> utilize the “split-enforcement” model of

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424. See *supra* notes 122-23 and accompanying text.

425. See *supra* Part IV. C. 1.

426. 474 U.S. 3 (1985) (per curiam).

427. *Id.* at 7.

428. 484 U.S. 112 (1987).

429. *Id.* at 126; see also *International Bhd. of Boilermakers Local 6 v. NLRB*, 872 F.2d 331, 334 (9th Cir. 1989) (extending *United Food Workers* unreviewability beyond the commencement of a hearing).

430. *United Food Workers*, 484 U.S. at 126.

431. *Id.* at 127-28; *Cuyahoga*, 474 U.S. at 7.

432. 29 U.S.C. §§ 651-678 (1982).

433. *Id.* §§ 151-169 (1982).

administrative enforcement: prosecution decisions are vested in one entity, adjudication in another.<sup>434</sup> Thus it was natural for the Court to view the Secretary of Labor and the NLRB's General Counsel as prosecutors, for that is the only role they play in the adjudicatory process. In the usual regulatory scheme, however, the decision whether to commence a proceeding and the ultimate decision on the merits are both made by the agency head. When such an agency decides to terminate a case, *Cuyahoga* and *United Food Workers* are weak authority for the proposition that courts should view the action as a prosecutorial decision rather than a merits decision.

Furthermore, any fixed rule that a midstream dismissal is as unreviewable as a refusal to commence proceedings would lead to paradoxical results. As noted, courts continue to assert the power to force an agency to complete a proceeding that they deem unreasonably delayed.<sup>435</sup> It would be anomalous to maintain that the courts can feasibly review a proceeding while it is pending, but not after it has been dropped. Indeed, judicial review of the midstream dismissal case seems *more* manageable than review of the delay case: at least the agency has *acted*, and thus the court can examine a tangible disposition of the matter.

To the extent that any pattern in the cases on reviewability of midstream dismissals can be discerned, much appears to depend on the court's perception of the rationale behind a midstream dismissal. If the case has developed to the point that there is a substantial record, and the agency prepares an opinion explaining the dismissal, a court is likely to assume that the action is a substantive decision that should be reviewed on the merits.<sup>436</sup> On the other hand, if the dismissal occurred soon af-

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434. See Occupational Safety and Health Act § 10, 29 U.S.C. § 659 (1982) (providing that Secretary of Labor brings enforcement actions, but Occupational Safety and Health Review Commission adjudicates them); National Labor Relations Act § 3(d), 29 U.S.C. § 153(d) (1982) (providing that General Counsel has final authority over issuance of complaints that will be adjudicated by the Board). See generally Johnson, *The Split-Enforcement Model: Some Conclusions From the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (discussing the OSHA split-enforcement setup).

435. See cases discussed *supra* notes 415-17 and accompanying text.

436. See *Wisconsin v. Federal Power Comm'n*, 373 U.S. 294, 308 (1963) (reviewing termination of rate proceedings for abuse of discretion); *Arctic Slope Regional Corp. v. Federal Energy Regulatory Comm'n*, 832 F.2d 158, 166-68 (D.C. Cir. 1987) (same), *cert. denied*, 109 S. Ct. 175 (1988); *Association of Businesses Advocating Tariff Equity v. Hanzlik*, 779 F.2d 697, 701-02 (D.C. Cir. 1985) (same); see also *Brandenfels v. Day*, 316 F.2d 375, 379-80 (D.C. Cir.) (supporting reviewability), *cert. denied*, 375 U.S. 824 (1963). If a case is dismissed

ter the proceeding was commenced, the agency action likely will be regarded as an unreviewable exercise of *Chaney*-like prosecutorial discretion.<sup>437</sup>

This timing distinction, however, has never been articulated in the cases. Moreover, even if it were adopted, it is hardly a principle that courts could apply with much precision. Many, if not most, midstream dismissals result from a combination of factors, some of which the agency may not choose to acknowledge.<sup>438</sup> Nevertheless, the case law probably will continue to be shaped in part by judges' intuitions about whether a given dismissal results from managerial considerations or from substantive regulatory policy views. For the immediate future, judicial flexibility in this area may be the least unattractive approach available.

