

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1985

Reviewing Agency Inaction after Heckler v. Chaney

Cass R. Sunstein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Cass R. Sunstein, "Reviewing Agency Inaction after Heckler v. Chaney," 52 University of Chicago Law Review 653 (1985).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Reviewing Agency Inaction After *Heckler v. Chaney*

Cass R. Sunstein†

Of the many innovations in modern administrative law, the recognition of a private right to initiate administrative action may be the most important. In the last twenty years, courts have made substantial inroads on principles of prosecutorial discretion, which have traditionally shielded agency inaction from judicial review.¹ For example, courts have required agencies to promulgate rules,² to issue regulatory standards,³ and to undertake enforcement activity.⁴ These rulings are part of a more general movement in public-law doctrine, which has abandoned the traditional focus on private autonomy in favor of an effort to ensure the identification and implementation of the values set out in the governing statute.⁵

† Professor of Law, University of Chicago. The author would like to thank Bruce A. Ackerman, Albert W. Alschuler, Douglas G. Baird, Mary E. Becker, David P. Currie, E. Donald Elliott, Ronald Levin, Carol M. Rose, Richard Shweder, Geoffrey R. Stone, David A. Strauss, and Peter L. Strauss for helpful comments on a previous draft. Richard A. Hertling provided valuable research assistance.

¹ See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (dictum) (discussing NLRB's "unreviewable discretion" to refuse to institute an unfair labor practice complaint); *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776 (2d Cir. 1966) (same), cert. denied, 385 U.S. 1026 (1967); *Pendleton v. Trans Union Sys. Corp.*, 430 F. Supp. 95, 97-98 (E.D. Pa. 1977) (denying mandamus to compel FTC enforcement action on grounds of executive discretion). The unavailability of review stemmed also from restrictive standing doctrines that limited review to those with a "legal interest." See *infra* notes 84-101 and accompanying text.

² See *Community Nutrition Inst. v. Young*, 757 F.2d 354, 361-62 (D.C. Cir. 1985) (requiring FDA to establish aflatoxin tolerances through rulemaking); *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (judicial review of denial of rulemaking petition available absent clear and convincing evidence of contrary legislative intent).

³ See *Sierra Club v. Ruckelshaus*, 61 AD. L. REP. 2D (P & F) 65, 70 (N.D. Cal. Dec. 11, 1984) (holding Administrator of EPA in civil contempt for failing to make findings or issue standards for radionuclides); *Public Citizen Health Research Group v. Auchter*, 554 F. Supp. 242, 251 (D.D.C.) (ordering OSHA to issue emergency standard for ethylene oxide exposure), *aff'd*, 702 F.2d 1150 (D.C. Cir. 1983).

⁴ See *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981) (holding mandamus available to require Secretary of Defense to enforce Davis-Bacon Act against contractors); *Adams v. Richardson*, 480 F.2d 1159, 1162-63 (D.C. Cir. 1973) (ordering enforcement program to secure HEW enforcement of Title VI); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097-98 (D.C. Cir. 1970) (holding decision not to cancel registration of DDT reviewable despite permissive statutory language).

⁵ See JOSEPH VINING, *LEGAL IDENTITY* 52 (1978) (discussing conception of the judicial

The Supreme Court itself has had little occasion to evaluate this trend. In *Dunlop v. Bachowski*,⁶ decided a decade ago, the Court held that the decision of the Secretary of Labor not to file suit to set aside a union election was subject to judicial review, but the most difficult issue raised by the case was disposed of in an obscure footnote.⁷ It was thus not until its recent decision in *Heckler v. Chaney*⁸ that the Court set out some general conclusions on the reviewability of agency inaction. Those conclusions prompted a vigorous separate opinion from Justice Marshall, who expressed concern that the Court had created a "presumption of unreviewability"⁹ that endangered "a firmly entrenched" body of law providing judicial review of agency refusals to act.¹⁰

There is little risk in predicting that the rationale and reach of the *Chaney* decision will provoke considerable controversy in the courts and elsewhere. This article explores the implications of *Chaney* for judicial review of agency enforcement decisions, attempting in the process to develop a set of guidelines for resolving claims of unlawful administrative inaction. That inquiry will be based on an analysis of the role of regulatory agencies and reviewing courts in the modern era.

I. REVIEWABILITY: A PRIMER

Under the Administrative Procedure Act (APA),¹¹ agency action is generally subject to judicial review. The presumption of reviewability is reflected in the legislative history of the APA,¹² producing the understanding, frequently repeated by the courts, that statutes will not be held to preclude review unless there is "clear

process as a means of achieving public or statutory values); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985) (contrasting interest-representation and fidelity models of administrative law). For an elaboration of this transformation, see *infra* notes 84-101 and accompanying text.

⁶ 421 U.S. 560, 566-68 (1975).

⁷ *Id.* at 567 n.7 ("We agree with the Court of Appeals, for the reasons stated in its opinion, that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion.") (citation omitted). For a discussion of the limits of the analogy of administrative discretion to prosecutorial discretion, see *infra* notes 75-122 and accompanying text.

⁸ 105 S. Ct. 1649 (1985).

⁹ *Id.* at 1660 (Marshall, J., concurring in the judgment).

¹⁰ *Id.* at 1665.

¹¹ 5 U.S.C. §§ 551-706 (1982).

¹² See H.R. REP. NO. 1980, 79th Cong., 2d Sess. 41 (1946), quoted in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967) ("To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it.").

and convincing" evidence that Congress intended to do so.¹³

The presumption of reviewability under the APA is based on a set of considerations, loosely captured in the notion of the rule of law, that relate to the perceived need to constrain the exercise of discretionary power by administrative agencies.¹⁴ Judicial review serves important goals in promoting fidelity to statutory requirements and, where those requirements are ambiguous or vague, in increasing the likelihood that the regulatory process will be a reasonable exercise of discretion instead of a bow in the direction of powerful private groups.¹⁵

These concerns are especially powerful in light of the awkward constitutional position of the administrative agency. The absence of the ordinary safeguards of electoral accountability and separation of powers has generated, in the administrative context, especially intense fears of factional influence over governmental processes and of decision free from public scrutiny and review. Such fears were a prime reason behind the nondelegation doctrine.¹⁶ After the demise of that doctrine,¹⁷ surrogate safe-

¹³ See, e.g., *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2457 (1984) ("clear and convincing" test controls unless congressional intent to preclude review is "fairly discernible in the statutory scheme."); *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967).

¹⁴ See LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320-27 (1965). See generally Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1203 (1982) (discussing functions of the rule of law).

¹⁵ See Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983). But see R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983) (criticizing certain effects of the judicial role). On agency "capture," see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975); Stewart & Sunstein, *supra* note 14, at 1226-27.

¹⁶ It is thus unsurprising that the primary case invoking that doctrine involved a delegation of government power to private groups. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937) (discussing advantages and dangers of participation by private groups in the administrative process).

¹⁷ While the nondelegation doctrine has never been expressly repudiated by the Court, it has not been used to strike down a statute since *Schechter Poultry*. In fact, broad legislative delegations of power to the executive branch were upheld prior to the New Deal period. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (upholding statute that permitted executive to make regulations declaring conduct criminal as a proper delegation of administrative power rather than an improper delegation of legislative power); *Field v. Clark*, 143 U.S. 649, 692-94 (1892) (upholding Tariff Act authorization of presidential suspension of favorable tariff status as not constituting grant of legislative power). Since *Schechter Poultry*, the Court has often found very broad "standards" to be an adequate basis for judicial review. See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 611-15 (1980) (reviewing exercise by OSHA of power to regulate toxics "to the extent feasible"); *Yakus v. United States*, 321 U.S. 414, 420-25 (1944) (sustaining broad

guards—judicial review prominent among them—have been developed to protect the coherence and the integrity of the regulatory process.¹⁸

In this regard it is important to keep in mind the fact, traditionally overlooked in discussions of judicial review of agency action,¹⁹ that the availability of review will often serve as an important constraint on regulators during the decisionmaking process long before review actually comes into play. The prospect of review increases the likelihood of fidelity to substantive and procedural norms—a fact that will be missed if one focuses only on the reported cases, where, to be sure, the courts make their share of mistakes.²⁰

The concerns that support the APA's presumption of reviewability appear no less applicable to review of inaction than to review of action. Review at the behest of statutory beneficiaries may perform a critical function in ensuring against unduly lax enforcement that would violate statutory requirements. Such requirements may be undone through inadequate implementation as well as through overzealous enforcement. In both contexts, judicial review serves to vindicate the will of Congress as against the executive branch and may guard against the undue influence of powerful private groups over the regulatory process.²¹ In the case of inaction, as well as in that of action, it is appropriate to take into ac-

grant of price-fixing powers). But some Justices have indicated a renewed interest in the doctrine. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting).

¹⁸ While much stress has traditionally been placed on judicial review, see, e.g., L. JAFFE, *supra* note 14, at 327, it is important not to disregard the potential of nonjudicial mechanisms for fulfilling these functions. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 150-60 (discussing legislative veto and other modes of legislative control). Nonjudicial mechanisms are particularly crucial for assuring presidential control and interagency coordination. For important modern illustrations, see Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985), and Exec. Order No. 12,291, 3 C.F.R. 127 (1982), which attempt to coordinate the regulatory process through supervision by the Office of Management and Budget.

¹⁹ For criticisms of judicial review that do not discuss the phenomenon of "anticipated reaction" CARL FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND POLITICS* 16-18 (1937), see, e.g., JERRY MASHAW, *BUREAUCRATIC JUSTICE* 8-11 (1983) (arguing that judicial review is irrelevant to internal agency decisionmaking, without reference to effect of prospect of review); R. MELNICK, *supra* note 15, at 379-83 (discussing impact of courts on EPA solely in terms of court-ordered action).

²⁰ See generally R. MELNICK, *supra* note 15 (contending that judicial review under Clean Air Act has had undesirable consequences for environmental policy).

²¹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2870 (1983) ("that the regulated industry has eschewed a given safety device . . . hardly constitutes cause to revoke the standard" requiring it).

count the deterrent effect of the prospect of review on administrators during the implementation process. The affirmative case for judicial review thus appears identical in the two contexts.

On its face, moreover, the APA treats agency inaction the same as agency action. Indeed, the statute defines agency action to include "failure to act"²² and says that courts shall "compel agency action unlawfully withheld or unreasonably delayed."²³ But it would be a mistake to understand this language as an across-the-board repudiation of principles of prosecutorial discretion. To understand how those principles interact with the APA, it is necessary to explore the exceptions to the general rule of reviewability.

The APA provides that agency decisions are unreviewable in two categories of cases: (1) those in which the statute precludes review,²⁴ and (2) those in which agency action "is committed to agency discretion by law."²⁵ The first exception is not difficult to understand, though in particular cases it may be difficult to decide whether there has been statutory preclusion of review.²⁶ The second exception creates two puzzles. First, a conclusion that agency action is committed to agency discretion "by law" appears substantially identical to a conclusion that a statute has precluded review. Second, there is an obvious tension between the idea that some exercises of discretion are unreviewable²⁷ and the fact that the APA allows courts to review agency action for "abuse of discretion."²⁸

In *Citizens to Preserve Overton Park, Inc. v. Volpe*,²⁹ the Supreme Court attempted to resolve both of these puzzles. According to the Court, the "committed to agency discretion" exception precludes review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"³⁰ This interpretation, based on the legislative history of the APA,

²² 5 U.S.C. § 551(13) (1982). The definition of agency action also includes the denial of a rule, order, license, sanction, or other relief. *Id.*

²³ *Id.* § 706(1).

²⁴ *Id.* § 701(a)(1).

²⁵ *Id.* § 701(a)(2).

²⁶ See, e.g., *Morris v. Gressette*, 432 U.S. 491 (1977) (holding by a divided Court that Attorney General's approval of reapportionment under Voting Rights Act was unreviewable).

²⁷ Compare *Davis, Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643, 643 (1967) (administrative arbitrariness is sometimes unreviewable), with *Berger, Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 999 (1969) (only non-arbitrary use of discretion is potentially unreviewable).

²⁸ 5 U.S.C. § 706(2)(A) (1982).

²⁹ 401 U.S. 402 (1971).

³⁰ *Id.* at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

has provoked sharp criticism.³¹ As we shall see, however, the Court's interpretation is consistent with sensible understandings of when agency action should be subject to judicial supervision.

The principal question raised by *Overton Park* is how one decides whether, in a given case, there is "law to apply." The answer turns on two considerations—one familiar, the other frequently ignored. The familiar consideration is the governing substantive statute, which is the major source of the "law to apply." *Overton Park* itself illustrates the point. The issue there was the legality of a decision by the Secretary of Transportation to approve the building of an interstate highway through a park in Memphis, Tennessee. The Court concluded that there was "law to apply" because the statute provided that the Secretary "shall not approve" construction through a public park unless "no feasible and prudent" alternative was available. That provision imposed constraints on the Secretary's decision by which a court might assess its legality.³² The same conclusion is appropriate with respect to the great proportion of administrative law cases, at least in the context of review of action. Governing statutes almost always set out standards by which to assess the legality of agency behavior or to evaluate a claim of arbitrariness.

The second consideration in deciding whether there is "law to apply" is the precise allegation made by the plaintiff. The importance of this point cannot be overstated, particularly in the context of review of agency inaction. For example, if a plaintiff claims that an agency has taken constitutionally impermissible factors into account, there is always "law to apply"—no matter what the governing statute may say.³³ Similarly, if the plaintiff alleges that the agency's conduct has been based on factors that are irrelevant under the governing statute, there is always law to apply, even if the agency has especially broad discretion in weighing those factors that are statutorily relevant.³⁴ Judicial evaluation of these claims will be equally straightforward whether the government has chosen to take or to refrain from taking enforcement action on the basis of these factors. On the other hand, if the plaintiff makes a generalized claim of agency "arbitrariness" in failing to act, there may sometimes be no judicially administrable standards by which to as-

³¹ See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 28.16, at 638-41 (1976).

³² 401 U.S. at 411-13.

³³ See *infra* notes 129-32 and accompanying text.

³⁴ See *infra* notes 135-40 and accompanying text.

sess the claim.³⁵ The central point is that the “law to apply” inquiry can be made coherent only by measuring the plaintiff’s allegation against the governing substantive statute. There may be review with respect to one allegation, but no review with respect to another, under the same statute.

Understood in these terms, the *Overton Park* test for reviewability—the “law to apply” inquiry—looks very much like a decision on the merits. Once one has said that an action is unreviewable because there are no legal constraints on the exercise of discretion with respect to the particular allegation, one might as well say that, with respect to that allegation, there is no legal violation. In this respect, the distinction between a conclusion that a decision is not reviewable and a conclusion that a decision is lawful is easy to collapse.³⁶ In both cases, one is saying the same thing: that the governing statute does not impose legal constraints on the action at issue.

The APA does, however, distinguish the issue of reviewability from that of the merits, and so long as the underlying considerations are understood, the distinction need not cause significant difficulties. The important point is that agency actions are “committed to agency discretion by law” whenever the governing statute imposes no legal constraints on the agency with respect to the particular allegation made by the plaintiff.³⁷

The framework provided by *Overton Park* thus provides courts with workable standards for deciding the reviewability of both agency action and agency inaction. Since *Overton Park*, the Supreme Court and lower courts have used these standards to review agency enforcement decisions.³⁸ The mere fact that inaction is

³⁵ See *infra* note 156 and accompanying text.

³⁶ This point is parallel to the idea, raised in connection with the political question doctrine, that a conclusion that a matter presents a “political question” is equivalent to a conclusion that there is no constitutional violation on the merits. See Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 606, 622-23 (1976).

³⁷ This formulation raises the question of how one decides that it is appropriate to dispose of a case on the merits rather than on grounds of reviewability. The decided cases furnish no clear criteria by which to make that decision. To some extent, they suggest that the question is to be answered on the basis of whether the statutory standard, measured against the plaintiff’s allegation, furnishes ascertainable standards by which to assess the legal question. If it does not, a decision on reviewability grounds is more likely. See, e.g., *Hahn v. Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970) (holding that statute provides inadequate standards for judicial review of FHA rental rates). To some extent, however, the decision is likely to be cast in terms of reviewability rather than the merits simply because of tradition. But see *Pendleton v. Trans Union Sys. Corp.*, 430 F. Supp. 95 (E.D. Pa. 1977) (dismissing mandamus action against FTC on the merits).

³⁸ See cases cited *supra* notes 2-4.

involved is insufficient to preclude review; inaction, no less than action, might be unlawful. The question turns on the nature of the governing statute and of the plaintiff's allegation.

Despite *Overton Park* and its progeny, one might readily have predicted that the Supreme Court would not be entirely receptive to efforts to obtain judicial review of the enforcement decisions of administrative agencies. In a number of areas of administrative law, the Court has recently confined the supervisory role of the federal courts, especially in suits brought by the beneficiaries of regulatory statutes. For example, the Court has held that federal courts may not impose procedural requirements on administrative agencies beyond those set out in the APA.³⁹ The Court also has slightly weakened the ordinary presumption of reviewability of agency action by lowering the standard required to demonstrate congressional intent to preclude judicial review.⁴⁰ In addition, the Court has stated that courts should accord considerable deference to executive constructions of regulatory statutes whenever "Congress has not directly addressed the precise question at issue."⁴¹ Finally, the Court has indirectly limited the role of judicial review through the doctrine of standing. In a decision of particular importance, the Court held that parents of children attending segregated schools did not have standing to challenge the failure of the IRS to deny tax-exempt status to private schools that discriminated on the basis of race.⁴² Relying in part on the "take Care" clause,⁴³ the Court concluded that separation-of-powers concerns require plaintiffs seeking a "restructuring" of executive-branch operations to

³⁹ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-46 (1978) (rejecting judicial addition of procedural requirements for APA informal rulemaking).