#### 4. Classification Problems

Obviously, the categories discussed in this section — negative order, delay, midstream dismissal — are theoretical constructs. In practice, they will not always be easy to distinguish from each other.<sup>439</sup> After all, they all involve a *lack* of agency activity. The absence of visible activity might be interpreted to

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when it is virtually complete, the court may denounce the dismissal as an attempt to evade the responsibility of decision on the ultimate issues, and may order the agency to complete the case. See *Minneapolis Gas Co. v. Federal Power Comm'n*, 294 F.2d 212, 215 (D.C. Cir. 1961). Courts use this approach sparingly, however. See *Wisconsin v. Federal Power Comm'n*, 373 U.S. at 311 (distinguishing termination of proceeding due to a stale record from "a case in which the Commission has walked right up to the line and then refused to cross it"); *Arctic Slope*, 832 F.2d at 164-66 (holding *Minneapolis Gas* inapplicable because case was "regrettably far from complete" when FERC terminated it).

437. See *Schering Corp. v. Heckler*, 779 F.2d 683, 685-85 (D.C. Cir. 1985) (holding that FDA's decision to settle three-month-old seizure action against manufacturer was unreviewable under *Chaney*); cf. *North Carolina Utils. Comm'n v. Federal Energy Regulatory Comm'n*, 653 F.2d 655, 668-69 (D.C. Cir. 1981) (finding Commission's action not reviewable where it conducted preliminary inquiry into pipeline's gas supply, but declined to take further enforcement measures).

438. Consider the disagreement between the majority and dissenting opinions in *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir.), *vacated as moot*, 817 F.2d 898 (D.C. Cir. 1987), over whether or not the Secretary's abandonment of rulemaking proceedings concerning sanitary facilities for agricultural workers was significantly based on resource allocation considerations. Compare *id.* at 623 n.11 (Wald, C.J.) (concluding that it was not) with *id.* at 638-40 (Williams, J., dissenting) (concluding that it was).

439. See *Sierra Club v. Thomas*, 828 F.2d 783, 793-94 (D.C. Cir. 1987) (noting that a court may view agency inaction as effectively final action, as abdication of duty, or as unreasonable delay).

mean either that the agency refuses to act (inaction) or that it has not acted *yet* (delay).<sup>440</sup> Obviously it is troubling to make reviewability turn on judicial guesswork about the agency's intentions, which are not susceptible of direct proof. Even if the agency conducts a minimal investigation and then declares that it will take no further action, one could characterize its decision either as the product of a brief proceeding (reviewable as a final agency action), or as a refusal to commence a proceeding (unreviewable under *Chaney*).

*Farmworker Justice Fund, Inc. v. Brock*<sup>441</sup> illustrates these difficulties. The Secretary of Labor, after fourteen years of proceedings to establish sanitary facilities requirements for agricultural workers, announced that he would suspend action in order to give states an opportunity to handle the problem themselves.<sup>442</sup> The D.C. Circuit noted that the case had some features of a delay case, and some features of a negative order.<sup>443</sup> Either of these characterizations would have suggested that the action was reviewable.<sup>444</sup> Nevertheless, both the majority and dissenting judges also recognized that the case was at least similar to the kind of "inaction" addressed in *Chaney*; thus, they each considered at length, but ultimately rejected, the possible application of *Chaney* to the case before them.<sup>445</sup> *Farmworker* exemplifies what may prove to be a typical and appropriate judicial reaction to hard-to-classify cases involving agency inaction: a cautious, exploratory approach to the question of reviewability, marked by a reluctance to extend *Chaney* beyond its necessary limits.

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440. Compare the long-recognized doctrine that protracted delay can be viewed as a de facto denial of relief, thus satisfying the judicial review prerequisite of a "final" agency action. See, e.g., *id.* at 793 (discussing *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)); see also *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1107-08 (D.C. Cir. 1988) (finding that NRC's issuance of allegedly inadequate policy statement should be analyzed as a final action, not as a continuing "delay" in taking correct action; thus, suit was time-barred because of petitioners' failure to seek review within 180 days of the agency action).

441. 811 F.2d 613 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 898 (D.C. Cir. 1987).

442. *Id.* at 618.

443. See *id.* at 623 n.10. The comparison with a negative order — or, to use the court's phrase, a "conditional withdrawal of a proposed rule after completion of rulemaking," *id.* — was probably the most apt analogy.