⁴⁰ *Compare* *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2456-58 (1984) (intent to preclude review must be "fairly discernible" from legislative scheme), *with* *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (requiring "clear and convincing evidence" of intent to preclude review).

⁴¹ *See* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984); *see also* *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108, 1110 (1985) (requiring clear, unambiguous expression of intent contrary to that of agency). Decisions of this sort may herald a quite general return to a variation of "formalism" in statutory interpretation. For critical appraisals of the "formalist" approach, see Stewart & Sunstein, *supra* note 14, at 1199-1201, 1220-32; Note, *Intent, Clear Statements, and the Common Law*, 95 HARV. L. REV. 892, 899-907 (1982). For a defense, see Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 582-92 (1985).

⁴² *Allen v. Wright*, 104 S. Ct. 3315 (1984).

⁴³ U.S. CONST. art. II, § 3 (the Executive shall "take Care that the Laws be faithfully executed").

meet especially stringent standing requirements.⁴⁴

This is not to say that the recent cases form an unbroken line of deference to executive authority. In one case, the Court applied the "hard-look" doctrine⁴⁵ with considerable rigor, overturning an administrative decision to rescind an existing regulatory standard.⁴⁶ And elsewhere the Court has shown a willingness to supervise the regulatory process with some care.⁴⁷ But the basic pattern is unmistakable. The Court's decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries.⁴⁸ Such skepticism has resulted in a willingness either to deny review entirely or to restrict its scope, often through "clear statement" principles of statutory construction.⁴⁹ It was against this background that the Supreme Court decided *Heckler v. Chaney*.

II. THE *Chaney* DECISION

The *Chaney* case involved a suit by inmates on death row to require the Food and Drug Administration (FDA) to take enforcement action to prevent particular drugs from being used in executions by lethal injection.⁵⁰ The FDA had approved the drugs at issue for some purposes, but not for use in executions. The inmates contended that the drugs had not been tested and labeled for use in human executions and that in the hands of untrained personnel the drugs would cause "torturous pain" rather than the intended quick and painless death.⁵¹ According to the inmates, the use of the drugs in human execution thus violated the "misbranding" and

⁴⁴ 104 S. Ct. at 3330. For a critical appraisal, see Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985).

⁴⁵ For discussion of the doctrine, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). See generally Sunstein, *De-regulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 181-82 (collecting cases).

⁴⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 103 S. Ct. 2856, 2862 (1983).

⁴⁷ See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 658-59 (1980) (plurality opinion) (rejecting OSHA benzene standard after "a more detailed examination of the record than is customary").

⁴⁸ For suggestions that this skepticism is misplaced, at least if the judicial role is suitably cabined, see Stewart & Sunstein, *supra* note 14, at 1316-22; L. JAFFE, *supra* note 14, at 320-27, 589-92. Most of the recent cases restricting the judicial role involved suits by beneficiaries, and the restrictions on the law of standing and reviewability will primarily affect beneficiaries rather than regulated entities. It remains uncertain whether the Court will similarly limit judicial power when the plaintiff is a member of the regulated class.

⁴⁹ See *supra* note 41.

⁵⁰ 105 S. Ct. at 1651-52. The requested enforcement actions were detailed in the opinion below, *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983).

⁵¹ 718 F.2d at 1177.

“new drug” provisions of the Food, Drug and Cosmetic Act.⁵² The FDA had declined to act, claiming that it did not have jurisdiction over the use of drugs for human execution⁵³ and that, even if it did, it had the “inherent discretion” not to act unless there was “a serious danger to the public health or a blatant scheme to defraud.”⁵⁴ According to the FDA, neither of the conditions that would require action was present in *Chaney*.

The Supreme Court, in an opinion by Justice Rehnquist, held that the FDA’s inaction was an unreviewable exercise of prosecutorial discretion.⁵⁵ In thus reversing the decision of the court of appeals, the Court said that there was often “no law to apply” to enforcement decisions. Such decisions should therefore be presumed unreviewable under the “committed to agency discretion” exception to the general rule of reviewability under the APA.⁵⁶

The Court marshaled four considerations in favor of this conclusion. First, it said that because of limited administrative resources, agencies must evaluate a wide range of factors in setting enforcement priorities and that such decisions are ill-suited to judicial review.⁵⁷ Second, it observed that “when an agency refuses to act it generally does not exercise its *coercive* power over an individual’s liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.”⁵⁸ Third, it indicated that inaction, unlike action, does not provide a focus for judicial review.⁵⁹ Fourth, it said that “an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict”—a decision that, the Court noted, is entrusted to the executive under the “take Care” clause of article II.⁶⁰

In the Court’s view, these considerations were sufficient to justify a “conclusion that an agency’s decision not to take enforcement action should be presumed immune from judicial review.”⁶¹ But the Court emphasized that the presumption could be rebutted

⁵² 21 U.S.C. §§ 352(f), 355 (1982).

⁵³ 105 S. Ct. at 1652.

⁵⁴ *Id.* (quoting statement by FDA Commissioner).

⁵⁵ *Id.* at 1659.

⁵⁶ 5 U.S.C. § 701(a)(2) (1982).

⁵⁷ 105 S. Ct. at 1656.

⁵⁸ *Id.* (emphasis in original).

⁵⁹ *Id.*

⁶⁰ *Id.* See *infra* notes 102-11 and accompanying text (evaluating the “executive function” argument).

⁶¹ 105 S. Ct. at 1656.

“where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.”⁶² The Court found that the presumption of unreviewability had not been rebutted in *Chaney* because the Food, Drug and Cosmetic Act provided no statutory constraints on the exercise of discretion.⁶³ The Court distinguished *Dunlop v. Bachowski*⁶⁴ on this ground. In that case, the Court said, the Labor-Management Reporting and Disclosure Act required the Secretary of Labor to file suit if certain “clearly defined” factors were present, and this requirement was an adequate basis for judicial review.⁶⁵

The result in *Chaney* is easy to defend. The FDA’s failure to investigate the unapproved use of the drugs was not constrained by the governing statute. There were various possible sources of statutory and regulatory “law” in *Chaney*, but the Court was probably correct in concluding that none formed a sufficient basis for judicial review. The court of appeals had relied on a policy statement indicating that the agency considered itself “obligated” to act against unapproved uses of approved drugs,⁶⁶ but the statement was ambiguous and was in any event appended to a rule that the agency never adopted.⁶⁷ The plaintiffs had also invoked a provision in the substantive statute stating that the Secretary of Health and Human Services need not prosecute “minor violations” if she “believes that the public interest will be adequately served by a suitable written notice.”⁶⁸ They argued for the negative implication that this provision was intended to require prosecution of “major” violations. But the Supreme Court read the provision as applicable to situations in which a violation had already been established to the agency’s satisfaction, not as an effort to require investigation of possible violations.⁶⁹ Furthermore, the plaintiff’s allegations did

⁶² *Id.*

⁶³ *Id.* at 1658-59.

⁶⁴ 421 U.S. 560 (1975).

⁶⁵ 105 S. Ct. at 1657. This was not an accurate reading of the understanding of the Court in *Dunlop* itself. In *Dunlop*, 421 U.S. at 567 n.7 (quoted *supra* note 7), the Court endorsed the reasoning of the lower court, which had said that principles of prosecutorial discretion should operate as a bar to review only when the interests represented by plaintiffs were those of the public as a whole (as in the case of a criminal prosecution), rather than those of identifiable individuals, *Bachowski v. Brennan*, 502 F.2d 79, 87 (3d Cir. 1974). Of course, *Chaney* itself involved the interests of identifiable individuals.

⁶⁶ *Chaney v. Heckler*, 718 F.2d 1174, 1186 (D.C. Cir. 1983).

⁶⁷ 105 S. Ct. at 1658. The court of appeals had suggested that the fact that the rule was not adopted was “not decisive” and that the statement itself constituted a “rule” under the APA. 718 F.2d at 1186 & n.28.

⁶⁸ 21 U.S.C. § 336 (1982) (quoted in *Chaney*, 105 S. Ct. at 1659).

⁶⁹ 105 S. Ct. at 1659.

not indicate specific deficiencies in agency decisionmaking that distinguished their claim from that of many others who could assert an interest in how the FDA's investigatory authority is used.⁷⁰ The plaintiffs were thus left with precisely the kind of generalized claim of "arbitrariness" that is often so difficult to sustain.⁷¹

On all this the Court was unanimous. The controversial character of the decision stems from the adoption of a seemingly broad presumption against review of enforcement decisions. Justice Brennan issued a short concurrence, noting that the majority opinion left open the possibility that agency inaction might be reviewable in a wide variety of circumstances.⁷² In an extensive separate concurrence, Justice Marshall took issue with the Court's creation of a "presumption of unreviewability" for enforcement decisions. In his view, decisions not to act will frequently survive on the merits, largely for the reasons identified by the Court. But that conclusion should not imply a refusal to review the particular bases for inaction—review that will generally serve as a safeguard against "caprice and lawlessness."⁷³ In Justice Marshall's view, the traditional principles of prosecutorial discretion are inconsistent with "one of the very purposes fueling the birth of administrative agencies"—the "reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."⁷⁴ The FDA's conduct in *Chaney*, according to Justice Marshall, was lawful only because it was reasonable on the merits.

⁷⁰ Such deficiencies would require special allegations—for example, a claim that agency inaction was based on constitutionally or statutorily irrelevant factors, see *infra* notes 129-32, 135-40 and accompanying text, or a showing that the inaction involved a matter that, because of the nature of the private conduct at issue, had a special claim on the agency's resources.

⁷¹ This is not to say that the case was quite as easy as the Court seems to have thought. A response to the foregoing line of reasoning might be that the Court should have looked more carefully at the nature of the plaintiffs' claim and at the FDA's enforcement priorities, in order to assure itself that the allocation of limited resources was reasonable in light of the various options before the agency. But such an examination is, in the absence of unusual circumstances, extremely difficult for a court to undertake. In light of the nature of the statute and the allegation, a posture of deference was appropriate.

⁷² 105 S. Ct. at 1659-60 (Brennan, J., concurring).

⁷³ *Id.* at 1665 (Marshall, J., concurring in the judgment).

⁷⁴ *Id.* at 1666. In constitutional law, this perception is reflected in *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (suggesting that government refusal to enact minimum wage law would amount to government subsidy to employers), and *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (describing governmental inaction as "none the less a choice"). See *infra* notes 84-91 and accompanying text.

III. THE LIMITS OF "PROSECUTORIAL DISCRETION" IN THE REGULATORY STATE

The *Chaney* Court's presumption against judicial review of agency enforcement decisions is based on principles of "prosecutorial discretion." Prosecutorial discretion has traditionally been thought to immunize decisions of criminal prosecutors from judicial review;⁷⁵ it has sometimes been extended to the administrative context, shielding agency inaction from legal control.⁷⁶ As Justice Marshall emphasized in *Chaney*, these principles are at odds with the general presumption of reviewability.

Judicial control of agency inaction has its origins in the law of mandamus, which allows courts to compel "nondiscretionary" agency decisions.⁷⁷ In an early case, however, the Supreme Court held that the federal courts had no general mandamus authority.⁷⁸ That authority has now been conferred on the courts by statute,⁷⁹ but "discretionary" decisions are immunized from judicial review.⁸⁰ This state of affairs, in conjunction with standing limitations,⁸¹ explains why judicial review of agency inaction has generally occurred under the APA rather than the federal mandamus statute.⁸² Under the APA, however, the *Chaney* Court's invocation of prosecutorial discretion does not justify the adoption of a presumption against review. This conclusion becomes apparent by scrutinizing the four central considerations on which refusal to review agency inaction is based: judicial solicitude for private rights, deference to executive discretion, the existence of alternative remedies, and various prudential concerns. Whatever their original merit, these considerations no longer carry significant weight.⁸³

⁷⁵ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973). For a discussion and critique of prosecutorial discretion in the criminal context, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969).

⁷⁶ See cases cited *supra* note 1.

⁷⁷ See generally L. JAFFE, *supra* note 14, at 178-92.

⁷⁸ *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813).

⁷⁹ 28 U.S.C. § 1651 (1982).

⁸⁰ *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930).

⁸¹ See *infra* note 87.

⁸² *But see* *Carpet, Linoleum & Resilient Tile Layers Local 419 v. Brown*, 656 F.2d 564 (10th Cir. 1981) (holding mandamus available under Davis-Bacon Act).

⁸³ For additional treatment of some of these considerations, see Stewart & Sunstein, *supra* note 14, at 1202-20 (discussing traditional concepts as obstacle to development of judicial remedies for administrative misconduct); Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 630-38 (1983) (discounting traditional obstacles to review).

A. Judicial Solicitude for Private Rights

The original role of judicial review of administrative conduct was based on two related understandings. The first was that market ordering within the constraints of the common law was normal and natural.⁸⁴ In light of this assumption, government intervention in the market appeared exceptional and was subject to special judicial control. For this reason, courts adopted what was in effect a one-way ratchet, consisting of legally enforceable constraints on regulation but no such constraints on inaction.⁸⁵ The second understanding was that the purpose of judicial review was to safeguard traditional private rights as defined by the common law.⁸⁶ The interests of those who were likely to benefit from administrative action were not traditional liberty or property interests and were thus not entitled to judicial protection.⁸⁷ The political process

⁸⁴ Compare *Lochner v. New York*, 198 U.S. 45 (1905) (reflecting a similar understanding), with *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (rejecting this understanding).

⁸⁵ Indeed, the very concepts of "inaction" and "action" are coherent only if one has a background understanding of the normal or desirable functions of government. Cf. LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 246-48 (1985) (discussing dependence of notion of "state action" on *Lochner*-like understandings of private and public spheres); Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1297-99 (1982) (same). See also Justice Frankfurter's suggestion, in interpreting the "negative order" doctrine, that

"negative order" and "affirmative order" are not appropriate terms of art. . . . "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—nonaction as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability. "Negative" and "affirmative," in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "malfeasance."

Rochester Tel. Corp. v. United States, 307 U.S. 125, 140-42 (1939) (citations omitted).

⁸⁶ See Stewart, *supra* note 15, at 1671-76.

⁸⁷ This notion was most important under the law of standing, where early cases involved claims of competitive disadvantage as a result of government action; standing was denied because of failure to allege violation of a "legal right" or "protected interest." See, e.g., *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479-80 (1938). See generally Stewart, *supra* note 15, at 1723-24 (recognized "legal rights" were common law contract and property rights). With the rejection of the "legal interest" test, see, e.g., *Association of Data Processing Serv. Orgs., Inc., v. Camp*, 397 U.S. 150, 153-54 & n.1 (1970) (competitor standing), standing was broadened to include the interests of regulatory beneficiaries, see, e.g., *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970) (tenant-farmer beneficiaries of upland-cotton program). Since a wide range of beneficiary injuries have been held to be "fairly traceable" to government conduct and to satisfy the "injury in fact" test, see, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 (1978) (local citizens have standing to challenge the effect of federal liability limit on the building of nuclear power plants), standing is a barrier to beneficiary actions in much more limited circumstances. *But cf.* *Allen v. Wright*, 104 U.S. 3315, 3329-30, 3333 (1984) (holding plaintiffs' claim of injury to strict causality standard where special circumstances raise separation-of-powers concerns).

was seen as the appropriate safeguard against unlawful inaction, especially since large numbers of people were often affected by failure to act.⁸⁸ Together, these two understandings represent a *Lochner*-like view of the judicial role.⁸⁹ The *Lochner* Court, too, saw the judicial role as the vindication of private rights, defined by reference to market ordering within the common law, against government "intervention."

With the rise of the regulatory state, however, this *Lochner*-era approach to judicial review of administrative inaction is no longer tenable. And it should be unsurprising to find that this view arose and declined in constitutional and administrative law in parallel fashion.⁹⁰ In the constitutional context, the Court recognized in *West Coast Hotel v. Parrish*⁹¹ that common law ordering was in no sense "natural," but was the product of governmental choice: both action and inaction amount to decisions. It was pursuant to this view that a failure to act might be seen as, in the Court's words, a "subsidy" to those who benefited from the inaction. Similarly, in the administrative context, the notion that judicial review is limited in purpose to safeguarding traditional private rights and in scope to the promotion of traditional private autonomy has become unacceptable.

This doctrinal shift is reflected in changes in three related aspects of administrative law, changes which undermine the *Lochner*-like deference to agency inaction. The first of these changes is the growth of public rights. The creation of administrative agencies was based on an understanding that interests unrecognized by the common law nonetheless merit governmental protection.⁹² Regula-

⁸⁸ Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (due process does not require individual hearings for determinations that affect large numbers of people, in part on ground that legislature is the appropriate forum for redress).

⁸⁹ *Lochner v. New York*, 198 U.S. 45 (1905). See Kennedy, *Form and Substance in Private Law Litigation*, 89 HARV. L. REV. 1685, 1746-48 (1976) (discussing theory of "naturalness" of economic interaction under common law).

⁹⁰ See Sunstein, *Interest Groups in American Public Law*, STAN. L. REV. (forthcoming).

⁹¹ 300 U.S. 379 (1937).