444. See *id.*

445. See *id.* at 620-24 (Wald, C.J.); *id.* at 635-37 (Williams, J., dissenting).

## D. SUMMARY

The precise holding of *Chaney* still survives: an administrative agency's decision not to commence an enforcement proceeding is unreviewable if it rests squarely on an exercise of prosecutorial discretion and is not governed by "law." Nevertheless, lower courts have consistently deflated the expansive overtones of the opinion. They have exploited to the utmost degree all intimations of liberality in *Chaney* itself, and have fashioned additional restrictions of their own. The preceding sections have examined several areas in which *Chaney's* apparent implications have been overridden. Those areas, however, merely illustrate a trend; they do not exhaust it. Several other lower court cases, aggressively applying the concept of partial unreviewability, have announced their own lists of circumstances that overcome the *Chaney* "presumption of unreviewability."<sup>446</sup>

Indeed, one might question whether *Chaney* can still be regarded as imposing a general presumption against judicial review of agency inaction. If so, the "presumption" does not appear to be tantamount to a general rule — a principle that agency refusals to institute proceedings *usually* are unreviewable. Rather, it has turned out to be the kind of "presumption" that only shifts a burden of going forward. That is, *Chaney* has come to mean that decisions not to enforce are unreviewable unless the challenger offers a good reason to allow review; and the burden shifted does not appear to be a very heavy one.

In a sense, this case study of *Chaney's* progeny seems to support the claim that a flexible, interest-balancing approach to unreviewability will tend to undermine the Supreme Court's efforts to enforce section 701(a)(2). Yet one cannot attempt to assess the narrowing thrust of these cases in isolation from the decision that occasioned them. Although the propensity of judges to expand their own realm of discretion may partially

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446. See, e.g., *Chong v. United States Information Agency*, 821 F.2d 171, 176 n.4 (3d Cir. 1987) (asserting that allegations of lack of jurisdiction, impermissible influence, or violation of Constitution, statute, or regulation prevent finding of unreviewability); *Dina v. Attorney Gen. of United States*, 793 F.2d 473, 476-77 (2d Cir. 1986) (noting that § 701(a)(2) would not foreclose allegations of fraud, excess absence of jurisdiction, or unconstitutionality); *Electricities of N.C., Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985) (listing factors similar to *Chong*); *Cardoza v. CFTC*, 768 F.2d 1542, 1547 (7th Cir. 1985) (claiming reviewal authority when not to do so would "frustrate Congressional intent").

explain the trend,<sup>447</sup> the fragility of the *Chaney* opinion probably was an important factor as well.

A comparison between *Chaney* and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>448</sup> another modern effort by the Supreme Court to redirect the course of judicial review of administrative action, may clarify this point. In *Vermont Yankee*, the Court held that courts generally may not impose procedural requirements on agencies beyond those duties contained in the Constitution or relevant statutes.<sup>449</sup> The lower courts have been almost entirely faithful to this holding.<sup>450</sup> Why has Justice Rehnquist's opinion in *Vermont Yankee* been so much more effective than his opinion in *Chaney*? One reason may be that in *Vermont Yankee* he laid down a precisely stated holding in a straightforward opinion for a unanimous Court, backing it up with rhetoric that left little doubt about the Court's seriousness of purpose.<sup>451</sup> The *Chaney* opinion, on the other hand, suffered from a confusing analytical structure, supported by vague and sometimes inconclusive policy arguments. Moreover, many of these weaknesses were unmasked in Justice Marshall's careful separate opinion.<sup>452</sup> Most importantly, the Court's opinion displayed a lack of resolve, for it contained qualifications and reservations that were inconsistent with the basic thrust of the opinion.<sup>453</sup> The lower courts can hardly be blamed for interpreting these mixed signals as a tacit invitation to use their creativity in exploring the boundaries of the *Chaney* presumption.<sup>454</sup>

Furthermore, the results that lower courts have reached in these cases have, on the whole, been sensible ones. Perhaps the courts could have recognized the "legal issues" exception to

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447. See *supra* Part III. C.

448. 435 U.S. 519 (1978).

449. See *id.* at 543, 548.

450. See Levin, *supra* note 291, at 60-61.

451. See, e.g., *Vermont Yankee*, 435 U.S. at 539-49. A cynic could argue, however, that another reason for *Vermont Yankee's* apparent success is that courts can easily control administrative action without resorting to the kind of procedural oversight *Vermont Yankee* condemned. In light of the enormous flexibility of "hard look" review, the argument goes, a court with a strong desire to overturn a given agency action can usually find a substantive ground for reaching that result.

452. *Heckler v. Chaney*, 470 U.S. 821, 840-55 (1985) (Marshall, J., dissenting).