⁹² This conclusion was alternately based on (1) the notion that the common law catalogue of private rights was insufficient to protect private autonomy, and that new rights should be added to the list; (2) a conclusion that important decisions ought to be subject to collective control in the service of democratic ends of self-government; or (3) an economic rationale pointing to the externalities not taken care of by an unregulated market. See generally Stewart & Sunstein, *supra* note 14, at 1235-39 (discussing the entitlement, production, and public value accounts of the rise of administrative regulation). At times, of course, the creation of a regulatory scheme might be understood as an interest-group deal. See Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

tory interests, representing public "rights,"⁹³ are created by congressional or administrative action and are entitled to judicial protection under the APA. The fact that inaction does not affect traditional private rights is therefore an insufficient basis for distinguishing between action and inaction.

The second change is in the law of standing. It is no longer necessary to show a traditional private right in order to obtain review of agency conduct;⁹⁴ beneficiaries of regulatory programs may bring suit if they can show "injury in fact" and demonstrate that a judicial decree will remedy the harm alleged.⁹⁵ Private autonomy, as it was understood at common law, need not be involved at all.

The third change is authorization of judicial review of agency action by the APA. Under the APA, the function of judicial review is to ensure governmental conformity with legal requirements, whether such requirements require or forbid regulation.⁹⁶ This conformity is to be achieved in two ways. First, courts are charged with promoting adherence to the governing statute—with adherence understood to include identification and implementation of the values set out in that statute. Statutorily irrelevant factors may not be considered,⁹⁷ and those factors made relevant by statute must be taken into account.⁹⁸ Second, where the statute is ambiguous, as is frequently the case, courts must ensure that there has been a reasoned exercise of discretion on the part of administrators.⁹⁹ These purposes apply with equal force to action and

⁹³ It may be misleading to treat such interests as "rights" at all. See Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129, 1173 (1983) (discussing "rights" as epiphenomena of political choice under "statist" concept of administrative law); Stewart, Regulation in a Liberal State: The Role of Non-commodity Values, 92 YALE L.J. 1537, 1556-59 (1983) (discussing limits of entitlement conception of regulation).

⁹⁴ This was the traditional requirement of the "legal interest" test. See *supra* note 87. See generally J. VINING, *supra* note 5, at 20-33 (discussing the test and its limits); Stewart, *supra* note 15, at 1723-25 (discussing the traditional standing model).

⁹⁵ This is something of an oversimplification of current doctrine. See *supra* note 87; cf. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (1982) (suggesting that a "zone of interests" requirement may also be an element of current standing doctrine under article III).

⁹⁶ See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 103 S. Ct. 2856, 2866 (1983) ("[T]he direction in which an agency chooses to move does not alter the standard of judicial review established by law.").

⁹⁷ See *infra* notes 135-40 and accompanying text.

⁹⁸ See *infra* notes 141-43 and accompanying text.

⁹⁹ The notion of reasoned decisionmaking has often been invoked by courts in recent years. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 103 S. Ct. 2856, 2874 (1983); Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1425-26 (D.C. Cir. 1983); NAACP v. FCC, 682 F.2d 993, 998 (D.C. Cir. 1982). That notion has three components. First, regulatory decisions should be based on a detailed inquiry into

inaction.

Moreover, the availability of political remedies does not, as a general rule, distinguish inaction from action. The possibility of political redress has not been thought sufficient to justify the elimination of judicial review of agency action.¹⁰⁰ The same conclusion is properly reached in the context of inaction. Often political remedies are more readily used by well-organized members of regulated classes than by regulatory beneficiaries, who must overcome substantial barriers to the exercise of political power.¹⁰¹ At least in some contexts, differential access to the political process may well make judicial review of agency inaction a particularly necessary safeguard.

B. Reviewing Discretion and Usurpation of the Executive Function

Reluctance to review inaction has traditionally been based in part on a set of considerations counseling against judicial usurpation of the executive function. Indeed, it is sometimes suggested that a court engaging in judicial review of executive inaction or issuing an order compelling an agency to act would be undertaking to "take Care that the Laws be faithfully executed"¹⁰²—an executive rather than a judicial task.¹⁰³ The suggestion is based on the understanding that enforcement activity is entrusted to the execu-

the advantages and disadvantages of proposed courses of action. Second, issues involving values must be resolved in accordance with the governing statute. Sometimes that statute will require consideration of particular factors; sometimes it will exclude consideration of other factors; and sometimes it will indicate that some factors, although relevant, are of secondary importance. Third, to the extent that issues of value are to be resolved through an exercise of discretion by administrators within the confines of the statute, it is important to ensure that the relevant considerations—and the actual bases for decision—are explicitly identified, are subject to public scrutiny and review, and reflect a reasonable weighing of the relevant factors. See Sunstein, *supra* note 45, at 181-82 (collecting cases).

¹⁰⁰ The reason lies in the fact that political remedies are too crude to be a reliable basis for preventing or redressing unauthorized or arbitrary regulatory action. Cf. R. LITAN & W. NORDHAUS, *REFORMING FEDERAL REGULATION* 60-81 (1983) (discussing the imperfections of congressional and presidential control of bureaucracy).

¹⁰¹ See generally RUSSELL HARDIN, *COLLECTIVE ACTION* (1983); cf. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 49 (1982) (suggesting that legislators, concerned with reelection, will be most likely to delegate responsibility when regulation has diffuse rather than concentrated benefits).

¹⁰² U.S. CONST. art. II, § 3.

¹⁰³ See Note, *Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal for Administrative Reform*, 86 *YALE L.J.* 885, 901-02 (1977); see also *Allen v. Wright*, 104 S. Ct. 3315, 3330 (1984) (using "take Care" clause as a basis for denying standing to claimants objecting to alleged IRS failure to deny tax-exempt status to racially discriminatory private schools).

tive, not to the courts, and that judicial involvement—in the form of a decree compelling prosecution—would violate the separation of powers. While this basic understanding is correct, the conclusion does not follow. The “take Care” clause is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws. If judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives.¹⁰⁴

This is not to deny that the executive has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe.¹⁰⁵ Congress frequently appropriates a smaller amount than would be necessary to redress all private violations of the law, in the expectation that the executive will use its discretion to allocate funds to the most pressing problems. Exercising discretion in this way is ordinarily consistent with congressional will. But there is a distinction between exercising such discretion and refusing to carry out obligations that Congress has imposed on the executive. The distinction turns, here as elsewhere, on interpretation of the substantive statute. Although there will be difficult intermediate cases, the “take Care” clause does not authorize the executive to fail to enforce those laws of which it disapproves.¹⁰⁶

Sometimes the separation-of-powers objections to review of agency inaction are supplemented with a reference to the remedial problems that may result whenever a court requires someone to act.¹⁰⁷ The executive may, for example, simply refuse; or it may decide to acquiesce in the court’s ruling by bringing an enforcement proceeding, but do so without much vigor. Any judicial remedies for such executive misconduct, it might be thought, would constitute impermissible judicial entanglement in the executive

¹⁰⁴ *Accord* *Allen v. Wright*, 104 S. Ct. 3315, 3348 (1984) (Stevens, J., dissenting) (relying on power of courts to say “what the law is”); *see also* *Nichol*, *supra* note 44.

¹⁰⁵ *See* Easterbrook, *On Not Enforcing the Law*, REGULATION, Jan.-Feb. 1983, at 14-16.

¹⁰⁶ The parallel here is to the impoundment controversy, which arose when President Nixon asserted an authority to decline to spend funds appropriated by Congress. That assertion was properly rejected. *See* Mikva & Hertz, *Impoundment of Funds—The Courts, the Congress, and the President: A Constitutional Triangle*, 69 Nw. U.L. REV. 335 (1974).

¹⁰⁷ This debate has focused on the question of whether courts would be required to undertake the management of institutions whose policies they sought to reform. *Compare* Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 40-42 (1984) (arguing that granting standing in *Allen v. Wright* would have in effect required judicial management of IRS), *with* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 603-04 (1985) (denying same).

function. The principal answer to such objections is that they assume intransigence on the part of the executive in the face of a court order, an assumption that is inconsistent with the general willingness of executive officials to obey the law as it has been interpreted by the courts.¹⁰⁸ Moreover, the defendants in these cases are institutions, not individuals; the people who are assigned the task of bringing the court-ordered enforcement proceedings may well not object to them. Finally, the same objections are applicable to the wide range of cases requiring action by state officials in the last quarter-century and have no more force here than there.

In the early period of administrative law, these concerns were more forceful in light of the fact that courts had not developed techniques to review the exercise of discretion on the part of administrators. Because courts lacked methods to review discretion without usurping it, review of inaction threatened to transform courts into prosecutors. The absence of such techniques buttressed traditional separation-of-powers concerns about judicial review of agency inaction. But the modern period has seen the rise of a number of strategies by which courts might review the exercise of discretion without usurping the executive function. Courts may require explanations for decisions,¹⁰⁹ and in reviewing those explanations, they may be quite deferential. The "arbitrary and capricious" standard of review under the APA,¹¹⁰ for example, authorizes review of discretion in order to assure reasoned decision-making within the confines of a statute.¹¹¹ That standard, properly applied, does not involve usurpation of the executive function.

C. Alternative Remedies

As a historical matter, the pressure for judicial review of prosecutorial decisions was relieved by the existence of alternative remedies by which to enforce the law if the prosecutor failed to act. Indeed, the notion of prosecutorial discretion developed in large part because of the availability of private prosecution.¹¹² Moreover, common law remedies were traditionally available for

¹⁰⁸ In the school-desegregation area, for example, courts have ordered action by executive officials, generally without having to usurp executive functions. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

¹⁰⁹ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 103 S. Ct. 2856, 2871-74 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

¹¹⁰ 5 U.S.C. § 706(2)(A) (1982).

¹¹¹ See *supra* note 99.

¹¹² See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443-46 (1974).

the same harms that were redressed by criminal prosecutors.

These considerations carry much less force in the modern period. In general, affected citizens have no right to proceed directly against the private person whose conduct violates a statutory standard. The modern Court's skeptical attitude toward implied causes of action¹¹³ has guaranteed this result. Even if it is available, a private right of action is often an inadequate surrogate remedy.¹¹⁴

D. Prudential Concerns

The final consideration is that review of inaction imposes unique burdens on courts. Agencies are almost always funded at levels that prevent them from redressing all violations of the law. A decision not to act is a choice of how to allocate these limited resources. This decision turns not only on the legality of the private conduct, but also on a wide variety of managerial considerations that are not well suited to judicial review.¹¹⁵ A decision not to act may be based on competing priorities, the desire to establish favorable precedents in an orderly fashion, the reaction of the public and of relevant officials in Congress and the executive branch, and so forth. When a plaintiff alleges that an agency has acted "arbitrarily" in failing to take action in a particular case, the court must consult all of these factors in order to make a reasoned decision. The fact of resource constraints thus makes review of prosecutorial decisions different from review of ordinary administrative action.

This consideration might be buttressed with other institutional concerns. Inaction may be the result of delay in agency decisionmaking rather than evidence of a decision not to act.¹¹⁶ Again, in light of budgetary constraints, failure to act is more frequent

¹¹³ See, e.g., *Universities Research Ass'n. v. Coutu*, 450 U.S. 754 (1981) (no implied employee right of action for back wages absent administrative determination that Davis-Bacon Act applies); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-25 (1979) (no implied right of action for monetary relief where statute contains express enforcement mechanisms); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-71 (1979) (no implied right of action against accountant performing audit required by statute). *But see Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) (granting implied right of action under Title IX in part because statute passed during period when Congress would have expected Court to imply cause of action).

¹¹⁴ Cf. *Stewart & Sunstein*, *supra* note 14, at 1305, 1312-13 (arguing that private rights of action are inappropriate under some regulatory statutes).

¹¹⁵ See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (discussing "polycentric" questions not readily susceptible to judicial resolution).

¹¹⁶ The fact that there may be no decision at all raises questions of ripeness and finality. See Note, *supra* note 83, at 647 & n.131, 652-55, 683-84.

than action.¹¹⁷ Decisions not to act are likely to have been reached informally¹¹⁸ and will often be unaccompanied by a record that a court might examine to assess the legality of the agency's conduct. If judicial review were available, it might become necessary to formalize inaction decisions, a step that could have considerable costs.

These considerations do serve to distinguish action from inaction, and they must be taken into account. Most important, the breadth of the considerations that may lawfully be considered by an administrative prosecutor suggests that judicially administrable standards are less likely to be available for assessing a plaintiff's claim. Consider, for example, an allegation by a consumer that the Federal Trade Commission (FTC) acted unlawfully in failing to initiate proceedings against a particular advertiser. Suppose that the ground of the complaint is that the advertisement is deceptive and misleading within the meaning of the Federal Trade Commission Act, or indeed that it is especially so and should be a high priority for the agency. In order to assess that claim, the court must evaluate the FTC's enforcement program to see where the advertisement in question "fits" in light of competing priorities. That inquiry must be undertaken without statutory guidance. In general there is "no law to apply" to such an allegation.

The matter may be different if the private conduct at issue can be shown to be especially egregious, or if the plaintiff is able to demonstrate that inaction is based on unconstitutional or statutorily irrelevant considerations.¹¹⁹ But a generalized allegation of arbitrariness will often be an insufficient basis for judicial review.

The other institutional concerns, which stress the informal character of inaction decisions, carry less weight. The courts have developed a number of techniques by which to review informal ac-

¹¹⁷ This point raises the concern that the creation of private rights to initiate regulatory action might impose significant burdens on the federal courts. Cf. RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-166 (1985) (discussing caseload explosion). But initiating litigation against the government is expensive, and experience suggests that the incremental increase in litigation would be insubstantial. See 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 9:5, at 229-35 (2d ed. 1979) (arguing that a mandatory enforcement system can be viable); Dimento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413 (1976) (examining the effect of state environmental citizen suit provisions); Fadil, *Citizen Suits Against Polluters: Picking up the Pace*, 9 HARV. ENV. L. REV. 23 (1985) (examining the effect of federal environmental citizen suit provisions). Of course, it is by no means clear that it would be undesirable to increase the federal caseload if the increase produces greater administrative compliance with the APA and governing substantive statutes.

¹¹⁸ "Informal" decisionmaking here means the use of methods that, while reviewable under the APA, are not subjected to special procedural requirements by the APA.

¹¹⁹ See *infra* notes 129-32, 135-40 and accompanying text.

tion,¹²⁰ so long as the various other prerequisites for review—finality, standing, ripeness, exhaustion—are satisfied. In this regard, inaction does not stand on a substantially different footing from action. While the frequently informal character of such decisions must be taken into account in conducting review, it does not justify a presumption against review.

It follows from this discussion that it is no longer possible to justify a general rule that enforcement decisions are unreviewable. To say this is hardly to say that inaction will often be found unlawful on the merits; it is not even to say that inaction is always reviewable. But it is to say that enforcement decisions should be subject to the same principles governing reviewability as are applied to other administrative decisions, formal and informal. Those general principles, it will be recalled, make the availability of review turn on an assessment of whether the statutory standards, measured against the plaintiff's allegation, furnish law that courts might apply to assess the claim.

To be sure, the distinctive features of inaction decisions—the numerous factors that must be taken into account—will mean that claims of arbitrariness are often an insufficient basis for judicial review. But claims of other sorts might well be enough to provide justiciable standards.¹²¹ In short, the application of generalized notions of prosecutorial discretion to the administrative context is often inappropriate, for the force of the considerations supporting deference to prosecutorial discretion will vary substantially with the statutory scheme and the plaintiff's allegation. The concept of prosecutorial discretion should, in this light, be understood as a metaphor that tends to conceal the underlying reasons for and against review in particular contexts.

These considerations suggest that the *Chaney* Court's reasoning was unpersuasive insofar as it indicated a general rule that inaction ought to be treated differently from other agency decisions. The "take Care" clause does not justify special judicial deference if the administrator's failure to act is in violation of duly enacted laws. The analogy to the discretion of the criminal prosecutor is largely unavailing. The fact that inaction does not appear "coercive" is also an unpersuasive distinction; unlawful governmental failure to act can be as harmful as unlawful action and is equally

¹²⁰ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (requiring Secretary of Transportation to provide statement of reasons for informal decision in order to establish basis for judicial review).

¹²¹ See *infra* notes 123-55 and accompanying text.

subject to judicial review under APA standards. And while inaction may not involve traditional property or liberty interests, the existence of a constitutionally protected interest is not a necessary predicate for the invocation of judicial review.

Of course, failure to act may be based on limited prosecutorial resources, and that factor provides an important consideration in evaluating claims of unlawful agency inaction. But the problem of limited resources does not justify a broad rule immunizing inaction from judicial review. Whether these institutional concerns carry force depends, as always, on the relationship between the statutory standard and the plaintiff's allegation. For example, an allegation that the FDA had failed to act because of a bribe from state officials seeking to use the drugs in question to administer the death penalty would be reviewable¹²²—no matter how many competing priorities one could find before the agency, and no matter how sparse the record.

IV. THE LIMITS OF *Chaney*: UNANSWERED QUESTIONS

It would probably be a mistake to read *Chaney* as establishing a general rule of nonreviewability for enforcement decisions. The opinion is filled with more than the usual number of disclaimers. The Court expressly puts to one side the following cases: (1) review of a refusal to undertake rulemaking;¹²³ (2) inaction based on a conclusion that statutory jurisdiction is lacking;¹²⁴ (3) cases in which an "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities";¹²⁵ (4) refusal to enforce properly adopted agency rules;¹²⁶ (5) nonenforcement that violates constitutional rights;¹²⁷ and—the catch-all category—(6) cases in which the governing substantive statute sets priorities or circumscribes "an agency's power to discriminate among issues or cases it will pursue."¹²⁸ The breadth of the decision will depend on how cases falling in these categories are treated, and how large the categories are

¹²² Cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-250 (1980) ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

¹²³ 105 S. Ct. at 1652 n.2.