453. See *supra* notes 137-43 and accompanying text.

454. See Mikva, *The Changing Role of Judicial Review*, 38 ADMIN. L. REV. 115, 139-40 (1986) (observing, shortly after *Chaney*, that the Court "may have created an opening for a range of limitations on administrative discretion").

*Chaney* more candidly, or exercised more caution when carving out an exception for rulemaking cases. In general, however, these cases have generated a more balanced set of guidelines for judicial review of agency inaction than a straightforward reading of the Supreme Court's opinion in *Chaney* would have provided. In a real sense, the pragmatic approach of the lower courts has rescued the Supreme Court from the excesses of its own formalistic analysis.

#### CONCLUSION: THE FUTURE OF UNREVIEWABILITY

Three recent Supreme Court decisions — *Chaney*, *BLE*, and *Doe* — demonstrate the continuing significance of the “committed to agency discretion” doctrine. Section 701(a)(2) seems likely to occupy a prominent place in the administrative law dialogue of the 1990s: that much can be surmised from the growing body of scholarship that regards judicial review of agency action as a very mixed blessing,<sup>455</sup> as well as from the continuing influence of Chief Justice Rehnquist and Justice Scalia at the Supreme Court.

The law of unreviewability cannot become intellectually respectable, however, without a major overhaul. Sooner or later, the Court will have to face up to the flaws in the *Overton Park* analysis of unreviewability — its shaky historical foundations, its circularity, and its dubious assumptions about the potential sweep of modern scope-of-review doctrine. In recent years the Court has been giving the “law to apply” test little more than lip service, but before long even lip service will cease to be credible. The “pragmatic approach” advocated in this Article would allow issues arising under section 701(a)(2) to be debated with far greater clarity and candor.

Admittedly, the pragmatic approach has its own limitations. It resists being reduced to an easy-to-apply “test;” indeed, it is a largely unstructured mode of reasoning that leaves room for wide differences of opinion to flourish. As elaborated above,<sup>456</sup> one could reasonably suspect that widespread use of the pragmatic approach would become troublesome in either of two complementary ways. It might make judges too willing to avoid hearing legitimate challenges to agency action; or, conversely, it might create too many opportunities for lower court

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455. See, e.g., articles cited *supra* note 2.

456. See *supra* notes 309-15 and accompanying text.

judges to use interest-balancing arguments to evade Supreme Court limitations on judicial review.

A principal purpose of the case study in Part IV was to assess whether the lower courts' experience with *Chaney's* progeny supports either of these apprehensions. At a minimum, the study strongly rebuts the first potential objection. The courts' resistance to applying *Chaney* beyond its facts demonstrates considerable loyalty to the *Abbott Laboratories* principle that section 701(a) should be applied narrowly. The status of that principle as a cornerstone of the administrative law system will not be easily dislodged.

By the same token, post-*Chaney* developments do seem to indicate that when lower courts perceive the Supreme Court has left them with room to maneuver, they will tend to move toward increased review. If the Court is wise, however, it will not reflexively treat this liberalizing tendency of the lower courts as insubordination. As the case study illustrates, pragmatic analysis can provide the flexibility that is necessary if the Court's sometimes overbroad pronouncements applying section 701(a)(2) are to be trimmed back to proper proportions. Perhaps this interplay between the Supreme Court and the lower courts is best seen as a healthy consequence of their respective roles within our judicial system.<sup>457</sup> Over time, the Supreme Court's goal should be to elaborate understandable rules under section 701(a)(2), but in a way that provides latitude for subsequent growth.<sup>458</sup>

For the immediate future, what is needed is a new generation of scholarship to guide the development of section 701(a)(2). With appropriate help from the secondary literature, courts may be able to refine the "committed to agency discretion" doctrine into a body of relatively firm principles that would match the predictability of the "law to apply" test, but without the perverse practical consequences of that test. If this occurs, concerns about the potential misuses of the pragmatic approach to unreviewability should wane in importance. The project of developing a workable and normatively appealing

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457. Cf. *Conservative Era*, *supra* note 123, at 395-96 (remarks of Cass Sunstein) (discussing creative tension between generalist Supreme Court and specialist D.C. Circuit).

458. See Mikva, *supra* note 454, at 140 (suggesting that the Supreme Court was wise to leave open various escape routes from the *Chaney* presumption, because drastic alterations in administrative law doctrine are usually for the worse).

common law of unreviewability should be a challenge for courts, counsel, and scholars alike in the years ahead.