¹²⁴ *Id.* at 1656 n.4.

¹²⁵ *Id.* (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

¹²⁶ 105 S. Ct. at 1658.

¹²⁷ *Id.* at 1659.

¹²⁸ *Id.* at 1657.

themselves said to be.

Chaney thus leaves unanswered a number of questions. The answers to those questions will determine the fate of the private right to initiate administrative proceedings. This section discusses the various categories left open in *Chaney*, in descending order of the strength of the case for review of inaction.

A. Inaction Based on Constitutionally Impermissible Factors

If agency inaction is based on constitutionally impermissible factors, such as race or exercise of first amendment rights, there is "law to apply" and the failure to act, or selective action, is reviewable.¹²⁹ Suppose, for example, that a plaintiff contends that an agency has failed to bring an enforcement proceeding because the potential defendants are white, or because the defendants were willing to waive their right to free speech in exchange for immunity from prosecution. In such cases, there are judicially administrable standards by which to evaluate the plaintiff's allegation; the Constitution furnishes the relevant constraints.¹³⁰ A case decided the day before *Chaney* reflects the same point by subjecting the discretion of criminal prosecutors to constitutional constraints.¹³¹ The remedial issue may turn out to be troublesome,¹³² but the issue of reviewability is not.

B. Inaction Based on Asserted Absence of Statutory Jurisdiction

In a case decided over two decades ago, the Supreme Court made clear that review is generally available when an agency's failure to act depends on a conclusion that it lacks jurisdiction over a particular class of cases.¹³³ The underlying reason is clear and

¹²⁹ The APA requires reviewing courts to set aside agency actions found to be "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B) (1982).

¹³⁰ Cf. *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943) (indicating in dictum that constitutional questions are exceptions to rule that agency decisions are unreviewable); *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1338-39 (5th Cir. 1983) (same), *cert. denied*, 104 S. Ct. 2385 (1984); *United States v. Feaster*, 410 F.2d 1354, 1366 (5th Cir. 1969) (same); *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949) (district court has jurisdiction to review NLRB certification decision if plaintiff raises constitutional question that is "not transparently frivolous").

¹³¹ See *Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985) (subjecting selective prosecution of vocal draft resisters to review for first and fifth amendment violations).

¹³² The problem arises from the awkwardness of one possible remedy—compelling prosecution. See *supra* notes 105-11 and accompanying text.

¹³³ *Office Employees Int'l Union Local 11 v. NLRB*, 353 U.S. 313, 318-20 (1957); see also *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1339-40 (5th Cir. 1983) (court can review agency methods of enforcement where Congress determined how the rights it created should

straightforward. Assume, for example, that the FDA had declined to act in *Chaney* on the sole ground that the governing substantive statute did not authorize the FDA to regulate the unapproved use of approved drugs. If the plaintiffs challenged that jurisdictional conclusion, the court could review the conclusion on the basis of "law"—that is, the governing statute. Allocation of scarce prosecutorial resources is not an issue—even if the agency may decide, after the issue of statutory jurisdiction has been resolved, not to bring enforcement proceedings notwithstanding its power to do so.¹³⁴ The considerations invoked in *Chaney* are thus inapplicable to questions of statutory jurisdiction. This conclusion follows naturally from the Court's statement that review of inaction is available when Congress has imposed constraints on enforcement discretion.

C. Inaction Based on Statutorily Irrelevant Factors or Otherwise in Violation of Statutory Constraints on Enforcement Discretion

Suppose a plaintiff alleges that agency inaction is based on a factor that is not relevant under the governing statute. For example, the claim may be that nonenforcement resulted from a bribe¹³⁵ or, to take a less extreme case, that an agency decided not to act because of the costs of regulation in a case in which costs are not a relevant consideration under the statute.¹³⁶ The most important exception in *Chaney* becomes relevant here. It will be recalled that the Court endorsed review of agency enforcement decisions when the governing statute "provided guidelines for the agency to follow in exercising its enforcement powers."¹³⁷ Whenever a plaintiff can allege that statutorily irrelevant factors have entered into a decision not to act, there are by hypothesis such guidelines to control the exercise of prosecutorial discretion.

This understanding captures a large number of the cases that have reviewed agency inaction before *Chaney*.¹³⁸ Indeed, this is the ground on which the *Chaney* Court distinguished and preserved

be enforced), *cert. denied*, 104 S. Ct. 2385 (1984).

¹³⁴ That there may be nonjurisdictional reasons for failing to act is not relevant here. Under *SEC v. Chenery Corp.*, 318 U.S. 80, 92-94 (1943), a court may not uphold an agency decision on grounds not articulated by the agency.

¹³⁵ See *supra* note 122.

¹³⁶ See, e.g., *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) (prohibiting EPA from considering costs in setting lead standards under Clean Air Act).

¹³⁷ 105 S. Ct. at 1656.

¹³⁸ See *supra* notes 2-4.

Dunlop v. Bachowski.¹³⁹ The same conclusion is appropriate whenever the plaintiff has alleged that irrelevant factors have influenced the decision¹⁴⁰ or that inaction is inconsistent with statutory constraints on enforcement discretion.

D. "Abdication" of Statutory Duty or a "Pattern" of Nonenforcement

In a number of cases in recent years, the courts have reviewed claims that agencies have abdicated their statutory obligations by failing to undertake enforcement action in a substantial category of cases. The most celebrated of these decisions, *Adams v. Richardson*,¹⁴¹ involved an alleged failure to enforce Title VI of the Civil Rights Act of 1964. According to the court, abdication of authority to enforce the statute was subject to judicial review. *Adams* was cited with apparent approval in *Chaney*.¹⁴²

The question remains why a "pattern" of nonenforcement, or "abdication" of statutory duty, should be treated differently from an isolated decision not to act. At least some of the factors referred to by the *Chaney* Court apply in both contexts. But the difference lies in a differing assessment of congressional intent, and thus of available "law to apply," in the two categories of cases. For example, if an agency announces that it will no longer enforce a particular statute—to take an extreme case—it is not difficult to conclude, at least as a general rule, that this decision is contrary to the will of the legislature that enacted the statute. Such a decision raises the possibility that the executive's inaction is based on its underlying disagreement with the goals of the statute and thus on executive usurpation of the legislative function.¹⁴³ With an isolated fail-

¹³⁹ See *supra* note 65 and accompanying text.

¹⁴⁰ This conclusion assumes that the agency has made some decision not to act. If there is no "decision," judicial relief should generally be unavailable in the absence of statutory requirements for action. Such requirements may take the form of statutory deadlines, which render delay in enforcement actionable. See, e.g., Clean Air Act, 42 U.S.C. § 7408(a)(2) (1982) (setting deadline for EPA issuance of air quality criteria). The use of deadlines is a familiar example of legislative action creating an active role for judicial review.

¹⁴¹ 480 F.2d 1159 (D.C. Cir. 1973). The *Adams* litigation has had a complex history. See Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 YALE L.J. 407, 423-25 (1978). For the latest episode, see *Women's Equity Action League v. Bell*, 743 F.2d 42 (D.C. Cir. 1984) (remanding for consideration of issue of standing, raised by the court sua sponte, in light of *Allen v. Wright*, 104 S. Ct. 3315 (1984)).

¹⁴² 105 S. Ct. at 1656 n.4 (noting that the governing statute might constrain discretion in such a case).

¹⁴³ Traditions of prosecutorial discretion have served, in the criminal context, as a safeguard against enforcement of outmoded or unpopular statutory prohibitions. Congress or a state legislature need not repeal such proscriptions; in the enforcement process, prosecutors

ure to act, it is difficult to draw that conclusion.

While the principal characteristic of a "pattern" of nonenforcement or "abdication" is a refusal to act in a large number of cases, an approach based on sheer magnitude is incomplete. If the agency's jurisdiction is extensive, a refusal to act in a large number of cases might be the result of legitimate processes of setting priorities in light of the pertinent statutory standards. To conclude that abdication has occurred, it may therefore be necessary to find that the refusal to act applies in a large number of cases weighed against the total jurisdiction of the agency under the relevant statute.

Of course, it will not always be easy to tell whether a particular case falls in the category of "abdication" or of isolated refusal to act. The plaintiffs in *Chaney* might have argued that their claims belonged to the former category. The argument would be unavailing, however, in light of the breadth of the enforcement opportunities before the FDA—opportunities of which the inmates' claim was but a small part. Of course, hard intermediate cases will inevitably arise, but here as elsewhere, the existence of such cases is not a reason to abandon an otherwise sensible distinction.

E. Refusal to Enforce Agency Regulations

A refusal to enforce an agency regulation is different from a refusal to enforce a statute in the important sense that in the former context, the principal basis for judicial intervention appears unavailable. That basis, as we have seen, is agency action—or inaction—that is inconsistent with "law," understood to mean the statute that Congress enacted. When failure to act violates a duty imposed on the executive branch by Congress, separation-of-powers concerns counsel in favor of, not against, an aggressive judicial role.

The matter is different when an agency complies with the will of Congress but refuses to enforce its own voluntarily adopted regulation. To be sure, there is a general principle requiring agencies

may achieve most of the benefits of a repeal through refusal to enforce. Recognition of a private right to initiate administrative action might remove this safeguard and intrude on desirable prosecutorial flexibility. To a large extent, however, the executive's authority to allocate limited prosecutorial resources to the most egregious violations should ensure that most inaction under obsolescent statutes will survive review. See *supra* notes 115-18 and accompanying text (discussing resource limitations as a basis for deference). Moreover, in some contexts the appropriate remedy for obsolescence is repeal by the legislature. And in any event, the dangers of effective repeal of statutes through executive inaction outweigh the risks produced by diminished flexibility.

to follow their regulations.¹⁴⁴ If a regulation evinces an intention to require an agency to act or otherwise to confine its enforcement discretion, this principle may in most instances be invoked by private parties.¹⁴⁵ The *Chaney* Court left open the possibility that a regulation that obligates an agency to act might provide "law to apply" in the same way as does a statute.¹⁴⁶

Nonetheless, the fact that a regulation indicates that certain private conduct is unlawful does not, in and of itself, impose on the agency any duty of enforcement. Such a regulation does not purport to require the agency to act but only sets out standards to guide regulated class members and regulatory beneficiaries. A failure to enforce such a regulation should not be grounds for judicial intervention. In short, the difference is between a regulation that purports to bind an agency to undertake certain enforcement actions and a regulation that merely describes what conduct is unlawful under a statutory program.

F. Failure to Initiate Rulemaking

In an important opinion by Judge McGowan, the Court of Appeals for the District of Columbia Circuit granted judicial review of a decision not to promulgate a rule.¹⁴⁷ The court emphasized that such review should be unusually deferential,¹⁴⁸ but said that in certain cases decisions not to issue rules might be reversed. A later decision applied this reasoning to allow review of failure to initiate rulemaking proceedings.¹⁴⁹ These decisions are thrown into question by *Chaney*. Many of the considerations that justify refusal to

¹⁴⁴ See, e.g., *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 389 (1932) (regulatory agency may not ignore its own quasi-legislative pronouncements); *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1974) (Watergate special-prosecutor regulation has force and effect of law and binds its issuer); Note, *Violation by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974) (examining interests supporting requirement that agencies observe their own rules).

¹⁴⁵ Once a rule is found to have been made pursuant to a proper statutory authorization, as will be the case for most rules, the question is whether the rule creates judicially enforceable private rights. See, e.g., *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Brown v. Lynn*, 392 F. Supp. 559, 562 (N.D. Ill. 1978). But cf. *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980) (doubting whether executive order may deny private rights of action and thus make itself unenforceable).

¹⁴⁶ See 105 S. Ct. at 1658.

¹⁴⁷ *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979).

¹⁴⁸ *Id.* at 1047 (such cases amenable to "at least a minimal level of judicial scrutiny").

¹⁴⁹ *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981) (availability of review acknowledged, but its scope said to be necessarily narrow).

review in that case are applicable in cases involving a refusal to issue a rule or to initiate rulemaking proceedings.

There are two grounds on which one might contend that judicial review should be available for refusals to initiate rulemaking. The first would rely on the legislative history of the APA. The Senate committee report said that the "refusal of an agency to grant the petition [for rulemaking] or to hold rulemaking proceedings . . . would not per se be subject to judicial reversal."¹⁵⁰ This language has been read to mean that generally such refusals would be subject to review and at least sometimes to reversal.¹⁵¹ But the language probably cannot bear that weight. It is an isolated statement in the legislative history; it is contradicted by the influential report of the Attorney General on the APA,¹⁵² and, perhaps most important, it is too ambiguous to support a general rule of reviewability.

The second ground for seeking review of a decision to deny rulemaking petitions is more plausible. A refusal to initiate rulemaking should be reviewable if there is "law to apply" in light of the allegation measured against the substantive statutory standard. Here as elsewhere, the reviewability of inaction will turn on whether the statute provides constraints on the agency's failure to act in the particular circumstances. Significantly, a refusal to engage in rulemaking is likely to affect a broader range of people than is an isolated enforcement decision; such a refusal is therefore more likely to implicate the concerns associated with a pattern of nonenforcement.

A recent example is provided by *Community Nutrition Institute v. Young*.¹⁵³ The case involved an effort to require the FDA to ban the use of aflatoxins, carcinogenic substances. The relevant statute reads:

Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe . . . ; but when such substance is so required or cannot be so avoided, the Secretary shall pro-

¹⁵⁰ ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong., 2d Sess. 201 (1946) [hereinafter cited as LEGISLATIVE HISTORY]), quoted in *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 n.14 (D.C. Cir. 1979) (emphasis added by the court).

¹⁵¹ See *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 n.14 (D.C. Cir. 1979).

¹⁵² See LEGISLATIVE HISTORY, *supra* note 150, at 229-30.

¹⁵³ 757 F.2d 354 (D.C. Cir. 1985).

mulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe¹⁵⁴

According to the court, the word "shall" was indicative of a congressional instruction, established as well by the statutory structure and history, to establish a tolerance level for foods with unavoidable poisonous or deleterious substances.¹⁵⁵ The FDA was therefore required to issue the regulation in question.

Whether or not the court's interpretation of the statute was correct, its approach is entirely consistent with *Chaney* and suggests a more general principle. Some statutes may require agencies to undertake enforcement action, including rulemaking, in certain circumstances. When a court vindicates such requirements, it is acting consistently with the APA.

G. Generalized Arbitrariness

An allegation that an agency has acted arbitrarily because it has failed to take action against a particular violation of the governing statute presents the weakest claim for reviewability. Such cases implicate all the concerns emphasized by the *Chaney* Court about judicial involvement in the allocation of scarce prosecutorial resources.

The matter may be different if the plaintiff is able to make a persuasive showing, in light of the statutory standard, that the violation in question poses an especially powerful case for regulatory action. Assume, for example, that a plaintiff can demonstrate that a particular substance causes special risks to life and health and that the costs of inaction are substantial in terms of both.¹⁵⁶ Such a demonstration may be sufficient to justify review of enforcement decisions, for the situation has features in common both with inaction in violation of statutory standards and with inaction that amounts to abdication of statutory authority. Cases in which re-

¹⁵⁴ 21 U.S.C. § 346 (1982).

¹⁵⁵ 757 F.2d at 357-58. At the same time, a statute that is phrased in permissive terms—stating, for example, that an agency "may" act in a category of cases—should not immunize inaction from review. In some circumstances, inaction may be based on factors that are impermissible under even "permissive" statutes. Decisions resting on impermissible factors are unlawful even if the agency has discretion not to act when the proper factors are taken into account.

¹⁵⁶ See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 594-95 (D.C. Cir. 1971) (plaintiffs utilized EPA findings of dangerousness of DDT as basis for review of EPA inaction).

view is justified under this rationale should, however, be relatively rare in light of the difficulty of assessing the agency's enforcement program that such review would entail.

CONCLUSION

The trend in the direction of judicial review of agency inaction is a salutary one. That trend is in keeping with the general movement of modern public law, which has increasingly abandoned the assumption that reviewing courts should act on the basis of a presumption against government regulation. The rise of the modern regulatory state results in large part from an understanding that government "inaction" is itself a decision and may have serious adverse consequences for affected citizens. It should not be surprising to find that judicial doctrines have moved in the same direction.

In the modern era, the judicial role is to ensure the identification and implementation of statutory values and to guard against factional power over the regulatory process. That role applies regardless of whether the agency is increasing or decreasing the scope of regulation. Judicial review is, to be sure, only one of a number of mechanisms for controlling agency performance, and it has serious disadvantages. Exclusive reliance must not be placed on the courts.¹⁵⁷ But judicial review has served as an important source of constraints on administrative action. Whatever the defects of judicial review, they do not justify a one-way ratchet against regulation, which may skew regulatory processes in directions inconsistent with the governing statute.

Notwithstanding these considerations, *Heckler v. Chaney*, the Court's first major encounter with the problem in the last decade, presented a weak case for review. The plaintiff's allegation, measured against the statutory standard, furnished little basis on which to assess the legality of the agency's decision not to act. But the *Chaney* decision, in keeping with the general direction of lower court cases over the past decade, made clear that judicial review of agency inaction is available when the agency's enforcement decision violates statutory constraints. Over time, one may expect that understanding to become increasingly prominent, as the problem of agency inaction is assimilated to the rest of the law governing judicial review of the conduct of administrative agencies.

¹⁵⁷ See *supra* note 18.